

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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

Case No. U-11830

At the April 17, 2001 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

In the October 2, 1998 order in Case No. U-11654, the Commission directed Ameritech Michigan to file an application to implement the provisions of the federal Telecommunications Act of 1996 (FTA), 47 USC 151 et seq., and the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq.; MSA 22.1469(101) et seq., that require it to provide nondiscriminatory access to its facilities and services. Ameritech Michigan filed its proposed performance measurements and benchmarks, reporting requirements, and remedies in this docket. On May 27, 1999, the Commission issued an order addressing the issues and stated:

There can be little doubt about the importance of the availability of nondiscriminatory access to services and facilities that enable competitive local exchange carriers (CLECs) to compete. Unless competitors are provided services and facilities equal in quality to that which the incumbent provides itself, the competitor probably will not be able to compete effectively.

May 27, 1999 order, p. 2. Prior orders in this docket have approved performance measures, standards, and reporting requirements. This order addresses the enforcement mechanism.

On October 16, 2000, Ameritech Michigan filed its proposed performance remedy plan.¹ Also on October 16, 2000, AT&T Communications of Michigan, Inc., and TCG Detroit (collectively, AT&T) filed the proposed performance remedy plan of the CLECs that have participated in the collaborative process in Case No. U-12320,² and McLeodUSA Telecommunications Services, Inc., (McLeodUSA) filed comments on the “parity with a floor” concept that is part of the CLEC plan. On that same day, Brooks Fiber Communications of Michigan, Inc., MCI WorldCom Communications, Inc., and MCImetro Access Transmission Service, Inc., (collectively, WorldCom) filed in support of AT&T and McLeodUSA. On November 13, 2000, The Association of Communications Enterprises (ASCENT) filed comments in Case No. U-12320 responding to Ameritech Michigan’s plan. On November 15, 2000, Ameritech Michigan, the Commission Staff (Staff), and ASCENT, AT&T, CoreComm Michigan, Inc., McLeodUSA, Rhythms Links, Inc., WorldCom, and Z-Tel Communications, Inc., (collectively, the CLECs) filed comments on the plans. On November 17, 2000, XO Michigan, Inc., filed a petition for leave to intervene and stated its support for the CLEC comments filed on November 15, 2000.³ On December 15, 2000, Ameritech Michigan and the CLECs filed reply comments.

¹The plan was filed in Case No. U-12320, and then filed in this docket on October 20, 2000.

²Case No. U-12320 is the docket established to examine Ameritech Michigan’s compliance with Section 271 of the federal Telecommunications Act of 1996, 47 USC 271, which specifies the conditions for Ameritech Michigan to obtain authority to provide in-region interLATA service.

³Formal petitions for leave to intervene have not been required in this case as a condition to the filing of comments.

Background

Ameritech Michigan cannot provide in-region interLATA service until the Federal Communications Commission (FCC) finds that it has complied with the requirements of Section 271 of the FTA, 47 USC 271, which includes a competitive checklist. In evaluating the public interest in granting such an application, the FCC will consider whether there is reason to conclude that the applicant will continue to comply with the requirements of Section 271. The FCC has found that an effective remedy plan can provide part of the basis for such a finding. The parties agree that the FCC defines an effective plan as providing (1) a potential liability that is sufficient to create a meaningful and significant incentive for the applicant to comply with the performance standards, (2) clearly articulated, comprehensive measures and standards, (3) a reasonable structure to detect and sanction poor performance, (4) a self-executing process that does not permit unreasonable litigation and appeal, and (5) a reasonable assurance that the data are accurate. Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, FCC 99-404, (December 22, 1999), para 433. Ameritech Michigan has offered one remedy plan, and the CLECs have offered another.

Performance Remedy Plans

Ameritech Michigan says that its plan is modeled on the remedy plan that was developed through a collaborative process for Southwestern Bell Telephone Company (SWBT) in Texas. It says that the Texas plan was endorsed by the FCC in connection with its approval of SWBT's application to provide in-region interLATA service in Texas. It also says that the plan is modeled on the plan that the FCC approved as a condition of the merger of SBC Communications, Inc., (SBC) and Ameritech Michigan's parent corporation, where the plan provides the basis for all 13

SBC operating companies to pay penalties to the federal government. Further, it says that the plan has been approved by state commissions in Texas, Kansas, Oklahoma, Illinois, and Ohio, and is used in those states.

The CLECs counter that the Texas plan was not developed in a collaborative process, but rather in a process in which they were “forbidden” to attend the discussions and their only “meaningful” input was assigning priorities to the performance measures, which they say they were “forced” to do. CLEC December 15, 2000 comments, pp. 18-19. They say that their plan is superior because it was developed for the Ameritech region and is not based on the Texas plan. Ameritech Michigan, in turn, criticizes the CLEC plan for not having been developed in a collaborative process and as not having been approved or tested anywhere.

The Staff says that certain aspects of each plan are desirable, although both are unnecessarily complex. The Commission agrees. Neither plan can be summarized or explained in a few words. Nevertheless, the Commission concludes that it should approve Ameritech Michigan’s proposed remedy plan as modified by incorporating elements of the Staff’s and CLECs’ proposals. The Commission reaches this decision for the reasons discussed below, but primarily because (1) Ameritech Michigan’s plan is modeled on a plan that has been approved by the FCC⁴ and other states, (2) it computes the remedies according to the number of violations, and (3) it is readily modifiable.

⁴Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Service, Inc., d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, FCC 00-238 (June 30, 2000), and Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Service, Inc., d/b/a Southwestern Bell Long Distance, for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, FCC 01-29 (January 22, 2001).

Although the Commission is approving Ameritech Michigan's plan with modifications, it does so without concluding that the plan will prove to be effective. That determination can be made only after the plan has been in use for a time. The Commission will review the effect of the approved plan and further revise the plan as the circumstances warrant or it may approve an entirely different plan. The goal remains to have a remedy plan that complies with the FCC's standards, adequately compensates the CLECs for Ameritech Michigan's failure to meet the approved performance standards, and sufficiently motivates Ameritech Michigan to end any discriminatory conduct that impedes the development of competition in Michigan.

Remedies

The parties agree that when there is a retail activity that is comparable to a service that Ameritech Michigan provides to interconnecting CLECs, the performance standard is parity—the level of service must be the same, and that when there is no comparable retail activity, the standard is the Commission-approved benchmark.

Ameritech Michigan's plan provides for "tier 1" liquidated damages, which would be paid to the CLECs for noncompliance with performance standards that affect their customers, and "tier 2" assessments, which would be paid to the State of Michigan for noncompliance that affects the development of competition. The plan imposes remedies based on the number of occurrences of noncompliance (except for a few measures that are treated on a per-measure basis) and whether the standard has a "high," "medium," or "low" priority. The amount of the remedy varies correspondingly, and chronic poor performance results in higher remedies.

The CLECs say that the proposed tier 1 payments will not adequately compensate them for the harm they suffer when the number of transactions is low, as it is in Michigan, particularly because

the amount per violation is low and the number of violations is adjusted in a manner that further reduces the penalties. They say that the proposed tier 2 payments will not be sufficient to deter discriminatory performance because the amounts are low and no penalty is due until Ameritech Michigan has failed on a measure for three consecutive months. The CLECs also criticize the concept of assigning priorities to the performance standards. They say that the priorities are subjective and arbitrary and might inappropriately influence the CLECs' market entry strategies by determining which performance measures are more important.

Ameritech Michigan responds that the priorities assigned to the various measures are not arbitrary, but were developed and approved like the rest of the Texas plan and recognize that the effect of some measures is captured by other measures and that not all measures affect competition equally. It says that it is appropriate to use the number of transactions in computing the tier 1 remedies because there is a close relationship between the number of transactions and the number of customers affected and because those CLECs that are competing, as reflected by the number of orders they place, should receive higher remedy payments. On the other hand, it says that it reasonably proposes that when the volumes may be low but a single instance of noncompliance may be important, the remedies would be paid on a per-measure, rather than a per-occurrence, basis.

The CLECs' plan proposes that the tier 1 payments to the CLECs and the tier 2 payments to the state increase on a per-measure basis depending on the severity and duration of the noncompliance. The CLECs say that their plan appropriately increases the amount payable to the CLECs as the gap in performance increases or continues over several months, while phasing out the assessments paid to the state as competition increases.

Ameritech Michigan criticizes the CLECs' plan for applying the same per-measure remedies regardless of the volume of transactions and regardless of the competitive effect of the noncompliance. It criticizes the plan for increasing the tier 2 penalties as the volume of the CLEC transactions decreases. It says that the adjustment to the tier 2 assessments for the amount of competition is arbitrary and fails to account for competition that occurs through cable, special access, or CLEC-owned facilities. It suggests that the adjustment to the tier 2 remedies provides an incentive for the CLECs not to compete because the payments are higher at low levels of competition.

The Staff says that the tier 1 remedies should apply to all non-diagnostic measures, while the tier 2 remedies should apply to only those measures that most affect service. The Staff suggests that the Commission avoid setting the tier 1 penalties at a level that makes noncompliance more attractive to the CLECs than compliance. It would not assign priorities as Ameritech Michigan proposes. The Staff suggests that most remedies should be imposed on a per-measure basis to recognize that even a few instances of noncompliance can adversely affect a new market entrant. It also suggests that the Commission avoid imposing higher remedies as competition increases and the volume of orders rises.

The Commission accepts Ameritech Michigan's basic plan, except that the Commission does not agree that priorities should be assigned to the performance measures. The Commission agrees that assigning priorities has different effects on different market strategies and creates numerous disputes about the priority for each of the more than 150 measures. Ameritech Michigan shall therefore collapse the priorities into a single category that will be treated as Ameritech Michigan proposed for the "medium" priority. On the other hand, the parties may, in their interconnection agreements, incorporate a priority system.

The Commission tentatively concludes that the number of transactions affected by substandard performance provides a better basis for imposing remedies than the number of measures for which there is noncompliance. Ameritech Michigan's proposal avoids giving a CLEC with a small number of transactions the same remedy as a CLEC with many more transactions. It seems appropriate that a CLEC that is competing more, as reflected by the number of transactions, should receive a greater payment for discriminatory conduct. The Commission recognizes that, as a result, a CLEC just entering the market and therefore receiving little compensation, may be viewed as disadvantaged by this approach. Nevertheless, on balance, the Commission finds the per-transaction approach preferable because it benefits the more active CLECs.

The Commission finds some merit in the CLEC proposal that remedies should be adjusted for competition, although it does not find it reasonable to ignore competition that develops through a variety of approaches, such as cable facilities. The Ameritech Michigan plan does not contain a competition adjustment, but the Commission does not find it necessary to amend the plan to incorporate one at this time.

Remedy Limits

Ameritech Michigan's plan limits the total remedies each year to no more than 36% of its net return, establishing a limit of approximately \$337 million based on recent earnings. The plan also limits total monthly payments, monthly payments to any one CLEC (until the completion of a hearing), and the remedies payable for each of 11 performance measures. The CLECs say that the effect is to significantly limit Ameritech Michigan's liability for discriminatory performance. Ameritech Michigan responds that the limits do not affect the ability of the CLECs, the Commission, and the FCC to pursue other remedies, including withholding, suspending, or revoking the

Section 271 approval. It also responds that penalties above its proposed limit should not be imposed automatically, but only after a hearing that provides due process.

In contrast, the CLECs propose an annual procedural threshold of 44% of Ameritech Michigan's net return, yielding a limit of approximately \$441 million. They propose that tier 2 payments in excess of that amount be placed in escrow until the completion of a hearing that would focus on determining the reason for the poor performance and how the Commission could enforce compliance. Tier 1 payments would be unaffected. They also propose a review, without placing any payments into escrow, for any month in which remedy payments exceed one-sixth of the annual procedural threshold.

The Staff supports only an annual procedural threshold of 40% of net earnings.

The Commission sees no reason to place an absolute limit on Ameritech Michigan's liability under the plan. On the other hand, it seems reasonable to provide that, at some point, the Commission should review whether ever higher liability is warranted by the circumstances and whether some further action is needed to achieve the purposes of a remedy plan. The Commission therefore concludes that Ameritech Michigan's proposal should be approved, except that the annual limit shall be a procedural limit. The Commission accepts the proposed limits, including 36% of Ameritech Michigan's net return, as reasonable points at which to conduct hearings. At the conclusion of the hearings, the Commission may order Ameritech Michigan to pay amounts above the limits. The Commission also notes that the limits do not prevent the Commission, the CLECs, the FCC, or any other party from pursuing other remedies, including seeking the revocation of Ameritech Michigan's authorization to provide in-region interLATA service.

Statistical Analysis

Ameritech Michigan says that its remedy plan uses the “modified z statistic”(which it says the CLECs initially proposed) for sample sizes of 30 and more and a permutation test for smaller samples to impose a remedy only when there is a 95% confidence that its performance actually failed to meet a performance standard (a confidence level that it says the CLECs initially supported). To address the remaining 5% error rate, Ameritech Michigan’s plan uses a “K statistic” (which it says some of the CLECs have supported elsewhere) to excuse apparent shortfalls in performance that are due to random fluctuations in its performance. It asserts that the FCC has approved the statistical methodology used in its plan.

The CLECs’ plan uses a different methodology, which they say is required to guard against erroneously concluding that Ameritech Michigan’s performance passed the parity test when it should have failed as well as erroneously concluding that Ameritech Michigan failed the parity test when it should have passed. Ameritech Michigan responds that the FCC has found that the 95% confidence level adequately balances the risk of an erroneous finding of discrimination and the risk of an erroneous finding of nondiscrimination (a conclusion that it says AT&T has supported elsewhere). When a benchmark rather than parity is the standard, the CLECs’ plan does not use a statistical test because they say that Ameritech Michigan should always achieve the benchmarks, which are set at less than 100% to allow some leeway for error.

Ameritech Michigan says that the CLEC plan cannot be implemented because it uses lengthy and complex formulas with undefined terms and self-contradictory provisions and requires statistical analysis for each of the more than 3,000 measurement categories. It also criticizes the CLEC methodology for asking and answering the wrong statistical question. It says that the plan is likely to impose remedies in error because the plan fails to properly distinguish between deficient

performance and random variations in data that appear to reflect deficient performance, a factor that it says is present for both parity and benchmark standards. It also says that the plan does not specify a method for making comparisons when the sample sizes are small, which it says is the case for nearly 65% of the disaggregated measures. It says that the CLEC plan does not achieve the 95% confidence level, but can yield confidence levels much lower.

The CLECs respond that, contrary to Ameritech Michigan's claim, their plan is complete and fully operational, that there are no omissions or errors, and that their methodology has been validated in proceedings in Louisiana and Georgia.

The Commission concludes that Ameritech Michigan's plan is based on a reasonable statistical methodology that has been approved by the FCC and appears, at least in large part, to have been supported by the CLECs at other times. In addition, the May 27, 1999 order, at pages 13 and 14, approved the use of the modified z test, as the CLECs had proposed, and the permutation test for small samples. Furthermore, the statistical test seems to ask the right question—whether the difference between Ameritech Michigan's performance and the standard is sufficient to conclude that it is due to something more than random chance. On the other hand, the statistical tests should not be applied to the benchmark standards. Those are set at less than 100%, which leaves sufficient flexibility for the random errors that are addressed by the statistical tests applied to the parity standards.

The Commission concludes that a less complex methodology would be acceptable as well. In fact, both plans focus too much on statistical theory rather than the practical need to design a remedy plan that will assist in implementing the nondiscrimination provisions of state and federal law. The Commission does not agree, statistical precision notwithstanding, that a proper remedy plan must avoid imposing remedies unless there is a near certainty that Ameritech Michigan's

conduct was in fact discriminatory. Likewise, the Commission does not agree that a proper remedy plan must explicitly adjust for, or “balance” as the CLECs put it, the likelihood that Ameritech Michigan will sometimes erroneously appear to have provided nondiscriminatory service. In fact, the intent of the CLECs’ plan to adjust for that error results in a complex plan that can apparently be made to function only by making simplifying assumptions that have the effect of reducing the precision that the plan is supposed to produce.

Affiliate Comparison

The CLEC plan requires that the parity standard be implemented by comparing the service provided to the CLECs to the service that Ameritech Michigan provides to its retail customers and its affiliates. Ameritech Michigan says that a comparison to its service to its affiliates will rely on transactions that are far less common and have less competitive effect, at the risk of increasing the complexity and potential errors in the calculations. It says that a comparison of its performance for its affiliates should be addressed in some other manner, such as enforcement under Section 271 of the FTA or a complaint before the Commission. The CLECs respond that Section 251(c)(2)(C) of the FTA requires that Ameritech Michigan provide interconnection “that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.” 47 USC 251(c)(2)(C). The Staff supports using Ameritech Michigan’s affiliates as a standard against which parity should be measured.

The Commission concludes that the comparison to service provided to Ameritech Michigan’s affiliates as well as service to its own retail customers should be part of the performance remedy plan. Section 251 of the FTA requires that Ameritech Michigan not provide inferior service to the CLECs as compared to its affiliates. It may be true that the matter could be addressed in another

manner, but the Commission finds no persuasive reason for doing so. A comparison to the performance it provides its affiliates or retail customers, whichever is better, shall therefore be part of the remedy plan approved by this order.

Exclusions

The CLECs criticize Ameritech Michigan's plan for creating layers of safeguards designed to assure that Ameritech Michigan will not pay penalties even for poor service, and assert that several of the proposed exclusions of liability have the potential to turn every instance of noncompliance into a matter to be litigated. Because they criticize Ameritech Michigan's plan for including many rules that excuse the payment of penalties, their plan dispenses with such provisions. Ameritech Michigan, in turn, criticizes that plan for not providing an allowance for shortfalls in performance that are the fault of the CLECs or events beyond its control (concepts that it says the CLECs have previously supported). The Staff says that the performance measure business rules should specify when noncompliance will be excused, and points out that factors such as force majeure should affect service to all customers equally.

The Commission concludes that Ameritech Michigan's plan provides unjustified exclusions. As the Staff notes, the performance measure business rules should define when noncompliance is excused, and force majeure events should not affect Ameritech Michigan's service to the CLECs any differently than they affect its service to its retail customers. Furthermore, the May 27, 1999 order rejected the view that force majeure should be an excuse for discriminatory performance. May 27, 1999 order, p. 16. The same analysis holds for problems with third-party systems and equipment. If Ameritech Michigan has designed its systems so that unexpected events disproportionately affect service to the CLECs, or has permitted third parties to design its systems in that

manner, that is not a reason to excuse the discriminatory conduct. The Commission therefore rejects the proposed exclusions of liability, except for the exclusions based on CLEC acts or omissions.

Reports and Payments

Ameritech Michigan proposes that reports on its performance for each month be provided by the 20th day of the following month, with assessments imposed for late filings, and that payment be due 30 days later. It proposes to make tier 1 payments by bill credit. The CLECs propose payment by check, which they say ensures payment and simplifies administration and enforcement. The Staff supports the CLECs' position.

The Commission finds that payments should be by check or other direct payment method, which simplifies administration and enforcement and provides for payment soon after Ameritech Michigan provides substandard performance.

Dispute Resolution and Audits

Ameritech Michigan proposes that disputes be resolved by the Commission or commercial arbitration. The Staff recommends that all disputes about tier 1 remedies be resolved by commercial arbitration and that disputes about tier 2 remedies and ongoing compliance be resolved by the Commission. The CLECs propose that disputes be addressed by the Commission and that Ameritech Michigan be required to continue to pay remedies while the disputes are pending.

The Commission agrees with the Staff that disputes about tier 1 remedies should be resolved by commercial arbitration, with the results reported to the Commission at the conclusion, and disputes about tier 2 remedies and ongoing compliance should be brought to the Commission for resolution. Furthermore, at this early stage of the development of competition, the Commission

agrees with the CLECs that the withholding of payments could adversely affect the development of competition. Therefore, Ameritech Michigan shall pay one-half of the tier 1 remedies while the disputes are pending, subject to refund if it prevails. It shall pay tier 2 remedies after the disputes are resolved. The Commission encourages good faith negotiation to resolve disputes. It will reexamine this treatment of disputed payments if complaints become common or cannot be resolved timely.

The CLECs' plan requires annual audits of the performance measure data and permits intermediate "mini-audits" of up to three measures or submeasures or one domain at the request of a CLEC. Ameritech Michigan criticizes the plan for providing the opportunity for each CLEC to request up to three audits each year.

The Commission finds that Ameritech Michigan's proposal is consistent with the May 27, 1999 order, which provides for yearly audits, and is sufficient for purposes of the remedy plan. May 27, 1999 order, Case No. U-11830, p. 11. The Commission does not agree with the CLECs about the need to provide numerous opportunities for incurring the costs of audits, and reiterates that "CLECs requesting an additional audit must expect to bear the costs related to those requests." May 27, 1999 order, p. 12.

Implementation

Ameritech Michigan proposes that its plan be implemented by incorporation into interconnection agreements with the CLECs. The CLECs propose that it be implemented by tariff or interconnection agreement, that the plan supplement remedies now provided by agreement, and that the parties be free to agree to modifications of the approved remedy plan. The Staff says that those CLECs interconnecting by tariff should have the right to avail themselves of the remedy plan.

The Commission agrees with the Staff that the remedy plan should be available whether a CLEC interconnects by agreement or tariff. The Commission also agrees with the Staff that the tariffed remedy plan should be available only to those CLECs interconnecting by tariff. CLECs with interconnection agreements must amend their agreements to incorporate the remedy plan.

Effectiveness of the Plan

The CLECs say that Ameritech Michigan's plan will not provide sufficient remedies to compensate them for poor performance or to create an incentive for Ameritech Michigan to improve its performance. They say that the result will be payments of no more than hundreds of thousands of dollars for performance that permits Ameritech Michigan to protect a monopoly worth hundreds of millions of dollars. Ameritech Michigan responds that, in October 2000, it passed the plan's statistical test on more than 86% of the performance measures subject to tier 1 remedies and more than 76% subject to tier 2 remedies. It calculates that it would have paid \$1,774,325 in tier 1 remedies and \$765,200 in tier 2 remedies. It estimates (based on more than 100 assumptions about variables and factors in the CLEC plan) that, for the same month, the CLEC plan would have required total payments of approximately \$25 million (\$13 million to the CLECs and \$12 million to the state). Ameritech Michigan further calculates that the CLEC plan would require it to pay \$12 million per month even when it provides service at parity. The CLECs say that they could not do comparable calculations because they do not have all of the necessary data.

The Commission shares the CLECs' concern that Ameritech Michigan's plan will not provide sufficient remedies and incentives, although it is also true that the FCC does not require, for purposes of considering a Section 271 application, that the remedy plan alone be sufficient to

assure compliance with Section 271 after approval is granted. Ameritech Michigan computes that its plan would have resulted in liquidated damages and assessments of \$2.5 million in October 2000, a month in which it says that it failed to achieve the parity or benchmark standards for 14% of tier 1 measures and 24% of tier 2 measures. The Commission rejects the implication of Ameritech Michigan's argument that those levels of performance are good enough or nearly so. If its performance were to continue at those unacceptable levels for a year, the total penalties would be \$30 million, a level that the Commission doubts is sufficient to adequately compensate the CLECs or to motivate Ameritech Michigan to improve its performance. Therefore, in addition to the changes discussed above that will increase its liability, the company shall incorporate into the remedy plan a multiplier of 2 for all tier 1 liquidated damages and tier 2 assessments.

The Commission would have preferred that the parties negotiate a remedy plan. Instead they developed very different plans that could not readily be reconciled, which required the Commission to modify one of their plans. The Commission will monitor Ameritech Michigan's performance under the remedy plan approved by this order, and will increase or decrease that multiplier, for either the liquidated damages or assessments or both, and will make other changes as necessary to achieve the purposes of the remedy plan without imposing unwarranted penalties on Ameritech Michigan.

Parity with a Floor

The CLECs say that a proper remedy plan must recognize that even when Ameritech Michigan provides service to them that is equal in quality to the service that it provides to its retail customers, that service is not always at the level they must have to provide adequate service to their customers. They say that their end-use customers hold them responsible for poor service even if

Ameritech Michigan causes the problem or fails to remedy it in a timely manner. They therefore assert that, if they are to establish themselves in the market, the Commission must establish a level of service quality below which Ameritech Michigan will incur a penalty—what the CLECs call parity with a floor—even if Ameritech Michigan is providing service to the CLECs at parity with the service it provides to retail customers and its affiliates.

The CLECs propose parity with a floor for 13 performance measures. They recommend that the Commission give Ameritech Michigan 90 days to improve service that is below the floor before penalties are imposed, that all penalties for performance below the floor be paid to the state, and that if Ameritech Michigan's performance is more than 10% below the floor, it be required to develop a plan for improving its performance. If the Commission adopts parity with a floor, they suggest that it remand the case for the parties to develop appropriate standards in a collaborative process.

Ameritech Michigan responds that parity with a floor does not directly relate to a remedy plan, which is designed to prevent discrimination, but rather represents an effort to revise the performance measures. It objects to the lack of logic in requiring it to pay penalties when it provides service below the floor but still provides service to the CLECs that is better than its service to its retail customers, which is possible with parity with a floor. It argues that the Court of Appeals for the Eighth Circuit, Iowa Utilities Bd v FCC, 219 F3d 744 (CA 8, 2000), has been clear that the FTA does not require an incumbent, such as Ameritech Michigan, to provide superior service to its competitors. It says that, for purposes of performance measures, parity is all that is required. It also asserts that imposing a penalty when wholesale service is below the floor creates an incentive for it to provide better service to wholesale customers than it provides to retail customers, skewing the competitive marketplace and diverting resources from improving service to retail customers as

well. It adds that it would have to redesign its systems to distinguish between retail and wholesale orders and would be entitled to recover the costs of that redesign. It concludes that retail service quality should be addressed in the context of adopting retail service quality rules and that any penalties that the CLECs incur to their end-use customers because of Ameritech Michigan's performance should be paid by it, although the matter should be addressed in tariffs and interconnection agreements.

The CLECs respond that they are not seeking superior service, but rather are seeking only to prevent Ameritech Michigan from using chronically poor service as a competitive weapon. They argue that because Ameritech Michigan controls the service that it provides to its retail customers, the Commission should not accept the outrageous argument that Ameritech Michigan seems to be making—that it will not provide adequate service to its own retail customers. They say that parity with a floor avoids the incentive for Ameritech Michigan to reduce the quality of its retail service to the level of its wholesale service and that the Iowa Utilities Bd decision has nothing to do with whether an incumbent can be required to provide service at a minimal level. They say that the decision only prevents a state commission from trying to force an incumbent to provide superior service to its competitors.

The Staff does not support the concept of parity with a floor. It says that Ameritech Michigan's service quality is of great concern, but is being addressed elsewhere. It says that parity with a floor would motivate Ameritech Michigan to deal with the problems of the CLEC customers first. It does agree that Ameritech Michigan should pay any penalties that it causes the CLECs to incur to their own customers.

The Commission will not adopt parity with a floor at this time. To do so would be a significant change in the scope of this case, which began to enforce the nondiscrimination provisions of

state and federal law. However, based on recent experience, the Commission agrees that the quality of service for retail customers is a significant concern that requires action, but it should be addressed in a rulemaking proceeding, which the Office of Regulatory Reform has authorized the Commission to begin. The Commission also agrees that when Ameritech Michigan's poor performance prevents the CLECs from meeting any approved retail service standards, it shall reimburse the CLECs, by check or other direct payment method, for the full amount of any penalties that the Commission's standards require the CLECs to pay to their customers. The parties may address elsewhere issues related to whether there is a need for minimum performance standards to permit the CLECs to compete effectively.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACRS, R 460.17101 et seq.
- b. Ameritech Michigan's proposed remedy plan should be approved as modified by this order.

THEREFORE, IT IS ORDERED that:

- A. Ameritech Michigan's proposed remedy plan is approved as modified by this order.
- B. Ameritech Michigan shall file tariffs within 10 days to comply with this order, and shall enter into conforming interconnection agreements without delay.

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

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of April 17, 2001.

/s/ Dorothy Wideman
Its Executive Secretary

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Suggested Minute:

“Adopt and issue order dated April 17, 2001 approving a performance standards remedy plan for Ameritech Michigan, as set forth in the order.”