EXHIBIT 2

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE MICHIGAN PAY TELEPHONE ASSOCIATION, et al,

Complainants-Appellees,

v

MICHIGAN BELL TELEPHONE COMPANY, d/b/a AMERITECH MICHIGAN, A MICHIGAN CORPORATION,

Respondent-Appellant,

and

GTE NORTH INCORPORATED, a Wisconsin Corporation,

Respondent-Appellee, and

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

Docket No. **254980**

(MPSC Case No. U-11756)

_____/

THE MICHIGAN PAY TELEPHONE ASSOCIATION, et al,

Complainants-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee, and

MICHIGAN BELL TELEPHONE COMPANY, d/b/a AMERITECH MICHIGAN, n/k/a SBC MICHIGAN,

Respondent-Appellee, and

GTE NORTH INCORPORATED, n/k/a VERIZON NORTH, INC.,

Respondent-Appellee.

Docket No. **261341**

(MPSC Case No. U-11756)

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BRIEF OF APPELLEE
MICHIGAN PUBLIC SERVICE COMMISSION

***** ORAL ARGUMENT REQUESTED *****

MICHIGAN PUBLIC SERVICE COMMISSION

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Counter-Statement of Appellate Jurisdiction and Standard of Review

The Michigan Public Service Commission (MPSC or Commission) concurs in the Statement of Basis of Jurisdiction made by Appellant Michigan Pay Telephone Association (MPTA) at page vi of the MPTA's Initial Brief on Appeal. The MPSC concurs in the Statement of Basis of Jurisdiction made by Appellant Michigan Bell Telephone Company, d/b/a SBC Michigan (SBC) at page vi of SBC's Brief on Appeal. The MPSC also concurs in the Jurisdictional Statement made by GTE North, Incorporated, a/k/a Verizon North, Inc. (Verizon) at page 4 of Brief of Verizon North, Inc.

The standard of review for Commission orders is narrow and well-established. Section 26(8)[1] provides that a person seeking to overturn a Commission order bears the heavy burden of proving by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable. The applicable standard of review for Commission orders is discussed in detail in Argument I.

[1] MCL 462.26(8).

Counter-Statement of Questions Involved

SBC

I. Has Appellant SBC demonstrated by clear and satisfactory evidence that the decision by the MPSC to order refunds of rates collected in violation of federal and state law was unlawful (i.e., that the MPSC failed to follow some mandatory provisions of a statute or was guilty of an abuse of discretion in the exercise of its judgment) or unreasonable (i.e., outside the broad "zone of reasonableness" within which the MPSC is permitted to operate)?

SBC says "Yes."
Michigan Public Service Commission says "No."
MPTA presumably says "No."
Verizon presumably says "Yes."

II. Has Appellant SBC demonstrated by clear and satisfactory evidence that the decision by the MPSC to require SBC to reduce its Independent Pay Phone (IPP) line rates by the amount of the intrastate End User Common Line charge (EUCL) was unlawful or unreasonable?

SBC says "Yes."
Michigan Public Service Commission says "No."
MPTA presumably says "No."
Verizon presumably says "Yes."

MPTA

III. Has Appellant MPTA demonstrated by clear and satisfactory evidence that the MPSC erred when it determined that SBC and Verizon North's rates for payphone services comply with the FCC's "New Services Test" with regard to usage sensitive elements.

MPTA says "Yes."
Michigan Public Service Commission says "No."
SBC presumably says "No."
Verizon presumably says "No."

IV. Has Appellant MPTA demonstrated by clear and satisfactory evidence that the MPSC erred when it determined that Verizon North's rates for payphone services complied with the FCC's "New Services Test" requirements for cost studies underlying Verizon's direct costs?

MPTA says "Yes."
Michigan Public Service Commission says "No."
SBC presumably says "No."
Verizon presumably says "No."

V. Has Appellant MPTA demonstrated by clear and satisfactory evidence that the MPSC erred when it refused to order refunds to payphone providers who were neither members of MPTA nor individually named complainants in the MPSC proceeding?

MPTA says "Yes."
Michigan Public Service Commission says "No."
SBC presumably says "No."
Verizon presumably says "No."

Verizon North

VI. Has Cross-Appellant Verizon North demonstrated by clear and satisfactory evidence that the MPSC erred in applying the FCC's "New Services Test" to Verizon North's payphone rates pursuant to § 318 of the Michigan Telecommunications Act?

Verizon says "Yes."
Michigan Public Service Commission says "No."
MPTA says "No."
SBC did not address this question.

Counter-Statement of Facts

The MPSC submits this Counter-Statement of Facts pursuant to MCR 7.212(D)(3) for the reason that the Appellant Michigan Pay Telephone Association's (MPTA) Statement of Facts is deficient in that it fails to fairly state all material facts, both favorable and unfavorable, without argument or bias.

Perhaps the clearest, most concise and chronological narrative of the material facts in the case, as required by MCR 7.212(C)(6), is to be found in the Commission's March 16, 2004 Opinion and Order.[2] That Opinion and Order began by outlining the nature of the proceeding and identifying the three major issues that were presented stating:[3]

> On August 10, 1998, the Michigan Pay Telephone Association (MPTA) filed a complaint regarding rates for the payphone services offered by Ameritech Michigan (now SBC Michigan [SBC]) and GTE North Incorporated (now, Verizon North Inc. [Verizon]). The MPTA's complaint sought a Commission determination that SBC and Verizon had failed to comply with certain provisions of the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq., the federal Telecommunications Act of 1996 (FTA), 47 USC 151 et seq., and orders issued by the Federal Communications Commission (FCC). Specifically, the complaint sought Commission determinations concerning whether (1) prices for network services were consistent with the new services test (NST) adopted by the FCC; (2) respondents' payphone operations are required to pass an imputation test pursuant to Section 362 of the MTA, MCL 484.2362; and (3) payphone services respondents provide to independent payphone operators (IPPs) are discriminatory.
>
> On March 8, 1999, the Commission issued an order in which it found that the MPTA had failed to meet its burden to show that SBC's and Verizon's payphone service rates did not comply with NST. The Commission further stated that it was not persuaded either that the NST required it to adopt the MPTA's approach, or that the results of that approach would be preferable to the rates then in place. The Commission specifically rejected the MPTA's assertion that the services sold to IPPs should be compared to the wholesale unbundled network elements (UNEs) sold to providers of basic local exchange service, which were priced in Cases Nos. U-11280 and U-11281. The Commission found that IPPs should be charged as business customers, not as wholesale customers.
>
> The Commission further rejected the MPTA's position that the end-user common line (EUCL) charge must be deducted from rates imposed in IPPs.

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[2] Copy attached as Appendix A.

[3] U-11756 (after remand), Opinion and Order dated March 16, 2004, pp. 1-4 (Appendix A).

However, the Commission did find that Section 362 of the MTA, MCL 484.2362, required SBC and Verizon each to perform and file an imputation analysis and subsidy analysis regarding IPP services within 45 days of the date of the order.

The MPTA appealed the March 8, 1999 order to the Michigan Court of Appeals (Court of Appeals). On October 23, 2001, the Court of Appeals affirmed the Commission's determinations in an unpublished opinion in its Docket No. 219950.

Thereafter, the MPTA applied for leave to appeal to the Michigan Supreme Court. While that appeal was pending, on March 4, 2002, the FCC entered an order finding that the Commission's March 8, 1999 order appeared to be inconsistent with the FCC's order in *In the matter of Wisconsin Public Service Commission*, CCB/CPD No. 00-01, Memorandum and Opinion and Order, rel'd January 31, 2002 (Wisconsin Order). In April 2002, the MPTA and the Commission filed a joint motion before the Michigan Supreme Court to remand this matter back to the Commission for further consideration in light of the Wisconsin Order. On June 24, 2002, the Michigan Supreme Court vacated the Court of Appeals' decision and remanded this case back to the Commission. *MPTA v MPSC*, 466 Mich 883 (2002).

On July 10, 2002, the Commission set a briefing schedule for the remanded proceedings. However, in its October 3, 2002 order, after examining the filed briefs, the Commission found that the parties should be given the opportunity to supplement the record before the Commission decided how the Wisconsin Order would affect this case and whether any refunds might be appropriate. Moreover, the Commission noted that the Wisconsin Order was then pending on appeal. The Commission reasoned that the extended time might allow for action to be completed on that appeal. The Wisconsin Order was affirmed in all respects by the United States Court of Appeals for the District of Columbia on July 11, 2003.

On November 5, 2002, a prehearing conference was held before Administrative Law Judge Barbara A. Stump (ALJ). The MPTA, SBC, Verizon, AT&T Communications of Michigan, Inc. (AT&T), MCI WorldCom (MCI), and the Commission Staff (Staff) participated in the proceedings. Evidentiary hearings for cross-examination were held on April 8 and 9, 2003. The record after remand consists of 772 pages of transcript.

Except for the Staff, all participants filed briefs and reply briefs on May 9 and 30, 2003, respectively. On June 30, 2003, the ALJ issued her Proposal for Decision (PFD) in which she concluded that the Commission's original findings and conclusions in this case were supported by the record and the law, and should be affirmed. She therefore recommended that the Commission deny the MPTA's complaint in its entirety.

On July 21, and August 4, 2003, the MPTA, SBC, Verizon, AT&T, and MCI filed exceptions and replies to exceptions, respectively.

> On January 30, 2004, the MPTA filed supplemental authority for its position, which is comprised of a November 12, 2003 Proposed Interim Order of the Illinois Commerce Commission (ICC) involving similar issues as the present case. On February 23, 2004, Verizon filed a response to the MPTA's supplemental authority. (Footnotes omitted).

The Commission, after considering all of the evidence, issued an order that held, with limited exceptions relating to treatment of the state End User Common Line Charge (EUCL), that nothing in the *Wisconsin Order*,[4] prior FCC orders,[5] or any of the evidence presented warranted a reversal of the decisions reached in its prior order.[6]

On April 15, 2004, the MPTA filed an application for rehearing of the Commission's March 16, 2004 Order. SBC and Verizon filed responses to the MPTA petition on April 30, 2004.

SBC filed a claim of appeal of the March 16, 2004 Order with this Court on April 15, 2004, which was assigned Docket No. 254980. SBC subsequently moved to hold Docket No. 254980 in abeyance pending action on the MPTA petition for rehearing by the MPSC. This Court granted SBC's motion. On February 10, 2005 the MPSC issued an order denying the MPTA petition for rehearing.[7] An order concluding the abeyance status of Docket No. 254980 was issued by this Court on February 23, 2005. The MPTA filed a claim of appeal from the MPSC's February 10, 2005 order denying rehearing on March 11, 2005, which was assigned

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[4] *In the matter of the Wisconsin Public Service Commission, Order Directing Filings*, Bureau/CPD No. 00-01, FCC 02-05 (January 31, 2002). Copy attached as Appendix B.

[5] *Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (9/20/1996) (Payphone Order); *Order on Reconsideration*, 11 FCC Rcd 21233 (11/8/1996), *aff'd in part and remanded in part, Illinois Pub Telecommunications Assoc v FCC*, 326 US App DC 1; 117 F3d 555 (1997) (Payphone Reconsideration Order); *Second Report and Order*, 13 FCC Rcd 1778 (10/9/1997), *vacated and remanded in part, MCI Telecommunications Corp v FCC*, 330 US App DC 92; 143 F3d 606 (1998), *Third Report and Order and Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 2545 (2/4/1999), aff'd *American Public Communications Counsel v FCC*, 342 US App DC 51; 215 F3d 51 (2000).

[6] U-11756 Opinion and Order dated March 8, 1999, copy attached as Appendix C.

[7] U-11756 Order dated February 10, 2005, copy attached as Appendix D.

Docket No. 261341. On March 21, 2005 Verizon filed a claim of cross-appeal in Docket No. 261341.

Argument

I. Standard of review: judicial review of Michigan Public Service Commission orders is narrow in scope and limited to determining whether the Commission's order is lawful and reasonable, and the burden of proof rests upon the Appellant to establish by clear and satisfactory evidence that the order is unlawful or unreasonable; federal and state courts have historically deferred to an agency's interpretation of statutes it administers and enforces.

The Legislature has prescribed both the manner and standard by which MPSC orders are to be reviewed. In Section 25 of the Railroad Act[8] the Legislature identified the manner in which MPSC orders are to be reviewed by providing that all rates, classifications, regulations, practices and services fixed by Commission are deemed *prima facie* lawful and reasonable:

> All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, or until changed or modified by the commission as provided for in section 24 of this act.

Under Section 25, all rates, terms and conditions prescribed by the MPSC in its orders went into immediate effect and are presumed to be lawful and reasonable.

Section 203(7) of the Michigan Telecommunications Act[9] provides that an order of the Commission shall be subject to review as provided by Section 26 of 1909 PA 300. Section 26(8) of the Railroad Act[10] places a heavy burden of proof upon an appellant to show by clear and satisfactory evidence, that the March 16, 2004 and February 10, 2005 orders are unlawful or unreasonable. Section 26(8) states:

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[8] 1909 PA 300, § 25, MCL 462.25.
[9] 1991 PA 179, § 203(7), MCL 484.2203(7).
[10] 1909 PA 300, § 26(8), MCL 462.26(8) (Section 26).

> In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable.

Under a Section 26 review, the broad issue is whether the Appellant has shown by clear and satisfactory evidence that the MPSC's order is either unlawful or unreasonable. The Michigan Supreme Court in *In Re MCI Telecommunications Complaint*[11], after citing Section 26 as governing its standard of review of an order of the MPSC went on to state:

> Against this background, we have held:
>
> > To declare an order of the commission unlawful there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment. [*Giaras v Public Service Comm*, 301 Mich 262, 269; 3 NW2d 268 (1942).]
>
> The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or "zone" of reasonableness within which the PSC may operate. *Michigan Bell Telephone Co. v Public Service Comm*, 332 Mich 7, 26-27; 50 NW2d 826 (1952). Cognizant of these confines, we proceed onward.

In *Michigan Bell Telephone Co v MPSC*[12] the Michigan Supreme Court noted:

> It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

The March 16, 2004 and February 10, 2005 MPSC Orders are lawful and reasonable, and Appellants have failed to carry their heavy burden of showing by clear and satisfactory evidence that the Commission's orders are otherwise.

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[11] *In Re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).
[12] *Michigan Bell Telephone Co v MPSC*, 332 Mich 7, 37; 50 NW2d 826 (1952).

The review standard applicable to non-legislative Commission actions (those that are judicial or quasi-judicial in nature) involves determining whether the Commission order is supported by competent, material and substantial evidence on the whole record, in accordance with Const 1963, art 6, § 28. Even in these "substantial evidence" cases, however, Michigan courts have held that Section 26 does not grant the court all of the powers traditionally vested in a court of equity, nor the power to make *de novo* findings of fact. Rather, the court's equity powers exist only to the extent permitted by constitutional and statutory provisions, and this Court is not permitted merely to substitute its judgment in place of the Commission's, even in situations where two reasonably varying conclusions can be derived from the evidence.[13]

Courts have a longstanding rule of giving deference to decisions made by administrative agencies. This is particularly true with respect to Commission orders that involve complex regulation. The principle of deference is supported by a long line of cases decided by federal and Michigan courts.[14]

Moreover, the *Magreta* precedent on which *Breuhan* relies leaves little doubt that Michigan jurisprudence follows the approach taken by the federal courts, as our Supreme Court in *Magreta* quotes with approval the United States Supreme Court's policy when reviewing agency determinations of statutes enforced by that agency:

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[13] *Associated Truck Lines, Inc v MPSC,* 377 Mich 259; 140 NW2d 515 (1966), *Michigan Gas Utilities Co v MPSC,* 27 Mich App 411; 183 NW2d 619 (1970); *Chicago, M, St P & P R Co v MPSC,* 74 Mich App 678; 254 NW2d 39, *lv den* 401 Mich 817 (1977); *Michigan Bell Telephone Co v MPSC, supra,* p 42.

[14] See, *United States v Mayes,* 12 Wall 381; 20 L Ed 381 (1871); *Investment Company Institute v Camp,* 401 US 617, 626-627; 28 L Ed 2d 367; 91 S Ct 1091 (1971) ("[i]t is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."); *Breuhan v Plymouth-Canton Community Schools,* 425 Mich 278, 282-283; 389 NW2d 85 (1986); *Magreta v Ambassador Steel Co,* 380 Mich 513, 519; 158 NW2d 473 (1968). ("This Court has repeatedly given great deference to the construction placed upon a statute by the agency legislatively chosen to enforce it.") [jump cites]

> In *Boyer-Campbell Co. v. Fry* (1935), 271 Mich 282, 296, we quoted with approval the following language of the United States Supreme Court in *United States v. Moore* (1877), 95 US 760, 763, (24 L Ed 588, 589):
>
> > "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."

Additionally, this Court has specifically held that judicial deference is to be given to the MPSC's construction of a statute which it enforces. In *Consumers Power Co v PSC No. 1,*[15] the Court in reviewing the MPSC's interpretation of Section 6j(13)(b) of 1982 PA 304, stated:

> Great deference is due the construction of a statute by the agency legislatively chosen to enforce it, which ought not to be overruled without cogent reasons. *Breuhan v Plymouth-Canton Community Schools,* 425 Mich 278, 282-283; 389 NW2d 85 (1986). We find the PSC's interpretation of Section 6j(13)(b) reasonable, and know of no cogent reasons to overrule it.

With regard to the degree of deference to be afforded to a statutory interpretation made by the MPSC, this Court held in *Ameritech Michigan v MPSC*[16] that:

> As a general rule, we will defer to the construction placed on a statute by the government agency charged with interpreting it, unless the agency interpretation is clearly erroneous. An agency's initial interpretation of new legislation is not entitled to the same measure of deference as is a longstanding interpretation. However, merely establishing that another interpretation of a statute is plausible does not satisfy a party's burden of proving by clear and convincing evidence that the PSC's interpretation is unlawful or unreasonable. *In re MCI Telecommunications Complaint,* 229 Mich App 664, 681-682; 583 NW2d 458 (1998), *aff'd in part and rev'd in part* 460 Mich 396; 596 NW2d 164 (1999).

The MPSC's March 16, 2004 and February 10, 2005 orders are lawful, reasonable, comport with the applicable statutes, and involve an appropriate exercise of the MPSC's duties, judgment, technical expertise, and discretion. Where the Legislature has determined that it does not possess the expertise, resources, or information to resolve policy issues, as in this case, a court should not substitute its judgment for that of the MPSC's. Regulatory orders issued by the

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[15] *Consumers Power Co v PSC No. 1,* 196 Mich App 436, 453; 493 NW2d 424 (1992).
[16] *Ameritech Michigan v MPSC, et al,* 239 Mich App 686, 689; 609 NW2d 854 (2000).

MPSC are deemed to be *prima facie* lawful and reasonable.[17] The MPSC's orders should be accorded deference under the Separation of Powers Doctrine.[18] The MPSC's orders should also be affirmed as Appellants have failed to establish by clear and satisfactory evidence that the orders are unlawful or unreasonable.

II. Appellants and Cross-Appellant have failed to demonstrate by clear and satisfactory evidence that the Commission's orders are unlawful or unreasonable and the orders should be affirmed.

A. The MPSC did not err when it ordered SBC and Verizon to issue refunds to payphone providers who were charged rates in excess of the levels authorized by federal and state law.

1. Retroactive Ratemaking

The doctrine of retroactive ratemaking is inapplicable to this case. The Michigan doctrine of retroactive ratemaking requires that rate orders have prospective effective only, and the MPSC cannot establish retroactive rates to correct any injustice resulting from inadequate rates in a past period.[19] The retroactive ratemaking doctrine does not, however, prevent a utility from collecting costs from ratepayers (or ratepayers receiving refunds) when a challenge is made that the rate is unlawful. In *Michigan Bell Tel Co v Pub Serv Comm'n*,[20] a case involving the retroactive ratemaking doctrine, the Court's opinion noted that "all the rates and charges imposed by the telephone company on its customers prior to December 28, 1944, were lawfully imposed, . . ." The retroactive ratemaking doctrine is premised on the finding that rates charged pursuant to a lawful rate order may not be altered, except by a new rate order.

The principle behind the retroactive rate doctrine is the fact that the MPSC establishes rates based on evidence of costs that is available at the time the rate is being established. There

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[17] 1909 PA 300, § 25, MCL 462.25.
[18] Const 1963, art 3, § 2.
[19] *Gen Tel Co v Public Service Comm'n*, 341 Mich 620, 632; 67 NW2d 882 (1954) and *Michigan Consolidated Gas Co v Pub Serv Comm'n*, 389 Mich 624, 642; 209 NW2d 210 (1973).
[20] *Michigan Bell Tel Co v Pub Serv Comm'n*, 315 Mich 533, 542; 24 NW2d 200 (1946).

would be no finality to a rate proceeding (and no incentive for parties to provide accurate estimates of costs) if rates could be subsequently reformed due to a change in future circumstances and applied retroactively. The Michigan Supreme Court has provided a concise statement of the principle behind the rule against retroactive ratemaking in *Detroit Edison v MPSC*:[21]

> the essential principle of the rule against retroactive ratemaking is that when the estimates prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct for the error; the only step that the MPSC can take is to prospectively revise rates in an effort to set more appropriate ones.

In arguing that the retroactive rate doctrine applies to this case, SBC erroneously equates "inaccurate estimates" with "unlawful rate". This is not a case where cost estimates were subsequently found to be inaccurate, which permitted a utility to overrecover, and the Commission attempts to address the overrecovery by ordering a retroactive refund. In this case the Commission determined that the rate charged by SBC and Verizon to Independent Pay Phone Operators (IPPs)was unlawful because it failed to properly account for intrastate End User Customer Line Charges (EUCL).[22]

This case is analogous to the Michigan Supreme Court decision in *In re MCI Telecommunications Complaint*.[23] In the *MCI* case the Commission ordered SBC to provide a 55% discount on its intraLATA toll access rates charged to interexchange carriers (IXCs).[24] SBC appealed the Commission's order, and the Michigan Supreme Court ultimately found the Commission's order to be unlawful (for a portion of the time covered by the order) and

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[21] *Detroit Edison v MPSC*, 416 Mich 510, 522; 331 NW2d 159 (1982).
[22] U-11756 Opinion and Order dated March 16, 2004, p. 26 (Appendix A). The EUCL is also referred to as a Subscriber Line Charge (SLC). It is a fee charged in addition to a customer's monthly local service charge. There is a separate interstate charge and an intrastate charge.
[23] *In re MCI Telecommunications Complaint*, 460 Mich 396; 596 NW2d 164 (1999).
[24] IXCs are primarily long distance providers like AT&T and MCI.

remanded the case back to the Commission to determine what refunds would be due to parties as a result of the Court's decision.[25]

In this case the MPSC determined that SBC's and Verizon's IPP rates were unlawful (to the extent that they failed to account for the EUCL). Once the Commission determined that SBC and Verizon had been assessing unlawful rates under the FCC's New Services Test (NST) the retroactive rate doctrine became inapplicable and it was appropriate for the Commission to order refunds pursuant to § 601(c) of the MTA.[26]

Section 601 provides, in part, as follows:

> If after notice and hearing the commissions finds a person has violated this act, the commission *shall* order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation, including but not limited to, 1 or more of the following:
>
> (c) A refund to the ratepayers of the provider of any collected excessive rates.

As explained in detail in Argument II. F. of this brief,[27] § 318(2) of the MTA[28] requires SBC and Verizon to comply with all non-structural safeguards adopted by the FCC, including the New Services Test. Since the Commission determined that SBC and Verizon failed to comply with the NST,[29] a violation of § 318 occurred. Given a finding of a violation of Section 318, Section 601(c) requires the Commission to order remedies, including refunds, to protect and make whole ratepayers who have suffered economic loss as a result of the violation. The foremost rule of statutory construction is that courts, and in this case an administrative agency, are to give effect

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[25] *In re MCI,* 460 Mich at 444. It is noteworthy that on remand to the Commission the IXCs argued that refunds would violate the retroactive rate doctrine. SBC argued that retroactive rate doctrine was not applicable as it only prohibits a court or agency from ordering a retroactive increase or decrease in lawfully tariffed rates. SBC Reply Brief, MPSC Docket Nos. U-10138/11743 dated May 5, 2000.
[26] MCL 484.2601(c).
[27] See *infra*, pp 23-25, *ante*.
[28] MCL 484.2318.
[29] See *infra*, pp 12-17 *ante* for NST violation discussion.

to the intent of the Legislature.[30] To effectuate legislative intent the Commission must look first to the language of the statute.[31] If the language of the statute is clear and unambiguous, then the Commission must assume that the Legislature intended the plain meaning of the language and the statute is enforced as written.[32] The phrase "shall" is unambiguous and denotes a mandatory, rather than a discretionary action.[33] The clear language of § 601 directed the Commission to order remedies, including refunds, if the Commission determined that a violation of § 318 of the MTA had occurred. The Commission's decision to follow the statutory directive of the Legislature was lawful and reasonable and should be affirmed.

2. Filed rate doctrine.

SBC also alleges that the refund ordered by the Commission is prohibited by the "filed rate doctrine." SBC is wrong because it confuses a lawful rate order with an unlawful rate order. The Michigan Supreme Court has stated that "under the 'filed rate doctrine' a public utility can claim no rate as a legal right other than the filed rate, whether fixed or merely accepted by the Commission."[34] This Court, however, has held that when a tariffed rate is unlawful the filed rate doctrine is not applicable.[35] In this case the Commission has determined that SBC and Verizon's

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[30] *People v Wager*, 460 Mich 118, 123 n 7; 594 NW2d 487 (1999).
[31] *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001).
[32] *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).
[33] *Roberts v Mecosta County General Hospital*, 466 Mich 57, 65; 642 NW2d 663 (2002) citing *People v Grant*, 465 Mich 535, 542; 520 NW2d 123 (1994).
[34] *Detroit Edison Co* v PSC, 416 Mich 510, 521; 331 NW2d 159 (1982).
[35] *In re MCI Telecommunications Complaint*, 255 Mich App 361, 367; 661 NW2d 611 (2003)("Cross-Appellants also argue that the discount was part of Ameritech's tariff filed with the PSC and that the tariff conclusively determined the rights and liabilities of the parties. However, where the Supreme Court found that the PSC did not have authority to order the discount, the rate was not a lawful tariff and Ameritech was not bound by the filed rate doctrine.")

IPP rates are unlawful. Since the tariffed rate was not lawful the filed rate doctrine is not applicable.[36]

B. The MPSC did not err when it ordered SBC to reduce its Independent Pay Phone line rates by the amount of the intrastate End User Common Line Charge.

1. The Wisconsin Order did not represent a change in law.

SBC's challenge of the Commission's decision to require an adjustment (reduction) to SBC's IPP rates to eliminate the Subscriber Line Charge (SLC) and the End User Common Line Charge (EUCL) is based on the assertion that the *Wisconsin Order* represents a substantial change in federal law (the NST) and how that law is to be applied.[37] Contrary to SBC's claim, the *Wisconsin Order* is neither new law nor a modification of prior law. The *Wisconsin Order* was intended to "assist states in applying the New Services Test to Bell Operating Companies' (BOC) intrastate payphone line rates in order to ensure compliance with the P*ayphone Orders* and Congress' directives in Section 276."[38] In short, the *Wisconsin Order* simply reiterates the New Services Test.

In *MCI Telecommunications, Inc. v Michigan Bell Telephone Company*,[39] the United States District Court for the Eastern District of Michigan addressed an appeal of a Commission order approving an interconnection agreement. One issue in the appeal was whether Michigan Bell (n/k/a SBC) was obligated to carry MCI's retail customers in the SBC yellow pages. The Court initially entered an order finding against MCI and in favor of Michigan Bell. MCI subsequently moved for reconsideration in light of a new FCC order entered just prior to the

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[36] *In re MCI Telecommunications Complaint, supra.*
[37] In an attempt to bolster its claims SBC has, on its own initiative, re-named the FCC's New Services Test as the "reformulated New Services Test."
[38] Wisconsin Order, ¶ 2.
[39] *MCI Telecommunications, Inc. v Michigan Bell Telephone Company*, 79 F Supp 2d 768 (ED Mich 1999).

Court's ruling (and not considered by the Court in its analysis). The FCC order clarified the FCC's definition of "directory listing."[40] The Court granted MCI's motion and reversed its previous determination. The Court based its decision on the fact that the recent FCC decision merely clarified existing law, but did not alter or change the law. The Court held that an FCC order "clarifying an unsettled or confusing area of the law does not change the law, but restates what the law according to the agency is and has always been...."[41] The Court held that the FCC order merely clarified what the law was at the time the MPSC rule and, as such, modified its previous finding to be consistent with "what the law according to the [FCC] is and has always been."[42]

In *Homemakers North Shore, Inc. v Bowen*,[43] the Court noted the important distinction between a clarifying rule and one that effects a substantive change in the law. In that case, the Court held that a clarifying regulation promulgated by an agency related back to a dispute brought under an earlier version of the regulation. The Court reasoned that "[n]ew language need not imply new substance" and that, even where there is differing language in the two regulations (a circumstance not present in the *Wisconsin Order*), the agency had only one position. In determining whether a rule is a clarification or a change in the law, the intent and interpretation of the promulgating agency as to the effect of the rule is certainly given great weight, but the agency's language is not dispositive.[44]

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[40] *MCI*, 79 F Supp 2d at 790.
[41] *MCI*, 79 F Supp 2d at 801; quoting, *Orr v Hawk*, 156 F.3d 651, 654 (CA 6, 1998) ("It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case at hand.").
[42] *MCI*, 79 F Supp 2d at 801.
[43] *Homemakers North Shore, Inc. v Bowen*, 832 F2d 408, 411 (CA 7, 1987) (citing *Georgetown Univ. Hosp. v Bowen*, 821 F2d 750, 756-758 (DC Cir 1987)).
[44] *Homemakers North Shore, Inc.*, 832 F2d at 412.

The MPSC correctly noted that the FCC entered its Wisconsin Order with the intent to "assist states in applying the new services test to BOCs' intrastate payphone line rates in order to ensure compliance with the Payphone Orders and Congress' directives in Section 276."[45] The FCC was also explicit in its *Wisconsin Order* that its use of the phrase "*Payphone Orders*" was referring to the first *Payphone Order* entered in September 1996 and the *Payphone Reconsideration Order* entered in November 1996.[46] In the *Wisconsin Order* the FCC clearly indicated that the terms of the *Wisconsin Order* simply reiterate its intent in applying the New Services Test when it entered its 1996 orders. Under the *Homemakers North Shore* holding, such clear explanation by the FCC of the intent of the *Wisconsin Order* must be given great weight.

The *Wisconsin Order* merely clarified how State commissions, and the MPSC in particular, should apply the NST – the *Wisconsin Order* is not new law.

After reviewing the *Wisconsin Order* and considering all of the arguments raised by the parties the Commission properly concluded that the *Wisconsin Order* did not represent a change in existing law:

> The Commission finds that the Wisconsin Order did not change existing law. Rather it is a reiteration of the requirements that the FCC set forth in its 1996 Payphone Orders, and merely restates and clarifies what the law according to the agency is and has been.[47]

2. Subscriber Line Charges and End User Common Line Charges must be accounted for when establishing independent pay phone line rates.

SBC's challenge to the Commission's decision regarding SLCs and EUCLs is two-fold. First, SBC alleges that the Commission exceeded the scope of the remand order from the

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[45] *Wisconsin Order*, at ¶ 2.
[46] *Id.* ¶ 1, n 5.
[47] U-11756 Opinion and Order dated March 16, 2004, p. 7 (Appendix A).

Michigan Supreme Court.[48] According to SBC, the parties were, on remand, limited to briefing the issue of whether SBC's IPP rates comply with the NST. SBC cites the MPSC's July 10, 2002 Opinion and Order as support for its claim. SBC neglects to mention that on October 3, 2002 the Commission, after receiving the briefing requested in the July 10, 2002 order, issued another order, which reopened the record and ordered a prehearing conference to establish a new schedule for the case.[49] The Commission's rationale for reopening the record included the following:[50]

> Second, Ameritech Michigan argues that the FCC has changed the new services test and that it should have the opportunity to present evidence based on the FCC's reformulation of the test. The MPTA denies that the test has changed or that further development of the record is needed. Before the Commission considers a remedy as significant as the refunds that the MPTA demands, it should assure that it has provided due process to all parties rather than leave the final order open to challenge on that basis. In the reopened proceedings, the MPTA will have the opportunity to show that the test has not changed and that the existing record is sufficient.

Since SBC asked for the contested case proceeding ordered by the Commission, it should not now be allowed to challenge the Commission's decision to grant its request.

SBC's second challenge to the Commission's decision to require SBC to take into account the SLC and EUCL when setting IPP rates is based on the claim that the *Wisconsin Order* modified existing law. A review of the *Wisconsin Order* demonstrates that the FCC affirmed the Common Carrier Bureau's (CCB) determination in the underlying CCB order[51] that BOCs must account for the SLC in their payphone line access rates.[52] In the Bureau Order that was affirmed by the FCC in the *Wisconsin Order*, the CCB explained that the same

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[48] SBC's Brief on Appeal pp. 34-35.
[49] U-11756, Order and Notice of Hearing dated October 3, 2002, pp. 4-5.
[50] *Id.*, p. 3.
[51] *In the matter of Wisconsin Public Service Commission Order Directing Filings*, DA No. 00-347, Order, 15 FCC Rcd 9978, ¶ 12 (March 2, 2000) (Bureau Order).
[52] *Wisconsin Order*, ¶ 59.

"longstanding precedent" (i.e., the *ONA/ARMIS Tariff Order* and *Local Competition Order*) producing the forward-looking cost methodology requirements mandate the LECs to produce cost estimates on an unseparated basis.[53]

> 12. We also note that the forward-looking cost studies we have required in the contexts described above produce cost estimates on an "unseparated" basis. In order to avoid double recovery of costs, therefore, the LEC must demonstrate that in setting its payphone line rates it has taken into account other sources of revenue (e.g., SLC/EUCL, PICC, and CCL access charges) that are used to recover the costs of the facilities involved.

The Bureau Order recognized that the FCC had historically reviewed all rate elements associated with a particular service in determining whether the costs were recovered, and whether the total revenue on a service was reasonable. The *Wisconsin Order* was not creating new law, but rather repeated previous FCC precedent. Requiring SBC to reduce the IPP line charge by the interstate SLC was not based on a change in law. Rather, the determination that SBC be required to make the interstate SLC reduction simply represented an application of "what the law according to the [FCC] is and always has been."[54] Consequently, SBC had been unlawfully collecting excessive IPP rates as a result of the failure to deduct interstate SLC rates. The Commission's decision to order a refund of the unlawfully collected portion of its IPP rates is not prohibited by the retroactive ratemaking doctrine or the filed rate doctrine.[55]

Regarding the intrastate EUCL charge, SBC is correct when it states the *Wisconsin Order* did not specifically address this item. The MPSC, however, correctly determined that pursuant to the Legislature's directive in § 318(2) of the MTA[56] it would be appropriate to follow the rationale which underlies the FCC's treatment of the interstate SLC (if IPP rates are to be cost

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[53] Bureau Order, ¶ 12.
[54] *MCI*, 79 F Supp 2d at 801 quoting *Orr v Hawk*, 156 F3d at 654.
[55] See Argument IIA at pages 8-11 of this brief for a detailed analysis of the retroactive ratemaking doctrine and the filed rate doctrine.
[56] MCL 484.2318(2).

based in order to avoid double recovery of costs the SLC must be accounted for in setting IPP rates).[57] The NST, as clarified in the *Wisconsin Order*, requires that the SLC be accounted for when setting IPP rates. In order to prevent SBC from double recovering costs, which would occur if SBC were allowed to set IPP rates without accounting for the intrastate EUCL,[58] the MPSC directed SBC to account for the intrastate EUCL when establishing IPP rates. If the Commission had not required SBC to account for the intrastate EUCL the SBC's IPP rates would be inconsistent with the nonstructured safeguard adopted by the FCC (the NST) and preempted by § 276(c) of the Federal Telecommunications Act.[59] Following the legislative directive in § 318(2) to comply with all nonstructured safeguards adopted by the FCC the MPSC ordered SBC to properly account for the intrastate EUCL when setting its IPP rates.[60]

For the same reasons previously outlined in the discussion on retroactive ratemaking and the filed rate doctrine,[61] it was appropriate for the Commission to order refunds which result from the proper accounting for the intrastate EUCL charge.

C. The MPSC did not err when it determined that the rates charged by SBC and Verizon for payphone services comply with the FCC's "New Services Test" with regard to usage sensitive elements.

1. Verizon

The MPTA asserts that the MPSC improperly applied the NST to usage sensitive elements contained in the services offered to payphone providers. The assertion ignores the MPSC's finding that "... Verizon's analysis included usage as part of the analysis ..."[62] and is contrary to the requirements of the *Wisconsin Order*.

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[57] *Wisconsin Order* ¶ 59 n 131.
[58] A state tariffed charge that is, in essence, identical to the federally tariffed interstate SLC.
[59] 47 USC § 276(c).
[60] U-11756 Opinion and Order dated March 16, 2004, p. 20 (Appendix A).
[61] pp. 8-11, *supra*.
[62] U-11756 Opinion and Order dated March 16, 2004, p. 22 (Appendix A).

In the *Wisconsin Order* the FCC ordered that the overall rate, including access and usage, must be cost based and prohibited adding a non-cost based usage rate on top of a cost-based access rate.[63] As the testimony of the Verizon witnesses indicated, the Customer Owned Coin Operated Telephone Rate (COCOT), plus estimated average usage revenue, plus the interstate and intrastate EUCLs were above the price floor and below the fully allocated cost ceiling. The direct costs associated with a COCOT line included both access elements and usage elements, meeting the requirements of ¶ 64 of the *Wisconsin Order*. Access and usage costs were combined because usage cannot be purchased separately without the access line.[64] Since Verizon's combined costs are cost justified the Commission correctly determined that they satisfy the requirements of the NST.

2. SBC

With regard to SBC, the MPTA alleges that SBC failed to account for any usage sensitive elements in violation of the requirements of the NST. Contrary to the MPTA's claims, SBC demonstrated compliance with the NST for the overhead loadings for usage rates by using a separate comparable services test. IntraLATA toll service was used as a comparable service for local usage. SBC provided testimony (Dr. Currie) that demonstrated that payphone usage services did not recover overheads greater than those of the comparable intraLATA toll usage. The MPSC agreed with and adopted this approach:[65]

> The Commission finds that the ALJ properly rejected the MPTA's argument that the LECs should be required to use the UNE method for determining whether the IPP rates comply with the NST. The FCC provided in the Wisconsin Order three options for LECs to use for reaching that determination. The Commission is not aware of any authority, and the MPTA cites none, that would require a LEC to use one method over the others. Thus, the Commission concludes, each company may use the method best suited to its

[63] *Wisconsin Order*, ¶¶ 64-65.
[64] 18 Tr 2468.
[65] U-11756 Opinion and Order dated March 16, 2004, p. 18.

> purposes to demonstrate that its IPP rates comply with the NST. If the provider's rates meet the NST through any appropriate analysis, the inquiry is at an end.

The MPSC's determination is consistent with the FCC's *Wisconsin Order*. Paragraph 52 of the *Wisconsin Order* indicates that uniform overhead loading is not required, and ¶ 58 of the *Wisconsin Order* acknowledges that the FCC has established a flexible approach to calculating overhead allocations for intrastate payphone line rates. Since the MPSC accepted a methodology proposed by SBC that has been authorized by the FCC no error has occurred.

The MPTA's claim that the MPSC erred by allowing SBC to use an average overhead when applying the comparable services methodology in its NST analysis should be rejected. The MPTA bases its claim on the fact that, as applied in the *Physical Collocation Tariff Order*,[66] the comparable services methodology examined specific, individual services (i.e., DS-1 and DS-3 services). In testimony presented by Dr. Currie, however, SBC demonstrated that the *Physical Collocation Tariff Order*, was not issued to address the payphone industry, but was issued in the context of facilities which terminate at locations using physical collocation. The FCC has determined that comparable services for physical collocation could also be used in an NST analysis.[67] The FCC's NST also does not "... mandate uniform overhead loading, provided that the loading methodology as well as any deviation from it is justified."[68] Through the testimony provided by Dr. Currie, SBC justified its decision to use SBC's own payphone operations as a

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[66] *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730 (June 13, 1997) (*Physical Collocation Tariff Order*).
[67] *Wisconsin Order* ¶¶ 54, 58.
[68] *Wisconsin Order* ¶ 52.

comparable service and to examine certain payphone services collectively rather than on an individual basis.[69]

The MPSC correctly determined that SBC's approach is consistent with the comparable services methodology outlined in the *Physical Collocation Tariff Order*:[70]

> [I]n order to apply our overhead loading policy, we must identify the LEC interstate access services that are comparable to those access services offered by the interconnectors to their customers using expanded interconnection. Comparable services are those for which the LEC and the interconnector compete or potentially compete for the same customers. After identifying the comparable services, we compare the overhead loadings reflected in the rates for the comparable services with the overhead loadings assigned to the physical collocation services. If the overhead loading factors reflected in the rates for the comparable services are lower than the overhead loading factors reflected in the rates for the physical collocation tariff services, we must determine whether the differences are justified.

SBC (Dr. Currie) identified the comparable services (*e.g.*, the smart and dumb lines, local usage, etc.) and the services he used in his analysis were payphone services for which SBC and the MPTA compete, or potentially compete, for the same customers.

Dr. Currie then calculated the overhead loading recovered by SBC's payphone operations, determining SBC's direct Total Element Long Run Incremental Costs (TELRIC) of its Michigan operations and subtracting those direct costs from the revenues of its payphone operations. The resulting difference was stated as a percentage: SBC's payphone operations recovered an overhead margin above direct costs.[71] SBC then compared the overhead loadings in SBC's IPP services with the loadings of SBC's own public payphone unit, and provided testimony showing that the overhead loading recovered in the aggregate by SBC's IPP services did not exceed that recovered by SBC's payphone operations.

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[69] 17 Tr 2106.
[70] *Physical Collocation Tariff Order*, ¶ 309.
[71] The specific number is confidential and included in the confidential portion of the record.

The MPSC recognized that the approach taken by SBC in this proceeding was necessary under the *Physical Collocation Tariff Order* because: (1) the comparable services in this case are really single services with multiple capabilities; (2) IPPs and SBC's payphone unit both compete on packages of services rather than individual services;[72] (3) taken on an individual level, most of the individual services were not "competitive" comparable services;[73] and (4) SBC simply did not have available any detailed information on each specific payphone location at issue or on the comparative rates paid by end users for different types of calls placed at SBC and IPP payphones.[74]

Additionally, Dr. Currie explained that most individual service components would not be "comparable services" in any event, but that the bundles of services examined by Dr. Currie (the smart line and dumb line, for example) do have comparable, competitive counterparts. It is noteworthy that in the Commission proceedings the MPTA never denied that there is a meaningful relationship between the IPP services at issue and the payphone services provided by SBC (which directly compete with those offered by the IPPs). Nor was the MPTA able to demonstrate that it was possible for SBC to apply the *Physical Collocation Tariff Order* in the manner the MPTA deems appropriate, given the unique context of the payphone industry. The MPSC recognized that SBC did what was required by the *Physical Collocation Tariff Order* to the greatest extent possible, and that SBC provided evidence explaining why slight deviations were necessary.

The MPTA's assertion that no record evidence exists to support the decision by the MPSC to allow SBC to use toll service as an appropriate competitive comparable service for SBC's usage sensitive services is simply incorrect. In fact, SBC provided evidence in the

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[72] 18 Tr 1280.
[73] 18 Tr 2207.
[74] 18 Tr 2203-2206.

remand proceeding that demonstrated that intraLATA toll usage is a comparable service for local usage and that the overhead margins recovered by local usage are consistent with those recovered by toll usage. Dr. Currie specifically testified that the overhead loading recovered in local usage rates was below the lowest overhead loading in SBC's toll rates, even accounting for volume and term discounts.[75] The MPTA did not challenge Dr. Currie's testimony, evaluate SBC's intraLATA roll rates or costs, or contest the comparability of intraLATA toll usage to local usage for purposes or the NST. The MPSC correctly determined that the rates and associated overheads recovered by intraLATA toll and local usage are comparable. The Commission's determination that SBC satisfied the NST for local usage rates is entirely proper.

The MPTA simply disagrees with using SBC's own payphone operations as a comparable service for purposes of the NST. The MPTA's disagreement with the Commission's decision, however, does not warrant reversal. The Commission concluded that SBC's approach was both reasonable and consistent with the requirements of the NST. The Commission's decision is supported by the evidence, as well as by federal law, and should be affirmed.

3. Comparison of SBC payphone rates and services to SBC's business line rates and services has not been foreclosed by the FCC in the *Wisconsin Order.*

The MPTA also takes exception to the Commission's conclusion that it "may compare business line rates with IPP rates as one factor to be examined in its assessment of whether the companies' IPP rates comply with the NST.[76] The MPTA claims that "any" business line comparison is "directly counter to" the *Wisconsin Order*.

The MPTA is wrong. As the Commission noted, the business line comparison is not only reasonable, it is permissible under the *Wisconsin Order*. In the *Wisconsin Order* the FCC did not

[75] 18A Tr 2231 (Confidential).
[76] U-11756 Opinion and Order dated March 16, 2004, p. 12.

strictly prohibit the MPSC from comparing payphone rates to other rates it has approved. The *Wisconsin Order* merely rejected the argument that a payphone rate is presumptively reasonable under the NST if it is set by applying the same markup over direct costs as is incorporated in the provider's business line rates.[77]

Such a comparison is particularly appropriate in cases such as this one, where: (1) the MPSC concluded that the applicable rates and services are comparable under the unique circumstances that exist in Michigan; and (2) the comparison to business line rates is not the only proof offered to show that SBC Michigan's rates comply with the NST. In addition, the MPTA's claim that State commissions can never compare IPP rates to other rates, for any purpose, is contrary to the FCC's repeated statements that commissions and BOCs should be permitted flexibility in applying the NST.[78]

The Commission, in 1999 and again in its March 16, 2004 Order, based its conclusions not solely on a comparison of SBC's payphone rates to its business line rates, but rather on a totality of the record evidence.

The MPTA claims that the *Wisconsin Order* prohibits the MPSC from using business line rates as a point of comparison for payphone rates for purposes of complying with the NST.[79] The MPTA has overstated the FCC's ruling. Paragraphs 55 and 56 of the *Wisconsin Order* clearly prohibit simply applying "... to payphone line service rates whatever markups over direct cost is incorporated in their business line rates . . . .[80] for purposes of NST analysis. Contrary to the MPTA's claim, that is not what occurred in this case. The MPSC did not use the business

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[77] *Wisconsin Order* ¶ 55.
[78] *See Wisconsin Order*, ¶ 52 (recognizing that the FCC's pricing requirements "do not mandate uniform overhead loading, provided that the loading methodology as well as any deviation from it is justified"), and ¶ 58 (recognizing that the NST is a "flexible approach to calculating BOCs' overhad allocation for intrastate payphone line rates").
[79] MPTA Brief, pp. 25-26.
[80] *Wisconsin Order* ¶ 55.

rate comparison as a surrogate for NST analysis. SBC presented a comparable services analysis using SBC's own payphone unit's rates. The overhead loading that resulted from this analysis did not simply incorporate SBC's business line overhead into the payphone rate. Instead, an overhead factor was developed that is comparable to SBC's own payphone unit's rates. The business line comparison simply provided an additional indication that SBC's payphone line rates are reasonable and consistent with the NST. The MPSC correctly limited the use of the business line data comparison in its March 16, 2004 order, stating:[81]

> The Commission is persuaded that it may compare business line rates with IPP rates as one factor to be examined in its assessment of whether the companies' IPP rates comply with the NST. Further, the Commission is still persuaded that IPPs are not telecommunications providers, which are entitled to obtain services provided by the LECs at UNE rates. However, the Commission does not conclude that IPPs should necessarily be treated the same as all other retail customers, because of legal constraints on payphone service rates outlined above. Rather, it is incumbent upon the Commission to determine whether the IPP rates of these two LECs meet the NST as expressed by the FCC in the Wisconsin Order. That analysis requires resolving the question whether IPP rates recover the direct costs of the services provided and a reasonable allocation of the LEC's overhead. As SBC notes, the Wisconsin Order does not prohibit looking at business line rates as a point of comparison. However, that order does require that the LECs provide more than evidence of such a comparison to justify their IPP rates.

D. The MPSC did not err when it determined that Verizon's rates for payphone services complied with the FCC's "New Services Test" requirements for cost studies underlying Verizon's direct costs.

The MPTA has consistently, but erroneously, asserted that the cost studies filed by Verizon in this case (U-11756) fail to satisfy the New Services Test because they are different from cost studies filed by Verizon in a subsequent proceeding.[82] The MPSC has consistently

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[81] U-11756 Opinion and Order dated March 16, 2004 p. 12.

[82] Case No. U-11281 (Opinion and Order dated February 5, 1998; Order Denying Rehearing, dated May 11, 1998). The MPSC orders approving the cost studies submitted by Verizon in Case U-11281 were issued almost one year after the filings in Case U-11756 were made.

rejected this claim stating:

> Finally, the Commission finds that the MPTA's objection to Verizon's use of TSLRIC figures that do not match the results of the Commission's orders in Cases Nos. U-11281 and U-11832 should be rejected. The approved figures were not available at the time that Verizon made its compliance filings in May 1997. The Commission's previous order approved the use of costs as projected by Verizon, and there is no reason now to second-guess those costs based on Commission orders after the fact.[83]

The MPTA's assertion that Verizon is relying on cost studies that have been rejected as producing non-cost-based rates[84] is simply false, as the MPSC has, on two separate occasions, accepted Verizon's filings for the purpose of analyzing its payphone rates. The MPTA has presented no evidence in this proceeding that the methodology used to develop the cost studies that were submitted in this proceeding were unreasonable at the time they were submitted. The MPTA simply wants the MPSC to conduct an "after the fact" analysis, which the Commission has appropriately declined to engage in.[85]

The MPTA also asserts that it was inappropriate for the MPSC to allow Verizon to use different cost studies for different services[86] to demonstrate compliance with the NST. The MPTA is wrong. In the *Wisconsin Order*, the FCC reiterated that the NST permits a flexible approach to calculating overhead allocations for intrastate payphone line rates.[87] The methodology used by Verizon utilized ARMIS data, which was expressly endorsed by the FCC in the *Wisconsin Order*.[88]

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[83] Case U-11756 Opinion and Order dated March 16, 2004, p. 23 (Appendix A).
[84] MPTA Brief, p. 32.
[85] If the Commission were to revisit cases each time a subsequent case identified different information that might have been useful in the earlier case cases would never conclude.
[86] Customer Owned Coin Operated Telephone (COCOT) and Coin Line Service (COPT).
[87] *Wisconsin Order* ¶ 58.
[88] *Id*, ¶ 54.

Simply asserting that two studies were used for two different kinds of services does not establish a valid basis for reversing the MPSC's order. The MPTA has failed to establish by clear and satisfactory evidence that the Commission's decision was unlawful or unreasonable. The decision should be affirmed.

E. The MPSC did not err when it refused to order refunds to payphone providers who were neither members of MPTA nor individually named complainants in the MPSC proceedings.

The MPSC correctly determined that any refunds resulting from the Commission's March 16, 2004 Order are limited to the 62 individually named complainants that are members of the MPTA.[89] The Commission's decision is consistent with MPSC rules and the rulings of this Court.

This case began as a complaint filed by the MPTA and certain, but not all, of its individual members against SBC and Verizon. Rule 501 of the MPSC Rules of Practice and Procedure provides that a complaint may be made by "a person having an interest in the subject matter of the complaint ..." subject to applicable statutory standards.[90] The MPSC has consistently applied the two-pronged standing analysis outlined by the United States Supreme Court when determining whether a party has standing to bring a complaint.[91] Under the two-pronged test a party must (1) have suffered an injury in fact, and (2) the injury must be within the zone of interests protected by the statute or constitutional provision in question.[92] The Commission has consistently determined that an association like the MPTA, which does not have

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[89] See U-11756 Order Denying Rehearing dated February 10, 2005, p. 10 (Appendix D).
[90] 1997 AACS, R 460.17501.
[91] *Ass'n of Data Processing Service Organizations v Lampe*, 397 US 150, 153, n 7; 90 SCt 827; 25 LEd 2d 184 (1970), and *Barlows v Collins*, 397 US 159; 90 SCt 832; 25 LEd 2d 192 (1970).
[92] *City Signal v Michigan Bell Tel Co*, 144 PUR 4th 60 (MPSC No. 10225, May 21, 1993, p 17).

standing because the association has not suffered an injury in fact, cannot pursue a complaint in a representative capacity.[93]

Contrary to the MPTA's assertion, the decision by the Commission to limit refunds to named complainants does not illegally discriminate. As this Court has held, there is no basis for a prevailing party in a case to obtain monetary relief for non-parties, unless statutory authorization for such a recovery exists.[94] The Michigan Telecommunications Act does not authorize a prevailing party to obtain monetary relief for non-parties. Consequently, the Commission correctly determined that the only parties entitled to refunds are those actually named as parties in the case. There is no unlawful discrimination in refusing to extend refunds to non-parties.

F. The MPSC did not err when it determined that § 318 of the Michigan Telecommunications Act authorized application of the FCC's "New Services Test" to Verizon's payphone rates.

Verizon erroneously argues in its Brief[95] that the MPSC is precluded from imposing the New Services Test (NST) on Verizon's payphone service rates because Verizon is not a Bell Operating Company (BOC).[96] Verizon is correct in its assertion that under federal law the NST is not applicable to non-BOCs. Verizon errs when it asserts that the MPSC cannot apply the NST to Verizon under state law.

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[93] *In re Complaint of Michigan Cable Television Assoc*, MPSC No. U-7620 (January 29, 1985); *In re Michigan Bell Tel Co*, 75 PUR 4th 349 (MPSC No. U-8083, May 20, 1986); *In re Complaint of Michigan Pay Telephone Assoc*, MPSC No. U-11202 (April 10, 1997).
[94] *Bolt v City of Lansing*, 238 Mich App 37, 57-58; 604 NW2d 745 (1999).
[95] At pages 14-17.
[96] Section 276(b)(1)(c) directed the FCC to prescribe a set of nonstructural safeguards that would implement the Section 276 requirements that prohibit a BOC from subsidizing its payphone services and from preferring or discriminating in favor of its payphone services. There is no dispute among the parties that the NST is a nonstructural safeguard adopted by the FCC.

The MTA expressly authorizes the MPSC to apply the NST to Verizon's payphone services. Section 318 of the MTA provides as follows:[97]

> (1) A provider of basic local exchange service shall not discriminate in favor of its or an affiliate's payphone service over similar services offered by another provider.
>
> (2) A provider of payphone service shall comply with all nonstructural safeguards adopted by the federal communications commission for payphone service.

Subsection 2 of § 318 clearly and unambiguously provides that a provider of payphone service must comply with all nonstructural safeguards adopted by the FCC. There is no question that the NST is a nonstructural safeguard adopted by the FCC. The Michigan statute does not draw a distinction between a BOC and a non-BOC. Verizon attempts to include a BOC versus non-BOC distinction in § 318(2) in an attempt to avoid the plain meaning of the statutory language. This attempt should be rejected as it is contrary to the Michigan rules of statutory interpretation. Michigan courts have consistently held that the foremost rule of statutory construction is that courts are to effect the intent of the Legislature.[98] The starting point for performing this task is an examination of the statutory language involved.[99] If the statute's language is clear and unambiguous, then the plain meaning of the statute is assumed to represent the Legislature's intent and must be enforced as written.[100]

The language of § 318(2) is clear and unambiguous – all payphone providers are subject to all nonstructural safeguards adopted by the FCC for payphone service. The language of § 318(2) should be enforced as written. The Commission's decision to apply the NST to Verizon is consistent with the express language of § 318(2). Verizon has failed to demonstrate that the

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[97] 1995 PA 216, MCL 484.2318.
[98] *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).
[99] *Danse Corp v Madison Heights*, 466 Mich 175, 181-182; 644 NW2d 721 (2002).
[100] *Danse Corp,* 466 Mich at 182.

Commission's application of § 318(2) is unlawful or unreasonable and this Court should not substitute its judgment for that of the Commission's.[101]

Verizon may subsequently attempt to argue that the Commission's application of § 318(2) conflicts with § 201 of the MTA.[102] Section 201 provides as follows:

> (1) Except as otherwise provided by this act, the Michigan public service commission shall have the jurisdiction and authority to administer this act and all federal telecommunications laws, rules, orders, and regulations that are delegated to the state.
>
> (2) The commission shall exercise its jurisdiction and authority consistent with this act and all federal telecommunications laws, rules, orders, and regulations.

Presumably, Verizon will argue that the MPSC's application of § 318(2) is inconsistent with federal telecommunications laws, rules, orders or regulations and is therefore prohibited.[103] Such an argument should be rejected. The requirement of § 318(2) to subject all payphone providers to the FCC's New Services Test is not inconsistent with federal law. As the FCC noted in its *Wisconsin Order*, Congress authorized the FCC to apply the NST to intrastate payphone services of BOCs, but did not authorize the FCC to exercise jurisdiction over the intrastate payphone services of non-BOCs. Nothing in the language of § 276 indicates that Congress intended to prevent States from imposing non-structural safeguards adopted by the FCC (i.e., the NST) on non-BOCs like Verizon. In fact, the FCC indicated that it would prefer that the States apply the NST to non-BOCs that occupy a position in the provision of payphone services that is similar to a BOC's position:[104]

> 42. In sum, we require that BOC payphone line rates be cost-based, in accordance with the standards we set forth below. It is important to note that we

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[101] *Brenhan*, n 12 *supra*; *Magreta*, n 4 *supra*.
[102] 2000 PA 295, MCL 484.2201.
[103] 47 USC § 276(c) provides that to the extent any State requirements are inconsistent with FCC regulations the FCC regulations preempt State requirements.
[104] *Wisconsin Order* ¶ 42.

> require only BOCs, and not LECs generally, to provide payphone lines at cost-based rates. Because sections 276(a) and (b)(1)(C) apply only to BOCs, we do not find that Congress has expressed with the requisite clarity its intention that the Commission exercise jurisdiction over the intrastate payphone prices of non-BOC LECs. Since there are statutory provisions that empower us to apply the new services test to payphone line rates and grant us that authority only over BOCs, we do not have a Congressional grant of jurisdiction over non-BOC LEC line rates. Although the federal regulatory program implemented in section 276 would surely benefit if all LECs were required to use cost-based rates for their payphone line services, we cannot say that, with respect to non-BOC LECs, Congress has spoken with sufficient clarity to overcome the presumption of section 2(b). We do, however, encourage states to apply the new services test to all LECs, thereby extending the pro-competitive regime intended by Congress to apply to the BOCs to other LECs that occupy a similarly dominant position in the provision of payphone lines. (Footnotes omitted).

The MPSC, using the express authority granted to it by Section 318(2) of the MTA, applied the NST to Verizon. This action was consistent with federal law and, therefore, not preempted. This Court should affirm the MPSC's decision to apply the NST to Verizon's payphone rates.

III. Conclusion

On remand, the Commission correctly determined that the *Wisconsin Order* represented a clarification of the requirements imposed by the FCC's New Services Test and not a change in law. The Commission properly determined that, with the exception of the treatment of the interstate SLC and the intrastate EUCL, the determinations made in the Commission's March 8, 1999 order were consistent with NST. With regard to the proper treatment of SLCs and EUCLs, the Commission determined that failure to account for these charges when establishing IPP rates did not comply with NST and resulted in the imposition of unlawful rates in violation of federal law (NST) and state law (§ 318). The Commission remedied the violation by ordering refunds of the unlawfully collected rates pursuant to § 601 of the MTA. The Commission's refund order did not violate the retroactive ratemaking doctrine or the filed rate doctrine because the rates involved were unlawful.

IV. Relief

The Commission requests that this Court affirm the Commission's March 16, 2004 Opinion and Order and the February 10, 2005 Order Denying Rehearing in their entirety.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

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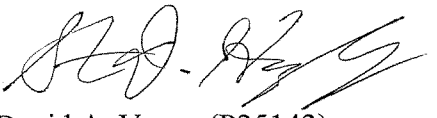

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