

June 28, 2006

**Via Hand Delivery &  
E-file**

Mary Jo Kunkle  
Executive Secretary  
Michigan Public Service Commission  
6545 Mercantile Way  
Lansing, MI 48911

**Re: In the matter of the complaint of Lucre, Inc. against Michigan Bell Telephone Company d/b/a SBC to resolve a dispute over payment of reciprocal compensation. MPSC Case No. U-14374**  
**In the matter of the complaint and application for resolution of SBC Michigan against Lucre, Inc., for refusals to pay certain charges lawfully assessed and for other violations of duties under law. MPSC Case No. U-14384**

Dear Ms. Kunkle:

Enclosed for filing in the above-referenced case is an original and 4 copies of *AT&T Michigan's Answer in Opposition to Lucre's Supplement to Motion For Rehearing and Proof of Service*.

If you should have any questions, please contact me.

Very truly yours,



**John M. Dempsey**

Digitally signed by John M. Dempsey  
DN: cn=John M. Dempsey, o=Dickinson Wright PLLC, c=US  
Date: 2006.06.28 14:46:56 -04'00'

John M. Dempsey

JMD:jkt  
Enclosures  
cc: Hon. Mark E. Cummins  
All Parties of Record

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C o u n s e l l o r s   A t   L a w

DETROIT   BLOOMFIELD HILLS   LANSING   GRAND RAPIDS   ANN ARBOR  
WASHINGTON, D.C.

**STATE OF MICHIGAN**

**BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

In the matter of the complaint of LUCRE, INC.     )  
against MICHIGAN BELL TELEPHONE             )  
COMPANY d/b/a SBC to resolve a dispute over     )  
payment of reciprocal compensation.            )  
\_\_\_\_\_ )

Case No. U-14374

In the matter of the complaint of and application for )  
resolution of SBC MICHIGAN against LUCRE,        )  
INC. for refusal to pay certain charges lawfully    )  
assessed and for other violations of duties under   )  
law.                                                        )  
\_\_\_\_\_ )

Case No. U-14384

**AT&T MICHIGAN'S ANSWER IN OPPOSITION TO**  
**LUCRE'S SUPPLEMENT TO MOTION FOR REHEARING**

**I. INTRODUCTION**

Lucre, Inc. ("Lucre") has filed a "supplemental" rehearing motion that not only reasserts arguments made nearly ten months ago, but attempts to make allegedly new legal claims in opposition to the Commission's August 1, 2005 Order. Lucre's supplemental pleading is improper and should be rejected. The Commission's rules simply do not permit new rehearing arguments to be brought more than ten months after a Commission order was issued. Moreover, Lucre has not provided any new evidence or a true claim of "unintended consequences" warranting rehearing. The arguments set forth in Lucre's supplement are merely reworded claims that were previously made and rejected by this Commission.

In its August 1, 2005 Order, the Commission properly rejected Lucre's attempt to avoid paying AT&T Michigan<sup>1</sup> for the facilities ordered by Lucre, finding that Lucre's claims were entirely unsupported by the Interconnection Agreement ("Agreement") between AT&T Michigan and Lucre. Now, Lucre has come back before the Commission for yet another bite at the apple, presenting the same arguments and evidence that were previously rejected. Lucre's filing fails to meet the requirements for rehearing, it fails to present meritorious arguments, and it should be rejected. In addition, AT&T Michigan should be granted its attorney fees and costs for having to respond to this improper and frivolous pleading.

## **II. PROCEDURAL HISTORY**

On August 11, 2005, Lucre filed a "Motion for Rehearing" and Brief in Support in two dockets – Case No. U-14374 and Case No. U-14384. Case No. U-14374 involved a complaint filed by Lucre against AT&T Michigan to resolve a dispute over payment of termination charges for local and intraLATA toll termination. Case No. U-14384 involved a complaint filed by AT&T against Lucre regarding Lucre's failure to pay certain charges for access, Signaling System Seven ("SS7"), and 911 facilities. Pursuant to MCL 484.2203a, the parties submitted both complaints to mediation. The mediator's recommendation was ultimately accepted by both parties in Case No. U-14374 and rejected in Case No. U-14384. Although the two cases involved different issues, each involved disputed amounts claimed to be owed by one party to the other. As such, part of the mediator's decision in Case No. U-14374 was to be carried out after resolution of Case No. U-14384.

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<sup>1</sup> During the hearing phase of this case, Michigan Bell Telephone Company was referenced as SBC or SBC Michigan. SBC is now known as "AT&T Michigan" or "AT&T" and will be referenced as such herein.

Recognizing the relationship between the two dockets, the Commission issued a single order captioned in both matters on August 1, 2005. In its Order, the Commission found, among other things, that Lucre should be required to pay the total amount of its indebtedness to AT&T for all unpaid access, SS7, and 911 charges up to the date of the order, that Lucre should be required to cease and desist from failing to comply with AT&T's tariffs, and that both parties should provide proof of payment in full to the mediator within 10 days.

On August 11, 2005, Lucre filed a Motion for Rehearing in both Case Nos. U-14374 and U-14384. Although motions were filed in both dockets, in reality, Lucre filed a single motion and brief, but filed the same documents twice. AT&T filed an answer in opposition to Lucre's Motion on September 1, 2005.

On October 21, 2005, Lucre filed a petition commencing a bankruptcy case. On November 10, 2005, the Commission issued an Order finding that "further proceedings in these matters should not be undertaken until Lucre's discharged from bankruptcy or until the bankruptcy court grants a motion to lift the automatic stay, whichever occurs first." November 10, 2005 Order, p. 2. Then, on November 25, 2005, Lucre's counsel sent a letter to the Commission opining that the Commission could proceed with its decision on Lucre's Motion for Reconsideration despite the Commission's Order staying further proceedings.<sup>2</sup>

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<sup>2</sup> AT&T agrees with Lucre's interpretation of the bankruptcy stay. As the Commission appropriately noted in its Order staying proceedings, the bankruptcy proceeding triggers an injunction against an action taken by a creditor against the debtor. (November 10, 2005 Order, p. 2). Here, however, the Motion for Rehearing was brought by Lucre (the debtor). Because it is not an action taken by a creditor, AT&T agrees that a decision on Lucre's Motion would not violate the automatic bankruptcy stay and urges the Commission to rule on (and deny) Lucre's original motion for rehearing.

### **III. LUCRE'S SUPPLEMENTAL REHEARING PETITION IS IMPROPER AND WITHOUT MERIT**

#### **A. The Commission's Rules Do Not Permit A Supplement To Motion For Rehearing**

The Commission should strike and/or disregard Lucre's supplemental filing because it is improper. Lucre filed its original Motion for Rehearing more than ten months ago. Lucre is now attempting to supplement its original Motion to include claims of legal error that were raised, or could have been raised, in Lucre's original Motion. The Commission has previously noted that the "Commission's Rules of Practice and Procedure do not allow for a supplement to a rehearing request filed after the date for timely rehearing requests" and has declined to respond to the issues raised in such a filing. See December 21, 2004 Order in MPSC Case No. U-13531.<sup>3</sup> The same result is appropriate here. As discussed below, Lucre's supplemental filing simply rewords or puts new twists on arguments that were raised by the parties and addressed by the ALJ and the Commission. There is no procedural mechanism that would permit Lucre to properly raise *additional* rehearing arguments ten months after the deadline for rehearing motions to be filed. As Lucre's supplemental pleading does not comport with the Commission's Rules of Practice and Procedure, it must be stricken or rejected.

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<sup>3</sup> In U-13531, the Commission also noted that the issues raised in the supplemental filing were similar to comments made during the compliance phase of the case and/or were addressed by other parties. Here, the new issues raised by Lucre could have been raised in briefing (and in many cases, they were), and they should have been addressed in Lucre's original motion.

**B. Lucre's Supplemental Filing Is Improper Because It Merely Offers Reargument On Issues Already Raised And Addressed**

Lucre's supplemental pleading should be denied as to each of the issues raised therein because those issues were already argued and decided in this case, and Lucre's supplemental argument on rehearing adds nothing new to the discussion. The Commission rule regarding rehearing states in pertinent part:

A petition for rehearing based on a claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the basis of the error. 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 ...

R 460.17403(1). The Commission has often stated that, in the rehearing context under Rule 403, it is not interested in hearing previously-presented arguments. For example, in its March 22, 1999 Order Denying Rehearing in Case No. U-11509, the Commission rejected the Attorney General's petition for rehearing, reasoning as follows:

Rule 403 of the Commission's Rules of Practice and Procedure, 1992 AACSR 460.17403, provides that a petition for rehearing may 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 a rehearing.

\* \* \*

The Commission agrees with the utility that the petition for rehearing should be rejected. As noted by Consumers, the Attorney General's first two claims of error merely repeat argument previously submitted in her brief, reply brief, and exceptions. These arguments were fully considered and dealt with by the Commission in its December 7 order. As a result, the Attorney General's first two claims of error fail to support rehearing.

1999 Mich PSC LEXIS 100, \*\*3, 7 (emphasis supplied). On rehearing then, the issue is whether the tribunal has been misled or whether new evidence or palpable error strips the decision of its efficacy.

Here, Lucre merely asserts that the Commission's decision was erroneous and then rehashes and reiterates its arguments in the hope that the Commission will change its mind. With regard to Lucre's first argument (responsibility for direct trunking), Lucre made its claim about Sections 4.1 and 4.4.2 of the AT&T/Lucre Agreement in its reply brief, and the ALJ considered the argument when he issued his PFD in this case. As such, Lucre's argument has already been offered and rejected. There is no allegation of new evidence or palpable error. Rather, Lucre asserts generally that the Commission's decision constituted an "error of law." The mere fact that the Commission disagreed with Lucre on an issue, however, does not constitute an "error" that warrants rehearing.<sup>4</sup> Lucre also raised this argument in its initial Motion for Rehearing, and its attempt to reargue the issue in a subsequent pleading is improper.

The same is true with regard to Lucre's second and third arguments, which assert that Section 7.3.4 of the Agreement does not relieve AT&T of its alleged obligation to "transit" the traffic at issue for Lucre, and that the Commission has no authority to order Lucre to pay a mediator. (Supp, pp. 2-4)<sup>5</sup> The second issue has been extensively argued and litigated, and Lucre's position has been consistently rejected. Lucre's filing simply rehashes the issue and adds nothing new to the many pages of discussion that the Commission already had before it when it issued its final order in this case. In addition, Lucre's arguments on both issues were fully set

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<sup>4</sup> AT&T already rebutted Lucre's claims on this issue in its September 1, 2005 Answer in Opposition to Motion for Rehearing (pp 5-7). Rather than restate its position here, AT&T simply incorporates its Answer as if fully set forth herein.

<sup>5</sup> The second issue was fully addressed by AT&T on pages 7-9 of AT&T's Answer to Lucre's original rehearing motion, and AT&T hereby incorporates its Answer.

forth in Lucre's original rehearing motion, and Lucre's supplemental pleading adds nothing new. As such, rehearing on these issues is inappropriate.

Lucre's fourth argument is that the Commission's interpretation of Section 4.4.2 of the Agreement improperly requires a carrier to strike a direct transport arrangement prior to signing an Interconnection Agreement and inappropriately ends AT&T's transiting obligations. (Supp., pp. 4-6) According to Lucre, the Commission cannot force a CLEC to interconnect with a third-party ILEC when the traffic between the CLEC and third-party ILEC reaches a set level. (Supp. p. 5) Lucre also claims that the Commission prematurely terminated AT&T's transiting duty. (Supp., p. 6) These are the same arguments raised by Lucre in the underlying proceeding. The Commission specifically recognized that AT&T's transiting obligation was an "interim arrangement" and that, when Lucre entered into an interconnection agreement with Verizon, AT&T's "temporary transit obligation ended at that point." (Order, p. 16) Lucre's attempt to challenge this holding nearly a year later is improper and should be rejected.

Finally, Lucre cites "new evidence" which allegedly shows that a portion of the DEOTs ordered by Lucre from AT&T are located in Verizon's service territory. Lucre apparently admits that it submitted orders for the facilities at issue, but argues that Verizon should have to pay for the build-out because Verizon's traffic led to the orders. (Supp., p. 7) Once again, this is the same argument that was previously made by Lucre and rejected by the Commission. A large portion of the argument made by Lucre in this case concerned Lucre's claim that the DEOTs ordered by Lucre were allegedly within AT&T's network and, thus, covered by the Agreement. See PFD, pp. 18-19. AT&T argued that the location of the facilities was irrelevant in that Lucre was required to order the facilities due to traffic volume, and as Lucre chose AT&T to install the

facilities, Lucre has an obligation to pay AT&T. Lucre's argument on rehearing adds nothing new and does not justify a grant of rehearing.

Because Lucre's "supplemental" rehearing request is improper, and because Lucre has not met the standard for rehearing, Lucre's supplemental pleading should be stricken and/or rejected.

**C. The Commission Correctly Found That Lucre Is Responsible For The Direct Trunking It Ordered From AT&T**

Lucre's first argument is that it cannot be held responsible for direct trunking to a third party pursuant to Section 4.4.2 of the Agreement. (Supp., p. 2) As noted above, this argument was previously made by Lucre and rejected by the Commission, and rehearing on the issue is improper. Moreover, Lucre's claim is without legal merit. See AT&T's September 1, 2005 Answer in Opposition to Motion for Rehearing, pp. 5-7 (incorporated herein by reference).

**D. Section 7.3.4 Of The Agreement Does Not Require AT&T To Provide Lucre With Direct Trunking Free of Charge Under The Circumstances Present In This Case**

Lucre next argues that the Commission erroneously allowed AT&T to avoid its transiting obligation by misreading Section 7.3.4 of the Agreement. (Supp., pp 2-3) As noted above, this argument was already made by Lucre and rejected by the Commission, and rehearing on the issue is improper. Moreover, Lucre's claim is without legal merit. See AT&T's September 1, 2005 Answer in Opposition to Motion for Rehearing, pp. 7-9 (incorporated herein by reference).

**E. AT&T Michigan Has No Position On Lucre's Third Issue Related to Proof of Payment of the Mediator's Bill**

Lucre's third issue argues that the Commission erred in ordering the parties to submit proof of payment of the mediator's bill within ten days of the Commission's Order. (Supp., pp.

3-4) As noted in AT&T's Answer in Opposition to Motion for Rehearing, p. 10, AT&T declines to take a position on the merits of this issue because resolution will not have an effect on AT&T. Nonetheless, AT&T notes that it paid its portion of the mediation bill, and it submitted proof of payment to the Commission on August 4, 2005, in compliance with the Commission's Order. In addition, Lucre's attempt to re-raise this claim in an untimely and improper "supplemental" rehearing petition is impermissible under the Commission's rules.

**F. Lucre's "Transiting" Issue Is Not Properly Brought For Rehearing And Is Without Merit**

Lucre's next claim raises an "additional" issue related to the Commission's Order, which Lucre claims has unintended consequences for Lucre. According to Lucre, the Commission's finding that AT&T is not required to offer free transiting services indefinitely has the unintended consequences of: (a) permitting an ILEC to force a CLEC to make interconnection arrangements with another ILEC; and (b) terminating AT&T's transiting responsibilities. (Supp., pp. 5-6)

In the first place, as described above, Lucre previously made these arguments, and they were rejected by the Commission. In Lucre's Exceptions to the PFD, Lucre argued that an "unintended consequence" of adopting AT&T's interpretation of the Agreement "would be the ability of ILECs to thrust the cost of such traffic on CLECs by forcing them to order 'access facilities' when the traffic originates with another ILEC." (Lucre Exceptions, p. 14) Lucre also disagreed with AT&T's contention that the Agreement "carried a limit on its transiting duties." (Lucre Exceptions, p. 14, fn 15) The Commission rejected Lucre's arguments, finding that AT&T's transiting obligation was an "interim arrangement" that ended when Lucre entered into a permanent arrangement with Verizon, and that Lucre's DEOT orders do not fall under the "transit

service" provisions in the Agreement. (Order, pp. 16-17) Lucre's supplemental arguments offer nothing new to refute the Commission's findings.

Secondly, Lucre is simply wrong on the merits of its claim. Here, Lucre is trying to mix portions of the Agreement to make an allegedly new argument. However, the Agreement is clear as to each party's obligations regarding traffic volume triggers and their resultant obligations to enhance trunking to address the volume triggers. As discussed in the rebuttal testimony of Roman Smith, there are two key provisions in the Agreement that require Lucre to transition from transit traffic service to DEOT – exactly what happened in this case. Section 4.4.2 requires Lucre to establish a DEOT to any end office for which there is more than one DS1 level of traffic. Tr 208. This provision is effective regardless of when the CLEC interconnects with another provider (before or after an interconnection agreement is in place). Section 7.3.4 specifies that transit service is an "interim arrangement" effective only until "either Party" enters into an arrangement with another provider to deliver traffic to Lucre. These two provisions, taken together, address when and how Lucre can transition from AT&T's transit services to direct interconnection arrangements with another provider (at which point transiting will no longer be offered).

**G. Lucre's "Trunking" Issue Is Not Properly Brought For Rehearing And Is Without Merit**

The final "new" argument offered by Lucre in its supplemental rehearing pleading alleges that Lucre should not have been required to pay for trunking that it ordered from AT&T because the trunking was installed in Verizon's network. (Supp., pp. 6-7) Lucre argues that AT&T should have billed Verizon instead of Lucre because the facilities are in Verizon's network and were necessitated by an increase in calls from Verizon customers to Lucre customers.

Once again, this general argument was previously made and rejected. In its Exceptions to the PFD, Lucre argued that it should not have to pay for trunking it ordered from AT&T because AT&T allegedly forced Lucre to order the trunking. (Lucre Exceptions, p. 7) Lucre also set forth an "originator pays" argument, claiming that Verizon and not Lucre should have been required to pay for the DEOTs in Verizon's territory. AT&T disputed this argument, noting that Verizon is not a party to the case and that, because Lucre ordered facilities from AT&T, AT&T is entitled to bill Lucre. (AT&T's Reply To Exceptions, p. 17)

Second, Lucre's claim is without merit. Lucre was required to order and pay for facilities for use in transporting traffic between its own customers and those of Verizon due to an increase in traffic.<sup>6</sup> Lucre decided to order the facilities from AT&T (rather than ordering from another ILEC, CLEC, or facilities provider or building the facilities itself), and there is simply no justification for permitting Lucre to avoid paying AT&T for the facilities it purchased. To the extent Lucre believes that Verizon should have to pay for the DEOTs, the Commission correctly found that Verizon was dismissed from the case "without prejudice to any future action Lucre may wish to bring against Verizon directly." (Order, p. 17) Lucre may assert an indemnification claim against Verizon if it desires, but Lucre is not permitted to avoid paying AT&T for facilities that it ordered and received. The Commission's order is correct on this point, and Lucre has not offered new evidence or proper justification for rehearing on this or any other issue contained in Lucre's supplemental pleading.

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<sup>6</sup> Importantly, Lucre is not contending that the facilities at issue are not used for Verizon-Lucre traffic. The diagram attached to Lucre's supplemental pleading clearly shows that the DEOTs at issue are *dedicated* Lucre trunk routes. Lucre's claim is merely another attempt to put forth an originator pays argument, suggesting that Verizon and not Lucre should pay for the facilities. Lucre's claim is misplaced.

#### **IV. AT&T SHOULD BE AWARDED ATTORNEY FEES AND COSTS FOR THIS RESPONSE**

Lucre's supplemental filing is devoid of merit, filed out of time, and deserves categorical rejection. AT&T should be awarded its costs and attorney fees for having to respond to the pleading under Section 209 of the Michigan Telecommunications Act, MCL 484.2209.

As discussed above, Lucre's filing fails to comport with the Commission's rules for filing of motions and petitions for rehearing, fails to offer anything new, and essentially reargues positions already presented in its rehearing request. It is, in a word, "devoid" of merit. Under Section 209(1), the Commission may award costs, including reasonable attorney fees, to a party who is forced to respond to a frivolous position. Lucre's filing clearly is frivolous. Section 209(2) defines three conditions under which the "frivolous" test is met: the position espoused is either intended to harass the opposing party, MCL 484.2209(2)(a)(i), lacks a reasonable basis, MCL 484.2209(2)(a)(ii), or has no arguable legal merit, MCL 484.2209(2)(a)(iii). All three of these conditions are met here. Lucre clearly made its filing to harass AT&T – it has participated in a number of Commission cases and either knows, or should know, that the filing of such a supplement is not permitted by the Commission's rules or precedent. Lucre's reiterative position lacks a reasonable basis and is devoid of legal merit, as shown above.

AT&T respectfully requests the Commission grant it attorney fees and costs associated with the filing of this response.

## V. CONCLUSION

For each and all of the reasons discussed above, AT&T Michigan respectfully requests that: (1) Lucre's supplemental motion/pleading be stricken and/or denied; (2) the Commission act on and deny Lucre's motion for rehearing of the Commission's August 1, 2005 Order finding Lucre responsible for said charges on access, SS7, and 911 facilities; and (3) the Commission award AT&T its attorney fees and costs incurred in responding to Lucre's frivolous, improper, untimely, and meritless pleading.

Respectfully submitted,

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and

DICKINSON WRIGHT PLLC

 Signature Not Verified

**John M. Dempsey**

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Dated: June 28, 2006

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STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of LUCRE, INC. )  
against MICHIGAN BELL TELEPHONE )  
COMPANY d/b/a SBC to resolve a dispute over )  
payment of reciprocal compensation. )  
\_\_\_\_\_ )

Case No. U-14374

In the matter of the complaint and )  
application for resolution of )  
SBC MICHIGAN against LUCRE, INC. )  
for refusals to pay certain charges )  
lawfully assessed and for other violations )  
of duties under law. )  
\_\_\_\_\_ )

Case No. U-14384

**PROOF OF SERVICE**

STATE OF MICHIGAN )  
 ) ss  
COUNTY OF WASHTENAW )

Jacqueline K. Tinney, being first duly sworn, deposes and says that she is employed at Dickinson Wright PLLC, and that on June 28, 2006, she caused a copy of ***AT&T Michigan's Answer in Opposition to Lucre's Supplement to Motion For Rehearing*** to be served upon the parties listed below via email.

  
Signature Not Verified

**Jacqueline K. Tinney**

Digitally signed by Jacqueline K. Tinney  
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\_\_\_\_\_  
Jacqueline K. Tinney

Subscribed and sworn to before me,  
a Notary Public in and for said County,  
this 28<sup>th</sup> day of June, 2006.

  
Signature Not Verified

**Elaine M. Masters**

Digitally signed by Elaine M. Masters  
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\_\_\_\_\_  
Elaine M. Masters, Notary Public  
Washtenaw County, Michigan  
Acting in Washtenaw County, Michigan  
My Commission Expires: 9/23/07

**Lucre, Inc.**

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