combine elements at the request of the competitive LEC is not inconsistent with Section 251(c)(3) of the federal Act and may be imposed pursuant to the provisions of state law.

Additionally, the MPSC notes that Section 355 of the Michigan Act, MCL 484.2355; MSA 22.1469(355), requires incumbent LECs to unbundle services to at least the loop and port components. However, the loop and the port may be divided into their smaller, constituent parts. Based on the provisions in Section 355, a Michigan competitive LEC could, for example, purchase an entire loop (which includes more than one piece) as an unbundled element. To hold that the competitive LEC cannot buy less than the entire loop unless that is the tiniest portion of the network defies common sense. However, if the competitive LEC desires to obtain a combination that requires the incumbent LEC to combine uncombined elements, the requesting carrier should be required to pay the cost of that activity."

Source: MPSC January 28, 1998 Order in Case No. U-11551.

Feb. 1998: Ameritech appealed the MPSC's Order in Case No. U-11280 in both state and federal court in Michigan, alleging that the MPSC misapplied state law, exceeded its authority under state law and, in any event, had no authority under state law because it was pre-empted by federal law.

Source: Michigan Court of Appeals
Case No. 209828

U.S.D.C., Western Dist. of MI
Case No. 5:98-CV-20

March 1998: William Celio, MPSC Director of Telecommunications, filed an Affidavit in Ameritech's State Court Appeal, addressing the MPSC's orders on common transport as it relates to Ameritech Michigan. Celio stated: "To date, Ameritech Michigan has not complied with any of the Commission's orders relating to common (shared) transport also known as the platform issue."

Source: March 9, 1998 Celio Affidavit, MI Court of Appeals, Case No. 209828.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the petition of **AT&T COMMUNICATIONS OF MICHIGAN, INC.,** for arbitration to establish an interconnection agreement with Ameritech Michigan.	)	Case No. U-11151
In the matter of the petition of **AMERITECH MICHIGAN** for arbitration to establish an interconnection agreement with AT&T Communications of Michigan, Inc.	)	Case No. U-11152

At the February 28, 1997 meeting of the Michigan Public Service Commission in Lansing, Michigan.

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

OPINION AND ORDER

On August 1, 1996, AT&T Communications of Michigan, Inc., (AT&T) filed a petition for arbitration regarding the terms, conditions, and prices for interconnection and related arrangements with Ameritech Michigan pursuant to Section 252(b) of the federal Telecommunications Act of 1996 (the federal Act), 47 USC 252(b). The next day, Ameritech Michigan filed its petition seeking Commission arbitration of interconnection issues with AT&T. The cases were consolidated and processed in accordance with the Commission's July 16, 1996 order in Case No.

U-11134.

In its November 26, 1996 order in these cases, the Commission approved an interconnection agreement adopted by the arbitration panel, with certain modifications. The Commission further required the parties to file an interconnection agreement consistent with the arbitration panel's conclusions as modified by the Commission, within 10 days of that order. To date, Ameritech Michigan and AT&T have filed five agreements, each of which contains disputed provisions. Additionally, only the most recently submitted agreement (filed January 29, 1997) carries the signatures of both parties.

The Commission Staff (Staff) initiated discussions with Ameritech Michigan and AT&T regarding the unresolved issues. On February 21, 1996, following a meeting with the parties, the Staff filed recommendations concerning the appropriate resolution of the remaining outstanding issues. On February 24, 1997, Ameritech Michigan and AT&T filed responses to the Staff's recommendations.

Discussion

The Staff points out that the latest agreement contains two disputed issues, neither of which was specifically addressed in the arbitration proceedings: (1) the difference, if any, between a port, as defined in the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., and the unbundled local switching element under the federal Act; and (2) the appropriate prices for the unbundled shared transport element.

MCL 484.2102(x); MSA 22.1469(102)(x).

The FCC rules define "local switching capability element" as including:

> (A) line-side facilities, which include, but are not limited to, the connection between a loop termination at a main distribution frame and a switch line card;
>
> (B) trunk-side facilities, which include, but are not limited to, the connection between trunk termination at a trunk-side cross-connect panel and a switch trunk card; and
>
> (C) all features, functions, and capabilities of the switch, which include, but are not limited to:
>
> > (1) the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, as well as the same basic capabilities made available to the incumbent LEC's customers, such as telephone number, white page listing, and dial tone; and
> >
> > (2) all other features that the switch is capable of providing, including, but not limited to custom calling, custom local area signaling service features, and centrex, as well as any technically feasible customized routing functions provided by the switch.

47 CFR 51.319(c)(1)(i).

The Commission finds that there is no functional difference between the port as defined by Michigan statute and the local switching capability element as defined in 47 CFR 51.319. Therefore, the pricing schedule should be amended to reflect the prices in Advice No. 2438B for the basic line port. Reference to Michigan ports should be deleted. As to the other markings on the schedule attached to the Staff's comments, the Commission finds that those items have not been submitted for arbitration. Thus, the parties are free to agree on those terms, subject to the Commission's approval of the contract submitted in compliance with this order.

b. <u>Pricing of Shared Transmission Facilities</u>

The Staff states that Ameritech Michigan proposes a flat rate for shared transmission facilities, based on its position that any sharing of these facilities would be at the option of and arranged

between other providers, not including Ameritech Michigan. The Staff further states that Ameritech Michigan's proposed rates for these facilities do not change when traffic volume changes, which results in the competing carriers' bearing the risk of underutilized facilities.

On the other hand, the Staff notes that AT&T proposes that its traffic be carried on existing interoffice facilities of Ameritech Michigan and that the applicable rates be the minute-of-use rates included in Ameritech Michigan's switched transport tariff. Payments to Ameritech Michigan would then depend on the actual traffic carried on these facilities. If AT&T volumes justify dedicated facilities, the company could pursue that option.

To resolve this issue, the Staff recommends that the Commission adopt AT&T's proposed rates, charges, and prices from Ameritech Michigan's FCC Tariff No. 2, Sections 6.1.3, entitled "Rate Categories," and 6.9.1, entitled "Switched Transport" (including the current 37th Revised Page 207, 7th Revised Page 207.1, and 4th Revised Page 207.2 as of 2-21-97). The Staff states that Ameritech Michigan's proposal is inconsistent with the FCC's intention to maximize competing carriers' flexibility in combining new technologies with existing facilities. In the Staff's view, the FCC would not have drawn a distinction between interoffice facilities dedicated to a particular customer or carrier and those shared by more than one customer or carrier if it had intended that the same rates must apply to both. Finally, the Staff asserts, the usage-sensitive prices included in Ameritech Michigan's switched transport tariff are the appropriate alternative for the shared interoffice facilities that Ameritech Michigan is required to offer.

AT&T responds that the Staff's recommendations are consistent with the position that AT&T has maintained throughout the proceedings, accurately state the disagreement between the parties, and should be adopted by the Commission.

Ameritech Michigan responds that the Staff's position misapprehends the actual dispute

between the parties. According to Ameritech Michigan, it has not declined to share transport facilities with competing carriers where capacity is available, nor does it insist that a flat rate must be imposed for transport facilities. In fact, Ameritech Michigan asserts, it will offer two pricing options to requesting carriers that share these facilities. The first option is a flat rate circuit capacity charge that is based on the pro-rated capacity of the facility. Requesting carriers may order one circuit (DS-O) or multiple circuits. However, Ameritech Michigan argues, based on current network design and architecture, if 24 or more circuits are ordered a dedicated DS-1 facility should be provided.

Therefore, Ameritech Michigan argues, the Staff's recommendation should be modified to require that footnote 10 in Item V.E., Pricing Schedule 9, be changed to clarify that, at AT&T's option, it can share up to 24 DS-Os with Ameritech Michigan on a pro-rata basis based on the rates in Ameritech Michigan's FCC Tariff No. 2, Section 7.5.9. This pro-rata flat rate charge would apply to shared transport facilities between Ameritech Michigan's central offices, as well as to those facilities between an Ameritech Michigan central office and AT&T's wire center.

Additionally, Ameritech Michigan states that a minute-of-use pricing option exists for AT&T for shared transport facilities between two Ameritech Michigan central office switches where AT&T obtains unbundled switching network elements (trunk ports). Ameritech Michigan argues that the usage-based price option should include the two interoffice facilities rate elements in Ameritech Michigan's FCC Tariff No. 2, Section 6.9.1, tandem-switched termination per minute of use and tandem-switched facility per access minute per mile.[1] See Ameritech Michigan's FCC

[1] In a letter dated February 25, 1997, AT&T states that it appears that Ameritech Michigan's per minute pricing is consistent with AT&T's position on the rate elements that should be included, but that no limit should be placed on AT&T use of the unbundled transport element. However, AT&T complains that Ameritech Michigan has, in effect, raised a new issue by changing what it is offering to AT&T.

Tariff No. 2, 37th Revised Page 207. In Ameritech Michigan's view, the Commission should require that the usage sensitive option in Item V.E. be revised to permit AT&T to order up to 24 DS-Os per trunk port on a per-minute-of-use basis.

In Ameritech Michigan's view, rate elements related to switching must be excluded from the price for shared interoffice transmission facilities because the federal Act requires that these facilities be unbundled from switching and other services. Therefore, Ameritech Michigan argues, the Staff's recommendation should be clarified to exclude any switching related rate elements from the price for shared transmission facilities.[2] According to Ameritech Michigan, its position is consistent with the requirements of Section 271 of the federal Act, 47 USC 271, as reflected in 47 CFR 51.319(d), which requires that interoffice transmission facilities be an unbundled network element and defines shared transmission facilities as those facilities between switches.

Ameritech Michigan further states that, consistent with FCC requirements, the interconnection agreement treats switching and interoffice transmission separately. On the other hand, Ameritech Michigan argues, AT&T's definition of "common transport" includes switching, which is not consistent with the FCC's requirements.

The Commission finds that Ameritech Michigan's modifications and new proposals should be rejected. There is nothing in the federal Act that supports limiting shared transport facilities to any particular number. Whether it makes economic sense to request a dedicated line rather than shared transport is a judgment that the competing carrier should be allowed to make.

As to the pricing, the Commission finds that the FCC's requirement that unbundled transport (without switching) be made available does not preclude a carrier from requesting switched

[2] According to Ameritech Michigan, the rate elements that should be excluded are its FCC Tariff No. 2, 4th Revised Page 207.2 (tandem switching per access minute) and its FCC Tariff No. 2, 48th Revised Page 214 (bundled local switching).

transport. However, it is unclear whether the dispute on this issue has been accurately identified. According to AT&T's letter, the rate elements included in Ameritech Michigan's proposed per-minute-of-use pricing appear acceptable to AT&T. Those elements also appear to be consistent with the Staff's recommendations, except for the exclusion of the switching element. The Commission finds that the parties' agreement on pricing, if any, should be implemented. Otherwise, the Staff's recommendations on the pricing of shared or common transport should be adopted.

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 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The Staff's recommendations to resolve the remaining disputed issues should be adopted as provided in this order.

THEREFORE, IT IS ORDERED that:

A. The recommendations submitted by the Commission Staff are adopted as provided in this order.

B. Within seven days of the date of this order, Ameritech Michigan and AT&T Communications of Michigan, Inc., shall submit a signed copy of the interconnection agreement that comports with the Commission's decisions in this order and the November 26, 1996 order in this case.

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

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(SEAL)

I dissent, as discussed in my separate opinion.

/s/ John C. Shea
Commissioner

/s/ David A. Svanda
Commissioner

By its action of February 28, 1997.

/s/ Dorothy Wideman
Its Executive Secretary

Information Industry Services
350 North Orleans Street
Floor 3
Chicago, IL 60654
Office 312/335-6531
Fax 312/467-9026

Theodore A. Edwards
Vice President - Sales
Local Exchange Carriers

November 21, 1997

Jane Medlin
Product Director - Local
Services Division
227 West Monroe Street
Chicago, Illinois 60606

Via Fax: 230.8886

Dear Jane:

Thank you for your letter of November 6 "concerning Ameritech's obligation to provide proper 'shared transport' pursuant to the interconnection agreement between our companies." You represented that letter as "a final effort to secure Ameritech's agreement to honor that obligation." To this end, you invoked "Section 28.3 of the interconnection agreements in Illinois, Indiana, Michigan, Ohio and Wisconsin." Speaking in the third person, you said "Jane Medlin is AT&T's designated representative pursuant to that provision [Section 28.3]; please contact Ms. Medlin as soon as possible to arrange a meeting." I contacted you as per your request and we met to discuss this matter on Thursday, November 20.

The majority of your November 6 letter was devoted to your description of the purported "history surrounding this issue ... ." Our view of much of that history was discussed at length in Bonnie Hemphill's January 31 letter to Ed Cardella. I will not repeat that discussion here. Suffice it to say that we will honor our interconnection agreements with AT&T which you identify in your November 6 letter, including the provisions relating to "shared transport."

To refresh your recollection, Section 9.2 of our agreement in Illinois (the other agreements contain similar language), says that:

> [a]t the request of AT&T, Ameritech shall provide AT&T access to the following Network Elements on an Unbundled basis:
>
> 9.2.4 Interoffice Transmission Facilities, as more fully described in **Schedule 9.2.4**
>
> Schedule 9.2.4 provides, in pertinent part, as follows:
>
> Interoffice transmission Facilities are Ameritech transmission facilities dedicated to a particular customer or carrier, or shared by more than one Customer or carrier, used to provide Telecommunications Services between Wire Centers owned by Ameritech or AT&T, or between switches owned by Ameritech or AT&T.

1. Ameritech provides several varieties of Unbundled transport facilities:

1.1. Unbundled dedicated interoffice transport facility ("**Dedicated Transport**") is a dedicated facility connecting two Ameritech Central Offices buildings via Ameritech transmission equipment. In each Central Office building, ;AT&T will Cross-Connect this facility to its own transmission_ equipment (physically or virtually) Collocated in each Wire Center, or to other Unbundled Network Elements provided by Ameritech to the extent the requested combination is technically feasible and is consistent with other standards established by the FCC for the combination of Unbundled Network Elements. All applicable digital Cross-Connect, multiplexing; and Collection space charges apply at an additional cost.

1.2. Unbundled dedicated entrance facility" is a dedicated facility connecting Ameritech's transmission equipment in an Ameritech Central Office with AT&T's transmission equipment in AT&T's Wire Center for the purposes of providing Telecommunications Services.

1.3. Shared transport transmission facilities ("Shared Transport") are a billing arrangement where two (2) or more carriers share the features, functions and capabilities of transmission facilities between the same types of locations as described for dedicated transport in Sections 1.1 and 1.2 preceding and share to costs.

Thus, the meaning of "shared transport" under our agreement could not be more clear. And it is a meaning that is entirely consistent with the recent decision of the Court of Appeals for the 8th Circuit.

I acknowledge that the FCC's August 18th Third Report and Order, which is on appeal to the 8th Circuit, has not been stayed and, therefore, remains a lawful order. However, the definition of "shared transport" in the Third Report and Order is not the definition of "shared transport" in our interconnection agreements. (Bruce Bennett was just plain wrong when he said that the Public Utilities Commission of Ohio held otherwise in its November 6 Second Entry on Rehearing in Case No. 96-922-TP-UNC.) Under the provisions of Section 29.3, our agreements cannot be modified to reflect the Third Report and Order until it is "final and non-appealable" and, as you know, the Third Report and Order still is appealable – in fact, it is subject to a pending appeal.

Moreover, it is not clear on the face of the Third Report and Order how that Order can be implemented. Shortly after the Third Report and Order was released, we discussed various implementation issues with representatives of the FCC and after that discussion, it still is not clear to us how the Third Report and Order could be implemented. And that was before the 8th Circuit's decisions.

Recall, if you will, that the 8th Circuit - quoting from the plain language of the 1996 Act, said as follows:

> The last sentence of subsection 251(c) reads, "An incumbent local exchange carrier shall provide such Unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services." 47 U.S.C.A. Sec.25(c)(3)(emphasis added). This sentence unambiguously indicates that

> requesting carriers will combine the Unbundled elements themselves. While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do this actual combining of elements ... . Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the Unbundled elements themselves..... .

And if the implication of this plain, statutory language on the FCC's view of "shared transport" were not clear enough, the 8th Circuit went on to hold that:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an Unbundled (as opposed to a combined) basis. Stated another way, Section 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services.

Jane – I simply do not understand how the FCC's Third Report and Order is consistent with this plain language of Section 251(c)(3) of the 1996 Act, as explained by the 8th Circuit. I asked Bruce at yesterday's meeting to provide me with AT&T's explanation on how Ameritech could implement the FCC's Third Report and Order decision in a manner that is consistent with the 8th Circuit decisions. Bruce's explanation, while clever, didn't answer the question. I believe that such an explanation is an integral part of the dispute escalation process you have invoked under our interconnection agreement.

Bruce indicated at the end of the meeting that he considered this stage of the Dispute Resolution process closed. Do you? If AT&T is willing to provide a clear explanation of how the FCC 3rd Order and Report and the 8th Circuit decision can be implemented in a consistent manner, perhaps we can schedule another meeting to continue discussing this matter in good faith, as contemplated by our interconnection agreements, including the Dispute Escalation and Resolution provisions which you have invoked.

Finally, and as a minor point of clarification, even though in your November 6 letter you (again, speaking in the third person) identified yourself as the AT&T representative responsible for work with me through those Dispute Escalation and Resolution provisions, Bruce Bennett did virtually all of the talking on behalf of AT&T during our November 20 meeting. Indeed, I was surprised to see Bruce when I showed up for our meeting because I thought you and I had agreed that, as our companies' designated representatives for purposes of the Dispute Escalation and Resolution provisions of our agreements, we would meet alone. Did I misunderstand you?

Sincerely,

Ted Edwards

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to consider the total service long run incremental costs and to determine the prices of unbundled network elements, interconnection services, resold services, and basic local exchange services for **AMERITECH MICHIGAN**.	)	Case No. U-11280

At the January 28, 1998 meeting of the Michigan Public Service Commission in Lansing, Michigan.

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

ORDER ON REHEARING

On July 14, 1997, the Commission issued an order modifying and approving a total service long run incremental cost (TSLRIC) study methodology for Ameritech Michigan and approving rates, terms, and conditions for Ameritech Michigan to provide unbundled network elements, interconnection services, and resale services. On July 24, 1997, Ameritech Michigan submitted tariff sheets to implement the order.

In response to petitions for rehearing filed by Ameritech Michigan, AT&T Communications of Michigan, Inc. (AT&T), and MCI Telecommunications Corporation (MCI), the Commission granted partial rehearing on September 30, 1997. The Commission defined the scope of rehearing by identifying eight issues. Those issues included the four cost inputs to the TSLRIC models: (1)

cost of capital, (2) depreciation lives, (3) fill factors, and (4) shared and common cost allocations. The other four issues are (5) whether the unbundled local switching charges recover the cost of vertical features, precluding the use of separate charges to recover those costs, (6) the terms and conditions for providing common transport as an unbundled network element, (7) the propriety of the resale discount percentages, and (8) unexplained differences between proposed tariffs submitted by Ameritech Michigan with its initial cost studies on January 21, 1997 and those submitted on July 24, 1997. The Commission denied rehearing in all other respects. The order established filing deadlines for the moving parties' proposals on rehearing and three additional rounds of comments.

On October 21, 1997, Ameritech Michigan, MCI, and AT&T filed their proposals on the rehearing issues.

In its proposal, Ameritech Michigan requested relief with respect to six of the eight issues. For issue (1), Ameritech Michigan proposed that the 10.6% cost of capital required in the July 14, 1997 order be replaced by the confidential cost of capital used in the original cost studies that it filed at the beginning of this case (in January 1997). With respect to issue (2), Ameritech Michigan proposed that the asset lives developed under the Federal Communications Commission's (FCC) prescription approach and adopted in the July 14, 1997 order for depreciation purposes be replaced by the accelerated asset lives used in the original Ameritech Michigan cost studies. On issue (4), which relates to shared and common costs, Ameritech Michigan proposed that the percentage markup approved in the Commission's order be replaced with the specific dollar allocations used in its original cost studies.

For issue (5), Ameritech Michigan claimed that the workpapers submitted with its original cost studies demonstrate that the pricing of its unbundled local switching element does not cover

the additional costs associated with the vertical features of a local switch port. Ameritech Michigan approached issue (6) by denying that it has an obligation under federal law to provide common transport as an unbundled network element. With respect to issue (7), Ameritech Michigan proposed adjustments to the computation of the resale discounts that would lower the discount percentages to 19.83% (from 25.96%) if the competing provider does not use Ameritech Michigan's operator services and directory assistance (OS/DA) and 19.71% (from 19.96%) if the provider purchases Ameritech Michigan's OS/DA services.

MCI's initial proposals addressed issues (3), fill factors, and (6), common transport. With respect to issue (3), MCI proposed that the fill factors supported by Ameritech Michigan and adopted by the Commission be replaced by the higher factors that MCI and AT&T had proposed in their comments filed prior to the July 14, 1997 order. For issue (6), MCI proposed that Ameritech Michigan be required to offer common transport at a usage-sensitive rate of $0.000109 per minute of use. MCI discussed matters relating to unbundled local switching and nonrecurring charges. AT&T also addressed Ameritech Michigan's tariff submissions with respect to those issues.

On the November 10, 1997 deadline for initial comments on the rehearing proposals, Ameritech Michigan, AT&T, MCI, the Michigan Exchange Carriers Association, Inc. (MECA), Attorney General Frank J. Kelley (Attorney General), and the Commission Staff (Staff) filed comments. On November 21, 1997, the same parties, except for MECA, filed response comments. On December 5, 1997, the parties, except for MECA, filed reply comments.

Having reviewed the parties' comments on rehearing, the Commission observes that much of the discussion addresses issues that are outside the scope of rehearing. Some of the other comments, when addressing issues designated for rehearing, did not bring new or different information to the Commission's attention, but instead repeated or expanded arguments made prior

to the July 14, 1997 order or supplemented those arguments with information that could have been advanced during the earlier phases of this case.

The Commission reminds the parties that the current proceeding is on rehearing from the determinations made in the July 14, 1997 order. As noted in the September 30, 1997 order at 1-2, the Commission's rehearing standard does not permit the parties to raise any argument that they choose, but imposes the following limitations:

> Rule 403 of the Commission's Rules of Practice and Procedure, 1992 AACS, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition - for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

The Commission reaffirms that Rule 403 governs this proceeding. Information and arguments that do not meet this standard are not entitled to consideration.

In the September 30, 1997 order at 7-8, the Commission defined the scope of proceedings on rehearing as follows:

> To summarize, the scope of further proceedings on rehearing shall be limited to the four cost inputs to the TSLRIC models . . . , the recovery of the cost of vertical features as part of unbundled local switching, unbundled common transport, resale, and certain tariff matters. *The Commission finds that the parties' petitions for rehearing should be denied in all other respects and should not be relitigated in this case.*
>
> . . . .
>
> Except for the issue of unbundled common transport (for which Ameritech Michigan acknowledges a responsibility to comply with the FCC's order), *the party seeking rehearing on an issue will have the burden of specifically demonstrating why the July 14, 1997 order was in error and how it should be changed.* To meet this burden, it must file a proposal to resolve the issue by the October 20, 1997 deadline. *The proposals as well as the subsequent comments or affidavits should not merely restate a party's position in general terms, but they should supply new information that was not previously in the record.*

(Emphasis added; footnote deleted). Because much of the discussion in the comments submitted during the rehearing phase of this case does not comply with the Rule 403 standard or the September 30, 1997 order, the Commission has determined that it should disregard those comments in resolving this case. Consequently, this order will focus only on the arguments that are within the proper scope of rehearing. Although already stated in the September 30, 1997 order, the Commission reiterates that the findings and conclusions in the July 14, 1997 order will continue to be effective, except as specifically modified in this order.

Cost of Capital

Ameritech Michigan has not presented new arguments or different information to support its position that the cost of capital should be higher than the 10.6% rate approved in the July 14, 1997 order. Moreover, the Commission remains persuaded that the July 14, 1997 order reached the appropriate result regarding the cost of capital. Therefore, the Commission will not alter this determination.

In addition, the Commission rejects the Attorney General's attempts to reargue his position that the cost of capital should be reduced to 9.74%. The Attorney General exercised his opportunity to develop this position in his earlier comments, which failed to persuade the Commission in its July 14, 1997 order. To the extent that he asserts that those arguments have been improved with new or different information, the information is neither material nor persuasive. The Attorney General's attempt to lower the cost of capital continues to rely on book values and is not forward-looking as required by a TSLRIC analysis.

Depreciation

In support of its depreciation proposal, Ameritech Michigan argues that the longer asset lives

universal support cost study case.

Unbundled Local Switching

Ameritech Michigan's comments in support of additional charges for the vertical features of the local switch do not meet the standard for rehearing, but instead they reiterate the same arguments that the Commission previously found unpersuasive. In making these arguments, Ameritech Michigan relies on the same workpapers that the Commission previously rejected as inadequate as well as some excerpted pages of its cost model documentation. This showing does not demonstrate that there are costs associated with the vertical features that are in addition to those incurred to use the basic switching function (and recovered through the charges for unbundled local switching).

Common Transport

In the July 14, 1997 order, the Commission mandated that Ameritech Michigan provide common transport or unbundled access to the same public switched network that Ameritech Michigan uses to serve its retail customers. In seeking rehearing on this issue, Ameritech Michigan made reference to the FCC's subsequent issuance of the Third Order on Reconsideration and Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 97-295 (Aug. 18, 1997). Although Ameritech Michigan viewed the FCC order as unlawful, it conceded that the terms of the order would alter its obligations to provide unbundled transport, if they survived subsequent legal challenges.

After the Commission's order granting rehearing, the United States Court of Appeals for the Eighth Circuit issued an order on October 14, 1997, in which it amended a portion of its opinion in

Iowa Utilities Bd v FCC, 120 F3d 753 (CA 8, 1997), cert gtd _ US_ (1998).[1] As a consequence of the court's amended decision, Ameritech Michigan now contends that it is under no obligation to provide common transport and proposes to remove all references to common transport from its tariffs. Ameritech Michigan reiterates its earlier proposal to offer inter-office transmission facilities on a dedicated basis, either to single providers or to two or more providers on a shared basis.

The Eighth Circuit's decision, as amended, vacated 47 C.F.R. § 51.315(b), which provides: "Except upon request, an incumbent LEC[2] shall not separate requested network elements that the incumbent LEC currently combines." In reaching this result, the court reasoned:

> Section 251(c)(3)[3] requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4)[4] between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b) . . . is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.

Slip op. at 2.

---

[1] The court's initial ruling in Iowa Utilities upheld in part and vacated in part the rules promulgated by the FCC in its First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 13042 (1996).

[2] A LEC is a local exchange carrier.

[3] 47 USC 251(c)(3).

[4] 47 USC 251(c)(4), which requires incumbent LECs to offer for resale at wholesale rates services that they provide on a retail basis.

Ameritech Michigan interprets the Eighth Circuit's decision as invalidating any obligation to provide common transport. Ameritech Michigan characterizes common transport as the undifferentiated use of its entire network from the end-use customer's switch line port to the called party's end office line port. As such, Ameritech Michigan contends, an obligation to offer common transport would impermissibly compel the incumbent to provide pre-assembled combinations of various elements, including unbundled local switching, inter-office transmission facilities, and unbundled tandem switching. Ameritech Michigan cites the FCC's statements in its Third Order on Reconsideration, paras. 42, 47 & n.127, which acknowledge that common transport cannot be effectively disassociated from local switching and that a competing carrier could not, as a practical matter, purchase common transport without also purchasing local switching from the incumbent.[5]

Ameritech Michigan further contends that even if common transport could be viewed as distinct from local and tandem switching, it would still entail an impermissible combination of network elements. According to Ameritech Michigan, each of the inter-office transmission links connecting two end offices, two tandem switches, or an end office and a tandem switch, is itself a distinct element. Ameritech Michigan reasons that a service providing for the transmission of signals over its entire network of inter-office transmission facilities would impermissibly combine those elements, contrary to the Eighth Circuit's holding.

Ameritech Michigan also argues that the Commission cannot require common transport to be offered pursuant to its authority under the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., because the Eighth Circuit's ruling preempts state law in this

[5] The FCC actually refers to "shared transport," but, in doing so, it makes reference to a concept that is synonymous, or virtually so, with common transport.

respect. Ameritech Michigan draws this conclusion from the Eighth Circuit's observation that mandating combinations of elements "would obliterate the careful distinctions Congress has drawn . . . between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Order amending Iowa Utilities, slip op. at 2. Ameritech Michigan argues that a state-imposed obligation to provide common transport and other pre-assembled combinations of elements would be subject to preemption because, if otherwise left to stand, it would erect obstacles to the purposes and policies of the federal Telecommunications Act of 1996.

In addition, Ameritech Michigan argues that imposing an obligation to offer common transport would exceed the Commission's authority, as provided in Section 355(1) of the Michigan Telecommunications Act, MCL 484.2355(1); MSA 22.1469(355)(1). According to Ameritech Michigan, Section 355 mandates that unbundling of basic local exchange service proceed no further than its loop and port components and does not address inter-office transmission facilities or tandem switching. Ameritech Michigan contends that AT&T's and MCI's proposals to use common transport for carrying long-distance traffic demonstrate that common transport is not an element of local exchange service.

In response, MCI and AT&T say that the FCC rejected Ameritech Michigan's arguments opposing common transport in the Third Order on Reconsideration. Observing further that the Eighth Circuit denied a motion to stay the Third Order on Reconsideration,[6] MCI and AT&T argue that the FCC order remains in effect and that Ameritech Michigan must comply with the order by providing common transport. MCI and AT&T further note that the Iowa Utilities decision upheld

[6] Southwestern Bell Telephone Co v FCC, order of the United States Court of Appeals for the Eighth Circuit, decided October 30, 1997 (Docket Nos. 97-3389/3576/3663). Oral arguments on appeal from the Third Order on Reconsideration were heard in January 1998.

the FCC's broad interpretation of network elements as including "all of the facilities and equipment that are used in the overall commercial offering of telecommunications." 120 F3d 808-09. MCI and AT&T contend that the October 14, 1997 amendment to the Iowa Utilities opinion should be understood as addressing only the narrow question of whether an incumbent provider must provide combinations of elements, a ruling that does not alter the court's broad holding that "a requesting carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications services." 120 F3d 815. AT&T states that the court's amended opinion did not purport to redefine any unbundled network element or even address common transport.

AT&T further contends that Ameritech Michigan's obligation under federal law to provide access to its unbundled network elements, as reaffirmed in Iowa Utilities, means all elements, including common transport. AT&T responds to Ameritech Michigan's claim that unbundled elements are discrete facilities or equipment by stating that no single element is capable of providing a service by itself, but that each is functionally interdependent and can only be used when combined with others. AT&T asserts that federal law confers the right to purchase any single unbundled network element or all of them as a complete package capable of providing local exchange service.

MCI and AT&T contend that nothing in the Eighth Circuit's decision or its underlying basis in federal law precludes state commissions, acting under state law, from ordering incumbents to provide combinations of elements or to refrain from disassembling elements that were previously combined. They say that federal law sets minimum requirements for unbundling, but does not preclude the states from adopting more demanding requirements of their own to prohibit

discrimination and promote competition. They further explain that the Eighth Circuit merely held that the FCC lacked authority under federal law to promulgate a rule, but that the court did not preempt the states from adopting the same standard.

Regarding the issue of preemption, MCI and AT&T cite Section 251(d)(3) of the federal act, which provides:

> In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that—
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part [Part II, or 47 USC 251 et seq.].

47 USC 251(d)(3).[7] AT&T further cites the discussion of the court in Iowa Utilities, 120 F3d 806, addressing this statute:

> It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this circumstance, subsection 251(d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.

AT&T concludes that a Commission-imposed common transport obligation would not be

---

[7] A similar statutory provision also cited by MCI and AT&T is Section 261(c), which provides:

> Nothing in [Part II] precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with [Part II] or the [FCC's] regulations to implement [Part II].

47 USC 261(c).

susceptible to preemption because it furthers the purpose of the federal act to introduce competition into local exchange markets.[8]

MCI argues that relieving Ameritech Michigan of the obligation to provide common transport in combination with other elements would mean that the retail services of competing providers would be inferior to, and more costly than, those provided by incumbents. According to MCI, discrimination of this variety would violate both Section 251(c)(3) of the federal act and Sections 305(1) and 355(1) of the Michigan act, MCL 484.2305(1); MSA 22.1469(305)(1), MCL 484.2355(1); MSA 22.1469(355)(1).

AT&T also relies on Section 355 as creating a duty for Ameritech Michigan to provide common transport. AT&T cites Section 355(2), which provides: "Unbundled services and points of interconnection shall include *at a minimum* the loop and the switch port." Emphasis supplied in AT&T's reply comments at 10. AT&T interprets this phrase as conferring authority for the Commission to require further unbundling, including common transport. MCI focuses on the statutory definition of a "port" as "the entirety of local exchange service [except for the loop], including . . . switching software, local calling, and access to . . . interexchange and intra-LATA toll carriers." MCL 484.2102(x); MSA 22.1469(102)(x). MCI reasons that the statutory definition of a port encompasses common transport as part of a local calling service.

MCI and AT&T also argue that Iowa Utilities does not alter Ameritech Michigan's preexisting contractual obligations to provide pre-assembled combinations of elements under its interconnection agreements.

MCI and AT&T propose that common transport be offered in conjunction with unbundled

---

[8] Ameritech Michigan says that Section 251(d)(3) does not forestall preemption because common transport, in its view, is inconsistent with Section 251.

local switching for both local and long-distance calling. MCI further proposes (and AT&T supports) a common transport rate of $0.000109 per minute of use, which MCI derived from Ameritech Michigan's TSLRIC studies for Call Plan 50 and Call Plan 400 (residential retail) services. MCI and AT&T also object to Ameritech Michigan's tariff provision requiring competing local exchange carriers to subscribe to dedicated trunk ports and collocation, which they view as an interface with dedicated transport links that would be unnecessary for common transport. Finally, MCI and AT&T say that requiring collocation is unnecessary and inefficient from a technical standpoint and would raise the cost of providing service through unbundled network elements.

The Staff says that the Commission should reaffirm the determinations regarding common transport in its July 14, 1997 order. The Staff's view is that the Eighth Circuit's ruling does not alter the validity of the July 14, 1997 order. The Staff adds that Ameritech Michigan should be ordered to delete tariff provisions that are inconsistent with common transport; e.g., the requirement that a competing provider subscribe to at least one dedicated trunk port.

The Commission rejects Ameritech Michigan's contention that the amended opinion in Iowa Utilities requires a different understanding of the legal considerations applicable to common transport than that in effect when the Commission issued the July 14 and September 30, 1997 orders in this case. Contrary to Ameritech Michigan's interpretation of the law, the Eighth Circuit's amended opinion of October 14, 1997 did not purport to address common transport, overrule the FCC's Third Order on Reconsideration, or redefine how unbundled inter-office transmission facilities should be made available. Common transport, as that term is defined by the FCC and used in this Commission's orders, is a functionality provided through inter-office transmission facilities. Although it may be used in conjunction with other equipment and