**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of the Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation. | **Case No. 93-487-TP-ALT** |
| In the Matter of the Complaint of the Office of the Consumers' Counsel, Complainant, v. The Ohio Bell Telephone Company, Respondent, Relative to the Alleged Unjust and Unreasonable Rates and Charges. | **Case No. 93-576-TP-CSS** |

# CONSUMER COALITION'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

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# CONSUMER COALITION'S[1] MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

## I. INTRODUCTION

On November 23, 1994 the Public Utilities Commission of Ohio (PUCO or Commission) issued its Opinion and Order (Order) in the above-captioned cases adopting a Stipulation and

[1] The Consumer Coalition consists of the Office of the Ohio Consumers' Counsel, American Association of Retired Persons (AARP), City of Cleveland, City of Columbus, City of Toledo, Edgemont Neighborhood Coalition, Greater Cleveland Welfare Rights Organization, Consumers' League of Ohio and the Western Reserve Alliance.

Recommendation (Stipulation) signed by many of the parties to these cases.[2] On December 23, 1994, pursuant to R.C. 4903.10, applications for rehearing of the Order were filed by several of the parties to these cases who had not signed the Stipulation.[3]

For the most part, these applications for rehearing simply repeat arguments raised on brief and already rejected by the Commission. The Consumer Coalition has already dealt extensively with these issues in our Post-Hearing and Reply Briefs, and we will not repeat here all the arguments therein.[4] Instead, in this document we will address new matters raised in the applications and arguments which depend either on erroneous interpretations of statutes and rules or on material misstatements or distortions of the record.

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[2] The Stipulation was offered on behalf of the Applicant Ohio Bell Telephone Company (Ameritech), the Office of the Consumers' Counsel (OCC), the American Association of Retired Persons, the City of Cleveland, the City of Columbus, the City of Toledo, the Edgemont Neighborhood Coalition, Greater Cleveland Welfare Rights Organization, Consumers' League of Ohio, the Western Reserve Alliance, the Committee for Fair Utility Rates, the Staff of the Public Utilities Commission of Ohio, the Ohio Library Council, the Ohio Department of Education, the Ohio Department of Administrative Services, and Bell Communications Research, Inc.

[3] Parties filing for rehearing on December 23 were Time Warner AxS (TW), Ohio Cable Television Association (OCTVA), Ohio Public Communications Association (OPCA), AT&T Communications of Ohio (AT&T), and Sprint Communications Company L.P. (Sprint). In addition, a joint application was filed by the IXC Coalition and MCI Telecommunications Corp. (IXC/MCI).

[4] Thus, for instance, we will not explicitly discuss in this memorandum such issues as Ameritech's commitments, or the price cap formula approved by the Commission. Rather, we hereby incorporate by reference our prior briefs in these cases.

## II. THE NEGOTIATION PROCESS

A number of parties argue that the Commission should have rejected the Stipulation because of alleged flaws in the negotiating process which produced it. TW, for instance, claims in its second assignment of error (at 2) that certain parties, including itself, were "excluded from the negotiation process," and that this supposed exclusion constituted a violation of due process. Interestingly, TW's entire discussion of this assignment of error is devoted to its attempt to demonstrate the alleged exclusion, while the claim that such an exclusion would constitute a violation of due process is ignored. Presumably this is because TW knows that, as we pointed out in our Reply Brief,[5] it is settled law "that the right to participate in a ratemaking proceeding is statutory, not constitutional, and that absent express statutory provision, a ratepayer has no right to notice and hearing under the Due Process Clauses of the Ohio and United States Constitutions." Consumers' Counsel v. Pub. Util. Comm. (1994), 70 Ohio St.3d 244, 248. Since the non-stipulating parties had no due process right to participate in this proceeding, there would have been no violation even if they had been totally excluded from negotiations (which, as demonstrated infra, they were not).

A related argument is raised by OCTVA, which states (at 6) that because none of Ameritech's competitors and potential

[5] Ameritech also made this point in its Reply Brief.

competitors signed the Stipulation, the Commission erred in finding that the Stipulation was supported by a wide range of interests. To begin with, we note that the Ohio Supreme Court has upheld the Commission's approval of a contested stipulation signed only by the applicant and Staff. Consumers' Counsel, supra. As a matter of law, then, the interests represented by the Signatory Parties are clearly wide enough to justify approval of the Stipulation in this case. Moreover, as a practical matter, we note that neither OCTVA nor the various interexchange carriers who have intervened in this case objected to the result in Western Reserve Telephone Company, Case No. 93-230-TP-ALT, Opinion and Order (March 30, 1994), where the Commission approved a stipulation which included only the Staff and a group of telecommunications providers, but no representatives of end users. Here, by contrast, the Stipulation is endorsed by the Company, the Staff, and by representatives of residence, non-residence, and governmental consumers. If the range of interests endorsing the stipulation in Western Reserve was sufficient, it is clearly more than sufficient here.

Finally, several parties take exception to the Commission's statement at page 10 of the Order that

> the record indicates that negotiations took place between various combinations of parties throughout the course of these proceedings (Staff Reply Brief at 3-4). While we prefer a negotiation process which is inclusive all the way up to the point that a stipulation is signed, we recognize that at some point, despite the best efforts and good faith of all parties, negotiations between certain parties may

> become unsuccessful and negotiations may break off. The fact that this happened in this proceeding is not reason for the Commission to conclude that there was not serious bargaining among capable, knowledgeable parties.

In particular, AT&T (at 12) and TW (at 8-10) argue that the Commission erred in relying on the Staff Reply Brief, which is not record evidence.

In fact, the conclusion that negotiations took place between various combinations of parties is not dependent solely on statements made in briefs. For instance, as far back as May 25, 1994, a group of intervenors, including, among others, every non-signatory party which has applied for rehearing, filed a Joint Motion seeking an extension of the procedural schedule. In support of that motion, the intervenors advised the Commission that they had already "initiated discussions among themselves and with Ameritech Ohio and the Commission's Staff," but "that they could not continue to devote time to settlement negotiations" unless the commencement of the evidentiary hearing was postponed. (Emphasis added.) Based upon this representation by the very same counsel who now claim to have been "totally excluded" from negotiations, the requested extension was granted. Entry (May 27, 1994) at 2. Indeed, TW's own witness, Dr. Lee Selwyn, testified that he personally "participated in one or perhaps several conference calls, and I did review various stages of the proposed agreement and discussed them with counsel." Tr. 47 at 26-27. The Commission was thus amply justified in finding that

"negotiations took place between various combinations of parties throughout the course of these proceedings," and the claim by TW (at 8) that the "evidence of record is that Time Warner was excluded from the negotiations" is disproved by the sworn testimony of its own witness.

## III. THE STANDARD FOR APPROVING THE STIPULATION

The standard which the Commission uses to judge the reasonableness of partial stipulations is well-known, and has been expressly approved by the Supreme Court of Ohio. Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm. (1994), 68 Ohio St.3d 559, 561.[6] Nevertheless, several parties raise questions about the standard used by the Commission in approving the Stipulation in this case.

We begin with AT&T, which makes the astonishing claim (at 4) that "this case was simply not appropriate for resolution via a stipulation of less than all of the parties." Not only is this statement without any basis in statute, rule, or case law, but it is also contrary to AT&T's own Initial Brief, which acknowledged (at 10-11) the applicability of the Commission's standard for stipulations. Of similar import is AT&T's complaint (at 5) that:

> Rather than analyzing the issue from the perspective of defining the best method of providing regulation for Ameritech given the facts developed at hearing, the *Commission has skewed its analysis to*

[6] The three-part standard is set forth at page 10 of the Order and need not be repeated here.

> address whether the stipulation presents an acceptable method -- and not necessarily the best method -- to provide that regulation and oversight.

(Emphasis in original.)

In response, we can only note that the analysis undertaken by the Commission is exactly the same analysis which the Ohio Supreme Court has approved repeatedly and which AT&T itself found perfectly unobjectionable in Western Reserve, supra. Clearly, AT&T's real complaint is not with the standard used by the Commission, but with the fact that, in applying that standard, the Commission had the nerve to issue an order of which AT&T disapproves.

TW (at 6-7) and IXC/MCI (at 10) complain that the Commission erroneously evaluated individual objections to the Stipulation against the weight of the entire Stipulation. This argument relies on an unnaturally constricted reading of the Order. We have no doubt that the Commission in fact weighed all of the arguments of the non-stipulating parties against the many benefits of the Stipulation, and properly found that the Stipulation met each of the criteria for approval.

## IV. THE STANDARD FOR APPROVING ALTERNATIVE REGULATION

TW and AT&T both argue (although for different reasons) that the Commission erred in granting alternative regulation to Ameritech. TW claims (at 11) that "[t]he Commission failed to

evaluate the reasonableness of the stipulated rates using the R.C. 4909.15 formula as the precedent to granting..." alternative regulation. This claim is without basis in statute (R.C. Chapter 4927 contains no such requirement) or fact (the Commission did in fact find the stipulated rates to be just and reasonable and within the range of reasonableness [Order at 17]).

AT&T, on the other hand, argues (at 8) that "the Commission has failed to make findings required by Section 4927.03 of the Ohio Code [sic]." R.C. 4927.03 allows the Commission to exempt Ameritech (or any other telephone company) from the provisions of R.C. Chapters 4905 or 4909, as to any service "except basic local exchange service," if the Commission finds that the exemption is in the public interest and either:

> (a) The telephone company or companies are subject to competition with respect to such public telecommunications service; [or]
>
> (b) the customers of such public telecommunications service have reasonably available alternatives.

AT&T complains that "[t]he Order grants Ameritech alternative regulation and exempts Ameritech from Section 4909 [sic] for local exchange and access services despite the fact that Ameritech has offered no evidence demonstrating that those services are subject to competition as required by law."

In making this argument, AT&T has apparently misunderstood the basis for Ameritech's application and for the Commission's order. Ameritech's application was filed pursuant to both R.C. 4927.03 and .04. The grant of alternative regulation for

noncompetitive services such as basic local exchange service[7] and access service was clearly made pursuant to R.C. 4927.04, which does not require a finding of competitiveness or of the availability of alternatives, but only that "the commission finds the use of the alternative method of establishing rates and charges to be in the public interest and... the applicant consents." Accordingly, the Commission acted well within the authority granted by Chapter 4927 when it approved the Stipulation.

## V. REVENUE REDUCTIONS

The Commission's discussion of this subject, found at pages 14-17 of the Order, dealt primarily with three issues raised by the non-stipulating parties:

* Whether the phase-in of rate reductions is reasonable;
* Whether the level of rate reductions is supported by the record; and
* Whether a "traditional" R.C. 4909.15 analysis was performed.

On each issue, the Commission properly rejected the arguments of the non-stipulating parties. In their applications for rehearing, the same parties have presented the same arguments. Since these parties have raised nothing new, and as these matters were fully considered by the Commission in its

[7] By its express terms, R.C. 4927.03 does not apply to basic local exchange service.

Opinion and Order, there is no basis to warrant reconsideration of these issues. Nevertheless, to clarify the record, we respond herein to the arguments explicitly addressed by TW, IXC/MCI, AT&T, and OCTVA in their applications for rehearing.

The first issue to be addressed is the phase-in of the stipulated revenue reductions. In our Post-Hearing Brief (at 16), we argued that the carriers were unaffected by the phase-in of rates to residence and non-residence customers. Likewise, the Commission found that "[t]hose who are complaining are unaffected by this provision." Order at 15. Now, IXC/MCI and AT&T argue in essence that if rates had not been phased-in, there would have been a larger pot of money, and if the "excess" money was used to reduce or eliminate the CCLC, then they would benefit, and thus, they are directly affected by the phase-in.[8] IXC/MCI at 4-6; AT&T at 18-19; see also TW at 10-11. Carried to its logical conclusion, each issue and each dollar of revenue affects everyone. The point, however, is that the customers whose rates are actually being phased-in have agreed to the phase-in, as the Commission found in its Order. Moreover, in the absence of a phase-in, while the initial reduction might very well have been greater, the eventual total reduction would probably have been less, thus producing higher rates for everyone in the end. The complaining parties have no standing to challenge the phase-in

[8] While making these arguments, they glibly state that the phase-in produces rates which exceed Ameritech's cost of service, without a single record citation.

and rehearing should be denied on this issue.[9]

The second issue relates to the level of the rate reductions. Essentially, it is argued by various parties that the "going-in" rates are too high. TW at 11; IXC/MCI at 5; AT&T at 16. This argument was properly rejected by the Commission at pages 15-16 of its Order. The analysis of each applicant on this issue is flawed because they compare OCC's best case of a $197,386,000 decrease (OCC Ex. 10, Rev. Sch. SUM 1-A [Chan]) and the Staff's best case (the $144-125 million decrease recommended in the Staff Report) to the Stipulation ($60.6 million present value decrease). They completely overlook the fact that the Company's best case was an increase of $125.6 million, and assume that Staff would have prevailed on every single issue! As noted in the Order, seven accounting issues alone reflect over $150 million in adjustments to revenue requirements. There was no guarantee that Staff or OCC would prevail on any of these issues, let alone on all of them. Further, a comparison to a one-time increase assumes that no rate increase would occur over the six-year term of the plan - something which is guaranteed only by the Stipulation itself.

Inasmuch as the non-signatory parties did not develop a revenue requirements recommendation, and have cited virtually no

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[9]OCTVA and AT&T still claim that the Commission is without authority to "order" a phase-in, based upon R.C. 4909.15 and Columbus Southern Power Co. v. Pub. Util. Comm. (1993), 67 Ohio St.3d 535. As discussed in our Reply Brief at p. 24 and the Order at 15, here the complainant agrees to the phase-in, and the Alt. Reg. case proceeds under R.C. 4927.04 -- not R.C. 4909.15.

evidence suggesting what an appropriate "going-in" rate should be, rehearing is not warranted on this matter and should be denied.

The third argument raised by TW, IXC/MCI and OCTVA is that no traditional R.C. 4909.15 revenue requirement analysis was performed. TW at 11-12; IXC/MCI at 6; OCTVA at 14. These parties cannot even agree among themselves as to why such an analysis should be performed, with TW describing it as a precedent to granting alternative regulation under R.C. 4927.04(A), while OCTVA claims that an R.C. 4909.15 analysis was required only in the complaint case. In any event, we are unable to find such a requirement in either R.C. 4905.26 or 4927.04(A), and even if there were such a requirement the record in this case would clearly support a finding that the stipulated rates are reasonable.

Accordingly, the Commission should deny rehearing on this issue.

## VI. REVENUE DISTRIBUTION

### A. Rate Reductions - Overall and Residence

A number of parties argue that the record does not support the stipulated distribution of the revenue decreases. Time Warner concludes that the revenue distribution is "unjustified based on the cost of service evidence in the record" but does not cite to any specific cost data to support this conclusion. TW at 12. AT&T states that "staff and Ameritech both concluded that

residential local exchange services were already being provided below cost," and Sprint alleges that "there ought to be no reductions in basic local service rates since they are already priced below costs." AT&T at 16; Sprint at 2. Like Time Warner, AT&T does not cite to cost studies in support of its conclusion. Sprint, however, cites to the Staff's fully distributed cost study (which, as Sprint has acknowledged, was criticized by OCC). Sprint thus ignores the fact that Staff's cost study was performed to test for cross-subsidies in this case, not to calculate the revenue distribution. See, e.g., Staff Ex. 27, Tr. 30 at 150-151, 175, Tr. 31 at 81-82, 124 (N. Soliman); Staff Ex. 30 at 22, Tr. 41 at 38-40 (Montgomery). As witness after witness has testified, LRSIC is the proper standard for determining whether services are priced below cost. See Tr. 20 at 152-153 (N. Soliman); Staff Ex. 30 at 22, Tr. 40 at 48 (Montgomery); Tr. 17 at 23, Tr. 18 at 9 (Co. witness Currie). Moreover, even if a fully distributed cost study could be used to calculate revenue distribution, the study performed by the Staff contained too many flaws to be used for that purpose. Tr. 36 at 63-64 (OCC witness Buckalew); OCC Ex. 22 at 6-11, 17-18 (Roycroft).

Even Ameritech itself claimed only that one rate component (the network access line) of basic local exchange service is priced below LRSIC in one region (Access Area D), and there was no testimony by anyone showing either that the usage component of basic local exchange service or basic local exchange service as a

whole is priced below LRSIC.[10] Thus, the claims that basic service rates are below cost constitute nothing more than wishful thinking by AT&T and Sprint.[11]

OCTVA acknowledges that the cost data contained in this record are inadequate, and, citing to GTE North, Inc., Case No. 87-1307-TP-AIR, Opinion and Order (November 16, 1988), at 50, criticizes the Commission for not applying a uniform percentage decrease to all classes of customers. OCTVA at 16. The GTE case, however, does not require the Commission to apply a uniform percentage in the absence of cost data. Instead, it stands only for the proposition that

> [t]his procedure is consistent with several previous decisions of the Commission in which the Commission has not been presented adequate cost data upon which to allocate revenue responsibility among various classes of service.

Id. (Citations omitted.) In this case, a number of parties, including OCTVA itself, had warned the Commission that one potential weakness of Ameritech's proposal was the possibility that Ameritech might be able to raise rates on inelastic services

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[10]The accuracy of even this limited claim was disapproved by OCC witness Roycroft. OCC Ex. 22 at 10.

[11] The attacks on the revenue distribution approved by the Commission ignore the testimony of Dr. Roycroft that "revenue reductions to every category are entirely consistent with the cost studies performed by Staff and Ohio Bell." OCC Ex. 22 at 10. Thus, in essence, parties attacking the revenue distribution are complaining that the distribution reflects the opinion of Dr. Roycroft (and of Company witness McKenzie [Co. Ex. 24AS.0 at 4-5], rather than that of Staff witness Montgomery. Clearly such a decision is squarely within the Commission's discretion.

in order to cross-subsidize its more competitive services. See, e.g., OCTVA Ex. 1 at 3, 48-49 (Hunt); TW Ex. 1 at 25-27 (Baldwin); Staff Report Addendum at 119-125; OCC Ex. 20 at 60-61 (Buckalew). Given this evidence, the Commission was clearly justified in targeting rate reductions to the most inelastic service provided to Ameritech's most captive customers.

Time Warner takes issue with the Commission's statement that market forces in the local exchange will remedy any imbalance in the overall revenue decreases, and points to the stipulated generic competition docket as a source of delay. TW at 13. Whether that docket will delay effective competition is completely speculative. Moreover, the events of the past two months contradict that speculation. In addition to Time Warner itself, MCI Metro and MFS Intelenet have also applied for certification to provide local exchange service in various Ohio exchanges since the stipulation in this case was filed. Thus Time Warner's speculation is demonstrably untrue.

### B. Rate Reductions - Carrier

The interexchange carriers have complained bitterly about what they perceive as an inadequate reduction in access charges. Their objections have focused mainly on the non-traffic sensitive carrier common line charge (CCLC). Initially, Staff had recommended elimination of the CCLC, and the IXCs have clung to this goal. "[I]f the stipulated overall revenue reductions had been of the appropriate magnitude, the CCLC could have been

eliminated without affecting the level of reductions to basic service customers." IXC/MCI at 6. AT&T expresses a similar grievance. AT&T at 16.

For the most part, these claims by the IXCs rely upon the flawed fully distributed cost study. "Access reductions ought to reflect the embedded cost analysis." Sprint at 2. "[S]taff and Ameritech both concluded that interLATA toll customer were already paying access rates which exceeded their fully distributed costs...." AT&T at 16. These statements must be taken with bowlfuls of salt, based as they are on a fully distributed cost study as opposed to a LRSIC study, and a flawed one to boot. AT&T goes much too far when it states, "It is undisputed that access services are priced to IXCs greatly above the incremental cost the LEC incurs to provide access services." Id. at 24. Again, it must be emphasized - there is no data in the record on the incremental cost of providing access. Accordingly, there is no basis for the IXCs' assertion that they are due greater access reductions than they received.

## VII. IMPUTATION

The IXCs and OPCA object to the imputation standard that the Commission approved in this case. The IXCs' major complaint focuses on the exceptions to the policy - namely, Ameritech's ability to exempt itself from imputation of tariffed rates if there are economies of scale or if competitors can provide the service more cheaply, and the 18 month exclusion for independent

company access charges. IXC/MCI at 10-12[12]; Sprint at 6-7; AT&T at 23-31. There is a concern too with the procedure for approval of rates. Id. OPCA's application for rehearing addresses Ameritech's exemption from imputation for pay telephones.

As to the exceptions, the IXCs are crying wolf before the wolf is at the door. IXC/MCI fears that "the exception will become the rule." IXC/MCI at 11. AT&T charges that "the imputation standard approved by the Commission will permit Ameritech to provide itself switched access at special access prices." AT&T at 25. These arguments ignore the fact that the Commission has said that it will hold the Company to a high burden of proof on the exception. Order at 36-37. Moreover, if the IXCs are dissatisfied with the Commission's actions in this regard, their remedy is a complaint pursuant to R.C. 4905.26. This is also true with respect to the IXCs' concerns about the perceived lack of notice and inability to participate in tariff approvals except through comments. They do not yet know whether this procedure will be ineffective. No wrong has been committed. A remedy should await the misapplication of this procedure and should be pursued under R. C. 4905.26.

The OPCA is in the same position. It was unable to

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[12] We note that in their response to Ameritech's Application for Rehearing filed in this case on December 8, 1994, IXC/MCI characterized the imputation policy approved by the Commission as "appropriate." The IXC Coalition and MCI Telecommunications Corporation Memorandum Contra Application for Rehearing of Ameritech Ohio (December 19, 1994) at 4. IXC/MCI does not explain how this policy became inappropriate when their application for rehearing was filed four days later.

demonstrate at hearing that the $.25 pay telephone coin rate is anti-competitive. Accordingly, the Commission was justified in ordering that the rate remain at $.25, for the public policy reasons acknowledged by the Commission in its Order (at 38-39).

Finally, with regard to the 18-month exclusion, it should be borne in mind that the purpose of the exclusion is to assist the independent operating companies, not to impair competition. While the IXCs may not care whether customers of MTS service offered by secondary carriers continue to receive service at just and reasonable rates, the Commission is certainly justified in ensuring that such service remains available.

The IXCs make much of the imputation policy approved for Cincinnati Bell, and urge the Commission to adopt the same policy for Ameritech. IXC/MCI at 12-14; Sprint at 6-7; AT&T at 28. IXC/MCI, for instance, asks rhetorically (at 3), "Why should Cincinnati Bell have a different imputation standard than Ameritech Ohio?", as though this were the only difference in the outcomes of the two cases. Perhaps IXC/MCI and the other IXCs have forgotten that Cincinnati Bell, unlike Ameritech, received a rate increase.[13] When the Commission adopted the Cincinnati Bell standard, it did not adopt an exclusive standard for the state of Ohio. It adopted a stipulation of the parties, which, as the IXCs well know, does not bind the Commission in subsequent

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[13] IXC/MCI also goes on to ask a similar rhetorical question with regard to CBT's agreement to provide intraLATA presubscription. Apparently IXC/MCI has also forgotten that CBT, unlike Ameritech, already has an affiliate which provides interLATA service.

proceedings. "Clearly, a stipulation in a proceeding is never considered a precedent for other cases." Columbus Southern Power Company, Case No. 91-418-EL-AIR, Entry on Rehearing (July 2, 1992) at 7.

The arguments against the imputation policy adopted in this case are repetitious and the Commission has repudiated them once. It should do so again.

## VIII. FULLY DISTRIBUTED COST STUDIES

OCTVA assigns as error that "[t]he Commission unreasonably and unlawfully failed to require the filing of a cost separations study based upon fully distributed costs in order to separate the cost of Cell 4 services from Ameritech Ohio's other services." OCTVA at 3, 9. In its discussion of this error, the OCTVA says little more than that

> [t]he Stipulation and Recommendation calls for the filing of a fully distributed cost study on the third and fifth anniversaries of the plan in a format agreeable to the Company and the Staff. (See Stipulation, par. 45). The Association is asking for a modification to the Stipulation and Recommendation so that the fully distributed cost study can be utilized as an appropriate safeguard.

OCTVA at 9.

What modification? How will it serve as a safeguard? The OCTVA does not say. This assignment of error must be denied.

## IX. CELL CLASSIFICATION AND PRICING

### A. Criteria for Competitive Cell Classifications

OCTVA decries the Commission's supposed failure to adopt objective criteria for competitive cell classifications: "[I]t is unreasonable and unlawful to require everybody to keep guessing...." about what constitutes competition and what does not. OCTVA at 11. To begin with, OCTVA points to no law which makes the Commission's decision to not decide on a particular formula unlawful. (We would note that neither Western Reserve nor Cincinnati Bell adopted such a formula.) OCTVA does not challenge the Commission's approval of Ameritech Ohio's classification of its current services (see id. at 10), so it would appear that this allegation is directed at future services. Whether any of the "reasonable, objective" standards mentioned by OCTVA would adequately address the competition as to those services is, of course, entirely speculative. This is clearly no ground on which to reject or to modify the Stipulation.

### B. Findings on Cell 4 Classifications

As part of its claim that the Opinion and Order fails to make findings required by statute and by the alt. reg. rules, AT&T argues that "the Commission makes no findings supporting its conclusion that [Ameritech's] services are properly categorized in Cell 4 as required." AT&T at 9. However, the Commission explicitly stated, "we find that the classifications into the various cells for all existing services are reasonable, including

the services in Cells 2 and 4." Order at 63. Nothing in the statutes or the rules requires the Commission to articulate a specific "finding" as to the cell classifications of each particular one of Ameritech's many services, whether Cell 1, 2, 3, or 4.

Further, AT&T's claim that "the record is devoid of... evidence..." that the Cell 4 services meet the Alternative Regulation Rule (A.R.R.) XII.E. criteria (AT&T at 9), is immediately contradicted by AT&T's recognition of the Commission's finding on the "poor quality" of that evidence. Id.; see Order at 64. The Commission found this "poor quality" evidence to be nonetheless adequate, particularly where none of the non-signatories specifically challenged the classification of any particular service.

### C. Review of Applications to Reclassify Services

While TW's Allegation of Error No. 14 apparently goes to the shortness of time for the Commission's review of reclassification (TW at 28), the argument in support of the allegation goes to two other subjects. First, TW states that "it is unclear how any interested party will have access to the information upon which it is allegedly able to comment..." within 14 days of the reclassification filing. Id. at 29. Second, TW alleges that "how this portion of the Order [at 64] comports or complies with the Signatory Parties' waiver request for Rules XIV(F) and XV(A)(B)(C)(D)(E) is equally unclear." TW at 29.

With regard to the first point, TW states that "only OCC and Staff will be provided with copies of such filings." Id. TW's position is the result of misreading two key portions of the Stipulation. The reclassification paragraph (Jt. Ex. 1 at 25) states:

> In seeking reclassification of a service into another cell the Company shall file an application with the Commission thirty days prior to the effective date of the change in cell classification. Documentation demonstrating that the service fits the criteria of the new cell classification will be provided with the application.

(Emphasis added.) Thus the application must be filed with the Commission, and the information will be provided with the application. TW's concern about not having access to this information is caused by a definitional portion of the Stipulation (Jt. Ex. 1 at 7):

> As used throughout this Stipulation... references to documents or information to be "provided" to the Staff mean that such documents or information shall be provided directly to the Staff and not filed with the Commission's Docketing Division...

(Emphasis added.) The lack of reference in the reclassification paragraph to provision to the Staff, as set forth in the definitional portion, means that the limitation about "providing" information only to Staff does not apply. Where documents are to be provided to Staff alone, such is specifically indicated in the text of the Stipulation. See, e.g., Jt. Ex. 1 at 43.

With regard to TW's second point (regarding rule waivers),

none of the waiver requests mentioned by TW are actually pertinent to TW's complaint about service reclassification, because A.R.R. XIV(H) applies to reclassification of services. (Neither is TW's point about Ameritech's Application for Rehearing pertinent, because Ameritech also dealt only with new services, not the reclassified services which are the basis for TW's claim of error.) A.R.R. XIV(H) allows for comments on reclassification; A.R.R. XIV(H) was not part of the Stipulation's waiver request. See Jt. Ex. 1, App. 1, Ex. I, p. 2.

Thus TW's arguments in support of this allegation of error (regarding reclassification of services) miss the mark. Even further from the mark are TW's arguments (at 30-31) with regard to classification of new services, because these have nothing to do with TW's actual allegation of error.

### D. Cell Pricing Flexibility

TW's Allegation of Error No. 15 reads, "The Commission erred in rejecting Time Warner and OCTVA concerns regarding pricing flexibility in each cell by stating summarily 'The alternative regulation rules specifically provide for pricing flexibility.'" TW at 4. Yet TW's own argument acknowledges that the Commission's discussion of TW's "concern" went well beyond the mere reference to the alt. reg. rules. See TW at 31. Thus it is unclear (from the allegation of error itself) just what TW is complaining about.

From TW's brief argument, however, it appears that TW's

"concern [is] regarding Cell 3 [services] containing basic network components [which] will be unaddressed for at least six years." TW at 32. (TW also refers to other "inappropriately classified services..." [id.] but does not deign to mention them by name. It is thus impossible to respond to TW's "argument" in this regard.)

TW acknowledges that "[f]or Cell 3 services which contain basic network components, the Commission attempts to appease Time Warner by stating that, 'we will explore this issue as a part of unbundling in the generic proceeding.'" Id. at 31. TW says that this is inadequate, because "even if the Commission carries out Staff's recommendations and orders the unbundling of Ameritech Ohio's network, this would have no effect on any Cell 3 service that should be reclassified into a more appropriate cell, since the Commission has locked services into cells for six years." Id. at 31-32. TW's argument demonstrates a fundamental misunderstanding of the nature of unbundling: It may be that a Cell 3 service "which contain[s] basic network components" will be "locked in" to Cell 3 for six years. Yet once the service is unbundled, the "basic network component" of the service will be able to be placed in Cell 1, while the unbundled non-basic network component of the service will be able to be classified in Cell 3. This entirely disposes of TW witness Selwyn's argument against Cell 3 pricing flexibility.

### E. Allocation of Joint Costs

The base of OCTVA's argument in support of its Allegation of Error No. 3 is that "[t]he Commission failed to explain why Staff witness Montgomery was wrong." OCTVA at 8. OCTVA then states that the Commission "must clarify this on rehearing." Id. The simple fact is that no such duty exists, and OCTVA cites to nothing which makes the failure to address the "errors" in a single witness' testimony unreasonable or unlawful. (We note, however, that OCC witness Roycroft did address the errors in Mr. Montgomery's analysis. See OCC Ex. 22.)

## X. COMPETITIVE ISSUES

### A. The Generic Docket

In the context of its allegation that the Stipulation is not in the public interest, OCTVA curiously appears to argue that rate reductions do not benefit the public interest. OCTVA at 6. Here, OCTVA's argument is dependent upon the proposition, completely unsupported by citation to statute or case law (from Ohio or elsewhere) that "[c]ompetitive issues must be resolved contemporaneously with the award of alternative regulatory relief." Id. at 7 (emphasis in original).

In this regard, OCTVA adds nothing to the arguments raised by others on brief, including OCTVA's complaint that "several intervenors have expended a great amount of resources in this case in the expectation that the Commission would address these competitive issues now." Id. (Emphasis in original). Given the

fact that neither the Western Reserve nor Cincinnati Bell alternative regulation cases ended with the competitive issues resolved, one might have expected some more significant attempt on these intervenors' parts to draw the Commission's attention to its "failure" in those cases, and its need to address those issues here, prior to briefing and application for rehearing.

Sprint goes even further than OCTVA. Sprint alleges that "the Commission should not adopt an incentive regulation plan for Ameritech Ohio until after the Company has made substantial headway in eliminating barriers to competition." Sprint at 5. Sprint ignores the fact that, here again, nothing in R.C. Chapter 4927 specifically requires this, as witnessed by the Cincinnati Bell and Western Reserve plans adopted by the Commission. Sprint points to nothing about Ameritech which requires a different standard. (Indeed, Sprint also fails to identify which of the issues which the Stipulation put in the generic docket would have to be addressed to constitute "substantial headway" in eliminating competitive barriers.)

Sprint's arguments here add nothing to those already considered by the Commission, except perhaps Sprint's statement that "[t]he purpose of incentive regulation is to provide the flexibility to local exchange carriers (LECs) to compete with services of non-regulated rivals." Id. Clearly, this is not the only purpose of alternative regulation (in Ohio, at least), and the Stipulation approved by the Commission in fact considerably reduces the flexibility originally requested by Ameritech.

Finally, we note that Sprint's statement that "paragraph 32 fails to make the outcome of the generic docket binding upon Ohio's largest LEC...." (id. at 6) is exaggerated. Per the Stipulation, only a few of the issues which may be a part of, and be resolved in, the generic docket are not to be binding on Ameritech, because these issues have been resolved in the Stipulation.

AT&T takes Sprint's concern and exaggerates it even further. AT&T's Allegation of Error C states "The Commission's Order Improperly Precludes Issues From Being Raised in the Generic Proceeding." AT&T at 10. This is simply untrue: As the Commission stated:

> [T]he fact that these specific issues, as applied to Ameritech, will not be addressed within the context of the generic proceeding should in no way hinder or limit the Staff's recommendation... It would be unfair to the Company to simply turn around in the generic proceeding and relitigate issues in that already complex proceeding.

Order at 57. This makes AT&T's claim (at 10) that "precluding" these issues "constitutes an improper rulemaking..." (without any citation to case law) simply another argument which misses the intended target. AT&T's claim of error should be rejected.

AT&T touches on this subject again within its Allegation of Error D.3, that the Stipulation violates important regulatory principles and practices. Here again AT&T's argument is dependent on its erroneous view that "[t]he Commission has stated that it will not re-examine issues... in the generic proceeding."

AT&T at 29. As the list of issues presented by AT&T ("minimum price floors, carrier access price levels, imputation and cell classification..." [id.]) shows, these are indeed issues which were litigated (and resolved) in this proceeding. Just because these issues were not resolved here in a fashion agreeable to AT&T is no reason to relitigate them vis-a-vis Ameritech.

TW asserts as error that "the Commission ignored the unfair burden imposed on other parties who fully litigated competition issues in the matter sub judice who, because of the Commission's failure to address those issues as they apply to Ameritech Ohio in this case, may be forced to relitigate those issues in the generic case." TW at 20-21 (emphasis added). In the first place, of course, the Commission did not "fail to address" these issues here -- it approved the fashion in which the Stipulation addressed them.

More importantly though, the emphasized language demonstrates a crucial error in TW's assertion that "[t]he Commission should expressly find in its Entry on Rehearing that as between the parties to this case, the issues on competition issues [sic] will not be relitigated in the generic proceeding..." Id. at 21, fn. 7. In this case, the competition issues were litigated in the context of the application of Ameritech Ohio (the largest LEC in this state) for a particular form of alternative regulation. It can fairly be said that what may be sauce for this big goose may not be sauce for the smaller ganders, LECs which are not seeking alternative regulation. Thus

TW's assertion that "[a]s to non-Ameritech LECs, those companies have no substantial rights which could be harmed by findings based on this record, and thus should not be heard to complain..." (id.) is simply self-serving. The Commission should not make TW's requested finding.

While on the one hand AT&T argues that it is unreasonable not to consider certain issues in the generic proceeding, on the other hand (in the context of its allegation that the Stipulation does not benefit ratepayers and the public interest) AT&T argues that

> [t]he mere institution of a proceeding involving all local exchange carriers to consider competitive issues is an inadequate substitute for what is needed in exchange for granting Ameritech regulatory freedom -- commitments to action.

AT&T at 20. In response, we can only point out - as the Commission itself noted (Order at 55) - that it was AT&T's own witness Rhonda Johnson who supported the institution of a generic proceeding.

Evidently as an example of a "commitment to action," AT&T resurrects Staff's milestone proposal. AT&T at 21. Here again AT&T ignores the fact that (as pointed out in the Consumer Coalition Joint Reply Brief at 41) it was the competitors themselves who stressed in cross-examination that under Staff's proposal, Ameritech Ohio could make a "business decision" to refrain from dropping the barriers identified as Staff milestones. See, e.g., Tr. 33 (Potter) at 65; Tr. 45 (Stroup) at

118, 127. AT&T is clearly grasping at straws in this regard.

Along similar lines, TW takes issue with two of the Commission's statements on competition; these arguments really amount to hair-splitting. First, TW says that the Commission's determination to promote competition in the state of Ohio "with all deliberate speed" (Opinion and Order at 55) is inadequate, because "the General Assembly did not qualify in any way the timing of the development of competition in Ohio." TW at 21. Yet the statement of public policy in R.C. 4927.02(A) became effective in March 1989; in the almost six years since then the General Assembly has not acted to indicate that the Commission's consideration of competition has been inadequate. TW's position appears to be that promoting competition is the only goal of the state, and a simple one at that; the truth is that it is complex, and only one of the state policies set forth in R.C. 4927.02(A). Further, in its zeal to make inappropriate comparisons to America's civil rights struggles, TW appears to have overlooked the Commission's statement that it will act to ensure that the barriers to competition will be eliminated "in as expeditious manner as possible." Opinion and Order at 56.

Next, TW quibbles with the Commission's statement of the "position taken by Staff... that the unreasonable barriers to competition should be eliminated..." (Order at 55), because Staff's testimony did not mention "unreasonable" barriers. TW at 22. Yet what TW really appears to be arguing against is the Commission's determination that "[w]e will be opening a generic

docket... to ensure that all unreasonable barriers to competition be eliminated in as expeditious a manner as possible." Order at 56 (emphasis added). This is because, according to TW, "[b]y definition, barriers to competition are not in the public interest and should be eliminated if competition is to flourish and benefit users of telecommunications services." TW at 22 (emphasis in original). The Commission should reject TW's allegation: In particular, a reasonable level of regulation can be seen as a "barrier" to competition, preventing absolutely free entry into the local exchange market; nevertheless, the public interest may demand that a reasonable level of regulation be retained and/or established.

Only AT&T applied for rehearing with regard to the Commission's decision to defer the intraLATA 1+ presubscription issue to the generic proceeding. (It should be noted that this is one small part of AT&T's allegation of Error D.2., that the stipulation does not benefit ratepayers and the public interest.) AT&T states boldly that "there is no rationale in the record for the Commission's conclusion..." AT&T at 22. Yet immediately thereafter, AT&T acknowledges that the Commission "rel[ied] on conclusory statements made by an Ameritech witness..." Id. AT&T says that this evidence "is merely a smokescreen thrown up by Ameritech..." Id. We note that the Opinion and Order sets out the arguments of the Consumer Coalition (Order at 53) and Ameritech (id. at 53-54) on this issue, which included an explanation of why the Ameritech resolution on Dial 1+ is

distinguishable from Cincinnati Bell and Western Reserve on this issue.

## B. Lifting of MFJ InterLATA Restrictions

We would first note that this is not an issue which was briefed by Sprint. Thus Sprint comes a little late to the table on this issue.

More importantly, though, Sprint's argument is simply insufficient to justify rehearing on this issue. Sprint states, "It would be more reasonable for the Commission to wait and evaluate the outcome of any legislation before it commits itself to a particular position." Sprint at 4. In fact, the Stipulation does not preclude the Commission from evaluating the outcome of any legislation.

Further, Sprint argues that the MFJ standard is absent from the conditions contained in the Stipulation. But the Stipulation does not require the Commission to abrogate the MFJ conditions: The conditions in the Stipulation are in fact in addition to those set forth in the MFJ.

TW, on the other hand, says that "it is inappropriate for the Commission to approve and adopt a stipulation which purports to bind the Commission to pursue this course of action." TW at 22-23. However, TW then attempts to dictate to the Commission the conditions under which it should "pursue this course of action." Id. at 23. While the factors listed by TW are certainly relevant to an evaluation of "the extent to which

Ameritech has indeed accomplished... the preconditions relating to the elimination of various barriers to competition..." (Order at 57), we submit that it is inappropriate for the Commission to be bound by a specific set of criteria. The public interest in ensuring that interLATA entry is only allowed when the conditions in the Stipulation are met would be better served through flexibility.

The arguments of the various applicants for rehearing with regard to the competitive issues are clearly inadequate to demonstrate that the Opinion and Order in this case was unreasonable and unlawful. Therefore, the Opinion and Order should stand.

## XI. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Post-Hearing Brief and Reply Brief of the Consumer Coalition, each application for rehearing filed in these dockets on December 23, 1994 should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the Office of the ohio Consumers' Counsel's Memorandum Contra have been served by first class mail, postage prepaid, or hand delivered to the following parties of record this 3rd day of January, 1995.

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