S T A T E O F M I C H I G A N

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 November 7, 2002 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

The federal Telecommunications Act of 1996 (the FTA) requires Ameritech Michigan to make available nondiscriminatory access to network elements. Section 271(c)(2)(B)(ii). On January 4, 2001, the Commission issued an order finding that Ameritech Michigan should offer new unbundled network element (UNE) combinations through its proposed Michigan Section 271 Amendment (Mi2A) and should continue to offer existing unbundled network element platform (UNE-P) combinations pursuant to the tariff that was already in effect. The Commission withheld a finding that Ameritech Michigan's compliance with the order would satisfy its obligations under Section 271. On March 19, 2001, the Commission issued an order on rehearing finding that the offerings contained in the Mi2A as revised by Ameritech Michigan after January 4, 2001 and modified by the Commission upon rehearing were consistent with the requirements of Section 271

as they existed at that time. In its May 15, 2001 informational filing, Ameritech Michigan indicated that it intended to rely on the Mi2A to demonstrate its compliance with Section 271.

The Mi2A was scheduled to expire on September 28, 2002. On April 9, 2002, Ameritech Michigan filed a request for a nine-month extension. On April 29, 2002, it withdrew that request. On May 13, 2002, the decision in Verizon Communications Inc v Federal Communications Comm, 535 US ___, affirmed the validity of the Federal Communications Commission's (FCC) combinations rules in 47 CFR 51.315. On May 16, 2002, the Commission issued an order requiring Ameritech Michigan to file a tariff making available new UNE combinations, including, at a minimum, the UNE-P and enhanced extended loop (EEL) combinations previously provided under the Mi2A. Subsequently, Ameritech Michigan filed the required tariffs. As required by the May 16, 2002 order, the Commission Staff (Staff) also convened a collaborative session to discuss the tariffs and other issues related to UNE combinations.

In its July 25, 2002 informational filing, Ameritech Michigan indicates that it intends to demonstrate its compliance with Section 271 through the tariffs governing new and existing combinations and a Michigan-specific interconnection agreement amendment, rather than the Mi2A. It says that it now offers three ways for a competitive local exchange carrier (CLEC) to obtain binding terms for UNE combinations: (1) the tariffs; (2) an amendment incorporating the tariffs into an existing interconnection agreement (the Michigan Combinations Tariff Amendment), which is available with an optional pricing schedule; and (3) an amendment to an existing agreement that does not refer to the tariffs, which is also available with an optional pricing schedule. Additionally, it says that CLECs may obtain UNE combinations in a new 13-state generic interconnection agreement.

Ameritech Michigan says that the tariffs and amendment offer the same three new UNE-P combinations available under the Mi2A, seven new UNE-P combinations not available under the Mi2A, and the same eight new EEL combinations available under the Mi2A. It also says that it offers a procedure to request ordinarily combined UNEs not specifically provided for in the tariffs or agreement—the streamlined bona fide request-ordinarily combined (BFR-OC) process—and a procedure to request other combinations—the standard bona fide request (BFR) process.

The Staff; AT&T Communications of Michigan, Inc., and TCG Detroit (AT&T); the Competitive Local Exchange Carriers Association of Michigan (CLEC Association); McLeodUSA Telecommunications Services Inc. (McLeod); Z-Tel Communications, Inc. (Z-Tel); XO Michigan, Inc. (XO); TelNet Worldwide, Inc. (TelNet); and MCImetro Access Transmission Services, Inc., Brooks Fiber Communications of Michigan, Inc., and MCI WorldCom Communications, Inc. (collectively, WorldCom) filed comments on August 9, 2002. Ameritech Michigan, the CLEC Association, and AT&T filed replies on August 26, 2002.

1. Binding Obligation

The new combinations tariff requires Ameritech Michigan to provide UNE combinations to the extent required by the FCC's rules and orders as well as the Commission's rules, regulations, and orders and other applicable law, to the extent they are not inconsistent with the FCC's rules and orders, and permits Ameritech Michigan to change the availability and prices of UNE combinations to accommodate changes in laws and regulations. The Michigan-specific amendment incorporates the tariffs into existing interconnection agreements, and therefore, when the tariffs change, the terms of the amendment change as well.

The CLECs argue that Ameritech Michigan's tariff offerings must be made permanent, and say that the proposed tariffs and amendment, with various reservations of rights and conditions,

give Ameritech Michigan the ability to unilaterally withdraw the offerings and to limit access to UNE combinations. They argue that compliance with Section 271 requires Ameritech Michigan to offer UNE combinations in a manner that prevents changes or withdrawal without notice to the CLECs and approval by the Commission. Some CLECs also say that Ameritech Michigan is seeking to avoid its obligation under state law to offer UNE combinations. They argue that the Commission should order Ameritech Michigan to make available all UNE combinations required by state law and to continue doing so even if federal law would permit withdrawal of one or more of the combinations.

The Staff and the CLECs also say that the Michigan-specific amendment permits Ameritech Michigan to change the terms of the amendment by changing the tariffs. The Staff says that this eliminates the price stability that is supposed to be an advantage of a contract. XO says that it expects an amendment to an interconnection agreement to give it protection against unilateral changes and any change to the amendment or incorporated tariffs to be subject to the change-of-law provisions of the underlying contract.

Ameritech Michigan responds that although it agreed in the Mi2A to make UNE prices available for two to three years without regard to any change in legal or regulatory requirements, Section 271 does not require it to do so. Further, it argues that Section 271 does not require it to comply with requirements that relevant courts or regulatory agencies determine to be no longer valid. Likewise, it argues that the Commission cannot require it to make UNE combinations available in a manner inconsistent with federal law. To the contrary, it asserts that the Commission must comply with federal law and that, to the extent laws and regulations may change, it must have flexibility to change the tariffs and amendment. Further, it says that the Staff is correct that a potential advantage of contracts is rate stability, although it points out that stability can be a

disadvantage when prices decline. In any event, it says that rate stability is not a necessary aspect of a contract, but rather is something that the parties must negotiate. It says that to the extent parties have negotiated terms that lock-in prices, regardless of changes in tariffs or Commission cost determinations, presumably those terms will govern. Likewise, it says that parties are free to negotiate terms that provide for a change in prices upon specified events. On the other hand, it argues that the FCC has found that the duty to negotiate in good faith prevents a party from refusing to negotiate a provision that permits the agreement to be amended to reflect changes in laws or regulations.

The Staff suggests a process for addressing future changes that Ameritech Michigan may propose to the tariffs. It recommends that Ameritech Michigan be required to provide 30 days' notice to all CLECs that are purchasing UNE combinations, that the CLECs be permitted to file objections within two weeks, and that the Commission resolve any disputes through collaborative discussions or formal proceedings. To provide greater stability in the amendment, the Staff recommends that Ameritech Michigan offer a price list with the amendment, as it did with the Mi2A, that would remain unchanged for the term of the underlying agreement.

The CLEC Association says that the Staff's proposal is not sufficient because it places too great a burden on the CLECs to respond to proposed changes rather than placing the burden on Ameritech Michigan to justify the changes. It also says that the time allowed by the process is not sufficient and that the CLECs need assurance that UNE combinations will be available for more than 30 days.

Ameritech Michigan says that the Commission may well lack authority to adopt the Staff's proposed process because, under state law, tariffs are effective the day after filing. Nonetheless, it says that it is willing to retain language in its new combinations tariff requiring it to provide notice

of any tariff changes that invoke the conditions limiting Ameritech Michigan's obligation to combine UNEs (e.g., related to a CLEC's ability to combine UNEs for itself).

The Commission can agree in principle with Ameritech Michigan's argument that changes in laws and regulations should be reflected in tariffs and interconnection agreements. The Commission cannot agree with Ameritech Michigan's apparent position that it alone should decide when the law has changed and when and how that change should be reflected in its tariffs and interconnection agreements. Ameritech Michigan comes close to arguing that the Commission cannot restrict in any manner its right to change the availability and pricing of UNE combinations. Whether intended or not, Ameritech Michigan seems to be arguing, among other things, that it can change UNE combination prices regardless of whether the Commission has approved new cost studies and that it can change the availability of UNE combinations regardless of whether it is correct that the law has changed or is correct about how the change should be implemented. It is one thing to argue that a CLEC cannot refuse to negotiate provisions governing how changes in laws and regulations will be reflected in the agreement. It is quite another to argue that a CLEC must accept tariffs and a Michigan-specific amendment, which are not subject to negotiation, that permit Ameritech Michigan alone to decide when and how changes should be implemented.

If Ameritech Michigan is correct about the Commission's lack of authority to restrict the right to change tariffs upon one day's notice, and the Commission does not agree that it is, Ameritech Michigan will be unable to comply with Section 271 by offering UNE combinations through tariffs or an amendment that incorporates the tariffs. Federal law requires a binding obligation. The Commission therefore agrees with the Staff and the CLECs that, as a condition of finding that Ameritech Michigan is in compliance with Section 271, a process is needed to address changes to the tariffs.

The Commission orders, as it did in the March 7, 2001 order in Case No. U-12540, that Ameritech Michigan may not change the UNE combination tariffs until it has complied with the following process. Further, before Ameritech Michigan may limit or withdraw the availability of any combination, including the UNE-P, to any provider, it must comply with this process. As Z-Tel proposed, this includes any proposal to limit or withdraw the availability of the UNE-P to providers seeking to serve any customers or class of customers based on the geographic location served or number of customer lines used. It must provide 30 days' notice of any proposed change to all CLECs that are purchasing UNE combinations. The CLECs will have two weeks to file objections with the Commission. If the Commission concludes, on its own motion or on the basis of the objections, that the change should not take effect without further proceedings, it will issue an order commencing a proceeding, and Ameritech Michigan may not implement the change until the Commission orders otherwise. In the absence of an order commencing a proceeding (either a collaborative discussion or contested case) within that period, Ameritech Michigan may implement the change at the conclusion of the notice period.

If the CLECs raise objections based on state law rather than federal law, the Commission will address those objections at that time. As discussed below, the Commission finds that, subject to the modifications specified in this order, Ameritech Michigan's proposed UNE combinations offerings are sufficient to comply with Section 271, and the Commission need not resolve now any questions about whether state law requires the availability of additional combinations.

This process will prevent unreviewed tariff changes from being reflected in the Michigan-specific amendment. The parties remain free to address in their interconnection agreements and amendments the conditions under which prices or other terms may change, and those agreements and amendments will be given effect according to their terms. If the parties have agreed to adopt a

pricing schedule, the agreement or amendment will determine when the pricing schedule can be changed.

Implementation of this process will require that Ameritech Michigan delete from the tariffs and Michigan-specific amendment all language that purports to give it the unilateral right to alter the tariffs and amendment. Such language is unnecessary to preserve an ability to change the tariffs and amendment pursuant to this order and is inconsistent with Ameritech Michigan's duty to offer UNE combinations under a binding obligation.

2. Paragraph 4, Sheet 3

One particular tariff provision to which the Staff and the CLECs object is a provision that gives Ameritech Michigan the unilateral right, upon 30 days' notice, to limit the availability of certain UNE combinations when the requesting carrier is able to make the combination itself. The Staff and McLeod propose deleting the language. AT&T and WorldCom agree, but also offer alternative language.

Ameritech Michigan says that the intent of the language was to place all parties on notice that it may exercise its right to withdraw certain UNE combinations. It says that the comments demonstrate that its intent has been fulfilled. It therefore offers to withdraw the provision from the tariff, subject to the understanding that all parties are in apparent agreement that such a reservation of rights is unnecessary and that deletion of the language will not prejudice its right to withdraw UNE combinations consistent with federal law. It proposes to leave the provision in the 13-state agreement because the agreement will not become effective until agreed upon and because the agreement may be obtained by CLECs that did not participate in the Michigan collaborative meetings.

The Commission agrees that the language should be removed from the tariff. As discussed above, Ameritech Michigan cannot comply with Section 271 if it can unilaterally withdraw UNE

combinations. It must comply with the notice provision discussed above. Further, the balance of the provision must be deleted or revised to correspond exactly to the FCC's rules and other relevant law. As for leaving the provision in the 13-state agreement, Ameritech Michigan may do so, but such agreements will not be viewed as complying with Section 271 in Michigan. To the extent that the FTA requires reliance on interconnection agreements to delineate the rates, terms, and conditions under which Section 271 offerings will be made, new interconnection agreements and amendments to existing agreements must not include any language permitting the unilateral withdrawal or limitation of UNE combinations.

3. BFR and BFR-OC Processes

Several parties object to the tariff requirement that they use the BFR process or the new BFR-OC process to obtain certain UNE combinations. AT&T says that because the CLECs have a nearly unqualified right to require Ameritech Michigan to combine UNEs, it cannot implement a process that permits it to reject a request for a combination. McLeod and TelNet say that CLECs should not be required to use a BFR process because it is costly and time consuming. McLeod says that the BFR process should be required only when a requested UNE does not exist anywhere on the network or does not ordinarily exist on the network. The CLEC Association says that all features and functions of UNE combinations must be made available by tariff and that the CLECs should be able to order, without resorting to the BFR process, any combination that they ordered under the Mi2A and any combination that is ordinarily combined on the network regardless of whether it is listed in the tariff.

Ameritech Michigan responds that the comments must be viewed from the perspective that virtually all UNE-P requests are for plain old telephone service and that almost all of the requests are for migrations of an end-user's working service. It says that the tariff lists more combinations

than were available under the Mi2A and enables the CLECs to provide a vast array of telecommunication services. Further, it says that the purpose of the BFR and BFR-OC processes is to enable the CLECs to request unusual combinations without being limited to the combinations that the parties were able to identify through collaborative discussions. It also says that it is not possible to list every conceivable combination of UNEs, to determine in the abstract whether a hypothetical combination would be technically feasible, or to provide appropriate rates, terms, and conditions for UNEs that have not even been identified.

The Commission finds that the UNE combinations offered in the tariffs and amendment, which are more extensive than offered under the Mi2A, are sufficient to comply with Section 271. Compliance does not require Ameritech Michigan to offer by tariff or amendment every conceivable UNE combination, and federal and state law do not create an unlimited right to UNE combinations. With the exception of one EEL combination, discussed below, the CLECs have not identified in their comments any combination that they currently want that is not available under the tariffs. Further, it is unreasonable for the CLECs to expect the tariffs to provide rates, terms, and conditions for unidentified combinations. If a CLEC needs a UNE combination that is not offered in the tariffs or amendment, it may rely upon the BFR and BFR-OC processes.

4. Restrictions on EELs

WorldCom says that Ameritech Michigan's new EELs offering improperly restricts the use of new EEL combinations to certain services to end users and requires the unnecessary use of collocation. It asserts that the FCC does not prohibit the removal of these restrictions, and urges the Commission to remove the restrictions on the basis of state law. WorldCom also says that Ameritech Michigan's ability to use the same facilities for all purposes, when the CLECs cannot

do likewise, is discriminatory and places them at a significant disadvantage. The CLEC Association and AT&T agree.

Ameritech Michigan responds that the restrictions are inherent in the FCC's test for determining when EELs must be made available. As such, it says that WorldCom's argument would be better directed to the FCC.

The restrictions to which WorldCom objects were created by the FCC. The Commission declines to order Ameritech Michigan to make EELs available under conditions that are contrary to the restrictions that the FCC has placed on them. Ameritech Michigan's compliance with Section 271 does not require otherwise.

5. <u>DS3 EELs</u>

TelNet says that Ameritech Michigan's proposal is unreasonable and discriminatory because it fails to include a DS3 EEL combination, which it says would permit the CLECs to compete more effectively for high-volume customers. It acknowledges that, during the collaborative discussions, Ameritech Michigan objected to providing the DS3 EEL on the basis that it would be unlikely to carry a significant amount of local traffic and that if it would, the CLEC could order it under the BFR process. TelNet says that it is not appropriate for Ameritech Michigan to prejudge whether a particular combination would carry a significant amount of local traffic and that the BFR process is objectionable because of the time and opportunity it provides for Ameritech Michigan to raise obstacles to providing the combination.

Ameritech Michigan says that although DS3 loops are sometimes used for high-volume customers, they are not commonly used to offer basic local exchange service. It says that, during the collaborative discussions that led to the Mi2A, not a single CLEC mentioned that such an offering was desirable.

The Commission finds that Ameritech Michigan is not required to offer the DS3 EEL combination as a standard offering. As discussed above, the Commission declines to order Ameritech Michigan to make EELs available under conditions that are contrary to the restrictions that the FCC has placed on them. To the extent that a CLEC needs a DS3 EEL combination to provide basic local exchange service, it may use the BFR process.

6. Distinction between New and Existing Combinations

AT&T says that there is no rational basis for distinguishing between new and existing combinations. It says that the distinction discriminates against CLECs and creates an ambiguity that Ameritech Michigan can use to impose unwarranted restrictions. On the other hand, McLeod criticizes the new combinations tariff for not making the distinction clearer.

Ameritech Michigan says that the Commission recognized in the May 16, 2002 order that there was already a tariff for existing combinations, and thus recognized the distinction between new and existing combinations. In addition, it says that the FCC's rules recognize the distinction. Further, it says that the distinction defines its legal obligations and has practical consequences as well. For example, it says that when a UNE combination already exists, it may not separate the elements unless requested to do so by the CLEC, and that the CLEC may request the UNE combination as a migration, for which the Commission-approved migration charge will apply.

The Commission agrees that the U.S. Supreme Court's May 13, 2002 decision clarifies Ameritech Michigan's obligation to provide UNE combinations regardless of any distinction that may be drawn between new or existing combinations. Nevertheless, it finds that the distinction should continue to be a feature of the tariffs because, as Ameritech Michigan argues, the distinction is not new and has practical consequences.

7. Nonrecurring Charges

The tariffs provide that nonrecurring charges (NRCs) are to be applied for each of the underlying UNEs that must be installed and assembled to provide a new combination.

The Staff says that the tariff may not be consistent with the Commission's prior orders. AT&T and the CLEC Association say that the provision violates the Commission's August 31, 2000 order in Case No. U-11831 and the July 23, 2002 order in Case No. U-13352.

Ameritech Michigan says that there may some confusion due to how the word "new" is used. In the August 31, 2000 order in Case No. U-11831, the Commission found that Ameritech Michigan could assess only a migration charge for a migration, although Ameritech Michigan could assess the NRCs for one of the underlying UNEs for a new combination. Ameritech Michigan says that, at the time, it was not obligated to combine UNEs and thus the only "new" combination to which the order could have referred was an existing combination that did not qualify as a migration. It also says that, in proposing the Mi2A, it applied "sum of the parts" pricing to new combinations and the Commission approved the Mi2A.

The Commission will require that Ameritech Michigan comply with the prior decisions on NRCs. Despite Ameritech Michigan's creative argument about what the Commission must have meant in Case No. U-11831, the simple fact is that the Commission used the term "new" in the usual manner. Ameritech Michigan can argue otherwise only because, at the time of the prior orders, Ameritech Michigan did not agree that it was under any obligation to offer new combinations as the Commission used that term. The Supreme Court rejected that view in Verizon, supra.

8. Voice Mail

The Staff says that the new combinations tariff may prevent the CLECs from providing voice mail. WorldCom and AT&T agree. WorldCom also says that the Commission should prevent discrimination between CLECs by requiring Ameritech Michigan to provide a non-telecommunication service to a requesting CLEC if it provides that service to any other CLEC.

Ameritech Michigan says that the parties have misconstrued the tariff, and offers revised tariff language. It objects to WorldCom's proposal to broaden the provision.

The Commission finds that Ameritech Michigan's offer resolves the issue and that WorldCom's proposed change is beyond the scope of this proceeding.

9. Extension of Mi2A

The Staff had suggested that, because the Mi2A would expire on September 28, 2002, the Mi2A should be extended until a substitute interconnection amendment could be entered into by the parties and approved by the Commission. The suggestion has been rendered moot.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 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.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Ameritech Michigan should offer new and existing UNE combinations through its current and proposed tariffs and interconnection agreements and amendments, as modified by this order.

THEREFORE, IT IS ORDERED that:

A. Ameritech Michigan shall immediately offer new and existing unbundled network element combinations through its current and proposed tariffs and interconnection agreements and amendments, as modified by this order.

B. Ameritech Michigan shall file, within 10 days, tariffs in compliance with this order.

C. Ameritech Michigan shall not withdraw or amend tariffs that comply with this order except in accordance with the process described in 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.

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 November 7, 2002.

/s/ Dorothy Wideman
Its Executive Secretary

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A. Ameritech Michigan shall immediately offer new and existing unbundled network element combinations through its current and proposed tariffs and interconnection agreements and amendments, as modified by this order.

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C. Ameritech Michigan shall not withdraw or amend tariffs that comply with this order except in accordance with the process described in 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.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of November 7, 2002.

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Its Executive Secretary

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

Suggested Minute:

> "Adopt and issue order dated November 7, 2002 finding that Ameritech Michigan should offer new and existing unbundled network element combinations through its current and proposed tariffs and interconnection agreements and amendments as modified by the order, as set forth in the order."