

In its November 1, 1996 order in Case No. U-11138, the Commission was faced with similar issues in the arbitrated interconnection agreement between TCG Detroit and Ameritech Michigan. The Commission was persuaded that neither party's final offer with regard to indemnification constituted an acceptable term or condition for their interconnection agreement. Further, the Commission was persuaded that it should not attempt to rewrite either party's indemnification offer. Therefore, it concluded that both must be rejected.

The Commission finds that the indemnification and limitation of liability proposals supported by the parties in this proceeding are also unacceptable. Both offers could create perverse incentives that will cause providers to overbuild their networks as a means of providing security against service outages, even if the duplicative facilities would not be economically efficient. Additionally, the parties may be induced to compete for customers by offering them better guarantees of performance than can be economically justified. Further, the indemnification and limitation of liability provisions may discourage customers from seeking to improve the quality of service offered to them by competing carriers. Finally, the Commission is persuaded that provisions that may lead to discriminatory concessions in favor of selected customers or against disfavored providers are incompatible with the competitive market and the purposes of the MTA.

Because the Commission does not wish to delay the process of interconnection, it will approve the agreement without the indemnification and limitation of liability provisions. However, because some indemnification and limitation of liability provisions are needed to make the interconnection agreement work efficiently, the Commission directs the parties to resume negotiations on these issues and to resubmit proposals to the Commission within 30

days. If the parties are able to agree on the indemnification and limitation of liability provisions, they should jointly submit them to the Commission. Otherwise, they should each submit their best offer, keeping in mind that their offers must be more reasonable than the offers to date and must also be compatible with the purposes and policies of the FTA and the MTA.

#### Standards of Performance

In resolving Issue 7, which concerns standards of performance, the arbitration panel recognized that Ameritech Michigan and AT&T were able to reach agreement on the standards of performance that will be utilized and measured in regard to network interconnection and the resale of network components. Expressing hope that the parties would be able to resolve issues regarding standards of performance in other areas including unbundled network components, collocation, and rights-of-way, the arbitration panel deferred making determinations on these issues in favor of having a resolution developed by the implementation team within the parameters of the implementation plan, as proposed by AT&T.

In its objections, Ameritech Michigan argues that the arbitration panel erred by deferring performance standard issues to the implementation team. Ameritech Michigan also argues that the arbitration panel erred by determining that the alternative dispute resolution process would be the proper forum for resolving disputes concerning compliance with performance standards. According to Ameritech Michigan, the arbitration panel improperly elevated the implementation team from the role of generally providing technical and operational coordination between the parties to the role of developing and applying performance benchmarks. Ameritech Michigan insists that the implementation team is ill-suited for this task.

Ameritech Michigan also insists that the panel erred in adopting many of AT&T's performance benchmarks. According to Ameritech Michigan, due to the custom nature of network element provisioning, interval categories will vary from order to order on the same element, and will have to be negotiated. Further, Ameritech Michigan argues that the panel erred in recommending resolution of performance standards through the dispute resolution process in Section 28.3 of the arbitration agreement. According to Ameritech Michigan, a better resolution would permit a party aggrieved by a performance breach to bring an action in federal District Court or to file a complaint with the Commission or the FCC.

The Commission is not persuaded that either party's final offer in the area of performance standards constitutes an acceptable provision for the interconnection agreement. Ameritech Michigan and AT&T are major providers of telecommunication services. Each is aggressively moving to enter the other's area of dominance and it can be reasonably anticipated that each will aggressively pursue the other's customers. Accordingly, the Commission foresees the likelihood that standards of performance will play an important part in the relationship between the parties. For that reason, the Commission will not attempt to rewrite either party's final offers regarding standards of performance. Rather, because the Commission does not wish to delay the process of interconnection, it will approve the agreement without specific standards of performance. The Commission recognizes that such provisions will be needed to make the interconnection agreement work efficiently. Accordingly, the Commission directs the parties to resume negotiations on these issues and to resubmit proposals within 30 days. If the parties are able to agree on standards of performance, they should submit them jointly. If the parties are unable to reach agreement, the Commission finds that the parties should adopt provisions for performance stan-

dards that are consistent with the standards for performance in the interconnection agreements between Ameritech Michigan and Brooks Fiber Communications of Michigan, Inc., and TCG Detroit.<sup>14</sup>

#### Alternative Dispute Resolution

In Issue 45, Ameritech Michigan maintains that the arbitration panel improperly adopted AT&T's proposed language for establishing an alternative dispute resolution mechanism. According to Ameritech Michigan, AT&T's proposal involves a complex, nine-page arrangement that is not required by law. Ameritech Michigan is particularly distressed that an independent arbitrator, not the FCC nor the Commission, would be required by AT&T's proposal. Ameritech Michigan urges the Commission to recognize the special expertise that regulatory agencies have in these types of matters.

In Issue 48, Ameritech Michigan claims that the arbitration panel erred in adopting AT&T's proposed language, which provides that if the parties are unable to agree upon provisions in their interconnection tariffs, then the dispute resolution process should be used to establish tariff provisions. Specifically, Ameritech Michigan argues that AT&T's proposed language in Section 29.2 of the interconnection agreement should be rejected. According to Ameritech Michigan, if there are disputes with regard to tariffs, they should be resolved by the Commission, not a private arbitrator.

The Commission finds that Ameritech Michigan's positions on Issues 45 and 48 should be adopted. Creating an unnecessary layer in the dispute resolution process, which would occur if

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<sup>14</sup>The Commission approved the interconnection agreements for these companies in its November 26, 1996 order in Case No. U-11178 and in its November 1, 1996 order in Case No. U-11138, respectively.

AT&T's proposed language for Section 28.3.2 of the arbitration agreement were to be adopted, delays the ultimate resolution of issues under the interconnection agreement and exposes the parties to additional costs associated with the hiring of an independent arbitrator.

#### Standard Offers

Issue 10 concerns the arbitration panel's finding that Ameritech Michigan should be required to offer a combination entitled "Unbundled Element Platform Without Operator Services and Directory Assistance" as a standard offering in the party's interconnection agreement. The arbitration panel recommended adoption of AT&T's proposed contract language in Section 9.3.4 and Schedule 9.3.4 on this issue.

In its objections, Ameritech Michigan argues that the interconnection agreement should allow Ameritech Michigan to offer this combination via the "bona fide request" process. According to Ameritech Michigan, there are unresolved technical issues associated with the unbundling of operator services and directory assistance. Indeed, Ameritech Michigan insists that other undisputed contract provisions reflect an understanding that problems still need to be worked out regarding the routing and branding of operator services and directory assistance. Citing Section 10.10.2 of the agreement, Ameritech Michigan points out that it is required to provide selective routing of operator services and directory assistance only to the extent that it is technically feasible to do so. Moreover, given that the Unbundled Element Platform Without Operator Services and Directory Assistance entails selective routing and branding, Ameritech Michigan insists that it should not be required to make a standard offer on a "one size fits all" basis. Rather, Ameritech Michigan maintains that the combination should be available only through a bona fide request, which will allow for the identification and resolution of the out-

standing technical issues. Finally, Ameritech contends that, even assuming that operator services and directory assistance routing or branding is technically feasible in all instances, the technical routing or branding solution may vary from switch to switch, which will cause the cost of the combination to vary on a switch-by-switch basis. Because such a variance in costs suggests that the combination should not be provided as a standard offer, Ameritech Michigan insists that its position that the combination should be available through a bona fide request is the only reasonable alternative on this record.

The Commission finds that Ameritech Michigan's position on Issue 10 should be adopted. The arbitration panel rejected Ameritech Michigan position on this issue primarily because the panel felt that Ameritech Michigan had not demonstrated that the offering was not technically feasible. However, as pointed out by Ameritech Michigan, the interconnection agreement contains examples of the parties' shared understanding that there are unresolved technical issues. As pointed out in its objections, Section 10.10.2 of the interconnection agreement and Section 8.9 of Schedule 9.5 reflect the parties' understanding that technical feasibility is a legitimate concern in Ameritech Michigan's ability to provide the combination. Moreover, the Commission is concerned that the cost of the combination could vary on a switch-by-switch basis. Accordingly, the Commission finds that the Unbundled Element Platform Without Operator Services and Directory Assistance should be offered through a bona fide request and not as a standard offering.

#### Gross Receipts Tax

Both parties proposed language regarding the liability for payment of taxes. They were unable to agree on the issue of liability for payment of taxes levied on gross receipts.

The arbitration panel adopted AT&T's proposed tax language, which provides for each party to be responsible for any tax imposed on its gross receipts. Ameritech Michigan objected to this determination. According to Ameritech Michigan, AT&T's proposed language for Section 30.7 of the interconnection arbitration agreement makes little sense and is economically irrational. According to Ameritech Michigan, AT&T's proposal could result in Ameritech Michigan being denied an opportunity to fully recover its costs.

The Commission finds that Ameritech Michigan's proposed language for Section 30.7 of the arbitration agreement is preferable to AT&T's language. In comparison, Ameritech Michigan's proposal appears to avoid the unfairness of AT&T's proposal. Moreover, Ameritech Michigan's proposal seems more consistent with the FTA and principles of Michigan tax law. Section 252(d) of the FTA permits Ameritech Michigan to recover all costs of providing services and elements. The taxes paid by Ameritech Michigan are among the expenses that it is permitted to fully recover. Accordingly, the Commission finds that Ameritech Michigan's proposed language for Section 30.7 should be adopted.

#### Publicity Clause

The arbitration panel found that the interconnection agreement should include AT&T's proposed Section 30.11 that would prevent Ameritech Michigan from engaging in any sort of advertising or marketing effort that would disclose that Ameritech Michigan is providing service to AT&T or that AT&T is reselling Ameritech Michigan's services. According to the arbitration panel, inclusion of this prohibition on advertising and marketing would promote competition because Ameritech Michigan would be barred from undermining efforts to develop competition.

Ameritech Michigan argues that AT&T's proposed publicity clause violates its First Amendment right to free speech. According to Ameritech Michigan, it is well settled that truthful commercial speech enjoys a wide degree of First Amendment protection and that restrictions on such speech must directly advance a substantial governmental interest by the least restrictive means. Moreover, Ameritech Michigan argues that AT&T's proposal is simply unfair because it protects AT&T's ability to tell the public whatever it wants about Ameritech Michigan's performance under the agreement but denies Ameritech Michigan an opportunity to respond.

The Commission finds that AT&T's proposed publicity clause should not be adopted. The Commission is not persuaded that the imposition of a prohibition on the dissemination of truthful information to the public is either a reasonable or an appropriate method to promote competition. It is the express policy of this state to promote the dissemination of truthful information to the public. Accordingly, placing an artificial restriction on Ameritech Michigan's advertising and marketing efforts is not consistent with fair play or the operation of a competitive marketplace. Therefore, the publicity clause proposed by AT&T should be rejected.

#### Miscellaneous Issues

Issue 55 consists of the arbitration panel's attempt to resolve a variety of miscellaneous issues. In each case, the disputed issues concern proposed contract language aimed at addressing how disputes arising under the contract should be handled. The panel's recommendations are summarized at pages 79-80 of its decision.

According to Ameritech Michigan's objections, a number of the matters covered in Issue 55 were resolved by the parties in their October 21, 1996 agreement. These matters include contract provisions 12.12.2(j), 12.12.3, 16.11, Schedule 9.2.3, and the definition of "CABS" in

Schedule 1.2. Additionally, neither of the parties expressed any objections to the arbitration panel's decisions regarding Sections 12.8.5, 12.12.2(d), 12.12.3(f), 16.6, 16.15, Schedule 10.11.1, and the concepts of conduit, dispute resolution, and permanent number portability contained in Schedule 1.2. Accordingly, through agreement or nonobjection, all but six of the miscellaneous issues appear to have been resolved.

Ameritech Michigan objected to six of the panel's recommendations. The first issue involves the bona fide request process established in Schedule 2.2, which would require Ameritech Michigan to provide AT&T with a firm price proposal and an availability date for development of certain AT&T requests for interconnection, network elements, or levels of quality within 60 days. Ameritech Michigan proposed a 120-day limit. Second, Ameritech Michigan maintains that the process for providing AT&T with a preliminary analysis of any bona fide request within 30 days of the request should be conditioned to make an exception for "extraordinary circumstances." Third, Ameritech Michigan maintains that Section 16.13 of the contract should allow it to provide AT&T with maps and records that have had confidential, proprietary information "redacted" from them. Fourth, Ameritech Michigan argues that Section 16.3.1 of the contract should not require notification "in writing" to parties having attachments on or in a structure that is about to be modified. Fifth, Ameritech Michigan objects to the definition of the term "capacity" found in Schedule 1.2, which is related to access to structure issues. Sixth, Ameritech Michigan maintains that the arbitration panel erred in adopting AT&T's proposed definition of the term "arbitrator" found in Schedule 2 of the contract for the same reason set forth in its objections to Issue 45 concerning alternative dispute resolution.

The Commission is persuaded that Ameritech Michigan's third and fourth objections to the miscellaneous issues have merit. The Commission accepts Ameritech Michigan's assertion that its maps, records, and additional information relating to its structure may contain information that is proprietary to Ameritech Michigan's business or relates to attachments of other parties with access that could be subject to confidentiality requirements. Accordingly, the interconnection agreement should provide that Ameritech Michigan may redact any such information from a map or record before providing it to AT&T so long as Ameritech Michigan agrees to make its outside plant engineers available to AT&T to clarify information about the maps and records.

Further, the Commission agrees with Ameritech Michigan that it may not always be possible to notify parties "in writing" that their attachment on or in a structure is to be modified. Certainly, written notification might not be possible in an emergency situation. Therefore, the Commission agrees with Ameritech Michigan that the notification provision should be revised to delete the "in writing" requirement, which will allow Ameritech Michigan to use other forms of communication to deliver the necessary modification.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) 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.; MSA 3.500(101) et seq.; and the Commission's Rules of Practice and Procedure, 1992 AACRS, R 460.17101 et seq.

b. The parties' final offers on the issues of indemnification and limitation of liability should be rejected.

- c. The parties' final offers on the issue of standards of performance should be rejected.
- d. The agreements reached by the parties in their October 21, 1996 filing should be adopted.
- e. Except for the indemnification, limitation of liability, and standards of performance provisions, the interconnection agreement, as adopted by the arbitration panel and as modified by this order, should be approved.

THEREFORE, IT IS ordered that:

- A. The final offers of both parties on the issues of indemnification, limitation of liability, and standards of performance are rejected.
- B. Except for the indemnification, limitation of liability, and standards of performance provisions, the interconnection agreement, as adopted by the arbitration panel and as modified by this order, is approved.
- C. A complete copy of the interconnection agreement, as adopted by the arbitration panel and as approved by the Commission, shall be filed within ten days of the issuance of this order.
- D. The parties should submit proposals on the indemnification, limitation of liability, and standards of performance issues within 30 days.

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

MICHIGAN PUBLIC SERVICE COMMISSION

(SEAL)

/s/ John G. Strand  
Chairman

I dissent, as discussed in my  
separate opinion.

/s/ John C. Shea  
Commissioner

/s/ David A. Svanda  
Commissioner

By its action of November 26, 1996.

/s/ Dorothy Wideman  
It's Executive Secretary

**STATE OF MICHIGAN**  
**BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

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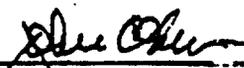
In the matter of the petition of	)	
AT&T COMMUNICATIONS OF MICHIGAN, INC.,	)	
for arbitration to establish an interconnection	)	Case No. U-11151
agreement with Ameritech Michigan.	)	
_____	)	

In the matter of the petition of	)	
AMERITECH MICHIGAN for arbitration	)	
to establish an interconnection agreement with	)	Case No. U-11152
AT&T Communications of Michigan, Inc.	)	
_____	)	

**DISSENTING OPINION OF COMMISSIONER JOHN C. SIEA**

(Submitted on November 26, 1996 concerning order issued on same date.)

For the reasons set forth in my November 1, 1996 Dissenting Opinion in Case No.  
U-11138, I dissent.

  
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John C. Siea Commissioner