

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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| In the matter of <b>AMERITECH MICHIGAN's</b>   | ) |                  |
| submission on performance measures, reporting, | ) |                  |
| and benchmarks pursuant to the October 2, 1998 | ) | Case No. U-11830 |
| order in Case No. U-11654.                     | ) |                  |
| _____                                          | ) |                  |

At the June 15, 2006 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. J. Peter Lark, Chairman  
Hon. Laura Chappelle, Commissioner  
Hon. Monica Martinez, Commissioner

**ORDER DENYING REHEARING AND RECONSIDERATION**

On February 9, 2006, AT&T Michigan filed a petition for rehearing and reconsideration of the Commission's January 10, 2006 order denying AT&T Michigan's motion to dismiss contested-case proceedings in this case. The underlying issue in this matter is whether the Commission's method for calculating charges imposed as part of a remedy plan for instances of failure by AT&T Michigan to provide nondiscriminatory access should continue to use statistical adjustments presented in what is known as a K table. On March 26, 2003, the Commission concluded that "it is necessary and appropriate to increase the incentives for [AT&T Michigan]<sup>1</sup> to provide nondiscriminatory access to its facilities and services" and that the "most effective modification to the remedy plan for that purpose is elimination of the K table, which excuses a number of instances of noncompl[iant] performance each month." March 26, 2003 order, p. 4. AT&T

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<sup>1</sup>Then known as SBC Michigan.

Michigan appealed, arguing that the Commission could not delete the K table without a contested-case proceeding. The Court of Appeals agreed and remanded to the Commission. *SBC Michigan v Public Service Comm*, unpublished opinion *per curiam* of the Court of Appeals, decided May 10, 2005 (Docket No. 251117), p. 9. In response, the Commission remanded “to allow contested case proceedings on the issue of whether the K table should be eliminated.” August 1, 2005 order, p. 4.

AT&T Michigan moved to dismiss, arguing that a subsequent revision to the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*, 2005 PA 235 (Act 235), requires that the Commission address the underlying issue through rulemaking instead of a contested case. The administrative law judge denied AT&T Michigan’s motion to dismiss, and the Commission refused AT&T Michigan’s petition for relief. January 10, 2006 order, p. 10. The Commission refused to dismiss the case for a number of reasons:

The Commission commenced the proceeding pursuant to Section 305 of the MTA, MCL 484.2305(1), that prohibits incumbent local exchange carriers from discriminating against CLECs [competitive local exchange carriers] or providing CLECs with inferior access or interconnection. . . . Act 235 did not modify or repeal Section 305(1). Thus, the Commission’s obligation to ensure that the provisions of Section 305 are met has not changed as a result of the passage of Act 235. This point was not addressed by AT&T Michigan in its application. The Commission finds that, for this reason alone, this contested case proceeding must continue. In addition, Section 202(2) of Act 235 mandates that the rules promulgated under subsection (1)(c)(ii) shall not apply to the provision of UNEs [unbundled network elements] and local interconnection services that are subject to quality standards in an interconnection agreement. Thus, any rules promulgated under Act 235 would not apply to CLECs that have performance measures and remedies under an interconnection agreement with AT&T Michigan. Moreover, there are performance measures and remedies that are not related to UNEs and interconnection services, such as those for collocation, billing, resale, 911 services, etc. The K table removal is relevant to these issues as well, and these issues are unaffected by Act 235.

Finally, this proceeding was initiated by the Commission on remand in accordance with an order from the Court of Appeals. The Court of Appeals’ findings are clear in its May 10, 2005 *per curiam* decision. It ordered the Commission to afford AT&T Michigan an evidentiary hearing on the issue of whether the K table should be eliminated, and it remanded the case to the

Commission for proceedings consistent with that decision. This fact, too, requires denial of AT&T Michigan's motion. [*Id.*, pp. 8-9.]

AT&T Michigan now moves for rehearing and reconsideration, arguing that the "Commission's January 10 Order in this docket and ongoing contested case proceedings cannot be reconciled with this new legislation [Act 235] mandating that the Commission resolve UNE and interconnection performance measurement issues through rules that will apply on an industry-wide basis." AT&T Michigan petition, February 9, 2006, pp. 1-2. The Commission Staff (Staff), McLeodUSA Telecommunications Services, Inc. (McLeod), and Talk America, Inc., LDMI Telecommunications, Inc., and XO Communications Services, Inc. (collectively, Talk America) filed responses opposing AT&T Michigan's petition for rehearing.

AT&T Michigan first argues that a contested-case proceeding is "fundamentally inconsistent" with the MTA, as revised by Act 235, because that act specifically requires the Commission to make rules to adopt new quality standards, including remedies for violations, for UNEs and for interconnection. AT&T Michigan asserts that the quality standards must be generally applicable and, therefore, must be adopted through the rulemaking process.

AT&T Michigan next argues, essentially, that the new Act 235 requirement that the Commission make rules concerning UNEs and interconnection "necessarily means that standards set forth via contested case proceedings applicable to only one provider do not comport with the newly-enacted [sic] Section 202." AT&T Michigan concedes that the Commission has the authority to enforce Section 305 and that Act 235 did not revise that section; however, AT&T Michigan argues, the Section 202 rulemaking requirement expressly covers services that are the subject of Section 305. Further, Section 305 only lists discriminatory practices prohibited to local exchange service providers, and it does not provide the Commission with authority to make quality standards through contested-case proceedings. AT&T Michigan also argues that the

Commission has previously started rulemaking when the Legislature passed laws requiring generally applicable quality standards while other, non-rulemaking proceedings were underway, citing *Michigan Electric Cooperative Ass’n v Public Service Comm*, 267 Mich App 608; 705 NW2d 709 (2005).

AT&T Michigan next argues that the Commission misread Section 202 by interpreting the new provision on UNEs and interconnection services to mean that Commission-mandated quality standards would not apply to any interconnection agreements. AT&T Michigan argues that the provision only exempts voluntarily negotiated interconnection agreements.

AT&T Michigan further argues that a contested case is improper even if it is currently applied to performance measurements and remedies other than just UNEs and interconnection services, the two elements specifically listed in Section 202. AT&T Michigan argues that it will not be possible to know which of the other performance measurements overlap with UNEs and interconnection services until the rulemaking required in Section 202 is completed.

Finally, AT&T Michigan asserts that Act 235 supersedes the remand order from the Court of Appeals. AT&T Michigan asserts that, because Act 235, which became effective six months after the Court of Appeals’ opinion, requires rulemaking to address standards for the entire industry, there is no basis for continuing with a contested-case proceeding that will only bind AT&T Michigan.

The Staff, McLeod, and Talk America all agree that AT&T Michigan’s petition for rehearing should be denied because it merely attempts to reargue AT&T Michigan’s prior positions without presenting new facts or unintended consequences of the denial.

The Staff also argues that Act 235 did not reduce the Commission’s authority to continue this contested case because Section 202 was a grant of *additional* authority that begins “in addition to

the other powers and duties prescribed in this act.” Further, the Staff argues, the Commission has authority to continue the case because of the Commission’s power to enforce the MTA and the federal telecommunications laws delegated to the state for enforcement, including the state and federal laws requiring AT&T Michigan to provide nondiscriminatory treatment. Moreover, the Staff argues that the present contested case must be completed to ensure uniformity across the industry because subsection 202(2) of Act 235 dictates that the new rules made under Act 235 will not apply to the interconnection agreements between CLECs and AT&T Michigan.

McLeod rebuts AT&T Michigan’s argument that Section 305 does not give the Commission authority to proceed by arguing that “this ignores the fact that this proceeding is addressed to a specific carrier, AT&T Michigan, and with measures to assure that this specific carrier with a history of failing to comply with Section 305’s requirement for nondiscriminatory access to UNEs does in fact comply with Section 305.” “That,” McLeod argues, “is not an appropriate situation for rulemaking.”

Talk America concurs with the Staff’s argument that Act 235 was a grant of additional authority to the Commission and that it did not take away the Commission’s authority to decide this contested case. Talk America also argues that the premise of AT&T Michigan’s argument is wrong:

AT&T Michigan’s petition for rehearing is also based on a faulty presumption that the rules created pursuant to Section 202 establishing quality standards are the same as non-discrimination standards which the Commission seeks to enforce in this proceeding. Depending on how the Commission chooses to promulgate its quality standards, there may be certain superficial overlap between quality standards and non-discrimination standards. At their core, however, the two concepts are vastly different. In this proceeding, the Commission is not seeking to impose standards on AT&T Michigan to ensure that AT&T Michigan provides high-quality service to CLECs. Instead, the Commission is merely seeking to impose standards and remedies to prevent discrimination which is prohibited by federal law.

Talk America’s brief, March 2, 2006, pp. 5-6.

Talk America also argues that, even if AT&T Michigan's argument equating service standards and nondiscrimination standards prevails, the contested case should still proceed because any rules adopted under Section 202 would not apply to provision of UNEs and interconnection services under an interconnection agreement, despite AT&T Michigan's argument that the interconnection agreements with performance measures and remedies were imposed by the Commission and were "not the result of voluntary negotiation with AT&T Michigan." Talk America argues that AT&T Michigan did not have to include those provisions in the interconnection agreements and that it could have chosen to arbitrate the issue and then to appeal it in federal court if dissatisfied. Therefore, Talk America argues, there is no merit to the argument that the present case should not be continued because the interconnection agreements will not be exempt from the rulemaking.

### Discussion

Rules 401 and 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17401 and R 460.17403 govern requests for reopening proceedings and for rehearings:

(1) A proceeding may be reopened for the purpose of receiving further evidence when a reopening is necessary for the development of a full and complete record or there has been a change in conditions of fact or law such that the public interest requires the reopening of the proceeding.

(2) After providing due notice and an opportunity for the parties to be heard, the presiding officer, upon his or her own motion or upon motion of any party, may reopen the proceeding at any time before the date for the filing of exceptions to a proposal for decision or, if provided for, replies to exceptions. After the date for filing exceptions or replies to exceptions and until the expiration of the statutory time period for filing a petition for rehearing, the commission may reopen a proceeding upon its own motion or motion of any party.

R 460.17401.

A petition for rehearing after a decision or order of the commission shall be filed with the commission within 30 days after service of the decision or order of the commission unless otherwise specified by statute. A petition for rehearing based on a claim of newly discovered evidence, on facts or circumstances arising subsequent

to the close of the record, or on unintended consequences resulting from compliance with the decision or order shall specifically set forth the matters relied upon. The petition shall be accompanied by proof of service on all parties to the proceeding.

R 460.17403(1).

Rule 403 provides that a petition for rehearing must be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant rehearing.

AT&T Michigan's argument that a contested-case proceeding is "fundamentally inconsistent" with the MTA as revised by Act 235 fails because, as the Staff and Talk America point out, Act 235 added to rather than diminished the Commission's authority. The requirement for general rulemaking imposed by Section 202 is not inconsistent with AT&T Michigan's successful argument before the Court of Appeals that it was entitled to an adversarial contested-case proceeding to determine whether, in its case, the K table would be used when figuring sanctions and charges for violations of the MTA nondiscrimination rules. This is especially so because, when the remedy plan was adopted, the Commission expressly stated that it would "review the effect of the approved plan and further revise the plan as circumstances warrant." April 17, 2001 order, pp. 4-5.

For the same reason, AT&T Michigan's second and third arguments—that the rulemaking required by Act 235 "necessarily means that standards set forth via contested-case proceedings applicable to only one provider do not comport with the newly-enacted [sic] Section 202"—also

fail. As the Staff and Talk America argue, subsection 202(2) states that subsequent rules “shall not apply to the provision of unbundled network elements and local interconnection services subject to quality standards in an interconnection agreement approved by the commission.” Therefore, to avoid having different standards applied to different providers, the Commission must be able to complete the contested-case process that AT&T Michigan demanded here, even as it undertakes the rulemaking required by Section 202(1)(c)(ii). AT&T Michigan’s reliance on *Michigan Electric Cooperative Ass’n* is misplaced. As Talk America argues, quality standards and remedies for discriminatory conduct are only superficially similar. For this reason, AT&T Michigan’s fourth argument fails: the overlap between quality standards for provision of UNEs and local interconnection services and the nondiscrimination rules is not meaningful here. In the end, whether the K table is used has nothing to do with quality standards; rather, it determines only how costly AT&T Michigan’s lapses from evenhanded service to CLECs are.

AT&T Michigan correctly argues that the Court of Appeals opinion does not actually mandate that this contested case be completed. The Commission could choose not to delete the K table, obviating the contested case entirely. What the Court of Appeals did hold was that, unless the proposal to delete the K table from the remedy plan is dropped, AT&T Michigan is entitled to “an opportunity to present evidence, or rebut adverse evidence, concerning [AT&T Michigan’s] compliance with its duty to provide nondiscriminatory access and service to its competitors.” *SBC*, *supra*, p. 5. The Commission has the discretion to change direction and may decide to retain the K table, at which point it could dismiss this proceeding.

AT&T Michigan begs the question in its final argument, asserting that Act 235 supersedes this remanded proceeding because it dictates that the contested case stop and the rulemaking begin.

This argument fails because whether Act 235 supersedes this proceeding is the question to be decided, not the place to begin.

In summary, the Commission is persuaded that AT&T Michigan has presented no new arguments that have not already been considered and rejected by the Commission. Therefore, the Commission concludes that AT&T Michigan has not shown any errors, newly discovered evidence, or unintended consequences of the refusal to dismiss the case that would justify rehearing or reconsideration.

McLeod seeks sanctions and attorney fees from AT&T Michigan, arguing that the arguments in AT&T Michigan's rehearing petition have become, "through repetition, nothing more than harassment to the prevailing parties, in this case the CLECs."<sup>2</sup> The Commission finds that McLeod is not entitled to attorney fees and costs because AT&T Michigan's petition for rehearing was not devoid of arguable legal merit and also was not made for the primary purpose of harassing the prevailing parties.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. AT&T Michigan's petition for reopening and reconsideration of the Commission's January 10, 2006 order in this matter should be denied.

THEREFORE, IT IS ORDERED that AT&T Michigan's February 9, 2006 petition for rehearing and reconsideration is denied.

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<sup>2</sup>McLeod cites "MCL 2.209" as its authority for sanctions, probably a reference to MCL 484.2209(1).

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, pursuant to MCL 484.2203(12).

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark  
Chairman

( S E A L )

/s/ Laura Chappelle  
Commissioner

/s/ Monica Martinez  
Commissioner

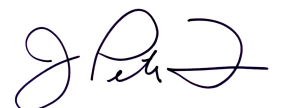
By its action of June 15, 2006.

/s/ Mary Jo Kunkle  
Its Executive Secretary

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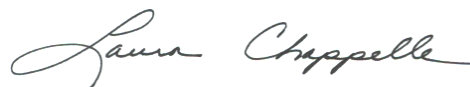
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MICHIGAN PUBLIC SERVICE COMMISSION



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Chairman



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Commissioner



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Commissioner

By its action of June 15, 2006.



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Its Executive Secretary

# PROOF OF SERVICE

STATE OF MICHIGAN )

Case No. U-11830

County of Ingham )

Patricia A. Fronta being duly sworn, deposes and says that on June 15<sup>th</sup> 2006, A.D. she served a copy of the attached Commission order by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.

Patricia  
A. Fronta

Digitally signed by Patricia  
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DN: CN = Patricia A.  
Fronta, C = US, O = Case  
Management, OU = MPSC  
Date: 2006.06.16 14:33:54  
-04'00' ®

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Patricia Fronta

Subscribed and sworn to before me  
this 15<sup>th</sup> day of June 2006

Sharron A.  
Allen

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Notary Public, Ingham County, Michigan  
My Commission expires August 16, 2011

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