FILE

Cincinnati Bell™
a Broadwing company
201 E. Fourth St.
P.O. Box 2301
Cincinnati, Ohio 45201-2301

October 2, 2000

Ms. Daisy Crockron
Chief, Docketing Division
The Public Utilities Commission of Ohio
180 E. Broad St.
Columbus, OH 43266-0573

RE: Case No. 99-998-TP-COI and 99-563-TP-COI

Dear Ms. Crockron:

Enclosed is an original and 10 copies of Cincinnati Bell Telephone's Comments in this proceeding. Questions concerning this matter may be directed to me at 513-397-1366.

Sincerely,

Mark A. Romito
Director - Regulatory Affairs

Enclosures

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the matter of the Commission Ordered Investigation of the Existing Local Exchange Competition Guidelines.	)))	Case No. 99-998-TP-COI
In the Matter of the Commission Review Of the Regulatory Framework for Competitive Telecommunications Services Under Chapter 4927, Revised Code.	))))	Case No. 99-563-TP-COI

INITIAL COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

On August 24, 2000, the Public Utilities Commission of Ohio ("Commission") issued an Entry inviting interested parties to comment on a Commission Staff proposal for comprehensive telecommunications rule reform. The Staff proposal recommends revisions to the existing competitive services and local competition guidelines. On September 8, 2000, an Entry was issued extending the comment period and directing parties to file Initial Comments on or before October 2, 2000 and Reply Comments no later than October 20, 2000. The Cincinnati Bell Telephone Company ("CBT") hereby submits its Initial Comments in this matter.

CBT offers comments on certain specific areas of the Staff's proposal. Failure of CBT to comment on any specific provision of the Staff's proposal should not be interpreted as concurrence in a specific provision by CBT. Because certain of the Staff's proposals have a generic effect on all LECs, CBT will rely upon the comments filed by the OTIA to address these issues and will focus its comments on areas of specific concern.

1. INTRODUCTION

In Case No. 95-845-TP-COI ("845"), the Commission's overarching concern was the creation of a competitive marketplace. Now that the Commission has had the opportunity to monitor the impact of the implementation of these guidelines over several years, it is time for a careful assessment of which of these guidelines have fostered competition among all providers in all markets and which have served no purpose or even have served as barriers to competition. CBT believes that this reevaluation is timely and necessary.

As it did in the companion proceeding, Case No. 00-1532-TP-COI ("1532"), CBT supports the Staff's effort to develop a comprehensive rule reform. CBT agrees with the reasons offered by the Staff for the much needed rule review. The Staff correctly suggests that many of the existing regulatory requirements have become obsolete or have failed to address the desired public policy goals. Nevertheless, the Staff has proposed many new rules in its proposal that would not serve the public interest and that fall short of moving competition forward.

The Staff cites the Telecommunications Act of 1996 as part of its rationale for the continuation of discriminatory treatment of ILECs vis a vis CLECs. The proposed reform maintains discriminatory practices in the areas of cost requirements, pricing requirements and financial obligations. Regulatory treatment in these areas should be the same for all entities with minimal regulatory intervention.

CBT is also concerned with the minimal relief the reform provides, especially in the area of regulatory oversight. While the Staff has suggested certain improvements, the potential benefits of those improvements are quickly negated by the imposition of new

rules and/or reporting requirements. New rules are proposed for promotions, certification, reciprocal compensation, resale pricing and the maintenance of a nondiscrimination manual. In this era of increasing market competition, fewer rules and requirements should be the goal. The focus should be to allow the market to drive competitive offerings and to provide all competitors, both ILECs and CLECs, with incentives and opportunities to serve the market.

The Staff also proposes that certain rules recently adopted for the electric industry should apply to ILECs as well. However, the electric industry has not experienced the same type of competitive change and resulting regulatory requirements that the telecommunications industry has lived with for decades. Therefore, the Commission's final rules in this proceeding should not place an additional layer of regulatory oversight on the telecommunications industry.

CBT encourages the Commission to maintain a focus on all the issues that are pending before it and that may impact the competitive market. The Commission has issued a companion docket in 1532 in which the Commission is seeking comments on a Staff proposed elective alternative regulatory framework. CBT submits that both of these proceedings are interrelated and must be viewed jointly. In addition, the pending review of the minimum telephone service standards in Case No. 00-1265-TP-COI, as well as universal service and access reform, may well impact the concepts contained in the reform for the reasons set forth herein.

3.1.1 Tier 1

CBT believes that Tier 1 should be limited to only the first basic residential service line and Tier 1 should not be capped for an indefinite term. Such a cap fails to recognize the historic public policy of keeping residential rates artificially low, as well as legitimate increases in costs that typically occur over time. While conditions may allow for a temporary cap of several years, these conditions will not continue indefinitely. As a result, the Commission should include a simple mechanism to allow for the possibility of modest increases, while avoiding the many disincentives associated with a rate case. Such increases would be consistent with moving toward greater competition in the residential market.

3.1.2 Tier 2

CBT suggests that Tier 2 and Tier 3 be combined into a single tier. Business service rates have not been driven by the same public policy to keep residential rates low. As such, there is no need for separate tiers and pricing rules.

3.2.1 Certification

In Case No. 99-1496-TP-UNC, the Commission authorized CBT to provide basic local service outside its traditional serving area without the need to create a separate subsidiary. In its Opinion and Order, the Commission found, *"Permitting CBT to begin providing NEC service outside its existing ILEC territory will provide additional competitive options to some customers."* CBT asserts that the Commission's finding in that proceeding is correct and provides a cost effective means to stimulate competition. The

Staff's proposal, if adopted, would be a step backward. CBT encourages the Commission to continue its pro-competitive approach and permit ILECs to serve new areas without establishing separate affiliates.

3.2.7 Basic Local Exchange Service Provider of Last Resort

CBT asserts that ILECs already have carrier-of-last-resort ("COLR") obligations within their traditional serving areas under Chapter 4905.22, Revised Code. Nevertheless, to the extent the Commission finds it necessary to restate these obligations in these guidelines, CBT supports the Staff's clarification that these obligations only apply to the traditional ILEC service area. In particular, CBT submits that COLR obligations are inappropriate for those areas outside the traditional serving area, such as CBT's entry into the Mason exchange.

3.2.8 Service Territory

CBT is concerned that CLECs have virtually no restrictions on changing local calling areas while ILECs continue to operate under the current EAS rules that do not account for competitive options. As a result, the current EAS rules impose calling area obligations and expenses on the ILECs that do not apply to CLECs. Therefore, if the Commission wishes to revisit the calling area obligations of LECs, CBT suggests that this be done as a separate proceeding to review the EAS rules, rather than as part of this case.

3.2.9 Requirement to Serve within 24 Months

CBT appreciates the clarification of the 24 month service requirement and supports the Staff's conclusion that it be eliminated.

3.2.10 Financing Approvals for CLECs

The proposed reform eliminates Commission approval pertaining to CLECs' financing arrangements. At the same time the Staff's proposal precludes similar treatment for ILEC financing. In fact, Section 4.7.8 expands the financial restrictions imposed on ILECs beyond the statutory requirements of Section 4905.40, Revised Code. CBT believes that financing approvals should be eliminated for the entire industry as authorized by Sections 4927.03 and 4927.04(B), Revised Code. CBT offers additional comments on this subject when addressing Section 4.7 below.

3.4.2 End User Contracts

CBT disagrees with the notion that **all** end user contracts involving regulated services should be filed with the Commission. Section 4905.31(e), Revised Code, does not contemplate that terms of filed tariffs forming the basis of a contract or "service agreement" should be filed with the Commission. Contracts that simply follow tariff provisions should not require separate filings.

Regardless of the types of contracts to be filed, the final rules should limit the submission of cost studies to only those situations where the Staff reasonably believes that the contract rate may be below cost.

Finally, the requirement to file contracts within seven days of execution is not realistic since in some instances the ILEC may not have received a copy of the executed contract from the end user. CBT recommends the final rules provide for such filing within ten (10) business days.

4.1.4 Application Fees

The Staff's proposal relative to application fees is unreasonable. CBT is concerned that the entire cost burden is placed upon the ILEC. In instances of a CLEC requesting an investigation of the technical feasibility of a particular service configuration that ultimately proves to be infeasible, the ILEC must still invest time and material to reach its conclusion. The proposed rules, however, would preclude recovering the cost of this investigation. CBT suggests that either a portion of the application fee be refunded or a provision should be included in the final rules that would permit cost recovery in these situations. Full cost recovery should be permitted in those instances where a CLEC continually requests feasibility studies that prove to be infeasible. As proposed, the ILEC has no recourse in these instances.

4.4.1 Resale of Promotions

The Staff recommends a step backward in the development of a competitive environment with its suggestion to limit promotions to "90 calendar days in a 12-month calendar period." CBT asserts that promotions benefit customers by allowing customers to try new services with little or no risk, by advancing technological changes and by testing

customer interest in new products and pricing plans. Limiting the length of a promotion will limit these benefits.

Limiting the length of a promotion is not in the public interest. If a promotion is successful, a company may want to repeat the promotion within 12 months. Waiting longer may not be practical in a market with rapidly evolving technology and services. The market window to promote a service may also be relatively short if a company is first to market a service. Staff's proposal may in fact preclude an ILEC from matching a competitor's promotion in these cases. If a competitor copies a promotion, the LEC that originally offered the promotion would not be able to continue the promotion should the 90 days expire. Clearly customers are the losers with this limitation because they would be deprived of additional competitive options.

The Staff claims to be living "an administrative nightmare." However, in lieu of limiting promotions as proposed by the Staff, CBT suggests resolving the administrative problem by including a tariff section that tracks promotions. This section would be amended with the filing of each new promotion and would identify the start and end date of the promotion and a description of the promotion itself. CBT is willing to explore this alternative or some other approach with the Staff rather then simply limiting promotions. Otherwise, the Staff's proposal will eliminate benefits that customers receive today.

4.5 Rights-of-Way

CBT requests clarification regarding exclusive service provision arrangements with landlords, real estate development companies, etc. CBT is concerned that such a prohibition could preclude an arrangement whereby the landlord, real estate development company, etc.

acts as an exclusive agent of a LEC. Under this type of agreement, the agent would agree to only promote the LEC's services but would not preclude the end users from purchasing services from any provider that is desired. CBT believes that these types of exclusive marketing arrangements have merit in a competitive environment and do not harm customers to the extent that customers still have a choice of providers.

On the other hand, CBT endorses the prohibition of exclusive use agreements that would deny the use of rights-of-way. CBT believes Chapter 4939, Revised Code, precludes the exclusive use of rights-of-way and the final rules should be consistent with the existing statute and provide for access to rights-of-way on a non-discriminatory basis.

CBT further requests that the final rules clarify the applicability of eminent domain if a property owner, e.g. a multiple dwelling unit owner, attempts to collect excessive fees to access customers when an ILEC is acting as the carrier of last resort, in particular if the ILEC is the only provider in an area.

4.7 Discrimination, Affiliate Transactions, and Anti-competitive Behavior

Telecommunication utilities operate in a competitive market that has evolved over a number of years. CBT, as well as other ILECs, operate under a number of reporting and separation requirements mandated by the FCC. In addition, ILECs have specific obligations vis-à-vis competitors from the Telecommunications Act of 1996 and FCC rules implementing that legislation. The additional requirements proposed by the Staff's Code of Conduct are unnecessary and, in some instances, impose requirements that interfere with the opportunity of CBT to compete in the market and to properly serve customers. No one has suggested the need for such a code and all providers have

available to them an array of remedies, including the Commission and FCC complaint processes, arbitration of disputes and antitrust actions to protect open and fair competition.

4.7.4 Nondiscrimination Manual ("NDM")

Based on the Staff's proposed Code of Conduct, all LECs must maintain the NDM mentioned above for the purpose of documenting and verifying compliance with the nondiscrimination, affiliate transaction and anti-competitive behavior rules. In short, the Commission is placing a burden on LECs to essentially prove compliance, prior to any complaint being filed or any indication of concern being raised. CBT asserts that this process goes far beyond the Commission's statutory enforcement mechanism in that it assumes LECs are guilty until proven innocent.

The requirements imposed by the NDM are extremely burdensome from an administrative standpoint, in that compliance requires constant monitoring and updating of the NDM to reflect any sharing between affiliates of any kind. In effect, the Commission is requiring LECs to create an additional regulatory staff position, the sole purpose of which is the monitoring and updating of the NDM to ensure compliance with the Code of Conduct.

4.7.6 Affiliate Transaction Safeguards

While the cost approach proposed by the Staff is probably not new, in that they propose that the method for allocating costs for transfers to an affiliate shall be based on fully allocated costs, what is more burdensome and unclear is the requirement that the

costs "be traceable to the books of the applicable corporate entity." This proposal requires tracing the allocation of costs to an unnecessarily miniscule level, without a significant regulatory or competitive benefit.

4.7.8 Financial Arrangements

In Section 4.7.8, the Staff oversteps the Commission's authority in rather startling fashion by interjecting themselves into the internal financial arrangements of LECs. In addition to the statutory restrictions set forth in ORC 4905.40, the Staff proposes the following additional restrictions on the financial arrangements of LECs:

- Any indebtedness incurred by an affiliate shall be without recourse to the ILEC.
- An ILEC shall not enter into any agreement with terms under which the ILEC is obligated to commit funds to maintain the financial viability of an affiliate.
- An ILEC shall not make any investment in an affiliate under any circumstances in which the ILEC would be liable for the debts and/or liabilities of the affiliate incurred as a result of actions or omissions of an affiliate.
- An ILEC shall not issue any security for the purpose of financing the acquisition, ownership, or operation of an affiliate.
- An ILEC shall not assume any obligation or liability as a guarantor, endorser, surety, or otherwise in respect to any security of an affiliate.
- An ILEC shall not pledge, mortgage, or use as collateral, any assets of the ILEC for the benefit of an affiliate.

Because ORC 4905.40 itself has been subject to several constitutional challenges based upon its interference with interstate commerce, these additional restrictions which the Staff proposes to impose are open to similar challenges. *See Panhandle Eastern Pipeline Company v. PUCO* (1978), 56 Ohio St.2d 334 and *Schneidewind v. ANR*

Pipeline Co. (U.S.D.C. Mich. 1988), 108 S.Ct. 1145. Further, because ORC 4905.40, *et seq.*, addresses the issuance of stocks, bonds, and notes by public utilities and the acquisition of public utilities and gives the Commission no specific additional authority to regulate the financial arrangements of public utilities, CBT asserts that these proposals by the Staff exceed any statutory authority of the Commission to regulate financial arrangements of public utilities.

6.1 Enforcement

In seeking to create an enforcement mechanism for its rules, the Commission proposal relies upon ORC 4905.54 for authority. Under the Staff proposal, the Commission would levy a fine or forfeiture for violations of these rules that would result in a fine of $1000 a day for each violation or failure, resulting in significant potential fines based on the methodology set forth by the Staff in its proposals.

CBT submits that the Commission's proposal completely ignores the actual language of ORC 4905.54 and the due process requirements of the statute. The relevant statutory provision reads as follows:

> Every public utility or railroad or every officer of a public utility or railroad shall comply with every order, direction, and requirement of the public utilities commission made under authority of this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so long as they remain in force. Except as otherwise specifically provided in sections 4905.83, 4905.95, 4919.99, 4921.99 and 4923.99 of the Revised Code, a public utility or railroad that violates a provision of those chapters or **that after due notice fails to comply with an order, direction, or requirement of the commission** that was officially promulgated shall forfeit to the state not more than one thousand dollars for each such violation or failure. Each day's continuance of the violation or failure is a separate offense.

Thus, for a fine to be imposed under this provision, there must be due notice given that a violation has occurred and the utility must be given an opportunity through hearing to show that it has complied. Under the Staff proposal, the Commission can simply impose a fine without providing notice and due process. This runs directly counter to the express language of the statute.

Also, the method proposed for the calculation of the fine assumes that each customer count or each individual violation should be aggregated. The Staff provides no support that this methodology is envisioned or permissible by the statute. CBT submits that this is a misreading of the Commission's statutory authority and will result in excessive punishment.

CBT asserts that the statute's intent is that every single customer affected by a violation is not a separate violation. Rather, this is a single violation of a Commission rule. On the face of the statute, the fine is intended to be aggregated for each day that the violation of the rules continues, but not across each individual customer.

6.2 Alternate Dispute Resolution

The Staff proposes that the Commission issue alternative dispute resolution rules that are modeled after those enacted in the electric utility context. Based on the electric rules, all parties to a pending formal complaint must agree to resolution through arbitration in order for the arbitration rules to be triggered. Once the parties have agreed that a dispute is appropriate for arbitration, the parties submit a joint filing to the Commission asking that the proceeding be stayed pending arbitration. In their submission to the Commission, the parties are to outline with specificity the exact issues

for which arbitration is being sought. The parties may elect to have Commission personnel assigned as arbitrators or they may make application to the Commission to use an approved external neutral as the arbitrator. The Commission reserves to itself, in the electric rules, the authority to approve the external arbitration process chosen by the parties to insure that it is fair, cost effective, and non-prejudicial toward any party.

Based on the electric rules, the Commission envisions the arbitration to be binding, with appeals to be taken only to insure that there has been no fraud, corruption, misconduct, impropriety or mistake on the part of the arbitrator. The Commission will not review the record or the legal basis of the decision *de novo*, but will only review a decision based on the issues outlined in the preceding sentence.

Such a process eliminates opportunities for appeal that are provided to LECs by statute, a prospect which is made acceptable only by the fact that all parties to a dispute must agree to submit the matter to arbitration. CBT submits that to the degree the voluntary nature of this proposal is in any way diminished, the proposal would not be lawful, in that it would take away statutory rights of appeal.

CONCLUSION

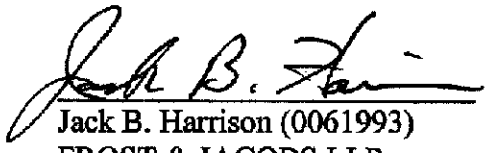
From the beginning of the 845 proceeding, CBT has been concerned that the guidelines were not focused on what should have been the overall goal, that of balancing the interests of all stakeholders to ensure the development of a competitive marketplace that truly benefits all Ohio customers. In order to ensure that all customers realize the benefits of competition, CBT has consistently asserted and continues to believe that the entire regulatory framework needs to be changed to reflect less regulation, a more competitive

environment and removal of traditional structural deficiencies, e.g., the elimination of rate subsidies.

Moreover, changes to the regulatory framework must occur in a manner that treats all providers of basic local exchange service, including the incumbent LECs, in a competitively neutral fashion. As the Commission examines necessary modifications to the 845 guidelines required by the changing competitive marketplace, CBT encourages the Commission to make regulatory parity one of the guiding principles for these modifications. The goal of this reevaluation should be to allow market forces to freely work rather than trying to craft a regulatory structure that is intended to mimic market activity. An open market, where all competitors are equally unrestricted by law or regulation from entering the market, building facilities, and serving customers, results in the application of appropriate market pressures sufficient to protect consumers. The Commission would make significant strides in this direction by modifying the local service competition guidelines to apply equally to all competitors.

CBT appreciates the opportunity to offer its views in this important proceeding.

Respectfully submitted,



Jack B. Harrison (0061993)
FROST & JACOBS LLP
2500 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

Christopher Wilson
Cincinnati Bell Telephone Company
201 East Fourth Street, 6th Floor
Cincinnati, Ohio 45202
(513) 397-6351

Attorneys for Cincinnati Bell
Telephone Company

Filed: October 2, 2000

816731.01