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AT&T

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June 14, 2001

MICHIGAN PUBLIC SERVICE
FILED
JUN 14 2001
COMMISSION

Ms. Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

Dear Ms. Wideman:

RE: **Case No. U-12759**

Enclosed for filing is the original and fifteen (15) copies of AT&T Communications of Michigan, Inc. and TCG Detroit's Reply to Exceptions in the above referenced case.

Sincerely,

John J. Reidy, III
(ap)

Enclosures

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MICHIGAN PUBLIC SERVICE
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COMMISSION

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Complaint of Covenant House Michigan and Great Lakes Telecom, Inc. against American Telephone & Telegraph Company (a/k/a AT&T Corp., AT&T, Inc.) and Teleport Communications Group, Inc. (a/k/a Teleport Communications, TCG Detroit, and TCG Detroit Holdings I, Inc.	)	**Case No. U-12759**

AT&T COMMUNICATIONS OF MICHIGAN, INC. AND TCG DETROIT'S REPLY TO EXCEPTIONS

Respondents AT&T Communications of Michigan Inc. and TCG Detroit (collectively "AT&T"), by their undersigned attorneys, submit this Reply to the Exceptions to the PFD filed by Great Lakes Telecom, Covenant House and Staff in this matter. This Reply relates to Case No. U-12759 only. AT&T has submitted a separate Reply to the Exceptions filed in the Molly Maid matter, Case No. U-12764.

I. REPLY TO EXCEPTIONS FILED BY COVENANT HOUSE AND GREAT LAKES TELECOM

A. THE PFD CORRECTLY CONCLUDED THAT COVENANT HOUSE HAD FAILED TO MEET ITS BURDEN OF PROOF WITH RESPECT TO ITS CLAIMS FOR THE PERIOD 1997 THROUGH APRIL 1, 2000.

In their first exception, the Complainants challenge the PFD's conclusion that they failed to sustain their burden of proving a violation of the MTA with respect to their claim for a refund as of April 1, 2000 in the amount of $2406. PFD p. 9. In their initial brief in this matter the Complainants specifically relied upon and directed the Administrative Law Judge to page 8 of Exhibit C-1 as the substantive basis for this claim. Complainants' Initial Brief p. 4.

Complainants' now criticize the ALJ for finding this document insufficient and cite the Commission to other documents that make up Exhibit C-1, which they now claim provide a foundation for the summary. However, the supporting documents suffer from the same deficiency as the summary—they only document amounts that Covenant House refused to pay and requested be credited to its account but they do not establish the merits of any such claim to a credit. Moreover, as the PFD noted at page 9 and Complainants concede at page 6 of their Exceptions, included within Exhibit C-1 are various charges, which were never quantified on the record, which Complainants now admit were correctly billed to Covenant House and for which payment should never have been refused.

In their Exceptions to the PFD, Complainants belatedly attempt to identify, explain and categorize some of these charges. However, these unsubstantiated explanations are made without any citation to the testimony in this case (and unlike testimony will never be subject to cross-examination), are not self-evident from the face of the Exhibit itself, and cannot form the evidentiary basis for a decision in this case. In addition, the attempted partial explanation fails to address or identify all of the relevant charges. In short, Exhibit C-1 -- whichever page is reviewed -- represents an admittedly erroneous and unsubstantiated claim for refunds that was based upon admittedly false assumptions regarding the underlying services provided to Covenant House. The most that the Commission can learn from it are the amounts for which credits were demanded, but these amounts were never proven to be due and owing to Covenant House from AT&T. A violation of the MTA cannot be predicated on a customer's claim for refund. The Complainant must establish a violation and damage directly attributable to that violation. As the PFD correctly determined Complainants have established neither in this case.

It should also be recognized that Covenant House never paid any of the charges that it disputed, nor has it paid any AT&T invoice for any service (disputed or not) since May 2000. Thus the amount that has been withheld by Covenant House includes not only all disputed charges, but additional amounts that it does not dispute and that are admittedly due and owing to AT&T. Tr. 142. One remedy specifically authorized by MTA § 601 (c) for a violation of the MTA is a refund of any "collected excessive rates." Because Covenant House never paid any disputed charges, and nearly a year's worth of undisputed charges, it is self-evident that AT&T has never collected any "improper" charges from Covenant House and, therefore, under no circumstances is any claim to an actual refund appropriate.

In addition, Covenant House's Mr. Sevelis testified that he began to prepare the various spreadsheets contained in Exhibit C-1 to show amounts he was refusing to pay. Tr. 114. But as the PFD concluded, this testimony does not prove a violation of the MTA or that the refusal to pay was warranted. It proves nothing since Mr. Sevelis admittedly refused to pay numerous AT&T charges he asserted were improper because telephone sets had not been delivered to it and, therefore, the lines were not usable. Tr. 117. AT&T pre-filed testimony rebutting this allegation. Its witness, Daryl Peguese, testified that these charges were proper and the credits demanded by Covenant House were completely unwarranted because the lines had, in fact, been ordered and provisioned for the time periods reflected on the invoices. Mr. Sevelis' assumption that Covenant House should not have to pay for the service provided to it because of a delay in the delivery of equipment intended to be used in connection with the service was without any factual basis because AT&T was not the vendor for the handsets. Tr. 272. Even after being informed of the error in the assumptions underlying his demands, Mr. Sevelis filed rebuttal testimony in which he simply refused to acknowledge he was wrong and continued to unreasonably assert that Covenant House should not be liable for these charges because they did not use the lines:

> "The basis for my credit request was that the lines were not in use and therefore no service was provided to them because the equipment necessary to use them was not available on a timely basis."
>
> Tr. 129

When AT&T's counsel began to cross-examine Mr. Sevelis on this subject during the hearing held on March 29, 2001, Covenant House finally dropped its claim that these charges were improper. Tr. 133.

While they never quantified the amounts involved in the "withdrawn" claim as part of the record in this case, Complainants attempt to supplement the evidentiary record in this case through unsworn and unsubstantiated factual assertions in their Exceptions. Notwithstanding these efforts, the total amount of unwarranted credits claimed by Covenant House, the total service charges accruing on these sums over the several years that Mr. Sevelis clung to his untenable position, and any other sums attributable to this "withdrawn" portion of the Complaint still cannot be deciphered from Exhibit C-1. At page 6 of their Exceptions Complainants suggest various charges on pages 119-121 of Exhibit C-1 totaling $181 relate to the withdrawn claims, but other portions of Exhibit C-1 indicate that Covenant House at one point withheld payment and demanded a credit of some $659 for "non-use" of the installed lines between August 19, 1998 and September 9, 1998 due to a delay in the delivery of the equipment. Exhibit C-1, p 81. Tr. 116. Other documents suggest that Covenant House withheld payments and demanded credits for line charges for subsequent time periods on the same basis. Exhibit C-1, p. 117. Mr. Sevelis' direct testimony also states that his spreadsheets included claimed credits for "improper" charges for "premature start-ups for lines requested," Tr. 116, line 22, which is another way he characterized the "non-use" of installed lines, but he never quantified the total amount attributable to such charges. In any event, Mr. Sevelis admitted that the charges he was refusing to pay, right up until the date he stopped paying any AT&T bills, included charges that were related to the delay in the delivery of the equipment. Tr. 142-145. Thus the amount claimed by Covenant House in this case continues to include substantial, but unspecified, amounts attributable to invoices that Covenant House ultimately admitted it should have paid all along and were dropped from its claim in the middle of the hearing. Id., Exhibit R-15.

In addition, Complainants have not identified or segregated other amounts that were admittedly wrongfully withheld by Covenant House. Mr. Sevelis baldly asserted in his direct testimony that voicemail on several lines had never been ordered because they were modem lines for which voice mail was not necessary. Tr. 119. Accordingly, he claimed a credit for the voicemail charges on these lines and listed sums attributable to this claim in his spreadsheets. Tr. 118. However, on cross-examination he admitted that he was wrong and that the voicemail had, in fact, initially been ordered by Mr. Perkins on these lines. It was only at some later date that Covenant House decided to use these lines for modems. Tr. 150. While Mr. Sevelis claimed a credit for voicemail charges on these lines, there is no evidence that Mr. Perkins initiated any request to have AT&T remove voicemail from these lines until long after they were installed. In fact, the first specific reference to any request to remove voicemail in the record is contained in Exhibit C-1, p. 70 and indicates that an oral request was made on February 19, 1999 to remove voicemail from four lines because they were modem lines. Mr. Sevelis admitted that his spreadsheets include a claim for credits for voicemail charges on these lines attributable to billing periods preceding that date. Tr. 150. The fact that Covenant House decided that it did not need voicemail on these lines in February 1999, after it had ordered the service with the lines, does not warrant a "retroactive" credit for all voicemail charges on those lines.

Nevertheless, since Mr. Sevelis was operating under the false assumption that the voicemail had never been ordered in the first place for these lines, that is exactly what he did when he prepared his spreadsheets and demanded that his account be credited for these charges. It is obvious that Mr. Sevelis was quick to demand credit on the Covenant House account irrespective of whether the underlying facts warranted a credit. His spreadsheets suffer from the same deficiency

Finally, AT&T's Ms. Jensen spent two weeks in May and June 2000 analyzing the accounts that are included in this portion of the Covenant House claims. Tr. 179. Although she was given a spreadsheet like those contained in Exhibit C-1 it, like they, did not contain any of the necessary detail to determine if any credits claimed by Covenant House were appropriate. Tr. 172. The only credit she could independently verify amounted to $247, which AT&T has already issued. Tr. 169.

What is clear and unassailable is that the spreadsheets contained in Exhibit C-1 include charges for numerous items that Covenant House has now conceded were proper and others that have never been substantiated as improper. Covenant House made no effort as part of the record in this case to segregate and deduct from the sum it claimed at the hearing those amounts that were initially disputed and were never paid, but which are now admittedly "appropriate" charges for which no credit was ever due, or to otherwise quantify and substantiate the additional credits it now claims. Neither the ALJ nor the Commission can be made to sift through hundreds of pages of confusing spreadsheets to glean "evidence" and interpret how the numbers listed in the documents actually relate to specific claims that have been asserted (or waived) in this proceeding.

In summary, the PFD correctly concluded that Covenant House did not establish a factual basis for either a refund or an additional credit in connection with its first group of claims. It certainly cannot seek a refund of charges because it never paid any disputed charges whatsoever in the first place. It has not established any right to a credit against its unpaid bill because it has failed to substantiate what portion of the sums contained in Exhibit C-1 are attributable to the claims that were dropped in the middle of the evidentiary hearing and what reductions should be made to the total claimed to reflect all credits demanded by Covenant House which are now conceded to have been completely unjustified. Nor has Covenant House substantiated that it is, in fact, entitled to any additional credits for any of the multitude of sums listed in the document. Covenant House bears the burden to prove its case by a preponderance of the evidence. With respect to the "first" group, the alleged overcharges between October 1997 and April 2000, it clearly did not do so and the PFD correctly recommended dismissal of these claims.

B. The PFD Correctly Concluded That Errors in a Bill for a Service That Has Been Ordered Does Not Constitute "Cramming" In Violation of MTA § 507(1)

When Covenant House opened its facility on Martin Luther King, Jr. Blvd. and relocated its headquarters personnel to that location, it arranged to obtain a single T-1 line from AT&T, Exhibit C-37, and <u>it ordered remote call forwarding services from AT&T</u> in connection with the move. Exhibit C-48. Therefore, the undisputed evidence is that remote call forwarding service was ordered by Covenant House as part of the telecommunications package it obtained from AT&T.

MTA § 507(1) states that "a telecommunications provider shall <u>not include or add optional services in the end-users telecommunications service package</u> without the express written or oral authorization of the end-user." (emphasis supplied). This provision is intended to address what is commonly referred to as "cramming". Cramming, however, involves the inclusion or addition of "optional services" in the end-users "telecommunications service package" that the end-user did not request or authorize. As will be discussed in further detail in AT&T's Reply to Staff's Exceptions infra, that is an entirely different matter than an error in billing on an account for an "optional service" that was, in fact, ordered by the end-user. In this case, Covenant House did request the optional service identified as "remote call forwarding" as part of the "telecommunications service package" provided to it by AT&T. Therefore, the problem is not that remote call forwarding service was never ordered for the Covenant House account, the problem was that due to an inadvertent error (that has since been rectified) the bills for the optional service that was ordered were miscalculated, resulting in higher charge than should have been billed to the account for the service. Tr. 378. An inadvertent billing error on a customer's account for an optional service that has been ordered for that account is not a "cramming" violation of Section 507.

Complainants attempt to mischaracterize what occurred as the addition of unordered remote call forwarding service to 76 lines. That is completely false. AT&T was not providing 76 lines to Covenant House during the relevant time period and no matter how many separate telephone numbers the remote call forwarding service was applied to, all the "forwarded" calls were carried over the single T-1 trunk that AT&T was providing to Covenant House at the Martin Luther King Blvd. location. The fact that AT&T calculated its bill for the optional service being provided over the T-1 line based upon an error in the quantity of telephone numbers involved in the service is unfortunate, but it is not a violation of Section 507 of the MTA.

Complainants also argue that the Commission should find violations of Section 507 for May and June 2000 because incorrect bills were sent in those months as well. However, as Complainants themselves state at page 14 of their Exceptions, Section 507 of the MTA did not become effective until July 17, 2000. The statute cannot be applied retrospectively to impose penalties for actions taken prior to that date. *Mary v Lewis,* 399 Mich 401, 249 NW2d 102 (1976), *Chesapeake & Ohio RR v Public Service Commission,* 5 Mich App 492, 147 NW2d 469 (1967*); Michigan Public Service Commission v Cheyboygan* 324 Mich 309, 37 NW2d 116 (1949)

Finally, as noted above, Covenant House has never paid any portion of these bills. Tr. 134, 142. Hence, there are no "collected" excessive charges and thus no basis for any "refund" under the remedy provisions of the MTA. In addition, because AT&T has already taken action for its billing system to issue the appropriate credits, no further credits are warranted with respect to the remote call forwarding charges. As Complainants acknowledge at page 13, fn 1, of their Exceptions, a portion of the total amount of the credits in question appeared in the May 1 bill and it is anticipated that the balance of the credits that have been authorized will appear on the bill in the next one or two billing cycles.

C. THE PFD CORRECTLY CONCLUDED THAT COMPLAINANTS FAILED TO MEET THEIR BURDEN OF PROVING THEIR CLAIM THAT RESPONDENTS VIOLATED MTA § 502(1)(A) BY MAKING FALSE, MISLEADING OR DECEPTIVE STATEMENTS OR § 502(1)(H) BY CAUSING A PROBABILITY OF CONFUSION OR A MISUNDERSTANDING AS TO THE LEGAL RIGHTS, OBLIGATIONS OR REMEDIES OF A PARTY TO A TRANSACTION.

The third exception to the PFD addresses claims relating to number block charges billed to Covenant House. In reviewing this exception the Commission should be cognizant that the issue now argued by Complainants is completely different from the theory that was advanced in the Complaint itself. The gravamen of the Complaint with respect to this issue was that (1) Mr. Apostoleris had negotiated an agreement with Mr. Livingston, (2) the agreement had been reduced to writing and that (3) AT&T was improperly charging Covenant House for DID number blocks contrary to the terms of the agreement. Complaint ¶¶ 8-12. A review of Mr. Apostoleris' direct testimony does not remotely suggest that he was in any way complaining that he had been misled by Mr. Livingston. In fact, in the prefiled testimony addressing the events that led up to the execution of the agreement, Mr. Apostoleris did not identify any specific false or misleading statements allegedly made Mr. Livingston. Tr. 195-198. To the contrary, that testimony suggests that he was simply seeking to enforce an agreement that had been negotiated, reduced to writing and signed in a matter of a few days in November 1999, and needed to be enforced because AT&T was allegedly improperly charging Covenant House for DID number blocks over and above the $340 price set forth in the written agreement. Tr. 195-197, Exhibit C-38.

The change in the Complainants' theory of the case is directly attributable to the fact that the version of the facts set forth in Mr. Apostoleris' prefiled direct testimony proved to be entirely inconsistent with the actual events and, as the ALJ observed during the hearing, Mr. Apostoleris ultimately recanted his direct testimony. Tr. 244-245. He admitted that at the very outset he had been given a written quote that indicated a charge of $340 for the T-1 trunk alone, with an additional charge of $180 per month for 800 DID numbers. Tr. 240. Exhibit R-32. He also conceded that he knew that the trunk charge listed in the contract covers the T-1 only and not DID numbers. Tr. 240. He also admitted that he was never told that the $340 trunk charge included DID number blocks. Tr. 241. These are Mr. Apostoleris' own admissions. In addition, contrary to what is asserted at page 20 of Complainants' Exceptions, Mr. Taylor did testify at the hearing in this matter that he specifically told Mr. Apostoleris that the $340 charge for the T-1 DID trunk did <u>not</u> include the number blocks:

> Q. Did Mr. Apostoleris ever ask you if the $340 included the price for the T-1 and the number blocks?

A. Yes, he did.

Q. What did you tell him?

A. No.

Tr. 457.

This testimony was confirmed by Mr. Taylor's handwritten notes which indicate that he gave Mr. Apostoleris accurate information regarding the cost of the DID number blocks. Exhibit R-53.

In any event, in his direct testimony Mr. Apostoleris did not claim there was any ambiguity in the contract or the contract tariff under which the T-1 line was purchased. In fact, Mr. Apostoleris confirmed that the documents controlling the price of the services he was buying were quite clear. So clear that he simply incorporated the terms of the contract tariff into his direct testimony by reference rather than restating them in their entirety:

> Q. What price terms were discussed?
>
> A. In our negotiations, Mr. Taylor outlined the terms of TCG's contract tariff for the various levels of service it offered. Those <u>terms are clearly</u> set forth in the tariff attached to the Covenant House agreement, which is Exhibit 2 to the Complaint, [Trial Exhibit C-38] which I have reviewed, so <u>I will not repeat each of those tariff rates here in my testimony, but incorporate them by reference. Those are the price terms that we reviewed in the course of our negotiations.</u>

Tr. 196, (emphasis added).

As Mr. Apostoleris indicated, the terms are clearly set forth in writing and a review of the controlling documents referenced in the agreement demonstrates beyond any doubt that the charges billed to Covenant House for the DID numbers were entirely appropriate. First, Mr. Apostoleris signed an initial Local Services Agreement, with no minimum annual revenue commitment, on behalf of Covenant House on November 17, 1999, at the same time he ordered the DID number blocks. That agreement stated that the services provided under the agreement would be provided pursuant to the applicable Tariffs. Exhibit R-33. Therefore all terms, conditions and prices for the services ordered under that Agreement can be determined simply by looking to the applicable general tariffs for the services ordered. A second Local Services Agreement dated January 14, 2000, which was attached to the Complaint and admitted into evidence as Exhibit C-38, consists of two parts, (1) a Local Services Agreement and (2) an Attached Contract Tariff. These documents contain several provisions that state that the terms and conditions governing the respective rights and obligations of the parties to the Agreement are to be derived from three distinct sources, (1) the Local Services Agreement, the (2) the Contract Tariff and the (3) the Applicable Tariffs:

> "1. Services Provided—TCG will provide to the Customer the Local Services described in the Attached Contract Tariff ("Local Services") in accordance with the applicable TCG local service tariffs governing the Local Services ("Applicable Tariffs"), as changed from time to time, except as specifically stated in this agreement and the attached Contract Tariff."
>
> ***
>
> "THIS AGREEMENT, THE ATTACHED CONTRACT TARIFF(S) AND THE APPLICABLE TARIFF(S) REPRESENT THE ENTIRE UNDERSTANDING BETWEEN THE PARTIES AND SUPERSEDE ALL PRIOR AGREEMENTS, PROPOSALS, REPRESENTATIONS, STATEMENTS, OR UNDERSTANDINGS, WHETHER WRITTEN OR ORAL CONCERNING THE LOCAL SERVICES OR THE RIGHTS AND OBLIGATIONS OF THE PARTIES."

Exhibit C-38, p.1, 2, (emphasis added).

Any understanding inconsistent with the controlling documents is entirely unwarranted in light of the clear language of the latter provision. Furthermore, the standard, form Local Services Agreement and Contract Tariff were given to Mr. Apostoleris as early as December 6, 1999, Exhibit R-34, so he had well over a month to read what it said before he signed a second copy of the identical form document sent to him on January 13, 2000. Exhibit C-38. It must be recognized that in dealing with Mr. Apostoleris, AT&T was not dealing with an ordinary consumer and Mr. Apostoleris cannot reasonably claim he was somehow confused by a reference in the Agreement to tariffs. He owns his own telecommunications company, Great Lakes Telecom, and claims vast experience in the industry. Tr. 190, 191. The Contract Tariff he signed identifies the specific Local Services covered by the Contract Tariff and expressly provides that these services are governed by TCG's general tariffs, including any changes made to those tariffs, except as may be specifically stated in the Contract Tariff itself. In other words the business arrangement between the parties is spelled out by the terms of the general tariffs except to the extent the Contract Tariff says otherwise.

> "1. **Services Provided** - TCG will provide the customer and its affiliates with the following Local Services in the State of Michigan, where facilities permit, in accordance with the provisions of Teleport Communications Group Tariff M.P.S.C. No. 2, as changed from time to time, except as specifically stated in this Contract Tariff
>
> A. PrimePath Service
> B. PrimeOne-Local Calling Plan
> C. PrimeXpress Network Service
> D. PrimePlus-IntraLATA Toll Service
> E. TCG PremePlex PRI Service"

Exhibit C-38, p. 5.

Section 4 of the Contract Tariff addresses the Contract Price for the Services being provided under the Contract Tariff, which are only those services specifically listed in Section 1, quoted above. According to this provision, the applicable prices and related terms and conditions can be found in the general TCG tariffs except for those Rates that are specified in Section 7 of the Contract Tariff. It also provides that except for those Rates specified in Section 7, any changes in the prices, terms and conditions under the general tariffs will be applied to the services being provided under the Contract Tariff. Similarly, Section 6.A. of the Contract Tariff addresses rates, classifications, practices and regulations and, in essence, adopts any and all of the provisions contained in the general tariffs, except as otherwise provided for in the Contract Tariff itself:

> "**4. Contract Price-** The Contract Price and any related terms and conditions for the Services provided under this Contract Tariff are set forth in the Applicable TCG Tariffs that are referenced in Section 1., preceding, as such tariffs may be amended from time to time, except for those Rates specified in Section 7, following."
>
> ***
>
> "**6. Classifications, Practices and Regulations**
>
> A. Except as otherwise provided in this contract tariff, the rates and regulations that apply to the Services provided specified in Section 1., preceding, are as set forth in the Applicable TCG Tariffs that are referenced in Section 1., preceding, as such tariffs are amended from time to time."

Id. pp. 4, 6

The penultimate section of the Contract Tariff addresses specific rates for certain elements. However, in no uncertain terms it states that the rates listed in Section 7 are to be substituted only for the elements specified in Section 7 and that all other rates in the general tariffs remain applicable:

> **7. Rates-**Subject to Section 4 of this Contract Tariff, the following rates are stabilized for the term of this Contract Tariff. These rates are in lieu of the rates for those elements specified in the Applicable Tariffs that are referenced in Section 1., preceding. All other rates in the Applicable Tariffs shall apply.

Id., p. 7, (emphasis supplied)

Section 7.A. lists rates for "PrimeXpress Network Service (excluding PrimeConnect Option)". The rate "per trunk" for a DID/DOD trunk is listed as $340 per month. Exhibit C-38.

Therefore, the documents clearly and unambiguously state that the trunk rate element for PrimeXpress Network Service under the Local Services Agreement was "stabilized" pursuant to Section 7 of the Contract Tariff at $340 for a DID/DOD trunk for a three year term. Because neither the Local Services Agreement nor the Contract Tariff "otherwise provide" a service description of PrimeXpress Network Service, the service description contained in the general tariff controls. The service description for PrimeXpress Network Service is contained in the general tariff that was admitted into evidence as Exhibit R-45. It replaced an early tariff that had been filed in 1996, but there are no material differences between the two that are relevant to the issues in this case. Exhibit R-44. The description of the service is concise and precise. It states that the service consists of the trunk connections between the TCG port and the customer's PBX. The service description does not state that it includes any DID number blocks. The service description is contained in TCG Detroit Tariff MPSC No 2 R, Section 4.6.1:

> "PrimeXpress Network Service is a digital service providing trunk connections from an end user's Private Branch Exchange, Key System, or other device to the TCG Port. PrimeXpress is available as a DS-1 (1.544 Mbps) connection providing 24 voice (DS0) communication channels."
>
> Exhibit R-45.

This service description is also clear and unambiguous. The Local Service that AT&T agreed to provide for $340 per month, and for which Covenant House agreed to pay $340 per month, was a trunk connection between the TCG switch port and the PBX owned by Covenant House capable of handling 1.544 Mbps in 24 separate voice grade channels between those two points. There is nothing in such description that even remotely suggests that PrimeXpress Network Service includes DID number blocks. If this description were not clear enough, the tariff goes on to explain that PrimeXpress Network Service can be utilized in several different ways, including direct outgoing calls, direct incoming calls or a combination of the two but that "When DID or DID/DOD service is ordered, direct inward dialing numbers must be purchased from the company." Exhibit R-45.

The general tariffed rates are listed in Section 4.6.2 of the general tariff. The standard rate for a DID/DOD trunk ranges from $425 per month to $445 per month depending on whether the customer elects a one, two or three year term, with the rate decreasing as the term increases.

Charges for DID numbers are also set forth in Section 4.6.2 of the general tariff. The monthly recurring rate for the initial block of 20 numbers is $4.50 per block. Each additional block of 10 numbers is $2.25 per block. There is no provision for any reduction in the charges for number blocks based upon any term commitment. Exhibit R-45.

There is nothing confusing or misleading about the Local Services Agreement, the Contract Tariff or the Applicable Tariffs. When ordering the T-1 trunk and the DID number blocks in November 1999, Covenant House knew and agreed that they would be charged the standard tariff rates of $425 per month for the DID/DOD T-1 trunk and $225 per month for the 1000 DID numbers ($4.45 for the first block of 20 numbers and $2.25 for 98 additional blocks of 10 each). Exhibit R-33, R-45. By subsequently signing the January 14, 2000 Agreement for a $15,000 minimum annual revenue commitment Covenant House was able to reduce the price of the DID/DOD trunk from the general tariff rate of $425 (for a three year term) to the $340 per month specified in the Contract Tariff for a DID/DOD trunk. Nothing in this January agreement purported to reduce the charge for the DID number blocks from that specified in the general tariff.

The service description for PrimeXpress Network Service clearly identifies this service as simply the trunk connection between the TCG switch port and the Covenant House PBX, not the trunk connection plus 99, or any other quantity, of DID number blocks. Moreover, even if the DID numbers were described as included in the service itself, only the rates for the specified elements listed in Section 7 of the Contract Tariff are substituted for the general tariff rates for those elements. All other rates, terms and conditions set forth in the Applicable Tariffs remain applicable. Because the Contract Tariff listed a rate for the trunk, that rate was in lieu of the rates set forth in the general tariffs for a DID/DOD trunk. There is nothing in the Contract Tariff that suggests some other rate is to be substituted in lieu of the general tariff rate for DID numbers blocks.

Finally, the $340 per trunk charge listed in the Contract Tariff did not confuse Mr. Apostoleris. He specifically admitted that he knew that the $340 per trunk charge listed in the contract tariff applied only to the trunk itself:

> Q. And the T-1 is always – the trunk itself is separate and distinct from the DID numbers, isn't it.
>
> A. Yes.
>
> Q. And the price listed in the contract that you referred to is for per trunk, correct?
>
> A. That's correct.
>
> Q. That's $340 for the trunk, right?
>
> A. Yes.
>
> Tr. 240.

On this record no misrepresentation by act or omission can be attributed to AT&T regarding the price of DID number blocks, nor can a reasonable person claim that AT&T "caused a probability" of confusion about these charges. As noted above, the industry and Mr. Apostoleris clearly understood that prices for T-1 trunks are for the trunk alone and do not include DID numbers. Tr. 212. AT&T's Mr. Peguese gave Mr. Apostoleris specific information in writing showing that the $340 charge was for the trunk alone and that the price for 800 DID numbers would be an additional $180. Tr. 229, Exhibit R- 32. Mr. Taylor gave Mr. Apostoleris the information setting forth the separate prices for the T-1 and the DID numbers when he placed the order in November, 1999. Tr. 227. Mr. Taylor's handwritten notes confirm that the information he gave was accurate. Exhibit R-63. Mr. Taylor testified at the hearing that he specifically told Mr. Apostoleris that the $340 trunk charge did not include the DID numbers.

Tr. 457. The clear and unambiguous terms and conditions of the controlling documents show that the charges are separate. Not only did Complainants' fail to carry their burden of proof on the issue, the proofs conclusively establish that nothing AT&T did in connection with this matter that was deceptive, misleading or otherwise improper. Therefore the PFD correctly concluded that this claim should be dismissed.

D. THE PFD CORRECTLY CONCLUDED THAT COMPLAINANTS FAILED TO MEET THEIR BURDEN OF PROVING THEY SUSTAINED ANY ECONOMIC HARM CAUSED BY A VIOLATION OF THE MTA.

Although they did not introduce any evidence of economic harm resulting from any violation of the MTA, Complainants except to the PFD's conclusion that they failed to meet their burden of proof on this issue. They admit that Covenant House did not pay any of the charges that it disputed in the first place, even those that it now admits should have been paid, and has not paid any AT&T bill whatsoever since May of 2000. AT&T has issued and is issuing credits to Covenant House for the full amount of all identified billing errors. Great Lakes Telecom was not billed for the services rendered by AT&T to Covenant House and paid nothing to AT&T. At the present time even after all pending credits are applied to the Covenant House account, there is a large balance that is due to AT&T, which Covenant House has yet to pay. Hence there is nothing that has been paid that should be refunded. Nonpayment of a disputed bill is not an economic loss, especially when it is coupled with non-payment of the undisputed portions of bills. Finally, Complainants reference to the availability of a cease and desist order in the absence of a refund has nothing to do with the issue at hand, which is whether the Complainants proved an economic loss resulting from a violation of the MTA by AT&T.

Complainants refer to a few lines of testimony regarding time spent in dealing with AT&T on billing matters and claim this testimony supports a claim of economic loss. Tr. 124-

125, 208-209. No detail or breakdown of what this time actually represents is given, but it is obvious that all or most of the efforts spent by the two witnesses relates to claims that were rejected by the PFD, not to any violation found to have occurred. For an economic loss to be compensable it must be suffered "as a result of the violation". There is no showing that any time relates to any violation that was found. Economic harm incurred as a result of a violation is a necessary and essential component of the claim and in the absence of any showing of such harm and the causal nexus to the violation, there is no basis for any award.

The MTA does not provide for remedies or penalties to be awarded to any person or entity simply because they decide to file a Complaint or join in a Complaint filed by another party against a provider. Each person or entity seeking to be awarded monetary or other relief must first prove that he has sustained an economic loss as a direct result of a violation of the MTA. Section 601 of the MTA provides for administrative remedies only under certain conditions: "If after notice and hearing the commission finds a person has violated the act, the commission shall order remedies and penalties to protect and make whole ratepayers and other persons who have <u>suffered an economic loss as a result of the violation</u>,..."

The Commission has explained that to obtain relief under this section, which is intended to make one whole, one must first have suffered an economic loss for which compensatory damages are appropriate:

> The phrase "make whole" is typically associated with compensatory damages. See Jefferson Development Co v Heritage Cleaners, 109 Mich App 606, 613; 311 NW2d 426 (1981). It is difficult to attribute a meaning to the Legislature's choice of that phrase that precludes the Commission from ordering reimbursement of a customer's economic loss in an appropriate case.
>
> *Robinson v Ameritech Michigan*, MPSC Case No. U-11934, p.12 (Order 9/28/99).

The *Robinson* case involved claims by a customer against a provider. Where a claim is asserted by someone other than a customer, such as Great Lakes Telecom in this case, the Commission has made it clear that the "make whole" remedies of Section 601 extend only to such other persons who "can show they sustained an economic harm as the result of the carrier's alleged violation." *Harper Avenue LLC, d/b/a Custom Van Enterprises, Inc v Ameritech Michigan,* MPSC Case No. U-11983, p.14 (February 22, 2000) (emphasis added).

Similarly, Section 506 provides for certain remedies, but only with respect to violations of Sections 505 (slamming) and 507 (cramming) of the MTA. The remedies under Section 506 are to "protect and make whole end-users and other persons who have suffered damages as a result of the violation..." Thus in order to obtain a remedy under Section 506 each Complainant must not only prove the violation, but also show that he suffered damages which were a direct result of a violation of either Section 505 or 507 of the Act. As the PFD concluded neither Complainant in this case has carried this burden.

Another relevant section of the MTA is Section 203(8), which unequivocally states that "the burden of proving a case filed under this act is with the party filing the application or complaint." In the *Robinson* and *Harper* cases the Commission made it clear that this burden applies not only to establishing a violation itself, but also requires that each complainant in a case establish that it sustained economic losses as a result of the violation, and the amount of such losses, with reasonable certainty. In *Harper* there were two separate but related businesses named as complainants in the case. One was referred to as Custom Van Enterprises or "CVE" and the other as Central Auto Leasing or "CAL". The Commission concluded that the provider in that case had violated the MTA and awarded relief to CVE, but declined to award any relief with respect to CAL. The reason relief was denied was because the Commission agreed with the

Respondent in that case, Ameritech, that evidence of damages to CAL was speculative and insufficient to "prove that CAL sustained a compensable loss." *Harper, supra* at 24. Thus, proof of a violation does not, *ipso facto*, give rise to an award under Section 601. A necessary element of a claim is damages, which cannot be speculative, but must be established with reasonable certainty by reliable and credible evidence.

Furthermore, the *Robinson* and *Harper* cases establish that proof of economic losses is a necessary element that must be proven as part of the Complainants' prima facie case and cannot be deferred to some subsequent proceeding. The statutory mandates contained in MTA § 203(7) and (8) in this case compelled Complainants to present and prove their case. Furthermore, Complainants knew very well the purpose of the evidentiary hearing conducted before the Administrative Law Judge on March 29 and March 30, 2001 was to specifically afford the Complainants the opportunity to prove their respective economic losses, if any, along with all other elements of their claims. AT&T had filed a motion for summary disposition which, *inter alia*, challenged Great Lakes Telecom's standing to pursue this case because there was no showing whatsoever in the prefiled testimony or exhibits that Great Lakes Telecom had sustained any economic losses. In denying this motion the Administrative Law Judge ruled that it would be premature to dismiss Great Lakes Telecom's claim before giving it "the opportunity to demonstrate if it in fact did suffer an economic loss." Tr. 49.

The Complainants simply failed to prove by a preponderance of the evidence that each of them did, in fact, suffer an economic loss and, if so, the amount each sustained. Where damages are susceptible of precise proof, such proof must be made. *Brady v Central Excavators, Inc.* 316 Mich 594, 612 (1947). Failure to meet this burden means the claim must be dismissed. *Benfield v H.K. Porter* 1 Mich App 543 (1965). Even where damages are not susceptible of precise proof, they cannot be based on speculation or conjecture but must be proven with reasonable certainty. *Berrios v Miles, Inc,* 226 Mich App 470. (1997). The trier of fact cannot be left to guess or speculate as to the amount of damages. *Joerger v Gordon Food, Inc.* 224 Mich 167 (1997). Here no such proofs of damages or economic loss were presented and it is not enough for Complainants to merely assert they were inconvenienced and suffered unspecified losses or damage.

In addition, Complainants did not establish a causal nexus between any economic losses and any violation of the act. Economic loss recoverable under Section 601 must not be incidental to a business transaction, it must be caused by a violation of the act by AT&T. Damages recoverable under Section 506 must be caused by the violation of Section 505 or 507. Damages caused by a violation of any other provision of the Act are not recoverable under Section 506. Here there has been no evidence to show any specific losses sustained by either Covenant House or Great Lakes Telecom and certainly no proof showing the amounts were caused by violation of specific sections of the MTA by Respondents. Each one of these deficiencies is fatal to any claim for relief under either Section 601 or Section 506 of the MTA. Hence the PFD was correct in concluding that the Complainants failed on this issue.

II. <u>REPLY TO STAFF'S EXCEPTIONS TO PFD.</u>

A. THE PFD CORRECTLY CONCLUDED THAT NO VIOLATION OF SECTION 507(1) OF THE MTA OCCURRED.

Staff excepts to the PFD's conclusion that AT&T's handling of remote call forwarding charges did not constitute a "cramming" violation of Section 507(1). Staff's argument regarding whether intent is a necessary element of the claim is a "red hearing" since, whether intentional or not, there was no showing that any optional service whatsoever was included or added to the end-users telecommunications package without express oral or written consent. Staff quotes from the statute and quotes from the testimony but never explains how one relates to the other. The fact is that the testimony quoted cannot support even a single violation of the Section quoted, let alone 76 violations per month as suggested by Staff assumes, without any analysis of the statutory language, that errors in a bill for an ordered service constitutes a violation of Section 507(1). That assumption is false and is not at all what the statute prohibits. It states:

> A telecommunications provider shall not include or <u>add optional services</u> in an end-users telecommunications <u>package</u> without express oral or written authorization of the end user.
>
> MCLA 484.3507(1).

The testimony quoted by Staff does not suggest that an optional <u>service</u> was added to the Covenant House telecommunications <u>package</u> without authorization. The testimony indicates that the service itself was requested, but that the billing for the requested service was incorrectly calculated:

> Q. No, the customer had requested only nine lines to have call forwarding?
>
> A. Actually <u>I won't say that is correct</u>. Ted brought it to my attention that <u>they only wanted to be billed</u> for nine remote call forward lines, and that's what initiated this order form.
>
> Tr. 383 (emphasis added).

Section 507 does not address or prohibit billing errors for an optional service that has, in fact, been ordered or even errors in the implementation of the ordered service to the customer. Here there is no claim that the optional service at issue, remote call forwarding, was improperly added to the Covenant House package of telecommunications services. Rather, the complaint was that the <u>bill</u> for the optional service was miscalculated because the charge for the service was determined by multiplying a fixed charge times seventy-six rather than nine. Although the witnesses speak in terms of "lines," it is probably more appropriate to refer to "numbers" because, in this case, the purpose of ordering remote call forwarding was to have calls dialed to a list of telephone numbers be "redirected" via the T-1 trunk from the AT&T/TCG switch to the PBX serving Covenant House's new facility. Thus, the "service" was ordered, but the correct list of numbers and the bill for the service was in error. It has been established that one physical line can serve many telephone numbers. Indeed, the T-1 trunk ordered by Covenant House was intended to serve some 1000 separate telephone numbers. Thus, while it might appear to an outsider that this represents 1000 lines, in fact all calls to and from each of these numbers were carried over the same single physical medium—the T-1 trunk. The single physical line could, however, be used to carry 24 simultaneous telephone conversations to or from any 24 of those 1000 numbers by electronically dividing the single physical "line" into multiple "channels." Tr. 278. Hence although the remote call service ordered by Covenant House involved multiple numbers, all calls were forwarded over a single line, the T-1 trunk serving the new Covenant House location. Thus, there is a distinction between a number and a line. There is also a distinction between a line and a service. Section 507 does not use either the word "line" or "number". It speaks to an entire "optional service" that has not been authorized, not to errors in the details of how an authorized service is billed as part of the package of authorized services provided to the end-user. Staff's suggestion that 76 "lines" were involved is wrong as a matter of fact and law.

Because a violation of § 507 may give rise to penalties under § 506(2), like any other statute that is penal in nature it must be strictly construed and any ambiguity is to be resolved in favor of lenity. *People v Gilbert*, 414 Mich 191, 211; 324 NW2d 834 (1982). "A penalty provision in a statute should be strictly construed in favor of the person being penalized." *Attorney General* v *Biewer Co.,* 140 Mich App 1 (1985). Moreover even if the statute was not penal in nature, statutes granting power to an administrative agency like the Public Service Commission must be strictly construed and a "doubtful power does not exist." *Union Carbide v PSC*, 431 Mich 135, 146 (1988); *In re Public Service Commission Determination No 2,* 204 Mich App 350 (1994).

In the latter case the Court of Appeals held that the statutory authority of the Commission to regulate "coin operated" telephones did not authorize it to regulate public telephones that were operated via the use of a credit card. The statute at issue in that case was Section 207a of the original MTA, 1991 PA 179. That statute granted the Commission the authority to determine whether "coin operated" telephones should be regulated. The Commission elected to regulate coin operated telephones and further reasoned that this should include all "pay phones" since the general public draws no distinction between telephones operated with coins or credit cards. MPSC Case No. U-10049 Order 3/13/92, p. 15. The Court of Appeals reversed the Commission, holding that the word "coin" has an accepted meaning and is a piece of metal of definite weight and value stamped by a governmental authority. 204 Mich App at 352. Since public pay telephones operated via credit cards use a means of payment other than the use of coins, the Court held that the statute did not grant the Commission the requisite authority to regulate them. Id. at 354.

With no analysis of the specific terms of the statute at issue, Staff draws the broad conclusion that Section 507(1) was violated. Section 507(1) uses the term "services." There is no basis to believe that the Legislature intended this to mean "lines" or "telephone numbers" and nothing in Section 507(1) suggests that violations are to be found on the basis of how many "lines" or "numbers" are involved in a service. In fact, the Legislature defined "services" to mean something very different from "lines." Section 102 (dd) defines the term "services" as:

> "Telecommunication Services" or "services" includes regulated and unregulated services offered for the transmission of 2-way interactive communication and associated usage."

In contrast, "line" is defined as "the medium over which a telecommunications user connects into the local exchange." MTA § 102(n). Hence when the term "service" is used in Section 507(1) it must be presumed to be used in the manner defined by the MTA. There is no evidence that the "optional service" known as remote call forwarding was not authorized to be added or included in the "package" of telecommunications services provided to Covenant House. Therefore, as the PFD correctly concluded, irrespective of errors that were made in the billing for that service, there is no basis for a finding that Section 507(1) was violated.

Furthermore, a violation of Section 507(1) consists of the act of "adding " or "including" the optional service in the "package" of telecommunications services provided to the end user. The statute does not make it a violation to "bill" for an "added" service once the service has been added to the service package. The MTA makes it very clear that it is the addition of the service itself that constitutes the offense, not how many monthly bills are issued for the service or how many lines are affected. Section 506(2)(a) states, in pertinent part, that "Each switch made in violation of Section 505 or <u>service added</u> in violation of 507 shall be a separate offense under this subdivision." Thus, the violation is judged based on the number of services added to the customer's package, not how many "lines" or "numbers" the customer has or how many "bills" are issued for the service. If Covenant House had not ordered remote call forwarding service for its account and AT&T had added this service without any authorization, which is not the case here, irrespective of the number of lines involved, there would be a single violation that occurred when the "service" itself was added to the package of services being provided to Covenant House. If AT&T were to add both remote call forwarding and call waiting, another optional service, to the package of services provided to Covenant House (without authorization for either service), then there would be two violations of Section 507 irrespective of the number of bills generated to the customer after each of these optional services had been added. Staff's facile conclusion that violations are based upon lines or numbers is without merit and is contrary to the express terms of MTA § 506(2)(a).

RELIEF

Wherefore, AT&T requests the Complaint be dismissed for the reason that the Complainants have failed to meet their burden of proof with respect to liability or damages.

Dated: June 14, 2001

Respectfully submitted,

AT&T COMMUNICATIONS OF MICHIGAN, INC.
and
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