

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of the Pay Telephone)	
Reclassification and Compensation Provisions)	
of the Telecommunications Act of 1996)	
)	CC Docket No. 96-128
The Michigan Pay Telephone Association's)	
Petition for Declaratory Ruling Regarding)	
The Prices Charges by AT&T Michigan)	
For Network Access Services Made)	
Available to Payphone Providers in Michigan)	

**COMMENTS OF AT&T INC.
ON THE MICHIGAN PAY TELEPHONE ASSOCIATION'S
SECOND PETITION FOR DECLARATORY RULING**

INTRODUCTION AND SUMMARY

As we have explained in comments filed jointly with BellSouth and Verizon, the Commission should deny the Petition for Declaratory Ruling filed by the Michigan Pay Telephone Association ("MPTA") without considering the merits of MPTA's claims. AT&T has already set out its arguments defending the decision of the Michigan Public Service Commission ("MPSC") in its brief responding to MPTA's appeal filed with the Michigan Court of Appeals – the appropriate venue for MPTA's appeal. That brief is attached here (Exh. 1), and AT&T incorporates all pertinent arguments therein by reference.¹

To summarize: if the Commission addresses the merits, it should deny MPTA's petition because the MPSC's decision is consistent with the "new services test" as it has been articulated and applied by the Commission. In particular, the MPSC's decision to compare overhead loading on payphone usage rates and the loading on admittedly competitive intraLATA toll

¹ The appellee brief filed by the MPSC in the Michigan Court of Appeals is also attached (Exh. 2).

service rates was supported by extensive and unrebutted expert testimony and record evidence. The MPSC's additional findings bolstered its determination that AT&T's usage rate complies with the new services test. MPTA thus presents no basis for this Commission to interfere with the MPSC's decision, which was fully within the range of discretion properly exercised by a state commission applying the "flexible" new services test.

ARGUMENT

THE MPSC DECISION IS A REASONABLE APPLICATION OF THE NEW SERVICES TEST

The Commission should not address the merits of MPTA's petition. If it does so, however, it should reject the MPTA's claim that the standard that the MPSC applied is inconsistent with the new services test, as articulated in the *Wisconsin Order*,² for the reasons explained below and in greater detail in the attached brief that was filed in the Michigan Court of Appeals.³

In the *Wisconsin Order*, the Commission laid out a "flexible approach to calculating BOCs' overhead allocation for intrastate payphone line rates." *Wisconsin Order* ¶ 58. The Commission specifically rejected the argument that "UNE overhead allocations must serve as a ceiling on payphone service overhead loading." *Id.* Rather, the Commission held that, to evaluate overhead allocations, state commissions should use "methodology from either the

² Memorandum Opinion and Order, *In re Wisconsin Public Service Commission*, 17 FCC Rcd 2051 (2002) ("*Wisconsin Order*").

³ These comments are not intended to provide a comprehensive defense of the MPSC's decision and, if the Commission decides to entertain MPTA's petition, it should establish a procedure and accompanying schedule to ensure that the Commission has a complete record for decision. Indeed, before the Commission could even attempt to review the determination of the MPSC, it would have to obtain and evaluate the entire factual record that was before the MSPC, including thousands of pages of testimony and hundreds of pages of briefs, as well as a Proposal for Decision that was not included with MPTA's petition. The MPTA cannot fairly seek a declaration that the MPSC erred when it has failed even to submit the record that was before that state commission.

Commission's *Physical Collocation Tariff Order* or *ONA Tariff Order*." *Id.* As described by the Commission in the *Wisconsin Order*, the *Physical Collocation Tariff Order* limits overhead loading on the regulated service to the overheads applied by LECs to a comparable "competitive service[]," to protect against discrimination. *Id.* ¶ 53.

The MPSC's decision is fully consistent with the *Wisconsin Order*. AT&T's expert witness, Dr. Kent Currie, presented testimony that relied on Commission-approved methodology to calculate the overhead loadings recovered in the aggregate for AT&T's Michigan payphone operations. *See* Opinion and Order, *Michigan Pay Telephone Association, et al. v. Ameritech, et al.*, Case No. U-11756, at 19 (Mich. Pub. Serv. Comm'n Mar. 16, 2004) ("MPSC Order") (describing Dr. Currie's testimony and citing to the transcript) (Exh. 1 to MPTA Pet.). In addition, Dr. Currie testified that intraLATA toll usage is a comparable service to local usage, and that the service is competitive. *Id.* at 18-19. MPTA made no attempt to discredit Dr. Currie's testimony on this subject or to evaluate AT&T's intraLATA toll rates or costs. The MPSC thus acted reasonably and justifiably in relying on AT&T's unrebutted expert testimony in determining that AT&T had presented an overhead loading factor that was consistent with this Commission's orders.⁴

Furthermore, the MPSC's finding was supported by testimony that AT&T's payphone service rates, in the aggregate, recover a lower allocation of overhead than AT&T's payphone operations as a whole. *See id.* at 19. The MPSC credited this testimony in finding that "the overhead loading factor as established by SBC's analysis is a reasonable one and complies with

⁴ The MPTA's repeated statements that AT&T Michigan did not "advocate" for the result the MPSC reached (*e.g.*, MPTA Pet. at 14), or that there is no evidence in the record to support that conclusion, is simply wrong, as AT&T has explained in the attached brief. That the MPTA's argument depends on a substantial evidence challenge itself underlines the inappropriateness of the relief it seeks.

the NST.” *Id.* Indeed, the analogy to the application of the new services test in the *Physical Collocation Order* is a compelling one. Collocation is one input into competitive access providers’ provision of competitive high-capacity services to end users. Thus, the Commission reasoned, by limiting the overhead loading on collocation to a level lower than the overhead loading on the service provided to end-users – in that case, DS1- and DS3-level access services – the Commission could allay any legitimate concern about discrimination against a competitor. Likewise, payphone line services are an input into independent payphone providers’ provision of payphone services to end users. The MPSC therefore properly relied in part on the undisputed fact that AT&T’s overhead loading on payphone line services is lower than the overhead loading implied in AT&T’s payphone operations in finding that AT&T’s payphone line rates complied with the new services test.

The MPTA presents no reason for the Commission to interfere with the MPSC’s careful application of the new services test. First, MPTA claims that it was unlawful for the MPSC to apply a single “overhead allocation to all services made available to IPPs with a single exception – local usage.” MPTA Pet. at 14; *see also id.* at 3-4, 15-16 (same), MPTA concedes, however, that the *Wisconsin Order* did “not mandate uniform overhead loading, provided that the loading methodology as well as any deviation from it is justified.” *Id.* at 14-15 (quoting *Wisconsin Order* ¶ 52) (MPTA emphasis omitted). While MPTA contends that “AT&T Michigan did not provide any justification for a non-uniform overhead allocation, and the MPSC gave no justification in its orders,” *id.* at 16, that contention ignores the record and the arguments below. As explained immediately above, AT&T’s methodology was supported by unrebutted expert testimony, and the MPSC specifically acknowledged its reliance on Dr. Currie’s testimony. *See* MPSC Order at 18-19. In particular, the MPSC found that toll usage “is an appropriate

competitive comparable service” to local usage. *Id.* at 18. By contrast, the MPSC rejected the MPTA’s proposed analysis for usage “because it is not structured in the same manner as rates for usage are structured.” *Id.* That the MPTA failed to present any appropriate alternative to AT&T’s proposed analysis was also a factor that the MPSC could properly take into account in its decision.

Second, MPTA claims that local payphone usage rates should not have been compared to toll usage rates, because the latter have “historically been set artificially high in order to contribute and subsidize other services” and are therefore not “cost-based.” MPTA Pet. at 17; *see also id.* at 4 (same). But MPTA does not cite *any* record evidence as to any supposed subsidization that might or might not be present in Michigan’s intraLATA toll usage rates.⁵ The MPSC specifically found – based on record evidence – that Michigan’s toll usage rates are competitive (MPSC Order at 18), and competitive service rates, by definition, do not include subsidies.

Third, MPTA claims that a comparison of payphone usage rates to toll usage rates for business customers was “specifically prohibited in the *Wisconsin Order*.” MPTA Pet. at 17. As an initial matter, the comparison of payphone line rates to business line rates was simply one factor among several supporting the MPSC’s determination that payphone line rates are compliant with the new services test. The MPSC did *not* rely solely on the comparison of business line rates to payphone line rates: to the contrary, the MPSC simply characterized the comparison as “one factor to be *examined*” and made clear that the *Wisconsin Order* “does require that the LECs provide more than evidence of such a comparison to justify their IPP

⁵ Instead, MPTA relies solely on a 1997 order from the Commission that merely described historical patterns of rate structures (*see* MPTA Pet. at 17 n.22). MPTA never demonstrated that this pattern is currently true of Michigan’s toll usage rates.

rates.” See MPSC Order at 12 (emphasis added). The MPSC primarily relied on other considerations – including the comparison of overhead loading on AT&T’s usage rates with overhead loadings in competitive intraLATA toll services and the comparison of overhead loading on payphone lines to the overhead loading for AT&T’s payphone operations – in finding that AT&T’s rates were new services test compliant. See MPSC Order at 16, 19.

Fourth, MPTA argues that the local usage rates are “more than 600% over the direct cost of the service,” and thus cannot “be considered a cost-based overhead allocation factor.” MPTA Pet. at 18-19; see also *id.* at 3-4 (same). Again, MPTA cites no record evidence to demonstrate that there is 600% discrepancy between MPSC-approved costs and rates. Nor does it explain how such a result could have been obtained from the *Physical Collocation Tariff Order* methodology. For these reasons alone, the Commission cannot credit MPTA’s unfounded allegations. In any event, even if MPTA had presented evidence of overhead loading of 600%, that would not in itself prove either that AT&T’s payphone line rates as a whole, or usage rates in particular, are inconsistent with the new services test. The Commission could only reach such a conclusion if the MPSC’s new services test methodology was inconsistent with federal standards – which it is not – or if it could show, after reviewing all the facts in the record, that the MPSC’s conclusion is not supported by evidence. That is a function not for this Commission’s declaratory jurisdiction, but for a reviewing court. The MPTA is pursuing its appeal in state court, and the Commission should not interfere with that state process.

CONCLUSION

The Commission should deny MPTA's petition.

Respectfully submitted,

/s/ Aaron M. Panner

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