STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint and request for declaratory ruling of the **MICHIGAN COMMUNICATIONS CARRIERS ASSOCIATION, CMC TELECOM, INC., AND GRID4 COMMUNICATIONS, INC.,** against **MICHIGAN BELL TELEPHONE COMPANY, d/b/a AT&T MICHIGAN,** to require AT&T Michigan to afford complainants wholesale rates consistent with applicable law.	)	Case No. U-14975

At the February 27, 2007 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER

On August 1, 2006, the Michigan Communications Carriers Association (MCCA), CMC Telecom, Inc. (CMC), and Grid 4 Communications, Inc., (Grid 4) (collectively, the CLECs) filed a complaint and request for declaratory ruling alleging that AT&T Michigan's provisions for resale services are contrary to the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*, and the federal Communications Act (federal Act), 47 USC 251 *et seq.* On August 28, 2006, AT&T Michigan filed its answer, affirmative defenses, and a motion to dismiss.

On September 6, 2006, a prehearing conference was held before Administrative Law Judge Daniel E. Nickerson, Jr., (ALJ). At that time, the MCCA, the CLECs, AT&T Michigan, and the

Commission Staff (Staff) appeared and participated, setting a schedule for the remainder of the proceeding.

On September 20, 2006, MCCA and the CLECs filed a response to AT&T Michigan's motion to dismiss. Thereafter, on October 18, 2006, the ALJ heard oral arguments on the motion to dismiss. However, no ruling was issued at that time.

The parties cross-examined witnesses on November 29 and 30, 2006. The record consists of 482 pages of transcript and 90 exhibits admitted into evidence. Among the admitted exhibits were five confidential exhibits admitted under seal and subject to the parties' confidentiality agreement: Exhibits A-16, A-27, A-60, A-61, and A-62.

On December 11, 2006, AT&T Michigan and the Staff filed initial briefs. On December 12, 2006, the MCCA and the CLECs filed their initial brief. The parties filed reply briefs on December 20, 2006.

On January 26, 2007, the ALJ issued his Proposal for Decision (PFD) in which he recommended that the Commission: (1) deny AT&T Michigan's motion to dismiss; (2) find that the MCCA lacks standing to prosecute the complaint; (3) find that AT&T Michigan's provisioning of the Winback program was an unreasonable and discriminatory practice under the FEDERAL ACT; (4) direct AT&T Michigan to provide a list of customers that the incumbent local exchange carrier (ILEC) won from these two CLECs, and waive any early termination fee (ETF) associated with transferring service back to these CLECs; (5) direct AT&T Michigan to disclose its individual contract basis (ICB) terms; (6) reject the CLECs' claims regarding volume discount terms; and (7) reject the claim that AT&T Michigan violated the resale provisions of the FEDERAL ACT through its resale ordering system. Further, the ALJ recommended that AT&T Michigan review and revise its CLEC Online Handbook for clarity and usefulness.

The parties filed exceptions and replies to exceptions on February 2 and 9, 2007, respectively.

Motion to Dismiss

AT&T Michigan excepts to the ALJ's denial of its motion to dismiss or for summary disposition based on the CLECs' failure to allege any violation of their interconnection agreements with AT&T Michigan. It argues that both CMC and Grid 4 have approved interconnection agreements with AT&T Michigan that "comprehensively address the resale obligations, as well as dispute resolution." AT&T Michigan's exceptions, p. 2. AT&T Michigan argues that the sole basis of the complaint is the contention that AT&T Michigan violated the resale provisions of 47 USC 251(c)(4).

AT&T Michigan argues that although the ALJ correctly recognized that the interconnection agreements govern the parties' relationship, he failed to dismiss the complaint, finding instead that the Commission may resolve disputes concerning the violation of federal law by an ILEC's "discriminatory or unreasonable practices." In AT&T Michigan's view, the ALJ erred by failing to find that the dispute resolution procedures in the parties' respective interconnection agreements should dictate the procedure for challenging a tariff. AT&T Michigan argues that the complaint is essentially a collateral attack on an approved interconnection agreement.

AT&T Michigan goes on to argue that the Commission lacks jurisdiction over this matter under the MTA, because the complainants do not allege any violation of that statute. Therefore, it argues, the only basis for Commission jurisdiction would be for the complaint to request enforcement of those federal laws delegated to the Commission's jurisdiction by the Federal Communications Commission (FCC). AT&T Michigan argues that the Commission may resolve disputes arising under an interconnection agreement, but is without jurisdiction in this matter because no dispute concerning an interconnection agreement exists. It argues that the ALJ

properly found that the issues in this case arise under federal law, not the interconnection agreements. However, it argues, the ALJ failed to identify any federal delegation of authority to supervise, interpret, or enforce interconnection agreements. In AT&T Michigan's view, the Commission may only resolve disputes arising under an interconnection agreement if that agreement provides for Commission dispute resolution.

AT&T Michigan posits, as it did before the ALJ, that a CLEC's sole cause of action is for breach of the applicable interconnection agreement. Because access to an incumbent's network is available only through negotiation of an interconnection agreement, AT&T Michigan asserts, there is no violation of federal law when an approved interconnection agreement is in place. To hold otherwise, AT&T Michigan argues, would permit the CLECs to file a "patently extralegal, omnibus complaint, seeking a bald and unprecedented pronouncement of law, totally divorced from the only permissible vehicle by which this Commission can implement the federal Act – interconnection agreements." AT&T Michigan exceptions, p. 6.

AT&T Michigan argues that permitting the CLECs to prosecute this complaint makes interconnection agreements meaningless because they can be superseded by a complaint under "general principles" of federal law. This, according to AT&T Michigan, turns current federal telecommunications law on its head. It argues that in *Verizon North* v *Strand*, 367 F3d 577 (CA6, 2004), the Court ruled that the Commission could not require Verizon to pay reciprocal compensation to a CLEC with which it had no interconnection agreement. If the Commission adopts the ALJ's stance on this issue, AT&T Michigan argues, it would remove the incumbent from the negotiation process and eliminate all incentive to adhere to the federal statutory process because it would render any interconnection agreement a nullity.

AT&T Michigan argues that the ALJ incorrectly distinguished the cases cited by AT&T Michigan from the instant one by the lack of interconnection agreements in the former. AT&T Michigan argues that the ALJ missed the full meaning of those cases, which, it argues, find interconnection agreements the exclusive governor of the relationship between an incumbent and a CLEC.

The CLECs respond that the ALJ correctly concluded that the Commission has jurisdiction to decide the resale issues raised in the complaint, because the complaint is based on federal law, not the current interconnection agreements between the parties. They argue that AT&T Michigan is not correct in its assertion that the Commission has jurisdiction to hear only cases brought under such agreements.

Contrary to AT&T Michigan's argument, the CLECs posit that the Commission has explicit delegated federal authority to address attempts by incumbents to impose unreasonable and discriminatory restrictions on resale obligations. They point out that 47 CFR 51.613(b) provides: "With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." The CLECs argue that AT&T Michigan's failure to discuss this provision does not negate its existence.

The CLECs further argue that the Commission has a history of addressing federal telecommunications issues outside the context of individual interconnection arbitrations and disputes. They urge the Commission to continue this practice, suggesting that industry-wide issues that require fact finding are appropriately handled outside of individual interconnection agreement arbitration and dispute resolution.

Furthermore, the CLECs contend, entertaining this complaint will not discourage negotiation of interconnection agreements. They argue that the violations of law alleged in the complaint do not represent terms that can or should be negotiated in interconnection agreements. Just as parties cannot negotiate wholesale rate discounts, the parties cannot negotiate the retail rates AT&T Michigan charges. The CLECs argue that they merely request Commission enforcement of already established state and federal requirements to provide service on a nondiscriminatory basis.

Moreover, the CLECs argue, the complaint does not seek anything that contradicts the terms of either interconnection agreement. Rather, they argue, the complaint and request for declaratory ruling merely request the Commission to act pursuant to its authority under federal law to ensure that AT&T Michigan does not impose unreasonable or discriminatory conditions or limitations upon resale services.

Finally, the CLECs argue, AT&T Michigan's citation to authority concerning the improper circumvention of the negotiation and arbitration provisions of Section 251 and 252 of the FEDERAL ACT are not on point. The CLECs argue that this complaint does not seek to change any provision of their interconnection agreements. The CLECs assert that they are not attempting to avoid any portion of their interconnection agreements. And, they state, if there are interconnection agreement provisions that foreclose the requested relief, AT&T Michigan should cite them.

The Commission finds that the ALJ properly recommended that the Commission deny the motion for summary disposition or dismissal of the case. If, as alleged by the CLECs, AT&T Michigan maintains tariffs that constitute a violation of federal law, the Commission has jurisdiction to examine those allegations to determine (1) whether there is a violation of either state or federal law and (2) the consequence of any such violation, within the boundaries of its

authority. Although the CLECs could have brought this issue to the fore using the dispute resolution process in their interconnection agreements, the Commission is not persuaded that this avenue is the exclusive remedy for the problems enumerated in the complaint.

The Commission is not persuaded to a different conclusion by the authority AT&T Michigan cites. Those cases may be distinguished from the present one in a number of ways. For example, in the present case, the parties have interconnection agreements in place. There is no attempt to avoid or evade the negotiation process required in 47 USC 252. Also, the present concern is over the lawfulness of a tariff for certain promotional programs that affect the ability of CLECs to resell services. The CLECs clearly state that they do not seek to amend their interconnection agreements, but desire the Commission to find unlawful a tariff that may require them to pay more for a service than AT&T Michigan charges certain of its own retail customers. AT&T Michigan points to no provision of the interconnection agreements that prohibits the CLECs from challenging the lawfulness of the tariff conditions in this forum.[1]

Winback Programs Tariff

In Count I of the complaint, the CLECs alleged that AT&T Michigan had failed to effectively offer for resale its tariffed long-term promotions, such as Winback, Win Save, *et al.* (collectively, Winback programs). The CLECs alleged that AT&T Michigan used these discounted offerings to recover or retain retail customers that transfer their business to a CLEC. They further alleged that the prices AT&T Michigan charged under these programs were lower than the wholesale rates available to CLECs. The CLECs further alleged that AT&T Michigan would permit a CLEC to

[1]AT&T Michigan does argue that all disputes arising from the interconnection agreement must be submitted to a dispute resolution process provided for in the agreement. That provision does not address whether a dispute concerning the lawfulness of a tariff must also go through that process.

resell these discounted services to other CLECs' customers, but not to retail customers of AT&T Michigan that the CLECs might win over.

AT&T Michigan answered that its tariff did not restrict resale of the Winback programs to customers of other CLECs, and those programs could be resold to win over AT&T Michigan's customers too. It argued that it had never interpreted the tariff in the manner alleged by the CLECs. AT&T Michigan provided testimony to the effect that some of its customers were in fact transferred to CLECs that resold some of the Winback programs offered by AT&T Michigan.

The ALJ determined that the plain meaning of the tariff related to the Winback programs was misleading as it relates to the issue of resale. He reasoned that the tariff stated "competitive local exchange carrier" meant the same as regulatory personnel and members of the telecommunications industry understand that term to mean – a non-incumbent carrier.[2] *See*, 47 CFR 61.26(a)(1) and 47 USC 251(h).

The ALJ noted AT&T Michigan's evidence that it provided Winback at wholesale to resellers without regard to whether the customer switched from a CLEC or from AT&T Michigan. He cited the testimony that CLECs resold 67 Winback promotional offers in the six-month period from April 1 to September 30, 2005, of which 22 were to AT&T Michigan customers won by CLECs. However, the ALJ determined that the evidence missed the point in that it did nothing to demonstrate that the tariff did not impose an unreasonable condition on the resale of Winback programs.

The ALJ therefore concluded that AT&T Michigan violated 47 USC 251(c)(4) when it used the term competitive local exchange carrier in the tariff, thereby creating a condition for resale of

[2]During the case, AT&T Michigan determined to amend its tariff to read "another local exchange carrier." That amendment effectively resolved issues on a going forward basis, but left the question of prior violations and related remedies.

Winback that, reasonably interpreted, prevented the CLECs from resale of this promotional program to AT&T Michigan's customers. The ALJ rejected AT&T Michigan's argument that the CLECs' failure to apply for Winback at wholesale is fatal to the success of their complaint. He found that the statute and the type of violation did not require the CLECs to attempt an apparently useless thing. The ALJ recognized that AT&T Michigan's revised tariff language would preclude a reasonable belief that the CLECs could not obtain Winback at wholesale to serve a customer won from AT&T Michigan. He determined that AT&T Michigan did not demonstrate any reason for the limitation that the previous language imposed, as required by 47 CFR 51.613.

The ALJ went on to determine that AT&T Michigan should provide the complainants the following relief: (1) list current AT&T Michigan customers obtained from the CLECs for the past two years through use of Winback, (2) permit those customers to end their contract with AT&T Michigan without imposing an ETF or other penalty, and (3) notify those customers that accepting Winback from these CLECs will not breach the customer's contract with AT&T Michigan, including ETF provisions. In so doing, he rejected AT&T Michigan's position that granting this relief would impermissibly abrogate the ILEC's agreements with its customers. In his view, the recommended relief was justified under the circumstances of this case, and would not nullify ETF provisions in general, only those applicable to the customers won by these complainants that had been previously won by AT&T Michigan.

AT&T Michigan excepts to the ALJ's conclusion that its tariff violated 47 USC 251(c)(4)(B) and argues that its undisputed evidence demonstrates that other CLECs actually resold Winback services. Therefore, asserts AT&T Michigan, the tariff should not be interpreted to preclude a request to resell Winback, and was never in violation of 47 USC 251(c)(4)(B). AT&T Michigan maintains that there is no evidence in the record that either Grid 4 or CMC had a requested

Winback resale rejected by the incumbent. AT&T Michigan complains that the ALJ essentially concluded that "the seasoned businessmen that run CMC and Grid 4 were justified in concluding that they could not resell Winback offerings to AT&T [Michigan] customers without ever asking AT&T about it and despite . . . the fact that CLECs were routinely reselling Winback offers to AT&T customers." AT&T Michigan exceptions, p. 17. It posits that a reasonable carrier would seek clarification before charging the incumbent with imposing unlawful conditions upon resale.

AT&T Michigan further asserts that the ALJ's proposed remedy is out of all proportion to the alleged violation. It states that the remedy is harsh and unprecedented. In its view, the remedy should be limited to the revision of the tariff to clarify what may have been viewed as ambiguous terms in the tariff.

AT&T Michigan further argues that the alleged harm suffered by the CLECs was a claimed inability to resell Winback to customers, which has nothing to do with AT&T Michigan winning customers from CLECs through its Winback offer. It states: "Indeed, the CLECs are free to win back those customers by assuming AT&T Michigan's Winback contracts with those customers at the commission's prescribed resale discount and providing service to those customers under whatever terms and conditions the CLEC chooses." AT&T Michigan's exceptions, p. 20.

AT&T Michigan further asserts that the CLECs should know who their former customers were, and can use resold Winback offers to win them in the competitive marketplace if they are so inclined. In AT&T Michigan's view, there is no reason to grant the competitive assistance to the CLECs that the ALJ proposed.

Finally, AT&T Michigan claims, the proposed remedy is not feasible. Although the incumbent can identify current Michigan customers under Winback through business records, it

claims that its records do not identify which of those customers were won from the CLECs in this proceeding. Therefore, it argues, the remedy cannot be implemented and should be rejected.

In its sole exception, the Staff objects to the ALJ's remedy recommendation and argues that the CLECs have failed to demonstrate any economic injury caused by the violation. It states that there is no evidence that AT&T Michigan refused to provide Winback for resale to take a customer from AT&T Michigan. The Staff argues that the Commission cannot grant a remedy pursuant to Section 601 of the MTA, MCL 484.2601, without a showing of economic injury. Moreover, the Staff argues that the remedy recommended by the ALJ would impair the dispute resolution provision of the parties' interconnection agreements, which, had it been employed, might have resolved the misunderstanding without the need to use limited Commission resources.

The Staff further notes that the Commission has consistently refused to abrogate ETF provisions in contracts between a carrier and its customer. It cites the record evidence to the effect that ETF provisions are an essential tool in the functioning of a competitive market. The Staff recommends that the Commission reject the remedy proposed by the CLECs and recommended by the ALJ.

The CLECs respond that the ALJ correctly found that AT&T Michigan unlawfully imposed unreasonable and arbitrary restrictions in the tariff language for long-term discounted promotions. They note that AT&T Michigan's motion to dismiss was not based on an assertion that the incumbent did in fact permit CLECs to use long-term discount packages to win AT&T Michigan customers. They insist that if AT&T Michigan had been offering these promotional items for resale, that would have been the most obvious grounds upon which to move for dismissal.

As to the evidence that AT&T Michigan actually provided Winback to resellers that won AT&T Michigan retail customers, the CLECs argue that AT&T Michigan did not demonstrate that

those cases in which the CLECs resold Winback were new contracts as opposed to assumed contracts. They state that a lower wholesale discount applies for assumed contracts (4%) than for contracts originating with the CLEC (16.62%). The CLECs state that they have not alleged that AT&T Michigan refused to permit CLECs to assume contracts with existing AT&T Michigan customers. Rather, they state that the issue here is the CLECs' ability to offer the long-term promotional discounts to new customers and thereby receive the higher discount. Moreover, the CLECs argue, AT&T Michigan did not clarify how many of the Winback offers that were resold by CLECs through the period ending September 30, 2006 had been resold after the present complaint was filed on August 1, 2006.

The CLECs state that the long-term promotional tariffs prohibited CLECs from using the long-term promotional discounts to win AT&T Michigan customers. They praise the ALJ for finding that the previous wording on the tariff was a violation, notwithstanding AT&T Michigan's assertions that a "competitive local exchange carrier" really meant to include the incumbent. The CLECs state that the tariff permitted AT&T Michigan to offer deeply discounted rates to every customer that it did not have, while limiting the CLECs' ability to obtain such rates to circumstances where a CLEC was attempting to take another CLEC's customer.

Moreover, the CLECs contend, their inability to offer Winback pricing to their customers is evidenced by the lack of a prompt, accurate response to discovery questions on the ordering process for a CLEC to follow to obtain such a service from AT&T Michigan. The CLECs posit that if AT&T Michigan routinely sells these promotions at wholesale, it should have been able to respond more quickly and completely.

Further, the CLECs argue, the complaint asserts that the tariff on its face placed an unreasonable or discriminatory condition or limitation on the CLECs' ability to purchase Winback promo-

tions for resale. Thus, there should be no requirement that the CLECs demonstrate that they ignored the plain terms of the tariff and attempted to order Winback promotions anyway. They state that the law does not require parties to engage in futile acts, citing *Turner* v *Lansing Twp*, 108 Mich App 103, 108; 310 NW2d 287 (1981). The CLECs contend that there can be no serious argument that an incumbent may issue a tariff with which it expects CLECs to comply, only to insist that they ignore the tariff and attempt to order the service anyway.

To AT&T Michigan's assertion that the CLECs' failed to introduce evidence that the CLECs unsuccessfully sought to provide these promotional services, the CLECs respond that such evidence would have been outside the scope of this case. As defined by the ALJ, the critical inquiry was whether AT&T Michigan offered its long-term promotional tariffs to CLECs for resale, not whether the CLEC had requested to purchase such offerings and been denied. The CLECs argue that if the ALJ erred in failing to expand the scope of the proceeding, AT&T Michigan should have filed an exception on that issue. However, there should be no complaint concerning the lack of evidence on issues excluded from the proceeding.

The CLECs further argue that the ALJ's proposed remedy is necessary to compensate the CLECs for AT&T Michigan's unlawful actions. The CLECs admit that AT&T Michigan's revision of its tariff takes care of the problem on a going forward basis, as long as the incumbent honors its commitment to improve its ordering process. However, the CLECs state, their requested remedy for the past violation merely permits them to recapture customers that they lost through AT&T Michigan's prior unlawful practices. In the CLECs' view, the remedy is appropriate to the wrong visited upon them by AT&T Michigan's failure to offer its retail promotional pricing for resale.

The CLECs argue that the cases cited by AT&T Michigan rejecting similar proposals do not involve remedial actions necessary after the incumbent was found in violation of law. They contend that AT&T Michigan provided no evidence that it could not identify these customers and they assert their conviction that, with a cooperative spirit, the parties can identify lost customers in order to relieve them of any ETFs contained in their contract with AT&T Michigan.

The CLECs further argue that the Commission has the authority to impose the recommended remedy pursuant to Section 201 of the MTA, MCL 484.2201, which provides the Commission authority to administer all federal telecommunications laws, rules, orders, and regulations that are delegated to the state. They reason that federal law delegates to the Commission authority to determine whether AT&T Michigan's resale Winback offering contained an unreasonable and discriminatory restriction. Of necessity, they argue, the Commission must have power to provide a remedy under Section 201 of the MTA. Otherwise, the Commission would lack any ability to prevent carriers from profiting from violations of those federal laws and regulations delegated to the Commission to safeguard. They argue that Section 601 of the MTA is not applicable to this case, as the CLECs did not claim any violation of the MTA.

The Commission finds that the wording of the AT&T Michigan tariff for Winback resale permitted resale only when the retail customer was obtained from another competitive local exchange carrier. AT&T Michigan is not a competitive local exchange carrier as that term is understood by the industry and defined by federal statute and related regulations. As such, the language imposed an unreasonable, discriminatory condition for resale of the Winback programs, and set up a price squeeze for CLECs that could not purchase the service for resale to the CLEC's retail customer at or below the price offered by the incumbent.

The Commission finds without basis AT&T Michigan's assertions that the CLECs misread or misinterpreted the tariff. The language says what it says, and its plain meaning is described above. However, the language has now been corrected so that there is no doubt that any CLEC may resell Winback promotions to any customer of any other carrier.

The evidence that some CLECs resold Winback does not persuade the Commission to reach a different conclusion. First, there is no indication that the resellers were permitted to establish new Winback customers, as opposed to assuming the contracts at a much lower discount for wholesale service. The assumption of contracts was not at issue in this case. Rather, it is the CLECs' ability to use Winback to return customers at the full wholesale discount.

However, the Commission is not persuaded that it should impose the remedy requested by the CLECs and recommended by the ALJ. First, a remedy should be imposed for a proved injury, and there is no proved injury in this case. The CLECs did not provide evidence concerning how many, if any, customers they lost to AT&T Michigan over any particular time period. The CLECs should be aware of any customers they lost to Winback promotions, and evidence of those losses should have been provided if the CLECs sought a remedy with respect to those losses.

The Commission has authority to fashion a remedy for violations of federal provisions delegated to it for administration and enforcement, however, that authority is not unlimited. The CLECs provide no authority for imposing the particular remedy that they seek and that the ALJ recommended. Moreover, the Commission will not provide a remedy for a loss not demonstrated on the record. The CLECs determined to keep the issues extremely narrow in this case, but now seek "fresh-look" relief that is broader than the record can support.

The CLECs do not argue that the Commission should impose this remedy pursuant to Section 601 of the MTA. The CLECs have not alleged violation of that statute or demonstrated

any resulting economic injury – both prerequisites for the Commission to grant a remedy under that section. They have insisted that their interconnection agreements are not at issue, which would have required use of the dispute resolution procedures and then mediation before Commission action, but which might have supported broader relief. It is not for the Commission to alter the consequences of the litigation choices made by the complainants.

The Commission finds that AT&T Michigan's tariff violated 47 USC 251(c)(4)(B) and related regulations by imposing an unreasonable, discriminatory condition on the resale of Winback. The appropriate remedy on this record for the violation is correction of the tariff language, which has already occurred. AT&T Michigan should make efforts to assist these CLECs in understanding the ordering system and procedures.

Finally, the Commission rejects the CLECs' first exception, which challenges the ALJ's failure to recommend an order directing AT&T Michigan to change its tariffs. AT&T Michigan submitted new tariff sheets to the Commission, and they are posted on its website. If the CLECs believe a change has not been made to which AT&T Michigan agreed, they should bring the tariff sheet forward that requires amendment. Furthermore, there is no requirement that, in the absence of direction to the contrary, a party must demonstrate compliance with a settlement agreement entered into the record. When the tariffs were filed, the record was closed.

Individual Case Basis (ICB) Contracts

1. Disclosing terms and conditions

The ALJ began his analysis of this issue by recognizing that ICB contracts center on the unique telecommunication services tailored and priced to fit the specialized needs and circumstances of individual customers. He found that AT&T Michigan must offer ICB contracts for resale under the federal Act. He further found that failure to disclose the terms and conditions for

ICB contracts is a restriction on resale prohibited by 47 USC 251(c)(4)(B). He concluded that to make a bona fide offer of its ICB contracts for resale, AT&T Michigan must make available to all CLECs "sufficient information so as to permit an informed determination of the competitive advantages or disadvantages of accepting such an offer." PFD, p. 31. To accomplish this, the ALJ recommended that AT&T Michigan be required to disclose information in a format as suggested by Dr. Gary L. Wolfram, which the ALJ found would sufficiently address confidentiality concerns of the ICB customers.

Dr. Wolfram testified that AT&T Michigan should post on the password-protected web site, CLEC Online, all of the pricing, volume, and term details of AT&T Michigan's ICB contracts without identifying any specific customer(s). He stated that AT&T Michigan should post all ICB pricing that it offers. "If there is a volume requirement associated with the price that the CLEC would have to meet, that information should be posted as well. Also, the length of time that the pricing is in effect should be posted." 5 Tr. 201.

AT&T Michigan excepts to the ALJ's recommendation and argues that it does permit the resale of ICB contracts, as the record demonstrates. It argues that the ALJ's conclusion, that not publicly disclosing the terms and conditions of ICB contracts is a prohibited restriction on resale under 47 CFR 51.601, is legally erroneous, and contrary to public policy.

AT&T Michigan argues that the issue here is not the disclosure of ICB contracts, because it has agreed to do so with the customer's permission. Rather, the charge is that the incumbent's refusal to publicly disclose the terms and conditions of its ICB contracts without customer authorization is an impermissible restriction on resale. It points to the testimony of Dr. Debra Aron regarding the economic harm that would result from a blanket ICB disclosure requirement. Additionally, AT&T Michigan argues, a blanket disclosure requirement would create serious

customer privacy and security concerns. It points to the confidentiality requirements stated in 47 USC 222(a), which requires AT&T Michigan to keep customer proprietary network information (CPNI) confidential.

AT&T Michigan argues that the ALJ's proposal should be rejected. It states that the requirement is not found in the federal Act or the parties' interconnection agreements. AT&T Michigan argues that any restriction on resale that its disclosure requirements create is a reasonable one.

AT&T Michigan argues that the proposed remedy is illogical, unnecessary, and illegal. AT&T Michigan admits it has an obligation under 47 USC 222(c)(2) to disclose CPNI at the customer's request. It states that it has made available on line a form for the CLEC to obtain the customer's permission to disclose. It argues that there is no policy goal served by disclosing confidential information to other providers when the customer is not interested in receiving competing offers.

Moreover, AT&T Michigan argues the PFD recommends a discriminatory regime, because not all providers are required to disclose this information. It argues that the Commission should not impose such a requirement in a complaint setting, with little or no industry or customer input.

The CLECs respond that the ALJ correctly required AT&T Michigan to inform on a regular basis all CLECs of the ICB pricing that is available for resale. They argue that the ICB contracts are similar to the long-term promotional offerings discussed in the previous section in that AT&T Michigan uses them to compete against CLECs.

Moreover, the CLECs argue, the ALJ did not require disclosure of the contracts, but rather of the contract pricing. They state that they seek this disclosure not to make a competitive offer to an AT&T Michigan customer, but rather to "determine the best retail pricing AT&T offers its retail

customers, thereby permitting CLECs to take advantage of such pricing for resale to the CLECs' own customers or potential customers." CLEC's reply exceptions, p. 38. These parties argue that it is an unreasonable or discriminatory condition or limitation on resale for AT&T Michigan to "hide what is often its best pricing – ICB pricing – from the CLECs." *Id.*

The Commission finds that the ALJ's recommendation on this issue should be rejected. An ICB contract is just that, an individual contract suited to an individual customer under that individual customer's particular circumstance, which includes considerations of at least 14 different criteria, including the services included, revenue commitment, competitive price in the market place, pricing for similar product, location, loop length, cable complement, available facilities, wire center, timing and current competitive environment, general state of the economy, network architecture or service configuration, term commitment, quantity commitment, and certain other risk factors. *See*, Exhibit A-43. When AT&T Michigan enters into an ICB contract, it must permit that contract to be resold either to the same customer or to a similarly situated one. However, it is under no obligation to offer a wholesale discount off its discounted prices for components of an ICB contract offered to another individual customer.

The requirement that a customer be similarly situated is reasonable on its face. How that determination of similarity is made should be addressed in an interconnection agreement. If there is a dispute as to the reasonableness of the determination, the interconnection agreement dispute resolution procedures may apply, before a challenge comes to the Commission.

2. Aggregation for ICB

The CLECs also argue that the ALJ failed to find that resellers have a right to aggregate service to obtain ICB contract pricing. They argue that federal law does not restrict to tariff offerings the obligation to aggregate or shield ICB pricing from that obligation. They point to

testimony in Case No. U-13531, AT&T Michigan's cost study proceeding, in which the company witness testified that ICB contracts are basically discounts off the published rates, carrying the same terms and conditions of tariffed services. In the CLECs' view, the ALJ failed to understand their position. In their exceptions, they clarify that they seek to aggregate their own customers' volumes to gain the same volume discount pricing available through an ICB contract. This is required, they argue, to give effect to the requirement to offer for resale all services offered to retail customers.

The CLECs argue that AT&T Michigan may price its ICB contracts at rates less than the total service long run incremental cost (TSLRIC), although it might be above its actual costs. Because the CLECs are limited to receiving service at TSLRIC, they argue, there is no way to compete with AT&T Michigan. Thus, they insist that they must have the ability to aggregate volumes and resell ICB pricing, without leaving the determination of whether the customers are similarly situated to those enjoying the ICB contracts solely to the discretion of AT&T Michigan.

AT&T Michigan argues that the Commission should reject the CLECs' claim to the right to aggregate customers to obtain ICB pricing. AT&T Michigan argues that the CLECs' proposal in their exceptions is new to the proceeding. Moreover, it argues, the new proposal makes less sense than the one rejected by the ALJ, as it would completely eliminate the similarly situated requirement of resale of ICBs that the ALJ found reasonable. AT&T Michigan argues that the CLECs may assume the ICB contracts at the applicable Commission-approved discount in order to resell the services to the retail customers, or they may find a similarly situated customer.

The Commission affirms the decision of the ALJ that ICB contracts are subject to the requirement of similarity in situation before they must be permitted to be resold. The Commission is not persuaded that AT&T Michigan must not look beyond the CLEC for the customer receiving

service. Resale service is service provided to a particular customer. Volume and term are not all that is relevant in determining price. However, AT&T Michigan is not permitted to impose unreasonable limitations on reselling ICB contracts. Those customers that are substantially similar should be granted resale of an ICB. Any claim that AT&T Michigan is pricing its services below TSLRIC is a proper subject for a complaint that the incumbent is violating Michigan law. There has been no showing on this record that would permit a finding that AT&T Michigan sells services below TSLRIC.

3. Burden of Proof

In the CLECs' fourth exception, they claim that the ALJ erroneously placed the burden on the CLECs to have demonstrated that the similarly situated requirement had been implemented in an unreasonable or discriminatory manner. In the CLECs' view, the burden is on AT&T Michigan to demonstrate the reasonableness of its restriction, which it failed to do.

AT&T Michigan argues that this exception should be rejected as procedurally defective, because it is raised for the first time in their exceptions. The only mention of ICB contracts in the complaint was to request disclosure of the pricing. The similarly situated requirement was not challenged at that time.

AT&T Michigan further argues that even if the Commission entertains the question, there is nothing unreasonable or discriminatory about the requirement that a customer be similarly situated to the customer under an ICB contract before one may take advantage of the unique pricing and other terms and conditions to offer the services to another customer. It states that courts and commissions have long recognized that offering different terms and conditions to different customers not similarly situated is permissible. It argues that adopting the CLECs' position would effectively eliminate the difference between a tariff and an ICB. If the CLECs obtain their goal,

AT&T Michigan argues, their small customers will not have to meet the criteria that justifies a discounted rate. The CLEC would thus obtain an unfair competitive advantage. In the long run, AT&T Michigan argues, all customers would be harmed.

The Commission is not persuaded that the ALJ imposed a legally incorrect burden of proof on the CLECs on this issue. He merely stated that on its face, the requirement for similarly situated customers is reasonable, and that the CLECs had not demonstrated that its implementation was not reasonable.

The CLECs object to AT&T Michigan being put in a position of final absolute arbiter of whether a customer is similarly situated to an ICB customer. It complains that AT&T Michigan desires to use undisclosed criteria, with no oversight.

AT&T Michigan argues that the ALJ correctly determined that it would be the appropriate party to determine whether the customer is similarly situated. To make that determination would require reference to confidential CPNI of the ICB customer. Because AT&T Michigan is the only authorized entity to review the information without a customer's consent, it reasons that it should be the arbiter of who is similarly situated. It acknowledges that the determination must be made in good faith.

The Commission finds that the process for determining whether a customer is similarly situated is properly the subject for an interconnection agreement. The parties may agree on the appropriate process and parameters to use, or may resort to arbitration to settle it. This case is not an arbitration proceeding, nor does it request enforcement of an interconnection agreement provision that is alleged to have been violated. "Similarly situated" carries with it the requirement that the determination be reasonable and made in good faith. Any problems that occur in that regard may be subjected to dispute resolution provisions if applicable or brought to the Commission.

CompleteLink® 2.0 Limitation

AT&T Michigan CompleteLink® 2.0 service offers retail customers the ability to aggregate usage over multiple billed telephone numbers (BTNs) in order to obtain volume discounts. One of the conditions on the retail service is that a maximum number of 250 BTNs may be aggregated by the customer.

The CLECs alleged that the 250 BTN cap on CompleteLink® 2.0 was an unreasonable restriction on resale, because if a CLEC wanted to obtain the CompleteLink® 2.0 discount, it may only do so for up to 250 BTNs. If it desired more than the 250 BTN limit, the CLEC would have to enter into another CompleteLink® 2.0 contract with the attendant non-recurring charges associated with new service. The CLECs wanted the cap removed as an unreasonable limitation on resale.

AT&T Michigan responded that the cap on BTNs is not a cap on lines to be served or phone numbers that can be used beneath the billed number. Because any number of lines may be served under one BTN, AT&T Michigan argued, there is no real impediment to aggregation for the reseller. AT&T Michigan further argued that CLECs are not permitted to change the retail offer in order to obtain it for resale purposes.

The ALJ determined that imposing the 250 BTN cap on this service constituted an unreasonable and discriminatory practice in violation of 47 USC 251. He opined that AT&T Michigan had not produced any evidence to suggest the reason for the limit. In his view, the 250 BTN limit was arbitrary and directly limited the CLECs' ability to compete in volume discount prices.

AT&T Michigan excepts to the ALJ's recommendation that it not be permitted to continue the 250 BTN limitation on CompleteLink® 2.0 service. It argues that 47 USC 251 requires it to

permit the resale of telecommunication services offered for retail. Further, AT&T Michigan states that its resale offering of CompleteLink® 2.0 is identical to this retail offering except for the mandated wholesale discount. It argues that pursuant to the resale rules, 47 CFR 51.601-617, by definition, the services that a CLEC may demand to resell are limited to those that the incumbent sells to retail customers. A reselling CLEC is not entitled to anything more or less than what AT&T Michigan provides its own retail customers.

AT&T Michigan argues that the ALJ's conclusion that the 250 BTN limit appears arbitrary is irrelevant to whether it is permissible for the cap to remain. As stated by AT&T Michigan:

> There is no dispute that CLECs are allowed to aggregate usage from multiple customers in order to obtain the volume discounts available under CompleteLink® 2.0. There is also no dispute that AT&T has not imposed any limitation on aggregation other than the inherent limitations of the retail service – limitations AT&T and its retail customers must live with as well.

AT&T Michigan exceptions, p. 31.

The CLECs respond that the ALJ properly found the 250 BTN limitation under the CompleteLink® 2.0 offering unacceptable, based on AT&T Michigan's failure to present evidence of the reasoning behind the limit. They argue that CLECs must be permitted to aggregate their volumes and receive all volume discounts available to AT&T Michigan's retail customers. The CLECs also complain that the CompleteLink® 2.0 discount did not apply to all AT&T Michigan services, but was limited to certain qualifying services.

The Commission finds that the recommendation of the PFD should not be adopted. AT&T Michigan offers its CompleteLink® 2.0 service on a retail basis. Pursuant to 47 USC 251, it must provide CompleteLink® 2.0 to resellers at the established discount. It is not required to alter the offering to meet the expectations or desires of various CLECs. In the Commission's view, the ALJ's recommendation impermissibly impinges on the incumbent's right to design its own

unregulated retail rates for bundled services. It is only prohibited from imposing conditions or restrictions on the CLECs that it does not impose on its own retail sales. Therefore, the Commission concludes that AT&T Michigan's 250 BTN limitation for CompleteLink® 2.0 is permissible, and is not an unreasonable or discriminatory practice on the incumbent's part.

CLEC Online

The CLECs complained about the adequacy of AT&T Michigan's resale ordering system. In their view, the CLEC Online Handbook is in great need of change to facilitate the ease of ordering. They state that the CLEC Online Handbook is the primary resale resource used by AT&T Michigan to inform CLECs of resale offerings and procedures for ordering. The CLECs' witness, Craig M. Champagne, testified that the resale facilities are not adequate to reasonably permit CLECs to understand and order all of AT&T Michigan's retail services for resale. He stated that the handbook fails to include pricing, requiring instead that the reseller become an expert in AT&T Michigan's tariff. Moreover, it is not updated to include the information on Accessible Letters issued by AT&T Michigan. Further, he testified, the personnel assigned to assist in the process are generally not very helpful.

The ALJ found that the CLECs had failed to demonstrate that AT&T Michigan's resale ordering system is unreasonable. He further found that the provisions of the interconnection agreement govern the ordering method, and no showing had been made that AT&T Michigan had violated a provision of the interconnection agreement. Furthermore, the ALJ found, AT&T Michigan had provided a totally mechanized ordering system, a web-based ordering interface, and account managers to assist in the ordering process. Although the account managers are not subject matter experts in every detail across the breadth of offerings, the ALJ found, they are responsible to obtain and provide precise and accurate information for the CLECs.

The ALJ further found that the ordering system had its faults, but nothing sufficient to render it a violation of 47 USC 251(c)(4). He noted AT&T Michigan's willingness to sit down with the Staff to dialogue and negotiate concerning the Staff's recommendations for the CLEC Online Handbook. The ALJ encouraged this interaction and thought the CLECs also should be included.

Based on the evidence, the ALJ concluded that the CLEC Online Handbook needed to be revised, reorganized, and simplified. He determined that the handbook was confusing to navigate and lacked pricing information or links to an ordering mechanism. However, he reasoned, the handbook was not required by the interconnection agreement or any other legal authority cited by the CLECs. It merely supplements the ordering system, which he found does operate within the requirements of 47 USC 251(c)(4). Thus, he concluded that the Commission could merely recommend that AT&T Michigan consider the requested revisions.

The CLECs except to the ALJ's failure to recommend that the Commission require AT&T Michigan to render its resale offerings and ordering procedures clear and understandable. They argue that pursuant to 47 USC 251, it is fundamental that AT&T Michigan make an offer for resale that is capable of being accepted. In their view, the evidence showed that AT&T Michigan has not made such an offer because of the problems with the handbook and ordering system. Moreover, they argue at length that the ALJ made findings on the evidence that support the conclusion that the ordering system and handbook are so fraught with problems and lacking needed information that AT&T Michigan has failed to make a bona fide offer of retail services for resale.

The Staff responds that its testimony, initial brief, and reply brief asserted that the current deficiencies in AT&T Michigan's CLEC Online Handbook are unreasonable and constitute a failure to satisfy the duty to offer imposed on AT&T Michigan by 47 USC 251(c)(4). The Staff

continues to believe that the Commission should direct AT&T Michigan to revise, reorganize, and simplify the CLEC Online Handbook.

AT&T Michigan responds that the ALJ properly declined to require that AT&T Michigan make changes to its CLEC Online Handbook. In its view, the ALJ correctly concluded that there is no requirement for AT&T Michigan to provide the website in the first place and there are no problems with the resale ordering system. AT&T Michigan argues that there is no legal requirement that it provide the CLEC Online system or provide any specific information there. It argues that statutory silence on the issue makes sense because it relates to implementation of an interconnection agreement and should be reflected in the terms and conditions negotiated by the parties to that agreement.

AT&T Michigan argues that the CLECs appear to be arguing for a new ordering system. However, it argues, the CLEC Online system is not an ordering system and cannot be converted to one. The intention for the handbook is to provide information only. Moreover, AT&T Michigan argues, the present ordering system was set up as a totally mechanized system with significant Commission oversight of operations support systems.

The Commission finds that the nearly unanimous (excepting AT&T Michigan) opinion on the record is that AT&T Michigan's CLEC Online Handbook fails to provide the information or assistance necessary for resellers to order retail service to resell. The confusion and frustration that the website apparently causes should not be ignored. Therefore, the Commission finds that it should direct AT&T Michigan to consult with the Staff to improve the quality and function of its website. It need not make an additional online ordering system. The Commission directs that AT&T Michigan file a report with the Commission's Telecommunications Division eight months from the date of this order to inform it of the progress made in revising its website to make it more

useful to CLECs needing information on ordering resale services. The report shall also include the number and nature of complaints, if any, that the incumbent receives from CLECs concerning the usefulness and function of the website and ordering systems. Within 60 days of receiving the report, the Staff shall inform the Commission as to whether it believes further action needs to be taken.

Term Discounts

In its seventh and last exception, the CLECs argue that the Commission should reject a portion of the ALJ's reasoning concerning the issue of imposing term requirements for a CLEC to resell term discounted services. They do not except to the conclusions that the ALJ reached.

AT&T Michigan argues that this exception should be rejected as it attempts to make an issue out of nothing. The Commission agrees. The conclusions reached by the ALJ are adopted. His reasoning does not require rejection nor does it require rejection of his recommended holding on this issue.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 *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 Michigan's long-term promotional tariff language violated 47 USC 251(c)(4)(B).

c. The remedy is limited to correction of the tariff language, which AT&T Michigan has already done.

d. AT&T Michigan should consult with the Staff to improve the functioning and usefulness of its CLEC Online Handbook.

e. AT&T Michigan should report to the Staff concerning its CLEC Online Handbook as directed in this order.

f. In all other respects, the complaint should be denied.

THEREFORE, IT IS ORDERED that:

A. The request for declaration that AT&T Michigan's tariff for long-term promotional offerings violated 47 USC 251(c)(4)(B) is granted but the requested remedy is denied.

B. AT&T Michigan is directed to consult with the Commission Staff to improve the functioning and usefulness of its CLEC Online Handbook, and to file the report required by this order.

C. In all other respects, the complaint is denied.

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

Any party aggrieved by this order may bring an action in an appropriate Federal district court as provided in 47 USC 252(e).

MICHIGAN PUBLIC SERVICE COMMISSION

(S E A L)

/s/ J. Peter Lark
Chairman

/s/ Laura Chappelle
Commissioner

By its action of February 27, 2007.

/s/ Mary Jo Kunkle
Its Executive Secretary

/s/ Monica Martinez
Commissioner

e. AT&T Michigan should report to the Staff concerning its CLEC Online Handbook as directed in this order.

f. In all other respects, the complaint should be denied.

THEREFORE, IT IS ORDERED that:

A. The request for declaration that AT&T Michigan's tariff for long-term promotional offerings violated 47 USC 251(c)(4)(B) is granted but the requested remedy is denied.

B. AT&T Michigan is directed to consult with the Commission Staff to improve the functioning and usefulness of its CLEC Online Handbook, and to file the report required by this order.

C. In all other respects, the complaint is denied.

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

Any party aggrieved by this order may bring an action in an appropriate Federal district court as provided in 47 USC 252(e).

MICHIGAN PUBLIC SERVICE COMMISSION

_____
Chairman

By its action of February 27, 2007.

_____
Commissioner

_____
Its Executive Secretary

_____
Commissioner