Attachment A

STATE OF MICHIGAN
IN THE COURT OF APPEALS

WESTPHALIA TELEPHONE COMPANY and GREAT LAKES COMNET, INC, Applicants/Complainants-Appellees	)	Court of Appeals
v	)	No. 326100
AT&T CORP., Respondent-Appellant	)	MPSC Case
and	)	No. U-17619
MICHIGAN PUBLIC SERVICE COMMISSION, Appellee.	)	

Mark R. Ortleib P-34962
AT&T Corp
Trent B. Collier P-66448
Collins Einhorn Farrell PC
Attorneys for AT&T Corp.

Michael G. Oliva P-29038
Michael A. Holmes P-24071
Leah H. Brooks P-72811
Loomis, Ewert, Parsley, Davis & Gotting, P.C.
Attorneys for Westphalia Telephone Co and Great Lakes Comnet, Inc.

Bryan A. Brandenburg P-77216
Assistant Attorney General
Attorneys for Michigan Public Service Commission

RECEIVED
2015 MAR 12 PM 4:58
COURT OF APPEALS
LANSING OFFICE

RESPONSE OPPOSING AT&T CORP.'S MOTION FOR STAY

Dated: March 12, 2015

Michael A. Holmes (P24071)
Michael G. Oliva (P29038)
Leah Brooks (P72811)
Loomis, Ewert, Parsley
Davis & Gotting, P.C.
124 W. Allegan, Suite 700
Lansing, MI 48933
(517)482-2400

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii
RESPONSE OPPOSING AT&T CORP.'S MOTION FOR STAY 1
APPLICABLE STANDARDS FOR GRANT OR DENIAL OF STAY 3
ARGUMENT 5
1. AT&T will suffer no irreparable harm whatsoever if a stay is not granted. 5
2. AT&T is not likely to prevail on the merits of its appeal. 7
3. The public interest would be seriously harmed if a stay is granted. 9
4. The harm to GLC and WTC from the grant of a stay would significantly outweigh any alleged harm to AT&T if a stay is denied. 12
CONCLUSION AND RELIEF 15

INDEX OF AUTHORITIES

Cases

Basiccomputer Corp v Scott, 973 F2d 507, 511 (6th Cir, 1992) 6
Business WATS Inc v American Telephone & Telegraph Co, order of the Federal Communications Commission, entered November 25, 1992 (7 FCC Rcd 7942, 7 FCCR 7942) 12
Duquesne Light Co v Barasch, 488 US 299, 307-308 (1989) 8
In re Bell Atlantic-Delaware, order of the Federal Communications Commission, entered October 23, 2000 (15 FCC Rcd. 20665 (FCC), 15 FCCR 20665 11
In the Matter of Connect America Fund, order of the Federal Communications Commission, entered November 18, 2011 26 FCC Rcd 17663, *affd sub nom In re: FCC11-161*, 753 F3d 1015 (10th Cir, 2014) 7
In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, 22 FCC Rcd, 11629 ¶5 (2007) 11
Mercy Health Services v 1199 Health & Human Services Employees Union, 888 FSupp 828, 838 (WD Mich, 1995) 10
Michigan Bell Telephone Co v MFS Intelenet of Michigan, 16 F Supp 2d 828 (WD Mich, 1998) 5, 10
Nixon v Kent County, 790 FSupp 738, 749 (WD Mich, 1992) 6
Ohio ex rel Celebrezze v Nuclear Regulatory Commission, 812 F2d 288, 290 (6th Cir, 1987) 10
re Brooks Fiber Communications of Michigan, order of the Public Service Commission, entered January 28, 1998 (Case No. U-11178) 5
re Developing a Unified Intercarrier Compensation Regime Declaratory Ruling CC Docket No. 01-92, DA 12-154 (February 6, 2012); *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, 22 FCC Rcd 11629, 11631 paras. 1, 6 (WCB 2007) 15

Statutes

1991 PA 179, as amended Sec 203(12); MCL 484.2203(12); MSA 22.2203(12) 4
MCL 484.2203(16) 3
MTA §203(16) 3
Railroad Act, 1909 PA 300 §26 4

Rules

GCR 1963 530.4 3
MCR 2.164 3
MCR 2.164(D) 3
MCR 2.614(D) 4
MCR 7.119 (E) 4
MCR 7.119(E) 5, 6
MCR 7.123 (E)(3) 4

MCR 7.209 .....2, 3, 4
MCR 7.209(A)(1) 3
MCR 7.209(B)(1) 3
MCR 7.209(E).....3

STATE OF MICHIGAN
IN THE COURT OF APPEALS

WESTPHALIA TELEPHONE COMPANY and GREAT LAKES COMNET, INC, Applicants/Complainants-Appellees	)	Court of Appeals No. 326100
v AT&T CORP., Respondent-Appellant	)	MPSC Case No. U-17619
and MICHIGAN PUBLIC SERVICE COMMISSION, Appellee.	)	

RESPONSE OPPOSING AT&T CORP.'S MOTION FOR STAY

Westphalia Telephone Company ("WTC") and Great Lakes Comnet, Inc. ("GLC"), Applicants/Complainants in the proceedings below before the Michigan Public Service Commission, ("MPSC") in Case No. U-17619, and Appellees herein, oppose the Motion for Stay of the MPSC's January 27, 2015 Order ("Order") sought by AT&T Corp. ("AT&T"). The MPSC properly determined that AT&T improperly and unlawfully refused to pay for intrastate access services which WTC and GLC provided to it, and properly rejected as baseless AT&T's counterclaim that it was overcharged for such services.[1] The MPSC held that AT&T must pay the amounts that it wrongfully withheld for past intrastate access services and that AT&T must pay, on a going-forward basis, for intrastate switched access services provided by GLC and WTC at their lawful tariffed rates.

The MPSC also properly denied AT&T's Motion for Stay of its January 27, 2015 Order, concluding that the interests of justice did not support issuance of a stay, finding (i) AT&T made no showing that it would be irreparably harmed in the absence of a stay;

[1] http://efile.mpsc.state.mi.us/efile/docs/17619/0121.pdf

(ii) AT&T made no showing that it is likely to prevail on the merits of its appeal; (iii) AT&T made no showing that the public interest would not be harmed if a stay were granted; and (iv) AT&T made no showing that the harm to it absent a stay would outweigh the harm to other parties if a stay were granted.[2]

Because AT&T did not, and cannot show, that the MPSC abused its discretion in denying a stay of its January 27, 2015 Order, or that it erred in any of its conclusions in its four-part analysis, AT&T instead argues that (i) the MPSC should not have applied the four-part analysis in determining whether or not to issue a stay; (ii) the Court should ignore the plain language of MCR 7.209 and conclude that a party may unilaterally file an appeal bond and thereby automatically stay an order of a trial court or administrative agency without obtaining an order of either the lower court or agency or this court; and (iii) the Court should simply issue a stay to "preserve the status quo", thereby enabling AT&T to continue to unlawfully refuse to pay for access services both for past services, and on a going-forward basis literally for years, in direct violation of well-established policy that condemns AT&T's "self-help" actions in this case as directly contrary to the public interest and national telecommunications policy. It cannot be over-emphasized that what AT&T is really seeking in its Motion for Stay is for the Court to order GLC and WTC to provide intrastate switched access services to AT&T for free for the next two to five years, because GLC and WTC are barred from terminating service to AT&T or from refusing to accept or forward AT&T traffic for nonpayment.

[2] http://efile.mpsc.state.mi.us/efile/docs/17619/0127.pdf

APPLICABLE STANDARDS FOR GRANT OR DENIAL OF STAY

Contrary to AT&T's claims, application of the four-part test discussed below is necessary and appropriate in determining whether an order should be stayed. When the Michigan Court Rules of 1985 were adopted, the provisions of the former GCR 1963 530.4, which provided that the filing of a supersedeas bond along with a claim of appeal would act as a stay of an order, were eliminated. Instead, the comparable rule, MCR 2.164 provides that a stay on appeal is governed by MCR 7.209. MCR 2.164(D). MCR 7.209 is explicit that the filing of an appeal does not stay the effect or enforceability of the order being appealed. MCR 7.209(A)(1) Nothing in MCR 7.209 supports the argument advanced by AT&T that, after a motion for stay is denied by the lower court or agency, and there had been no motion or order by such court or agency approving a bond, the appellant may nevertheless obtain a stay simply by filing a claim of appeal and an appeal bond. MCR 7.209 is explicit in requiring approval of a stay and of a bond by the court prior to the filing of the bond. MCR 7.209(B)(1); MCR 7.209(E).

The MPSC is authorized, upon motion of a party, to issue a stay of an order pending appeal under the Michigan Telecommunications Act ("MTA") pursuant to MTA §203(16); MCL 484.2203(16). It is required to act on such a motion within ten (10) days. Under §203(16), the standards for grant or denial of a stay pending appeal are the same as those set forth in MCR 7.209, which authorizes the trial court or the Michigan Court of Appeals to grant stays pending appeal once the automatic 21-day stay of trial court judgments pursuant to MCR 2.614(D) has expired.[3]

[3] The MPSC has held that the 21-day automatic stay provided by MCR 2.614 for trial court judgments does not apply to Orders of the MPSC and that, accordingly, it may require payment deadlines in its orders of any length, shorter than 21 days. In *re Michigan Exchange Carriers Association*, order of the

Although MCR 7.209 is silent as to what standards the trial court or the Court of Appeals should apply in determining whether or not to stay an order of an administrative agency pending appeal, the Michigan Court Rules explicitly set forth standards for a Circuit Court to consider in determining whether to stay an order of an administrative agency pending an appeal.[4] The standards for an appellate circuit court to grant a stay of an order of an administrative agency pending appeal are set forth in MCR 7.119 (E), as well as in MCR 7.123 (E)(3). These rules are, as stated in the Staff Comment, "modeled on the rules of the Court of Appeals". The standards for issuing or denying a stay are identical to the standards which apply to the grant of a preliminary injunction. The MPSC has consistently applied those same standards in determining whether to order a stay of its orders pending appeal. In *re International Transmission Co*, order of the Public Service Commission, entered April 12, 2011, p 7 (Case No. U-16200).[5] Similarly, the United States District Court for the Western District of Michigan applied the same standard in denying an injunction to stay enforcement of a MPSC order directly comparable to the order in this case[6] pending appeal. *Michigan Bell Telephone Co v MFS Intelenet of Michigan*, 16 F Supp 2d 828 (WD Mich, 1998)

Public Service Commission, entered October 25, 2007, pp 6, 8-9 (Case No. U-14905); http://www.dleg.state.mi.us/mpsc/orders/comm/2007/u-14905_10-25-2007.pdf

[4] Formerly, all MPSC orders were appealed to the Ingham Circuit Court in the first instance under Section 26 of the Railroad Act, 1909 PA 300 §26. Section 26 was amended by 1987 PA 12 to provide that most such appeals would be filed in the Court of Appeals in the first instance instead of the Ingham Circuit Court, and when the MTA was adopted in 1991, it similarly provided that all MPSC orders thereunder would be appealed directly to the Court of Appeals. 1991 PA 179, as amended Sec 203(12); MCL 484.2203(12); MSA 22.2203(12)

[5] http://www.dleg.state.mi.us/mpsc/orders/electric/2011/u-16200_04-12-2011.pdf

[6] The Order that the Federal Court declined to enjoin was the MPSC's order *in In re Brooks Fiber Communications of Michigan*, order of the Public Service Commission, entered January 28, 1998 (Case No. U-11178), which required Michigan Bell Telephone Co, now AT&T Michigan, to pay reciprocal compensation payments on a going-forward basis to the complainant ISPs, and to promptly pay within 10 days amounts previously withheld by AT&T Michigan.
http://www.dleg.state.mi.us/mpsc/orders/comm/1998/u-11178b.pdf

The four requirements of MCR 7.119(E), which the MPSC applied in considering AT&T's motion for stay this case are:

1. The moving party will suffer irreparable injury if a stay is not granted.
2. The moving party will make 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.
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.

The argument advanced by AT&T's Motion for Stay that the MPSC erred in applying this same 4-part test in determining whether to grant or deny a stay is utterly baseless, and underscores forcefully that AT&T did not, and cannot establish that it could satisfy this test.

ARGUMENT

As discussed below, AT&T's Motion for Stay below was properly denied by the MPSC and the instant Motion for Stay should be denied by this Court of Appeals because AT&T failed to demonstrate that it meets the requirements of MCR 7.119(E). A careful review of the facts shows that AT&T cannot meet those requirements in this case.

1. AT&T will suffer no irreparable harm whatsoever if a stay is not granted.

Absent a stay, AT&T will not suffer irreparable harm. It is well established that, in order to show irreparable harm sufficient to grant a stay or to issue an injunction, the moving party is required to identify "a noncompensible injury for which there is no legal measure of damages, or none that can be determined with a sufficient degree of

certainty". Thus, claims of monetary damages will not be considered to be irreparable. *Michigan Bell Tel Co*, supra,, citing *Nixon v Kent County*, 790 F Supp 738, 749 (WD Mich, 1992) and *Basiccomputer Corp v Scott*, 973 F2d 507, 511 (6th Cir, 1992). Because it has no competent claim of irreparable injury, AT&T instead speculates, with no evidentiary or factual support, that WTC and GLC might not be able to repay AT&T if, years from now, the MPSC's Order is ultimately reversed on appeal. The Courts and the MPSC have consistently held that purely speculative claims of injury, such as that advanced by AT&T in this case, do not satisfy the requirement of showing irreparable harm. See *Michigan Bell, supra; ITC Transmission, supra*.

AT&T completely mischaracterizes an argument made by Appellees below to suggest that there is some risk that GLC would go out of business if AT&T were to prevail on its claims in this and related cases. Appellees made no such claim or suggestion below. Rather, what WTC and GLC argued below was that one of the reasons supporting its position that Section 61.26 of the FCC's Rules was inapplicable to them was that the FCC was careful in *In the Matter of Connect America Fund*, order of the Federal Communications Commission, entered November 18, 2011 26 FCC Rcd 17663, *affd sub nom In re: FCC11-161*, 753 F3d 1015 (10th Cir, 2014) ("CAF") to explicitly exempt tandem providers which do not own an end office and thus do not serve end-users, from the transition of certain access charges to "bill and keep". *See CAF*, 26 FCC Rcd 17663 ¶¶1306, 1312 n. 2358., Appellee pointed out that the reason for this exemption for such providers from the transition to "bill and keep" compensation

was that, absent end users, there is no customer to bill and no revenue to keep.[7] AT&T does not dispute that the FCC established this explicit exemption, nor does it claim that the access charges at issue in this or any related proceedings are subject to "bill and keep". There is no legitimate concern that the FCC would eliminate that exemption, because to do so would be confiscatory. *See Duquesne Light Co v Barasch*, 488 US 299, 307-308 (1989). Further, neither the outcome of this nor any other related litigation, would affect that circumstance in any way.

2. AT&T is not likely to prevail on the merits of its appeal.

The MPSC properly found that AT&T has made no showing that it is likely to prevail on appeal. AT&T advanced no argument to the MPSC that the January 27, 2015 Order was in error in any respect. AT&T's arguments in its Motion to this Court are identical to the arguments which it advanced on the merits before the MPSC. The MPSC has carefully considered, and rejected the merit of those arguments.

At most, AT&T observes that (i) the Proposal for Decision in this case proposed a different result than the MPSC's Order; and (ii) AT&T is hopeful that in a pending case before the Federal Communications Commission ("FCC") involving intrastate switched access charges, the FCC will come to a different conclusion than the MPSC. AT&T's Motion pointedly omits the fact that this case first went to mediation prior to contested case hearings, and that the Mediator's Recommended Settlement in the case was, in all material respects, the same as the MPSC's final Order.[8] Moreover, it pointedly avoids acknowledging that the MPSC's Staff, which is an independent, disinterested party in

---

[7] See Reply Brief of Applicants/Complainants Westphalia Telephone Company and Great Lakes Comnet, Inc. pp. 7-8 http://efile.mpsc.state.mi.us/efile/docs/17619/0104.pdf ; Applicants'/Complainants' Exceptions to Proposal for Decision, pp 8-11 http://efile.mpsc.state.mi.us/efile/docs/17619/0115.pdf

[8] On February 27, 2015 the MPSC Ordered AT&T to pay GLC and WTC's litigation costs as mediation sanctions. http://efile.mpsc.state.mi.us/efile/docs/17619/0137.pdf

this case, supported WTC and GLC's positions and opposed AT&T's positions in this case, and that the MPSC's order in this case is consistent with the Staff's position. AT&T falsely claims that the MPSC Staff concluded that GLC was a CLEC under federal law. The MPSC Staff took exactly the opposite position, and argued, consistent with the MPSC's Final Order in this case, that GLC is not a CLEC under controlling law, and that, if it were a CLEC, it would be exempt from the benchmark rate rule of Section 61.26 because it would qualify as a "rural CLEC".[9] Thus, four of the five decision makers[10] that have considered this case, and the independent and disinterested MPSC Staff, have all concluded that AT&T's case is without merit.

With respect to the pending proceedings before the FCC, as the MPSC observed in denying the stay, there is no reason to believe that the FCC will come to any different conclusion than the MPSC. AT&T simply speculates that the FCC will come to a different conclusion. Moreover, there is no reason to believe that whatever order is issued by the FCC will be on any basis that would require any modification or reversal of the MPSC's Final Order. As the MPSC observed in its order denying the 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."
> (February 12, 2015 Order, p 5)

Despite any limited debate on the MPSC's final Order that may exist, the mere possibility of success on appeal is insufficient to satisfy this requirement. See *Michigan*

---

[9] See, Michigan Public Service Commission Staff's Reply Brief, pp. 3-5 http://efile.mpsc.state.mi.us/efile/docs/17619/0106.pdf ; Michigan Public Service Commission Staff's Exceptions to Proposal for Decision, pp. 2-5 http://efile.mpsc.state.mi.us/efile/docs/17619/0106.pdf

[10] The ALJ who served as Mediator, the ALJ who served as Hearings Examiner, and the three Commissioners.

Bell, supra, citing *Mercy Health Services v 1199 Health & Human Services Employees Union*, 888 FSupp 828, 838 (WD Mich, 1995); *Ohio ex rel Celebrezze v Nuclear Regulatory Commission*, 812 F2d 288, 290 (6th Cir, 1987) Because AT&T has made no showing that it is likely to prevail on the merits of its as-yet-unfiled appeal, there is no basis to grant AT&T's requested stay. See *ITC Transmission, supra*.

3. <u>The public interest would be seriously harmed if a stay is granted.</u>

The grant of a stay in this case will seriously harm the public interest. AT&T has unlawfully engaged in improper and unlawful self-help by refusing to pay GLC and WTC for intrastate access services in violation of their lawful tariffs. Withholding of payments owed pursuant to a filed tariff is contrary to established precedent and prior industry protocol regarding contested amounts. The FCC has held that such "self-help" is contrary to industry protocol. *See In re Bell Atlantic-Delaware*, order of the Federal Communications Commission, entered October 23, 2000 (15 FCC Rcd. 20665 (FCC), 15 FCCR 20665, where the FCC stated that "a customer should pay its bills under a carrier's lawful tariff where the customer nevertheless disputes those charges. " *In re MCI Telecommunication Corp*, Memorandum Opinion and Order, FCC 76-685 (rel. Jul. 30, 1976); cf. *In re All American Telephone Co v. AT&T Corp*, memorandum opinion and order of the Federal Communications Commission, entered January 20, 2011 (26 FCC Rcd 723, ¶ 18) ("All American Order")(pet. for recon denied, 28 FCC Rcd 3469 (2013), clarifying that self-help is not a per se violation of Section 203(c) of the Act but that "[w]e do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions."

Moreover, self-help actions endanger the reliability and functioning of the national telecommunications network. *See In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd, 11629 ¶5 (2007) Engaging in impermissible self-help by withholding payment directly negates any claim of irreparable injury on the part of the withholding carrier or customer. In *Business WATS Inc*, order of the Federal Communications Commission, entered November 25, 1992 (7 FCC Rcd 7942, ¶ 297 FCCR 7942), explaining that "'self help' undercuts a claim of irreparable injury for the purpose of emergency relief", the FCC stated:

> "In determining whether to grant the extraordinary remedy of a stay of its action or other extraordinary relief in the nature of a temporary restraining order or preliminary injunction, the Commission generally considers whether the petitioner has made a strong showing that it is likely to prevail on the merits on appeal, that irreparable injury would result absent a stay, a stay will not substantially harm other interested parties, and that a stay will be in the public interest. [1] BWI has not shown that it would be irreparably injured by paying the disputed amounts billed to it by AT & T or by meeting AT & T's security or advance payment requirements, and that it cannot be made whole should it ultimately prevail on the merits of its complaint. [2] *The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations.* [3]
>
> [1] *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 104 FCC2d 451, 456 (1985), citing *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921 (D.C.Cir.1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C.Cir.1977); *Big Valley Cablevision, Inc.*, 85 FCC2d 973, 978 (1981).
> [2] BWI's showing of supposed irreparable harm consists mostly, if not entirely, of conclusionary allegations that it will be put out of business and forced to abandon the resale market if AT & T cuts off its service. (Petition at 10–15). In light of BWI's failure to show irreparable injury, we need not determine whether BWI met the other criteria of the four-prong test for a stay or injunctive relief.
> [3] *MCI Telecommunications Corp.*, order of the Federal Communications Commission, entered July 15, 1976 (62 FCC2d 703, 705–06)(Customer may not withhold payment of properly billed tariffed charges for voluntarily ordered services)."
> [Emphasis Added]

In this case, AT&T acted directly contrary to established national telecommunications policy. AT&T was required, if it disputed the reasonableness of the rates set forth in GLC and WTC tariffs, to pay the amounts under protest, and seek a determination from the appropriate regulatory bodies. Instead, it simply withheld payment, and forced GLC and WTC to bring this action which, even under the tight deadlines of the MTA, took 9 months for the MPSC to decide. AT&T then has the temerity, after the MPSC has determined that arguments are without merit, to ask first the Commission and now this Court, to issue a stay to "preserve the status quo" created by its wrongdoing for another two to five years.

A stay pending appeal, which could easily take five years or more to conclude if pursued through both the Michigan Court of Appeals and the Michigan Supreme Court, would say to long-distance service providers that they are free to ignore lawful tariffs for year after year, even after the MPSC has concluded that it is unlawful for them to do so. In addition, because AT&T's Motion, in effect, requests that this Court reprieve AT&T from paying GLC's and WTC's tariffed rates on a going-forward basis as other carriers are required to pay, the Court should be disinclined to condone the implicit rate discrimination that AT&T effectively seeks, and should deny such request.

Moreover, the Court should keep in mind that AT&T is pursuing this unlawful course of action against GLC which is a supplier of access services that operates as a competitor of AT&T and its affiliates in providing these services. The record in this case reflects that GLC was formed by the small, rural independent ILECs in Michigan to provide an alternative to AT&T and its affiliates and to provide a greater level of reliability and efficiency in access services. A stay of the MPSC's order would signal

that anticompetitive "self-help" actions by AT&T in this case will be tolerated for years even after they were found to be unlawful. Thus, a stay in this case would clearly be contrary to the public interest.

4. The harm to GLC and WTC from the grant of a stay would significantly outweigh any alleged harm to AT&T if a stay is denied.

The harms which GLC and WTC would face from a stay would far outweigh any alleged harm AT&T would face if a stay were denied. The MPSC has held in this case that AT&T has unlawfully failed to pay WTC and GLC in accordance with their lawful tariffs for intrastate access services. The amounts unlawfully withheld by AT&T through the date of the Commission's Final Order for intrastate switched access services, inclusive of late charges, was $4,362,391.71. The amount paid by AT&T averaged approximately 10% of what was billed for those services. Moreover, since September, 2014, WTC and GLC have invoiced AT&T approximately $40,000 per month for intrastate access services[11], and AT&T has refused to pay anything to WTC and GLC for those services. If a stay is granted pending appeal, AT&T could continue to refuse to pay WTC and GLC for intrastate access services AT&T obtains from them for literally years.

On the other hand, WTC and GLC are barred from blocking AT&T traffic by reason of such nonpayment. *See CAF*, 17 FCC Rcd 17663 ¶734, where the FCC emphasized that it "has a longstanding prohibition on call blocking" and that "the ubiquity and reliability of the nation's telecommunications network is of paramount importance to the explicit goals of the Communications Act of 1934, as amended" and that "Commission precedent provides that no carriers, including interexchange carriers,

[11] See Updated Final Accounting (Confidential) http://efile.mpsc.state.mi.us/efile/nofile.html

may block, choke, reduce or restrict traffic in any way." (quoting and citing *Re Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, 22 FCC Rcd 11629 (2007). *See also Re Developing a Unified Intercarrier Compensation Regime Declaratory Ruling* CC Docket No. 01-92, , FCC Rcd 1351 ¶ 3(2012);

It is not unusual for appeals of MPSC Orders to the Michigan Court of Appeals to take two years or more before they are even scheduled for oral argument, and another year to be decided. Further appeals to the Michigan Supreme Court can easily take another year or two before a decision. AT&T's motion also references proceedings before the FCC involving similar questions to the instant case relating to WTC's and GLC's interstate access tariffs. There is no reason to believe that the FCC will reach any different conclusion than the MPSC. The FCC decision, which is expected to be issued by March 20, 2015, will involve no determination of damages in favor of whatever party prevails, and the non-prevailing party will almost certainly seek reconsideration. Typically, the FCC then takes as long as it wants in ruling on a petition for reconsideration. The FCC has frequently taken many years before resolving reconsideration requests, after which appellate proceedings could take many additional years.

While AT&T makes the illusory offer of posting a bond[12] to secure eventual payment of the amounts at issue should it lose its appeal, it ignores that what AT&T is

[12] AT&T posted a bond with the MPSC in the amount of $5,553,000. This amount is clearly inadequate in light of (i) AT&T does not dispute that the amount of intrastate switched access charges it failed to pay through the date of the MPSC's Order was $4,362,391.71; (ii) the MPSC has ordered AT&T to pay mediation sanctions, and the Bill of Costs submitted by GLC and WTC in this case is approximately $300,0000; and (iii) AT&T is incurring approximately $40,000 per month in intrastate switched access services from GLC and WTC, but has paid nothing since September 2014, and would presumably

really proposing is that WTC and GLC provide it with intrastate access services for another 2-5 years or more without being paid anything whatsoever for those services. Clearly, such a result and the impact thereof, which would condone AT&T's impermissible self-help actions, creates a harm to GLC and WTC far in excess of any damage that AT&T would incur if a stay is denied in direct violation of telecommunications policy and contrary to the public interest .

---

continue to pay GLC and WTC nothing for however long the appellate process takes, increasing the amount at issue by nearly $500,000 per year, exclusive of late charges and interest.

CONCLUSION AND RELIEF

AT&T's Motion should be denied because AT&T fails to meet any one of the four requirements for the grant of a stay pending appeal, let alone meeting all of them. The Court of Appeals should, therefore, affirmatively find (i) that AT&T has failed to show that it would suffer irreparable harm unless a stay is granted; (ii) that AT&T has failed to show that it has a substantial likelihood that it will prevail on the merits of its as yet unfiled appeal; (iii) that the grant of a stay would be contrary to the public interest and (iv) the harm to WTC and GLC if a stay is granted outweighs any potential harm to AT&T is a stay is denied.

Dated: March 12, 2015

Respectfully Submitted,

WESTPHALIA TELEPHONE COMPANY
GREAT LAKES COMNET, INC.

By: _____

Philip J. Macres
Klein Law Group PLLC
1250 Connecticut Avenue N.W., Ste. 200
Washington, D.C. 20036
(202) 289-6956

Michael A. Holmes (P-24071)
Michael G. Oliva (P-29038)
Leah H. Brooks (P-72811)
Loomis, Ewert, Parsley Davis & Gotting, P.C.
124 W. Allegan, Suite 700
Lansing, MI 48933
(517) 482-2400

Attorneys for Westphalia Telephone Company and Great Lakes Comnet, Inc.