

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of **LUCRE, INC.**,)
against **MICHIGAN BELL TELEPHONE**)
COMPANY, d/b/a SBC MICHIGAN, to resolve)
a dispute over a refusal to allow adoption of an)
interconnection agreement, a refusal to pay certain)
charges, and improper charges imposed.)
_____)

Case No. U-13785

At the June 29, 2004 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

ORDER DENYING PETITION FOR REHEARING AND REOPENING

On December 18, 2003, the Commission issued an order dismissing a complaint filed on May 6, 2003 by Lucre, Inc., against SBC Michigan (SBC) alleging, among other things, that SBC breached their July 17, 1997 interconnection agreement by refusing to compensate Lucre for certain services required to deliver SBC-originating traffic to the Lucre network. On January 16, 2004, Lucre filed a petition for rehearing and reopening of the proceeding. On February 6, 2004, SBC filed a response to Lucre’s petition.¹

Rule 403 of the Commission’s Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence,

¹The additional pleadings filed by Lucre and SBC on February 23, 2004 and March 10, 2004, respectively, have not been considered because the Commission’s rules do not provide for the filing of such pleadings.

facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant rehearing.

Lucre alleges that the Commission committed legal error in failing to follow the plain meaning of the July 17, 1997 interconnection agreement. According to Lucre, had the Commission simply abided by the plain meaning of the contract language, the Commission would never have had to consider the course of dealing between the parties. In raising this argument on rehearing, Lucre contends that the Commission's analysis and resolution of the Lucre/SBC dispute created an unintended consequence – allowing SBC to convey the impression that carriers do not charge for the services at issue when, in fact, SBC itself charges for the disputed services.

Lucre also asserts that the Commission disregarded the Michigan law of contracts in reaching its determination. According to Lucre, Section 252 of the federal Telecommunications Act of 1996, 47 USC 151 et seq., requires both federal courts and state agencies to abide by state law in interpreting interconnection agreements. Lucre insists that the Commission chose to ignore the plain meaning of the Lucre/SBC interconnection agreement and never bothered to address Lucre's argument that the interconnection agreement plainly and unambiguously requires SBC to compensate Lucre for Lucre's provision of certain services to SBC for termination of SBC-originating inbound traffic.

Lucre argues that the Commission adopted SBC's tortured arguments, which it maintains selectively emphasizes some words and provisions over others, rather than upholding the plain meaning of the interconnection agreement. Further, although acknowledging that Michigan law

recognizes course of performance as an aid to contract interpretation, citing Ditzik v Schaeffer Lumber Co, 139 Mich App 81, 89; 360 NW2d 876 (1984), Lucre insists that the Commission erred because the clear and unambiguous language of a contract cannot be altered by a prior course of performance. Because the words “facilities” and “services” are used throughout the interconnection agreement according to their common meaning without definition, Lucre asserts that it follows that no course of performance is permissible as a guide to construction. For this reason, Lucre insists that relying on Lucre’s failure to bill SBC is contrary to law and compounds the legal error committed by the Commission of ignoring the plain meaning of the interconnection agreement.

Next, Lucre argues that the Commission has no choice but to reopen this proceeding to allow Lucre to submit additional proofs regarding SBC’s billing practices with regard to multiplexing. Lucre insists that the consideration of such information is necessary to fully develop the facts relating to the actual course of the parties’ billing practices. Although maintaining that the Commission should never have considered SBC’s course of performance argument, Lucre now contends that additional evidence is crucial to a full understanding of SBC’s course of performance argument. According to Lucre, the absence of this additional evidence has allowed SBC to be disingenuous with regard to the rationale underlying Lucre’s failure to invoice SBC before February 6, 2003 for the services at issue in this proceeding. Lucre insists that the new evidence that it seeks to admit will prove that (1) Lucre was a new competitive local exchange carrier during this period, (2) Lucre was receiving multiple invoices from SBC during this period, (3) during late 2002 and early 2003, Lucre audited SBC’s invoices and determined that SBC had been charging Lucre for multiplexing, that such charges were proper, and that Lucre had not been charging for these services itself, (4) that Lucre merely began to comply with the established

course of dealing by submitting the disputed invoice, (5) that SBC charged, and continues to charge, Lucre for multiplexing, (6) that such charges are greater than SBC had previously indicated to Lucre, and (7) that multiplexing charges are in no way limited to 9-1-1 calls.

Lucre submits that reopening the record will allow the Commission, if it decides to continue to rely on the parties' performances under the contract, to make its determinations based on a complete record. According to Lucre, the expanded record will show that the established course of dealing consisted of SBC charging Lucre regularly for multiplexing services.

In response, SBC maintains that Lucre's petition for rehearing or to reopen the record should be dismissed. According to SBC, the issue of contract interpretation was properly resolved by the Commission. SBC asserts that both the administrative law judge (ALJ) and the Commission correctly concluded that the underlying philosophy of the interconnection agreement requires both parties to be financially responsible for building out their facilities to the SONET² to support both the origination and termination of both carriers' traffic. SBC maintains that it is responsible for providing the necessary facilities (including DS1 services and multiplexing) for the delivery of all SBC-originated traffic to its end of the SONET, and that once SBC-originated traffic is delivered to Lucre at the SONET, Lucre is then responsible for all facilities (including DS1 services and multiplexing) for terminating this traffic. SBC insists that the same is true for Lucre-originated traffic.

SBC contends that Lucre is simply dissatisfied with the outcome of the proceeding and seeks to reargue its original arguments in hopes of a different result. SBC asserts that Lucre has raised no new arguments. According to SBC, the Commission previously considered and rejected

²SONET is an acronym for Synchronous Optical Network, a standard protocol for transmitting calls over fiber optic cable on one network or transmitting calls over fiber optic cable between two different networks. A SONET passes light back and forth over fiber cable in lockstep with a master clock allowing for transmissions that arrive and depart to be neither lost nor jumbled.

Lucre's arguments about Michigan law and the importance of the plain meaning of the interconnection agreement in its December 18, 2003 order. Indeed, SBC quoted four passages from the December 18, 2003 order to refute Lucre's contention that the Commission "simply never bothered to address Lucre's arguments." Lucre's petition for rehearing, p. 4. SBC insists that Lucre's dissatisfaction stems not from the Commission's failure to consider its arguments, but from the fact that the Commission determined Lucre's arguments lacked merit. SBC points out that mere dissatisfaction with the Commission's decision is not a basis for rehearing under Rule 403.

SBC also stresses that the Commission's rejection of Lucre's complaint was not based solely on Lucre's delay in sending out the February 6, 2003 invoice, but involved three other grounds, each of which, standing alone, validated the Commission's decision. These grounds include the Commission's holdings that (1) the language of Section 3.2.4 of the interconnection agreement supports the conclusion that both parties are responsible for the services provided on its side of the SONET ring, (2) the parties intended "facilities" also to include the services the facility performs, and (3) Lucre's interpretation of Section 3.2.4 renders Section 3.9.1 of the interconnection agreement surplus verbiage.

Finally, citing Rule 401, R 460.17401, SBC argues that reopening the record for the submission of additional proofs would not be appropriate. According to SBC, the window for reopening the record has closed. Additionally, SBC maintains that, if Lucre wanted to place information in the record explaining the reasons why it waited four years to send an invoice to SBC, then it should have done so at the time that it filed its complaint and prefiled testimony.

The Commission finds that Lucre's petition for rehearing should be rejected. The ALJ who presided over the hearing recommended dismissal of Lucre's complaint. The Commission agreed.

In so doing, the Commission rejected the notion that the language within the interconnection agreement plainly and unambiguously resolved the dispute. Rather, the Commission attempted to discern the intent of the parties by resorting to the rules of contract construction. In so doing, the Commission stated:

Neither party has identified specific language in the interconnection agreement that explicitly controls the outcome of this proceeding. Rather, their positions are constructed on various provisions that arguably disclose the intent to the parties with respect to whether SBC should be found to be liable to Lucre for services performed in delivering SBC-originating traffic to Lucre's network. Because Lucre is the complainant, it bears the burden of persuasion on this issue. The ALJ found that Lucre failed to meet this burden. For the reasons set forth in this order, the Commission agrees with the ALJ.

Order, Case No. U-13785, p. 5.

The Commission noted that the language of Section 3.2.4 of the interconnection agreement was more consistent with the position that financial responsibility for the services performed on each side of the SONET ring should be assigned to the party responsible for the physical facilities and logical trunking necessary on its side of the SONET ring.

The Commission also found that Lucre's claim that it simply overlooked billing SBC for nearly four years strains credibility in light of the significant amount involved. Indeed, the Commission found that the administration of the interconnection agreement by the parties for such an extended period of time could be used to interpret the meaning of Section 3.2.4.

In addition, the Commission found that a reference in Section 3.2.4 to Item V of the Pricing Schedule, a list of facilities and services, supported SBC's position because it included services that Lucre claimed were the responsibility of SBC. The ALJ had stated that this provision indicated that the parties intended to include services within the term physical facilities.

Finally, the Commission found that acceptance of Lucre's position regarding Section 3.2.4 would render Section 3.9.1 surplus verbiage. Instead, the Commission agreed with the ALJ's

assessment that Section 3.2.4 should be viewed as expressing the intent of the parties that each party is responsible for the costs incurred on its side of the joint SONET ring, with Section 3.9.1 stating an exception that obligates Lucre to pay for multiplexing services for 9-1-1 traffic.

The Commission also finds that Lucre's request to reopen the record should be denied. Lucre should have realized at the time that it filed its complaint that the explanation of its failure to bill SBC for nearly four years could have a significant effect on the outcome of this proceeding, particularly where the major dispute centers on an interpretation of the provisions of the interconnection agreement. Lucre could have elaborated on its failure to bill SBC for the disputed services in a timely manner at the time that it filed the complaint. It did not do so. The Commission found that Lucre's attempt to explain away its nearly four year failure to bill SBC for these services as a simple oversight strained credulity. Nothing in Lucre's January 16, 2004 petition convinces the Commission that this proceeding should be reopened for the submission of additional evidence.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 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 petition for rehearing and reopening filed by Lucre should be denied.

THEREFORE, IT IS ORDERED that the petition for rehearing and reopening filed by Lucre, Inc., is denied.

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 June 29, 2004.

/s/ Mary Jo Kunkle

Its Executive Secretary

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COMPANY, d/b/a SBC MICHIGAN, to resolve)
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Suggested Minute:

“Adopt and issue order dated June 29, 2004 denying the petition for rehearing and reopening filed by Lucre, Inc., as set forth in the order.”