STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion, to establish service quality standards, including enforcement provisions, for Ameritech Michigan.	))))	Case No. U-12598

AMERITECH MICHIGAN'S INITIAL BRIEF ON THE MERITS

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

In its September 7, 2000 Order initiating this case ("Order"), the Commission indicated that it "intends that this case will establish enhanced standards and enforcement provisions for Ameritech Michigan's service quality." Order, p 2. Ameritech Michigan[1] recognizes that the Commission is concerned about Ameritech Michigan's recent inability to meet certain existing service quality standards. And, Ameritech Michigan is attempting, in a number of ways, to respond to the Commission's concerns. As stated in the presentations of Ms. Gail Torreano and Ms. Cindie Bucks at the public hearing on September 18, 2000 in Case No. U-12571, Ameritech Michigan is striving mightily to return its service to previously excellent levels of quality, and it has accelerated its commitment to get its average repair duration interval back to MPSC standards from March 31, 2001 to December 31, 2000.

Ameritech Michigan's service levels, however, do not justify proceedings which are unnecessary and which are not in compliance with requisite due process and statutory requirements. For the following reasons, Ameritech Michigan strongly urges that the Commission refrain from issuing an order in this case which purports to adopt "enhanced" or amended service quality standards applicable to Ameritech Michigan:

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1 Michigan Bell Telephone Company, a Michigan corporation, is a wholly owned subsidiary of Ameritech Corporation, which owns the former Bell operating companies in the states of Michigan, Illinois, Wisconsin, Indiana, and Ohio. Ameritech Corporation is a wholly-owned subsidiary of SBC Communications, Inc. Michigan Bell offers telecommunications services and operates under the names "Ameritech" and "Ameritech Michigan" pursuant to assumed name filings with the State of Michigan.

1. Ameritech Michigan's recent inability to comply with the existing service quality standards in no way suggests that those standards are in need of revision. The problem is not with the standards, but rather with Ameritech Michigan's inability to meet those standards. While Ameritech Michigan has suggested a few revisions to the existing standards, Ameritech Michigan generally opposes the adoption of new or revised standards in this proceeding.

2. The Commission may only amend the existing rules through the rule-making procedures set forth in the Administrative Procedures Act ("APA"). Because those procedures have not been followed in this case, it would be unlawful for the Commission to adopt amended rules or standards at this time.

3. The Commission cannot, consistent with the Michigan Constitution, adopt standards applicable only to Ameritech Michigan. Discriminatory or targeted standards would violate Const. 1963, Art. IV, § 29, which prohibits the enactment of "special" laws where "general" laws can reasonably be enacted, as well as Const. 1963, Art. I, § 2, the Equal Protection clause.

4. The schedule required by the Commission's September 7, 2000 Order does not permit Ameritech Michigan sufficient time to prepare its case or rebuttal testimony or to evaluate (and, in some instances, refute) the proposals set forth by the Intervenors in this proceeding. Because it is axiomatic that a party must be given sufficient time to prepare its case and respond to the cases of other parties where its legal rights and obligations are affected, the schedule set in this case violates Ameritech Michigan's due process rights.

5. The extremely short time frame permitted for analysis of the myriad of proposals submitted in this case – a time frame approximating less than two weeks – is wholly insufficient to allow the parties to adequately study and assess the impacts of the proposed standards. It would be bad business, and bad public policy, to adopt new or revised standards without first conducting the necessary study and analysis.

For each of these reasons, this proceeding is improper and unlawful. Therefore, it should be dismissed or, at the very least, no order should be issued which purports to alter or amend the existing service quality rules as to Ameritech Michigan exclusively.

Ameritech Michigan recognizes, however, that the Commission might decide that "enhanced" service quality standards are somehow appropriate, despite each of Ameritech

Michigan's objections listed above. If the Commission does ultimately[2] decide to establish "enhanced" standards, Ameritech Michigan strongly urges the Commission to adopt a few basic, but fundamental guidelines. First, the resulting standards should not be subject to a 100% compliance requirement. As discussed in the pre-filed direct testimony of Dr. Michael A. Carnall, absolute standards are very costly, inefficient, unnecessary, and impossible to meet. Second, if failure to meet the resulting standards should result in the issuance of credits to Ameritech Michigan customers, those credits may not, under current law and Ameritech Michigan's tariffs, exceed the basic monthly local service rate.[3]

II. IT WOULD BE UNREASONABLE AND IMPROPER FOR THE COMMISSION TO UTILIZE THIS CONTESTED CASE PROCEEDING TO AMEND THE EXISTING SERVICE QUALITY RULES AS TO AMERITECH MICHIGAN EXCLUSIVELY

As a preliminary matter, the Commission may not, under law, utilize this contested case to alter or amend the existing service quality rules with respect to Ameritech Michigan. The Order, however, indicates that revision or "enhancement" of the existing rules is the goal of this case. Should the Commission issue an order in this docket adopting revised rules, it would violate the APA by failing to abide by requisite rule-making procedures. Moreover, because the

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[2] If the Commission does so, it must act through a lawful process – not in this proceeding.

[3] In this proceeding, Staff, the Attorney General, and Ameritech Michigan have all submitted proposals regarding service quality standards. The number and complexity of the proposed revisions to the current rules proposed by Staff alone is overwhelming. See, Exhibit R-2 (comparison of Staff's proposed rules to the existing service quality rules). Given the limitations imposed by the schedule in this case – which ultimately required the submission of briefs a mere four business days after the cross-examination hearing – Ameritech Michigan will not attempt here to address each of the proposed revisions. For its statement of position with regard to the numerous proposals submitted by Staff and the Attorney General, Ameritech Michigan relies upon the testimony of its witnesses, Mr. Harry Semerjian and Dr. Michael A. Carnall.

Order does not afford Ameritech Michigan adequate time to prepare and respond to the proposals submitted by other parties, the adoption of revised rules in this proceeding would deprive Ameritech Michigan of its constitutional and statutory rights to be heard.

The Commission set a schedule in this case that made it impossible for the parties to perform any meaningful analysis with regard to the proposed standards submitted in this docket. Ameritech Michigan has not been able to conduct studies with regard to the myriad of proposals offered by Staff and the Attorney General or analyze the feasibility of those proposals. It is simply incomprehensible that an abbreviated proceeding such as this one, targeted at only one provider, could result in the adoption of effective and workable service quality standards.

While the Commission might gain insight from the lessons learned in this case, it should not – for each of the reasons detailed below -- issue an order in this proceeding which attempts to put into force enhanced or amended service quality standards.[4]

A. The Commission May Not Establish Service Quality Standards Without Complying With The Rulemaking Procedures Of The Administrative Procedures Act

The Commission convened this contested case proceeding to establish "enhanced" quality of service standards. Order, p 2. It has become obvious in this case that these "enhanced" standards will likely require an amendment of the existing rules as to Ameritech Michigan. This is made abundantly clear by the proposals set forth by Staff which, when compared with the current service quality rules, represent a wholesale revision of those rules. See, Exhibit R-2

[4] Ameritech Michigan does not object to consideration of revised rules, equally applicable to all carriers, that deal with the subject matter of this docket pursuant to the Commission's rulemaking authority under recent amendments to section 213 of the Michigan Telecommunications Act. Ameritech Michigan would commit to working with the Commission and Staff on such rulemaking.

(comparing Staff's proposed "rules" to the existing rules). See also, Tr[5] 341 (Choura testimony) (stating that Staff's proposals "would replace the rules that are in existence today"), Tr 269 (Ostrander testimony) (stating that the Attorney General's proposals refer to "amending or revising the Commission's existing service quality rules").

While the Commission may reconsider its current rules and adopt other -- even "enhanced" -- rules, it may lawfully do so only if it follows the rulemaking procedures set forth in the APA Because compliance with the APA's procedural requirements has not occurred, it would be unlawful for the Commission to amend the existing service quality rules, even as to Ameritech Michigan, in this proceeding.

1. Section 31(5) Of The APA Requires That Amendments To Existing Rules Be Accomplished In Compliance With The Rulemaking Process And Does Not Permit Changes Through Contested Case Proceedings

Section 31(5) of the APA governs the manner in which rules that have been promulgated and enacted through rulemaking procedures may be rescinded or amended. That Section states:

> Except in the case of the amendment of rules concerning inmates as described in section 7(k), a rule may be amended or rescinded by another rule which constitutes the whole or a part of a filing of rules or as a result of an act of the legislature.

MCL 24.231(5); MSA 3.560(131)(5). This is the only provision in the APA which specifies how existing rules are to be amended -- Section 31(5) does not suggest that any other avenue is permissible. In fact, Section 31(5) explicitly provides for one exception to the amendment

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[5] As used herein, "Tr" refers to the transcript of the cross-examination hearing in this case, conducted on November 3, 2000.

procedure, which is not pertinent here, and which is the only exception recognized by the Michigan Legislature.

The current telecommunications services standards, R 484.1 et. seq., were promulgated as "rules" by the Commission and were made effective July 17, 1996. See, May 31, 1996 Order in MPSC Case No. U-11040. If the Commission seeks to alter those rules, it must do so in the same manner, not by adopting new "standards" through contested case or other non-rulemaking proceedings. The only other manner in which the current rules may be amended or enhanced, according to APA § 31(5), is "as a result of an act of the legislature." Of course, the Legislature has not so acted. In amending § 213 through the enactment of 2000 PA 295, the Legislature recodified the MPSC's rulemaking authority[6], demonstrating that the MPSC must promulgate rules through the rulemaking process, rather than adopt enhanced standards through a contested case process. The Legislature has unequivocally required that the Commission deal with this issue through compliance with statutory rulemaking procedures.

This proceeding has not been initiated consistent with requisite statutory rulemaking procedures. The APA – as amended effective April 1, 2000 – requires the agency to file with the Office of Regulatory Reform ("ORR") a "request for rulemaking." MCL 24.239(1); MSA 3.560(139)(1). The APA specifically states that an agency cannot even publish a notice of hearing unless the "draft proposed rules" have been received by the ORR and the ORR gives the agency "approval to proceed with a public hearing." MCL 24.239a; MSA 3.560(139a). The Order fails to demonstrate that these actions have taken place, as indeed they have not. The

6 The Legislature did so at the Commission's express request. See, February 1998 Report on Local Telephone Interconnection, submitted to the Michigan Governor and Legislature pursuant to former MTA § 353. This contested case proceeding to adopt revised ("enhanced") rules is particularly troublesome given recent legislative action regarding the Commission's rulemaking authority.

Order is based on the false premise that the "standards" outlined in whatever order results from this proceeding will not constitute "rules." However, because those "standards" will clearly supplement or "enhance" the current rules, they are undoubtedly nothing other than amendments to those rules. Amendments must be promulgated in a manner that complies with APA Section 31(5). Failing this compliance, new standards -- rules -- are invalid. See MCL 24.243.

2. Applicable Case Law Demonstrates That The Commission Can Only Amend Or Enhance Current Rules Through The Rulemaking Process

The APA and Michigan case law both permit the Commission to establish new principles of law through adjudicative proceedings. See, MCL 24.207(f); DAIIE v Comm'r of Insurance, 119 Mich App 113, 117-118 (1982). Similarly, federal case precedent does not limit an agency from developing principles or policies through adjudicative orders. However, the Commission may not, under Michigan law, proceed on a case-by-case basis when amending existing rules and thereby circumvent the rulemaking requirements of the APA. See, Detroit Based Coalition v Dep't of Social Services, 431 Mich 172 (1988) (holding that existing rules may not be modified in a manner inconsistent with those rules without going through the process mandated by the APA). Under Michigan law, even where administrative agencies have used adjudicative proceedings to announce new principles, such action has been limited to instances where the agency was filling a void in the law. Where, as here, there is an existing promulgated rule on point, there is no void in the law, and while an agency may use an adjudicatory proceeding to interpret the rule, it may not use such a proceeding to change the rule. Michigan's leading expert on administrative law, Professor Don LeDuc, sums up the principle this way:

> . . . there is certainly one limitation [on an agency's ability to announce policy changes in an adjudicatory proceeding] – the agency must follow its own promulgated rules, substantive or procedural. Thus, this concept has never been

> used to justify an agency attempt to overturn a policy contained in an existing rule during an adjudication or contested proceeding.

LeDuc, Michigan Administrative Law, ¶ 4:16, p. 27. As this language clearly demonstrates, an agency may not change its existing rules via the course of a contested case proceeding.

This definitive distinguishing factor was also discussed by the Ninth Circuit Court of Appeals in Montgomery Ward & Co v FTC, 691 F2d 1322 (9th Cir 1982). In that case, the Federal Trade Commission "interpreted" a prior rule in a new manner, finding that the rule (which mandated that sellers provide notice of the availability of warranty binders by placing "signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department") required the signs to be posted on cash registers in each department. 691 F2d at 1436. The federal court discussed the Supreme Court's decision in SEC v Chenery Corp, 332 US 194 (1947), and agreed that "when a new problem is presented to an administrative agency, the agency may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted." 691 F2d at 1328. The Court stated, however, that this doctrine does not apply to announcing changes in existing rules:

> The issue is whether an adjudicatory restatement of the conduct required by a rule is an interpretation or an amendment of the rule. Adjudication allows an agency to apply a rule to particular factual circumstances and to provide an interpretation of the required conduct in light of those circumstances. An adjudicatory restatement so alters the requirements of the rule that the regulated party had inadequate notice of the required conduct. An amendment is proper only when adequate notice is provided to affected parties pursuant to appropriate rulemaking procedures.

691 F2d at 1321-1322. The federal court looked to a number of factors to determine whether the FTC's "interpretation" of the sign rule was really an amendment to currently existing rules. Ultimately, the court held that:

> the Commission's decision on the sign requirements of the pre-sale rule's binder option was an abuse of discretion. If the FTC wishes to amend the rule to require signs in each department, it may do so in a formal rulemaking proceeding. Until such time as the rule is amended, however, the FTC may not hold retail sellers to any standard other than that stated in the rule.

691 F2d at 1332. In other words, a company is held only to standards in existing rules, and if an agency desires to change those rules such that the company would have had "inadequate notice of the required conduct" (i.e., could not anticipate the rule amendment based on the language of the original rule), it must follow statutory rule-making procedures.

The Commission's stated intention in this case is to "enhance" or revise the current service quality rules, as applicable to Ameritech Michigan. But there are already rules on the books which are binding on Ameritech Michigan. The fundamental problem with the procedures being utilized in this case is well illustrated by the Staff's recently proposed changes in service quality standards which are filled with provisions inconsistent with the existing rules. See, Exhibit R-2. Which of these disparate requirements will Ameritech Michigan be expected to follow -- the existing requirements which were promulgated in accordance with the APA, or the new requirements which were not? Ameritech Michigan submits that the only proper answer, under law, is that Ameritech Michigan is subject to the existing rules until such time as the rules are properly amended.

B. The MPSC Cannot, Consistent With The Michigan Constitution, Enact Rules Applicable Only To Ameritech Michigan

A second reason this proceeding is unlawful concerns the Commission's attempt to establish rules applicable only to one provider in a competitive marketplace. As the following analysis demonstrates, the Commission cannot, consistent with the Michigan Constitution, establish new quality service rules against one provider that are not also applicable to other providers. Such an attempt would violate Const. 1963, Art. IV, § 29, which prohibits the enactment of "special" laws where "general" laws can reasonably be enacted, as well as Const. 1963, Art. I, § 2, which states that "[n]o person shall be denied the equal protection of the laws."

1. General And Special Acts

First, the establishment of "enhanced standards and enforcement provisions" that are applicable only to Ameritech Michigan would violate Const. 1963, Art. IV, § 29, which provides that the Legislature "shall pass no local or special act in any case where a general act can be made applicable."[7] The MPSC is an agency with rule-making powers that have been delegated by the Legislature in order to facilitate the implementation of specific legislation (the MTA). In other words, the Legislature has delegated part of its lawmaking function to the Commission. Thus, § 29 is applicable here. As the Commission has itself stated, "a rule promulgated pursuant to a legislative grant of authority has the force and effect of a statute". See, September 28, 1999 Opinion and Order in MPSC Case No. U-11934, p 14-15. See also, Carroll v Barnes, 169 Colo 277, 283; 455 P2d 644 (Colo 1942) (equating rule-making with "quasi-legislative action"); 1 Davis, Administrative Law Treaties, pp 287-288. Since the Legislature has no constitutional authority to enact "special" laws where "general" laws can be made applicable, the Commission similarly cannot do so, as the Legislature cannot delegate a power it does not have. See, State Bd of Agriculture v Auditory General, 226 Mich 417, 427 (1924) (concurring opinion) ("The

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[7] The remainder of § 29, which is inapplicable here, states that "No local or special act shall take effect until approved by two thirds of the members elected to and serving in each house and by a majority of electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district."

legislature cannot . . . delegate any authority to the administrative board which it, itself, does not possess"). Accordingly, the MPSC, like the Legislature, is subject to the limitation in § 29.[8]

The Commission's proposed activity in this proceeding would constitute a "special" act because it would apply to a particular person within a group rather than the group as a whole. In Rohan v Detroit Racing Ass'n, 314 Mich 326 (1946), the Michigan Supreme Court stated that the question as to whether an act is a "general or special act" does not depend upon the number of persons within the class it purports to regulate, but rather depends upon whether the act "applies uniform rules of conduct for all those persons within the scope of its application." 314 Mich at 351. The Court quoted with approval the following "general rule for determining whether a legislative enactment is general or special in character":

> Classification is permissible under constitutional provisions prohibiting local or special laws, provided not only the law applies uniformly to all persons in its operation who are in the same circumstances, but provided there is a rational basis for putting the persons to whom it applies in a different group from other persons. Therefore, the rule is settled that a statute relating to persons or things as a class is a general law, but a statute relating to particular persons or things of a class is special. Under this rule it is apparent that in every case the vice of a law, as a special law, is that it rests upon a false and deficient classification and does not embrace all of the class to which it naturally related.

314 Mich at 350 (quoting 12 Am Jur pp 238, 239, § 541) (emphasis supplied). See also, 16B Am Jur 2d, Constitutional Law, § 874 ("[i]n general, every special or private law which directly proposes to destroy or affect individual rights, or does not same thing by restricting the privileges

8 While § 29 speaks of an "act," a MPSC order which purports to adopt enforceable standards certainly has the effect of law in the same way as a legislative "act."

of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void").[9]

Here, the proposals submitted by Staff and the Attorney General constitute new or amended rules that would relate only to a particular person (Ameritech Michigan) within a class (telecommunications providers or basic local exchange carriers). Certainly, these new rules could be made applicable to the entire class, as service quality standards have in the past. There is no reasonable basis for not doing so now. As such, the adoption of new rules applicable only to Ameritech Michigan would violate Art IV, § 29 of the Constitution because a "general" law (rules applicable to all similarly situated providers) is possible and desirable and because the Commission's decision to single out Ameritech Michigan is based upon a "false and deficient classification" which fails to encompass the class in which Ameritech Michigan is a member.

2. Equal Protection

The establishment of service rules applicable only to Ameritech Michigan also has equal protection implications. As noted in Mohammed v Mathog, 635 F Supp 748 (ED Mich 1986), "[t]he Equal Protection Clause prevents governments from making *improper* classifications and from applying proper classifications in such a way as to indicate that improper classifications are

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9 There is an important distinction between standards which affect only one provider and those which are applicable to a class of providers (i.e., basic local exchange carriers, IXCs, etc.). While the Commission may make rules applicable to a class of providers, it may not, under the Michigan Constitution, target one provider within a class. Parties in this proceeding have suggested that laws which draw reasonable classifications are permissible. However, that is not what is happening here. The Commission has not targeted Ameritech Michigan based on the number of its access lines or the type of service it provides. Rather, the Commission has indicated its intent to adopt a set of standards applicable only to Ameritech Michigan. This classification is impermissible because no other provider will ever fit into the class.

being drawn in the administrative process." 635 F Supp at 752. "A reasonable classification is one that is not arbitrary and that is based upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Greenstein By Horowitz v Bane, 833 F Supp 1054, 1075 (SDNY 1993). Administrative agencies are prohibited from acting in an "arbitrary or irrational way" in making classifications. See, RI Affiliate AM Civ Liberties v RI Lottery, 553 F Supp 752, 768 n13 (D RI 1982) (the Equal Protection Clause demands reasonableness in the administrative context).[10]

The Commission has indicated its intent in this proceeding to adopt new service quality rules applicable to one carrier and apply other rules – of a parallel but not identical form – to all other carriers. Such differential treatment implicates the equal protection clause because it discriminates against Ameritech Michigan in favor of other "similarly circumstanced" carriers.[11]

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10 The Legislature may permissibly make reasonable classifications by legislative enactment. In the MTA, the Legislature has made several such classifications according to, for example, the number of end-users served by a provider (see, MCL 484.2208) and the number of access lines used by the provider (see, MCL 484.2601). The Legislature has not, however, developed a class which encompasses only Ameritech Michigan, and the Commission may not now, without statutory authority, make classifications in addition to those already drawn by the Legislature.

11 It might be suggested that Ameritech Michigan is not similarly situated with respect to other carriers because its service quality problems have been more severe than other carriers in recent months. This, however, does not justify enacting rules applicable only to Ameritech Michigan. Ameritech Michigan has committed to restoring its level of service quality to that required by the existing rules – the same level applicable to other LECs in Michigan -- by year-end. At that point, even under the faulty reasoning expressed by other Intervenors in this proceeding, there would be no justification whatsoever for having two sets of service quality standards.

See, Greenstein By Horowitz, 833 F Supp at 1075.[12] Certainly, as discussed above, the Commission could initiate a rulemaking proceeding with the intention of "enhancing" or amending the current service quality rules so as to alleviate or prevent problems with repair service. This is not, however, what is being done in this proceeding.[13]

C. The Accelerated Schedule Of This Proceeding Violates Ameritech Michigan's Due Process Rights

A third reason that this proceeding should not be used to establish amended service quality rules is that the schedule set in this proceeding does not afford Ameritech Michigan sufficient time to prepare its rebuttal to the standards and enforcement provisions proposed by

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12 It has been suggested in this case that special rules should apply to Ameritech Michigan due to its "monopoly" status. First, Ameritech Michigan is not a "monopoly." Tr 179. Second, there is competition in many of the areas covered by the service quality rules, such as directory assistance. That customers do not have a choice of local service providers in all areas throughout the State does not mean that competition does not exist, and certainly does not mean that Ameritech Michigan should be governed by different standards than all other providers of telecommunications services in the State. Finally, this suggestion assumes that special, strict service quality rules must be applied to Ameritech Michigan to ensure it has an incentive to provide a high quality of service. That Ameritech Michigan has every incentive to do so, irregardless of the Commission's service quality rules, is aptly demonstrated by the fact that Ameritech Michigan's service quality has been, for the first three and one-half years following adoption of the current rules, generally excellent and often exceeding the Commission's standards.

13 This proceeding is problematic for an additional reason. Section 253(b) of the Federal Telecommunications Act states that "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." (emphasis added). This language indicates that the MPSC may not, under governing federal law, impose requirements on providers aimed at ensuring the "continued quality of telecommunications services" if those requirements are not "competitively neutral." Thus, the Commission should establish meaningful standards and reasonable remedies applicable to all providers so that the Commission's efforts to ensure service quality do not inadvertently act as a barrier to the continued growth of competition in Michigan. See, Tr 97-98.

Staff and the Attorney General. In its September 7, 2000 Order commencing this case, the Commission set a schedule that purported to provide an "expeditious resolution" of the matters set forth therein. Order, p 2. The Commission directed Ameritech Michigan to file its proposed standards and enforcement provisions by September 28, 2000. Ameritech Michigan was able to do so because its filing built upon the August 31, 2000 business plan submitted in Case No. U-12571, the legislative inquiry proceeding addressing service quality issues. The Commission directed that other parties would file their own proposals by October 19, 2000. Order, p 3. Finally, the Commission directed the ALJ to set a schedule so that the case would come to the Commission for a decision by November 15, 2000. Id. Essentially, then, the Commission ordered a timetable that required the ALJ to set the following remaining schedule for the case:[14]

Rebuttal due	October 26
Motions to Strike due	November 1
Hearing	November 3
Initial Briefs	November 9
Reply Briefs	November 15

This schedule violates Ameritech Michigan's due process rights. It is axiomatic that a party must be given sufficient time to prepare its case and respond to the cases of other parties where its legal rights and obligations are affected. For example, APA § 72(3) provides:

> The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

[14] Ameritech Michigan was allowed only one round of discovery regarding the October 19 filings. Due to the abbreviated schedule set by the Commission and ALJ, Ameritech Michigan did not have the opportunity to conduct discovery regarding the Intervenors' filings before submitting its rebuttal testimony. And, although Ameritech Michigan submitted discovery requests to both Staff and the Attorney General within 2 business days of receiving their pre-filed testimony and proposed standards, Ameritech Michigan received discovery responses – including nearly 2,000 pages of responsive documentation – less than 48 hours before the cross-examination hearing in this case.

Similarly, the Commission's own Rules of Practice and Procedure require that a party must be given adequate opportunity to present rebuttal evidence. Rule 325(3) states:

> A party shall have the right of cross-examination and shall have the right to submit rebuttal evidence.

Both the federal (Amends. V and XIV) and state constitutions (Art. I, Sec. 17) afford Ameritech Michigan the right to be heard if its property interests are to be affected.[15] "Having adequate time to prepare a defense" is a "basic due process right." Willford v United States, 469 US 893, 894 (1984). Thus, due process dictates that a party must "be given a reasonable time in which to prepare a defense." FOP Lodge 98 v County of Kalamazoo, 82 Mich App 312 (1978).

The schedule set in this case in no way comports with these requirements. Ameritech Michigan was given only a week to analyze and prepare its response to the voluminous filings made by Staff and the Attorney General.[16] It was given no opportunity to obtain discovery of those filings before preparing and filing its rebuttal testimony. Within the space of one week, Ameritech Michigan was expected to investigate, quantify, and prepare an adequate response, including counterproposals to those that were made. At the same time, Ameritech Michigan had to prepare and submit discovery responses, and it was expected to respond to a second round of discovery submitted by the Attorney General. Importantly, a number of the individuals involved in the discovery process, as well as the submission of Ameritech Michigan's proposals, are also

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15 There is no question that the proposals submitted by Staff and the Attorney General implicate Ameritech Michigan's property interests, since they require significant changes to its operations, increase its expenses, and require the undertaking of costly activities.

16 These filings consist of direct testimony and exhibits totaling 190 pages. Tr 110. However, the number of pages is not a complete indicator of the task at hand. Staff alone has proposed a complete revision of the existing service quality rules. See, Exhibit R-2. Moreover, Staff's proposals have major operational and financial impacts, such as the proposal to mandate a 56kbits per second data rate for all customer loops.

involved in Ameritech Michigan's efforts to return its service quality to its previously excellent levels. How the Commission expected Ameritech Michigan to accomplish all of these tasks, let alone conduct any meaningful analysis of the proposals submitted in this case, is inconceivable.

Clearly, affording a party a week in which to mount its defense to proposed major changes in its operations is utterly deficient when measured against requisite due process. And, Ameritech Michigan's right to file rebuttal testimony has not been upheld. Moreover, as there was insufficient time for Ameritech Michigan to conduct discovery and analyze the discovery responses prior to the cross-examination hearing in this case, Ameritech Michigan was also effectively denied its right to cross-examine opposing witnesses. Therefore, because the schedule set forth in the Order does not comport with due process, the Commission may not use this proceeding to adopt revised standards which affect Ameritech Michigan's property rights.

D. The Time-Constraints In This Proceeding Prevent The Parties From Conducting The Analysis And Study Necessary For The Establishment Of Workable Service Quality Standards

Moreover, due to the time constraints imposed by the Commission's September 7, 2000 Order, this proceeding simply cannot serve as the basis for the establishment of any meaningful, workable, or effective service quality standards. Ameritech Michigan's response to the service quality standards proposed in this proceeding has been guided by a number of factors, including economic and business decisions. However, this proceeding has not allowed for more than a very cursory analysis of the financial and operational ramifications associated with the proposals. The Attorney General's witness, Bion Ostrander, admitted not only that in submitting his proposals he did not review the costs associated with those proposals, but also that he had not obtained information regarding costs prior to submitting his testimony. Tr 297.[17] And, Staff admitted in response to discovery requests that it: (1) conducted no studies or analyses of the costs which would be incurred to provide basic local exchange services consistent with Staff's proposed standards (see, Exhibit R-34); (2) did not compare its proposed standards to service quality standards used by other ILECs, other CLECs, other regulated industries, or even other service providers in the telecommunications industry (Exhibit R-38); (3) did not analyze the impact of Staff's proposed standards on Michigan customers (Exhibit R-39); (4) did not analyze customer demand for the proposed standards (Exhibit R-40); (5) did not review or analyze the need for changing current business office practices (Exhibit R-41); (6) did not review or analyze customer satisfaction with voice response units (Exhibit R-42); and, (7) did not conduct any analysis to determine the need for the revised service quality standards (Exhibit R-43).

Adopting modified standards under such conditions would be bad business, and bad public policy. As Dr. Michael Carnall, Senior Managing Economist at LECG, has testified:

> Reasonable minimum standards should be maintained and higher quality service should be available, at a price which reflects its cost, to those who value it highly. Development of standards that meet these criteria cannot be accomplished without thorough study of both the costs associated with various levels of quality and the value of quality to consumers. Within the time limits of this proceeding it is unlikely that more than a minimum standard can be determined.
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> . . . . the time constraints of this proceeding make it impossible to perform the various analyses necessary to adequately assess the probable effects of the proposed changes to the current standards. Any changes resulting from this process should therefore, at most, be incremental in nature in order to avoid the possible unintended consequences associated with more substantial modifications.

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[17] Mr. Ostrander also states in his pre-filed direct testimony that he is still reviewing and investigating several different issues. See, e.g., Tr 259, 260, 262, 263. This demonstrates that Mr. Ostrander had insufficient time to complete his analysis within the time constraints imposed by the Commission in this proceeding.

Tr 195, 199.

Issues such as feasibility and cost are significant in the development of service quality standards. Generally, working service quality rules are guided by standards in existence in the industry. However, if a standard cannot technically be achieved, or if the cost is prohibitive, that standard will never be adopted as an "industry standard." Remarkably, Staff has proposed that service quality standards in Michigan should be adopted through a collaborative process involving the entire industry. See, Tr 330 (recommending a "Michigan Standards Institute" modeled after ATIS). Yet, Staff also recommends that the Commission use this proceeding to revise the existing service quality rules, as to Ameritech Michigan only. Such an approach is wholly inappropriate. There has not been sufficient time in this proceeding for Ameritech Michigan to assess whether Staff's proposed revisions to the existing rules are economically or technically feasible for Ameritech Michigan, let alone for the entire industry. Thus, it would be bad public policy to adopt those revisions without regard for how they might impact customers, rates, business decisions, or the telecommunications network in Michigan.

A few examples are illustrative. Staff has proposed that a new standard be adopted requiring a data rate of 56Kbits per second for all access lines. See, Exhibit S-21, proposed standard 5.9. Although Ameritech Michigan has not had the time to fully investigate this proposal, initial estimates suggest that it would cost Ameritech Michigan hundreds of millions of dollars and take years to implement, as Ameritech Michigan would need to reconstruct its entire loop plant.[18] See, Tr 159. And, even if these substantial investments were made, Ameritech Michigan would not be able to guarantee a data rate of 56Kb over its telephone lines due to a

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18 As noted by Mr. Semerjian at the cross-examination hearing in this case, Ameritech Michigan currently has approximately 5.4 million access lines. Tr 178.

number of factors beyond Ameritech Michigan's control, such as the capability of the customer's wiring, the Internet, and the server to handle higher data speeds. Tr 160-161.

Ameritech Michigan has also conducted preliminary estimates as to the cost of Staff's proposed standards 2.2 and 4.2 (see, Exhibit S-21), which would require live person accessibility in three minutes or less in all cases. Based on the preliminary data Ameritech Michigan was able to gather, the cost of answering all calls to Ameritech Michigan's business office in three minutes or less would be approximately $22 million annually. In addition, there would be one-time costs of at least $17 million, plus an additional $5 million in recruiting and training costs. See, Tr 124. And, once again, even with such investment Ameritech Michigan could not *guarantee* that all calls would be answered within three minutes, as there is always the possibility that an extraordinary event (such as the sale by telephone of Bruce Springsteen concert tickets, see, Tr 169-170) would overwhelm telephone lines, or that other unusual circumstances beyond Ameritech Michigan's control would prevent a customer's telephone call from being answered within the requisite time. See, Tr 102, 196-197.

These are but a few examples. Ameritech Michigan simply has not had the time to fully address each of the other proposed service quality standards submitted by Staff and the Attorney General. In order to ensure that these proposed standards are efficient and meet customers' needs however, and that adoption of such standards will not have unanticipated consequences, further study and review is necessary. Among other things, adoption of the proposed standards would require a complete revision of Ameritech Michigan's service cost studies and the adoption of new rates for basic local exchange service to reflect the additional costs. See, Tr 114. If the majority of customers are not willing to pay the increased rate in order to receive the corresponding increase in service quality, then the proposed standard does not best meet customer needs and would not stand up under a cost-benefit analysis. See, Tr 197-198 ("That analysis should include an estimate, based on actual data, of the cost of meeting the modified proposed standard. It should also include evidence that any economic incentives will elicit the desired behavior."). Therefore, just as a "Michigan Standards Institute" which adopted voluntary service standards by consensus would not put standards into effect before they had been reviewed and approved by the industry, the Commission should not adopt proposed standards until the consequences of those standards have been fully analyzed. To do otherwise "will only provide more confusion and require additional time and resources to undo any unintended consequences." Tr 200.

E. The Need For "Enhanced" Service Quality Standards Has Not Been Established

Finally, the Commission should not issue an order adopting "enhanced" service quality standards applicable to Ameritech Michigan because the need for revised standards has not been established. Ameritech Michigan's recent difficulties conforming to several of the existing service quality standards does not show that the standards themselves need to be altered. During the first three and a half years after the existing standards were established, Ameritech Michigan was meeting those standards and customers were generally satisfied. See, Tr 94-95. Recent events are regrettable, but temporary, and they do not reflect a problem with the rules, but rather a short-term problem meeting a few of those rules. That a provider's inability to meet a particular standard does not mean that the standard is deficient was admitted, on cross-examination, by Staff's witness Mr. Choura. Tr 385 (answering "No" to the question: "There's an existing standard, whatever that standard is. And a provider of telecommunications services does not meet that particular standard for some period of time. Is it your testimony that the standard is deficient in that hypothetical?").

The "enhancement" of a standard can serve one or both of two purposes, either increasing the level of quality to a more appropriate level or providing additional incentives to more consistently maintain the mandated level of quality. There has been no evidence presented that a level of quality higher than mandated by the current rules is appropriate. Nor has there been any evidence presented that the proposed standards will result in fewer instances in which the current standards are not met. Staff has not even shown that it knows whether its proposed standards will, or are intended to, increase the level of quality or decrease the occurrence of noncompliance with current standards or both.

The Commission's existing service quality rules have served the industry well, have generally been consistent with industry standards in Michigan, and have not imposed an overly onerous burden on providers. Yet, both Staff and the Attorney General in this proceeding have recommended replacing the existing rules with standards which are among the strictest in the country,[19] and they have done so without any degree of study or analysis regarding the need for revised standards, the impact of their proposals, or the cost involved. It would be a mistake to

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[19] California standards, for example, which are described in a NARUC Handbook relied upon by Mr. Choura, do not include a fixed installation interval (see, Tr 339-340) – yet Staff is proposing the adoption of an abbreviated interval in Michigan. And, while Mr. Ostrander purports to rely upon the existing Kansas standards as a basis for his proposals, the Kansas standards include a trouble report standard ranging between 6 and 10 reports per 100 access lines. See, Exhibit R-28, Attachment A. Furthermore, the customer repair interval in Kansas is 30 hours – more than the 24 hours recommended by Mr. Ostrander. Id. Finally, both Mr. Choura and Mr. Ostrander have ignored states with standards much more lenient that those currently in existence in Michigan, such as Rhode Island's repair requirement of 60% completed in 24 hours. Tr 288-289 (admitting that "there would be other states out there that have a more lenient standard than what I have proposed").

assume that the answer for Michigan is stricter standards when there is no indication that other states with standards parallel to or more lenient that the existing Michigan service quality standards have experienced an unreasonable level of customer dissatisfaction, and there is certainly no indication that customers in Michigan have generally been dissatisfied during the periods in which providers were meeting the existing standards. As Mr. Ostrander admitted on cross-examination, customer satisfaction is an important measure of the effectiveness of an existing standard. Tr 289 ("customer dissatisfaction is maybe one standard where you can measure how customers feel about a particular standard").

Since there is no evidence that customers are dissatisfied with the existing standards, and because none of the parties in this case have done any analysis or study regarding customer demand for revised standards, Ameritech Michigan submits that it would be inappropriate, at this time, to adopt revised standards.

III. IF THE COMMISSION DOES ADOPT "ENHANCED" SERVICE QUALITY STANDARDS THROUGH LAWFUL PROCEDURES, IT MUST FOLLOW A FEW BASIC GUIDELINES

Ameritech Michigan cannot and will not attempt to address here all of the suggested changes to the existing service quality rules that have been proposed by Staff and the Attorney General. As discussed above, a proper analysis of the multitude of proposed standards cannot be conducted within the time limitations imposed in this proceeding – and certainly cannot be fully briefed in the few days in which the parties must prepare their initial briefs. Thus, Ameritech Michigan relies on the record, including the rebuttal testimonies of Harry Semerjian and Dr. Michael A. Carnall, to establish its position. If necessary, Ameritech Michigan will expand upon its critique of the proposed standards in its reply brief, due for filing November 16, 2000.

However, because Ameritech Michigan believes it vitally important that the Commission follow a few basic guidelines if it ultimately decides, despite Ameritech Michigan's objections voiced above, to alter or amend the existing service quality standards as to Ameritech Michigan, the following analysis will therefore touch upon some of those basic guidelines. First, the Commission should not adopt any rules or standards which are subject to a 100 percent compliance requirement. Second, if the Commission decides to follow the proposals of Staff and the Attorney General with regard to customer credits, any resulting standard must limit the total amount of potential credits to the customer's monthly service rate.

A. A Provider's Performance Should Not Be Subject To Any Requirement Mandating 100% Compliance

Staff has proposed in this proceeding that service quality standards applicable to Ameritech Michigan should be adopted and that those standards should be absolute – i.e., that Ameritech Michigan must meet each standard 100% of the time or risk the application of penalties and enforcement provisions. This is not how the current rules are written, it is not how service quality standards are adopted or utilized in the industry, and it is not a reasonable or feasible proposal. Therefore, regardless of whether the Commission ultimately adopts standards proposed by Staff, the Attorney General, or Ameritech Michigan, the resulting standards should be minimum standards and should not be absolute.

That it is "arbitrary, inappropriate, and bad public policy" to set standards in which "all activities or transactions of a certain type must be completed within a fixed time" is discussed in the rebuttal testimony of Dr. Michael A. Carnall. Tr 196. As Dr. Carnall notes:

> In individual transactions, human error, uncontrollable outside circumstances such as weather, or other factors will invariably cause some delays, even if the overwhelming majority of all transactions are completed within the prescribed interval. Thus, any provider required to meet an absolute time interval for a certain transaction is going to miss that deadline on occasion, however liberal the interval may be. It is inappropriate to set a standard that a provider is doomed to breach on a number of occasions.
>
> In order to understand the effect of a change in standards on consumers and on Ameritech Michigan one must first understand the nature of the measurement in question. For example, the time required to restore service is affected by many factors, many of them external, random and uncontrollable by Ameritech Michigan. As a result, actual repair times are distributed across a wide range. Even though most are completed in a relatively short time, some invariably take substantially longer. The distribution of times to repair over this range is highly skewed, meaning that the times are distributed more widely above the mean than below the mean. As a result, there is always a positive probability that even what may seem to be a modest absolute standard will not be met. For example, the proposed standard that all repairs be completed within 24 hours will, in all likelihood, never be met, making any penalty for noncompliance simply an additional cost of doing business.

Tr 196-197. As Dr. Carnall's testimony makes clear, standards with a time component (i.e., 24 hour repair time) must be set in terms of either an average time or a certain percentage of transactions (i.e., 80% within a certain time period). See, Tr 199.[20] Ameritech Michigan's proposals and testimony in this case thus assume that, if any specific service quality standard is to be altered or added to the existing rules, it must allow for human error and uncontrollable

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[20] At the cross-examination hearing in this case, Staff expressed a concern that an average standard would permit some extreme deviations (i.e., a customer who experiences a service outage lasting 36 days). See, Tr 172-173. Staff's concern is misplaced. First, as Dr. Carnall's analysis demonstrates, the vast majority of customers will receive service of approximately the same quality. See, Tr 197-199. Second, this concern is properly taken only if a provider has an incentive to give some customers extremely poor service. But, this would simply be bad business. Ameritech Michigan has every incentive, financial and otherwise, to give all of its customers service meeting or exceeding quality standards.

circumstances, and providers should not be penalized for their inability to meet an absolute compliance requirement.[21]

B. Customer Credits Should Not Exceed The Total Monthly Rate For Basic Local Exchange Service

Another issue addressed in this case concerns the issuance of credits to customers who do not receive the requisite level of service quality (i.e., whose service outage lasts more than 24 hours, etc.). Ameritech Michigan agrees with Staff that credits to customers are effective enforcement mechanisms and are preferable to fines. See, Tr 325. However, Ameritech Michigan disagrees with the level of credits proposed by Staff and the Attorney General.

Staff has suggested, for example, with regard to a number of its proposed standards, that Ameritech Michigan should be required to provide a $25 or $50 per day credit each time Ameritech Michigan fails to meet the standards. See, Exhibit R-2 (e.g., proposed standards 4.2, 5.3, 5.4). Such a credit would be inconsistent with Rule 32 of the current service quality rules as well as with Ameritech Michigan's limitation of liability tariff. Both the current rules and Ameritech Michigan's tariff provide for credits up to the monthly service rate. Staff's proposals would require payments that could be well in excess of the monthly service rate, totaling hundreds or even thousands of dollars to one customer within the span of a month. These payments would be required without regard for the actual financial harm suffered by the

[21] A 1992 NARUC Telephone Service Quality Handbook relied upon by Mr. Choura (Tr 337, 340) specifically states that "state regulators generally recognize that service quality results for a particular service quality measurement in a given month may be below the objective standard, although this does not mean that the quality of service is inadequate." Tr 339. This statement demonstrates that, in the telecommunications industry, providers can – and often do – miss a particular objective standard without compromising overall service quality. Staff's absolutist proposals, however, ignore this reality.

customer (if any). As these proposed credits are well beyond levels that could reasonably be called compensatory, they operate as improper penalties on Ameritech Michigan. Thus, the Commission would be acting beyond the authority granted it by the MTA if it were to adopt and enforce the proposed credits.[22]

Ameritech Michigan's tariff defines the scope of the contractual relationship between the company and its customers. See, Rinaldo's Construction Corp v Michigan Bell Telephone Co, 454 Mich 65, 88 (1997) ("Tariff 7's limitation on liability for nonperformance or incomplete performance by a telephone company is presumptively valid, and, as part of the contract between the parties, is the manifested intention of the parties to the agreement."). Included in the tariff is a provision that limits Ameritech Michigan's liability for damages "arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission" and other failures to "an amount equivalent to the proportionate charge to the customer for the period of service during which such mistake, omission, interruption, delay or error or defect in transmission . . .occurs."

Staff's proposed $25 per day and $50 per day credits would impose liability on Ameritech Michigan for purported "damages" that far exceed the "proportionate charge" defined in

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[22] This is particularly true given that Staff's proposed standards are inconsistent with the MTA, or at least not contemplated by the MTA. For example, Staff's proposed standard 5.4 states that all "failures to issue accurate bills" should be considered a violation of MTA § 507. Section 507, however, provides that "[a] telecommunications provider shall not include or add optional services in an end-user's telecommunications service package without the express oral or written authorization of the end-user" and further states that a contested case may be conducted, either upon receipt of a customer's allegation that this section has been violated or on the Commission's own motion. MCL 484.2507. Staff proposes to consider all instances in which a customer receives an inaccurate bill – regardless of the source of or reason for the inaccuracy – as Ameritech's having included or added "optional services" in an end user's service package. Such action, if taken, would be unlawful and unreasonable. And, if the Commission had been given authority to deem, before the fact, particular acts a violation of this section, it would not have been necessary to authorize it to initiate a contested case regarding the question.

Ameritech Michigan's tariff. In effect, the proposals would force Ameritech Michigan to violate provisions of its tariff. That tariff, however, is presumptively valid and should prevail if a customer experiencing the specified events (e.g., phone calls returned in two days rather than one, receipt of an inaccurate bill) filed a claim against Ameritech Michigan and sought the payments Staff seeks to impose. Numerous courts have held that limitations on liability like that in Ameritech Michigan's tariff are valid and reflect legitimate public policy concerns. See, e.g., Waters v Pacific Telephone Co, 12 Cal3d 1, 7; 523 P2d 1161, 1164 (1974) (quoting Cole v Pacific Telephone & Telegraph Co, 112 CalApp2d 416, 419; 246 P2d 686 (1952) for the proposition that "'[r]easonable rates are in part dependent upon . . . a rule [limiting liability]'"); In re Illinois Bell Switching Station Litigation, 161 Ill2d 233, 244; 641 NE2d 440 (1994) (explaining that Illinois Bell's limitation of liability provision played "an integral role in allowing [Illinois Bell] to meet the expectations of the General Assembly" because it enabled the company to provide cost-effective service); Rinaldo's Construction, 454 Mich at 88 ("[B]ecause these types of problems are anticipated by the tariffs, and are matters incident to the regulation of the utility, the plaintiff's claim falls within the primary jurisdiction of the MPSC and is limited by the tariff."(emphasis added)).

Staff here is suggesting that the Commission should provide for "damages" in the event of a breach of a service quality standard that the customer herself could not obtain without a declaration that Ameritech Michigan's tariff is unreasonable and should not be applied. Although the Commission may have authority to "establish and enforce quality standards," see MCL 484.2202(c), forcing a telecommunications provider to violate the provisions of its tariff for a select group of individuals – e.g., those whose phone calls have not been returned -- cannot fall within the scope of that authority.

Examination of other provisions of the MTA supports the conclusion that the Commission would be acting outside the scope of its authority if it were to adopt the proposed customer credit standards. As discussed above, the "credits" proposed are beyond levels that tariff language would dictate is owed to the customer if the stated events were to occur, and they are totally unrelated to the actual damages suffered by the customer. As such, the credits constitute penalties to be imposed on Ameritech Michigan for allowing those events to occur in the future. See, e.g., Black's Law Dictionary 1154 (7th ed 1999) (defining a civil penalty as "a fine assessed for a violation of a statute or regulation"). The Commission, however, has no authority to impose on Ameritech penalties beyond those specifically authorized by the MTA. See, Consumers Power Co v MPSC, 460 Mich 148, 155 (1999) (the "Commission has no common-law powers. It possesses only that authority granted by the Legislature"); Union Carbide Corp v PSC, 431 Mich 135, 151 (1988) ("The power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist").

Section 601 of the MTA provides:

> If after notice and hearing the commission finds a person has violated this act, the commission shall order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation . . .

MCL 484.2601. This provision does not grant the Commission the authority to impose the penalties reflected in its proposed standards.

First, the penalties would be triggered not by a finding, after notice and hearing, that Ameritech Michigan has violated the MTA, but by the mere occurrence of a stated event. This would violate Ameritech Michigan's due process rights.

Second, the Commission is only authorized to order penalties "to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation." As was noted in In re Complaint of City of Southfield, 235 Mich App 523 (1999), the term "economic loss," as utilized in the MTA, stems from the "economic loss" concept developed through the interpretation and application of the Uniform Commercial Code. See, id. at 534. The Supreme Court of Michigan set forth the economic loss doctrine as follows: "The economic loss doctrine, simply stated, provides that where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic losses'." Neibarger v Universal Cooperatives Inc, 439 Mich 512, 520 (1992). Under this doctrine, Ameritech's tariff, as the contract between the customer and Ameritech, must be considered in assessing whether economic losses have occurred. Certainly no such economic losses occur when a customer's bill contains an error which is promptly corrected, and certainly no such losses occur when a customer's telephone call is returned in 36 hours rather than 24. Given the nature of the language in Ameritech Michigan's tariff, such losses could not be proven for every event to which Staff proposes to attach a penalty. Therefore, because the proposed rules contain penalties which would be inconsistent with Ameritech Michigan's tariff, the current service quality rules, and the language of the MTA, and because those proposed standards would provide for penalties even where the requirements of MTA § 601 have not been met, the Commission would be acting outside the scope of its authority if it were to adopt the proposed standards.

IV. CONCLUSION

The Commission should refrain from adopting revised service quality rules applicable to Ameritech Michigan in this proceeding. While the Commission certainly can take the lessons learned from this proceeding and make use of them in a new proceeding that is compliant with the APA's requirements, the Commission cannot, under law, use a contested case proceeding to amend the currently effective rules. Moreover, it may not lawfully target revised rules at one provider or apply rules to one provider that are not also applicable to other providers. Such action contravenes the requirements of the APA and violates the Michigan Constitution. Additionally, the adoption of "enhanced" standards in this proceeding would violate Ameritech Michigan's due process rights, as there was insufficient time in this proceeding for Ameritech Michigan to present its case in response to the proposals of the other parties.

Ameritech Michigan recognizes that the current service quality rules are set to expire in less than a year. However, as demonstrated in the analysis above, this proceeding may not properly be used to revise those rules. The haste of this case, the inability of the parties to study or analyze the proposed standards submitted in this docket, and the massive defects in the other parties' proposals indicate that this case should form the basis for one that more thoroughly and carefully reviews what revisions to the existing rules might make sense. If the Commission seeks meaningful and effective revision of the current rules, it should seek industry involvement and should allow parties the time and the opportunity to investigate proposed changes and evaluate the impact of the proposals in such areas as rates, customer demand, technical feasibility and workability. It should not, however, rush to judgment in this case merely because Ameritech Michigan has had service quality problems in recent months. Ameritech Michigan's service quality has been steadily improving and, in most areas, has reached or nearly reached levels consistent with current service quality standards. Promulgating standards in a rush would not only be detrimental to Ameritech Michigan and its customers, but could also hurt other providers, as the Commission indicated that this case might form the basis for proceedings involving other providers. Order, p 2.

Ameritech Michigan has submitted a number of proposals in this proceeding that might be considered should the Commission decide to amend its existing service quality rules governing telecommunications providers in Michigan. While Ameritech Michigan does not believe that wholesale revision of the rules is necessary, or that revision of the rules is the answer to Ameritech Michigan's recent service quality problems, it is willing to work with the Commission, Staff, and other interested parties to develop a reasonable and effective set of rules. In this proceeding, Ameritech Michigan has suggested a few guidelines that should be incorporated into any resulting amended service quality rules. Among other things, those rules should set minimum standards rather than absolute one, and customer credits should not exceed the customer's total monthly bill for local exchange service.

Respectfully submitted,

AMERITECH MICHIGAN
By: Michael A. Holmes (P24071)
444 Michigan Avenue, Room 1750
Detroit, Michigan 48226
(313) 223-8008

and

DICKINSON WRIGHT PLLC
Attorneys for Ameritech Michigan

By: ____________________
John M. Dempsey (P30987)
Jennifer L. Frye (P57123)
215 S. Washington Square, Suite 200
Lansing, Michigan 48933
(517) 371-1730

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