STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of Ameritech Michigan for a determination that directory assistance services provided to end-users are competitive services under the Michigan Telecommunications Act.	**)** **)** **)** **)** **)** **)**	**Case No. U-13007**

AT&T COMMUNICATIONS OF MICHIGAN, INC.
REPLY TO THE EXCEPTIONS OF AMERITECH MICHIGAN

AT&T Communications of Michigan, Inc. ("AT&T") submits its replies to the exceptions filed by Ameritech Michigan to the Proposal for Decision ("PFD") issued by the Administrative Law Judge ("ALJ").

On December 15, 2000, Ameritech Michigan submitted its first application in Case No. U-12765 seeking to have its "retail and resale directory assistance (DA) and related services" declared "competitive" pursuant to § 207 and 701 of the Michigan Telecommunications Act ("MTA"), as reenacted by 2000 PA 295. MCL 484.2207, 484.2701. When it denied that application, the Commission ordered Ameritech Michigan to file any future application seeking similar relief pursuant to the contested case procedures found in § 203 and the "competitive services" provisions of § 208 of the MTA. Opinion and Order, Case No. U-12765, p. 12 (March 29, 2001) (referring to MCL 484.2203, 484.2208). The Commission also found that, pursuant to § 208(9), "Ameritech Michigan must obtain Commission approval of a TSLRIC study for DA services *before* seeking to have the service declared competitive." *Id.* (emphasis added).

On July 6, 2001, Ameritech Michigan filed the instant application seeking a "determination that directory assistance services provided to end-users are competitive in all areas of the State of Michigan in which Ameritech Michigan provides such services."

Application Of Ameritech Michigan For A Determination That Retail Directory Assistance Services Are Competitive, Case No. U-13007, p. 1 (July 6, 2001) ("Application").[1] Following the evidentiary hearing held on October 9, 2001, the ALJ issued the PFD recommending that the Commission find that directory assistance services provided to end-users are not competitive. PFD, p. 20. Ameritech Michigan has filed exceptions recommending that the Commission reject this proposal. Furthermore, Ameritech Michigan states in its exceptions that it disagrees with the PFD's finding that "should the Commission find that DA is a competitive service, deregulation of the service should be 'deferred' until Ameritech Michigan files and gains approval of a cost study" for its DA services. Ameritech Michigan's Exceptions to Proposal for Decision, p. 19, Case No. U-13007 (filed Dec. 6, 2001) ("Ameritech Exceptions"). Finally, Ameritech Michigan also disagrees with the PFD's finding that Ameritech Michigan's costs studies must be revised before they can be accepted as valid TSLRIC studies. Ameritech Exceptions, p. 26.

Although AT&T does not necessarily disagree with the underlying premise of Ameritech's Application – that retail directory service may be a competitive service within certain geographic areas in Michigan – AT&T does not believe that Ameritech Michigan has fulfilled the requirements that would allow the Application filed in this case to be granted. Therefore, AT&T recommends that should the Commission reject the PFD and find that retail directory service is a competitive service, the Commission should condition its finding as the PFD recommends. In other words, Ameritech Michigan's Application should not be approved until it has first obtained Commission approval of a

[1] Ameritech Michigan has not sought a similar finding for "resale directory services" as it did in Case No. U-12765.

TSLRIC study for DA services, which is what the Commission required in Case U-12765. The Commission should not approve the "TSLRIC" studies Ameritech Michigan offers with its Application because they fail to comply with the Commission's TSLRIC requirements. The Local Directory Assistance ("DA") and National Directory Assistance ("NDA") studies that Ameritech Michigan submitted with the Application run afoul of so many express Commission directives on point that Ameritech Michigan's conduct cannot be attributed to mere oversight. Hence, to grant the Application based upon the studies submitted by Ameritech Michigan would simply reward Ameritech Michigan's refusal to adhere to the Commission's prior directives.

A. Ameritech Michigan Has Failed to Comply with the Commission's Directive From Case U-12765 or the Requirements of MTA § 208(9)

As noted above, when dismissing Ameritech Michigan's earlier application, the Commission specifically ordered Ameritech Michigan to "obtain Commission approval of a TSLRIC study for DA services *before seeking to have the services declared competitive.*" Opinion and Order, Case No. U-12765, p. 12 (March 29, 2001) ("U-12765 Order"). As the PFD notes, Ameritech Michigan has not yet received approval (or even sought approval for) a TSLRIC study for DA services from the Commission. Instead, in direct contravention of the Commission's order in U-12765, Ameritech Michigan sought in this case to "short-cut" the process by filing an application *before* obtaining approval of a DA TSLRIC study. This is contrary to the Commission's plain requirement that Ameritech Michigan should have obtained approval "before" filing the instant application. The Commission did not in any way suggest that filing an unapproved cost study concurrently with its application to have DA declared a competitive service would suffice. Although AT&T is mystified by Ameritech Michigan's failures (particularly in

light of AT&T's generally favorable stance regarding the relief requested), the fact remains that the Ameritech Michigan has not complied with the Commission's directives.

The requirement that Ameritech obtain *prior* approval of the TSLRIC study makes sense. The approval of a TSLRIC study is not inherently a matter related to the investigation of whether a service is "competitive" under § 208. An *approved* study may provide useful information to the Commission, particularly with regard to whether carriers are pricing services at or below cost. An *unapproved* study provides no useful information and certainly has not allowed the carriers participating in the docket to take definitive positions.[2]

It is for precisely this reason that § 208(9) makes it a statutory requirement that "a provider shall not file to have a service classified as competitive until the provider has received the approval of the commission of a total service long run incremental cost study for the service to be classified." The words " shall not file" and "until the provider has received the approval of the commission" could not be clearer.[3] Ameritech Michigan should not have filed its instant Application until it had "received the approval of the commission."

Here there is no room to argue that it was insufficient for Ameritech Michigan to submit an unapproved TSLRIC study *concurrently* with the filing of an application to

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[2] For example, presently Ameritech Michigan claims that its DA services are price below TSLRIC. Application, ¶ 14. If the Commission were to reject the studies or require modification, Ameritech Michigan might not be able to make this claim. Regardless, the problem is that no party (even Ameritech Michigan) will know the status of these rates vis a vis TSLRIC until *after* the Commission enters its order. It is for this reason that the statute and the Commission require that a TSLRIC study be approved *before* an application such as Ameritech Michigan's is filed.

[3] "When statutory language is clear and unambiguous, judicial interpretation of the statute is precluded. We will assume that the Legislature must have intended the meaning it plainly expressed and the statute must be enforced as written. [citation omitted]. Further the word "shall is generally used to designate a mandatory provision, while the word "may" designates a provision that grants discretion." *Macomb Road Commission v Fischer* 170 Mich App 967 (1988).

have a service declared competitive. Until the provider has received the Commission's approval of a TSLRIC study of the service, Section 208(9) is an absolute bar to the filing of an application to have that service declared competitive. There is simply no discretion involved and the PFD's finding that "deregulation of DA should be deferred until Ameritech files and gains approval of a DA cost study which is consistent with the U-11831, TSLRIC study" is fully consistent with the statutory requirements of § 208(9).

Ameritech Michigan suggests (at p. 24 of its Exceptions) that § 208(9) is inapplicable to this case. AT&T disagrees with that assertion, but even in the absence of the express statutory prohibition against filing the instant application prior to receipt of Commission approval of the cost study, Ameritech Michigan was given full notice by the Commission in Case No. U-12765 that the Commission would require it to meet § 208(9)'s requirement. That it chose to ignore both the statute and the Commission's directive on how to proceed unfortunately renders the Application in this case legally deficient and, thus, fatally flawed.

B. Ameritech Michigan's Purported Cost Studies Are Completely Flawed and Cannot be Rectified.

Even if the Commission were able to absolve Ameritech Michigan's non-compliance with the statutory mandate and the Commission's prior orders, and AT&T knows of no legal basis for it to do so, the PFD is correct that there is no factual basis in the record for such absolution. Thus, the Commission should follow the PFD's recommendation and not approve the cost studies that Ameritech Michigan has proposed (almost as an afterthought) in this docket. AT&T agrees with the Commission Staff (Mr. Passariello's) opinion that the two purported TSLRIC studies filed in this case fail to comply with many of this Commission's TSLRIC principles. Before Ameritech

Michigan's relief may be granted in this case, it must file and receive approval of a TSLRIC study that complies with all of the Commission's TSLRIC principles.

Ameritech Michigan (through its witness Mr. Barch) filed TSLRIC studies for two "services" – Directory Assistance 2001-2004 ("DA Cost Study")[4] and National Directory Assistance 2001-2004 (NDA Cost Study") (collectively, the "DA/NDA Cost Studies").[5] Although there are numerous errors, there are several primary aspects of these studies that violate prior Commission orders or TSLRIC principles and render them completely unusable. Summarized, these flaws are as follows:

- The DA/NDA Cost Studies are "individualized" or piecemeal studies that violate the requirement that TSLRIC studies be filed for an entire network.
- The DA/NDA Cost Studies are service-specific and violate the TSLRIC requirement that studies must be performed for the total output of specific services at a basic network function level.
- The DA/NDA Cost Studies use inputs and assumptions that are inconsistent with Ameritech Michigan's present TSLRIC studies. In particular, Ameritech Michigan's introduction of entirely new cost models for one service that uses basic network functionality while using other models/methodologies for other services using the same basic network functionality is wholly inappropriate.

The studies are piecemeal. The first flaw that requires rejection of the DA/NDA Cost studies is that they violate the principle that a TSLRIC study must be performed for the entire network. The Commission has reiterated this basic requirement on nearly every occasion that it has been called upon to review TSLRIC studies. For example, as Mr. Passariello pointed out during his testimony (Tr. 289), while the Commission has removed the requirement that Ameritech Michigan file TSLRIC studies on a biennial basis, it has not authorized Ameritech Michigan to file TSLRIC studies for individual

[4] Tr. 140; Exhibit A-7 (Confidential).

services. *See* Opinion and Order, U-11831, p. 39 (November 16, 1999). Rather, as Mr. Passariello notes, "the Commission made it clear that when Ameritech does file its next TSLRIC study, it must do so for its entire network." Tr. 289.

The requirement to study the entire network is embedded in the Commission's TSLRIC principles and the Commission has steadfastly refused to allow carriers to file TSLRIC studies that focus on only a part of the entire network. In docket U-10620, the Commission expressly rejected the notion (raised by Ameritech Michigan in that case) that valid TSLRIC studies could be performed for only part of the network. *See, e.g.,* Order, U-10620, pp. 5-7 (Nov. 10, 1994). The Commission confirmed that position in its order establishing TSLRIC cost study methodology. Order, U-11103, p. 21 (Dec. 12, 1996) ("It is impossible to perform a cost study without reference to the entire cost of the network"). The Commission has put in practice its conviction – indeed, it has warned Ameritech Michigan on this very point. In it November 16, 1999 Order in Case U-11831, Staff pointed out that Ameritech Michigan had failed to follow TSLRIC rules requiring the study of the "entire network" by failing to file unbundled Directory Assistance TSLRIC studies. Order and Opinion, Case No. U-11831, p. 38 (Nov. 19, 1999). ("November 19, 1999 U-11831 Order"). The Commission ordered Ameritech Michigan to file the UNE DA TSLRIC study noting, "A failure to file required studies in future proceedings may result in the imposition of penalties." *Id.*[6]

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[5] Tr. 140; Exhibit A-8 (Confidential).

[6] In Case No. U-11831, the Commission imposed other requirements that Ameritech Michigan has not followed in this case. For example, the Commission required Ameritech Michigan, when it filed its "next" TSLRIC study, to identify any cost increases above 10%. November 16, 1999 U-11831 Order, p. 39. Ameritech Michigan is silent on this requirement in this case. Ameritech Michigan is also required to file an "extended" TSLRIC study. *Id.* There is no reference by Ameritech Michigan in this case to an "extended" TSLRIC for DA/NDA.

Against this backdrop, Ameritech Michigan's DA/NDA studies cannot survive scrutiny and certainly cannot be approved. Despite its weak statements otherwise, Ameritech Michigan has not submitted a study for a "new" service. Mr. Barch admitted during cross-examination that the service specific definition for UNE DA and retail DA are essentially the same. Tr. 164-165. In other words, UNE DA, for which Ameritech Michigan has filed a TSLRIC study,[7] and retail DA, for which Ameritech Michigan has filed a new, wholly different TSLRIC study, are in reality the same or essentially similar services. Thus, the DA/NDA Cost Studies are not TSLRIC studies of new services (which might be acceptable if correctly compiled); they are new TSLRIC studies for services that have been provided by Ameritech Michigan for "many" years. Tr. 128. As Mr. Passariello stated in his testimony, "Ameritech should have included retail DA in its cost filing in U-11831." Tr. 294. If Ameritech Michigan is seeking to correct that error, it must go back to the cost studies that were in issue in U-11831 and properly compile TSLRIC studies for retail DA based upon the factors and assumptions approved in that case.[8]

[7] Whether the Commission has ever approved this study is an open question. *See, e.g.*, Opinion and Order, U-12765, p. 12 (March 29, 2001) ("That study has not yet been specifically approved by the Commission.").

[8] In rebuttal, indeed, in the last sentence of Mr. Barch's rebuttal testimony, Ameritech Michigan states that it "could submit revised cost studies" based upon the DA TSLRIC studies filed in Case No. U-11831. Tr. 151. Ameritech Michigan makes a similar offer at the last page of its exceptions. Ameritech Exceptions, p. 28 ("While Ameritech Michigan believes the cost studies submitted in this case are the most accurate, relevant and representative of its TSLRIC of providing retail directory assistance services, in the event the Commission requires Ameritech Michigan to file a compliance cost study consistent with Mr. Passariello's recommendations, Ameritech Michigan will do so"). This statement is the definition of "too little, too late". Apparently, Ameritech Michigan has now recognized that its starting point should have been the U-11831 TSLRIC studies, but it cannot explain why the U-11831 studies were not used or why the "whole cloth" new studies it has submitted are acceptable. Moreover, Ameritech Michigan's late-breaking offer is beside the point. No "modified" U-11831-based retail DA TSLRIC study has been presented in this case for the parties, much less the Commission, to approve.

The studies are "service specific". The second fatal flaw in the DA/NDA Cost Studies is that they study a service in a manner focused on the type of DA service involved or, as Mr. Passariello states it, "based on who is purchasing the service." Tr. 292. This is inconsistent with cost principle No. 8 (among other principles) that requires a TSLRIC study to ensure that "costs for services which use the network in the same way are treated consistently." Tr. 293. The Commission only recently rejected Ameritech Michigan TSLRIC switching cost studies on the same basis. Using language that could easily be applied to the studies filed in this case, the Commission rejected Ameritech Michigan's study, "because it determines different switching costs depending on the service that is using the switch. That is inconsistent with costing principle no. 8. The commenting parties [which included AT&T] are correct that Ameritech Michigan should develop a single cost for local switching and a single cost for tandem switching, and should map those costs to any service that uses switching." November 16, 1999 U-11831 Order, at pp. 15-16.

Ameritech Michigan's DA/NDA Cost Studies are similarly flawed. As Ameritech Michigan's witness Mr. Barch admitted, Ameritech Michigan did not even start with the DA cost studies that were filed in Case No. U-11831. Tr. 160. Nor did Ameritech Michigan go back and revise its studies from U-11831 to be consistent with the studies it presented in this case. Tr. 155. Indeed, Mr. Barch was not even able to explain the impact that the new studies might have on the old studies. Tr. 157-58. But one very negative impact can be readily seen. Ameritech Michigan's UNE DA TSLRIC studies produce costs that were higher than those produced by the DA/NDA Cost Studies. Tr. 166. If Ameritech Michigan were to set its retail DA rates at the level produced by

the DA/NDA Cost Studies, a classic price squeeze would result because carriers would be purchasing wholesale DA services at rates *higher* than Ameritech Michigan's retail rates. This is the exactly the anticompetitive outcome that TSLRIC principle No. 8 is meant to prevent.[9]

The studies are inconsistent with other submitted cost studies. The third flaw is that Ameritech Michigan's DA/NDA Cost Studies violate the requirements that TSLRIC costs be developed in a consistent manner using uniform inputs. There is a veritable laundry list of inconsistencies between the U-11831 DA cost studies and the cost studies at issue in this case. For example, Ameritech Michigan has used a different cost model (OACIS is replaced by OSCARS). Tr. 152-53, 292. Ameritech Michigan has studied a different time period. Tr. 292. Ameritech Michigan used new (or different) switch vendor contracts and discount levels than used in the U-11831 case to develop the switching costs used in the DA/NDA Cost Studies. Tr. 161. Ameritech Michigan used new labor and inflation rates. Tr. 293. Each of these changes inappropriately distances the UNE DA TSLRIC study filed in Case U-11831 from the retail DA TSLRIC studies filed in this case.

In other words, there is no single, unified TSLRIC study anymore for Ameritech Michigan's network (and in particular, for the portion of the network dedicated to DA functionality). There are (at least) two separate, irreconcilable cost studies each (according to Ameritech Michigan) studying a separate service, each of which (according to Ameritech Michigan) has separate cost study assumptions and inputs. The

[9] *See* Order, U-11103, p. 23 (Dec. 12, 1996), where the Commission stated: "The Commission also agrees with the Staff that disaggregation should produce cost elements that do not vary with the manner in which they are combined to provide services or with the types of customers that use the services. The Staff's

Commission has expressly rejected any attempt to "update" assumptions for portions of its TSLRIC studies, as pointed out in Mr. Passariello's testimony:

> Ameritech may not make piecemeal changes to its studies. If it changes an input that is used in other studies, or if the results of the changed study are inputs to other studies, it must change those studies as well. Even then, Ameritech Michigan cannot amend its studies more often than every two years unless there is a fundamental change in circumstances.

Tr. 293-94 (quoting May 3, 2000 U-11831 Order, pp. 12-13).

In sum, Ameritech Michigan's DA/NDA are the complete antithesis of a properly conducted TSLRIC study. The methodology used openly flouts the Commission's long-established (and fully explicated) TSLRIC methodology. The TSLRICs produced cannot be verified to be consistent with forward-looking, economic principles. The results should not be approved.

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approach is better suited than Ameritech Michigan's as a means of eliminating discrimination within a provider's rate structure."

CONCLUSION

AT&T respectfully recommends that should the Commission reject the PFD and find that Ameritech Michigan's Application be granted, the Commission should condition its approval as the PFD recommends and require Ameritech Michigan to refile and obtain approval of TSLRICs for its retail DA services before any future application is filed.

Respectfully submitted this 13th day of December 2001.

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