

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan and a New Alternative Regulation Plan.)
Case No. 96-899-TP-ALT)

ENTRY

The Commission finds:

- (1) On December 8, 1997, the attorney examiner issued an entry denying a motion by Cincinnati Bell Telephone Company (CBT or company) to compel discovery responses from MCI Telecommunications Corporation (MCI). CBT's motion sought responses regarding MCI's operations throughout the country; regarding MCI's activities in CBT's service area; and regarding MCI's position on various issues relating to local competition. In rejecting CBT's motion to compel, the examiner ruled that "the current status of MCI's operations, both outside of and within CBT's service area, as well as MCI's potential marketing strategies are not relevant for the purposes asserted by CBT (i.e., to ascertain the future level of competition in CBT's service territory)" and "any attempts by CBT to project the future market of potential competitors through the type of information sought in CBT's discovery would be purely speculative and, thus, not likely to lead to the discovery of admissible evidence" (December 8, 1997 Entry, at 2).
- (2) On December 15, 1997, CBT filed a motion to certify and an application for interlocutory review of the attorney examiner's ruling.¹ In support of its interlocutory appeal, CBT argues that the discovery requests to which MCI objected are needed by CBT to show that other providers, and especially MCI, are poised to aggressively permeate CBT's market, targeting CBT's most lucrative customers for long-term exclusive

¹ By entry issued December 31, 1997, the attorney examiner certified the interlocutory appeal to the Commission. The examiner found that certification of the appeal was warranted, pursuant to Rule 4901-1-15(B), Ohio Administrative Code, because the appeal presented a novel issue to the extent that the Commission has not previously considered the effect of competitive operations on an ILEC's request for regulatory flexibility within the context of an alternative regulation plan application, especially given the Staff Report's proposal to limit flexibility absent a demonstration of the loss of 20 percent market share by CBT. The attorney examiner also found that an immediate ruling by the Commission was necessary to avoid prejudice to CBT because, if the Commission reverses the examiner's ruling, CBT may be given an opportunity to submit supplemental testimony based on the information obtained through the discovery.

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contracts. CBT claims that evidence of the emerging competitive environment is necessary for CBT to support its request for regulatory flexibility. With respect to the discovery requests at issue, CBT contends that MCI will likely follow its practice in other jurisdictions and soon saturate the CBT market with advertising targeted at large nonresidential customers. CBT states that the Commission must consider the competitive consequences for the entire three-year term of the alternative regulation plan and MCI's refusal to provide information regarding its marketing plans in other states and in CBT's service area hinder CBT's ability to present evidence showing competitive threats. CBT concludes that the attorney examiner's ruling must be reversed, and responses to the discovery requests compelled, in order for the company to demonstrate a significant level of competition in CBT's service territory.

- (3) On December 19, 1997, MCI filed a memorandum contra. MCI argues that the discovery requests posed by CBT, specifically as they relate to the state of competition in CBT's service territory, have nothing to do with the pertinent issues in this proceeding. MCI claims that its activities in other states have no relevance to this case or to the question of whether CBT now faces a level of actual competition within its own service area sufficient to justify the pricing flexibility it requests in its application. MCI also contends that it would be inappropriate to require it to disclose information about its intended operations, including its marketing strategies, under the guise of determining the state of competition in CBT's service territory. MCI states that CBT's attempt, through discovery in this case, to determine future market share losses from competitor-provided information is burdensome, inefficient, unnecessary, and not likely to produce reliable results. According to MCI, it would be far simpler for CBT to identify the number of customers or revenues it has lost at various intervals during the plan than for the Commission to attempt to gather data from all local competitors every three months. MCI claims that the relevant inquiry in this dispute is not which competitors get former CBT customers, but how many total customers CBT ultimately loses. MCI argues that, in any event, the attorney examiner properly concluded that the information sought by CBT through its discovery requests would offer no insight into the future level of competition in CBT's service territory.

- (4) We believe that the issue of future competition in CBT's service area is an important consideration in this proceeding for purposes of establishing an appropriate level of regulatory flexibility for CBT in a competitive environment. The Commission is concerned that the attorney examiner's ruling (that "the current status of MCI's operations, both outside of and within CBT's service area, as well as MCI's potential marketing strategies, are not relevant for the purposes asserted by CBT") may be interpreted as an indication that the Commission is not interested in the presentation of evidence that would assist in evaluating CBT's future market share. In fact, we are very interested in such information and we expect the parties (including the company and competitor intervenors) to present evidence and respond to questions regarding various alternatives available for determining market share during the term of the plan. In order to assist CBT's efforts in developing evidence regarding potential market share losses, we believe it is necessary to partially reverse the attorney examiner's December 8, 1997 ruling. Accordingly, MCI is directed to respond to the following discovery requests that were the subject of CBT's motion to compel: Interrogatories 15, 16, 20, and 21 - The information requested in these interrogatories regarding MCI's operations in other jurisdictions could lead to admissible evidence with respect to what CBT may expect from MCI's entrance into the CBT service area. MCI may, however, limit its responses to its operations within the Ameritech states and Kentucky. Interrogatories 22, 23, 36, 57, 58, and 59 - MCI's marketing and advertising in CBT's service area to date may lead to admissible evidence regarding the extent of immediate competitive pressure on CBT's local market share. MCI's responses may be limited to providing copies of published advertising and the content of public statements. Interrogatories 28, 29, 32, 33, 41, 43, 54, 55, and 56 - MCI's willingness to comply with all requirements imposed on NECs should require only brief responses and may be relevant. Therefore, MCI should respond to these interrogatories. Requests for Production 1 and 2 - MCI should provide the supporting documentation consulted, used, or referred to in

responding to the interrogatories indicated above. The attorney examiner's ruling regarding the remaining discovery requests will be affirmed. With respect to Interrogatory 14, which requests interconnection agreements throughout the United States, CBT can obtain such documents from appropriate regulatory agencies. MCI shall have seven days from the issuance of this entry to submit responses to the interrogatories and requests for production indicated above. CBT will be given an appropriate period of time, as determined by the attorney examiner, to file supplemental testimony based on MCI's discovery responses.

- (5) Although we are granting, in part, CBT's interlocutory appeal, we agree with the point made in the attorney examiner's entry certifying the appeal that it is unclear why CBT sought to compel responses only from MCI when CBT received similar objections from intervenors TCG and Time Warner. If, as CBT alleges, it needs information from competing providers to ascertain loss of market share, it is curious that the company pursued this line of discovery from only one of several competitors that are parties in this case. Since we are presented only with the motion to compel discovery from MCI, we need not at this time address whether the same ruling would have been appropriate for other competitor intervenors. However, CBT bears the burden of proving that it is unable to determine market share losses without data from competitors. We also wish to reemphasize our interest in the general issue of market share analysis for purposes of determining regulatory flexibility and we expect the full cooperation of CBT and competitor intervenors in providing all relevant information that the Commission or the staff deems necessary to assess CBT's ongoing market share during the term of the alternative regulation plan.

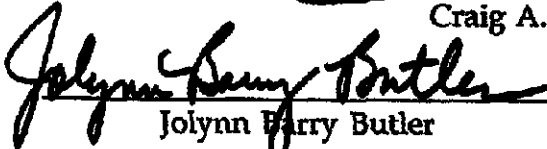
It is, therefore,

ORDERED, That CBT's interlocutory appeal is granted to the extent described above and MCI is directed to respond to the interrogatories and requests for production specified in finding 4. It is, further,

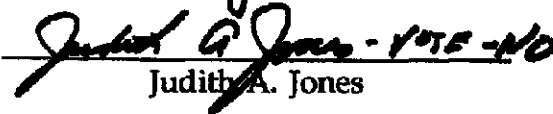
ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Craig A. Glazer, Chairman


Jolynn Barry Butler


Ronda Hartman Fergus

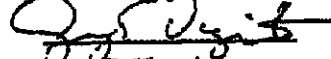

Judith A. Jones

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Entered in the Journal

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Gary E. Vigorito
Secretary