

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission’s own motion,)
to consider AMERITECH MICHIGAN’s compliance)
with the competitive checklist in Section 271 of)
the federal Telecommunications Act of 1996.)
_____)

Case No. U-12320

At the January 4, 2001 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

History of Proceedings

On February 9, 2000, the Commission issued an order commencing a collaborative process and establishing a procedural framework for determining Ameritech Michigan’s compliance with the competitive checklist set forth in Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (FTA), 47 USC 271.¹ Included among the checklist requirements is that Ameritech Michigan provide or generally offer “[n]ondiscriminatory access to

¹As explained in the February 9, 2000 order, Section 271 sets forth the conditions that a Bell operating company (in this case, Ameritech Michigan) must meet to obtain authorization from the Federal Communications Commission (FCC) to provide in-region interLATA services. These conditions include the competitive checklist in Section 271(c)(2)(B), which enumerates requirements for offering or providing to competing providers access and interconnection to the Bell operating company’s network facilities. Section 271(d)(2)(B) requires the FCC to consult with state commissions with respect to compliance with the competitive checklist.

network elements in accordance with the requirements of” 47 USC 251(c)(3) and 252(d)(1). 47 USC 271(c)(2)(B)(ii). With regard to unbundled network elements (UNEs), the Commission’s February 9, 2000 order required Ameritech Michigan to file tariffs that demonstrate compliance with prior Commission orders as well as other pertinent federal and state statutes and rules. In setting forth this requirement, the Commission specifically referenced the February 9, 2000 order in Cases Nos. U-11104 and U-12143, which held that Ameritech Michigan was obligated to provide an unrestricted UNE platform (UNE-P). (A platform is a standardized combination of UNEs that typically includes the loop, local switching, and transport elements used to provide telephone service to an end-use customer.)

The parties now find themselves in substantial disagreement over the subset of collaborative issues that relates to the terms upon which Ameritech Michigan will make its UNE-P available to competitive local exchange carriers (CLECs). The parties agreed to submit disputed UNE combination issues to the Commission in three rounds of comments. On September 13, 2000, the Commission Staff (Staff) issued a notice that framed the issues for comment.

On September 25, 2000, Ameritech Michigan; AT&T Communications of Michigan, Inc., and TCG Detroit (collectively, AT&T); Long Distance of Michigan, Inc., CoreComm Michigan, Inc., and BRE Communications, LLC, d/b/a McLeodUSA (collectively, LDMI); XO Michigan, Inc., f/k/a NEXTLINK Michigan, Inc. (XO); Sprint Communications Company, L.P. (Sprint); and MCImetro Access Transmission Services, Inc. (WorldCom) filed initial comments, including, in some cases, written testimony. The second round of reply comments were due October 23, 2000. AT&T, Ameritech Michigan, LDMI,² the Staff, and WorldCom filed reply comments on that date.

²LDMI’s reply comments indicate that they are also on behalf of the Association of Communications Enterprises.

With respect to the final round, due November 13, 2000, AT&T, Ameritech Michigan, LDMI, XO, WorldCom, and the Association of Communications Enterprises filed response comments.

Ameritech Michigan's proposal, as presented in its initial comments, draws a distinction between existing and new platforms. As defined in the proposal, an existing UNE-P refers to a platform of elements that are currently combined in Ameritech Michigan's network, and a new platform requires installation work or other manual intervention to provide physical connections for the UNEs that provide service to a given customer. According to Ameritech Michigan, it already provides existing UNE-P combinations for CLECs pursuant to tariff, and those combinations are not in dispute. However, Ameritech Michigan says, new combinations are a different matter, in that it claims to have no obligation under federal or state law to make them available, particularly in light of the recent decision in Iowa Utilities Board v FCC, 219 F3d 744 (CA 8, 2000).

Ameritech Michigan proposes to offer, on an entirely voluntary basis, new UNE-Ps in the form of a standard contractual amendment to its existing interconnection agreements with CLECs. It refers to its proposal as the Michigan 271 Amendment (or M2A). As a starting point for the M2A proposal, Ameritech Michigan used the UNE-P provisions of an interconnection agreement that SBC Communications Inc. (SBC) had previously adopted in the course of its successful application to the Federal Communications Commission (FCC) for Section 271 authorization in Texas.³

³Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, 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, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 00-238 (June 30, 2000).

Ameritech Michigan then accepted some modifications to the draft agreement during the collaborative discussions.

In addition to UNE-Ps, the M2A proposal would permit a CLEC to purchase another UNE combination known as the enhanced extended loop (EEL). An EEL combines an unbundled local loop and dedicated transport facilities, with multiplexing, at Ameritech Michigan's serving central office. The transport facilities terminate at the CLEC's collocation cage located in another central office. The advantage to the CLEC is that it avoids the necessity of collocating with Ameritech Michigan's facilities at every central office, so that it can provide service in multiple central offices with fewer collocation arrangements.

Ameritech Michigan's proposal makes two alternative forms of the M2A amendment available to CLECs, one that covers both existing and new UNE-Ps and EELs (Exhibit A of Ameritech Michigan's initial comments) and a second alternative that deals only with new UNE-Ps and EELs (Exhibit B of the same comments). By choosing Exhibit A, a CLEC would agree to purchase both existing and new combinations at the rates and terms established in the M2A amendment; the Exhibit B version would free the CLEC to continue to use the tariff provisions to acquire existing UNE-Ps. Because the M2A amendment sets the pricing for combinations, a CLEC opting for the first version would not be subject to changes in tariff prices for existing UNE-Ps for the duration of the amendment.

The M2A's recurring charges incorporate the results of the total service long run incremental cost (TSLRIC) studies approved by the Commission in Case No. U-11831, although the pricing for nonrecurring charges exceeds the TSLRICs established in those studies. Alexander Aff. dated Sept. 25, 2000, at 28-29, 35-36. The M2A proposal guarantees the pricing for two years for the UNE-Ps and EELs used by CLECs to serve business retail customers and three years for UNE-Ps

and EELs used to serve residential customers. Thereafter, if standards applicable to UNE pricing change as a result of action taken by the FCC or the courts, the prices could be reopened.

The proposed M2A amendment would become available to CLECs requesting it after the Commission approves the proposal. The term of the amendment would end 18 months after the date of the Commission's approval, unless the FCC grants a request by Ameritech Michigan for Section 271 authorization. If the FCC were to grant the Section 271 authorization within 15 months of the date of the Commission's approval, the expiration date of the amendment would be extended from 18 months to 4 years.

The proposed M2A amendment contains provisions that would enable Ameritech Michigan, under specified conditions, to modify the arrangements for connecting the UNE-Ps used to serve business end-users after two years. After the second year of the M2A, Ameritech Michigan could choose not to provide CLECs with combined platforms in central offices at which at least four CLECs have collocation arrangements. If Ameritech Michigan selects this option, it would assign each CLEC a secured frame room in the central office or, if space is unavailable, it would provide an external cross connect cabinet for that purpose. It would also perform the necessary cross-connections. There will be no additional charge for providing the secured frame or cabinet or making the cross-connections.

The M2A agreement secures a CLEC's waiver of its right to challenge the agreement on the grounds of inconsistency with Ameritech Michigan's obligations to provide UNE combinations under Section 271 in any judicial or regulatory proceeding. It further provides that, by accepting it, the CLEC agrees to purchase new combinations exclusively under the agreement and waives the right to pick and choose UNE provisions from other interconnection agreements, as it would otherwise be permitted to do under Section 252(i) of the FTA, 47 USC 252(i).

The parties' comments in this proceeding reveal widely divergent views regarding the rates, terms, and conditions that they believe should control UNE combinations. Disputed matters relate to pricing, unregulated services, the substitution of arrangements using secured frames for UNE-P combinations, the waiver of rights, and the duration of the M2A amendment. Although the comments discuss most of the issues in terms of whether Ameritech Michigan has a legal duty to offer the UNE-P (and, if so, under what conditions), the Commission is not persuaded that it is necessary or appropriate at this time to decide whether it has the authority to require new UNE combinations over Ameritech Michigan's objections.⁴ Nor does it find it necessary to resolve in detail each of the 13 issues framed by the Staff, most of which ask the Commission to prescribe various terms and conditions that would control the availability of UNE combinations. Competition is a dynamic process, and attempting to resolve seemingly interminable disputes could produce further interpretational disputes, litigation, and delay. That outcome could undermine the potential value of Ameritech Michigan's proposal, which carries a promise of making new UNE combinations immediately available to the CLECs that have asserted that those platforms are essential for local competition to take hold.

Therefore, the Commission has reviewed Ameritech Michigan's proposal as a whole and has determined that its immediate benefits favor accepting it largely as it is (except as noted below) and outweigh a more time-consuming effort to resolve each disputed issue. Although the M2A

⁴In Verizon North Inc v Strand, opinion of the United States District Court for the Western District of Michigan, decided Dec. 5, 2000 (File No. 5:98-CV-38), the Court stated that federal law, as interpreted in Iowa Utilities, preempted a Commission order requiring Verizon North Inc. to provide new UNE combinations. The decision did not explain how the Court reached its conclusion regarding preemption. Moreover, some of its reasoning is inconsistent with Michigan Bell Telephone Co v Strand, 26 F Supp 2d 993, 1000-01 (WD Mich, 1998). The Commission has appealed the Verizon North decision to the United States Court of Appeals for the Sixth Circuit.

proposal is not perfectly suited to advance all of the CLECs' goals, the Commission is concerned that rejecting a proposal that is less than perfect by finding it to be wholly inadequate would forgo the present opportunity to make Michigan a more competitive market for local exchange service.

The rates provided in the M2A proposal are largely, although not entirely, in line with the TSLRICs approved in Case No. U-11831. Based upon a review of the pricing and other provisions of the M2A proposal, the Commission reaches the conclusion that immediate implementation will advance the cause of local competition by making new UNE-Ps and EELs available for the first time in Michigan. That availability comes with rates, terms, and conditions that are, on the whole, acceptable. The fact that the M2A proposal used a previously approved Texas interconnection agreement as a starting point is significant.

This order need not, and does not, express an opinion regarding how Iowa Utilities or other decisions of the federal courts and the FCC affect this Commission's authority with respect to UNEs and interconnection arrangements. Moreover, the holding in Iowa Utilities upon which Ameritech Michigan relies is itself subject to possible appellate review. The Commission defers those matters for another day. It does not foreclose a future decision on whether Ameritech Michigan can be lawfully required to offer UNE-Ps and EELs at different rates or on different terms or whether Ameritech Michigan must file tariffs on new combinations. It only decides for now that Ameritech Michigan should proceed to implement the M2A proposal along with its tariffed offering of the existing UNE-P.

Although the Commission has reviewed and accepted the M2A provisions, it does not agree that it should at this time grant Ameritech Michigan's request for a finding that the M2A meets the UNE checklist requirement in Section 271(c)(2)(B)(ii) of the FTA. Ameritech Michigan's initial comments, Exs. A at 14 & B at 13-14. It would be difficult to make this finding on the basis of an

amendment to an interconnection agreement that has yet to be implemented in Michigan.

Moreover, Ameritech Michigan has not offered to file tariffs for new combinations. Conceivably, the finding called for by Section 271(c)(2)(B)(ii) could require an inquiry that is broader than the issues explored in this order. When the time comes for the Commission to address compliance with the checklist, the Commission will assess whether Ameritech Michigan has in fact met its obligations to provide or offer nondiscriminatory access to UNEs. The Commission further notes that a prospective failure to make new combinations freely available to potential competitors may impede or preclude a favorable Section 271 recommendation.

One other issue requires discussion. The parties have disputed how to define and differentiate between new and existing combinations. The definition is important, in that Ameritech Michigan will continue to make existing combinations available to CLECs under the less restrictive terms of its tariff, but it will (at least for now) offer new combinations only under the M2A.

Ameritech Michigan uses the words “existing” or “currently combined” in the M2A to refer to a platform of installed UNEs that does not require manual work on the part of Ameritech Michigan personnel to provide physical connections at the central office, an outside plant location, or the customer’s premises. The M2A defines a new combination as a platform that requires manual intervention to make the physical connections. Ameritech Michigan’s initial comments, Exs. A at 3-4 & B at 3-4. Ameritech Michigan says that this definition allows a CLEC to use the existing UNE-P tariff to serve a new customer moving into a residence vacated by a previous Ameritech Michigan customer, notwithstanding any activation and feature installation required to be performed by Ameritech Michigan. Alexander Aff. dated Sept. 25, 2000, at 19-21. However, it would not enable the CLEC to use the existing UNE-P tariff to provide service to a new residence or to install a second line to an existing residence.

AT&T and WorldCom propose that Ameritech Michigan treat as existing any UNEs that it “ordinarily combines” in providing service to its own retail customers. Under this definition, Ameritech Michigan would treat a CLEC’s request for UNEs to provide service to a customer ordering an additional line to his or her premises as an existing UNE-P. WorldCom says that a CLEC customer moving into the premises of a former Ameritech Michigan customer may not qualify as an existing UNE-P under Ameritech Michigan’s restrictive definition, given that the demand for new and additional services often requires Ameritech Michigan to disconnect the existing line so that the circuit can be used elsewhere. The CLECs argue that their inability to obtain this type of combination as an existing UNE-P places them at an unfair disadvantage in competing with Ameritech Michigan for new customers.

Ameritech Michigan argues that its definitions of “new” and “existing” are consistent with Iowa Utilities, in which the Court stated that the FTA “does not require the incumbent LECs to do all the work.” 219 F3d at 759 (quoting Iowa Utilities Bd v FCC, 120 F3d 753, 813 [CA 8, 1997]). It says that the CLECs’ “ordinarily combined” standard cannot be squared with the FCC’s rule prohibiting an incumbent from separating UNEs that it “currently combines.” 47 CFR 51.315(b). Ameritech Michigan criticizes the “ordinarily combined” standard as vague and unworkable in practice. Ameritech Michigan claims that redefining existing UNE-Ps would also require repricing them.

The Commission determines that defining existing UNE-P and EEL combinations to include those configurations that Ameritech Michigan “ordinarily combines” is more persuasive than Ameritech Michigan’s definition. Ameritech Michigan’s position would permit it to withhold from CLECs the types of UNE combinations that it routinely assembles to provide service to its own retail customers. To accept a definition as restrictive as this would confer an unfair advantage on

Ameritech Michigan by allowing it to leverage its control of telephone network facilities in competing with CLECs to fulfill routine requests for retail service. As a matter of policy, the objective of promoting local competition in Michigan would not be well served by this definition. The Commission finds that Ameritech Michigan should define and provide for existing combinations in both its tariff and the M2A to include the types of situations encompassed by the CLECs' "ordinarily combined" standard.

In its reply comments, Ameritech Michigan says that, in keeping with the objective of compromise that underlies the collaborative, it will file tariffs covering the conversion of an existing special access arrangement to an existing EEL and its operator services and directory assistance (OS/DA) service for CLECs (although it does not agree that OS/DA pricing will be TSLRIC-based). Finally, Ameritech Michigan says that it will comply with the November 5, 1998 order in Case No. U-11525 as it affects a CLEC's request for a UNE-P to provide service to an existing Ameritech Michigan customer with a ValueLink contract. The Commission accepts these commitments on Ameritech Michigan's part.

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.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 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 AACCS, R 460.17101 et seq.
- b. Ameritech Michigan should proceed to implement its proposed M2A and provide new and existing combinations in accordance with the provisions of this order.

THEREFORE, IT IS ORDERED that Ameritech Michigan shall proceed to implement its proposed Michigan 271 Amendment and provide new and existing combinations in accordance with the provisions of this order.

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/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of January 4, 2001.

/s/ Dorothy Wideman
Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,)
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with the competitive checklist in Section 271 of)
the federal Telecommunications Act of 1996.)
_____)

Case No. U-12320

Suggested Minute:

“Adopt and issue order dated January 4, 2001 directing Ameritech Michigan to implement its proposal for providing combinations of unbundled network elements, as set forth in the order.”