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

<u>AMERITECH MICHIGAN'S REPLY BRIEF</u>

I. INTRODUCTION

Ameritech Michigan hereby respectfully responds to the initial briefs filed in this case by the MPSC Staff, the Michigan Attorney General and AT&T Telecommunications of Michigan, Inc./TCG Detroit (collectively, "AT&T").

None of these parties has refuted the impropriety, indeed the unlawfulness, of this proceeding. In an attempt to adopt and enforce revised and new rules applicable solely to one provider, the Commission has, unfortunately, commenced a proceeding which is in violation of the Administrative Procedures Act ("APA"). Moreover, the haste with which this case had to be conducted has produced a record that does not support the unilateral adoption of new service quality rules or standards. The record here does, however, provide some initial input for the Commission with regard to Staff's proposed service quality standard. That input may, if more adequately developed, be useful in an appropriate proceeding for the promulgation of new, industry-wide rules and enforcement provisions following requisite statutory and constitutional due process requirements. Ameritech Michigan stands ready to assist the Commission in that process.

The record here demonstrates that Ameritech Michigan has made great strides in bringing its service quality levels back to those required by the Commission's existing rules. By the end of this year, it is highly likely that Ameritech Michigan's service quality levels will comply with those rules. Thus, there is no need, and no justification in this record, for the Commission to adopt new rules at this time. There is no need to rush to judgment; there is no emergency. What has been proposed by the other parties, however, is a set of rules that has not been adequately studied and that is inimical to the public interest.

The unrebutted evidence of record shows that those proposed rules "are arbitrary, unworkable, unnecessary, administratively burdensome, prohibitively expensive, and therefore inappropriate." Tr 110. As to the issue of cost, a single proposed standard has an estimated price tag of some $500 million; several others would cost in excess of $40 million each in the first year alone. Tr 114. No showing has been made that any proposals, much less these exorbitantly expensive standards, are sought by customers. Tr 111, 114-115. Some of the proposals seek to impose remedies, not for noncompliance with the rules that were in existence at the time Ameritech Michigan's experienced its recent service quality problems, but instead seek to apply them retroactively based on noncompliance with a standard that might be adopted in this case. Tr 303-304. Beyond question, adoption of all of these proposals is unwarranted, unnecessary, and unlawful.

Ameritech Michigan respectfully recommends that the Commission immediately approve and convene the Michigan Standards Institute recommended by Staff for the adoption of a voluntary, industry-wide set of updated and enhanced rules. Such a collaborative process holds the best promise of promulgating revised service quality rules that make sense, aid customers, are cost-effective, and do not disadvantage any competitor in the marketplace. See, Tr 353.

II. THE COMMISSION MAY NOT LAWFULLY AMEND THE EXISTING SERVICE QUALITY RULES AS TO AMERITECH MICHIGAN IN THIS PROCEEDING

A. Rules That Were Promulgated Pursuant To The APA May Only Be Amended Via The Same Procedure

In this proceeding, Staff has proposed to amend the existing service quality rules as to Ameritech Michigan exclusively. Staff's direct testimony indicated that its proposals were designed "to essentially replace the current service quality rules as they pertain to Ameritech."

(Tr 324) The first page of Staff's proposed new standards (See, Exhibit S-21) is entitled "Proposed Quality Service Rules" (emphasis supplied). A comparison of Staff's proposals to the current rules clearly demonstrates that Staff is amending and revising them substantially. (Exhibit R-2) Although Staff's brief carefully uses "standards" and does not refer to its proposals as "rules,"[1] Staff's witness admitted on cross-examination that "I would assume if they [the Commission] adopted the ones that are in my proposals, then that would replace the rules that are in existence today." Tr 341. And then the current rules would not apply to Ameritech Michigan. Tr 342. The Attorney General's witness made the same admission. Mr. Ostrander's proposals seek to replace, amend, or add to the existing rules. E.g., Tr 269, 272. Clearly, what is being proposed by both parties is to amend and replace the existing rules as to Ameritech Michigan.

Under Michigan law, the Commission may only amend the existing rules through the procedures used to put those rules into existence – i.e., rulemaking procedures. Because those procedures have not been followed in this proceeding, the Commission may not use this case to enact new rules, amend existing rules, or enforce such rules against Ameritech Michigan. See, MCL 24.243, 24.245; MSA 3.560(143), 3.560(145); Pharris v Secretary of State, 117 Mich App 202 (1982) (holding that a rule that does not comply with the APA's requirements is invalid under Michigan law and is not binding on any party).

Section 31(5) of the Administrative Procedures Act ("APA") states that, except for *one specified exception* for rules concerning inmates, promulgated rules may be amended only by a proper adoption of the amended rules through APA procedures or by an act of the Legislature.

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1 Webster's Ninth New Collegiate Dictionary defines a "standard" as either "something established by authority, custom, or general consent as a model or example." This kind of standard could be lawful in the context of this proceeding. Another definition of "standard", however, that of "something set up and established by authority as a rule," is clearly barred by the APA.

Importantly, § 31(5) is the only provision in the APA which specifies how existing rules are to be amended – it does not provide that any other procedures are permissible.[2] Since § 31(5) explicitly provides for only one exception to the rule amendment procedure, which is not pertinent here, a proper reading of the statutory language is that *there are no other exceptions.* See, Jennings v Southwood, 446 Mich 125, 142 (1994) (superseded by statute as stated in Vine v County of Ingham, 884 F Supp 1153 (WD Mich 1995) (the express mention of one thing implies the exclusion of other similar things); Nation v WDE Electric Co, 454 Mich 489, 494 (1997) (the Legislature is presumed to have intended to include the words and meaning it plainly expressed, and omissions are deemed to be intentional). An interpretation of § 31(5) which permits agencies the discretion to amend their rules by any procedure the agencies deem desirable would render § 31(5) meaningless. Because the Attorney General's interpretation would make this section meaningless, it must be rejected. See, WMU Bd of Control v Michigan, 455 Mich 531, 539 (1997) (no part of a statute should be treated as mere surplusage or rendered nugatory).

The Attorney General's Brief relies predominantly on the argument that an administrative agency may adopt new interpretations of rules through adjudicative proceedings. The Attorney General cites several cases which stand for the proposition that the Commission may set some standards and non-binding guidelines through adjudication. See, AG Brief, pp. 4-5 (citing Northern Michigan Exploration Co v PSC, 153 Mich App 635 (1986) and Midland Cogeneration

[2] Section 31(5) is also the only legal authority an agency has to repeal or amend a rule, and there is no legal authority for an agency to change a rule except by issuing a new rule.

v PSC, 199 Mich App 286 (1993)).[3] These cases, however, which follow the analysis established by the U.S. Supreme Court in SEC v Chenery, 332 US 194 (1947) and applied in Michigan through cases such as American Way Life Ins v Ins Comm'r, 131 Mich App 1 (1983) (cited in Northern Michigan Exploration Co, 153 Mich App at 649), do not involve changes to existing rules and therefore they are inapplicable.[4].

In Montgomery Ward & Co v FTC, 691 F2d 1322 (9th Cir 1982), the federal court discussed Chenery, 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 noted, however, that:

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3 The cases cited by the Attorney General are distinguishable for additional reasons. Both cases involve decisions made as part of the MPSC's ratemaking authority. In Northern Michigan Exploration Co, the Court of Appeals held that "specific rules and regulations are not necessary to authorize . . . production adjustments." 153 Mich App at 650. Similarly, the requirement in Midland Cogeneration that the terms of Consumers' contract conform with newly established tariffs was upheld under the MPSC's "broad rate-making authority." 199 Mich App at 310.

4 American Way Life Ins, which holds that an agency may announce new principles in adjudicative proceedings, is inapplicable here. First, that case involved ratemaking authority, which is not at issue here. See, 131 Mich App at 6-7. Second, the case was based upon the Supreme Court's holding in Chenery, supra, which was distinguished in Montgomery Ward & Co, 691 F2d 1322. Third, the portion of the opinion relating to rulemaking is *dicta* and is prefaced by the court's notation that it is just a "final observation." 131 Mich App at 6-7. Finally, the Court specifically noted that the rate at issue in American Way Life Ins was not "binding" because insurers could propose higher premiums. 131 Mich App at 7-8. In this case, however, the Commission clearly intends the revised standards to be binding on Ameritech Michigan, as evidenced by the Commission's suggestion, in its September 7, 2000 Order, that Ameritech Michigan and the Intervenors file proposed standards and "enforcement provisions." Order, p 2.

> While the general policy considerations raised in Chenery are fundamental to an analysis of an agency's adjudicatory lawmaking, its result is not controlling. The case at hand does not involve the filling of a void in the law. Here, a rule, describing in some detail the required conduct, recently had been promulgated, and Wards arguably had acted in reliance on the plain meaning of that rule. This case involves an adjudicatory restatement of previously articulated law. While the Supreme Court has addressed adjudicatory changes in administrative case law, and adjudicatory interpretations of "law" developed in administrative manuals, we have not been directed to, nor does there appear to be, any case where the Court has addressed an adjudicatory change in a recently promulgated rule.

691 F2d at 1321-1322 (emphasis supplied). Thus, Montgomery Ward & Co stands for the opposite proposition.[5] That case specifically distinguishes between adjudicatory statements of existing law (which is the subject of the cases cited by the Attorney General) and adjudicatory re-statements of the law which operate as amendments. As to the latter, the court held that amendments can only be accomplished through a "formal rulemaking proceeding" and that, until a proper amendment was enacted, the agency could not hold companies to "any standard other than that stated in the rule." Id. at 1332.[6] The rationale used by the court to determine whether

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5 Another case which supports Ameritech Michigan's position is Detroit Base Coalition of Handicapped v Dep't of Social Services, 431 Mich 172 (1998). In that case, the Supreme Court found that a policy bulletin used by the DSS effectively modified an existing rule which governed the manner in which hearings were conducted. As such, the Court held that rulemaking procedures were required to effectuate the amendment.

6 This is similar to the MPSC's holding in In the Matter of the Commission's Interpretive and Informational Statements, 1985 Mich PSC LEXIS 479 (1985) (Order rescinding Interpretive and Informational Statements). In that case, the Commission found that the I&I Statements at issue were of "dubious legal validity" in view of the term "guidelines" in the APA and further noted that, to the extent the Commission intended to bind parties with the Statements, it should have done so through the APA's rulemaking process because guidelines do not have the "force or effect of law."

an "amendment" was taking place relied, in part, on whether a company could anticipate the FTC's new "interpretation" of the rule by reference to the language in the existing rule.[7]

It might be argued that the Commission has the authority to promulgate emergency rules. But there can be no suggestion that this proceeding somehow fits within that APA procedure. The undisputed facts are: (1) that the subject of this case is a new set of rules, and (2) that a rulemaking, albeit of an emergency nature, is the way that such rules can and must be adopted. This is no rulemaking. There has been no attempt at issuance of emergency rules pursuant to section 48 of the APA dealing with such rulemaking mandates. This is a contested case proceeding aimed at promulgating rules regarding one provider.[8] It is manifest that these proceedings are fatally defective and must be dismissed.[9]

B. An Administrative Agency May Not Define A Classification By Reference To Only One Company

The other parties contend that the Commission may adopt rules that are applicable to Ameritech Michigan exclusively. This is erroneous. The Commission cannot, under the

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[7] There can be no argument that Ameritech Michigan has received notice of the "enhanced" rules which might emerge from this proceeding. Ameritech Michigan cannot predict what the Commission might do in this case just from reviewing the existing rules. Therefore, under Montgomery Ward & Co, it has not had "notice of the required conduct," and – under the APA – the proposed amendments may be promulgated only through rule-making procedures.

[8] If a rule could be amended by a contested case order, there would likely be conflicts between the two because the duly promulgated rule would still be fully effective. So, which one would Ameritech Michigan be legally required to follow? Due to this problem, Ameritech Michigan's interpretation is the only reasonable way to read § 31(5).

[9] As stated previously, Ameritech Michigan stands ready and willing to work with the Commission, the Staff, and the industry to fashion appropriate rules that may be necessary, using statutorily required processes.

Constitution, adopt a "special" act applicable to only one company. The Commission has taken the position that, "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 or rules, 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 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 of the State Constitution, as shown in Ameritech Michigan's Initial Brief.

This does not mean that all special legislation is unconstitutional or that the Commission cannot distinguish between classes of providers. Michigan case law confirms that the Commission cannot apply a "special" law to only one company where a "general" law is possible and desirable.[10] The Commission has previously adopted standards applicable to all local exchange service providers in Michigan. Such standards are fair, desirable, and certainly possible, as evidenced by the existing rules.

The Attorney General argues that the Commission may subject Ameritech Michigan to different rules than all other providers because Ameritech Michigan is "the state's largest

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[10] While Congress, in the 1996 federal Act, has imposed some different obligations on different providers (such as having special provisions for ILECs or BOCs), that federal law does not implicate Michigan's constitutional guarantees here.

dominant incumbent provider of basic local exchange service." AG Brief p 5.[11] The Attorney General references language in Rohan v Detroit Racing Association, 314 Mich 326 (1946) which notes that a law may be "general within the constitutional sense and yet, in its application, only affect one person or place." AG Brief, pp. 6-7 (quoting Rohan, 314 Mich at 349). This argument misses the mark. It is one thing to create a classification based on certain common characteristics associated with members of the class (such as LECs). It is quite another to define a classification based on the name or identity of a single company, as the Commission has done here by stating that the "enhanced" standards will apply only to "Ameritech Michigan." The former is "general within the constitutional sense." The latter is not.[12]

C. The Adoption Of Standards In This Abbreviated Proceeding Which Would Affect Ameritech Michigan's Property Rights Would Violate Ameritech Michigan's Right To Due Process

Due process has not been afforded within the abbreviated time frame in which the Commission has required this contested case to be completed. Ameritech Michigan has not been

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11 This argument also ignores that many of the standards proposed by Staff do not deal with basic local exchange service but address other services where competition is undisputable.

12 Additionally, the Attorney General's position ignores § 253(b) of the federal Act, which 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). While Congress determined that classifications may be drawn for § 271 purposes between BOCs and other providers, Congress drew the line at classifying providers for the purposes of service quality. If the Commission were to apply stricter standards to Ameritech Michigan than other providers, those standards would not be "competitively neutral," and the Commission's action would be in violation of § 253(b) of the federal Act.

able to effectively conduct discovery or to analyze the proposals set forth by the other parties. The schedule did not permit Ameritech Michigan to conduct discovery of the other parties' proposals before it submitted its rebuttal testimony. Tr 110-111. And, this problem was not unique to Ameritech Michigan. One of the Intervenors expressed difficulties coming up with workable proposals in the timeframe allowed. Mr. Ostrander's prefiled direct testimony, for example, indicated in connection with several proposals that he was still analyzing or investigating the issue. See, e.g., Tr 259, 260, 262, 263. By the same token, Staff's proposed standards contain a number of definitions that are not used in the text of the proposals, contain terms that are not defined, contain terms that mean other things, and contain requirements that do not make sense literally when examined. See, Tr 351, 359-365, 369, 372. And in one of the more curious incidents during the case, both the Staff witness and Staff counsel did not even have the correct version of the exhibit in front of them during cross-examination (Tr 372), once again demonstrating the problems with rushing a case like this. This all demonstrates that due process has not been afforded within the time constraints imposed in this proceeding.

The problems associated with the schedule carry over to the Attorney General's Brief where new revisions that were not previously proposed or made clear in Mr. Ostrander's testimony are proposed. For example, the Attorney General suggests that a live operator should be made available within 85 seconds ("60 seconds from the automated response time of 25 seconds"), and that answering time "should be separately reported and measured for each 'answering/call location'." AG Brief, p 14. This is not the proposal set forth in Mr. Ostrander's testimony. Mr. Ostrander merely suggested that he "might be willing to accept a 60 second answer time for both [repair and installation] but that he was "still reviewing this matter." Tr, 259.[13] To now propose new standards is entirely improper and violative of Ameritech Michigan's due process rights.

Staff and Intervenors were required to file their proposed standards by October 19, 2000. Mr. Ostrander's testimony clearly demonstrates that there was insufficient time allowed in this proceeding for the parties to adequately investigate and propose service quality standards.[14] As a result, the Attorney General is now attempting to introduce new standards after the evidentiary hearing in this case. Clearly, Ameritech Michigan's due process rights would be violated if the Commission were to adopt a standard as to which Ameritech Michigan received no notification and was not permitted to cross-examine the Attorney General's witness as to the basis for the standard. For this reason, the Commission should strike, or at least reject, proposals that were not made clear in the parties' testimonies.

The Attorney General's sole attempt at refutation of the problems created by the abbreviated schedule in this case is the claim that the Intervenors "suffer[ed] a distinct disadvantage by virtue of the time pressures attendant to the expeditious schedule" because they

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13 Similarly, the Attorney General's Brief improperly changes and expands upon the customer credit program proposed in Mr. Ostrander's testimony. In Attachment B, the Attorney General proposes that a customer with a service outage lasting more than 30 days should get two full months credit on the 31st day "and doubling every 30th days [sic] thereafter." See, AG Brief, Attachment B, p 1. This proposal was not contained in Mr. Ostrander's testimony, and is not found anywhere in the record. While Ameritech Michigan may sympathize with Mr. Ostrander's inability to properly analyze and explain his proposals within the time frame of this proceeding, it is entirely improper for the Attorney General to make new proposals at this late stage where Ameritech Michigan does not have the opportunity to cross-examine Mr. Ostrander about the proposal, conduct discovery, submit rebuttal, or invoke its right for a "hearing" on the issue. It became apparent that Staff's proposed standards had been under development for several years, perhaps for 5 years of more for some standards, yet Ameritech Michigan was given 1 week to study and assess the impact and feasibility of the proposals.

14 Indeed, the witness's testimony was prepared in such haste that three pages of errata were required to be filed. Tr 264.

did not have ready access to Ameritech Michigan's data. AG Brief, p 7. However, this merely supports Ameritech Michigan's argument that this proceeding did not allow for sufficient time for the parties' proposed service quality standards to be adequately analyzed, discussed, and refined. Additionally, the Attorney General is not the party whose property rights have been put at issue. The immense cost and administrative burden that would be imposed by adoption of Staff's proposed standards, for example, would fall only on Ameritech Michigan – not on the Attorney General. Finally, the Attorney General's claim that it is prejudiced by Ameritech Michigan's "refusal to respond to discovery" is negated by the fact that the ALJ ordered Ameritech Michigan to respond to that discovery and made suggestions as to how the Attorney General could seek to get discovery responses in the record after the cut-off date if necessary.[15]

III. THE NEED FOR "ENHANCED" SERVICE QUALITY STANDARDS HAS NOT BEEN ESTABLISHED

Ameritech Michigan's position in this proceeding has consistently been that recent service quality problems are not attributable to problems with the existing service quality rules, but rather with a number of factors which, in combination, created difficulties for Ameritech Michigan in meeting those rules. See, e.g., Tr 119. Importantly, none of the other parties in this proceeding has yet demonstrated that their proposed standards would have any effect on service quality in Michigan, let alone demonstrated that the revisions are necessary or even desirable.

Staff asserts in its Brief that Ameritech Michigan could somehow have controlled the factors which created service quality problems in Ameritech Michigan's region this past year. Staff Brief, p 2. Staff cites testimony of the Attorney General's witness, Mr. Ostrander, which purports to analyze Ameritech Michigan's claim that factors such as workforce reductions,

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[15] The Attorney General made no such attempt.

economic growth, and rainfall contributed to its service quality problems. Id., pp. 2-3. The record indicates, however, that Mr. Ostrander's analysis improperly looks at each of these reasons in isolation and fails to account for the combination of factors that have come together to create the situation. Tr, 119. And, in any event, arguing the root causes of recent service quality problems is not productive to the focus of this proceeding (as opposed to Case No. U-12571, where Ameritech Michigan extensively demonstrated the combination of factors which inhibited Ameritech Michigan's ability to control certain aspects of its service quality) or relevant to determining how, if at all, the existing rules should be modified. The Attorney General's witness himself admitted that it was not useful to debate the contributing factors to the situation that existed in the past in this proceeding aimed at developing new rules. Tr 119, 237.

It is also interesting that Staff has apparently abandoned its claim that Ameritech Michigan has disinvested in its network. Although Staff's witness argued this point in his prefiled direct testimony (Tr 322-323), Ameritech Michigan's rebuttal testimony clearly showed that Staff was incorrectly interpreting data. For example, Mr. Semerjian showed that Ameritech Michigan's gross plant in service exceeds $9 billion, up 20%; that its capital expenditures have increased; that net plant has been dropping due to accelerated depreciation resulting from continued network expansion and increasing investment in newer technologies; that its fiber deployment has increased 50%; and that the total number of Ameritech employees in Michigan has remained stable. Tr 117-118. Plainly, Ameritech Michigan has increased its stake in Michigan. Staff's brief no longer makes mention of its contention, obviously reflecting that the point cannot be made with any degree of credibility.

Staff also asserts that the current standards are deficient because Ameritech Michigan purportedly "faces no monitoring, accountability or liability for noncompliance with the existing standards." Staff Brief, p 6. This is simply untrue. First, the current rules require Ameritech Michigan to submit reports to the Commission when Ameritech Michigan fails to meet certain service quality standards. Ameritech Michigan did so, and was thus able to call these problems to the Commission's attention. Additionally, Ameritech Michigan fully accepted "accountability or liability for noncompliance" by crediting customers as required by the existing rules, by voluntarily initiating a program in which – among other things – customer credits were increased, and by engaging in a number of other measures to rapidly bring service quality back under control. See, Exhibit R-1.

Like Staff, the Attorney General has taken the position in this proceeding that it is necessary to adopt the strictest possible standards without any delay or further investigation in order to "address the current and specific problems of [Ameritech Michigan]." AG Brief, p 3. The Attorney General's argument is premised on the assumption that "existing service quality standards have proved wholly inadequate" (Id., p 2) and that Ameritech Michigan's service quality problems are purportedly of "crisis proportion" (Id., p 5). Similarly, Staff's Brief asserts that the increase in the number of complaints received by Staff in September, 2000[16] somehow demonstrates that "the current standards have not served Ameritech's customers well." Staff Brief, pp. 3-4.[17] This position simply is not supported by the record.

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[16] Exhibit S-12 is a summary of "contacts," not complaints, regarding all providers. Tr 116. A very high percentage of contacts are informational. Tr 344.

[17] Staff also claims, without explanation, that the current standards have "permitted" events to occur – events that were unanticipated and beyond Ameritech Michigan's control. Staff Br, p 4. This statement makes no sense. Regardless of the wording of the MPSC's service quality standards, or the requirements imposed by the standards, Ameritech Michigan would not have been able to meet those standards given recent events.

There is no proof whatsoever that the existing service quality rules are "inadequate." To the contrary, Staff's witness admitted on cross-examination that a provider's inability to meet a particular standard does not mean that the standard is deficient. Tr 359, 384-385. And, that Ameritech Michigan experienced difficulties in the past year meeting the existing standards certainly does not suggest that those standards are ineffective, and the Attorney General certainly has not so proven. Rather, it suggests that Ameritech Michigan needed to restore its service to the level of quality customers had come to expect – a level that customers generally found satisfactory. Such changes included: (1) hiring more personnel in Ameritech Michigan's Network Services, Repair and Executive Appeal departments; (2) additional network investment to upgrade its plant facilities, and (3) deployment of new, labor-savings technologies. As explained in Ameritech Michigan's Amended Response filed in Case No. U-12571 (see, Exhibit R-1), Ameritech has taken all of these steps. As a result, as of October 16, 2000, the backlog of orders for installation and repair in the Ameritech region had been reduced 35 percent over only four weeks. During that same time period, specifically for Michigan, the backlog was reduced by 37 percent for installation and repair. Through October 16, 2000, the repair-related backlog was reduced by 67 percent. As of October 24, 2000, the repair and installation backlog was reduced by 46 percent and the repair-specific backlog had been reduced by 76 percent.[18] Tr, 113. And this progress will continue.

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18 The Attorney General's position that immediate action is necessary as to Ameritech Michigan only is premised upon some June, 2000 FCC data regarding average repair times. AG Brief, pp. 16, 17, 18, 21. The data relied upon by the Attorney General were out-of-date and do not reflect current service quality conditions in Michigan as shown in the record.

In any event, the Attorney General's claim does not refute the point that, if revised service quality rules are desirable, then they should be revised as to all carriers. A number of the reasons cited by the Attorney General to "support the adoption of new service quality standards" (AG Brief, pp. 7-8) are reasons why *general, comprehensive changes* might be desirable as to the standards applicable to all carriers. See, AG Br, p 8 (asserting, for example, that the proposed standards would "help detect and identify potential service quality problems at an earlier date" and that "[s]ervice quality should naturally improve over time due to advanced technology, so service standards should naturally become tighter").[19] Moreover, in contrast to Staff, the Attorney General has proposed a limited number of rule changes. This undercuts any notion that immediate, wholesale changes are needed to the entirety of the rules.

IV. SERVICE QUALITY RULES SHOULD NOT VARY ACCORDING TO DIFFERENT MARKET CONDITIONS IN DIFFERENT GEOGRAPHIC AREAS

Several of the other parties also suggest that differential standards are permissible in Michigan in areas where the market is not "competitive." See, AG Brief, pp. 5-6; AT&T Brief, pp. 4-5; Staff Brief, pp. 3-4. This is simply wrong. First, there is no case law whatsoever, and none cited by these parties, in support of the dubious position that an administrative agency may subject one provider to different laws or rules than all other companies providing the same services due to conditions in the market or the economy.

[19] That other parties have given reasons why general changes to the existing rules are necessary directly refutes AT&T's statement that "there is no evidence in the record to suggest that there is any need to impose service quality standards appropriate for Ameritech on all providers in all circumstances." AT&T Brief, p 4.

Second, such a proposition violates the very purpose of the MTA. MTA §101(2)(c) states as one of the purposes of the act to: "Restructure regulation to focus on price and quality of service and not on the provider." MCL 484.2101(2)(c). Clearly, this case would violate that essential tenet by "focusing" on "the one provider" if rules are adopted that only apply to Ameritech Michigan.

Third, there is no conceivable reason to make rules applicable to Ameritech Michigan, and provide service quality guarantees to Ameritech Michigan's customers, while at the same time denying those same guarantees to customers of other providers. Regardless of the level of competition in a given area, all Michigan customers should be able to expect the same quality of service. Should GTE/Verizon not be obligated to provide its customers with repairs in the same average time frame as customers served by Ameritech Michigan? And should a customer of AT&T, the world's largest telecommunications company, not be entitled to the same amounts of codified credits if service quality standards are violated? If customer credits are truly intended to compensate customers, as the other parties have suggested, it makes no sense to refuse compensation to customers just because they are not served by Ameritech Michigan.[20] This is particularly the case given that Staff and the Attorney General have argued that differential

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[20] AT&T suggests that "the standards adopted in this case should be crafted to reflect what is appropriate given the conditions that exist with respect to Ameritech Michigan's services." AT&T Brief, p 4. This is the wrong focus. The "conditions that exist with respect to Ameritech Michigan's services" are constantly changing. While Ameritech Michigan experienced some severe problems over the summer, those problems are rapidly being resolved and service quality is being brought into line with the current rules. AT&T's statement would suggest that, when Ameritech Michigan's service quality is restored to acceptable levels, a different set of standards should apply. Service quality rules should not vary depending on temporary conditions created by factors such as the weather and unanticipated levels of retirement. Rather, a minimum standard should be applied to all providers, and all customers should receive the same minimum guarantees.

standards are needed in areas lacking competition. Mr. Choura stated on cross-examination that he was unaware of any competition in the GTE/Verizon service territory for basic local exchange service. Tr 350. By Staff's admission, the greater competition in Ameritech Michigan's service territory should result in a lesser standard than in GTE/Verizon's territory, not a higher one.

Fourth, the assertion that there is no competition in Ameritech Michigan's service areas assumes, wrongly, that customers have no choice of providers. This is not the case. In fact, on cross-examination, Mr. Choura admitted not only that "alternative technologies" such as wireless broadband are already creating competition in certain Michigan areas (Tr, 348), but also that there is in fact competition in wire centers in the Ameritech Michigan service territory (Tr 350). Furthermore, this assertion wrongly assumes that the only issue raised here is basic local exchange service for residential customers. What is ignored are the numerous other areas covered by Staff's proposed service quality rules, such as DSL, directory assistance, operator services,[21] and repair of customer equipment. In such areas, there is much competition, and therefore differential standards are unnecessary and unwarranted.[22]

Finally, the other parties' positions assume 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, regardless of the Commission's service

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21 Notably, a number of these services are unregulated under the MTA. Thus, there should be no mandatory rules applicable to the services provided by, for example, operator service providers.

22 AT&T attempts to characterize Ameritech Michigan as a "monopoly." AT&T Brief, pp. 4-5. As economist Dr. Carnall explained, however, the market share statistics relied upon by AT&T are meaningless in a shared market and fail to properly account for the history of the market in Michigan. Tr 207, 210. The record also shows how many CLEC licenses have been issued by the Commission (Tr 342) and that those companies are obligated by tariff to provide service.

quality rules, is aptly demonstrated by the record: 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. See, e.g., Tr 116.

V. THE SERVICE QUALITY STANDARDS PROPOSED BY THE ATTORNEY GENERAL AND STAFF ARE UNWORKABLE, INFEASIBLE, PROHIBITIVELY EXPENSIVE, AND LACK ADEQUATE REVIEW AND STUDY

The following portion of Ameritech Michigan's reply brief discusses the problems with several of the standards proposed by Staff and the Attorney General in detail. The addendum to this Brief (Attachment A) provides a brief synopsis of the problems and concerns with other Staff and Attorney General proposals, which was covered in depth in the rebuttal testimony of Mr. Semerjian, and which has been raised and addressed in the tables and attachments appended to the Initial Briefs of Staff and the Attorney General.

A. Individual Measurement Of Service Quality

Staff has proposed in this proceeding that the Commission should adopt standards which "provide for the individual [customer] measurement of service quality." Staff Brief, p 4.[23] When asked to explain on cross-examination the "detailed specifications" being proposed by Staff (Tr, 351), Mr. Choura explained that customers should have a "quantitative way of measuring whether [a line] is working within the parameters or outside the parameters" by, for example,

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[23] Staff's Brief also suggests that the standards should provide for "the tracking of service orders." Staff Brief, p 4. This is an entirely new suggestion that was not previously raised by Staff. Because Staff was required to submit all of its proposed standards in its October 19, 2000 filing, the Commission should strike this portion of Staff's Brief, or, at a minimum, should ignore this new proposal. Failure to do so would directly violate Ameritech Michigan's right to due process.

being able to determine "technically whether the line is exactly working at the NID." Tr, 352. It is simply incomprehensible how a workable standard could be adopted which would, for example, allow the typical residential customer to measure something like the "milliamperes of circuit current." Tr, 356. Staff has not proposed any language for this standard, it has not explained how or if the standard would work, and it has not even shown that customers desire such a proposal to be implemented (let alone study customer demand). Staff's vague, unsupported proposal should be rejected.[24]

B. Service Installation Time

The Attorney General's Brief suggests implementation of a strict service installation time standard in Michigan. However, the Attorney General has failed to demonstrate that this standard is necessary, that it is feasible, or that it is appropriate for Michigan customers. In part, this inability to demonstrate necessity or feasibility comes from the Attorney General's witness's unfamiliarity with the state of Ameritech Michigan's plant and network. Tr 268-269.

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[24] Another example of the vague nature of Staff's proposals is its assertion here that Ameritech Michigan should be "required to upgrade its network." Staff Brief, p 5. The only "upgrade" proposal set forth by Staff in this case was its proposal that Ameritech Michigan should be required to guarantee a data rate of 56Kb per second for all access lines. <u>See</u>, Exhibit S-21, proposed standard 5.9. As explained in the record, however, such a proposal would cost Ameritech Michigan hundreds of millions of dollars and take years to implement, and even then Ameritech Michigan could never guarantee a specific data rate due to various engineering issues. <u>See</u>, Tr 159-161. Staff has never responded to these concerns nor has it analyzed the consequences of its proposal. Instead, Staff merely asserts generally in its Brief that this "upgrade" would somehow prevent service quality problems in the future. Staff Brief, p 5. Staff does not track data communication complaints (Tr 345), evidencing that its proposal is a solution in search of a problem. Its proposal must therefore be rejected.

The Attorney General has no support whatsoever for the assertion that "service installation time" is "one of the most important service quality standards in other states." AG Brief, p 9. In fact, California standards, which are described in a NARUC Handbook relied upon by Mr. Choura, do not include a fixed installation interval. See, Tr 262-263. And, there has been no proof that the existence of such a standard would have any effect on service quality in Michigan. The fact that the Attorney General cites to other SBC states which have installation standards but have also experienced service quality problems negates the Attorney General's assertion. Finally, the Attorney General has not explained why Michigan should adopt the strictest possible standard (95% in 5 days) as opposed to other standards cited by the Attorney General (e.g., Illinois' standard of 90% in 5 days).

C. Installation Answer Time

The Attorney General proposes that a standard should be enacted requiring the availability of a live operator within a given time period (60 seconds) in all instances. The Attorney General further proposes that answering time should be separately reported and measured for each "answering/call location." AG Brief, p 14. Aside from the fact, explained above, that the Attorney General's Brief improperly proposes standards that have not previously been set forth in this proceeding, the Attorney General's recommendation would be inherently unworkable and prohibitively expensive. Initial estimates suggest that an answer time of three minutes in all cases would cost tens of millions of dollars each year, plus at least an additional $22 million in start-up costs, and that Ameritech Michigan could not guarantee that all calls would be answered in less than three minutes even with this substantial (and unnecessary) investment. See, Tr 16-17. Ameritech Michigan has not been able to estimate the costs of a 60-second requirement, but anticipates that the cost would be enormous and prohibitive.

The Attorney General implies that the definition of "Answer" contained in current Rule 484.2 (definitions) requires that a live representative be available at all times. AG Brief, p 12. This is not what the rules require. The term "answer" is defined as when either an automated system or a live representative is ready to render assistance or accept information from the customer. Currently, Ameritech Michigan's automated system gives customers the option of waiting for a live representative rather than using the IVRU exclusively. In the vast majority of cases, customers who elect to speak to a live representative are able to do so in a reasonable amount of time.[25] That the current rule does not *require* a live representative to answer all calls is consistent with standard practices. In many cases, customers can report trouble or request repairs much faster and much more conveniently by using an automated system. There is no

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[25] The Attorney General mischaracterizes Ameritech Michigan's position by stating that, "[g]iven [Ameritech Michigan's] vehement opposition to a live operator, it is clear that [Ameritech Michigan] does not consider a "live operator" to even be a reasonable option available to customers. . . ." AG Brief, pp. 12-13. This statement is misleading and unsupported by the record. Ameritech Michigan has no objection to making live representatives available when customers so desire, and it does exactly that in practice today. Ameritech Michigan's objection is to a requirement that "all calls" be answered by a live representative within a specific time frame. As documented in the testimony of Dr. Michael A. Carnall, such a requirement would be arbitrary and inappropriate, and would not best serve Michigan consumers. See, Tr 196-197.

proof, and certainly none offered by the Attorney General, that customers desire or need live representatives to answer all calls within a specific time frame.[26]

D. Out Of Service Repair Speed

The Attorney General proposes that 95% of all out-of-service conditions must be cured within 24 hours on weekdays and 48 hours on weekends, on a wire center basis. AG Brief, p 15. In purported support, the Attorney General's Brief cites a statement made by Mr. Ostrander indicating that prior to adoption of the current service quality rules in 1996, the out-of-service standard required 90% to be cleared within 24 hours on weekdays and 48 hours on weekends. AG Brief, p 16 (citing Tr, 256). Rather than return to that Michigan standard, however, the Attorney General proposes that a stricter standard should be adopted.

Once again, the Attorney General offers no rationale, study, or support for the conclusion that a new standard is needed or that a stricter standard should be adopted in Michigan. There is no consideration for customer demand, for Michigan's unique geography, or for the cost that would be incurred in adopting the proposed standard. These factors are extremely important given that, in the first three-and-a half years following adoption of the current service quality rules, Ameritech Michigan's customers were generally satisfied with out-of-service repair speed.

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[26] The Attorney General's Brief is replete with assertions that lack any foundation or evidentiary support. For example, the Attorney General claims that "it is very likely that access to live operators is necessary at times to improve communication and ensure timely installation and confirm commitment dates." AG Brief, p 13. This assertion has no record support whatsoever. The Attorney General has not conducted any studies regarding the proposed standard (or any other proposed standard), has not investigated customer demand for this proposal, and has no idea of what the cost might be to implement the proposal. See, Tr 259, 260, 262, 263, 297. It is dangerous and bad public policy to make a new, enforceable rule under these conditions. Tr 196.

The Attorney General's Brief merely states that the proposed standard is "reasonable" because it is similar to the standard in two other states. AG Brief, p 16. This, however, does not mean the standard is necessary or even desirable for consumers in Michigan.[27] In fact, while Mr. Ostrander testified that he based his recommendations, in part, on the service quality standards in existence in Kansas (see, Tr 295), those standards require an *average* of 30 hours or less for repair service. (See, Exhibit R-28). The Kansas standard is much more reasonable that the standard proposed here by the Attorney General.

E. Customer Trouble Reports

The Attorney General has proposed that current Rule 484.65 be changed to require no more than 4 customer trouble reports per 100 access lines per month on a wire center basis. AG Brief, p 20. The Attorney General claims that this standard would be "very reasonable," but the *sole* basis for this claim is an assertion that the proposal "is more lenient than Texas." Id. Again, just because one state has adopted a particular standard has no bearing on whether a similar standard would be reasonable for Michigan. The standard in Kansas, which was purportedly relied upon by Mr. Ostrander in preparing his testimony (see, Tr 295), requires no more than 6 trouble reports per 100 access lines for large companies (those LECs serving more than 10,000

[27] Similarly, there is no justification for Staff's claim that revised standards should "exceed those of other states." Staff Brief, p 5. Staff claims that stricter standards would somehow "encourage economic development and deter other providers from relocating to jurisdictions with better service quality" (Id.), but there is no support or explanation for this claim. If the cost of implementing Staff's proposals would be prohibitively excessive or would result in a significant increase in Ameritech Michigan's rates for basic local exchange service, as Ameritech Michigan has demonstrated, the result would not be economic development, but rather would be injury to Ameritech Michigan and its ratepayers and the State of Michigan as a whole.

access lines) going up to 10 per 100 access lines for LECs serving less than 1,000 access lines. See, Exhibit R-28. While the Attorney General asserts here that the number of trouble reports should not vary between urban and rural exchanges (AG Brief, pp. 20-21), the Kansas standard recognizes that, for statistical reasons, wirecenters with few access lines should be allowed more trouble reports than those serving more access lines. This is similar to the standard which Ameritech Michigan has proposed.[28] The Attorney General has failed to refute the reasonableness of Ameritech Michigan's proposed standard, and has further failed to establish that the Attorney General's proposal is reasonable, cost-effective, necessary, or even feasible.

F. Proposed Customer Credits Programs

The Attorney General also proposes that "when either repairs or service outages impede the ability to use phone [sic] for 24 hours," customers should receive a credit of *twice* the monthly basic local service rate. AG Brief, p 22. The Attorney General claims this proposal is "more reasonable" than Ameritech Michigan's interim customer credits program, but no analysis is offered in support of this assertion. Furthermore, the Attorney General has completely ignored

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[28] AT&T asserts in its Brief that the fact that the Kansas standard "included different benchmark levels depending on company size" somehow supports the assumption that the Commission can single Ameritech Michigan out for differential treatment. AT&T Brief, p 2. In purported support, AT&T cites a portion of Mr. Semerjian's testimony in which he notes that there "should be some modification of the standard to reflect the density of lines in a particular exchange." AT&T Brief, p 2 (citing Tr 174-175). AT&T neglects, however, to cite that portion of the transcript in which Mr. Semerjian clarifies that his statement only applies to Ameritech Michigan's proposed trouble report rate standard. See, Tr 182-184. And, the Kansas standard cited by AT&T is only applicable to trouble report rates. See, Exhibit R-28. With regard to trouble report rates, Ameritech Michigan agrees that the number of lines operated by a provider may require differential standards. However, the record does not point to any other state in which entirely different sets of service quality rules have been adopted for each and every provider in the state.

the provision in Ameritech Michigan's tariff which limits a customer's recovery to the basic local exchange service monthly rate.[29] This kind of limitation on liability is lawful, it is reasonable, and it has consistently been upheld as being in the public interest. See, e.g., In re Illinois Bell Switching Station Litigation, 161 Ill 2d 233; 641 NE 2d 440 (1994). Tariffed limitations on liability prevent frivolous and exorbitant claims and enable Ameritech Michigan to keep its rates at a reasonable level. See, Cole v Pacific Telephone & Telegraph Co, 112 CalApp2d 416, 419 (1952) (noting that reasonable rates are "in part dependent upon . . . a rule [limiting liability]" (citation omitted)).[30]

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29 The Attorney General has also proposed that a cellular telephone program should be required, which would be administratively burdensome and prohibitively costly. The Attorney General has not performed any cost studies or analyses of the technical feasibility of this proposal, instead just asserting that it should be done. It would be bad business, however, and bad public policy, to put a law on the books just because it sounds good without evaluating the consequences, intended and unintended, that the law might bring about. See, Tr 193.

30 The Attorney General's attempt to make an issue out of customer credits issued by Ameritech Michigan in the past is completely improper. The Attorney General's Brief states that "further credits should apply for customers in the past that did not receive proper credits or pro rates." AG Brief, p 23. However, the ALJ ruled that the issue of whether Ameritech Michigan provided sufficient credits to customers who experienced service outages in the past is properly addressed in Case No. U-12599 and is not relevant to this case. For this reason, the ALJ struck a section of Mr. Ostrander's testimony -- the same section the Attorney General purports to rely on here. See, Tr, 224-225. The Attorney General's Brief cites to pages 252-253 of the hearing transcript. AG Brief, p 23. However, a large portion of the discussion on page 252 of the transcript is a discussion of past credits, and that portion was properly stricken. While the issue is raised again on page 253, Mr. Ostrander merely states on that page that he is still reviewing the issue. Thus, the Attorney General's argument here is improper and should be stricken.

VI. PROJECT PRONTO HAS BEEN SHOWN TO BE A NON-ISSUE IN THIS PROCEEDING

Finally, both AT&T and Staff attempt to challenge Ameritech Michigan's showing concerning Project Pronto. AT&T claims without analysis that Mr. Semerjian's testimony "fails to even address the specific issues raised by the Commission" and surmises that Staff was not able "to make any assessment." AT&T Brief, p 6. Staff claims that Ameritech Michigan "provided no information that would tend to demonstrate that 'Project Pronto' would result in improved service quality." Staff Brief, p 5. These broad-brush arguments are both unwarranted and miss the issue which the Commission has asked Ameritech Michigan to address.

The Commission's September 7, 2000 Order requires, in reference to Project Pronto, that "Ameritech's filing . . . demonstrate that its proposed standards are consistent with the competitive policies of the Michigan Telecommunications Act and does not confer an anticompetitive advantage on Ameritech Michigan." Order, p 2. This demonstration is aptly and extensively made in the testimony of Ameritech Michigan's witness Harry Semerjian. See, Tr, 103-107. Mr. Semerjian explains that "Project Pronto" – a wholesale broadband service which SBC intends to offer to data affiliates, including Ameritech Michigan's data affiliate, on a nondiscriminatory basis – was extensively discussed and analyzed in FCC 00-336, Docket No. 98-141, in an order which was issued the same day as the Commission here asked for information concerning Project Pronto (September 7, 2000). See, Tr 103-107. Mr. Semerjian's testimony sets forth the relevant portions of the FCC's findings that among other things, Project Pronto will "affirmatively and identifiably promote the rapid deployment of advanced services in a pro-competitive manner." See, Tr 105 (citing FCC 00-336 at ¶23) (emphasis added).

There is simply no need to spend additional time in this proceeding demonstrating the pro-competitive effects and benefits of Project Pronto as affirmed by the FCC. Ameritech

Michigan made the requested demonstration in its September 28, 2000 filing. That demonstration has gone completely un-rebutted throughout this entire proceeding. And, when asked by Staff for additional information in discovery, Ameritech Michigan produced well over a hundred pages of documentation describing, in detail, Project Pronto.[31] None of the other parties attempted to use that information, to introduce it into the record, or to rebut the conclusions contained therein. Accordingly, Project Pronto is not an issue in this case. Because Ameritech Michigan's case and the FCC's order in 00-336 directly address the Commission's concerns, no further demonstration is necessary here.

VII. CONCLUSION

For each and all of the reasons expressed above, Ameritech Michigan respectfully requests that the Commission refrain from adopting new or revised service quality rules in this proceeding. As there has not been proper time allotted in this proceeding for the parties to study and evaluate all of the proposals submitted in this case, adoption of revised rules at this stage would be inimical to the public interest. Moreover, because Ameritech Michigan has not been able to adequately investigate those proposals, cross-examine witnesses, conduct discovery or submit complete rebuttal thereto, adoption of rules – moreover rules applicable only to

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[31] Staff asserts that Ameritech Michigan "was not responsive to the Attorney General's efforts to obtain information regarding Project Pronto through the discovery process." Staff Brief, pp. 6-7. Staff neglects to mention that Ameritech Michigan was required to respond to Staff's discovery requests before the Attorney General's (and thus implicitly admits that the requisite information was provided), that Ameritech Michigan provided the documentation requested by Staff, and that the same documentation was responsive to the Attorney General's discovery requests. Thus, Ameritech Michigan simply directed the Attorney General to its earlier responses. Further, the Attorney General (and Staff) failed to move to compel more responsive answers, as they should have done if holding the view that more information was necessary.

Ameritech Michigan – would violate Ameritech Michigan's due process rights. And, adoption of rules applicable to only one provider, without resort to the APA's rulemaking procedures, would violate the Michigan constitution, the APA, and provisions of both the MTA and the federal Telecommunications Act.

Ameritech Michigan stands ready to assist the Commission, Staff, and the other parties in an appropriate rule-making proceeding in coming up with revised rules that are workable, that benefit Michigan consumers, and that do not risk unanticipated consequences from lack of study. Therefore, Ameritech Michigan respectfully recommends that the Commission immediately approve and convene the Michigan Standards Institute recommended by Staff for the adoption of a voluntary, industry-wide set of updated and enhanced rules. Such a collaborative process holds the best promise of promulgating revised service quality rules that make sense, aid customers, are cost-effective, and do not disadvantage any competitor in the marketplace. See, Tr 353.

Respectfully submitted,

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