STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission’s own motion, to investigate Ameritech Michigan’s provision of intraLATA toll service to customers of competing basic local exchange service providers. Case No. U-11525

At the January 8, 1998 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
          Hon. John C. Shea, Commissioner
          Hon. David A. Svanda, Commissioner

ORDER GRANTING LEAVE TO APPEAL

This case began on September 12, 1997 when the Commission issued an order commencing an investigation into Ameritech Michigan’s provision of intraLATA toll service. The Commission did so because of concerns raised by a settlement of a case involving Ameritech Michigan’s refusal to provide intraLATA toll service to customers of competing providers of basic local exchange service. Since the case commenced, Ameritech Michigan has filed testimony and the parties have engaged in extensive discovery.

On November 19, 1997, Ameritech Michigan filed an application for leave to appeal Administrative Law Judge Daniel E. Nickerson, Jr.’s (ALJ) November 7, 1997 order compelling it to provide certain discovery. On November 24, 1997, Ameritech Michigan filed a supplement appealing the ALJ’s November 20, 1997 order compelling it to provide further discovery. On

Rule 337 of the Commission's Rules of Practice and Procedure, 1992 AACS, R 460.17337, establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review; an appellant must establish one of the following conditions before the Commission will grant review:

1. A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.

2. A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.

If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate.

The Commission concludes that it should grant the applications for leave to appeal so that this case can proceed to a conclusion.

With respect to the November 19, 1997 application for leave to appeal and the November 24, 1997 supplement, the Commission has a concern about whether MCI’s first motion to compel was
properly before the ALJ on November 7, 1997 because Ameritech Michigan had not had an opportunity to file a written response. Although Rule 335 of the Commission’s Rules of Practice and Procedure, 1992 AACS, R 460.17335, permits the presiding officer to shorten the time for serving a motion and filing responses, the rule does not permit the presiding officer to do so retroactively at the time of the hearing to the prejudice of an objecting party. Although not clear, the ALJ’s November 20, 1997 ruling on MCI’s second motion may be subject to the same defect. Further, the Commission has a concern about direct competitors engaging in wide-ranging discovery into competitively sensitive information that may be of only marginal relevance. The existence of a protective order reduces, but does not eliminate, that concern.

In light of these concerns, the Commission concludes that it should reverse the ALJ’s rulings, and the parties should be required to return the discovery responses that Ameritech Michigan provided in compliance with those rulings. Further, the parties may not use those responses for any purpose. In reaching this conclusion, the Commission does not accept or reject Ameritech Michigan’s view of the scope of this case.

With respect to the December 30, 1997 application for leave to appeal the denial of Ameritech Michigan’s motion to compel discovery from intervenors that also provide basic local exchange and intralATA toll services, the Commission has a concern that the motion is aimed broadly at claims by the responding parties that the questions are outside the scope of the case without giving due weight to the fact that some of the parties answered many of the questions, even if not to Ameritech Michigan’s satisfaction. A motion to compel should focus on the claimed defects in particular responses of specific parties. The motion does not become procedurally proper because Ameritech Michigan intended it to serve as a mechanism for obtaining a generic ruling from the ALJ or the Commission about the scope of cross-examination. Further, the Commission has a
concern that some of the information that Ameritech Michigan sought is competitively sensitive information that may be of only marginal relevance.

In light of these concerns, the Commission concludes that it should affirm the ALJ’s ruling. In reaching this conclusion, the Commission does not accept the intervenors’ view that the manner in which they offer intraLATA toll service cannot possibly be relevant or lead to information that would be relevant.

With respect to the December 30, 1997 application for leave to appeal the schedule, the Commission concludes that the record will be better developed if Ameritech Michigan has adequate time to prepare rebuttal testimony. It also concludes that eight calendar days is not adequate. The Commission therefore directs that all dates set by the ALJ, commencing with the date for filing rebuttal testimony, shall be extended by 14 days.

This case began four months ago. It is becoming increasingly tangled in the discovery process. Even with the issuance of this order, and the guidance it provides to the parties and the ALJ, it seems likely that many weeks (or months) would be consumed before all pending and new discovery disputes could be properly raised by the parties, resolved by the ALJ, and decided by the Commission upon appeal. It is time for this case to proceed, and the continuation of discovery is inconsistent with that objective. Rule 317 of the Commission’s Rules of Practice and Procedure permits the presiding officer, including the Commission, to “set time limitations for the conduct of discovery.” 1992 AACS, R 460.17317. Consistent with that rule, and in light of the course of discovery in this case, the Commission directs that no further discovery shall occur in this case. It is time for the Staff and intervenors to file their testimony about the subject matter of this case based upon the information they have, consistent with the requirement of this order that they return certain responses, and for all parties to do likewise with the filing of any rebuttal testimony. If the
resulting record is inadequate, the Commission will decide what, if any, further action to take when the case is before it for a final decision.

The Commission FINDS that:


b. The four applications for leave to appeal should be granted.

c. The ALJ’s November 7 and 20, 1997 rulings on MCI’s motions to compel should be reversed, and the parties required to return the responses that Ameritech Michigan provided.

d. The ALJ’s ruling on Ameritech Michigan’s motion to compel should be affirmed.

e. No further discovery should occur in this case.

f. All dates set by the ALJ, commencing with the date for filing rebuttal testimony, should be extended by 14 days.

THEREFORE, IT IS ORDERED that:

A. The four applications for leave to appeal are granted.

B. The Administrative Law Judge’s November 7 and 20, 1997 rulings on MCI’s motions to compel are reversed, and the parties shall return the responses that Ameritech Michigan provided.

C. The Administrative Law Judge’s ruling on Ameritech Michigan’s motion to compel is affirmed.

D. No further discovery shall occur in this case.
E. All dates set by the Administrative Law Judge, commencing with the date for filing rebuttal testimony, shall be extended by 14 days.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

( S E A L )

/s/ John G. Strand
Chairman

/s/ John C. Shea
Commissioner

By its action of January 8, 1998.

/s/ Dorothy Wideman
Executive Secretary

/s/ David A. Svanda
Commissioner

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B. The Administrative Law Judge’s November 7 and 20, 1997 rulings on MCI’s motions to compel are reversed, and the parties shall return the responses that Ameritech Michigan provided.

C. The Administrative Law Judge’s ruling on Ameritech Michigan’s motion to compel is affirmed.

D. No further discovery shall occur in this case.

E. All dates set by the Administrative Law Judge, commencing with the date for filing rebuttal testimony, shall be extended by 14 days.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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action of January 8, 1998. Commissioner

______________________________Its
Executive Secretary Commissioner
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Suggested Minute:

“Adopt and issue order dated January 8, 1998 granting applications for leave to appeal filed by Ameritech Michigan and reversing in part and affirming in part rulings of the Administrative Law Judge, as set forth in the order.”