

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion,)	
to review the costs of telecommunications services)	Case No. U-13531
provided by SBC MICHIGAN.)	
_____)	

At the February 12, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

On October 23, 2003, the Commission issued an order (October 23 order) denying the motion to stay filed by MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc., and Brooks Fiber Communications of Michigan, Inc., (collectively, MCI), that directed SBC Michigan (SBC) to file additional total service long-run incremental cost (TSLRIC) studies, and setting a procedural schedule in this docket. In addition, the Commission reiterated that its policy established in Case No. U-11831¹ would be followed.

On November 24, 2003, SBC filed a petition for rehearing of the October 23 order, alleging that the order established a two-year policy for future filings of TSLRIC studies that was unlawful

¹ In Case No. U-11831, decided November 16, 1999, the Commission established a policy whereby SBC would not be permitted to file a new TSLRIC studies case less than two years from the date of a final order unless it could demonstrate that there had been a fundamental change in circumstances.

and violated SBC's due process rights. On December 15, 2003, MCI and AT&T Communications of Michigan, Inc., (AT&T) filed replies in opposition to SBC's petition for rehearing.

Rule 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant rehearing.

In its request for rehearing, SBC complains that the October 23 order establishes a two-year interval between TSLRIC filings that deprives it of an opportunity to be heard on this issue. Specifically, SBC contends that the Commission's notice for comments was for this proceeding only and not for some subsequent case. As a result, SBC continues, none of the parties filed comments on the two-year policy. SBC does concede that it did mention "in passing" that the Commission had previously imposed a two-year interval between TSLRIC filings. Regardless, SBC concludes that the Commission rendered a decision on an issue without giving it an opportunity to be heard.

Further, SBC opines that the two-year policy violates Section 321 of the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq., which requires that SBC not charge a rate for a service that is less than the cost of providing the service. SBC maintains that if its costs increase, the Commission cannot bar it from filing an application for new cost determinations. SBC further complains that the October 23 order similarly violates Sections 251(c)(2)(C) and

252(d) of the federal Telecommunications Act of 1996, 47 USC 251(c)(2)(C) and 47 USC 252(d), which allows it to recover its total element long-run incremental costs. SBC proposes that the Commission cannot lawfully deprive it of an opportunity to recover costs. Finally, SBC claims that the deprivation of its property without due process is a violation of the federal and state constitutions.

MCI argues that SBC's petition discusses neither new facts nor unintended consequences, nor was the October 23 order incorrect, improper, or in error. Therefore, MCI urges the Commission to find that its October 23 order was neither procedurally improper nor substantively unlawful. MCI points out that the two-year filing interval between cost study filings was established in Case No. U-11831, wherein the issue of future filings was fully considered by the Commission, SBC, and the other parties, and, therefore, is nothing new. MCI reminds the Commission that in that case, SBC proposed to eliminate the requirement that it file new cost studies every two years and supported a longer period between filings. MCI and AT&T note that following a denial of rehearing in that case, SBC appealed but has since dropped its appeal altogether, essentially conceding the final nature of the Commission's order.

The October 23 order, MCI proposes, only restated the Commission's existing policy of the two-year interval between filings established in Case No. U-11831. MCI concludes that SBC is rehashing its disagreement with the two-year interval and is using the October 23 order merely as another opportunity to argue its position. MCI points out that in the September 16, 2002 order establishing this case, the Commission stated that SBC should file cost studies in compliance with the Commission's prior orders in Case No. U-11831. AT&T adds that the notice in the September 30, 2003 prehearing conference order was broadly drawn, requesting comments that address all matters that affect the outcome of this proceeding.

Further, MCI says, the two-year interval neither deprives SBC of its property nor violates applicable law, because costs might at any time during the two-year interval rise above its rates. MCI notes that SBC presumes that its costs only will increase, whereas in technology-based industries, costs often decline. MCI contends that SBC's complaint, that the two-year interval will prevent it from keeping its costs current, is unfounded. The two-year interval, MCI and AT&T concur, is not an absolute ban because SBC can file new cost studies in less than two years if it can demonstrate a fundamental change in circumstances. MCI argues that this is the same requirement the Commission approved in Case No. U-11831, yet SBC does not explain why this is now objectionable. Therefore, MCI and AT&T conclude that SBC has not demonstrated a due process violation.

The Commission is persuaded by MCI & AT&T's arguments that SBC is expressing disagreement with the Commission's decision in its October 23 order and has not presented any claim of error that was not previously considered and rejected by the Commission in Case No. U-11831. As the Commission has consistently held in the past, a petition for rehearing is not "merely another opportunity to argue a position or to express disagreement with"² a Commission order. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing. The issue of the two-year interval between TSLRIC filings was established and fully and fairly debated by all parties in Case No. U-11831. Had the Commission not reiterated its policy in its October 23 order, the policy would still be in effect.

For all of the reasons discussed above, the Commission finds that SBC's petition for rehearing should be denied.

² See, the October 23, 2003 orders in Cases Nos. U-13129 and U-13793.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.
- b. SBC's petition for rehearing of the Commission's October 23, 2003 order should be denied.

THEREFORE, IT IS ORDERED that SBC Michigan's November 24, 2003 petition for rehearing is denied.

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

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

(S E A L)

/s/ J. Peter Lark
Chair

By its action of February 12, 2004.

/s/ Robert B. Nelson
Commissioner

/s/ Mary Jo Kunkle
Its Executive Secretary

/s/ Laura Chappelle
Commissioner

The Commission FINDS that:

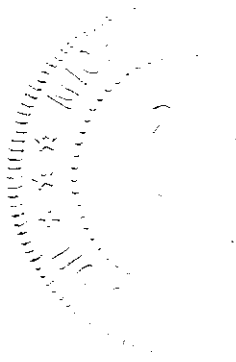
- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.
- b. SBC's petition for rehearing of the Commission's October 23, 2003 order should be denied.

THEREFORE, IT IS ORDERED that SBC Michigan's November 24, 2003 petition for rehearing is denied.

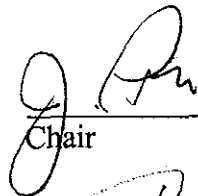
The Commission reserves jurisdiction and may issue further orders as necessary.

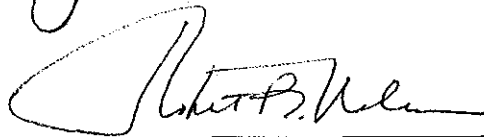
Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

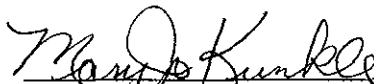
MICHIGAN PUBLIC SERVICE COMMISSION

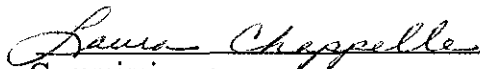


By its action of February 12, 2004.


Chair


Commissioner


Its Executive Secretary


Commissioner

PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-13531

County of Ingham)

Patricia A. Fronta being duly sworn, deposes and says that on February 13th 2004, A.D. she served a copy of the attached Commission orders by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.

Patricia Fronta

Subscribed and sworn to before me
this 13th day of February 2004

Notary Public, Eaton County, Michigan
Acting in Ingham County
My Commission expires November 22, 2004

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

STATE OF MICHIGAN)

Case No. U-13531

County of Ingham)

Anita M. Castilla being duly sworn, deposes and says that on February 13th 2004, A.D. she served a copy of the attached Commission orders via E-Mail, to the persons as shown on the attached service list.

Anita M. Castilla

Subscribed and sworn to before me
this 13th day of February 2004

Notary Public, Eaton County, Michigan
Acting in Ingham County
My Commission expires November 22, 2004

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Service List for Commission's Own Motion

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