BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware, Inc., Ameritech Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control | ) | Case No. 98-1082-TP-AMT |

**AT&T COMMUNICATIONS OF OHIO, INC.'S MEMORANDUM CONTRA TO THE MOTION TO COMPEL DISCOVERY AND REQUEST FOR SANCTIONS OF SBC COMMUNICATIONS, INC.**

AT&T Communications of Ohio, Inc. ("AT&T"), by its undersigned attorneys, submits this Memorandum Contra to the Motion to Compel and Request For Sanctions ("Motion") filed by SBC Communications, Inc. ("SBC"). The Commission should deny SBC's Motion as it is without merit. As discussed more fully below, SBC failed to comply with the requirements of O.A.C. rule 4901-1-23, AT&T properly responded to the document requests for which SBC is attempting to compel discovery, and AT&T has not concealed, nor is it withholding, documents responsive to SBC's request. Had SBC fully complied with the Commission's rules on discovery, it would have been apparent that this motion to compel was unnecessary and would result in no additional production.

SBC asserts in its Motion that AT&T has failed to fully respond to Interrogatories 54 and 55 and Document Request 5 in its Second Set of Interrogatories and Request for Production of Documents ("Second Set of Discovery") A review of SBC's Motion reveals that no mention is made of its compliance with the requirements of Rule 4901-1-23 O.A.C. This rule specifically provides that: i) the moving party give reasonable notice to the person affected that it may move for an order compelling discovery; ii) the moving

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party must exhaust all other reasonable means of resolving any differences with the party from whom the specific discovery is sought; iii) the moving party must file an affidavit setting forth the efforts made to resolve the differences; and iv) sanctions may not be sought unless the party from whom discovery has been sought has disobeyed an order of the Commission compelling discovery.

First, a chronological review of all AT&T responses to SBC's Second Set Discovery is necessary. This review demonstrates that SBC neither gave reasonable notice of its intention to file a motion to compel, nor did it exhaust all reasonable means to resolve what it apparently believes was a dispute.

SBC's Second Set of Discovery was served on AT&T on November 13, 1998 and AT&T served written responses on November 23, 1998. As Counsel for SBC acknowledged in his December 7, 1998 letter (attached as an exhibit to the Motion), SBC had made identical requests to NextLink and had concerns with NextLink's responses, so it filed a motion to compel against NextLink and on December 4, 1998 the Attorney Examiner issued an Entry partially granted this motion and ordered NextLink to respond accordingly ("December 4 Entry"). After the issuance of the December 4 Entry, counsel for AT&T advised SBC that AT&T would review the Entry and, where necessary, supplement AT&T's initial response to the Second Set of Discovery. Counsel for SBC followed this conversation with his December 7, 1998 letter.

Even though SBC's November 30 motion to compel and the Commission's Entry were directed at NextLink, consistent with its commitment, on December 14, 1998,

AT&T supplemented its prior discovery responses to the Second Set of Discovery.[1] Although not mentioned in SBC's Motion, AT&T further supplemented its responses to the Second Set of Discovery on December 15[2] and December 16. On December 18, AT&T received the letter attached to SBC's Motion. In spite of SBC's claims that this was its "last ditch effort to convince AT&T" to respond, it, in fact, was the first indication that SBC questioned AT&T's supplemental answers given as AT&T interpreted the December 4th Entry . In response, and quite similar to the explanation of counsel for Time Warner Communications, AT&T explained on December 18 that AT&T participates in weekly meetings with the Coalition for Customer Choice (which includes MCI, Time Warner, NextLink, ICG and CoreComm), in which issues related to the merger had occasionally been discussed.[3]

Further, the December 16 letter supplementing AT&T's responses to the Second Set of Discovery (attached as Exhibit B) and the December 18 letter from AT&T make evident that SBC's assertions of AT&T's evasiveness and deceptiveness cannot be supported. SBC claims in its Motion that it was unaware of AT&T's involvement with the Coalition for Customer Choice until Time Warner's December 17, 1998 supplemental response. However, it was clearly stated in the December 16 letter that AT&T was

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[1] In fact, in the December 14, 1998 cover letter (attached as Exhibit A), Mr. Chorzempa specifically stated that the supplemental responses in no way waived AT&T's right to contest relevancy of the information sought. As further stated, this reservation was due to AT&T's concern that it was not a party to SBC's motion to compel NextLink and was not aware of the arguments or objections raised by NextLink.

[2] This Supplement included responses to the Interrogatories currently at issue (Nos. 54 and 55) and Document Request 5, also at issue.

[3] As indicated in the December 17 letter from Time Warner counsel, such letter was served by regular mail to parties of record. It is also of interest that despite the similarity of the further explanations by Time Warner and AT&T, no motion to compel has been filed against Time Warner.

producing documents in response to a request for "all documents prepared by or for AT&T that discuss or analyze" the merger. The December 16 letter further provides that the documents that were being produced were "prepared by the Coalition for Customer Choice."

In addition, rather than "evading," the December 18 letter of AT&T very precisely stated how AT&T interpreted the Attorney Examiner's December 4th ruling. Subsequent to the December 18 letter of AT&T and up until the current SBC Motion, AT&T was not made aware that SBC was challenging the explanation specified by AT&T in that letter. Likewise, AT&T was not advised that SBC had concerns with the responsiveness of AT&T's answers to Second Set of Discovery, as AT&T interpreted the ordered NextLink compliance of the Attorney Examiner's December 4 Entry. SBC cannot support that it has complied with the requirement to give reasonable notice or the requirement to exhaust all reasonable means to resolve the apparent differences in the interpretation of the December 4 Entry. Further, although SBC attached various documents to its Motion, it further failed to comply with the Commission's rule by its failure to attach an affidavit setting forth the efforts made to resolve the dispute.

Equally important as the chronological and procedural aspects is a review of the substantive requests and responses. The interrogatories and document request for which SBC now demands an order to compel, both relate to the same matter. It is important to note that Document Request 5 which is at issue was limited to documents that "relate to hindering, stopping, delaying or defeating the efforts of SBC and Ameritech to obtain regulatory approval in Ohio of the merger." SBC's counsel, however, attempted in his

December 18 letter (after the closure of discovery) to broaden this request to all documents between and among members of the Coalition for Customer Choice and all documents "which form the basis for the Coalition's erroneous position on draft legislation in Ohio." December 18, 1998 letter of Tony LaCerva attached to SBC Motion. If it is this expanded discovery request that is truly at issue in SBC's Motion, AT&T is not aware that legislation proposed by Ohio ILECs has been made a part of this proceeding or that SBC could expand its discovery requests subsequent to the close of discovery.

As indicated, prior to filing its supplemental responses AT&T reviewed the Attorney Examiner's December 4 Entry. In that Entry, NextLink was ordered to respond i) if counsel did not prepare the documents or such documents did not otherwise qualify as attorney work product and ii) "only if the purpose of such strategies or discussions impacted or were intended to impact Ohio's review of the merger." December 4, 1998 Entry, p. 3.

In its Motion, SBC addresses several documents discussed by Ms. Schermer in her deposition or produced by Time Warner. For example, SBC references a "bullet point set of concepts" presented to the Coalition for Customer Choice. This document was prepared by the Ohio Telecommunications Industry Association ("OTIA," an association primarily comprised of ILECs) and discusses proposed rate balancing, access and alternative regulation legislation. AT&T did not and still does not believe this bullet point document is responsive to any discovery request made by SBC, nor would it conclude that SBC considers the discussion of proposed rate rebalancing legislation to be proposed by the OTIA to be relevant to this proceeding.

This bullet point document, however, is relevant in AT&T's interpretation of the December 4 Entry and its subsequent responses to SBC. A fair reading of both letters produced by Time Warner and attached to SBC's Motion makes it apparent that such letters are responsive to the legislation discussed in the bullet point document which the Coalition for Customer Choice believed would be proposed to the legislature. Neither letter was for the "purpose of impacting Ohio's review of the merger," as such review was being conducted by the Commission.[4]

SBC also references e-mail messages from Wayne Hill and asserts that AT&T failed to produce these.[5] Upon further inquiry, AT&T counsel was advised by Ms. Finnerty and Ms. Varasso that their standard business practice is to regularly delete e-mail messages. Thus, at the time counsel discussed these document requests, there were no e-mail messages, nor was there recall of any such messages. Based on two letters and four e-mail messages, SBC claims that AT&T failed to produce documents responsive to its requests, as interpreted by the Attorney Examiner. Relying on these negligible claims, SBC makes the significant leap that AT&T must be withholding notes from meetings and other information from meetings. As has been stated by counsel, however, a review of the likely repositories has been made and no further documents were found.[6]

It is likewise important to reiterate, that despite SBC's attempts to leave the impression that AT&T was completely unresponsive in its production of documents, in its

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[4] Although Ms. Schermer's deposition testimony is not precise, it would appear that the other references to letters on page 4 of SBC's Motion are the exact same letters attached as exhibits to their Motion.

[5] SBC asserts that all four messages appear to concern the SBC/Ameritech merger, however, the fourth e-mail message makes no reference to the merger.

[6] Similar to their standard procedure for deleting e-mail messages, as a standard practice, neither Ms. Finnerty nor Ms. Varasso retain any documents distributed at meetings of the Coalition for Customer Choice.

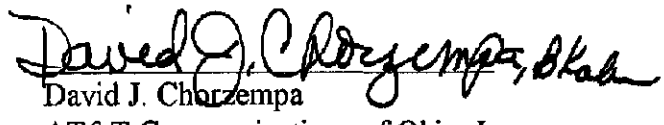
December 16, 1998 supplemental response, AT&T produced two documents in response to Document Request 1. Although AT&T designated these in response to Document Request 1, as it was the broader request, these documents also clearly are equally responsive to Document Request 5. See, attached Exhibit B.

What the foregoing demonstrates is that based on the requests and the documents produced, SBC's request for sanctions is not justified. More important, however, the condition precedent to sanctions under the Commission's rule is that first a party must disobey an order compelling discovery. As indicated above, no such order has been issued against AT&T in this proceeding. Thus, the condition precedent does not exist and such sanctions cannot be supported.[7]

**CONCLUSION**

SBC has failed to comply with the requirements of the Commission's rule for motions to compel. This, however, is not the only flaw of SBC's Motion. SBC has failed to demonstrate that an order compelling discovery from AT&T is necessary or would result in the production of any additional documents. The Commission should deny SBC's Motion and Request for Sanctions.

Respectfully submitted,



David J. Chorzempa
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[7] AT&T would also note that SBC has requested motions to compel against NextLink and MCI without any similar request for sanctions.

Benita Kahn
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
(614) 464-6487

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum Contra to SBC's Motion to Compel and Request for Sanctions was served via facsimile to Kevin M. Sullivan, Calfee, Halter & Griswold LLP, (216) 241-0816 and by regular U.S. mail, postage prepaid, to all parties listed on the attached service list, this 11th day of January 1999

Benita Kahn

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EXHIBIT A

**David J. Chorzempa**
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December 14, 1998

Anthony LaCerva
Calfee, Halter & Griswold LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, OH 44114-2688

Re: **PUCO Case No. 98-1082**

Dear Tony:

Enclosed are AT&T's supplemental responses to Joint Applicants' Second set of Interrogatories and Requests for Production of Documents. Also enclosed are documents responsive to certain of those requests. In addition, I have enclosed documents that certain of AT&T's witnesses (Gillan, Blitch, Whiteaker) have relied upon in providing their testimony. In regard to AT&T witness Mr. Falcone, tomorrow, December 15, 1998, AT&T will produce the documents he relied upon in providing his testimony. In addition, AT&T will then produce documents responsive to Request No. 18.

I stress that AT&T is providing these supplemental responses subject to its objections and in no way is waiving its right to contest the relevancy of the information sought. AT&T was certainly not part a party to SBC's motion to compel against Nextlink and is not aware of the arguments or objections raised by Nextlink.

Very truly yours,

David J. Chorzempa

DJC:
Enclosures

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EXHIBIT B


# Vorys, Sater, Seymour and Pease LLP

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December 16, 1998

HAND DELIVERED
Kevin Sullivan
Calfee, Halter & Griswold LLP
88 E. Broad Street- Suite 1500
Columbus, Ohio 43215

Re: PUCO Case No. 98-1082-TP-AMT

Dear Kevin:

By letter dated December 15, 1998, AT&T Communications of Ohio, Inc. supplemented its Responses to Joint Applicants' Second Request for Production of Documents. In further supplement to Request No. 1 of Joint Applicants' Second Request for Production of Documents, enclosed are two documents prepared by the Coalition for Customer Choice - "Changes and Concerns for Competition and Customer Choice" dated July, 1998 and "The Case for Public Hearings" dated September, 1998 and one document prepared by Californians for Telecommunications Choice - "How SBC Devoured Pac Bell." In addition, I have enclosed supplemental documents relied upon by Mr. Falcone in providing his testimony in this proceeding (Redlined Verified Statement of Gregory J. Dunny filed with the Illinois Commerce Commission, Dkt. Nos. 96-AB-003 and 96-AB-004, pp. 25-26 and Direct Testimony of Wayne Fonteix filed with the Illinois Commerce Commission, Dkt. No. 96-0404).

Provision of these documents to you in the Columbus offices of Calfee, Halter and Griswold is consistent with Mr. Chorzempa's December 15, 1998 phone conversation with Mr. LaCerva. Should you have any additional questions, please let me or Dave Chorzempa know.

Very truly yours,

Benita Kahn

BK/jm

cc: all parties of record (w/out enclosures)
Ameritech Ohio (with enclosures)(hand delivered)

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