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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)

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Case No. 98-1496-TP-UNC

AT&T's MOTION TO INTERVENE AND PARTIAL OBJECTION TO
CBT'S WAIVER REQUEST

Pursuant to § 4903.221 of the Revised Code and Rule 4901-1-11 of the Ohio Administrative Code ("O.A.C."), AT&T Communications of Ohio, Inc. ("AT&T"), by its undersigned attorneys, hereby files this Motion to Intervene in the above captioned proceeding and objection to the waiver request of Cincinnati Bell Telephone Company and Cincinnati Bell Long distance (collectively "CBT"). The basis of AT&T's motion and objection are fully set forth in the attached memorandum in support.

WHEREFORE, for the reasons set forth in the attached memorandum in support, AT&T urges the Commission to deny CBT's waiver request.

Dated: December 23, 1999

Respectfully submitted,

AT&T COMMUNICATIONS OF OHIO, INC.

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MEMORANDUM IN SUPPORT

Introduction

By its application, CBT has requested three specific waiver requests:

(1) CBT first seeks authority to function as a NEC outside of its region without having to create a separate subsidiary subject to the affiliate transaction rules embodied in the Local Service Guidelines. AT&T opposes this waiver request. As this Commission has already held, until CBT's monopoly-like control of its local bottleneck within its region is irreparably broken, which has not occurred to date, the Commission cannot allow CBT to exploit this monopoly power outside its serving territory. Without the affiliate transaction rules, such exploitation is bound to occur. In fact, CBT's waiver request boldly claims that such exploitation is CBT's goal – to use the strength, marketing power, and facilities of its existing local monopoly as its spring board into other regions of the state. While AT&T welcomes competition between incumbent local exchange carriers ("ILECs"), and believes that such competition could benefit Ohio consumers and the current stagnate state of local competition, the Commission must ensure that all local competitors are placed on equal footing. The separate affiliate rules help assure this equality.¹

(2) Second, CBT seeks authority to set up a "sham" NEC inside its region. That NEC would compete against other NECs as a local service provider, would be free of any separate affiliate rules, and would, therefore, allow CBT to effectively conduct all of its local service

¹ Indeed, the Commission on several occasions over the last three years has imposed separate affiliate rules in order to protect NECs from such discrimination. In regard to Ameritech, the Commission assured that Ameritech's advanced services subsidiary, AADS, could not use Ameritech's local monopoly as an undue advantage in the advanced services market. And in regard to GTE, a company with a serving territory similar to CBT's, the Commission assured that GTE could not joint market its competitive long distance and bottleneck local service offerings. Competition has not occurred in CBT's market in any significant manner that lessens the necessity of these types of protections.

offering within its region free of the increased regulations imposed on ILECs. Most importantly, CBT's waiver request would free CBT of many of the essential terms of its alternative regulation plan, which is the product of intense negotiations between CBT, Ohio NECs, and Ohio consumer groups. AT&T strongly opposes this waiver request. There is good reason for increased regulation of incumbents, who control the local bottleneck and can exploit that bottleneck within their region to discriminate in favor of itself. On the other hand, CBT has offered no good reason or public interest benefit for allowing CBT to conduct its local services within its territory through a NEC. The only purpose for that NEC is to allow CBT to more freely discriminate in favor of itself to the detriment of competition.

(3) Finally, CBT seeks a waiver of the Commission's rule that its NEC affiliate provide service within 24 months. AT&T does not oppose this waiver request and, in fact, believes that all NECs should be granted such a waiver.

The Commission Should Reject CBT's Request For Waiver of the Separate Affiliate Rules.

Section II.A.4 of the Commission's Local Service Guidelines provides that:

ILECs cannot establish NEC affiliates within their current existing serving areas in order to offer basic local exchange services. A separate ILEC-affiliated NEC may be established to compete in other ILEC serving areas. These NEC affiliates are subject to the affiliate transaction guidelines embodied in Commission decisions regarding United Telephone Long Distance (Case No. 86-2173-TP-ACE), Ameritech Advanced Data Services, Inc. (Case No. 93-1081-TP-UNC), and in 563, as subsequently amended or supplemented, and any other requirements imposed by the Commission.

The Commission should not forget the reason it first instituted this rule: to foster competition by assuring that ILECs could not leverage their local monopolies when offering local service inside and outside their serving territories. In regard to its rule requiring an ILEC to establish a separate affiliate to compete outside its region, the Commission made clear that it was doing so to combat the ability of that ILEC-affiliated NEC to use the market power of the ILEC.

PUCO Case No. 95-845-TP-COI, Finding and Order, pp. 29-30 (June 12, 1996). In addition, the Commission believed that this rule would assure that all interconnection agreements and other arrangements between the ILEC-affiliated NEC and the ILEC be made public and subject to Commission approval and available to all other competitive NECs. Id.

Similarly, the Commission saw absolutely no public benefit in allowing ILECs to set up NECs within their region as "sham" or "dummy" NECs. The only purpose of those sham NECs would be to avoid the increased regulations revolving around ILECs and allow the ILEC to more easily discriminate in favor of itself. The Commission could not have been more clear:

We fail to envision how end users would benefit from a provision authorizing an ILEC to establish a NEC affiliate within its current service territory. To the contrary, an ILEC affiliated NEC offering service on a resold basis will be dependent upon the service offerings of its underlying facilities based carrier. Should the facilities based carrier be the affiliated ILEC, substantial opportunity exists for the ILEC and its affiliate to operate in an anti-competitive fashion

PUCO Case No. 95-845-TP-COI, Entry On Rehearing, pp. 9-10 (November 7, 1996). Indeed, the Commission also made it clear that it would not entertain a waiver or change in these separate affiliate rules until the requesting ILEC has "fully removed all barriers to competitive entry in its service territory." Id.

Certainly, CBT's vague and unsupported petition does not meet this burden. And it's suspect to even assert that CBT could meet this burden at this time.

The fact remains that nothing has changed since the implementation of the Local Service Guidelines that lessens the concerns that led the Commission to adopt the separate affiliate rules in the first place. Indeed, while CBT claims that its serving area is more dense, and therefore allegedly more susceptible to competition, the fact remains that CBT faces little to no local competition in its serving area. CBT has offered no evidence that this phantom competition has actually occurred, or will soon occur in its serving territory. AT&T is unaware of any local

residential competitor offering service in CBT's serving territory, nor is it aware of anything but spotty local business competition.

CBT's actions have assured that this status quo will not change. CBT has a paltry 8% wholesale discount, compared to Ameritech Ohio's discount well in excess of 20%, making it impossible for any resale competitor, like CoreComm, to even think of entering CBT's market on a resale basis. In regard to unbundled network elements, CBT's "interim rates" for unbundled loops, for example, are many times that of Ameritech.

Moreover, CBT has refused to provide carriers all combinations of unbundled elements, including the UNE-platform, even though they are legally required to do so. CBT has done so because they know what all the other carriers know: that the UNE-platform is the essential first step necessary to allow carriers to enter CBT's residential local market on a mass-market basis. In the pending TELRIC case, CBT has not even offered a price for the UNE-platform.

CBT's operational support systems, which are critical to widespread competition, have not received any test under full market conditions. There is no evidence that those OSS systems are working properly for even the extremely low levels of competition faced by CBT, much less whether they would work in a fully competitive market.

In short, CBT has successfully used its entrenched monopoly position, and its control of the local bottleneck, to keep competitors out of its market. And there is no evidence that CBT's ability to use that local monopoly in an anti-competitive manner has decreased. In promulgating the separate affiliate rules, the Commission hoped to lessen that ability and made it clear that until all barriers to entry have been removed, it would not even consider a waiver. CBT has not, and cannot, demonstrate that such barriers have been permanently removed.

By its separate affiliate rules, the Commission sought to avoid having ILECs set up "sham" NECs within their region to compete against other NECs. The Commission properly

recognized that the incumbent's entrenched monopoly position is deserving of increased regulatory oversight. And the Commission was correctly concerned that if an ILEC set up such a sham NEC, and provided all of its local services through this NEC, that it could easily discriminate against other NECs in favor of itself. Nothing has changed in CBT's region to date to lessen CBT's ability to take such anti-competitive action. Therefore, there is no evidence that CBT deserves increased regulatory flexibility to compete within its region.

AT&T stresses that it strongly objects to CBT's waiver request to set up a sham NEC within its region to compete against other NECs. On the whole, CBT has provided no evidence that competition in its region is so robust that competition could replace regulation in curtailing CBT's undisputed incentive to discriminate against other NECs.

But what is even more important, is the fact that CBT has failed to give any reason whatsoever why it should be allowed to compete within its region as a NEC. CBT has failed to provide any explanation how the public interest would be furthered by the existence of such a sham NEC. This sham NEC would present the opportunity for CBT to create its new and innovative services in the NEC and then attempt to avoid 96 Act ILEC obligations associated therewith. Certainly this cannot be in the public interest and CBT fails to even address this public interest concern.

Likewise, CBT fails to address the public interest concerns associated with its recently negotiated alternative regulation plan. CBT's plan allows it to offer services within its region in a manner quite like other NECs. CBT's timeframes for filing new services are not significantly different than the timeframes that NECs, like AT&T, must follow. CBT does not take issue with the terms of its alternative regulation plan, nor has it otherwise pointed to any specific regulation that hampers its ability to compete against NECs within its serving territory. Indeed, CBT's waiver request only offers a benefit to CBT: to allow CBT to discriminate more easily.

The fact that CBT has so recently entered into an alternative regulation plan, a plan that it willingly agreed to along with other NECs and consumer groups, is direct evidence of the fact that CBT does not need additional regulatory flexibility within its region. CBT's waiver request, which would allow it to conduct its local business through a "sham" NEC, would effectively and illegally allow CBT to escape the provisions of its negotiated and approved alternative regulation plan. That plan was the product of intense negotiations between CBT, Ohio NECs, Ohio consumer groups, and the Commission staff. The plan specifically details the rules under which CBT is to offer its services within its region. CBT's request represents an improper end-run around that plan and would make many of its terms and conditions meaningless.

The Commission Should Reject CBT's Waiver Request Out of Hand.

It is undisputed that CBT bears the burden of proving that its waiver request is in the public interest. In addition, based on the Commission's order in the 845 case, CBT bears the additional burden of proving that it has removed "all barriers to competition in its service territory" before the Commission will even consider a waiver request regarding the separate affiliate requirements.

CBT's application fails to meet this burden on its face and should be rejected out of hand. While long on vague and unsupported claims regarding the state of competition in its service territory, CBT's application is short on any facts regarding the true state of that competition. The reason for CBT's silence is quite simple: CBT has not removed all the barriers to entry within its service territory and, as a result, it faces little to no local competition at this time. Based on this lack of evidence, the Commission should reject CBT's application on its face.

It is far too early, when competition is in its current embryonic state, for the Commission to release CBT from the separate affiliate requirements that were intended to alleviate CBT's monopoly market power in the local market. Certainly, in the last four years that market power

has not diminished in any measurable amount. Therefore, AT&T requests that the Commission reject CBT's application as described above.

The Commission Should Grant AT&T Intervention.

AT&T further requests that the Commission grant it intervention in this matter. Rule 4901-1-11(A) of the Ohio Administrative Code sets forth the criteria for the Commission to consider in evaluating mandatory interventions. Rule 4901-11(B) sets forth the criteria for permissive intervention. AT&T meets both sets of criteria and should be granted intervention in this matter.

As a NEC in Ohio that must interconnect with and obtain services and elements from CBT, AT&T has a real and substantial interest in the proceeding. Failure to assure that CBT provides service in a nondiscriminatory manner and at parity would directly impact AT&T. If the Commission were to grant CBT's waiver, AT&T's ability, as well as other new entrants, to compete against CBT as a new entrant could be severely impaired. AT&T also has a significant interest in assuring that the proposed application will ensure parity between all new entrant carriers. Furthermore, AT&T's interest in this proceeding is not adequately protected by other parties.

AT&T will bring expertise to assist the Commission in its investigation of this matter. AT&T's motion to intervene will also not unduly delay these proceedings or otherwise prejudice other parties. AT&T plans to participate in this proceeding in accordance with whatever schedule the Commission might set.

WHEREFORE, AT&T respectfully requests that the Commission grant it leave to intervene in this matter and partially deny CBT's waiver request as described above.

Dated: December 23, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **AT&T's Motion to Intervene and Partial Objection to CBT's Waiver Request** was served upon the parties listed below via regular U.S. mail, postage prepaid, this 23rd day of December, 1999.



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