

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint and)	
request for emergency relief filed by)	
TDS METROCOM, LLC , against)	Case No. U-13789
SBC MICHIGAN.)	
_____)	

At the March 16, 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 REOPENING AND REHEARING

On May 13, 2003, TDS Metrocom, LLC (TDS), filed a complaint, alleging that SBC Michigan (SBC) breached a mutual waiver agreement that resulted in violations of Section 502(1) of the Michigan Telecommunications Act (MTA), MCL 484.2501(1). Additionally, TDS requested emergency relief,¹ pursuant to MCL 484.2203(2). On May 20, 2003, SBC filed an answer.

On June 23, 2003, Administrative Law Judge Barbara A. Stump (ALJ) denied intervention to TelNet Worldwide, Inc. (TelNet), whereupon it filed an emergency application for leave to appeal to the Commission. The Commission upheld the ALJ and denied TelNet's intervention on July 8, 2003.

¹ On June 16, 2003, the Commission issued an order denying TDS's request for emergency relief.

On August 4, 2003, SBC filed a motion to dismiss and TDS filed a motion for partial summary disposition, and on August 11, 2003, both parties filed answers to the other party's motion. On August 14, 2003, a hearing was held on both motions and the ALJ issued an oral Proposal for Decision (PFD), granting SBC's motion to dismiss and denying TDS's motion for summary disposition. On August 27, 2003, TDS filed exceptions to the PFD, and on September 4, 2003, SBC filed a response to TDS's exceptions.

On October 23, 2003, the Commission issued an order dismissing TDS's complaint, finding that it lacked jurisdiction to hear the dispute over a breach of the mutual waiver agreement that had been negotiated privately by the parties without Commission participation or approval. Further, the Commission found that the mutual waiver agreement does not fall within the terms of Section 251 of the federal Telecommunications Act of 1966 (FTA), 47 USC 251, because it did not relate to interconnection.

On November 21, 2003, TelNet filed a petition for reopening and rehearing, and on November 24, 2003, TDS filed a petition for rehearing. SBC filed replies to TelNet's petition on December 12, 2003 and to TDS's petition on December 15, 2003. On December 16, 2003, TelNet filed a response to SBC's reply.

Rules 401 and 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17401 and R 460.17403 govern requests for reopening and rehearing:

Rule 401. (1) A proceeding may be reopened for the purpose of receiving further evidence when a reopening is necessary for the development of a full and complete record or there has been a change in conditions of fact or law such that the public interest requires the reopening of the proceeding.

(2) After providing due notice and an opportunity for the parties to be heard, the presiding officer, upon his or her own motion or upon motion of any party, may reopen the proceeding at any time before the date for the filing of exceptions to a proposal for decision or, if provided for, replies to exceptions. After the date for filing exceptions or replies to exceptions and until the expiration of the statutory time

period for filing a petition for rehearing, the commission may reopen a proceeding upon its on motion or motion of any party.

R 460.17401.

Rule 403. (1) A petition for rehearing after a decision or order of the commission shall be filed with the commission within 30 days after service of the decision or order of the commission unless otherwise specified by statute. A petition for rehearing based on a claim of newly discovered evidence, on facts or circumstances arising subsequent to the close of the record, or on unintended consequences resulting from compliance with the decision or order shall specifically set forth the matters relied upon. The petition shall be accompanied by proof of service on all parties to the proceeding.

R 460.17403.

In its request for rehearing, TDS opines that the Commission committed legal error when it failed to consider Counts I and II of its complaint that alleged that SBC had violated Sections 501(1)(a) and (h) of the MTA by making false statements regarding the rates, terms, or conditions of providing a telecommunications service when it billed its customers early termination fees, thereby causing confusion as to the legal obligations of its customers. TDS agrees to pursue its legal dispute regarding the mutual waiver agreement in the appropriate judicial forum. However, TDS argues that the alleged MTA violations are not dependent upon the scope and interpretation of the mutual waiver agreement, but arise because SBC, despite having promised to waive early termination fees for customers switching local exchange service, billed its customers for termination fees when switching service to TDS. Further, TDS reasons that SBC's Integrated Services Digital Network (ISDN)² is a local exchange service, and, therefore, is covered by the mutual waiver agreement. Finally, TDS requests that the Commission grant the rehearing request and order SBC to cease and desist and pay refunds, fines, and attorney fees.

² Also described as ISDN-Primary Rate Interface (ISDN PRI) or ISDN Prime.

SBC contends that TDS is just rehashing its exceptions to the PFD, raises no new issues, and fails to establish any Commission error. TDS, SBC continues, is rearguing the merits of its claims, not the jurisdictional issue that was the basis of the Commission's dismissal of the complaint. SBC asserts that the gravamen of TDS's argument is the interpretation of the mutual waiver agreement that was an unregulated, privately negotiated contract between it and TDS without Commission participation or approval. Further, SBC says that its ISDN PRI is a high-speed data service and that the mutual waiver agreement is applicable only to toll and local exchange services. SBC agrees with the ALJ's conclusions, that billing customers for contract term charges is not a statement regarding the rates, terms, or conditions of providing a telecommunications service, and that, regardless, it was TDS that had made statements about the early termination fees being waived, not SBC.

Rule 403 provides that a petition for rehearing must be based on claims of error, newly discovered evidence, 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.

The Commission is persuaded by SBC's arguments and finds that TDS has presented no new arguments that have not already been considered and rejected by the Commission. Although TDS claims that it is not asking the Commission to resolve the dispute over the scope and interpretation of the mutual waiver agreement, it does just that. Indeed, although TDS argues that Counts I and II are not contingent upon an interpretation of the mutual waiver agreement, it then argues that

SBC promised to waive early termination fees, thereby giving rise to MTA violations. Therefore, the Commission concludes that it cannot find any violations of the MTA without first concluding that SBC breached the mutual waiver agreement.

Further, although TDS proposes that ISDN is a basic local exchange service, the Commission did not dismiss the complaint because of any findings relative to the ISDN service. The Commission dismissed TDS's complaint because it lacked subject matter jurisdiction over the mutual waiver agreement; therefore, the Commission need not consider the merits of the complaint. For all of the reasons discussed above, TDS's request for rehearing should be denied.

Finally, Rules 401 and 403 require that only parties can make reopening or rehearing requests. TelNet requested intervention in this case, which was denied by the Commission. Because TelNet is not a party to this case, its request for reopening and rehearing is denied because it lacks standing. Regardless, TelNet has put forth no new arguments that were not considered and rejected by the Commission in its mutual waiver agreement complaint case against SBC,³ that the Commission also dismissed on jurisdictional grounds. A company that is dissatisfied with the outcome in a case cannot seek rehearing of every other case upon which the Commission relied to support its decision. The Commission roundly rejected such reasoning in an order in Case No. U-10555, decided June 16, 1994.

The Commission rejects the argument that the potential precedential effect of a decision in this case creates an injury in fact that conveys standing on anyone who might have some interest in competition in the telecommunications marketplace.

Order, p. 8.

Therefore, TelNet's request for reopening and rehearing is denied.

³ See, Case No. U-13886, decided December 18, 2003.

SBC insists that TelNet's petition is frivolous and devoid of arguable merit; therefore, SBC requests costs and attorney fees in responding to TelNet's position for reopening and rehearing. MCL 484.2209(1). The Commission finds that SBC is not entitled to attorney fees and costs because there was an arguable basis to TelNet's claim.

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. TelNet's petition for reopening and rehearing and TDS's petition for rehearing of the Commission's October 23, 2003 order in this matter should be denied.

THEREFORE, IT IS ORDERED that TelNet Worldwide, Inc.'s November 21, 2003 petition for reopening and rehearing and TDS Metrocom, LLC's November 24, 2003 petition for rehearing are 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
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 March 16, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

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Suggested Minute:

“Adopt and issue order dated March 16, 2004 denying the petitions for reopening and rehearing filed by TDS Metrocom, LLC, and TelNet Worldwide, Inc., as set forth in the order.”