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<u>Exhibit No.</u>	<u>Description</u>
1	Complaint filed by AT&T Corp. with Federal Communications Commission
2	December 11, 2014 Proposal For Decision (excerpts)
3	December 29, 2014 Exceptions Brief filed by MPSC Staff
4	December 29, 2014 Exceptions Brief filed by Applicants/ Complainants

STATEMENT OF QUESTIONS PRESENTED

1. Should this Court issue a stay of the Michigan Public Service Commission's January 27, 2015 Order, where AT&T Corp. has filed a bond in excess of 125% of the amount in dispute, the appeal presents serious questions of federal law, a controlling decision from the Federal Communications Commission is imminent, and there is a substantial risk of harm to AT&T Corp. if a stay is not granted?

The Michigan Public Service Commission ("MPSC") did not answer this question, but it denied AT&T Corp.'s motion for stay.

Respondent-Appellant AT&T Corp. answers "Yes."

2. In the alternative, should this Court issue a preliminary stay of the MPSC Order until March 31, 2015, by which time the Federal Communications Commission is expected to issue a ruling on the controlling question of federal law presented here?

The MPSC did not answer this question, but it denied AT&T Corp.'s motion for stay.

Respondent-Appellant AT&T Corp. answers "Yes."

I. INTRODUCTION

With this motion, AT&T Corp. seeks a stay of a Michigan Public Service Commission Order (“MPSC Order”) stating that AT&T Corp. owes approximately \$4.3 million in intrastate “switched access charges” and late fees to Petitioners-Appellees Westphalia Telephone Company (“Westphalia”) and Great Lakes Comnet, Inc. (“Great Lakes”). AT&T Corp. has filed a bond of 125% of the disputed amount with the MPSC and a copy is attached to the accompanying motion. This bond alone should be sufficient to stay proceedings pending appeal under MCR 7.209(E)(2) (“If a stay bond filed under this subrule substantially meets the requirements of subrule (F), it will be a sufficient bond to stay proceedings pending disposition of an appeal subsequently filed.”).

The interests of justice also support a stay. The MPSC Order rests on the MPSC’s view of federal rules issued by the Federal Communications Commission (“FCC”). Neither the FCC, nor any court or regulatory commission in any jurisdiction, has ever adopted the theory advanced by the MPSC. The MPSC erred as a matter of law; indeed, the Administrative Law Judge (“ALJ”) appointed by the MPSC held an evidentiary hearing, observed the parties’ witnesses firsthand, thoroughly reviewed the controlling FCC rules and orders, and agreed with AT&T Corp.’s analysis of federal law. At the very least, there are serious questions going to the merits.

More importantly, the controlling authority – the FCC – is about to release a decision that will almost certainly be dispositive here. On March 22, 2015 (less than a month after briefing on this motion will be complete) the FCC is scheduled to rule on the same questions of federal law presented here, in a parallel case involving the same parties here. If the FCC rules in AT&T Corp.’s favor (as the ALJ reasoned it would, and as AT&T Corp. expects it will), it will conclusively confirm that the MPSC misread federal law, and it will mean that Westphalia and Great Lakes must refund some \$12 million in *interstate* switched access charges to AT&T Corp.

If AT&T Corp. has to pay Westphalia and Great Lakes the \$4.3 million in *intrastate*

charges addressed by the MPSC Order, before the FCC issues its own decision, there is a substantial risk that Westphalia and Great Lakes will default and not repay those amounts (let alone the amounts due under the anticipated FCC order). And as a matter of common sense, it would be unjust for AT&T Corp. to pay Westphalia and Great Lakes now, just because the MPSC happened to rule first, when the FCC order – which involves much larger amounts, and which controls both interstate and intrastate charges – is imminent. Moreover, AT&T Corp. has posted an appeal bond in the amount of \$5,553,000 – more than 125% of the amount at issue.

Accordingly, AT&T Corp. respectfully requests that the Court enter a stay of the MPSC Order pending appeal. In the alternative, AT&T Corp. requests that the Court enter a very short, preliminary stay until March 31, 2015, shortly after the scheduled date of the FCC’s anticipated order. If the FCC does rule in AT&T Corp.’s favor, AT&T Corp. would then renew its request for a stay pending appeal.

II. BACKGROUND

A. Switched Access Charges

The telecommunications industry consists of two sorts of carriers relevant to this appeal. Interexchange carriers (“IXCs”) provide long-distance service for end users to make the familiar long-distance “toll” calls that go between local calling areas or exchanges: *intrastate* long-distance calls (e.g. from Detroit to Grand Rapids), *interstate* calls (e.g. from Detroit to Chicago) and international calls. Volume 3 Tr. 331 lines 64-66.¹ Local exchange carriers or “LECs” provide wireline phone service to end users within a local exchange (called “telephone exchange service”) and provide IXCs with access (“exchange access” service) to the LECs’ local facilities. See 47 U.S.C. § 153(32) (defining LECs), 153(20) (defining exchange access), & 153(54) (defining

¹ “Tr.” refers to the volume, page and lines of the transcript for the evidentiary hearing in the MPSC. AT&T Corp. has ordered an official copy of the transcript from the MPSC.

telephone exchange service). With the advent of local phone competition under the federal Telecommunications Act of 1996 (“1996 Act”), LECs were subdivided between “incumbent” LECs, which provided telephone exchange service when the 1996 Act was enacted (47 U.S.C. § 251(h)), and other LECs called “competitive” LECs or “CLECs.”

“Switched access charges” are the fees that a LEC charges an IXC to carry an interexchange call over the LEC’s network facilities. 3 Tr. 332 lines 87-89. IXCs do not build out their long-distance networks to reach all of their customers, so they rely on LECs to transport a long-distance call to or from the end user at each end of the call. *AT&T Corp. v. Alpine Communications, LLC*, 27 FCC Rcd. 11511, ¶ 4, *recon. denied*, 27 FCC Rcd. 16606 (2012) (“*Alpine*”). One or more LECs provide “originating” access from the end user making the call to the IXC’s network, and one or more LECs provide “terminating” access from the IXC’s network to the end user receiving the call. *Id.*

The FCC regulates access charges on interstate calls. *Id.* at lines 135-137. Access rates on intrastate calls within Michigan are subject to limited regulation by the MPSC. *Id.* at lines 133-135. However, Michigan law requires that each access provider’s in-state access rates cannot exceed its corresponding interstate rates. MCL 484.2310. Thus, as the MPSC recognized in the Order at bar, the FCC’s rules governing access charges for interstate calls apply with equal force to intrastate calls.

B. Interstate And Intrastate Reforms On Switched Access Charges

Normally, a business that provides a service decides which suppliers to use. Switched access service is unique, as the IXC that pays the charges does not choose which LECs will originate or terminate a call (and thus, cannot choose the LECs that provide access service to the IXC). 3 Tr. 335 lines 143-155; see *In re Access Charge Reform & Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd. 9923, ¶ 31 (2001) (“*CLEC*

Access Reform Order”). Rather, this choice is made by the end users. 3 Tr. 335 lines 144-145. For originating access, the IXC does not choose the originating LEC; the end user making the call does that when he or she decides who to buy local service from. *Id.* at lines 144-147. Likewise, for terminating access, the IXC does not choose the terminating LEC that serves the person who receives the call; the end user at the receiving end does that. *Id.* In some cases (including this one) the originating or terminating LEC uses an intermediate carrier rather than taking the call all the way to the end user by itself; there, too, the IXC does not choose the intermediate carrier; the LEC does. *Id.* at lines 153-155; see also *In re Access Charge Reform & Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd. 9108, ¶ 17 (2004) (“*CLEC Access Reform Clarification*”).

In addition to having no role in choosing access providers, IXCs like AT&T Corp. have no choice but to accept each call from the originating LEC, carry the call, and hand it off to the terminating LEC – even if the LECs’ charges are unlawful. 3 Tr. 335 lines 147-151. IXCs cannot block calls originated by or destined for their end users. *Id.* at lines 149-151. Thus, in contrast to a competitive market, the access market is unable to control prices because the “buyers” who pay access charges (the IXCs) cannot choose which provider to use and cannot refuse any provider’s service if the price is too high. This gives access providers an opportunity to impose excessive access charges. *CLEC Access Reform Order*, ¶ 34.

Historical factors compounded the inherent problems in the access market. When access charges were established, they were set above the associated cost so that IXCs would subsidize below-cost local phone service for end users. *In re Connect America Fund*, 27 FCC Rcd. 4040, ¶¶ 2, 9 (2011). However well-intentioned such subsidies may have been, the FCC recognized that high access charges are harmful. In a 1997 order, the FCC found that the “inefficient system of access charges retards job creation and economic growth” and “imped[es] the efficient

development of competition in both the local and long-distance markets.” *In re Access Charge Reform*, 12 FCC Rcd. 15982, ¶ 30 (1997). The FCC implemented significant access charge reductions for incumbent LECs in 1997,² in 2000,³ and 2001.⁴

The FCC turned to CLECs in 2001, when it established a “benchmark” or cap on CLEC tariffed interstate access rates. *CLEC Access Reform Order*, ¶¶ 1-3; 47 C.F.R. § 61.26. In 2004, the FCC issued a clarifying order that specifically applied the cap to intermediate carriers (like Great Lakes) that are “not serving the end-user” but instead provide only *part* of the link between the end user and the IXC. *CLEC Access Reform Clarification*, ¶ 17; 47 C.F.R. § 61.26(f).

The FCC implemented additional rules in 2011 to address the problem of “[a]ccess stimulation,” which “occurs when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations.” *Connect America Fund*, ¶ 656. Such an “arrangement inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand” with the service provider that stimulated the increase in volume. *Id.* The FCC found that access stimulation schemes had cost IXCs hundreds of millions of dollars per year, costs that (i) force all IXC customers to pay higher prices and (ii) “substantially reduce the amount of capital available to invest in broadband deployment and other network investments that would benefit consumers.” *Id.* ¶¶ 663-64. To remedy these problems, the FCC mandated another cap on LEC rates, which applies when the LEC stimulates access volumes. See 47 C.F.R. § 61.26(g).

C. The Parties’ Dispute

AT&T Corporation is an IXC. 3 Tr. 331 lines 64-66. It provides long-distance service to end users in Michigan and throughout the country. See *id.*

² *In re Access Charge Reform*, 12 FCC Rcd. 15982, ¶ 6.

³ *In re Access Charge Reform*, 15 FCC Rcd. 12962 (2000).

⁴ *In re Multi-Ass’n Group Plan for Regulation of Interstate Servs.*, 16 FCC Rcd. 19613 (2001).

The parties' dispute arose in early 2013, after AT&T Corp. noticed unusually sharp increases in the volume of access charges billed by Westphalia and Great Lakes. 3 Tr. 338 lines 218-219 & 3 Tr. 344 lines 359-361. After investigation, AT&T Corp. advised Westphalia and Great Lakes in March 2013 that it was disputing a portion of their switched access charges, on the ground that their rates exceeded those permitted by federal and state law.

Because a substantial majority of the disputed charges relate to interstate calls, AT&T Corp. filed a formal complaint with the FCC against Westphalia, Great Lakes and another carrier (Local Exchange Carriers of Michigan or "LECFMI") that is not a party to this case. See Ex. 1 hereto. Among other things, AT&T Corp. sought a refund of approximately \$12 million in interstate switched access charges it had paid to Westphalia and Great Lakes prior to March 2013 (that is, before AT&T Corp. discovered that Westphalia and Great Lakes had overcharged it and began disputing a portion of their bills). Under the FCC's schedule and rules, the FCC is expected to issue a ruling by March 22, 2015. Other large IXCs (Verizon, Sprint, and CenturyLink) filed a similar complaint at the FCC.

With respect to intrastate calls, Great Lakes and Westphalia filed a complaint with the MPSC, seeking to collect the portion of their intrastate access bills that AT&T Corp. had disputed and refused to pay beginning in March 2013. AT&T Corp. filed an answer on July 24, 2014, along with counterclaims seeking to collect amounts it overpaid before March 2013.

D. The ALJ's Recommended Decision In AT&T Corp.'s Favor.

The MPSC appointed an ALJ to conduct an evidentiary hearing, receive legal briefs, and issue a proposed decision. The ALJ received three rounds of written testimony, heard live cross-examination, and reviewed two rounds of legal briefs.

Westphalia and Great Lakes did not dispute that under Michigan law, the FCC's rules for interstate calls applied with equal force to the intrastate switched access charges that were the

subject of the MPSC case. AT&T Corp. demonstrated that Great Lakes, whose charges comprised the bulk of the charges at issue, violated federal law (and therefore Michigan law) in several respects. Among other things, Great Lakes's rates exceeded (i) the limit the FCC placed on CLEC rates in its 2001 *CLEC Access Reform Order*, and (ii) the independent limit the FCC placed on CLECs that engage in "access stimulation." There was no dispute that Great Lakes's rates vastly exceeded those limits – in fact, Great Lakes's per-minute rate is some *40 times* the maximum amount allowed. Instead, Great Lakes took the novel position that the FCC's rules for CLECs did not apply to it, claiming that Great Lakes was not a CLEC but a "Competitive Access Provider" or "CAP" because it carried calls between AT&T Corp. and other carriers, not all the way to the end users making or receiving the calls. Thus, Great Lakes contended it (and every other "CAP" that did not serve end users) was immune from the rules.

On December 11, 2014, the MPSC-appointed ALJ issued a 116-page Proposal for Decision, which analyzed the evidence and legal authorities and concluded that Westphalia and Great Lakes's charges exceeded those permitted by federal and state law. Ex. 2 hereto (excerpts of Proposal for Decision). Among other things, the ALJ held that Great Lakes exceeded the FCC's general limit on CLEC access rates and the FCC's independent limit for access stimulation.⁵

In so doing, the ALJ considered and rejected Great Lakes's novel assertion that intermediate carriers or "CAPs" that do not serve end users are exempt from the FCC's rules. As the ALJ explained, there is no mention or definition of "CAPs" (let alone an exemption for them) in the governing FCC rule (47 C.F.R. § 61.26), or any FCC rule on access charges, or the 1996

⁵ The ALJ also found that Westphalia and Great Lakes had overcharged AT&T Corp. in several other respects. For example, they charged AT&T Corp. for transporting calls at their own, very high rates, even though nearly half the transport service was really provided by another carrier, LECMI. Even Westphalia and Great Lakes conceded that LECMI was a CLEC subject to the FCC's rate limits. For purposes of this motion, the issues raised by the federal rate limits for CLECs and access stimulation are sufficient in and of themselves to support the stay.

Act, or the Michigan Telecommunications Act. Ex. 2 at 60. In the ALJ's words, the "CAP" term is "a label defined neither in the MTA nor its federal counterpart." *Id.* Indeed, the controlling FCC rule squarely states that the rate cap *does* apply to a carrier that – like Great Lakes – "provides some portion of the switched exchange access services used to send traffic to or from an *end user not served* by that CLEC." 47 C.F.R. § 61.26(f) (emphasis added). In such cases, the cap is *lower* (because such carriers do not do all the work that a carrier normally performs when it takes a call all the way to or from the originating or terminating end user). As discussed above, the FCC adopted that provision in its 2004 *CLEC Access Reform Clarification*, and it did so to resolve "disputes related to the rates charged by competitive LECs when they act as intermediate carriers" and to address the application of the cap when an intermediate carrier, like Great Lakes, "is not serving the end-user." *CLEC Access Reform Clarification*, ¶ 17 (2004). Thus, the ALJ concluded, the FCC "has expressly extended [its] reform to intermediate carriers" like Great Lakes, and Great Lakes's argument that intermediate carriers or "CAPs" are exempt "must fail." Ex. 2 at 61.

Accordingly, the ALJ recommended that the MPSC deny the complaint filed by Westphalia and Great Lakes, and give AT&T Corp. relief on its Counterclaim. Great Lakes and Westphalia took exception to the ALJ's proposals. The MPSC's technical Staff also filed a brief; although it took exception to some of the ALJ's proposed findings, the Staff agreed with the ALJ's conclusion that under federal law, Great Lakes is a CLEC. Ex. 3 hereto, at 4.

E. The MPSC Order

On January 27, 2015, the MPSC issued its Order. AT&T Corp. Motion for Stay, Ex. 1. The MPSC agreed with the ALJ that the case turned on an interpretation of federal law, namely the FCC's rules regarding switched access charges. *Id.* at 9, 17. However, it refused to adopt the ALJ's analysis and recommendations, deciding instead to adopt Great Lakes's novel "CAP" theory. Despite recognizing that "there is no mention of CAPs in any FCC rule on access charges"

(*id.* at 18) the MPSC stated that by its “reckoning, the FCC has not provided a definitive answer to whether CAPs are to be treated as though they are CLECs for purposes of the federal access charge rule” (*id.* at 17). Accordingly, the MPSC decided that “CAPs” like Great Lakes were immune from the FCC’s limits. *Id.* at 20. As a result, the MPSC found that AT&T Corp. has to pay Westphalia’s and Great Lakes’s charges and denied AT&T Corp. relief on its counterclaim.

AT&T Corp. moved the MPSC to stay its Order pending appeal to this Court, or at least until March 31, 2015 (by which time the FCC is scheduled to issue its order in the parties’ parallel case). AT&T Corp. Motion for Stay, Ex. 3. The MPSC denied AT&T Corp.’s motion on February 12, 2015. *Id.* Ex. 4. In denying the stay, the MPSC did not apply MCR 7.209 (the rule that governs stays in this Court) but the four-factor test in MCR 7.119 (which governs stays in appeals to the circuit court from certain agency decisions). *Id.* at 5.

III. ARGUMENT

AT&T Corp. has filed a bond of 125% of the amount awarded by the MPSC Order. AT&T Corp. Motion for Stay, Ex. 2. This bond alone justifies a stay and obviates any potential harm to the appellees. See MCR 7.209(E)(2). Moreover, MCR 7.209(D) authorizes this Court to grant a “stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just.” The rule’s plain language gives the Court broad discretion to award a stay and fashion the appropriate terms. Accordingly, the Court has not imposed any rigid requirements for a stay.

A stay pending appeal is manifestly “just.” AT&T Corp. is likely to succeed on the merits, and has at least presented serious questions going to the merits. Moreover, a definitive decision from the FCC – which the MPSC itself acknowledged to be the controlling authority – is imminent. Courts commonly stay orders involving the payment of money, and there is a substantial risk of irreparable harm to AT&T Corp. absent a stay. At a minimum, the Court should grant a stay until March 31, 2015 – a stay that is very short but should be very valuable to the

Court, as the FCC is expected to rule by then. The Court can then consider, based on the FCC's ruling, whether a further stay pending appeal is just.

A. At the very least, this appeal presents serious questions on the merits, and a dispositive ruling from the FCC is imminent.

This appeal is far from the ordinary appeal of an MPSC order. First, the MPSC recognized that *federal* rules control – rules authored not by the MPSC but by the FCC – and as a result its Order purports to interpret federal law.

Second, neither the FCC (nor *any* authority in *any* jurisdiction) has ever adopted the novel exemption for intermediate carriers or “CAPs” that the MPSC adopted. Indeed, until Great Lakes made its argument here, there is no reported authority in which any party even *argued for* such an exemption (even though there are many carriers that are similarly situated to Great Lakes and could make the argument). This should come as no surprise. Far from making intermediate carriers or “CAPs” immune from its rules, the FCC specifically issued a clarification to address “the rates charged by competitive LECs when they act as intermediate carriers” and to address the application of the cap when an intermediate carrier, like Great Lakes, “is not serving the end-user.” *CLEC Access Reform Clarification*, ¶ 17 (2004). As a result of that clarification, the controlling FCC rule squarely states that the rate cap *does* apply to a carrier that – like Great Lakes – “provides some portion of the switched exchange access services used to send traffic to or from an *end user not served* by that CLEC.” 47 C.F.R. § 61.26(f) (emphasis added).

Third, the MPSC's decision does not rest on any factual finding or policy judgment, but on a plain error of law. The MPSC noted that the pertinent FCC rule defines a “CLEC” subject to the rule to “mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user.” 47 C.F.R. § 61.26(a)(1). Looking at the two words “end user” in isolation, the MPSC thought that a CLEC has to be a carrier that serves end

users, and conversely intermediate carriers like Great Lakes that do *not* serve end users were immune. AT&T Corp. Motion for Stay, Ex. 1 at 18. But the MPSC ignored two critical points.

To begin with, the definition as a whole does not say what the MPSC thought – that a CLEC must be “a carrier that serves end users.” Instead, a CLEC is a carrier that provides “some or all of the interstate exchange access services used to send traffic to or from an end user.” 47 C.F.R. § 61.26(a)(1). An intermediate carrier like Great Lakes takes calls *part* of the way from the IXC to the end user (by carrying the call from the IXC to another LEC, which takes the calls the rest of the way) and therefore neatly fits within the definition of providing “some” of the “exchange access services used to send traffic to or from an end user.” An intermediate carrier or CAP may not provide “all” the access services “to send traffic to or from an end user,” but it certainly provides “some” of those services, and under the rule’s plain language “some” is enough.

Further, sub-paragraph (f) of the rule confirms that a CLEC does *not* have to serve end users. It specifically states that the FCC’s rate cap applies (and is in fact lower) “[i]f a CLEC provides some portion of the switched exchange access services used to send traffic to or from *an end user not served by that CLEC.*” 47 C.F.R. § 61.26(f).

Finally, while the MPSC’s error is plain, the Court need not take AT&T Corp.’s word for it. The MPSC’s own ALJ thoroughly reviewed the pertinent FCC rules and orders, and agreed with AT&T Corp. that the rule contains no exemption for “CAPs.” Further, the MPSC’s own Staff agreed that under the controlling federal rule, Great Lakes is a CLEC.⁶ Most importantly, the agency with the controlling voice – the FCC – is about to speak. The FCC has AT&T Corp., Great Lakes and Westphalia before it, in a parallel case raising the same issues with respect to interstate calls, and its ruling is due March 22, 2015. Because Michigan law requires that a carrier’s rates for

⁶ The Staff took the position that the federal rule was irrelevant, but the MPSC and the ALJ both agreed that under MTA 484.2310, the federal rule controls.

“intrastate switched access” services may “not exceed the rates allowed for the same interstate services by the federal government” (MCL 484.2310(2)) the FCC’s ruling will almost certainly be dispositive for the intrastate calls at issue here. The MPSC Order rests on the MPSC’s erroneous attempt to predict the FCC’s interpretation of FCC rules. Within just a few weeks, this Court will be in the unique position of having the actual FCC order, straight from the horse’s mouth.

All of these factors demonstrate that AT&T Corp. is likely to succeed on the merits of its appeal. At the very least, AT&T Corp. has demonstrated serious questions going to the merits – questions serious enough to make a stay pending appeal “just,” and certainly serious enough to grant AT&T Corp.’s alternative request for a short stay to preserve the status quo until March 31, 2015. By that time the FCC will weigh in, and if the FCC rejects the MPSC’s novel theory and rules in AT&T Corp.’s favor (as AT&T Corp. expects it will) AT&T Corp. can then show that it is not only likely but virtually certain to succeed.

B. Monetary awards are routinely stayed, and in any event there is a substantial risk of irreparable harm absent a stay.

This Court has explicit authority to “stay or terminate a stay of any order or judgment of a lower court or tribunal on just terms.” MCR 7.209(H)(2). Paragraph (D) reaffirms that “[t]he Court of Appeals may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just.” MCR 7.209(D). The Rule’s plain language contains no requirement that the movant demonstrate irreparable harm, and the Court has not held that such a showing is required. To the contrary, the rule states that “[i]f a bond is filed before execution issues, and notice is given to the officer having authority to issue execution, execution is stayed.” MCR 7.209(H)(1). Likewise, the analogous federal Rule gives appellants a stay “as a matter of right” upon posting a bond, as AT&T Corp. has done here. *Arban*

v. West Pub. Corp., 345 F.3d 390, 409 (CA6, 2003); *Hamlin v. Charter Twp. of Flint*, 181 F.R.D. 348, 351 (ED Mich, 1998).

In any event, given the unique posture of this case, AT&T Corp. faces a substantial risk of imminent irreparable harm if it were required to pay Westphalia and Great Lakes pursuant to the MPSC Order while this appeal is pending. As Section III.A demonstrates, there is a substantial likelihood that the FCC will soon issue an order in AT&T Corp.'s favor in the parallel case regarding interstate calls. If it does, Great Lakes and Westphalia will owe substantial refunds to AT&T Corp. on interstate calls – refunds that will dwarf the amounts they would receive on intrastate calls under the MPSC Order. Further, Great Lakes and Westphalia will owe additional refunds to other large IXCs, including Verizon and Sprint, that have also brought complaints before the FCC. Moreover, Great Lakes would have to drastically reduce its switched access rates (and therefore its revenues) going forward to comply with the FCC's rules.

Thus, if AT&T Corp. is required to pay Westphalia and Great Lakes the amounts stated by the MPSC Order, and the FCC then rules in favor of AT&T Corp. and other IXCs on the interstate side of the parties' dispute, there is a substantial risk that Westphalia and Great Lakes will simply pocket the proceeds from the MPSC Order, default on the federal orders, and never repay the amounts that would become due when AT&T Corp. prevails in this appeal. The record of this proceeding shows this concern is serious: Great Lakes itself argued below that if the federal limits on access charges were enforced, they "would be forced out of business." Ex. 4 hereto at 9-10.

If the Court desires further confirmation, it need only wait for the response brief filed by Great Lakes and Westphalia. If these carriers truly can pay the intrastate refunds that would be due if AT&T Corp. prevailed in this appeal, *plus* the amounts that would be due to AT&T Corp. under the FCC's anticipated order, *plus* the amounts that would be due to other IXCs in other cases, they should have no problem demonstrating their own financial wherewithal. But if Great Lakes and

Westphalia cannot shoulder those burdens, as AT&T Corp. expects and as their own admissions below indicate, they will provide no concrete showing that they can repay the amounts due.

In addition, the public interest favors a stay. The FCC imposed caps on access rates because it decided that high access rates, and access stimulation, are anticompetitive and harmful to the public interest. In turn, the Michigan legislature has decided to follow the FCC's lead, by mandating that every carrier's rates for "intrastate switched access" services may "not exceed the rates allowed for the same interstate services by the federal government." MCL 484.2310(2). The MPSC's radical attempt to carve out a massive exemption from these federal and state laws should be reviewed *before* AT&T Corp. is forced to pay millions of dollars (over and above the substantial sums it has already paid to Great Lakes and Westphalia).

Finally, as a matter of common sense, it would be manifestly unjust for AT&T Corp. to be forced to pay substantial sums to Westphalia and Great Lakes now for the intrastate side of the parties' dispute, based solely on the MPSC's preliminary – and erroneous – views of *federal* law. The much larger interstate side of the parties' dispute remains pending, and the FCC – which is the controlling authority on the issues that govern this appeal – is about to weigh in. If the FCC (like the MPSC-appointed ALJ) agrees with AT&T Corp., then Great Lakes and Westphalia would owe AT&T Corp. substantial amounts on a net basis. That is even before one considers the fact that the MPSC Order (which depends on the MPSC's erroneous view of federal law) would necessarily have to be reversed if the FCC, the expert agency on questions of federal law, decides that the MPSC's view of federal law is wrong. If AT&T Corp. is required to pay Great Lakes and Westphalia now – while the FCC's decision is imminent – it would be like awarding Super Bowl rings at the end of the first quarter while the majority of the game remains to be played.

C. The MPSC's denial of a stay was based on a patently inapplicable rule.

As MCR 7.209 requires, AT&T Corp. presented its motion for stay pending appeal (and its

alternative request for a preliminary stay until March 31, 2015) to the MPSC. The MPSC denied AT&T Corp.'s request. But its decision was based on a rule that has no bearing here.

The MPSC acknowledged that a motion for stay is “governed by the provisions for obtaining a stay of a civil action set forth in R. 7.209.” AT&T Corp. Motion for Stay, Ex. 4, at 2. But after its initial point to the governing rule, the MPSC changed course and decided to evaluate the motion based on “the four criteria listed in MCR 7.119(E)”: likelihood of success, irreparable harm, balance of hardships, and the public interest. *Id.* at 5.

The MPSC's mid-course shift was erroneous. By its plain terms, MCR 7.119 only governs “appeal[s] to the circuit court from an agency decision where MCL 24.201 *et seq.* applies.” This Court is not the circuit court, and this is not an appeal under MCL 24.201. While the preceding sections show that this motion would also satisfy the four-factor test for circuit courts under MCR 7.119, that rule is inapplicable. The dispositive point is that AT&T Corp.'s motion falls well within *this* Court's much broader discretion to “stay or terminate a stay of any order or judgment of a lower court or tribunal on just terms” (MCR 7.209(H)(2)) and to stay “enforcement of any judgment or order of a trial court on the terms it deems just” (MCR 7.209(D)).

IV. CONCLUSION

WHEREFORE, Respondent-Appellant, AT&T Corp., respectfully requests that this Court:

- 1) Pending resolution of this case and pursuant to MCR 7.209(A)(2) and (D), stay that portion of the January 27, 2015 MPSC Order that sustains Westphalia's and Great Lakes's excessive charges and finds that AT&T Corp. owes over \$4.3 million in switched access charges and late fees to Westphalia and Great Lakes;
- 2) In the alternative, stay that portion of the January 27, 2015 MPSC Order until March 31, 2015 on a preliminary basis, without prejudice to AT&T Corp. renewing its request for a stay pending appeal based on the anticipated FCC order;
- 3) Grant such further and other relief as justice and equity require.

Respectfully submitted,

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