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January 27, 2014

Ms. Mary J. Kunkle
Executive Secretary
Michigan Public Service Commission
4300 West Saginaw Highway
Lansing, MI 48909

Re: In the matter of the complaint of Michigan Pay Telephone Association et al. against Ameritech Michigan and Verizon North Inc. f/k/a/ GTE North Incorporated
Case No. U-11756

Dear Executive Secretary:

Enclosed for filing is the following document:

AT&T Michigan's Response to Complainant's Motion for Clarification, Or in the Alternative, Petition for Rehearing

Please call me with any questions concerning this filing.

Sincerely,

Craig A. Anderson

Digitally signed by Craig A. Anderson
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Date: 2014.01.27 10:05:23 -06'00'

Craig A. Anderson
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CAA/ajb
Enclosure
Cc: Service List (w/enclosure)

STATE OF MICHIGAN
MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of Michigan Pay Telephone Association et. al. against Ameritech Michigan and Verizon North Inc. f/k/a/ GTE North Incorporated	))))	Case No. U-11756

PROOF OF SERVICE

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

Craig Anderson, first being duly sworn, deposes and says that he is employed at AT&T Michigan, and that on the 27th day of January 2014, he caused copies of **AT&T Michigan's Response to Complainant's Motion for Clarification, Or in the Alternative, Petition for Rehearing** to be served via U.S. Mail and/or electronic mail upon the parties listed on the attached service list.

Craig A. Anderson

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Craig A. Anderson

Subscribed and sworn to before me this
27th day of January 2014

Trina J. Sarlo

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Trina J. Sarlo
Notary Public, State of Illinois
My Commission Expires: December 1, 2014

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STATE OF MICHIGAN
MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of	)	
MICHIGAN PAY TELEPHONE ASSOCIATION	)	Case No. U-11756
et al., against AMERITECH MICHIGAN and GTE	)	(After Remand)
NORTH INCORPORATED	)	

AT&T MICHIGAN'S RESPONSE TO COMPLAINANT'S MOTION FOR CLARIFICATION, OR IN THE ALTERNATIVE, PETITION FOR REHEARING

Michigan Bell Telephone Company ("AT&T Michigan") hereby submits its Response to the Michigan Pay Telephone Association's ("MPTA") "Motion for Clarification, or in the Alternative, Petition for Rehearing" ("MPTA Petition") of the Commission's order in this case ("*December 2013 Refund Order*"). The Petition[1] should be denied.

A. Interest on Refunds is Neither Required Nor Appropriate Here

The MPTA asks the Commission to grant rehearing and materially change the *December 2013 Refund Order* to require AT&T Michigan to pay interest on top of the payphone refunds. The MPTA relies primarily on the fact that the Commission required interest on the refund ordered in 2004. MPTA Petition at 4. But the Commission certainly was well aware of that when drafting a new order on a different issue in 2013, and chose not to require interest this time. This was an appropriate exercise of the Commission's discretion, for interest on refunds is not required by law under MTA § 601 or any other provision.

Moreover, excluding interest is appropriate in the interest of fairness. As explained below, AT&T Michigan did nothing but charge rates that had been upheld by the Commission and the Court of Appeals. In other words, it was doing precisely what the law in place at the time (*i.e.*¸ the law as applied by the Commission and Court of Appeals) said it was supposed to

[1] Although it is captioned as both a Motion and a Petition, the MPTA submitted its pleading "[p]ursuant to Rule 403" (R.460.17403), which deals only with requests for rehearing. AT&T Michigan therefore responds to the pleading as being a Petition for Rehearing, which allows 21 days for a response. R.460.17403.

do. The long delay between the Court of Appeals' decision and the FCC's 2013 order was not AT&T Michigan's fault, and during that period even the MPTA agreed that all issues in the case had been resolved and agreed to the closing of the docket in 2007.

The MPTA also cites unrelated cases where the Commission required interest to be paid on refunds. MPTA Petition at 4-5. None of those cases has any bearing here, for none of them involved a situation where rates had previously been approved by the Commission and Court of Appeals and the Commission subsequently decided to change its mind by interpreting the same facts and law differently. Whatever the reason for granting interest in those other cases (*e.g.*, intrastate rates did not mirror interstate rates, "shareable earnings" had not been properly accounted for), this case is unusual and different, for AT&T Michigan would have had no reason to even suspect that its approved rates could later be deemed unlawful, and declining to require interest on top of already substantial refunds was both lawful and appropriate.

Finally, the MPTA claims that interest should be imposed because AT&T Michigan has "knowingly not been in compliance" with the FCC's New Services Test since 1997. MPTA Petition at 5. That is patently wrong. Not only did AT&T Michigan file rates that it reasonably believed to be in compliance with the New Services Test at all times, but with respect to the overhead loadings at issue here the Commission itself expressly held in 2004 that the overhead loadings complied with the NST, and defended its ruling on appeal, and the Court of Appeals likewise held that the overhead loadings satisfied the NST. AT&T Michigan then continued to charge the approved rates, including the approved overhead loadings, as expressly authorized by the Commission's and Court of Appeals' binding decisions. The Commission now has elected to reverse its prior decision based on its new interpretation of the identical law and same facts – *not* based on any purported "knowing" misconduct by AT&T Michigan. Thus, the idea that AT&T

Michigan should be punished for knowingly not following the law is baseless. It is the Commission that was charged with implementing Section 276 and applying the NST to payphone rates, and until its 2013 Order the Commission had held that AT&T Michigan's overhead loadings for local usage complied with Section 276 and the NST.

For these reasons, the Commission should reject the MPTA's request for rehearing regarding interest.

B. Non-Parties Are Not Entitled to Refunds

The MPTA contends that AT&T Michigan should be required to pay refunds not merely to the actual Complainants in this proceeding, but rather to *all* independent payphone providers ("IPPs") that have ever obtained service from AT&T Michigan since April 15, 1997. MPTA Petition at 2, 6-7. The Commission should reject that request, which is unlawful and ignores the Commission's and Court of Appeals' prior rulings on the identical issue, which held that refunds could only be owed to IPPs that were parties to this proceeding.

The MPTA raised a nearly identical argument when seeking rehearing of the Commission's *March 2004 Refund Order* in this docket. The MPTA argued that AT&T Michigan should pay refunds to *all* MPTA members, even if they were not a complainant in the case. In response, AT&T Michigan explained that the case was filed and pursued by a limited number of Complainants, not all MPTA members (and certainly not all IPPs), and that "there is no authority in the MTA or the Commission's Rules of Practice and Procedure that would permit the named Member-Complainants to seek refunds for nonparties," and therefore "[t]he MPTA's requested relief is simply unlawful." SBC Michigan's Response to Objections to SBC Michigan's Refund Report, at 2-4 (filed June 8, 2004). AT&T Michigan also provided supporting caselaw. *Male v. Grand Rapids Educ. Ass'n*, 98 Mich App 742, 756 (1980) (no

refund owed to members of union that had not opted into the class that brought the case); *Bolt v. City of Lansing (On Remand)*, 238 Mich App 37, 53-54 (2000) ("There is simply no provision in the constitution, the statutes, or the court rules that allows plaintiff to obtain monetary relief for persons not named as plaintiffs in this lawsuit"; "plaintiff's argument amounts to a request to dispense with all the applicable litigation rules that apply to all other litigants"; "we find no statutory or constitutional authorization for plaintiff to seek damages on behalf of nonparty[ies]"); *New York City Health and Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 639 N.E.2d 740 (denying refund to non-party to the case).

The Commission rejected the MPTA's request, agreed with AT&T Michigan, and held that refunds were not owed to any IPP that had not been an actual Complainant in the case. The Commission explained that "[t]he only customers specifically at issue in this case are those 62 named member-complainants," and, therefore, non-parties were not entitled to refunds. Feb. 10, 2005 Order Denying Rehearing, at 10.

The MPTA then raised the same issue and argument on appeal of the *2004 Refund Order*, and the Court of Appeals again rejected the MPTA's theory. The Court of Appeals explained that "absent statutory authority, the PSC could not grant monetary relief to non-parties." *SBC Michigan v. Michigan Pub. Serv. Comm'n*, Nos. 254980 & 261341 (cons.) (Sept. 28, 2006) (per curiam) (unpub.).

The MPTA's Petition cites no constitutional or statutory authority allowing the Commission to grant refunds to non-parties. Nor does the MPTA cite any change in law or other basis to depart from the Commission's and Court of Appeals' prior holdings that as a matter of law refunds cannot be awarded to non-parties and that failure to order refunds to non-parties is not discriminatory and does not violate 47 U.S.C. § 276. The Commission's and Court of

Appeals' rulings are not only fully supported by Michigan law but also are the binding law of the case. *Grievance Administrator v. Lopatin*, 462 Mich 235, 260, 612 N.W.2d 120 (2000) ("an appellate court's determination of an issue in a case binds lower tribunals" in later proceedings); *Driver v. Hanley (After Remand)*, 226 Mich App 558, 565 (1997) ("[A] question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal of the same case."); *Michigan Elec. Coop. Ass'n v. Michigan Pub. Serv. Comm'n*, 2004 WL 1837822, at *2-*3 (Mich App 2004) (per curiam) (unpub.) (where Commission had rejected parties' arguments in a prior appeal of a Commission order, the law of the case doctrine "require[d]" that later proceedings "adhere to the holdings in that decision" and reach the same conclusion as to the legality of the Commission's action). Accordingly, as a matter of law the Commission should deny the MPTA's request to require refunds to non-parties.

CONCLUSION

For the reasons stated, the Commission should deny the MPTA's Petition for Rehearing.

January 27, 2014

Respectfully submitted,

AT&T MICHIGAN

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