

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of)	
SAGE TELECOM, INC. , against SBC MICHIGAN)	Case No. U-13747
for implementation of procedures for incollect traffic.)	
_____)	

At the November 25, 2003 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

History of Proceedings

On March 26, 2003, Sage Telecom, Inc., (Sage) filed a complaint against SBC Michigan (SBC) alleging that SBC had breached certain provisions of the parties' interconnection agreement and, in so doing, had also violated provisions of the federal Telecommunications Act of 1996 (FTA), 47 USC 251 et seq., and the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq.

On April 14, 2003, SBC filed an answer to the complaint. Pursuant to MCL 484.2203(14), the case was sent to mediation. On May 7, 2003, Administrative Law Judge Mark E. Cummins issued his recommended settlement. By memo dated May 15, 2003, the Commission was notified that one or both of the parties had rejected the recommended settlement and the case would proceed to hearing.

On May 27, 2003, the Competitive Local Exchange Carriers Association (CLECA) filed a petition to intervene.

On June 5 and 19, 2003, prehearing conferences were held before Administrative Law Judge Barbara A. Stump (ALJ). At the conclusion of arguments offered concerning CLECA's proposed intervention at the second prehearing conference, the ALJ denied CLECA's petition to intervene. The Commission Staff (Staff) also participated in the case, although it did not file any testimony or briefs.

On July 3, 2003, CLECA filed an application for leave to appeal the ALJ's June 19, 2003 ruling. On July 17, 2003, SBC filed a response to the application.

On August 6, 2003, the parties waived cross-examination of the witnesses and all prefiled testimony was bound into the record. The ALJ also admitted 36 exhibits into evidence. Pursuant to the parties' agreement, SBC submitted an additional exhibit on August 11, 2003.

Sage and SBC filed briefs and reply briefs on August 21 and 28, 2003, respectively. On September 24, 2003, the ALJ issued her Proposal for Decision (PFD) in which she concluded that the allegations in the complaint concern an unregulated service for which the Commission lacks the authority to render the relief sought. She therefore recommended that the Commission dismiss the complaint with prejudice.

On October 1, 2003, Sage filed exceptions to the PFD, arguing that the ALJ incorrectly concluded that the Commission was without jurisdiction to determine the issues raised in the complaint. It further argues that the Commission should grant the relief Sage requested. On October 8, 2003, SBC filed a reply to those exceptions in which it takes no position on the issue of jurisdiction and generally relies on its brief and reply brief concerning the merits of the issues raised in the complaint.

Factual Background

Pursuant to a license granted by the Commission in Case No. U-13312, Sage provides telecommunication services primarily to residential and small business customers in rural and suburban communities surrounding the metropolitan areas of Michigan. It provides service using a group of unbundled network elements (UNEs) available as the UNE platform from SBC. To obtain the UNE platform, Sage opted into an interconnection agreement that the Commission had approved between Ameritech Information Industry Services, Inc., and AT&T Communications of Michigan, Inc. (AT&T). The Commission approved the interconnection agreement for Sage and SBC in its October 3, 2002 order in Case No. U-13515.

Using the UNE platform, Sage provides its customers a combination of basic local, local toll, and long distance services at a flat monthly rate. That service includes the customer's ability to accept and receive incollect calls.¹ Incollect calls are a portion of what is referred to as alternatively billed services (ABS).² The parties dispute whether the interconnection agreement requires that Sage be liable to remit all of the incollect charges for which it acts as the billing agent for third party providers.

Jurisdiction

Sage argues that, contrary to the ALJ's conclusions, the Commission has jurisdiction to interpret and enforce interconnection agreement provisions regardless of whether the subject matter of the particular disputed section is regulated or unregulated. It argues that the Commission has the

¹Incollect calls are calls billed to a number other than the originating number. For purposes of this case, they are calls provided by SBC or some other provider to a Sage customer, for which the Sage customer has agreed to pay the charges.

²ABS also includes outcollect calls, which would be placed in this instance by a Sage customer, but billed to a different number. Outcollect charges are not at issue in this complaint.

obligation to enforce the agreement against SBC. It claims that the Commission's jurisdiction to adjudicate this case emanates from the MTA, and Sections 251 and 252 of the FTA, 47 USC 251 and 252. Sage argues that the Commission reserved jurisdiction over the interconnection agreement when it issued its order approving the agreement pursuant to Section 252 of the FTA.

Sage argues that this proceeding is a contract enforcement dispute in which the contract to be enforced is a regulated interconnection agreement. It reasons that because the Commission had authority to approve or reject the agreement it now must have jurisdiction to interpret and enforce each provision in the interconnection agreement.

Sage further argues that the reason for the complaint is the inability of the two providers to "agree on a matter related to a regulated telecommunication issue between the parties," which supports the Commission's jurisdiction pursuant to MCL 484.2204. Sage argues that one of the stated purposes of the MTA is to "ensure effective review and disposition of disputes between telecommunication providers." MCL 484.2101(2)(c).

Moreover, Sage argues, MCL 484.2203(14) explicitly refers to interconnection agreement disputes when it requires that the parties to all such disputes utilize the alternative dispute resolution process provided under Section 203a of the MTA. Sage disagrees with the ALJ's conclusion that Section 203(14) merely provides a mechanism for resolution and does not confer jurisdiction on the Commission to resolve disputes related to unregulated services. Sage argues that this section does not distinguish between regulated and unregulated services.

In fact, Sage argues, the contents of an interconnection agreement become regulated telecommunications services by virtue of the requirements for negotiation, arbitration, and submittal to the Commission for approval by order of those agreements. According to Sage, orders approving interconnection agreements are deemed lawful and reasonable until found otherwise in an action

brought for such purpose, or until changed or modified by the Commission. Therefore, Sage reasons, any violation of the provisions of an interconnection agreement is a violation of a Commission order, which may be remedied pursuant to Section 305(1)(n) of the MTA, MCL 484.2305(1)(n).

Sage further argues that, contrary to the ALJ's conclusion, the Commission's jurisdiction to take action concerning the provision of ABS in a manner that violates any subsection of Section 502 of the MTA, MCL 484.2502, is not specifically prohibited by the provisions of Section 401, MCL 484.2401. Therefore, Sage reasons, the ALJ's reliance on the Commission's July 23, 2002 order in Case No. U-13195, a complaint action by Rucker Regional Physician Billing against Ameritech Advanced Data Services of Michigan et al. to support her conclusion that the Commission may not enforce the provisions of Section 502 concerning unregulated services was misplaced.

Sage asserts that the Commission must first determine whether SBC has violated the provisions of the interconnection agreement before it may determine whether the charged violations of Section 502 of the MTA or Section 252 of the FTA have occurred. Thus, Sage argues, the Commission must be permitted to interpret and enforce the interconnection agreement in furtherance of its responsibility to enforce those statutory provisions.

Moreover, Sage points out that the United States Court of Appeals for the Sixth Circuit (Court of Appeals) has stated:

The [FCC] has determined that interpreting the agreement is a function given to state commissions under the Act, and no court has denied a state commission the power to interpret agreements. Thus, interpretation of an agreement is an authorized state commission determination under Section 252.

Michigan Bell Tel Co v MCI Metro Access Transmission Services, 323 F3d 348, 356 (CA 6, 2003) (citations omitted).

Sage argues that the above quote reflects the Court of Appeals' opinion that it has jurisdiction to review a state commission's interpretation of the terms of an interconnection agreement. Thus, Sage argues, once an interconnection agreement has been approved by the Commission, the Commission may resolve disputes concerning the interpretation or enforcement of any part of that interconnection agreement.

Sage continues that the Commission's decision in Case No. U-13758, upon which the ALJ relied for her finding that the Commission has no jurisdiction to resolve this case, should be distinguished from the present case. First, Sage notes, the provisions regarding ABS are in an approved interconnection agreement between Sage and SBC. The case relied upon by the ALJ, on the other hand, was an arbitration proceeding involving SBC and MCImetro Transmission Company (MCI_m). The parties to that case disputed whether provisions for ABS must be submitted to arbitration. Sage argues that the parties to the MCI_m/SBC arbitration did not dispute the appropriate interpretation of a contract provision already in effect.

Moreover, Sage contends, ABS is in fact a regulated service pursuant to the MTA, because ABS is necessarily included in the statutory definition of "operator service" in MCL 484.2102(s), which Sage argues is within the Commission's jurisdiction by virtue of the provisions in MCL 484.2317.

After a review of the arguments Sage presents, the Commission finds that the ALJ's determination should be affirmed and this case should be dismissed. An arrangement between providers for ABS is an unregulated billing and collection service. As the Commission found in its August 18, 2003 order in Case No. U-13758, there is no requirement that ABS arrangements be included in an interconnection agreement, or submitted to arbitration. Thus, there is no right to Commission interpretation or enforcement of this contract term. In the present case, Sage and

SBC negotiated their own terms for ABS, which they agreed to include in the interconnection agreement. However, the parties' agreement to include ABS arrangements within the agreement cannot confer subject matter jurisdiction where it does not otherwise exist.

The Commission further rejects Sage's argument that because a Commission order approved the interconnection agreement, a breach of an uncontested portion of that agreement is a violation of a Commission order within the meaning of MCL 484.2305(n). Breach of an agreed contract term is very different than refusing to properly implement a Commission direction on a disputed issue. Generally, when parties agree to the inclusion of a provision in their interconnection agreement, the Commission will not interfere with that agreement unless, on its face, the provision would not be consistent with the FTA or would be contrary to the public interest. Although the Commission may approve an agreement by order, that does not mean that breaching an agreed to provision will subject the breacher to penalties for violating a Commission order.

The Commission further rejects Sage's position that Section 203(14), MCL 484.2203(14), grants the Commission jurisdiction over the present dispute. That section provides that if a complaint involves an interconnection dispute between providers, the Commission shall require that the providers engage in alternative dispute resolution prior to a contested case proceeding. The Commission agrees with the ALJ's conclusion that this provision is intended to institute a required process for interconnection disputes between providers, rather than describe jurisdictional limitations. Moreover, the Commission finds that an ABS arrangement between providers is not interconnection. It is, rather, an unregulated billing and collection service agreement, which is not required for interconnection. Therefore, this dispute is not an interconnection dispute between providers and Section 203(14) is not applicable.

As to Sage's allegations that SBC has violated portions of Section 502 due to its breach of interconnection provisions, the Commission finds that the ALJ's conclusions that the Commission lacks jurisdiction over ABS arrangements should be affirmed. Although the Commission agrees that Section 502 prohibitions are not expressly limited to the provision of regulated services, the Commission finds that Section 401 acts as a limitation on the Commission's authority over unregulated services. Section 401(1) prevents the Commission from exercising authority over certain named services. One of those services is the enhanced service at issue in Case No. U-13195. The Commission agrees that ABS is not among the specifically named services. However, Section 401(2) provides: "Except as otherwise provided by this act, the commission shall not have the authority over a telecommunication service not specifically provided for in this act." An ABS arrangement between providers is not a telecommunication service specifically provided for within the MTA. And the MTA does not provide the Commission other authority over these arrangements. Thus, the Commission finds that violations of Section 502 may not be established for actions related to ABS arrangements between providers.

The Commission further rejects Sage's argument that the Court of Appeals decision in Michigan Bell, supra, requires a different result. In that case, the Court found that it had jurisdiction to review a state court decision interpreting a contract provision within an interconnection agreement. However, the issue in that case involved an interconnection issue concerning whether the competitive local exchange carrier should be permitted to send a facsimile to order resold services. Ordering is indeed an interconnection issue. ABS arrangements between providers are not. There is no indication in that order that the Commission should be required to interpret and enforce every provision of an interconnection agreement, even if it is not an interconnection issue or an issue related to a regulated service, but merely provides for a tangentially related business

arrangement. The Commission similarly rejects Sage's reliance on Verizon Md, Inc v Public Service Commn of Md, 535 US 635 (2002) for the same proposition.³

Finally, the Commission rejects Sage's argument that ABS is in fact a regulated service pursuant to Sections 102(s) and 317⁴ of the MTA. Section 102(s) defines operator service as:

“a telecommunication service that includes automatic or live assistance to a person to arrange for completion and billing of a telephone call originating within this state that is specified by the caller through a method other than 1 of the following:

- (i) Automatic completion with billing to the telephone from which the call originated.
- (ii) Completion through an access code or a proprietary account number used by the person, with billing to an account previously established with the provider by the person.
- (iii) Completion in association with directory assistance services.

MCL 484.2102(s).

Section 317 provides that the Commission shall adopt operating requirements for operator service providers and lists four categories of requirements that must be included in those requirements. None of those categories touch upon the financial responsibility for ABS between providers. The Commission finds no support in the cited sections for a determination that ABS arrangements between providers are a regulated matter or that the Commission has jurisdiction over those arrangements.

Therefore, the Commission concludes that the ALJ correctly reasoned that the Commission is without authority to resolve the issues raised in the complaint. Her recommendation that the complaint be dismissed should be adopted.

³The portion of this decision quoted in Sage's exceptions formed part of the United States Supreme Court's determination that it had jurisdiction to review a state commission decision that involved a federal question. In the Commission's view, that case is wholly inapposite to the present one.

⁴MCL 484.2317.

Finally, the Commission rejects Sage's argument that a dismissal with prejudice would preclude Sage from obtaining relief in any other forum. A dismissal with prejudice merely prevents Sage from again bringing the present complaint before this Commission. It does not prevent Sage from either filing an appeal to an appropriate court or seeking redress in a court of competent jurisdiction to resolve the dispute.

Leave to Appeal

Given the Commission's finding that it does not have jurisdiction to resolve the issues in this complaint, CLECA's application for leave to appeal the ALJ's rejection of CLECA's petition to intervene is 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, 1999 AC, R 460.17101 et seq.
- b. The complaint should be dismissed with prejudice.
- c. CLECA's application for leave to appeal should be denied as moot.

THEREFORE, IT IS ORDERED that:

- A. The complaint filed by Sage Telecom, Inc., against SBC Michigan is dismissed with prejudice.
- B. The application for leave to appeal filed by the Competitive Local Exchange Carriers Association is denied as moot.

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/ J. Peter Lark

Chair

(S E A L)

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its action of November 25, 2003.

/s/ Robert W. Kehres

Its Acting Executive Secretary

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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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Commissioner

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By its action of November 25, 2003.

Its Acting Executive Secretary

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Suggested Minute:

“Adopt and issue order dated November 25, 2003 dismissing the complaint filed by Sage Telecom, Inc., against SBC Michigan, and denying the application for leave to appeal filed by the Competitive Local Exchange Carriers Association, as set forth in the order.”