STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **AT&T COMMUNICATIONS OF MICHIGAN, INC.,** for Commission determination of switched access rates pursuant to Section 310(2) of the Michigan Telecommunications Act, MCL 484.2310.	)	Case No. U-13977
In the matter, on the Commission's own motion, for establishing a policy on switched access rates pursuant to Section 310(2) of the Michigan Telecommunications Act, MCL 484.2310.	)	Case No. U-14175

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

OPINION AND ORDER

On December 9, 2003, AT&T Communications of Michigan, Inc. (AT&T), filed an application pursuant to Sections 204 and 310 of the Michigan Telecommunications Act (MTA), MCL 484.2204 and MCL 484.2310, concerning the rates that SBC Michigan (SBC) charges interexchange carriers for providing them with intrastate toll access service.[1] The application

[1]Although AT&T titled its pleading "Application for Commission Determination of Switched Access Rates Pursuant to MTA Section 310(2)," the case was captioned as a complaint. At the prehearing, it was determined that the case should be captioned as an application, because AT&T is not alleging that SBC has violated any provision of the MTA.

requests that the Commission set intrastate access rates on the basis of SBC's total service long run incremental cost (TSLRIC). SBC's current intrastate access rates are the same as, or "mirror," the usage-based components of its interstate access rates that it files with the Federal Communications Commission (FCC).

AT&T, SBC, and the Commission Staff participated in a prehearing conference held on January 15, 2004, conducted by Administrative Law Judge Barbara A. Stump (ALJ).

On February 6, 2004, SBC filed a motion to compel discovery, which was denied on February 13, 2004. On February 18, 2004, SBC filed an application for leave to appeal this ruling.

Cross-examination of 5 witnesses was conducted on April 6 and 7, 2004 and 30 exhibits were admitted in the record.[2]

AT&T and SBC filed briefs and reply briefs on April 19 and 26, 2004, respectively.

On May 19, 2004, the ALJ issued a Proposal for Decision (PFD), relying on Section 310 of the MTA, which provides in part:

> (1) Except as provided by this act, the commission shall not review or set the rates for toll access services.
>
> (2) A provider of toll access services shall set the rates for toll access services. Access service rates and charges set by a provider that exceed the rates allowed for the same interstate services by the federal government are not just and reasonable. Providers may agree to a rate that is less than the rate allowed by the federal government. If the providers cannot agree on a rate, a provider may apply to the commission under section 204.

MCL 484.2310(1), (2).

In the PFD, the ALJ noted that little had changed since the Commission issued its August 17, 2000 order in Case No. U-12287, where the Commission declined to abandon its long-standing policy of allowing intrastate access rates to mirror FCC interstate rates and denied AT&T's request

[2]Although 32 exhibits were offered, the ALJ denied admission of Exhibits R-16 and R-18.

to set intrastate access rates on the basis of SBC's TSLRIC. The ALJ found that AT&T's current application for the same relief was premature and recommended that it be dismissed. In reaching this conclusion, the ALJ found that AT&T did not present sufficient evidence to warrant a departure from the Commission's findings in Case No. U-12287.

Three months prior to the issuance of the Commission's order in Case No. U-12287, the ALJ pointed out, the FCC issued an order adopting a proposal for access charge reform by the Coalition for Affordable Local and Long Distance Service (CALLS).[3] In denying AT&T's request in 2000, she reasoned, the Commission found that it would be imprudent to abandon its long-standing mirroring policy, particularly because access charge relief appeared imminent in view of the recent CALLS order. The 2000 CALLS order, she noted, is effective until July 2005 and the FCC has recently issued a notice of proposed rulemaking (NPRM)[4] to garner input regarding post-CALLS access rates. Because the Commission has historically declined requests to reduce switched access rates when there was ongoing regulatory activity at either the state or federal level[5] and because

[3]Access Charge Reform, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, and Eleventh Report and Order in CC Docket No. 96-46 (May 31, 2000).

[4]See, In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92 (April 27, 2001).

[5]See, the December 7, 1995 order in Case No. U-10852 where the Commission declined AT&T's request because the MTA had been amended while the case was pending, and the July 31, 1997 order in Case No. U-11366, where the Commission denied a similar request filed by MCI Telecommunications Corporation, currently known as MCI WorldCom Network Services, Inc. (MCI).

the FCC is again reviewing access rates in anticipation of the expiration of the CALLS order, the ALJ recommended that the Commission decline AT&T's application at this time.[6]

Finally, the ALJ said that the evidence failed to show that the mirroring of federal charges had produced rates that are unjust or unreasonable, or rates that were an impediment to competition. In fact, she concluded, the evidence showed that SBC's access rates are lower than the access rates charged by MCI or Sprint[7] and that the market in recent years had become more competitive, offering consumers more alternatives for long distance service.

AT&T filed exceptions to the PFD on May 27, 2004, and an errata to its exceptions on June 1, 2004. SBC filed a reply to exceptions on June 4, 2004.

In its exceptions, AT&T argues that this is not the sort of case where dismissal is appropriate, nor should action on the application be withheld until it can prove that SBC's rates are having an anti-competitive effect. Rather, it claims jurisdiction has been properly placed with the Commission because AT&T and SBC could not agree on access rates, and, therefore, the Commission must undertake an evaluation of the facts and set access rates at a level that will promote competition in Michigan.

SBC disagrees. AT&T, SBC maintains, has failed to carry its burden of proof that mirroring is wrong. Further, SBC maintains, AT&T is arguing semantics because dismissal of the application has the same legal effect as denial of relief. Further, SBC maintains, that just because

[6]The ALJ noted that in its comments to the FCC in support of the CALLS proposal, AT&T indicated the CALLS plan "would remove the uncertainty and unpredictability of the current regulatory regime for the next five years . . .. [and] will allow carriers to focus on competition, not on litigation." See, Exhibit R-28, p. 2.

[7]Sprint Communications Company Limited Partnership.

Commission jurisdiction has been properly invoked,[8] it does not follow that the Commission is legally required to grant the relief that AT&T has requested.

AT&T further complains that the ALJ erred in granting SBC's motion to strike evidence regarding the potential effect that above cost rates may have on competition. AT&T disagrees with the ALJ that testimony regarding a potential price squeeze was speculative. AT&T requests that the Commission reverse the ALJ and consider the proffered testimony that supports its position that access rates be set using forward-looking cost studies to eliminate the opportunity for an access provider to use access charges for anti-competitive purposes. AT&T opines that this was the type of evidence the FCC considered in setting prices for unbundled network elements (UNEs).

SBC disagrees and urges the Commission to uphold the ALJ and not consider the proffered testimony regarding possible future competitive effects in maintaining access rates at current levels. SBC asserts that speculative expert testimony should be excluded under MRE 702, because an expert's opinion must be based on facts in evidence, not speculation or conjecture. See, Karbel v Comerica Bank, 247 Mich App 90, 98-99; 635 NW2d 69 (2001) and Skinner v Square D Co, 445 Mich 153, 164-165, 173; 516 NW2d 475 (1994).

SBC further notes that MRE 703 requires that evidence upon which an expert bases his testimony must be in the record. Indeed, SBC continues, the Commission applied this very principle in its October 29, 1997 order in Case No. U-11453, finding that the speculative testimony "does not present evidence that is helpful to the issues raised in this case. Rather the testimony is more in the nature of arguments concerning the possible anticompetitive effects of granting Consumers'

[8]SBC did, however, preserve for appeal an argument rejected by the Commission in Case No. U-12287, that the Commission does not have the authority under MTA 310(2) to mandate reductions below mirrored levels, and this case, if considered at all, should be considered in the context of an industry-wide generic proceeding.

request." See, Order, p. 16. SBC concludes that the ALJ did not err when she allowed testimony regarding current anticompetitive effects but denied testimony relating to possible future anticompetitive effects, including the theoretical price squeeze. However, SBC points out that the ALJ denied its discovery request for the facts to support AT&T's proffered testimony, so if the proffered testimony is considered, its discovery request should be granted, as well.

In addition, AT&T alleges that the ALJ erred in concluding that pricing access rates above the forward-looking cost of access does not give SBC a competitive advantage. AT&T contends that SBC's competitive advantage cannot be disputed based upon generally recognized economic principles, citing the reasons advanced by the FCC for adopting cost-based pricing for UNEs. AT&T maintains that SBC's access rates are above cost and the difference between the economic cost incurred by SBC and the access rate it charges to AT&T creates a cost burden on AT&T and a profit cushion to SBC.

SBC objects to this reasoning and maintains that SBC's long distance affiliate purchases long distance services for resale from a third party that was charged the same access rates as AT&T. SBC maintains that AT&T offers no evidence that SBC enjoys a competitive advantage now or will in the future. Surely, SBC concludes, that if pricing access rates above TSLRIC causes competitive harm, there would be some evidence of this harm from the past ten years. Conversely, SBC notes, all business segments at issue in this proceeding have become substantially more competitive since the Commission considered this issue in Case No. U-12287.

Finally, AT&T claims that the ALJ erroneously concluded that AT&T's application was premature because the CALLS plan is still in effect and further FCC action is likely. AT&T complains that Michigan consumers have been denied the benefits of economically efficient access

prices for too long and the Commission currently has the information available in the approved TSLRIC studies to set prices at economically efficient levels based upon these studies.

SBC encourages the Commission to adopt the reasoning in the PFD and dismiss the application. The CALLS plan and mirroring, SBC says, led to significant intrastate access rate reductions. SBC agrees with the Commission's rationale in Case No. U-12287 wherein it stated, "Even if TSLRIC were to be viewed as a cost benchmark for access services, the post-CALLS mirrored rates are well within a zone of reasonableness and are not so far removed from TSLRIC levels as to pose a potential impediment to competition." See, Order in Case No. U-12287, p. 14. In 2000, SBC points out, the Commission knew that SBC's intrastate access rates were above TSLRIC but determined they were still reasonable. Further, SBC continues, the Commission has never supported a blanket policy that prices for different services that share underlying components must be identical.

SBC says that the only thing that has changed since 2000 is that SBC's affiliate now participates in the interLATA toll market, however AT&T has advanced no evidence, only economic theories, that this might someday, somehow give SBC an anticompetitive advantage. SBC concludes that the advantages of mirroring and the reasons supporting the Commission's order in Case No. U-12287 are as strong today, or stronger, than they were in 2000 when Case No. U-12287 was decided.

The facts, SBC maintains, belie AT&T's speculation about future possible competitive harm, including that (1) SBC's intrastate access rates are among the lowest in the state, (2) since 1993 SBC intrastate access rates have been reduced by more than 46%, bringing total Michigan intrastate access reductions to $570 million, (3) SBC's market share has fallen from 81% in 1999 to

62.9%[9] in 2002, (4) Michigan consumers have far more choices since 2000, including 200 other local exchange carriers, wireless phones, or voice over Internet protocol, (5) the long distance market remains competitive even with SBC's entry and AT&T admits its long distance market is profitable, and (6) the FCC's NPRM for developing the next phase of access reforms should be in place prior to the expiration of the CALLS plan in July 2005, which will likely result in further reductions in access rates. SBC concludes that since 2000, when the Commission last denied AT&T's request to abandon mirroring, the local exchange market has become extremely competitive, thereby undermining any claim that its access rates are somehow anticompetitive or justifying a departure from the Commission's long-standing mirroring policy.

The Commission agrees with the findings of the ALJ that AT&T failed to meet its burden of proof and its application should be dismissed. However, the Commission finds that it is time to reconsider its long-standing mirroring policy and move toward forward-looking costs as a basis for determining switched access rates, consistent with Section 310 of the MTA. Because the CALLS plan is only in effect for another year and the FCC has issued a NPRM for consideration of access rate reform after the CALLS plan expires, the Commission is persuaded that its mirroring policy should be examined in an industry-wide generic proceeding. Toward that end, the Commission has opened Case No. U-14175 for the purpose of establishing a policy on intrastate switched access rates. Interested parties are directed to submit comments and reply comments by September 17, 2004, and October 1, 2004, respectively, in Case No. U-14175.

The Commission has selected this case for participation in its electronic filings program. All documents filed in this case must be submitted in both paper and electronic versions. An original

[9]Or even lower according to the Michigan Public Service Commission Staff Report, Results of 5th Competitive Market Conditions Survey, May 2004, available at http://www.michigan.gov/mpsc.

and four paper copies and an electronic copy in the portable document format (PDF) should be filed with the Commission. Requirements for filing electronic documents can be found in the Commission's Electronic Filings Users Manual at: http://efile.mpsc.cis.state.mi.us/efile/usersmanual.pdf . You may contact the Commission Staff at (800) 292-9555, (517) 241-6170, or by E-mail at mpsc.efile.cases@michigan.gov with any questions and/or to obtain access privileges prior to filing.

Because the Commission is dismissing AT&T's application, SBC's pending motion is moot, and, therefore, its application for leave to appeal the denial of its discovery request is likewise dismissed.

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. AT&T's application should be dismissed.

c. SBC's application for leave to appeal should be dismissed.

d. A generic proceeding to establish a policy on switched access rates should be commenced.

THEREFORE, IT IS ORDERED that:

A. The December 9, 2003 application filed by AT&T Communications of Michigan, Inc., is dismissed.

B . SBC Michigan's February 18, 2004 application for leave to appeal the denial of its discovery request is dismissed.

C. Consistent with this order, an industry-wide proceeding to establish a policy on switched access rates is commenced.

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

C. Consistent with this order, an industry-wide proceeding to establish a policy on switched access rates is commenced.

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MICHIGAN PUBLIC SERVICE COMMISSION

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Chair

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Commissioner

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By its action of June 29, 2004.

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Its Executive Secretary

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Suggested Minute:

"Adopt and issue order dated June 29, 2004 dismissing the application filed by AT&T Communications of Michigan, Inc., and commencing a generic proceeding to establish a policy on switched access rates industry-wide, as set forth in the order."