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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Joint Application )  
of Cincinnati Bell Telephone Company )  
and Cincinnati Bell Long Distance for )  
a Waiver of Certain of the Commission's )  
Local Service Guidelines. )

Case No. 99-1496-TP-UNC

**MEMORANDUM IN OPPOSITION OF**  
**CINCINNATI BELL TELEPHONE COMPANY &**  
**CINCINNATI BELL LONG DISTANCE**  
**TO APPLICATIONS FOR REHEARING**

**I. INTRODUCTION**

Pursuant to the Ohio Rules of Civil Procedure and applicable statutes and regulations, including, but not limited to ORC § 4903.10 and Ohio Admin. Code § 4901-1-35(A), Cincinnati Bell Telephone Company ("CBT") and Cincinnati Bell Long Distance ("CBLD"), collectively the "Joint Applicants", by their attorneys, state their opposition to the Applications for Rehearing filed by AT&T Communications of Ohio, Inc., TCG Ohio Inc., MCI Worldcom, Inc. and the Ohio Consumers' Counsel. These parties seek rehearing of the Commission's March 2, 2000 Finding and Order in this matter basically on the grounds that the record supporting the Commission's decision is inadequate. Given that all of these parties participated fully in this proceeding, it is disingenuous for them now to claim that because they disagree with the result, the record is somehow insufficient.

**II. DEVELOPMENT OF THE RECORD**

On November 17, 1999, Cincinnati Bell Telephone Company ("CBT") and Cincinnati Bell Long Distance ("CBLD") filed a joint application seeking a waiver from certain guidelines governing local exchange competition adopted by the Commission in Case No. 95-845-TP-COI

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("845 Guidelines"). On January 11, 2000, an attorney examiner issued an Entry directing interested parties to submit initial comments on January 27, 2000 and Reply comments on February 7, 2000.

The Ohio Consumers' Counsel ("OCC"), on behalf of the residential utility consumers of the state of Ohio, AT&T Communications of Ohio, Inc. ("AT&T") and MCI WorldCom, Inc. ("MCI") filed objections to the joint application prior to the attorney examiner's January 11 entry. On January 27, 2000, United Telephone Company of Ohio d/b/a Sprint and Sprint Communications Company (collectively "Sprint") and ICG Telecom Group, Inc. ("ICG") filed comments similar to those of AT&T and MCI, generally opposing the competitive entry of the Joint Applicants. Also on January 27, Telephone Service Company and TSC Communications, Inc. ("TSC") filed comments but took no position on the Joint Applicant's waiver except to request that the Commission grant "me too" requests. In addition on January 27, Ameritech Ohio filed comments in support of the Joint Application, asking the Commission to grant the waivers expeditiously. Finally, AT&T and MCI filed motions to intervene in the proceeding.

On February 7, 2000, the Joint Applicants filed a response to the initial comments filed by the other parties to this matter. In that response, the Joint Applicants explained why the concerns and issues raised by those opposed to the waiver request were unfounded and articulated the reasons why they should be allowed to provide competitive alternatives.

On March 2, 2000, the Commission issued a Finding and Order in this matter in which it granted, on a "pilot" and exploratory basis, the Joint Applicants' requests for waivers with some conditions and limitations. In its Findings and Order, the Commission "thoroughly reviewed" the issues that had been raised by CBT and CBLD in their joint application and those raised by the intervenors, concluding that, "for the reasons set forth herein and based on the conditions set

forth below, . . . it is appropriate to grant, in part, the waiver requests of CBT/CBLD.” Finding and Order at ¶ 15.

### III. LEGAL ARGUMENT

It is important to note that in their Applications for Rehearing the Intervenors essentially reiterated the arguments that were contained in their other pleadings filed in this matter. While they claim that the record in this proceeding is inadequate to support the Commission’s decision, their argument can be summarized as follows: “*Because the Commission does not see the facts before it in the same manner that we do, those facts must be somehow insufficient and inadequate.*” Unfortunately for the Intervenors, this is not the standard for the Commission in reviewing applications for rehearing.

Pursuant to ORC § 4903.10, the Commission reviews applications for rehearing to determine whether or not its ultimate decision is supported by adequate facts in the record of the proceeding before it. In this proceeding, the Joint Applicants set forth the facts underlying and supporting their applications in their initial Petition and in their Reply Comments responding to the issues raised by the Intervenors. While the Intervenors apparently disagreed with certain of these facts, they were provided an adequate opportunity to offer contrary facts and argument, which they did. In its March 2, 2000 Finding and Order, the Commission thoroughly reviewed all of these facts and arguments prior to making its decision.

AT&T cites *Tongren v. Pub. Util. Comm. Of Ohio* (1999), 85 Ohio St. 3<sup>rd</sup> 87, as supporting its argument for rehearing. However, the Finding and Order and the record supporting it in this case is very different from that analyzed by the Court in *Tongren*. In *Tongren*, the Supreme Court was concerned that the Commission decision was based upon staff findings and recommendations where “the record was devoid of what data, information, or facts

the staff reviewed or considered in support of its recommendations.” *Id.* at 90. In this case, however, the Commission sets forth findings that are based upon the facts presented by the parties in their various pleadings. All parties were given an adequate opportunity to present information through the procedural schedule set forth by the Commission, the Commission considered all the material presented by the parties and then, in full compliance with ORC § 4903.09, the Commission issued “findings of fact and written opinions setting forth the reasons prompting the decision arrived at.”

However, given the issues raised again by the Intervenors in their respective requests for rehearing, the Joint Applicants will once again address these issues.

***A. Opposition to Separate Subsidiary Waiver Request.***

Both AT&T and the OCC seek rehearing on the Commission’s approval of the Joint Applicants’ request to waive the requirement to establish a separate affiliate to provide local service. Both the OCC and AT&T incorrectly assert that this waiver request somehow relieves the Joint Applicants from the affiliate transaction rules. This simply is not true.

First of all, the Joint Applicants’ intend to follow the affiliate transaction requirements in their entirety. CBT and CBLD are separate subsidiaries and are not seeking any different treatment as a result of the joint application. CBT seeks to establish itself as a NEC outside its serving area and CBLD seeks the opportunity to provide similar service within CBT’s serving area also as a NEC. In effect, the waiver granted by the Commission eliminates the separate subsidiary requirements so that both CBT and CBLD can operate anywhere within the state of Ohio - the same as MCI and AT&T can do today. Both entities, however, remain separate legal entities in full compliance with affiliate transaction rules. Finding and Order at ¶ 15.

There appears to be a general misunderstanding by the parties with regard to the relationship between CBT and CBLD. For example, AT&T argues that CBT is attempting to create a "sham" NEC. The success of CBLD has no relevance to the request of CBT since both are separate corporate entities. Viable competitive alternatives will be provided by both CBT and CBLD with the granting of the waiver by the Commission's March 2, 2000 Order.

The OCC continues to argue that the granting of this application will create a precedent that the Commission will be forced to apply to all large ILECs. This assertion is simply wrong. CBT is in the unique position of being large enough to provide innovation and competition in the marketplace, but lacks the significant scale of the RBOCs. The impact on corporate resources caused by the formation of separate affiliates is significantly and disproportionately greater on CBT than on the much larger RBOCs with greater economies of scale. The structural separation imposed by the Commission's separate affiliate rule has been a significant factor in deterring CBT from providing services outside its present service area in the past. The rule prevents a mid-size company like CBT from using its limited resources for out of territory ventures in an economically efficient manner. The result is that out of territory ventures have not been economically attractive.

AT&T and TCG again argue that rehearing must be granted and the waiver request denied due to CBT's anti-competitive behavior. However, as recognized by the Commission, CBT enumerated in its joint application the number of pro competitive steps it has taken. Further, the Commission recognized in its Finding and Order that "[p]ermitting CBT to begin providing NEC service outside of its existing ILEC territory will provide additional competitive options to some customers." Finding and Order at ¶ 15.

Also, AT&T and TCG continue to raise issues related to the unbundled network elements ("UNE") and pricing. AT&T participated in and presented evidence in CBT's TELRIC proceeding that just recently concluded. New UNE prices will be established as a result of the Commission's decision in that proceeding, so AT&T's reiterated claim that CBT's UNE rates are anti-competitive continues to be without merit and certainly provides no basis for granting rehearing in this matter. AT&T's continued insistence that CBT is illegally denying AT&T access to a UNE platform not only fails to recognize the facts surrounding that issue, but misstates the current state of the law on that issue.

As set forth in pleadings filed in this proceedings, CBT continues to operate under a temporary suspension regarding UNE combinations as negotiated in its alternative regulation plan, to which AT&T agreed. That suspension remains in place until the rules go into effect, the Eighth Circuit issues its decision and the FCC clarifies the scope of the combination requirement. Since AT&T has had an interconnection agreement in place with CBT since December 5, 1997 and will shortly begin negotiation of a second generation of that agreement, the proper forum for raising issues regarding these matters is in that negotiation process or another process, not by seeking rehearing in this matter. Finding and Order at ¶ 18.

***B. Demand for the Provision of Residential Service.***

The OCC seeks rehearing on its demand that the Joint Applicants provide residential service in a manner similar to that established as a condition of approval of the SBC/Ameritech Stipulation in their multi-billion dollar merger. To demand that the Joint Applicants be required to serve residential customers in order to obtain the requested waiver is completely inappropriate. As stated by the Commission in its Finding and Order:

[W]e do not believe that we should dictate the business plans of CBT/CBLD in this fledgling competitive local market. If the provision of residential service is

an economically viable business, NECs and ILECs that seek to serve customers outside their existing franchise areas will naturally migrate to the provision of that service. However, if the residential market is not currently an economically viable market for competitive entry, we should not discourage additional competitive entry in the business customer market by placing uneconomic burdens on the NECs and ILECs serving outside their traditional market through their market entry plans.

Finding and Order at ¶ 18.

As set forth by the Joint Applicants, the potential competition between two affiliates will have no particular negative implications for either individual affiliate or the customers that they respectively serve. In addition, both entities have the potential to serve residential customers. *The OCC's logic is seriously flawed and conflicts with the benefits of competition that the OCC seeks to foster.* Denying CBT the opportunity to provide business services outside its service area will virtually guarantee that residential service will not be provided. The current local competition rules have imposed a barrier to ILECs seeking to provide competition for local services. Why limit the very companies that have the most expertise in providing local service from competing with other incumbents? OCC's insistence that CBT commit to providing residential local service, even where it is uneconomic to do so, would, if approved by the Commission, remove an effective competitor for local service from the marketplace. The practical effect of OCC's petition is to obstruct the development of any creative alternatives that will ultimately benefit all Ohio customers, a demand that is inappropriate and well beyond the OCC's statutory authority.

In its Finding and Order, the Commission fully considered these arguments and the facts presented and partially granted the Joint Application on the grounds that it will provide an overall benefit to all telecommunication customers in the State of Ohio. In again making this argument, the OCC has provided no basis for the Commission to grant rehearing.

**C. *Granting of Waiver to CBLD***

In its request for rehearing, MCI claims that the Commission had an insufficient basis for granting the waiver to allow CBLD to provide service in CBT's territory. MCI asserts that rehearing is necessary because the Commission considered the facts presented by all parties and did not simply accept the facts as presented by MCI. Again, like other parties seeking rehearing, MCI incorrectly characterizes the record before the Commission. While MCI asserts that it is concerned about the door being locked after the horse has left the barn, it appears that MCI, as well as the other providers requesting rehearing, are actually more akin to the proverbial fox guarding the chicken coop, in that they are opposed to any steps toward providing competitive parity.

In the case of CBLD, the Commission considered the facts in the record in this case and concluded:

Permitting CBLD to provide NEC service in CBT's territory should provide an inarguable measure of parity relative to the service that CBT provides CBLD as compared to the service CBT provides to unaffiliated NECs. Since the Commission's affiliate transaction rules will still apply, and the joint applicants have committed to abide by the affiliate transaction requirements, we believe that, should there be any claims of anti-competitive behavior in the future, those claims could be adequately examined.

Finding and Order at ¶ 15. MCI has failed to state any basis for rehearing on the Commission's decision granting a waiver to CBLD, and therefore, their request for rehearing on this issue should be denied.



#### IV. CONCLUSION

As none of the requests for rehearing filed in this matter set forth sufficient grounds to require the Commission to grant rehearing, all of them should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been sent by ordinary United States mail,  
postage prepaid to all of the persons on the attached service list on this 18<sup>th</sup> day of April, 2000.

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