

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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.

Case No. 93-576-TP-CSS

The Ohio Bell Telephone Company,

Respondent.

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AMERITECH OHIO MEMORANDUM CONTRA MOTION TO ENFORCE PROVISION
PUBLIC UTILITIES COMMISSION OF OHIO

Ameritech Ohio submits this Memorandum Contra to Time Warner AxS' ("Time Warner") Motion to Enforce Provision of the Stipulation in this case. Time Warner's Motion seeks an order from the Commission enforcing a section of the Stipulation submitted in this case in which Ameritech Ohio agreed to withdraw several pending Supreme Court of Ohio appeals. Each of the appeals involved the issue of exclusive franchise rights. Time Warner claims that the Stipulation plainly stated that the appeals were to be dismissed upon approval of the September 20, 1994 Stipulation. Time Warner's Motion is both without merit and procedurally defective.

On November 23, 1994 the Commission issued an order which modified and clarified the Stipulation entered into by various parties in this case.¹ Time Warner and various other parties filed for rehearing on December 23, 1994 in an effort to overturn the November 23, 1994 Order. The tariffs implementing the initial rate reductions, cell classifications and pricing parameters were approved and became effective on January 9, 1995. On January 19, 1995 the Commission denied all of the applications for rehearing.²

Time Warner's Motion should be denied as being without merit. In its Memorandum Contra Time Warner states that the terms of the Stipulation plainly state that the pending appeals must be dismissed upon approval of the Stipulation.³ As a result Time Warner claims that Ameritech Ohio has not held up its part of the "bargain". The Stipulation stated that,

The Company agrees to withdraw its pending Supreme Court of Ohio appeals in Ameritech Ohio v. The Public Utilities Commission of Ohio, Case Nos. 94-988, 94-1246 and 94-1247 and to withdraw its Motion to Intervene and Suspend Application and Request for Hearing in the application of FoneNet Ohio, Inc., Case No. 94-961-CT-ACE.

Stipulation, p. 70. Contrary to Time Warner's claim no specific deadline for withdrawal is contained in the Stipulation or the Commission's Orders. Therefore, Ameritech Ohio cannot be found

¹ Opinion and Order (November 23, 1994).

² Entry on Rehearing (January 19, 1995).

³ Time Warner Motion, p. 4.

to be in non-compliance with a Commission Order which has, until only recently (January 19, 1995), been the subject of rehearing requests and which may be subject to further rehearing or an appeal.

The Stipulation also stated that in order to effectuate the agreement Ameritech Ohio agrees to withdraw its claimed exclusive franchise right for any person or company. Ameritech Ohio has and will in the future comply fully with Commission's Orders in this case. In fact, in Ameritech Ohio's Written Statement filed today in the Time Warner local exchange service certification case (Case No. 94-1695-TP-ACE) there is no mention of any claimed exclusive franchise right.

Ameritech Ohio is unwilling to dismiss the pending Supreme Court appeals while Time Warner and others have the opportunity to seek an appeal or further rehearing of the Commission's Orders. To do otherwise would subject Ameritech Ohio to the potential of dismissing the appeals as part of the "bargain" in the alternative regulation cases, only to have the Court overturn the "bargain". In the unlikely event this occurred Ameritech Ohio would be left without a remedy to be placed in the same position as before the appeals were withdrawn. For the other terms of the "bargain" the Commission has the jurisdiction to reverse the effect of the Orders. A good example is the initial rate reductions which could be removed by a future

Commission order. In the case of the withdrawn appeals the Commission has no jurisdiction to reinstate the appeals after they have been withdrawn.⁴ In this scenario only Time Warner would continue to receive the benefit of the "bargain" --- a "bargain" overturned as a result of Time Warner's own efforts.

Time Warner bases its Motion on the concept that the Commission's November 23, 1994 Order has been implemented and that nothing remains to be effectuated, except the dismissal of the appeals. In reality, there are a number of provisions contained in the Commission's Orders which must be implemented over a period of years. The provisions of the Order which will be implemented over a period of years are too numerous to list, but they include the local competition docket, rate changes, education funds, infrastructure commitments, fully distributed cost studies and public input surveys. There is no reason why dismissal of the appeals cannot be handled in the same manner.

⁴ The appeals are currently being held in abeyance at the request of the parties. Ameritech Ohio suggests that a request be made to take the cases off the Court's active docket until the appeal period has expired. Clearly, if no further rehearing or notice of appeal is filed then this issue is moot and the appeals will be dismissed immediately.

In addition, a motion to enforce the Stipulation is not the appropriate procedural vehicle to enforce the Commission Orders that have been issued. The Stipulation was not adopted in this case. The Commission's November 23, 1994 Order modified the Stipulation entered into by the Stipulating parties. Thus, Time Warner is really seeking to enforce the Commission's Order. As a result the appropriate forum for allegations that Ameritech Ohio has failed to comply with the terms of the Commission's Order is a complaint pursuant to Ohio Rev. Code Section 4905.26. In addition, Time Warner was not a party to the Stipulation and in fact has consistently challenged every aspect of the Stipulation and may file an appeal of the Commission's Orders. Time Warner should not be permitted to selectively seek to enforce one provision of the Orders it likes while at the same time seeking to overturn the Orders.

Ameritech Ohio requests that the Commission deny the Motion to Enforce filed by Time Warner. The Motion is procedurally defective since the Commission has issued Orders modifying the Stipulation. Time Warner's remedy is to file a complaint for allegedly failing to comply with the Commission's Orders. In addition, Ameritech Ohio is in compliance and fully intends to continue to comply with the terms of the Commission's

Orders in every aspect. Those Orders do not require the withdrawal of the appeals at this time.

Respectfully submitted,

AMERITECH OHIO

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Ameritech Ohio's Memorandum Contra Motion to Enforce was served upon counsel for all parties as shown on the attached service list by regular U.S. mail, postage prepaid, this 30th day of January, 1995.

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