

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of)
MCI TELECOMMUNICATIONS CORPORATION)
against AMERITECH MICHIGAN and GTE)
NORTH INCORPORATED relative to their not)
making intraLATA equal access available to MCI)
in the state of Michigan.)
_____)

Case No. U-10138

In the matter of the application and complaint of)
MCI TELECOMMUNICATIONS CORPORATION)
against MICHIGAN BELL TELEPHONE COM-)
PANY, d/b/a AMERITECH MICHIGAN, seeking)
(i) a 55% discount on intrastate switched access)
service where intraLATA dialing parity is not)
provided and (ii) an order requiring implementation)
of intraLATA dialing parity on an expedited basis)
now that July 1, 1997 has passed.)
_____)

Case No. U-11743

At the December 4, 2000 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

ORDER

History of Proceedings

On December 16, 1999, the Commission commenced this proceeding to resolve issues
related to the Michigan Supreme Court's decision in In re MCI Telecommunications Complaint,
460 Mich 396; 596 NW2d 164 (1999).

On January 13, 2000, Administrative Law Judge Daniel E. Nickerson, Jr., (ALJ) presided over a prehearing conference attended by Ameritech Michigan, AT&T Communications of Michigan, Inc. (AT&T), MCI WorldCom Network Services, Inc., f/k/a MCI Telecommunications, Inc. (MCI), LCI International Telecom Corp., d/b/a Qwest Communications Services (Qwest), Sprint Communications Company, LP (Sprint), and the Commission Staff (Staff).

On February 3, 2000, motions for summary and partial summary disposition were filed by Ameritech Michigan, MCI, AT&T, and Qwest. On April 3, 2000, the ALJ issued his rulings on the motions for summary and partial summary disposition in the form of a Proposal for Decision (PFD).

On April 21, 2000, exceptions to the PFD were filed by Ameritech Michigan, AT&T, MCI, and Qwest. Subsequently, timely replies to exceptions were filed by the same parties.

Background

On July 31, 1992, MCI filed a complaint with the Commission alleging that Ameritech Michigan was violating various provisions of the Michigan Telecommunications Act, 1991 PA 179, MCL 484.2101 et seq.; MSA 22.1469(101) et seq. (MTA), by failing to make intraLATA toll dialing parity (dialing parity) available to MCI. In a February 24, 1994 order in Case No. U-10138, the Commission found that Ameritech Michigan's failure to provide dialing parity did not violate the MTA. However, the Commission ultimately determined that implementation of dialing parity was in the public interest and ordered Ameritech Michigan to implement dialing parity no later than January 1, 1996. Ameritech Michigan's request for rehearing of that order was denied on July 19, 1994.

On March 10, 1995, in response to a task force investigation and report on dialing parity, the Commission issued another order in Case No. U-10138, which directed Ameritech Michigan to begin implementation of dialing parity on January 1, 1996 at those offices where it was technically feasible to do so and to adopt a firm schedule for converting to dialing parity at its other offices. The Commission also provided that a 55% discount on access charges would be imposed for all offices that did not meet the schedule for converting to dialing parity.

On November 30, 1995, the MTA was amended by passage of 1995 PA 216 (Act 216), which substantially revised the MTA and added several new sections. Sections 312a and 312b specifically address implementation of dialing parity in Michigan.¹ Section 312a provides that if a waiver of the prohibition against the provision of interLATA service, which was imposed on regional Bell Operating Companies (BOCs) by the Modification of Final Judgement (MFJ) issued in United States v American Telephone & Telegraphy Company, 522 F Supp 131 (1982), affd sub nom Maryland v United States, 460 US 1001; 103 S Ct 1240; 75 L Ed 2d 472 (1983), is granted for a specific service area and if that service area has 2 or more basic local exchange service providers, then those providers shall provide dialing parity within the affected service areas.

In Section 312b, the Legislature established a schedule for providers of basic local exchange service having 250,000 or more access lines to offer dialing parity in the absence of interLATA relief. Section 312b required such providers of basic local exchange service to implement dialing parity for 10% of their customers by January 1, 1996. Although Section 312b(1) increased the percentage of customers that were to be provided with dialing parity on a monthly basis, those

¹Section 312a was enacted with a repeal date of January 1, 2001, while Section 312b was enacted with a repeal date of July 1, 1997.

increases were only applicable if the provider of basic local exchange service was no longer prohibited by law from providing interLATA toll service or from providing dialing parity.

Section 312b(4) specifically provided that the Commission's orders regarding dialing parity that were issued on or before January 1, 1995 were neither altered or voided by Act 216.

In response to enactment of Section 312b, Ameritech Michigan provided dialing parity to only 10% of its customers after January 1, 1996. Following expiration of the statutory phase-in schedule contained in Section 312b(1), MCI and AT&T sought to have the Commission compel Ameritech Michigan to comply with the Commission's previous orders concerning dialing parity. In response, Ameritech Michigan contended that Section 312b constituted a statutory plan linking dialing parity with interLATA relief. Ameritech Michigan insisted that it was obligated to provide only 10% of its customers with dialing parity until such time as it was allowed to provide interLATA service.

In an order issued on June 26, 1996 in Case No. U-10138, the Commission again ordered Ameritech Michigan to provide dialing parity and to implement the 55% discount on access charges pursuant to the February 24, 1994 and March 10, 1995 orders. One month later, on July 26, 1996, Ameritech Michigan filed tariff sheets implementing the 55% discount. Ameritech Michigan's application for rehearing of the June 26, 1996 order was denied on October 7, 1996.

Ameritech Michigan timely appealed the Commission's 1996 orders to the Court of Appeals. On December 4, 1996, the Court of Appeals entered a stay of proceedings.

On May 19, 1998, the Court of Appeals ruled that the Commission's 1994, 1995, and 1996 orders were invalid because they conflicted with Section 312b(1) of the MTA that, according to the Court of Appeals, linked dialing parity for 90% of Ameritech Michigan's customers to removal of the interLATA prohibitions contained in the MFJ. *In re MCI Telecommunications Complaint*,

229 Mich App 664; 583 NW2d 458 (1998). The Court of Appeals also concluded that the Commission's imposition of a 55% discount on access charges was illegal because the dialing parity implementation schedule contained in the Commission's February 24, 1994 and March 10, 1995 orders was void due to its conflict with the schedule adopted by the Legislature in Section 312b. In June 1998, in the aftermath of the Court of Appeals's May 19, 1998 decision, Ameritech Michigan eliminated the 55% discount on current billings and backbilled the inter-exchange carriers (IXCs) to recover the amount of the access charge discounts on their prior billings.

On appeal, the Michigan Supreme Court concluded that Section 312b constituted a temporary suspension of the Commission's discretion over the establishment of a dialing parity implementation schedule. The Supreme Court further held that the Commission's March 10, 1995 order in Case No. U-10138, which required a 55% discount on access charges for those exchanges where dialing parity was not available, was enforceable subsequent to the repeal of Section 312b on July 1, 1997. Finally, the Supreme Court remanded the matter to the Commission, "solely for the purposes of determining the calculation of what monies might be due to which parties by operation of our holding regarding the fifty-five percent discount." 460 Mich at 445.

First Time Period

The parties generally agree that the issues presented by this proceeding may be grouped into three distinct time periods. The first time period began on July 26, 1996 (the date that Ameritech Michigan implemented the 55% discount in access charges in areas where dialing parity was not available) and ended on June 30, 1997 (the date that Section 312b was last in effect). It is undisputed that during the first period, Ameritech Michigan provided the 55% discount in areas where

dialing parity did not exist. It is equally undisputed that the Supreme Court determined that the Commission had no authority to issue the June 26, 1996 order that required Ameritech Michigan to offer dialing parity to more than 10% of its customers at that time.

Ameritech Michigan maintains that it is entitled to collect from the IXCs the difference between the full access charges that it could have collected but for the Commission's June 26, 1996 order and the amount that it actually collected from the IXCs pursuant to the tariffed 55% discount ordered by the Commission.

On the other hand, the IXCs maintain that permitting Ameritech Michigan to collect the 55% discount at this time would constitute a violation of the prohibition against retroactive ratemaking that has been recognized and applied by the Commission and the courts of this state for over 50 years. They also claim myriad other defenses including the filed rate doctrine, tariff limitations, accord and satisfaction, and the legality of the MTA.

The ALJ ruled that the prohibition against retroactive ratemaking is not applicable to this proceeding because of the Supreme Court's finding that the 55% discount could not be enforced until after repeal of Section 312b on July 1, 1997. Further, based on the Supreme Court's description of the purpose of its remand to the Commission, the ALJ found that the Commission is limited to resolving the specific issues described by the Supreme Court. For that reason, the ALJ rejected arguments raised by the IXCs regarding the filed rate doctrine and limitations contained in Ameritech Michigan's tariffs. The ALJ also rejected claims raised by the IXCs that the doctrine of accord and satisfaction precludes Ameritech Michigan from collecting the disputed 55% discount. Finally, the ALJ rejected an argument that Section 312b of the MTA is unconstitutional because he found that issue to be outside the scope of this proceeding.

a. Retroactive Ratemaking

In its exceptions, AT&T argues that allowing Ameritech Michigan to retroactively eliminate the 55% discount applied between July 26, 1996 and June 30, 1997 constitutes retroactive rate-making. However, in so doing, AT&T insists that the ALJ incorrectly assumed that the Michigan Supreme Court found that the Commission's June 26, 1996 order in Case No. U-10138 was null and void. Citing language from page 418 of the Supreme Court's order, AT&T argues that the Supreme Court actually concluded that the Commission's June 26, 1996 order was viable and enforceable except for the period specified in Section 312b during which the Legislature's mandated implementation schedule for dialing parity was in effect.

In response, Ameritech Michigan insists that it had consistently maintained that the Commission's 55% discount order was unlawful and that the Michigan Supreme Court agreed with Ameritech Michigan's position on this point.

A review of the Supreme Court's opinion indicates that the Supreme Court differentiated between the Commission's various orders that discussed the 55% discount. The Commission first established the 55% discount in its March 10, 1995 order in Case No. U-10138, which was affirmed by the Court of Appeals in an unpublished per curium opinion issued February 7, 1997 in Court of Appeals Docket No. 184718. Ameritech Michigan did not appeal that decision to the Supreme Court. Accordingly, the Commission's March 10, 1995 order constitutes a final and binding decision with respect to the imposition of the 55% discount prior to the effective date of Section 312b. In *In re MCI Telecommunications Complaint*, supra, the Michigan Supreme Court held that Section 312b operated to deprive the Commission of the ability to implement a dialing parity schedule of its own choosing until Section 312b(1) expired on July 1, 1997. However, because Section 312b(4) specifically included a savings clause that preserved prior Commission

orders, subsequent to the repeal of Section 312b on July 1, 1997, the Commission's authority over dialing parity issues and its ability to enforce both its dialing parity schedules and its prior orders was restored. Specifically, the Supreme Court held that the Commission's March 10, 1995 order had been temporarily stayed from November 30, 1995 to July 1, 1997, but not voided by Section 312b:

Accordingly, while the PSC was without authority to issue its 1996 orders, and thus could not rely on them following July 1, 1997, the prior 1995 order providing for the fifty-five percent discount remained valid and applicable to those dates following the Legislature's repeal of its intraLATA regulation (§ 312b). Given that this order has already been affirmed by the Court of Appeals, it has already been determined that it represents a lawful and reasonable rate-making function of the PSC, and thus is valid.

460 Mich at 430-431.

Therefore, it is clear that the Michigan Supreme Court held that the Commission's March 10, 1995 order was valid and enforceable, except while temporarily stayed by Section 312b(1). However, the Supreme Court also held that the Commission's June 26 and October 7, 1996 orders were wholly unlawful because, at the time that they were issued, the Commission lacked authority to adopt any schedule regarding dialing parity other than the schedule specified by the Legislature.

Having clarified that the March 10, 1995 order was merely suspended from January 1, 1996 through June 30, 1997, whereas the June 26 and October 7, 1996 orders were determined to be unlawful and void ab initio, the Commission turns to the question of whether the prohibition against retroactive ratemaking precludes Ameritech Michigan from backbilling the IXCs to recover

the 55% discount.² AT&T, MCI, and Qwest maintain that allowing Ameritech Michigan to backbill them for the 55% discount that was in effect from July 26, 1996 through June 30, 1997 constitutes retroactive ratemaking. According to the IXCs, it is well established by Michigan Bell Telephone Co v Public Service Commission, 315 Mich 533; 24 NW2d 200 (1946), that the Commission lacks authority to retroactively establish rates to correct an injustice caused by a delay in establishing necessary increased rates. Therefore, they insist that Ameritech Michigan has no right to backbill them for the amount of the discount that the Michigan Supreme Court determined that the Commission had no authority to order Ameritech Michigan to provide from July 26, 1996 through June 30, 1997. Moreover, they assert that the case of Michigan Consolidated Gas Co v Public Service Commission, 25 Mich App 512; 181 NW2d 596 (1970), affirmed 389 Mich 624; 209 NW2d 210 (1973), establishes that Ameritech Michigan's only avenue for preserving its right to collect the 55% discount was to seek a preliminary injunction that would have allowed it to collect the full amount of the access charges pending appeal of the legality of the Commission's orders.

In response, Ameritech Michigan maintains that the prohibition against retroactive ratemaking does not apply to a situation where Ameritech Michigan discounted the cost of access charges pursuant to a Commission order that was later determined to be unlawful. Citing Attorney General

²In so doing, the Commission acknowledges that consideration of this issue is not explicitly required by the language of the Supreme Court's remand directive. However, the Commission is aware that the issue of the amount in dispute due to Ameritech Michigan's backbilling of the IXCs was interposed into In re MCI Telecommunications Complaint, *supra*, at oral argument before the Supreme Court in the context of a mootness issue raised by Ameritech Michigan. Under the circumstances, because the parties have not had a prior opportunity to brief the backbilling issue, the Commission is persuaded that it should not preclude any of the parties from raising any issue that bears on Ameritech Michigan's efforts to rebill the IXCs for the 55% discount.

v Public Service Commission, 206 Mich App 290; 520 NW2d 636 (1994), Ameritech Michigan contends that the prohibition against retroactive ratemaking applies “to a change, either upward or downward, in the rates charged by a utility for its service under a lawful order”. 206 Mich App at 297 [emphasis added]. Because the order at issue in this proceeding was determined to be unlawful by the Michigan Supreme Court, Ameritech Michigan insists that the prohibition against retroactive ratemaking is simply not applicable.

The Commission finds that the IXCs’ reliance on the prohibition against retroactive rate-making as support for their position that they should not be required to repay Ameritech Michigan for the 55% discount is misplaced. The lead case regarding the prohibition against retroactive ratemaking is Michigan Bell, supra. In that case, the Commission attempted to reduce a utility’s gross revenues by \$3.5 million on an annual basis and to require the utility to refund that amount to its ratepayers. The Commission’s effort to require the refund of excess earnings was rejected. In so doing, the Michigan Supreme Court stated:

We conclude that orderly protection of the rights of the parties concerned requires the holding in law that a lawfully established rate remains in force until altered by a subsequently established lawful rate.

315 Mich at 544. (Emphasis added.)

In Michigan Bell, supra, the Supreme Court grounded its decision on the fact that there was no express or reasonably implied statutory provision authorizing the Commission to alter or readjust rates or charges retroactively. Indeed, the Supreme Court found that the Commission’s statutory authority to fix utility rates was “quite clearly prospective only.” 315 Mich at 545. In this proceeding, however, Ameritech Michigan’s effort to rebill the IXCs is not based on a Commission order that retroactively affects Ameritech Michigan’s rates, but upon a statutory provision that expressly precludes enforcement of the 55% discount ordered by the Commission until July 1,

1997. In passing Section 312b, the Legislature was aware of the Commission's prior orders. Indeed, in Section 312b(4), the Legislature made reference to those orders. Accordingly, the Commission does not agree that the prohibition against retroactive ratemaking, which is grounded on interpretation of the Commission's statutory ratemaking authority, should be applied to this situation. Ameritech Michigan's right to recover the undiscounted amount for access charges between July 26, 1996 and June 30, 1997 is based upon an act of the Legislature that the Supreme Court has determined controls the outcome of this proceeding. Therefore, the Commission agrees with Ameritech Michigan that the Supreme Court's decision precludes application of the prohibition against retroactive ratemaking to this proceeding because the Supreme Court has determined that the Commission's imposition of a 55% discount in access charges for Ameritech Michigan's customers between July 26, 1996 and June 30, 1997 was unlawful.

b. Filed Rate Doctrine

MCI and Qwest maintain that the filed rate doctrine prevents Ameritech Michigan from backbilling them for the 55% discount. According to them, because Ameritech Michigan tariffed the 55% discount during the entire first time period, Ameritech Michigan's backbilling amounts to a retroactive change in its rates that is simply not permissible.

In response, Ameritech Michigan argues that its right to recover access charge amounts that were unlawfully discounted by the Commission is not prohibited by the filed rate doctrine. Rather, Ameritech Michigan maintains that the filed rate doctrine protects carriers from being sued for charging allegedly unreasonable rates because properly filed rates are virtually unassailable in judicial proceedings brought by ratepayers. Moreover, Ameritech Michigan asserts that the filed rate doctrine is facially inapplicable to the circumstances of this case.

An examination of case law discloses that the filed rate doctrine, which applies to provider/customer relationships in regulated industries such as railroads, motor carriers, and telecommunications, rests on two separate and distinct statutory purposes. Requiring a provider of a regulated service to publish its rates in a tariff that is filed with a regulatory agency ensures against rate discrimination and provides the public with a measure of predictability regarding the rate to be charged for the service. Arizona Grocery Company v Atchison Topeka & Santa Fe RR Co, 284 US 370; 52 S Ct 183; 76 L Ed 348 (1932). The classic statement of the filed rate doctrine was authored by Justice Charles Evans Hughes of the United States Supreme Court in Louisville & Nashville R Co v Maxwell, 237 US 94; 35 S Ct 494; 59 L Ed 853 (1915). It was held that a passenger who purchased a ticket at a rate misquoted by a ticket agent subsequently could be rebilled and required to pay the higher tariff rate. In so doing, Mr. Justice Hughes wrote:

Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Id., at 97. However, in Maislin Industries v Primary Steel, 497 US 116; 110 S Ct 2759; 111 L Ed 2d 94 (1990), it was determined that the filed rate doctrine is not applicable if the rate is unlawful or unreasonable. Additionally, in Security Services, Inc. v K Mart Corporation, 511 US 431; 114 S Ct 1702; 128 L Ed 2d 433 (1994), it was held that a party has no right to rely on a filed, but void, tariff.

Because the Michigan Supreme Court determined that the Commission improperly ordered Ameritech Michigan to discount its access charges by 55% between July 26, 1996 and June 30,

1997, the Commission is persuaded that based on the Maislin Industries and Security Services cases, the filed rate doctrine should have no application to this proceeding. Absent Commission orders that have been determined to be unlawful, Ameritech Michigan would not have tariffed the 55% discount. Moreover, requiring strict adherence to the rate for access service contained in Ameritech Michigan's tariffs from July 26, 1996 through June 30, 1997 is inconsistent with the intent of the Legislature. For these reasons, the Commission finds that the arguments raised by MCI and Qwest regarding application of the filed rate doctrine should be rejected.

c. Injunctive Relief

MCI and Qwest argue that the stay of the Commission's June 26 and October 6, 1996 orders that was issued by the Court of Appeals on December 4, 1996 relieved Ameritech Michigan from the obligation to comply with the 55% discount. According to them, subsequent to December 4, 1996 and through the end of the first period, it should be determined that Ameritech Michigan "voluntarily" continued to apply the 55% discount because it was then under no legal obligation to do so. Therefore, they contend that Ameritech Michigan has no right to backbill them for the period December 5, 1996 through June 30, 1997.

Ameritech Michigan answers this argument by contending that it should not be penalized for complying with the Commission's orders. According to Ameritech Michigan, the December 4, 1996 stay issued by the Court of Appeals is not relevant because case law establishes that a party that prevails in a lawsuit has the right to recover the full amount of any underlying indebtedness. Indeed, Ameritech Michigan insists that the Michigan Supreme Court's remand was specifically intended for that purpose.

Having obtained a stay from the Court of Appeals on December 4, 1996, it is difficult to understand why Ameritech Michigan failed to take advantage of it. Commencing December 5,

1996, Ameritech Michigan had the right to eliminate the 55% discount. Instead, Ameritech Michigan waited until after the Court of Appeals' May 19, 1998 ruling on the merits of the appeal before eliminating the 55% discount on current billings. However, the arguments raised by MCI and Qwest to the effect that Ameritech Michigan should be prevented from backbilling them due to its failure to properly take advantage of the December 4, 1996 stay appear to be an effort to raise an equitable defense such as laches or estoppel. Even if the Commission could exercise equitable jurisdiction, which it cannot, MCI and Qwest have not established that Ameritech Michigan's failure to immediately eliminate the 55% discount adversely affected them in any way. Moreover, the Commission finds that it would not be in the public interest to establish that a provider places itself at risk for choosing to comply with a Commission order even when the provider is free to do otherwise. This is particularly true when the provider has appealed the Commission's order and decides to await the outcome of the appeal as Ameritech Michigan did in this case.

d. Tariff Limitation

Tariff MPSC No. 20 R, Part 2, Section 2 (2nd Revised Sheet No. 15) of Ameritech Michigan's tariffs provides, in part³:

Except as otherwise provided in a written contract between a customer and the Company, a customer will be liable for net underbilled service for one year from the date that the service was provided or a bill for that service was rendered, whichever is later. This limitation does not apply when the service was obtained by the customer by fraud or deception.

MCI and Qwest maintain that this language precludes Ameritech Michigan from recovering any net underbilled portion of any bill for access charges that is more than 1 year old. Further, citing Shields v Shell Oil Company, 237 Mich App 682; 604 NW2d 709 (1999), MCI argues that

³This language became effective January 11, 1997. Prior to that date, Tariff MPSC No. 20 R, Part 2, Section 2 (1st Revised Sheet No. 15) contained a similar 1 year limitation.

the tariff should be considered the functional equivalent of a statute of repose because it prevents Ameritech Michigan from pursuing stale claims. Finally, MCI contends that if not totally barred from billing the IXCs, Ameritech Michigan should be limited to billing for the June and July 1997 access bills that pertain to the May and June 1997 access services.⁴

In response, Ameritech Michigan maintains that this proceeding is not controlled by the tariff. Rather, Ameritech Michigan argues that the tariff applies to billing errors related to customer usage, the applicable rate applied to the service, or other such factors discovered after the customer has been billed for the service. Ameritech Michigan maintains that this proceeding involves its efforts to recoup a discount that it was unlawfully ordered to provide to its customers. Accordingly, Ameritech Michigan contends that the tariff should not be considered by the Commission in determining the outcome of this proceeding.

The Commission agrees with Ameritech Michigan that Tariff MPSC No. 20 R, Part 2, Section 2 does not control the outcome of this proceeding. That provision applies to the correction of billing mistakes that results in net underbilled services. The underbillings at issue in this proceeding did not result from such billing errors. Rather, the underbillings are directly related to a Commission order regarding the rate that Ameritech Michigan may charge its customers for access services, which was later determined to be unlawful. Therefore, the Commission finds that MCI's and Qwest's exception should be rejected.

⁴This argument is based on MCI's concession that Ameritech Michigan's June 24, 1998 e-mail message could be construed as a timely effort to rebill MCI for previous underbillings.

e. Accord and Satisfaction

Citing Stefanac v Cranbrook Educational Community, 435 Mich 155; 458 NW2d 56 (1990), MCI contends that the contract doctrine of accord and satisfaction⁵ precludes Ameritech Michigan from attempting to rebill MCI for the unpaid portion of the discounted access charges. MCI contends that Ameritech Michigan's acceptance of the discounted access charge payment constitutes satisfaction of MCI's obligation to pay access charges.

In response, Ameritech Michigan argues that the doctrine of accord and satisfaction does not apply to this situation. According to Ameritech Michigan, the doctrine applies only if one party agrees to accept something other than what it was owed as full settlement of its claim against the other party. Ameritech Michigan insists that this case does not involve the type of settlement agreement that is required for the doctrine of accord and satisfaction to apply. Ameritech Michigan contends that its acceptance of discounted access rates was required by order of the Commission. Further, Ameritech Michigan stresses that all parties to this proceeding were aware of Ameritech's Michigan's challenges to the Commission's orders and to Ameritech Michigan's intention to recoup the discounted amounts in the event that its appeal was successful.

The Commission finds that MCI's argument regarding the doctrine of accord and satisfaction is misplaced. Although Ameritech Michigan did receive discounted payments for access charges, it is clear that Ameritech Michigan did not accept such payments pursuant to an understanding that acceptance of the discounted amount constituted satisfaction of Ameritech Michigan's claim for payment in full. Accordingly, MCI's accord and satisfaction argument is rejected.

⁵An accord is an agreement whereby the parties to a contract agree that one of the parties may discharge a preexisting duty through some substituted performance. Satisfaction is the acceptance by the other party of the substituted performance, which discharges any further duties owed.

f. Retroactive Application of Judicial Opinions

MCI argues that the doctrine against retroactive application of judicial opinions should be applied to prohibit Ameritech Michigan from backbilling the IXCs for the discounted access charges. However, the Commission finds that further elaboration on this issue is not necessary because, by remanding this matter to the Commission for further proceedings in accordance with its July 8, 1999 decision, the Michigan Supreme Court quite clearly determined that its decision should be applied retroactively.

g. Constitutionality of Section 312b

AT&T maintains that application of the schedule for implementation of dialing parity contained in Section 312b of the MTA without also applying the 55% discount to customers where dialing parity was not available is discriminatory and constitutes a denial of equal protection and due process of the law because customers who could not avail themselves of dialing parity were receiving an inferior form of service despite being required to pay the price associated with a higher form of service that only 10% of them were receiving. According to AT&T, interpreting Section 312b in this manner is tantamount to a determination that the Legislature expressly intended to discriminate against 90% of Ameritech Michigan's customers.

The Commission understands AT&T's argument regarding the legality of Section 312b, but notes that, as an administrative agency, it has no authority to pass on the constitutionality of the statutes that empower it. Dation v Ford Motor Company, 314 Mich 152; 22 NW2d 252 (1946).⁶

⁶Moreover, because AT&T included a similar argument in its December 7, 1998 brief to the Michigan Supreme Court, it may be inferred that the Supreme Court rejected AT&T's equal protection and due process arguments.

Accordingly, the Commission finds that the ALJ did not err in rejecting AT&T's arguments on this issue.

Second Time Period

The second time period commenced July 1, 1997 (the date that Section 312b was repealed) and ended January 19, 1999 (the date of the order in Case No. U-11743). During the initial phase of the second time period, Ameritech Michigan issued bills reflecting the 55% discount. However, after the Court of Appeals' May 19, 1998 ruling on the merits of Ameritech Michigan's appeal of the Commission's June 26 and October 7, 1996 orders, Ameritech Michigan commenced issuing bills that reflected prospective elimination of the 55% discount.

For the second time period, Ameritech Michigan and the IXCs are in agreement that the IXCs are entitled to the 55% discount and Ameritech Michigan is in the process of issuing appropriate credits to them. Accordingly, none of the parties have raised any exceptions regarding the second time period.

Third Time Period

Ameritech Michigan and MCI have filed exceptions pertaining to the ALJ's rulings regarding the third time period, which commenced January 20, 1999 and ended May 11, 1999 (the last day that Ameritech Michigan did not provide dialing parity in all areas). All of the exceptions concern the "flow-through" requirement that was adopted by the Commission in its January 19, 1999 order in Case No. U-11743. The Commission stated:

Turning to a final issue on the discount, as discussed above, the Commission concludes that the IXCs have established that the lack of dialing parity creates an inferior service and that a discount is appropriate to reflect the lesser value of the service. The Commission is not persuaded on this record that the IXCs are affected in a manner that merits compensation to them, although they are harmed in some

unquantified fashion by the inability of some of their customers to select them as the dial 1+ carrier. The record does not provide a basis for concluding to what extent their market share has been impaired by the lack of dialing parity. The record does show that the connection to the network without dialing parity is the technical equivalent of the connection that is provided with dialing parity, and the IXCs have apparently successfully marketed dial around service. In fact, they are able to sell that service even where dialing parity is available.

On the other hand, the record also shows that the customers of the IXCs are directly affected by the lack of dialing parity, if only because they have to dial additional digits or make some other arrangement such as a dedicated connection. It also appears that, for reasons not disclosed on this record, some customers will choose to use an inferior service even without a discount. Whatever the reason, as a matter of ratemaking, the Commission finds no compelling reason on this record to order a discount in access rates if the IXCs choose to retain the discount rather than passing it along to their customers. Consequently, the Commission orders that Ameritech Michigan shall discount its intraLATA access rates by 55% for each IXC that passes along all of the discount to its customers by reducing its per minute charges for all calls initiated without dialing parity.

January 19, 1999 order, Case No. U-11743, p. 22.

The January 19, 1999 order was appealed to the Court of Appeals by Ameritech Michigan. On February 9, 1999, in response to a motion filed by Ameritech Michigan, the Court of Appeals issued a stay of the order. In a separate order issued simultaneously with *In re MCI Telecommunications Complaint*, supra, the Michigan Supreme Court lifted the February 9, 1999 stay issued by the Court of Appeals and remanded that matter to the Court of Appeals for further consideration. Subsequently, Ameritech Michigan requested that all issues in the case be dropped except for Ameritech Michigan's challenge to the Commission's award of attorney fees and costs. On January 12, 2000, the Court of Appeals entered an order reversing the award of attorney fees and indicating that the only issue still subject to appeal involves Ameritech Michigan's challenge to the award of costs.

Because the appeal of the January 19, 1999 order is final with regard to the merits of the flow-through requirement, the parties cannot collaterally attack the Commission's determination that, as

a condition of receiving the 55% discount subsequent to January 19, 1999, IXC's must flow-through the entire discount to their customers.

The ALJ found that the IXC's were obligated to implement the flow-through requirement in order to obtain the 55% discount. However, he also determined that the IXC's were prohibited from complying with the flow-through requirement due to Ameritech Michigan's failure to provide them the 55% discount from January 20 to May 11, 1999. Accordingly, the ALJ concluded that the issues presented by the parties should not be resolved on the basis of the motions for summary disposition.

MCI offers five arguments in support of its position regarding the flow-through requirement.⁷ First, MCI argues that because the January 19, 1999 order was stayed and never implemented by Ameritech Michigan during the third time period, the flow-through requirement was never in effect during the third time period and cannot now be applied retroactively. Second, MCI contends that its claim to the 55% discount stems from the Commission's March 10, 1995 order that was upheld by the Supreme Court. Third, citing Section 312 of the MTA, MCI argues that the Commission has no jurisdiction over toll rates. Therefore, MCI insists that the Commission cannot implement the flow-through requirement without violating Section 312 of the MTA. Fourth, MCI maintains that the January 19, 1999 order did not produce any access rate savings beyond the savings associated with the Commission's March 10, 1995 order. Therefore, MCI reasons that, because

⁷References made by MCI at page 6 of its exceptions and page 5 of its reply to exceptions indicate that MCI resorted to self-help during the third time period by revising Ameritech Michigan's undiscounted access billings and paying only 45% of the amount owed. Therefore, it may be assumed that MCI reduced its payment to Ameritech Michigan by 55% without flowing through the benefit to its customers. Accordingly, MCI is at risk of being required to either reimburse Ameritech Michigan or pass on the full amount of the discount to its customers, unless it is able to convince the Commission that the flow-through requirement in the January 19, 1999 order is a nullity.

there were no additional access savings as a result of the January 19, 1999 order, IXCs that realized a reduction in access charges pursuant to the March 10, 1995 order were under no obligation to flow through any benefits to their customers.⁸ Fifth, MCI maintains that under no circumstances should Ameritech Michigan be permitted to enrich itself by keeping the 55% discount in the event that an IXC does not comply with the flow-through requirement. According to MCI, rather than returning the funds to Ameritech Michigan, the Commission should direct that they be paid to the State of Michigan or to a charitable organization within Michigan.

In its exceptions, Ameritech Michigan maintains that the flow-through requirement is valid and in force for the entire third time period. Accordingly, Ameritech Michigan insists that any IXC desiring to claim the 55% discount must first establish that it lowered its per minute rates for dial-around calls by the full 55% in all areas where the dialing parity was not available from January 20, 1999 through May 11, 1999. Moreover, Ameritech Michigan insists that it would be inappropriate for an IXC to argue that contemporaneous compliance with the flow-through requirement was impracticable. According to Ameritech Michigan, the issue of practical compliance with the flow-through requirement is simply not within the scope of the Supreme Court's remand order. Further, Ameritech Michigan contends that, in the absence of proof of contemporaneous compliance with the flow-through requirement, Ameritech Michigan is entitled to receive

⁸In any event, MCI contends that the Commission needs to determine a methodology for establishing that the flow-through has taken place. MCI believes that the flow-through requirement does not make sense given that the Supreme Court upheld the 55% discount for the third time period that was not subject to a flow-through requirement. Further, MCI suggests that the only proper methodology for a provider to establish its compliance with the flow-through requirement is for the provider to demonstrate it did not increase rates to its customers without intraLATA dialing parity after January 19, 1999 as compared to the rates charged to customers with dialing parity after January 19, 1999. MCI reasons that this test is appropriate because the rates in effect before January 19, 1999 already fully reflect the 55% discount.

undiscounted access charges for the third time period. Finally, Ameritech Michigan argues that given the limitations on the remand established by the Michigan Supreme Court, the Commission may not entertain alternative distributions of the assets at issue in this proceeding.

In its reply to exceptions, AT&T insists that the IXC's were under no obligation pursuant to the January 19, 1999 order to contribute the 55% discount to their customers prior to actually receiving the discount from Ameritech Michigan. According to AT&T, the Commission's choice of words in drafting the flow-through requirement clearly evidences that the Commission intended Ameritech Michigan to provide the IXC's with a discount before the IXC's were obligated to distribute the discount to their customers. Moreover, AT&T questions how an IXC could ever establish, in advance, that it distributed the entire discount to its customers prior to knowing how much money was involved. Rather, AT&T argues that a fair reading of the Commission's January 19, 1999 order indicates that the Commission intended the IXC's to pass through an amount equal to the discount to the IXC's that was actually received from Ameritech Michigan after the discount was provided. According to AT&T, it simply defies logic to contend, as Ameritech Michigan does through its exceptions, that the Commission intended that the IXC's would be required to estimate, in advance, how long Ameritech Michigan would continue to withhold dialing parity in its remaining exchanges, the volume of access that would be used during that period in those exchanges, and the total amount of money that would be represented by a 55% discount in access charges for those yet to be provided services for the entire period.

AT&T also maintains that an appropriate methodology for ensuring that any discounted sums are flowed through by the IXC's for the benefit of their end users was already the subject of prior hearings conducted in Case No. U-11743. According to AT&T, the Commission should direct the IXC's and the Staff to determine how the flow-through issues should be resolved.

Finally, AT&T insists that affirmation of the 55% discount by the Michigan Supreme Court in In re MCI Telecommunications Complaint, supra, means that, under no circumstances, should Ameritech Michigan be permitted to charge 100% access charges between January 20, 1999 and May 11, 1999. Accordingly, AT&T insists that the scope of this proceeding is broad enough to allow the Commission to determine alternative recipients for the 55% discount.

According to Qwest, because Ameritech Michigan took immediate action to obtain a stay of the January 19, 1999 order from the Court of Appeals, Ameritech Michigan cannot reasonably contend that the IXCs' failure to contemporaneously comply with the flow-through requirement should relieve Ameritech Michigan from its obligation to provide the IXCs with the 55% discount at this time. Indeed, Qwest insists that the Commission should reject Ameritech Michigan's effort to enrich itself at the expense of end users. Rather, Qwest urges the Commission to implement the clear intention of its January 19, 1999 order by crafting a solution that benefits end users, not Ameritech Michigan.

The Commission finds that Ameritech Michigan and MCI share the same misconception regarding the effect of the Court of Appeals' February 9, 1999 stay of the Commission's January 19, 1999 order in Case No. U-11743. Both Ameritech Michigan and MCI seem to believe that their individual positions were improved because the third time period expired before the stay of the Commission's order in Case No. U-11743 was lifted by the Michigan Supreme Court. Ameritech Michigan insists that the existence of the stay precludes retroactive enforcement of the 55% discount. Based on similar logic, MCI maintains that the stay precludes application of the flow-through requirement. Neither party is correct.

A stay operates merely to preserve the status quo existing on the date of its issuance and in no way addresses the merits of the parties' dispute. Douglas Transit, Inc. v Illinois Commerce

Commission, 145 Ill App 3d 115; 495 NE2d 620 (1996). Further, while a stay is a provisional remedy that delays the effectiveness of a prior determination, it does not alter the substantive rights of the parties. Housing Authority of Morristown v Little, 135 NJ 274; 639 A2d 286 (1994).

Nothing in the Michigan Supreme Court's order in In re MCI Telecommunications Complaint, supra, or the order lifting the stay of the Commission's order in Case No. U-11743 suggests that any party's position was enhanced or prejudiced as a result of the stay.

The Commission also rejects MCI's contention that the prohibition against retroactive ratemaking constitutes a barrier to application of the flow-through requirement during the third time period. The Commission's January 19, 1999 order placed the flow-through requirement into effect as of January 20, 1999. As previously noted, the flow-through requirement is the law of the case. Accordingly, the Commission finds that application of the flow-through requirement to the third time period does not involve retroactive ratemaking in any regard.

Likewise, the Commission rejects MCI's position that the MTA precludes the Commission from adopting the flow-through requirement. MCL 484.2312; MSA 22.1469(312) precludes the Commission from reviewing or setting the rates for toll service, except as expressly provided in the MTA. However, while the Commission's January 19, 1999 order in Case No. U-11743 provided IXCs with an incentive to reduce their rates for toll service, that order clearly did not review or establish any toll rate. For that reason, the Commission finds that MCI's reliance upon MCL 484.2312; MSA 22.1469(312) is misplaced.

Additionally, the Commission rejects MCI's argument that the March 10, 1995 order in Case No. U-10138, which did not require the flow-through of the 55% discount, controls the conditions for the 55% discount during the third time period. MCI's contention that the decision in In re MCI Telecommunications Complaint, supra, controls the outcome of the third time period is directly

contradicted by the position taken by MCI in its August 28, 1998 answer to Ameritech Michigan's motion to dismiss in Case No. U-11743, wherein MCI argued that its complaint in Case No. U-11743 only concerns the Commission's authority to rule that the lack of intraLATA dialing parity after July 1, 1997 was entirely independent of the issues addressed in the Commission's 1994, 1995, and 1996 orders in Case No. U-10138. Moreover, the Commission notes that MCI's exception regarding this issue is devoid of any citation of authority in support of its current position or any effort by MCI to distinguish the position taken in its August 28, 1998 brief from its current position. It is well established that a litigant may not merely claim error and leave the decision-making body to search for authority to sustain or to reject the claim. As was so eloquently put by Justice John D. Voelker in Mitcham v City of Detroit, 355 Mich 182; 94 NW2d 388 (1959):

The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

355 Mich at 203. For these reasons, the Commission finds that MCI's contention that the Commission's March 10, 1995 order controls the outcome of the third time period should be rejected.

The Commission also rejects Ameritech Michigan's argument that the IXCs' failure to contemporaneously flow through the 55% discount necessarily determines the outcome of this proceeding in Ameritech Michigan's favor. The January 19, 1999 order in Case No. U-11743 contemplated only two scenarios. It was anticipated that Ameritech Michigan would either (1) provide a 55% discount in access charges to IXCs that agreed to flow all such benefits to their customers, or (2) bill the IXCs that declined to pass the 55% discount through to their customers at the full rate. The January 19, 1999 order did not provide for the possibility that Ameritech

Michigan would obtain a stay and bill the IXCs without regard to whether the IXCs intended to flow through a discount to their customers. The Commission's failure to address other possible scenarios does not lead to the conclusion that the parties should not now be bound by the intent of the Commission's order.⁹

Therefore, the Commission agrees with the ALJ's determination that Ameritech Michigan's failure to provide the 55% discount during the third time period obviated the IXCs from complying with the flow-through requirement on a contemporaneous basis. Accordingly, the Commission needs to address how the ALJ should proceed with settling "the calculations of what moneys might be due to which parties." 460 Mich at page 445.

To qualify for the 55% discount, an IXC that previously paid Ameritech Michigan in full for access charges billed during the third time period must show that it either flowed through the 55% discount during the third time period or that it will do so in the future. As a practical matter, the Commission doubts that the IXCs are in a position to contend that they have already flowed through the 55% discount to their customers.¹⁰ Nevertheless, in the event that an IXC desires an opportunity to establish its contemporaneous compliance with the flow-through requirement, it shall file prepared testimony and exhibits in this docket within 21 days of the issuance of this order. If an IXC claims to have complied with the flow-through requirement, the ALJ shall

⁹The two linchpins of the Commission's January 19, 1999 order are its findings that (1) the lack of dialing parity created an inferior service that justified a discount and (2) there was no compelling reason to order a discount in access rates unless the IXCs would agree to pass the discount onto their customers. The Commission's concerns were not diminished by the stay and are now the law of the case.

¹⁰Requiring the IXCs to bear the burden of proof on this issue is reasonable in light of their exclusive control of the information necessary to establish compliance with the flow-through requirement.

establish a schedule and conduct a contested case proceeding to establish the factual basis for the IXC's claim.

IXCs that previously paid Ameritech Michigan in full for access charges billed during the third time period and that do not claim to have contemporaneously complied with the flow-through requirement shall have 21 days from the date of this order to propose a methodology for flowing through the benefits of the 55% discount to their customers at a future time. However, while an IXC's proposal of a methodology for a future flow-through of the 55% discount should be submitted in this docket, the Commission finds such proposals should not be subject to contested case proceedings. The January 19, 1999 order requiring the flow-through of the 55% discount gave IXCs discretion to determine how to accomplish this task. Nothing in the January 19, 1999 order suggested that Ameritech Michigan had any right to contest in an IXC's determination of a flow-through methodology.

Accordingly, within 21 days from the date of this order, every IXC that paid Ameritech Michigan the full amount of the access charges billed during the third time period shall elect one of the following three options¹¹:

1. Submission of prepared direct testimony and exhibits in support of the IXC's claim that it contemporaneously flowed through the 55% discount benefit to its customers.
2. Submission of a plan to flow-through the amount of the 55% discount to its customers in the near future.

¹¹The Commission finds that an IXC shall not be permitted to claim past compliance with the flow-through requirement and also to propose a methodology for a future flow-through of the 55% discount.

3. Submission of a waiver of its right to claim the 55% discount due to the IXC's refusal to flow-through the benefits of the 55% discount to its customers.

The failure of an IXC to follow through with one of these three options within 21 days shall be deemed a waiver of its right to receive the 55% discount. Each IXC shall obtain the Staff's concurrence regarding the terms of the IXC's flow-through methodology. After the Staff certifies that the IXC and the Staff have reached an agreement regarding the flow-through methodology, Ameritech Michigan shall release the funds associated with the 55% discount during the third time period to the IXC for disbursement in accordance with the IXC's methodology.¹²

If Ameritech Michigan and an IXC cannot agree on the amount of the 55% discount, the ALJ shall resolve the issue in a contested case proceeding. In the event that an IXC waives its right to a 55% discount, Ameritech Michigan shall be entitled to keep all such amounts.

Finally, the Commission finds that MCI's arguments regarding possible alternative dispositions of the 55% discount should be rejected. Clearly, the January 19, 1999 order did not contemplate such alternative dispositions of the funds associated with the discount. Therefore, the Commission finds that, unless an IXC has already flowed through the benefits of the 55% discount to its customers or agrees to do so in the future in accordance with a plan that is acceptable to the Staff, Ameritech Michigan should be permitted to retain the full amount of the access fees charged during the third time period.¹³

¹²The Commission contemplates that the methodologies of individual IXCs may differ.

¹³In the event that an IXC resorted to self-help by not paying the full amount of the access charges billed by Ameritech Michigan during the third time period and also failed to contemporaneously comply with the flow-through requirement, Ameritech Michigan shall be entitled to recover the full amount of the unpaid access charges.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACRS, R 460.17101 et seq.
- b. The defenses raised by the IXCs do not preclude Ameritech Michigan from backbilling the IXCs for the full amount of the access charges owed during the first time period as a result of the Michigan Supreme Court's reversal of the Commission's June 26 and October 7, 1996 orders in Case No. U-10138.
- c. An IXC's failure to contemporaneously flow-through the benefits of the 55% discount to its customers during the third time period does not preclude the IXC from now collecting the amount of the discount for distribution to its customers in accordance with a methodology approved by the Staff.
- d. An IXC should have 21 days from the date of this order to submit documentation of previous compliance with the flow-through requirement set forth in the Commission's January 19, 1999 order, to propose a methodology for future compliance with the flow-through requirement, or to waive its claim to the 55% discount for the third time period.
- e. An IXC that fails to submit a filing required by this order should be deemed to have waived its right to the 55% discount for the third time period.
- f. An IXC that did not pay the full amount of the billed access charges to Ameritech Michigan during the third time period and that also failed to contemporaneously comply with the flow-through requirement, should not be permitted to propose a flow-through mechanism at this time.

g. This matter should be remanded to the ALJ for further proceedings consistent with this order.

THEREFORE IT IS ORDERED that:

A. The April 3, 2000 rulings of Administrative Law Judge Daniel E. Nickerson, Jr., are affirmed to the extent that they are consistent with this order.

B. An interexchange carrier that paid access charges to Ameritech Michigan between January 20, 1999 and May 11, 1999 shall have 21 days from the date of this order to submit documentation of its previous compliance with the flow-through requirement set forth in the January 19, 1999 order in Case No. U-11743, to propose a methodology for future compliance with the flow-through requirement, or to waive its claim to the 55% discount in access charges.

C. An interexchange carrier that fails to submit a filing required by this order shall be deemed to have waived its right to the 55% discount approved by the January 19, 1999 order in Case No. U-11743.

D. An interexchange carrier that did not pay the full amount of the billed access charges to Ameritech Michigan during the third time period and that also failed to contemporaneously comply with the flow-through requirement shall not be permitted to propose a flow-through mechanism at this time.

E. This matter is remanded to Administrative Law Judge Daniel E. Nickerson, Jr., for further proceedings consistent with this order.

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

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of December 4, 2000.

/s/ Dorothy Wideman
Its Executive Secretary

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

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of December 4, 2000.

Its Executive Secretary

In the matter of the complaint of)
MCI TELECOMMUNICATIONS CORPORATION)
against **AMERITECH MICHIGAN** and **GTE**)
NORTH INCORPORATED relative to their not)
making intraLATA equal access available to MCI)
in the state of Michigan.)
_____)

Case No. U-10138

In the matter of the application and complaint of)
MCI TELECOMMUNICATIONS CORPORATION)
against **MICHIGAN BELL TELEPHONE COM-**)
PANY, d/b/a AMERITECH MICHIGAN, seeking)
(i) a 55% discount on intrastate switched access)
service where intraLATA dialing parity is not)
provided and (ii) an order requiring implementation)
of intraLATA dialing parity on an expedited basis)
now that July 1, 1997 has passed.)
_____)

Case No. U-11743

Suggested Minute:

“Adopt and issue order dated December 4, 2000 affirming rulings made by Administrative Law Judge Daniel E. Nickerson, Jr., establishing procedures for interexchange carriers to claim the 55% discount on access charges from Ameritech Michigan, and remanding the matter for further proceedings, as set forth in the order.”