

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of the)	
TELECOMMUNICATIONS ASSOCIATION OF)	
MICHIGAN for the initiation of a proceeding to)	Case No. U-11899
address the need for a Michigan universal service)	
mechanism and related matters.)	
_____)	

At the September 28, 1999 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

On February 5, 1999, the Telecommunications Association of Michigan (TAM) filed an application on behalf of its members, other than Ameritech Michigan and GTE North Incorporated, requesting that the Commission initiate a proceeding to investigate and determine the need for a state universal service mechanism, to address the Commission's statutory authority to preserve universal service in Michigan, to prescribe the scope of a state universal service plan, to determine an equitable and nondiscriminatory basis for funding such a plan, and to address necessary related matters. On February 12, 1999, TAM filed a memorandum of law in support of its application.

TAM proposed a benchmark rate of \$16.55 per month (inclusive of the charge for touchtone service and the intrastate subscriber line charge) for residential and single-line business service and a benchmark rate of \$24.84 (inclusive of the charge for touchtone service and the intrastate subscriber line charge) for multi-line business service. TAM proposed that a state universal service mechanism fund the difference between the revenue produced by charging the comparability benchmark and the total service long run incremental cost (TSLRIC) of providing basic local exchange service (including common costs and adjusted for revenues from some other sources that support universal service).

On February 26, 1999, the Commission issued an order soliciting comments on its statutory authority under the Michigan Telecommunications Act (the Act), MCL 484.2101 et seq.; MSA 22.1469(101) et seq., to establish a state universal service mechanism.

By March 15, 1999, GTE North Incorporated and Contel of the South, Inc. (collectively, GTE), AirTouch Communications, Inc. (AirTouch), AT&T Communications of Michigan, Inc. (AT&T), Ameritech Michigan, MCI WorldCom, the Commission Staff (Staff), and Attorney General Jennifer M. Granholm (Attorney General) filed briefs addressing the Commission's statutory authority. After reading the briefs, the Commission concluded that they provided a sufficient basis for the proceeding to continue. The Commission's Executive Secretary therefore issued a notice of hearing on May 4, 1999.

A prehearing conference was held on May 17, 1999 before Administrative Law Judge George Schankler (ALJ). Among other things, the ALJ granted petitions for leave to intervene filed by the Attorney General, GTE, MCI WorldCom, BRE Communications, L.L.C. Ameritech Michigan, MediaOne Telecommunications of Michigan, Inc., Sprint Communications Company L.P. (Sprint), the

Michigan Pay Telephone Association (MPTA), AirTouch, and AT&T. The ALJ also set a schedule, which he later extended due to TAM's failure to comply with discovery orders.

On May 28, 1999, TAM filed testimony in support of the application. On June 29, 1999, the Staff, Sprint, AT&T, MCI WorldCom, GTE, and Ameritech Michigan filed testimony. On July 14, 1999, TAM, AT&T, GTE, and Ameritech Michigan filed rebuttal testimony. On July 22, 1999, the parties agreed to bind in the testimony without cross-examination. The record consists of 564 pages of transcript and 53 exhibits.

On August 18, 1999, AirTouch, Ameritech Michigan, AT&T, the Attorney General, GTE, MCI WorldCom, the MPTA, Sprint, the Staff and TAM filed briefs. By September 2, 1999, AirTouch, Ameritech Michigan, AT&T, the Attorney General, MCI WorldCom, the Staff, TAM, and GTE filed reply briefs.

Discussion

As discussed below, the Commission concludes that there are procedural, evidentiary, policy, and jurisdictional impediments to establishing a state universal service mechanism in this proceeding.

If nothing else, the record demonstrates the complexity of the issues surrounding a state universal service mechanism. The parties disagree about the services that should be supported, the providers that should be eligible to receive support, the methodology for determining the cost of the supported services, the benchmark that should be used, the revenues to be considered in determining whether support is required, the degree of geographic deaveraging that should be permitted or required, the providers, the services, and the revenues against which the funding should be assessed, the mechanism for providers to recover their assessments from end use customers, and the process for administering the fund. The

divergence of views continues through the myriad issues that must be resolved if Michigan is to have a state universal service mechanism. The Commission does not believe that this proceeding, conducted as a contested case, provides adequate time to do justice to the complexity and importance of the issues.

Furthermore, TAM takes the position that the Commission need not know the potential amount of the needed funding before resolving any of the issues raised by the application. The Commission does not agree. The potential funding need is relevant to both whether a mechanism should be created and its terms. The parties put forth widely divergent views about the funding need. TAM initially filed data for only six of its members, and resisted discovery related to the other members. It ultimately provided data supporting a position that 18 of its members need funding that exceeds a total of \$14 million per year. Tr. 240. Others characterize TAM's presentation as suggesting that the need might be \$20 million per year. Tr. 386. TAM does not know what the funding need would be if its proposal were available to Ameritech Michigan and GTE. Exhibit I-48. GTE says that it might need as much as \$135 million per year. Tr. 432-433. If the same mechanism were extended to Ameritech Michigan's customers, the yearly total might exceed \$200 million. Tr. 299. The effect on customers whose rates are not eligible for universal service support might be significant. Other parties, using different assumptions, conclude that there is no need at all for a fund. Tr. 373-375, 521, 524.

The Commission concludes that it is not possible to determine on this record the potential funding need. Even the most basic question—what will the rates of the local exchange companies (LECs) be after they comply with the restructuring requirement of the Act, MCL 484.2304a; MSA 22.1469(304a)—cannot be answered because the members of TAM have not completed the restructuring of their rates and some of the TSLRIC studies that have been approved are several years old and may therefore not

provide an adequate basis for judging the need for a universal service mechanism. Tr. 548, 551; Exhibits I-33 and S-53. Further, the need depends on the benchmark. TAM proposes a residential benchmark of \$16.55 per month¹, but the average rate in the state is \$18.50, Exhibit A-18, and consequently some customers are already paying more than the proposed benchmark. In fact, one TAM member already charges \$19.55 per month. Tr. 198. Even then, the funding need depends on policy and legal determinations such as whether rural rates can or should be permitted to be higher than urban rates and, if so, by how much, and whether the benchmark should be based on an average rate or the highest rate that some customers are paying without apparently adversely affecting universal service. The need determination is further complicated because TAM asserts the right for each company to use a methodology of its choice to determine its own need and because the Federal Communications Commission is more than a year away from addressing federal high cost funds for rural companies.

In addition, TAM's and GTE's proposals are not consistent with the policies of the Act. TAM proposes that universal service funds be made available to each LEC based on the difference between the benchmark rate and the LEC's TSLRIC and that as each LEC's revenues and costs change, its universal service funding change correspondingly. Tr. 198. In fact, the filing of TAM's application appears to have been significantly motivated by the dissolution of the Michigan Exchange Carriers Association (MECA) access pool and the approaching end of the temporary dial equipment minutes (DEM) weighting fund, both of which have decreased some LECs' revenues. In essence, TAM proposes a mechanism that appears to protect its members' revenue streams rather than assuring universal service by determining a benchmark rate for rural customers that is comparable to urban rates and affordable. It is true that

¹Its members' rates are already at or above the benchmark.

TAM's proposal is not designed explicitly to replace lost DEM and pool revenues (because those revenue reductions are not part of the funding formula), but the effect of its proposal is to increase revenues above what they would otherwise be. For some members of TAM, the effect may be a net increase in revenues, and the effect collectively for TAM may be an increase. The record does not provide an adequate basis to justify such increases.

GTE proposes that the Commission identify all implicit support for basic local exchange service in the rates for switched access, toll, and vertical services (which it quantifies for itself to be \$135 million annually) and remove that support from those services on a dollar-for-dollar basis by increasing rates for basic local exchange service or replacing the support with funding from the universal service mechanism, or a combination of the two. Like TAM, GTE proposes a mechanism that is designed to protect its revenue stream rather than creating a mechanism no more costly than needed to preserve universal service.

The Commission does not agree that the Act embodies any policy that the Commission is to protect and make whole providers who find that their revenues or costs have changed. To the contrary, the Act embodies policies that competition should be encouraged as the means of setting prices and that the Commission is not to set prices based on embedded cost using rate of return regulation. In fact, the Act does not grant the Commission any plenary ratemaking power. Furthermore, the Act requires that access rates not exceed the federal rates. MCL 484.2310(2); MSA 22.1469(310)(2). It is not consistent with the language or purpose of the Act to conclude that the Commission is authorized to assist the providers in evading the effect of mandated reductions in access rates by increasing basic local exchange rates or creating a universal service mechanism to replace lost revenues. Likewise, it is not

consistent with the language or purpose of the Act to conclude that the Commission is to assume that current revenues are to be protected against any prospective reduction, particularly when the Commission is not authorized to consider whether current rates yield rates of return above market levels, or that the Commission is to identify and make explicit all implicit support for basic local exchange service. All LECs must comply with the provisions of the Act, which specify when and how they may (and in the case of restructuring, must) increase rates. The proposals of TAM and GTE are at odds with the policies embodied in the Act and should be rejected for that reason.

Furthermore, TAM's proposal is anticompetitive and will block the development of competition. TAM proposes that each LEC recover from its customers the benchmark rate and recover from the universal service fund the difference between that rate and the LEC's TSLRIC. If a competitor with a lower cost (although still above the benchmark rate) were to try to compete with the incumbent, it could not charge less than the benchmark rate and recover its costs because the sum of its lower rate and universal service support would be less than its TSLRIC. Tr. 320. Essentially, TAM's proposal prevents all rate competition (except by a competitor whose TSLRIC is less than the benchmark rate, a scenario that has not developed thus far). Under TAM's proposal, every LEC would have to charge the same benchmark rate, and then with its individually determined universal service support, would just recover its TSLRIC of providing basic local exchange service. A proposal that stifles competition by requiring all LECs to charge the same rate cannot be described as consistent with the policies of the Act.

Finally, the Commission concludes that it does not have statutory authority to create a universal service mechanism. Section 201 of the Act states: "In administering this act, the commission shall be limited to the powers and duties prescribed by this act." MCL 484.2201(2); MSA 22.1469(201)(2).

After TAM filed its application, the Commission sought comments on its statutory authority. After reviewing those filings, the Commission considered the question of its authority sufficiently open to permit the case to continue. On June 29, 1999, the Michigan Supreme Court issued an opinion in an appeal of the Commission's authority to order an electric retail wheeling experiment. The Court's opinion emphasizes that it "strictly construes the statutes which confer power on the [Commission]." Consumers Power Co v Public Service Comm, 460 Mich 148, 155; 596 NW2d 126 (1999). The Commission concludes that the creation of a state universal service mechanism is not a power or duty prescribed by the Act.

TAM argues that Section 101(2) of the Act, MCL 484.2101(2); MSA 22.1469(101)(2), (which lists among the purposes of the Act ensuring that every person has access to basic residential telecommunication service and improving the opportunities for economic development) and Section 202 of the Act, MCL 484.2202; MSA 22.1469(202), (which requires the Commission to preserve the provision of high quality basic local exchange service) authorize the Commission to implement a state universal service mechanism. Further, it argues that Section 205(2), MCL 484.2205(2); MSA 22.1469(205)(2), (which authorizes the Commission to require changes in how a telecommunication service is provided when the general availability of a regulated service is threatened or the conditions for offering a service are adverse to the public interest) grants the Commission authority to act to prevent rural rates from rising to a level that would threaten the availability and condition of that service. It also argues that Section 254(f) of the federal Telecommunications Act of 1996, 47 USC 254(f), empowers the Commission to act to preserve universal service.

The Commission does not dispute the importance of policies stated in the Act, but cannot agree that the Legislature conferred broad jurisdiction on the Commission when it placed statements of policy in the Act or that it thereby conferred jurisdiction for the Commission to take any and all actions that might promote those policies. The Legislature has considered the possibility that “a state universal service fund [might be needed] to promote and maintain basic local exchange service in high cost rural areas at affordable rates.” MCL 484.2202(e); MSA 22.1469(202)(e). That section therefore created a task force to report to the Legislature and the Governor on universal service, presumably so that they could consider whether to establish a fund. Section 202(e) therefore casts doubt on any argument that, independent of the task force report and any action or inaction by the Legislature and Governor, the Act also confers authority on the Commission to create a state universal service fund. There might be circumstances in which the Commission could take action under Section 205(2) to promote universal service, but TAM has proposed a mechanism that, in major respects as discussed above, is inconsistent with the policies, if not the language, of the Act. As for the federal act, Section 254(f) is not a grant of authority but a statement of Congressional intent not to preempt states in their efforts to maintain universal service.

Leave to Appeal

On May 24, 1999, Ameritech Michigan filed an application for leave to appeal, arguing that the ALJ should not have determined that this proceeding is subject to the time constraints in Section 203 of the Act, MCL 484.2203; MSA 22.1469(203), and should not have determined that the time must be counted from the date of the filing of the initial application. It argues that the time constraints cannot apply

until TAM files a complete application, May 28, 1999. In the alternative, it proposes that the Commission treat this proceeding as an investigation, which would not be subject to the time constraints.

On May 24, 1999, GTE filed a similar application for leave to appeal, arguing that the time constraints do not apply until TAM files its plan and supporting testimony. It also appealed the implication of the ALJ's ruling that this proceeding was to examine only TAM's proposal.

TAM and MCI WorldCom filed responses on May 27, 1999.

The Commission did not previously grant the applications for leave to appeal because it had concluded that this case should not be delayed. With the issuance of this final order, the applications for leave to appeal become moot. Ameritech Michigan has prevailed on its position that the Commission should not establish a universal service fund, and GTE was permitted to present and support its alternative proposal.

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 AACCS, R 460.17101 et seq.

b. TAM's application for the creation of a state universal service mechanism should be dismissed.

THEREFORE, IT IS ORDERED that the application filed by the Telecommunications Association of Michigan for the creation of a state universal service mechanism is dismissed with prejudice.

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 September 28, 1999.

/s/ Dorothy Wideman
Its Executive Secretary

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Suggested Minute:

“Adopt and issue order dated September 28, 1999 dismissing the application filed by the Telecommunications Association of Michigan for the creation of a state universal service mechanism, as set forth in the order.”