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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) Case No. 99-1496-TP-UNC
Distance for a Waiver of Certain of)
the Commission's Local Service)
Guidelines.)

REPLY COMMENTS OF
THE OHIO CONSUMERS' COUNSEL

On November 17, 1999, Cincinnati Bell Telephone Company (CBT) and Cincinnati Bell Long Distance (CBLD) filed a joint application for a permanent waiver of the provisions of Local Service Guideline (LSG) II.A.4. that require an incumbent local exchange company (ILEC) to form a separate subsidiary to compete outside the ILEC's current service territory, and that forbid an ILEC affiliate from competing for local service within the ILEC's territory.¹ Robert S. Tongren, in his capacity as the Ohio Consumers' Counsel (OCC), on behalf of the residential utility consumers of the State of Ohio, files these reply comments to renew his objections to the granting of the CBT/CBLD application. These objections were set forth in a filing with the Commission on December 1, 1999.

¹ In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI, Entry on Rehearing (February 20, 1997), Appendix A.

On January 11, 2000, the Attorney Examiner issued an Entry that called for comments on the application. Comments were filed by Ameritech Ohio,² AT&T Communications of Ohio Inc. and MCI WorldCom, Inc. (AT&T/MCI), ICG Telecom Group, Inc. (ICG), Telephone Service Company and TSC Communications, Inc. (jointly TSC), and United Telephone Company of Ohio d/b/a Sprint and Sprint Communications Company L.P. (jointly, Sprint). The OCC filed a letter adopting his December 1, 1999 Objections as comments. The OCC replies herein to each of the other parties' comments.

With regard to the substance of the CBT/CBLD application, the parties' views are diverse. AT&T/MCI, ICG and Sprint say the application should be denied. AT&T/MCI at 4 (AT&T and MCI incorporate the arguments against the application raised in their separate motions to intervene); Sprint at 2; ICG at 4-5. Ameritech Ohio says that CBT and CBLD have provided ample justification for the waiver. Ameritech Ohio at 3. And TSC takes no position on the merits, but wants a "me too" waiver for "other carriers similarly situated...." TSC at 1. These will be addressed in order.

AT&T/MCI's focus is on the fact that CBT has not met what AT&T/MCI describe as the Commission-mandated condition precedent to the granting of the waiver, namely having removed all barriers to competitive entry in CBT's service territory. AT&T/MCI at 2, citing *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI, Entry on Rehearing (November 7, 1996) at 9-10. From the context of the Entry on Rehearing language cited, it appears that the Commission was referring to

² Ameritech Ohio's comments were filed jointly in this docket, Case No. 99-1544-TP-UNC (New Knoxville), and Case No. 99-1584-TP-AAC (Sprint). The CBT/CBLD application was the focus of most of Ameritech Ohio's comments.

the NEC competing against affiliated ILEC guideline provision, rather than the competition outside the ILEC territory provision. As the OCC argued in the Objections filed December 1, 1999, CBLD should not in any circumstances be allowed to compete against CBT in CBT's territory.

Yet AT&T/MCI's position also has relevance to the other waiver requested by CBT/CBLD, waiver of the separate subsidiary requirement for CBLD's operations outside CBT territory. AT&T and MCI argue that CBT's failure to state whether it will reapply for suspension of its obligation to provide UNE combinations -- a requirement of the stipulation in CBT's alt. reg. case -- is a clear sign of not opening its local market. AT&T and MCI stress the importance of such combinations for the provision of residential service. It is hard to understand CBT's reluctance to state whether it will reapply for the suspension, particularly since (as ICG notes at 3) CBT's claims of open competition in its territory are otherwise unsupported.

The Commission recalls that the OCC proposed that the separate subsidiary waiver could be granted as a pilot program if CBLD would commit to serving residential customers. OCC Objections at 9-10. Again in the interest of spurring competition for residential customers -- and to provide parity between the CBT territory and the CBLD territory -- the OCC submits that a commitment from CBT to offer the UNE-P in its territory would be a reasonable additional condition for granting the separate subsidiary waiver for competition outside CBT's territory.

ICG's view is that CBT has failed to provide any basis why the Commission should consider this waiver request, given the pendency of the Commission's review of the local service guidelines from which CBT seeks a waiver. ICG at 2. ICG also correctly

analyzes the factual shortcomings of the application. *Id.* at 3-4. The lack of factual support is also stressed by Sprint. Sprint at 2-4.

The granting of waivers is always a balancing of the interests that led to the adoption of the rule in the first place with the possible benefits of granting the waiver. In this context, under the OCC's proposed conditions, the public interest benefits outweigh the risks of granting the waiver, especially if the waiver is granted on a temporary basis as a "pilot." These benefits outweigh the risks that would exist if CBT's claims about its markets would turn out to be untrue.

Ameritech Ohio alone among the commenters believes that CBT/CBLD have provided "ample justification" for the waivers. Ameritech Ohio at 3. This conclusory statement is the extent of Ameritech Ohio's argument on the point.

Another part of Ameritech Ohio's argument is the claim that the Local Service Guideline sought to be waived -- Guideline II.A.4. -- is inconsistent with federal law as set forth in the Telecommunications Act of 1996. Ameritech Ohio's citation to § 253(a) of the Act (Ameritech Ohio at 2-3) ignores the provisions of § 253(b). The Commission acknowledged this fact in establishing the Guideline. *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI, Entry on Rehearing (November 7, 1996) at 10-11. In any event, Ameritech Ohio's arguments on the propriety of the guideline itself have no relevance to the question of whether CBT/CBLD should be granted a waiver of the guideline.

Another significant portion of Ameritech Ohio's initial comments is actually a response to the OCC's objections filed in this docket on December 1, 1999. Each of Ameritech Ohio's points deserves a response.

Ameritech Ohio first notes that the OCC "provide[d] little substantive argument against" the CBT/CBLD application. Ameritech Ohio at 3. This is true... because the principal thrust of the OCC's objections was *CBT/CBLD's* failure to meet the burden of showing that the waiver should be granted. See OCC Objections at 3-8. Ameritech Ohio's argument is an attempt to shift the burden from the proponents of the waiver, CBT/CBLD, to the opponents of the waiver.

Ameritech Ohio then notes that the OCC proposed that the separate subsidiary requirement could be waived if CBLD would commit to serve residential customers, but claims that "[w]hy such a commitment should be extracted from ... these applicants when it is not applied to competing companies is not explained." Ameritech Ohio at 3. Contrary to Ameritech Ohio's claims, the Commission's rationale for the separate subsidiary requirement was sound. Only ILECs are required to have such separate subsidiaries for competition outside their territories because only the ILECs have an effective monopoly on local exchange service -- particularly residential service -- within their territories. Only four CLECs claim to be operational within CBT territory; none of them serve residential customers. See OCC Objections at 3-4.³

Ameritech Ohio then states that the "OCC offers only the time-worn claims concerning 'cross-subsidization' and 'anti-competitive practices' without explaining the

³ Per reports to the FCC, even Ameritech Ohio, the ILEC with the greatest level of competition for residential customers, still holds a 99.5% market share for those customers. The reports are available on the FCC's website: www.fcc.gov/ccb/local_competition/survey5/responses.

basis for either concern...." citing OCC Objections at 6. The reference cited was the OCC's quotation of the *Commission's* holdings when it established the guideline of which CBT/CBLD seek a waiver.

Ameritech Ohio then states that "OCC's reference to the differences between the provision of basic local exchange service and the provision of competitive services ignores the reality of today's telecommunication marketplace." Ameritech Ohio at 4. The OCC's reference to these differences was in the context of recognizing that the Commission originally required a separate subsidiary for the provision of toll service. See OCC Objections at 6. Ameritech Ohio's attempt to imply that the level of competition for local service is similar to toll and other competitive services ignores the reality that Ameritech Ohio -- the ILEC facing competition -- retains a 97% overall share and a 99.5% residential share of the local service market.⁴

Finally, Ameritech Ohio responds to the OCC's statement that CBT/CBLD did not cite any jurisdictions where a CLEC affiliate was allowed to compete against the ILEC by referring to Sprint's application in Case No. 99-1584-TP-AAC. In that application, as a footnote, Sprint claimed that the only state out of the eighteen states where Sprint's CLEC has certification where the CLEC cannot provide service in its ILEC territory is Ohio. One appropriate response to Ameritech Ohio's recitation of Sprint's argument would be to quote Sprint's comments in the instant docket: "Where the Joint Applicants discuss trends in other jurisdictions in support of their claim to an exemption from the separate affiliate requirement, the Joint Applicants do not provide any case citations." Sprint at 3. Such case citations were noticeably lacking from the

⁴ See the reports to the FCC discussed in footnote 3.

Sprint footnote that Ameritech Ohio cites. In fact, Sprint's comments in this case appear to reflect a difference from what was stated in Sprint's own application: Immediately after chastising CBT/CBLD for not providing case citations, Sprint notes that in Nevada its CLEC does not operate within the ILEC's territory. Sprint at 3.⁵

It should also be noted that the fact that other states -- for whatever reasons -- have apparently allowed affiliated -- structurally separate -- CLECs to compete against affiliated ILECs, is not grounds for allowing CBLD to compete against CBT in CBT territory *without structural separations* such as those between the Sprint ILEC and the Sprint CLEC. Such "unseparated" competition (if it can be called competition) is precisely what CBT requests.

Moving from Ameritech Ohio to TSC, TSC's interest is stated as not with the merits of the CBT/CBLD application but that if the Commission grants New Knoxville's application, the "result should be applied equally to other carriers similarly situated, and that the Commission should both invite and entertain such 'me-too' applications." TSC at 1-2. Given that the Commission should only grant CBT/CBLD's separate subsidiary waiver request as a means to incent CBLD to serve residential customers, and that the Commission should deny the affiliated CLEC vs. affiliated ILEC in ILEC territory waiver in any event, if there are any other ILEC-affiliated CLECs out there that are not

⁵ The Commission should recall that in Sprint's comments filed February 16, 1999 in Case No. 96-1175-TP-ORD with regard to the disconnection of local service for nonpayment of toll, Sprint -- similarly without case citation -- identified a number of states as allowing universal toll blocking for nonpayment of toll charges. In the OCC's March 3, 1999 reply comments in that docket, it was pointed out that most of those states also allowed disconnection of local service for nonpayment of toll. Thus it is crucial to examine the entirety of another state's regulatory structure when making comparisons with Ohio regulation.

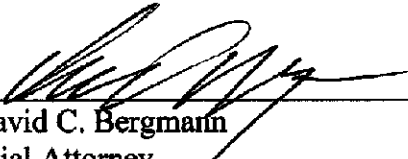
already required to serve residential customers, the Commission should consider pilot programs similar to the one proposed for CBT.⁶

CONCLUSION

Wherefore, for the reasons set forth herein, CBT/CBLD's requested waivers should be granted only to the extent of and under the conditions proposed by the OCC.

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⁶ Ameritech already committed that Ameritech Ohio's affiliate, ACSI, would serve residential customers with the separate subsidiary requirements in place. *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, Opinion and Order (April 8, 1999) at 26-27.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Comments of the Ohio Consumers' Counsel was served by first class mail, postage prepaid, or hand-delivered on the parties identified below on February 7, 2000.



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