

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application and complaint of)	
WESTPHALIA TELEPHONE COMPANY and)	
GREAT LAKES COMNET, INC. , against)	Case No. U-17619
AT&T CORP.)	
_____)	

At the February 12, 2015 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John D. Quackenbush, Chairman
Hon. Greg R. White, Commissioner
Hon. Sally A. Talberg, Commissioner

ORDER

On May 13, 2014, Westphalia Telephone Company (WTC) and Great Lakes Comnet, Inc. (GLC) (collectively, complainants) filed a complaint against AT&T Corp. (AT&T) alleging breach of tariff, and breach of implied-in-fact and implied-in-law contracts. On July 24, 2014, AT&T filed a counter-complaint.

On January 27, 2015, the Commission issued an order finding in favor of complainants, and directed AT&T to pay amounts properly billed pursuant to lawful tariffs for intrastate switched access service, along with associated interest and late fees (January 27 order).

On February 4, 2015, AT&T filed a motion for stay pending appeal, asking the Commission, pursuant to Section 203(16) of the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*, to stay the January 27 order pending final disposition of AT&T's appeal of right from that order. MCL 484.2203(16).

MCL 484.2203(16) provides:

Upon the filing of a motion for stay, the commission may, on terms as it considers just, stay the effect or enforcement of an order, except an order regarding rates or cost studies. A motion for stay, including a request for setting the amount of any appeal bond, are governed by the provisions for obtaining a stay of a civil action set forth in R 7.209 of the Michigan court rules. The commission shall decide a motion for stay within 10 days from the date the motion is filed with the commission.

MCR 7.209 governs the bond provisions of a stay, and provides that the Commission “may order a stay of proceedings, with or without a bond as justice requires.” MCR 7.209(E)(1).

AT&T argues that a stay is just and reasonable in this case because, if AT&T pays the disputed amount and then ultimately prevails on appeal, complainants may not be able to repay the funds at that time. AT&T states that it has a complaint pending before the Federal Communications Commission (FCC) against complainants regarding interstate switched access service charges. AT&T is concerned that, if complainants are found to be responsible for refunds to AT&T (and possibly other parties), complainants may not be able to repay AT&T the amounts in issue in this matter when, with respect to intrastate charges, AT&T prevails on appeal. AT&T indicates that it has not yet filed an appeal.

AT&T contends that it has the size and financial resources to pay the amount in dispute if it does not win on appeal, and thus no bond should be required. However, should the Commission find that a bond is required, AT&T offers to obtain one in an amount determined by the Commission. AT&T states that it “will prosecute the appeal to completion and will abide by the orders entered by the Michigan Court of Appeals or Michigan Supreme Court.” Motion, p. 2.

If the Commission does not wish to grant an indefinite stay, AT&T requests, in the alternative, that the Commission grant a stay until March 31, 2015, by which time, AT&T claims, the FCC will have issued its order addressing AT&T’s complaint regarding interstate charges.

On February 9, 2015, complainants filed a response to the motion for stay. Complainants argue that AT&T's motion does not acknowledge, let alone apply, the relevant standards required for receiving a stay pending appeal of a Commission order. Complainants contend that the Commission applies the standards that allow an appellate court to grant a stay of an order of an administrative agency pending appeal, that are set forth in MCR 7.119(E). Complainants note that the Commission has explicitly held that, in determining whether to order a stay of an order pending appeal, a party must satisfy the four requirements of MCR 7.119(E). April 12, 2011 order in Case No. U-16200, p. 7.¹ Complainants further argue that the U.S. District Court for the Western District of Michigan applied the same standard in denying an injunction to stay enforcement of a Commission order, comparable to the order in this case, pending appeal. *Michigan Bell Telephone Co v MFS Intelenet of Michigan, Inc*, 16 F Supp 2d 828 (WD Mich, 1998). Complainants point out that the four requirements of MCR 7.119(E) are: (1) the moving party will suffer irreparable injury if a stay is not granted; (2) the moving party made a strong showing that it is likely to prevail on the merits of its appeal; (3) the public interest will not be harmed if a stay is granted; and (4) the harm to the moving party if a stay is not granted will outweigh the harm to the other parties to the proceeding if a stay is granted.

Complainants argue that AT&T will suffer no irreparable harm if a stay is not granted. Complainants contend that claims of monetary damages are not considered irreparable, and note that AT&T's claim is purely speculative. Complainants also maintain that AT&T has failed to show that it is likely to prevail on appeal. Complainants note that AT&T has not filed an appeal as of this date, and did not advance any arguments showing that the January 27 order was in error. Complainants note that the mediator's recommended settlement was, in all material respects,

¹ In that order, the Commission applied the four criteria listed in MCR 7.105(G)(1)(b). The numbering of that rule has since changed to MCR 7.119(E).

identical to the January 27 order, and that the Commission Staff (Staff) supported complainants' positions in this case. Complainants assert that the mere possibility of success on appeal is insufficient to show that an entity is likely to prevail.

Complainants further argue that the grant of a stay would seriously harm the public interest. Complainants contend that AT&T has unlawfully engaged in self-help by refusing to pay complainants for intrastate switched access service for many years. Complainants point out that even this proceeding before the Commission (which must conform to tight deadlines) has taken nine months, and an appeal that moves to the Michigan Court of Appeals and the Michigan Supreme Court could take up to five years or more. Complainants contend that such a stay would send a message to long-distance providers that they are free to ignore lawful tariffs for years at a time. Complainants further note that GLC is a competitor of AT&T that was formed by the small, rural, independent incumbent local exchange carriers in order to provide an alternative to the larger carrier and its affiliates. Complainants contend that the harm that they would experience as a result of a stay would far outweigh any harm AT&T would face if the stay were denied. Complainants point out that the amounts unlawfully withheld by AT&T amount to millions of dollars, and state that AT&T has, on average, paid only approximately 10% per month of what it owed under the lawful tariffs; in addition, complainants state that since September 2014 AT&T has not paid anything for these services. Complainants argue that there is no reason to believe that the FCC will reach a different conclusion from the Commission, and that the FCC's decision will involve no determination of damages in any case. Complainants note that the non-prevailing party is likely to seek reconsideration in any case, which may take many years. In conclusion, complainants contend that AT&T has not met any one of the four requirements for the grant of a

stay pending appeal, and they request that the Commission find that the motion was frivolous, and award costs and attorney fees to complainants for having to respond to the motion.

The exercise of the power to stay an order is a matter of discretion. The Commission may grant a motion to stay upon terms that it considers just and appropriate. MCL 484.2203(16); MCL 24.304(1); *see also*, MCR 7.208(F). In determining whether a stay is just and appropriate, the Commission considers the four criteria listed in MCR 7.119(E). In this case, the Commission finds that AT&T satisfies none of the four criteria. Indeed, AT&T made no attempt to address the four criteria in its motion. The only alleged injury that AT&T posits – concerning the financial viability of the complainants – is entirely speculative. AT&T provides no evidence or argument to support its claimed concerns regarding the complainants’ financial viability, and no citation to statutes, rules, or cases finding that the expression of such a concern provides a legitimate basis for granting a motion to stay the effect of an order, whether administrative or judicial. AT&T has made no showing of an irreparable injury, no showing that it will prevail on the merits on appeal, no showing of the basis for an appeal, no showing of an error in the January 27 order, no showing that the public interest will not be harmed if a stay is granted, and no showing that the harm to AT&T in the absence of a stay outweighs the harm to the complainants if the stay is granted. The Commission declines to grant the indefinite stay requested by AT&T. The Commission also declines to grant the alternative stay. In determining whether to exercise this power simply because a federal agency may soon rule in another matter, the Commission would wish to consider, among other things, to what extent the outcome of the action before the FCC would have any effect on the January 27 order, and to what extent the parties, claims, facts, and legal issues in the two actions are the same. AT&T has provided no information or argument on these points.

The Commission finds that justice does not require staying the January 27 order. However, the Commission does not find that the motion was frivolous.

THEREFORE, IT IS ORDERED that the motion to stay filed by AT&T Corp. on February 4, 2015, is denied.

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

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 484.2203(12).

MICHIGAN PUBLIC SERVICE COMMISSION



John D. Quackenbush, Chairman



Greg R. White, Commissioner



Sally A. Talberg, Commissioner

By its action of February 12, 2015.



Mary Jo Kunkle, Executive Secretary

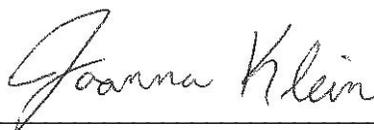
P R O O F O F S E R V I C E

STATE OF MICHIGAN)

Case No. U-17619

County of Ingham)

Joanna Klein being duly sworn, deposes and says that on February 12, 2015 A.D. she served a copy of the attached Commission order by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.



Joanna Klein

Subscribed and sworn to before me
This 12th day of February 2015



Steven J. Cook
Notary Public, Ingham County, Michigan
As acting in Eaton County
My Commission Expires: April 30, 2018

Service List U-17619

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