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July 10, 2008

Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 31221
Lansing, MI 48990-7504

Paperless E-filing

Re: 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

Dear Ms. Kunkel:

Enclosed for filing in the above referenced matter is the *Michigan Communications Carriers Association's Statement of Position*. Also enclosed is the Proof of Service. Please call if you have any questions.

Very truly yours,

FIELD LAW GROUP, PLLC

Gary L. Field

GLF/tab

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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

STATEMENT OF POSITION

The Michigan Communications Carriers Association ("MCCA"), on behalf of its member telecommunications providers within the State of Michigan, submits this Statement of Position in response to the Commission's June 10, 2008 order in Case No. U-11830 (the "*June 10 Order*").

In the *June 10 Order*, the Commission approved a performance measurements and remedy plan that AT&T Michigan ("AT&T") and various CLECs had agreed to and jointly submitted to the Commission. This joint plan eliminated the K table. *June 10 Order*, p. 6. As such, the Commission held as follows: "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." *Id.* at 7. The MCCA agrees with the Commission that "all issues with the K Table are now moot," and is providing this statement to specifically indicate the MCCA's position that AT&T is now prohibited from seeking a refund of performance remedy amounts paid while the K table was eliminated.

The Commission originally eliminated the K table from the remedy plan in its March 26, 2003 order in Case No. U-11830. The Michigan Court of Appeals reversed and remanded the Commission's March 2003 order, holding that it was error for the Commission to eliminate the K table without resorting to the full, adversarial contested-case process. *SBC Michigan v. MPSC*, Docket No. 251117 (May 10, 2005 Order) (the "*Remand Order*"). As a result of the Court of Appeals' holding, the Commission remanded the proceeding to the State Office of Administrative

Hearings and Rules “to allow contested case proceedings on the issue of whether the K table should be eliminated in order to better ensure that [AT&T] allows CLECs to purchase network elements on a nondiscriminatory basis.” Case No. U-11830, p. 3 (Aug. 1, 2005 Order). The Commission specifically indicated that “[d]uring the pendency of the remanded contested case proceedings, [AT&T] shall refrain from taking action to recover any amounts paid during the period in which the K table was eliminated.” *Id.* at 4.

The Commission’s refusal to permit AT&T to initiate recovery of payments made while the K table was eliminated reveals that the Commission recognized two important propositions: (1) the remedy plan payments are compensatory in nature, representing liquidated damages that establish a reasonable approximation of the contractual damages resulting from AT&T’s non-compliant performance, and (2) the Michigan Court of Appeals did not address the substantive merits of the Commission’s decision to eliminate the K table, but “remanded[ed] th[e] case for further proceedings consistent with [its] opinion,” which further proceedings were for the purpose of additional evidentiary development. *See Remand Order*, p. 9. Thus, the Commission recognized that it would **not** be appropriate for AT&T to recover payments meant to compensate the CLECs for AT&T’s inadequate performance where the Commission had not yet determined in the remanded contested case proceedings whether such payments were in fact excessive.

The Commission has still **not** determined that the evidence developed in the remand proceeding shows that AT&T’s remedy plan payments made while the K table plan was eliminated were excessive or unreasonable. Accordingly, having agreed to a remedy plan that does not include the K table, and having discontinued pursuit of its argument that utilization of the K table is appropriate, AT&T now has no basis to seek a refund of remedy plan payments made while the K table was eliminated. As the Commission stated, this issue is now moot.

In the *June 10 Order*, page 7, the Commission also stated:

Should any party disagree with this finding [that all K table issues are now moot], 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.

To reiterate, the MCCA hereby states its position that it agrees with the Commission that all K table issues are now moot, which means that AT&T is prohibited from seeking a refund of remedy payments made after March 26, 2003 through such time as AT&T resumed making remedy payments utilizing the K table. However, if the Commission believes that the refund issue is not resolved, the MCCA requests that the Commission determine a process pursuant to the *June 10 Order* to reach a conclusion relating to the refund issue.

Respectfully submitted,

MICHIGAN COMMUNICATIONS
CARRIERS ASSOCIATION

Dated: July 10, 2008

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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 of the October 2, 1998)
order in Case no. U-11654)
_____)

Case No. U-11830

PROOF OF SERVICE

Gary A. Gensch, employed at Field Law Group, PLLC, being duly sworn, affirms that on this 10th day of July, 2008, he served the *Michigan Communications Carriers Association's Statement of Position* in the above referenced matter via Electronic Mail upon the Parties of Record as listed on the attached Service List.

Gary A. Gensch

Subscribed and sworn to before me on July 10, 2008

Tina A. Barlow
Ingham County, MI
My Commission Expires September 9, 2008

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U-11830

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