BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Sprint Communications Company L.P.,	)	
Complainant,	)	
v.	)	Case No. 96-142-TP-CSS
Ameritech Ohio,	)	
Respondent.	)	

ENTRY ON REHEARING

The Commission finds:

(1) On February 13, as amended on April 8, 1996, Sprint Communications Company L.P. (Sprint) filed a complaint with the Commission alleging that Ameritech Ohio's (Ameritech) December 1995 bill insert and slamming protection program (called Prohibit PIC Change or PPC) are unjust and unreasonable. Specifically, Sprint contended that the bill insert was misleading and deceptive and that PPC gives Ameritech an undue or unreasonable preference or advantage, in violation of Section 4905.35, Revised Code. Additionally, Sprint alleged that Ameritech violated the terms of its alternative regulation plan by failing to seek Commission approval of the program offered in the bill insert.

(2) On September 11, 1997, the Commission issued an Opinion and Order in this case finding that Ameritech sent a less than accurate bill insert to its customers in the December 1995 billing cycle and such action was improper, unjust, and unreasonable. Moreover, the Commission found that Ameritech placed itself in an advantageous position and subjected new entrants in the intraLATA and local markets to an unreasonable disadvantage through the mass-marketing of its PPC in December 1995. Also, the Commission concluded that Sprint failed to sustain its burden of proof as to its claim that Ameritech violated its alternative regulation plan.

On the basis of those determinations and the statutory authority contained in Section 4905.381, Revised Code, the Commission prescribed the manner in which Ameritech should oper-

ate its facilities and PPC. Also, the Commission ordered Ameritech to cease and desist from disseminating less than accurate information about the program.

(3) Section 4903.10, Revised Code, states that, within 30 days after the entry of an order upon the journal of the Commission, any party who entered an appearance in a proceeding may apply for rehearing with respect to matters determined in that proceeding.

(4) On October 10 and 14, Ameritech, Sprint, MCI Telecommunications Corporation (MCI), and AT&T Communications of Ohio, Inc. (AT&T) filed applications for rehearing. AT&T requested, in the alternative, that clarifications be made. Upon review of the applications for rehearing, we note that Ameritech alleges error with the Commission's decision regarding Ameritech's liability, as well as the manner in which its PPC must now operate. Sprint, MCI, and AT&T allege error only with respect to three aspects of the Commission's ruling regarding the manner in which PPC must now operate. Sprint, MCI, AT&T, and Ameritech filed memoranda contra each other's application for rehearing. We will address Ameritech's assignments of error regarding the liability issue before turning to the assignments of error regarding the remedy.

(5) With regard to the liability question, Ameritech alleges that that the Commission erred in five respects (those being its first five assignments of error). First, Ameritech states that the Commission erred in concluding that the bill insert was "less than accurate and improper" because, in Ameritech's view, a fair and balanced reading of the bill insert reveals that it is not deceptive. Ameritech points to several parts of the bill insert and states that its non-technical text provides customers with a correct understanding of PPC.

Sprint and MCI state in response that Ameritech presented evidence during the hearing that PPC applied to the entire account (thus, the customer did not have the option to "freeze" only the selection of his interLATA provider) and its statements now, if accepted, that PPC only applies to interLATA service demonstrates that Ameritech knowingly misrepresented the program to its customers in December 1995. AT&T supports the Commission's finding that the bill insert

was less than accurate, noting that the determination is supported by the record.

(6) The first assignment of error by Ameritech raises the same argument that Ameritech made at the hearing. We indicated in our Opinion and Order that the brochure did not adequately inform customers that PPC applied to local service at the time the brochure was disseminated. Nothing that Ameritech has stated in its application for rehearing convinces us that this conclusion was incorrect. Also, Ameritech's characterization in its pleading of PPC not being "implemented" for all services does not alter the stipulated fact that Ameritech applied PPC to its customer's entire account at the time the brochure was disseminated. Thus, PPC applied to local, intraLATA, and interLATA services. Ameritech's possible plans to not apply PPC to local service in the future and the fact that PPC did not prevent a switch in local carrier or intraLATA carrier without the customer's knowledge are irrelevant to a ruling on the accuracy of the brochure. Moreover, we previously found that one sentence in the brochure was simply an incorrect statement. Ameritech has not raised anything in its application for rehearing to negate that conclusion either. For these reasons, we deny Ameritech's first assignment of error.

(7) Ameritech's second allegation of error states that the Commission erred in concluding that the dissemination of the bill insert was improper, unjust, and unreasonable. Ameritech believes that it cannot be found to have erred in disseminating the brochure simply because the brochure was less than accurate. Moreover, Ameritech alleges that the Commission's decision violates Ameritech's free speech rights because dissemination of the brochure was not improper and the Commission is intruding into the company's prerogative to communicate with its customers. Furthermore, Ameritech states that the Commission improperly found that Ameritech placed itself in an advantageous position, while subjecting new entrants in the intraLATA and local service markets to

an unreasonable disadvantage. Ameritech believes this finding was wrong because it is the customer who selects PPC, not Ameritech.

Sprint and MCI state in response that the Commission properly determined that Ameritech's dissemination of the brochure was incorrect. Also, they state that, as a result of this complaint and others, Ameritech now appears willing to not apply PPC on a total account basis. However, they state that Ameritech's change of plans does not mean that the program, as marketed in December 1995 was reasonable. Sprint, MCI and AT&T also reject Ameritech's commercial speech argument.

(8) We fail to see how Ameritech can honestly argue that its dissemination of a less than accurate brochure to its customers was proper, just, or reasonable. However, that is part of Ameritech's argument. We do not accept it. We fully considered these arguments in our Opinion and Order and find no reason to alter our conclusion. Ameritech raises also a constitutional argument concerning its right to commercial free speech, relying on the case of *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n.* (1980), 447 U.S. 557. The U.S. Supreme Court made clear in *City of Cincinnati v. Discovery Network* (1993), 507 U.S. 410, 434, that in applying its test from *Central Hudson*, the Court will "...first determine whether the speech concerns a lawful activity and is not misleading. If the speech does not pass this preliminary threshold, then it is not protected by the First Amendment at all." As the Court further explained, "[G]overnment may regulate commercial speech in ways that it may not regulate protected noncommercial speech" (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. at 770-772). Also, government may regulate commercial speech to insure that it is not false, deceptive or misleading (*Virginia Pharmacy Bd.*, 425 U.S. at 771-772) and to insure that it is not coercive (*Discovery Network*, 507 U.S. at 410, citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 457). "To permit government regulation on these grounds is consistent with this Court's emphasis on the First Amendment interest of the listener in the commercial speech context. A listener has little interest in receiving false, misleading, or deceptive commercial information...." *Discovery Network*, 507 U.S. at 433 (citations omitted). Ameritech's second assignment of error is denied.

(9) In Ameritech's third assignment of error, it contends that the Commission improperly found fault in Ameritech for a program "which has never been implemented and, therefore, has had no impact in the intraLATA and local exchange service markets". Ameritech contends that, because PPC was only applicable to the customer's choice of an interLATA carrier (since that was the only market which was competitive in 1995), PPC was not implemented for the intraLATA or local service markets. Also, Ameritech points out that it has not affirmatively implemented PPC to prevent unauthorized changes to local exchange services, given all of the complaints and questions in the Ameritech region over PPC. Ameritech notes that PPC is in place for toll service, but will not be in place for intraLATA or local service until it is competitive.[1]

Sprint and MCI state in response that, regardless of how Ameritech might now be willing to apply PPC, the Commission made the appropriate determination that PPC should not be offered when there is no possibility of slamming. AT&T concurs, pointing out that Ameritech's claim that PPC was not implemented for intraLATA and local service is inconsistent with the stipulated facts.

(10) The record in this proceeding clearly shows that Ameritech accepted numerous requests from its customers for PPC before and after the bill insert was sent. PPC was applied to the customer's entire account. Ameritech states in its application for rehearing (page one) that the Commission should not nullify the desires of over 347,000 Ameritech customers. Obviously, PPC was actively in place for a customer's entire account at the time the brochure was disseminated; it just so happens that PPC did not have to be triggered for the customers' intraLATA or local service because no competition existed in either of those segments of the market in December 1995.

Sprint and MCI appear to believe that Ameritech has decided not to apply PPC to local service. Indeed, Ameritech's January 15, 1997 letter to the Commission appears to indicate such. However, that does not alter the fact that PPC applied to the entire account at the time of the facts giving rise to this complaint. We see no reason to reverse our ruling even if

[1] Also, Ameritech states that intraLATA PPC requires no system changes, but local PPC will require system adaptations.

Ameritech might be altering the nature of PPC now or in the future. Moreover, we are not certain that Ameritech is, in fact, voluntarily altering PPC so that it does not apply to local service. In Ameritech's sixth, seventh, and tenth assignments of error (addressed in more detail below), Ameritech states that the Commission erred in requiring the "unbundling" of PPC and in requiring Ameritech to recontact all PPC customers. We fail to see how Ameritech can claim error in those rulings if, in fact, Ameritech already planned to "unbundle" PPC so that it did not apply to local service and, thus, was altering the program that its customers had selected. Ameritech seems to be providing conflicting statements about its intentions; nevertheless, those statements do not alter the evidence in this case or justify another result.

(11) In Ameritech's fourth assignment of error, it contends that the Commission erred in finding that Section 4905.35, Revised Code, applied to the facts in this case and that Sprint met its burden of proof. In Ameritech's view, Section 4905.35, Revised Code, prohibits a utility from unreasonably discriminating against one customer or group of customers vis-à-vis another customer or group of customers. Additionally, Ameritech states that "it is axiomatic that the Commission lacks jurisdiction to referee this dispute between competitors", citing *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, and rejecting the applicability of *Allnet Services Communications, Inc. v. Pub. Util. Comm.* (1988), 38 Ohio St. 3d 195, 196. Ameritech also states that the Commission should note an Illinois appellate decision, which addresses a similar Illinois statute.

Sprint and MCI state in response that Section 4905.35, Revised Code, was intended to prevent utilities from using their unique position as monopoly service providers to subject persons, firms, corporations, or localities to any unreasonable disadvantage. Also, they state that there is nothing in the statute that limits its application to similarly situated customers and, therefore, its application to these facts is not precluded. AT&T states that the Illinois decision is consistent with the Commission's decision and supports a denial of Ameritech's application for rehearing.

(12) We fully addressed this argument by Ameritech in the Opinion and Order. Ameritech simply makes the same allegations.

Section 4905.35, Revised Code, is, in many ways, the mirror of Sections 4905.33 and 4905.22, Revised Code, which require reasonable and nondiscriminatory action by utilities. A preference given to one set of customers in this case discriminated against both the competitor and its customers. Moreover, although Ameritech cites to the Ohio Supreme Court's dicta in *Dayton, supra*, we note that the dicta cited predated the court's decision in *Allnet, supra*, the legislature's adoption of Section 4927.02, Revised Code, and the legislature's grant to the Commission of the powers of a state commission under the Telecommunications Act of 1996 in Section 4905.04, Revised Code. The dicta of *Dayton* clearly needs to be read in the context of the time and appears to have been superseded by the statutes and case cited above. We affirm our ruling and deny Ameritech's fourth assignment of error.

(13) Next, Ameritech alleges that the Commission erred by not addressing its earlier argument that Section 4905.26, Revised Code, is only a procedural vehicle that does not create an independent basis for liability. Ameritech states that, in light of the fact that Section 4905.35, Revised Code, is not applicable to this case (see the fourth assignment of error above) and that Section 4905.26, Revised Code, is not a proper basis for liability, there is no statutory basis to find against Ameritech.

Sprint and MCI state only that it cannot be error for the Commission to fail to address this argument when it did not rely upon Section 4905.26, Revised Code, when reaching its decision.

(14) We did not rely solely upon Section 4905.26, Revised Code, in reaching our decision in this case. We found that Ameritech sent a less than accurate bill insert to its customers in the December 1995 billing cycle and such action was improper, unjust, and unreasonable. Moreover, we found that Ameritech placed itself in an advantageous position and subjected new entrants in the intraLATA and local markets to an unreasonable disadvantage through the mass-marketing of its PPC in December 1995. Also, on the basis of these findings, we determined under our authority in Section 4905.381, Revised Code, that specific modifications were needed to Ameritech's PPC program. We find no error in not specifically commenting upon this portion of Ameritech's arguments in our Opinion and Order because we, nevertheless, rejected it (implicitly

by making the findings that we did and explicitly on page 34, when we rejected all arguments raised by the parties but not specifically addressed). The fifth assignment of error by Ameritech is denied.

(15) The remaining assignments of error all relate to the Commission's remedy in this case. Ameritech's sixth assignment of error states that the Commission improperly requires that PPC apply only to interLATA carrier selections until the customer affirmatively selects PPC for intraLATA or local service. Ameritech states that this directive is contrary to the express wishes of the customers who have enrolled in PPC. Further, Ameritech claims that it "defies common sense" to suggest that customers would want to protect one aspect of their service, but not another. Ameritech supports this contention by pointing to the testimony of its expert and to a determination made by the Minnesota Public Utilities Commission.

Sprint, MCI, and AT&T support the Commission's determination that PPC should only be available to protect a customer's provider choice when competition for that service is occurring. Sprint and MCI posit that Ameritech can only want PPC to apply before there are options for the customers because it would subject its upcoming competitors to an unreasonable disadvantage.

(16) Interestingly, we note that, by raising this allegation of error, Ameritech acknowledges that PPC is applicable to and impacts its customers' intraLATA and local service, something that Ameritech denies in its third assignment of error. The obvious contradiction in the same pleading only reinforces the accuracy issue and need for the Commission's decision in this case. In any event, our directive to separate PPC and apply PPC only to interLATA services until the customers select PPC for another service was crafted based upon our conclusion that the bill insert was misleading to customers and that PPC should not be applicable to services for which no competition yet exists. We do not intend to prohibit customers from selecting PPC by our conclusion; rather, we want customers who wish to have PPC protection to be able to select it at the appropriate time. We have only limited PPC's availability to when the actual need for PPC arises, given our determination that to allow otherwise can cause an unreasonable advantage for Ameritech. We still agree with those conclusions and find

no reason to alter them. Of course, Ameritech must review this issue with the Commission staff before such notice is circulated, in order to avoid the problems which gave rise to this case. Ameritech's sixth ground for rehearing is denied.

(17) In Ameritech's next assignment of error, it states that the Commission should not have required Ameritech to comply with the order particularly when there is nothing in the record to show that: (1) Ameritech can do what is necessary to comply with the order, (2) Ameritech can do so within 120 days, or (3) Ameritech's costs of such compliance. Ameritech focuses on the "unbundling" aspect of the order in particular. Ameritech states that the order requires the company to implement a different program and Ameritech has now determined that extensive work will be required to implement the order.

Neither Sprint nor MCI believe that the Commission's order requires Ameritech to provide PPC. Sprint and MCI state that the Commission does have authority under Section 4905.381, Revised Code, to impose requirements under a 120-day deadline. Also, they state that, if Ameritech cannot meet that deadline, it can petition for relief.

(18) Sprint and MCI correctly recognize that we have statutory authority to impose requirements upon Ameritech. Furthermore, not only was there evidence in the record to indicate that Ameritech can "unbundle" PPC to apply it separately for interLATA, intraLATA, and local services, there was also evidence in the record to demonstrate that at least one of Ameritech's sister companies had already done so. Upon cross-examination, Ameritech's own witness stated that the unbundling could be done, the billing system could be altered in 90-120 days, and Ameritech can manually limit the application of PPC in the interim. We cited that evidence in our order (page 11, citing Tr. I, 193) and it was upon that basis that we stated that Ameritech should unbundle PPC within 120 days of our order. Thus, Ameritech is incorrect in stating that there was no evidence upon which we could base the unbundling aspect of our remedy. Ameritech's seventh assignment of error is denied.

(19) In Ameritech's last three assignments of error, it alleges that the Commission erred by requiring Ameritech to provide

information to its PPC customers by letter and on their bills. First, Ameritech contends that its prior brochure was proper and it need not develop another for Commission review. Ameritech reiterates its commercial speech rights argument and also states that it should not have to recontact all customers who currently have PPC. Second, Ameritech states that the notice that we are requiring to be included in the customer's bill is vague and incapable of proper enforcement.

Sprint and MCI state in response that another customer notice is reasonable since the bill insert was less than accurate and, thus, its anticompetitive effect can be reversed. Also, they state that the Opinion and Order amply explains the type of information that must be included in the customer's bill.

(20) We continue to disagree with Ameritech's claim that the bill insert was accurate. Given that conclusion, we believe that it is very reasonable to require Ameritech to inform its PPC customers about the fact that PPC will not be applicable to their entire account. Quite simply, they should know. Since Ameritech explained that it cannot readily identify which PPC customers selected PPC as a result of the 1995 brochure, it is only reasonable that all PPC customers be given complete and accurate information. Moreover, it was readily apparent from the evidence in this record that often customers do not remember that they selected PPC. Thus, we found that basic information for those subscribers who selected PPC should be provided and such should be provided in their bills. Our Opinion and Order was not vague on this point. We continue to find these aspects of our decision to be reasonable. Ameritech's eighth, ninth, and tenth assignments of error are denied.

(21) Sprint and MCI jointly raised three assignments of error, the last of which is the same as that raised by AT&T. Sprint and MCI first state that the Commission erred because it did not prohibit Ameritech from offering PPC to local and intraLATA customers until six months after the advent of competition in each of those markets. Essentially, Sprint and MCI believe that what the Commission did order is insufficient because effective competition will not exist at the time of a competitor's first commercial call (in the case of the local service market) or at the time of intraLATA presubscription (in the case of

intraLATA services). Sprint and MCI believe that the Commission is allowing the same hurdle it found unreasonable to exist at another point in time.

Ameritech states in response that the Commission correctly understood that delaying or suspending the application of PPC would create the opportunity for slamming the very customers who want protection. Ameritech believes that a six-month moratorium would foster customer abuse, not competition.

(22) Sprint and MCI repeatedly have stated to this Commission in this case that Ameritech should not be permitted to use PPC as a device to retain market share by locking in customers before they have options. We agreed. However, Sprint and MCI also want PPC delayed for six months after customers have options apparently because Sprint and MCI believe that six months is a reasonable period of time for the new players to begin their marketing campaigns. We indicated in our decision that we are unwilling to create the opportunity for slamming by delaying or suspending the application of PPC. Even though other commissions or governmental agencies may believe otherwise, we still believe our decision on this point appropriately balances the interests of consumers and competitors.

We also disagree with the statement by Sprint and MCI (page six of their joint application for rehearing) that PPC should be delayed until there is evidence that a customer has affirmatively made an alternate provider selection. First of all, that proposal would preclude the availability of PPC for all customers who did not select another provider (other than Ameritech) for their intraLATA and local services, while at the same time, exposing those same customers to slamming. We do not see a reason to allow such to occur. After all, we have repeatedly stated that we agree with the concept of allowing customers to have additional protections against slamming, so long as the protections are appropriately crafted. Moreover, it is clear that customers want this type of protection. Ameritech will not automatically have an unreasonable advantage if, for example, one of its customers selects PPC for Ameritech's intraLATA services at the time when competition for intraLATA services has begun (as opposed to having to wait for a period of time, such as six months). Obviously, if

a customer selects Ameritech's PPC at the time of competition, the customer wants the protection afforded by PPC to apply to Ameritech's intraLATA service, regardless of whether the customer might agree to change carriers at some other point in time or regardless of whether all competitors have actively marketed their services to that customer. The first assignment of error by Sprint and MCI is denied.

(23) In Sprint's and MCI's second assignment of error, they contend that the Commission should have required Ameritech to submit, to the Commission for review, all information that Ameritech intends to disseminate about PPC. Sprint and MCI state that there is no reason to believe that Ameritech will provide accurate information and there is no reason to require competitors to prosecute complaints about misleading information when the Commission could prevent it by prior review.

Ameritech states in response that to require the submission of all PPC information is clearly uncalled for and would implicate Ameritech's commercial speech rights.

(24) We required Ameritech to provide us with its PPC information for its intraLATA presubscription and a notice for all current PPC customers (both for our review and approval). However, what Sprint and MCI are seeking is much broader in scope. Essentially, Sprint and MCI want the Commission to preview all PPC information that Ameritech could provide to its customers for an indefinite period of time. This request presumes that Ameritech will not comply with our order to provide full and adequate information about PPC, including how customers will be able to change carriers once they have selected PPC. We now agree that it is worthwhile to have staff preview all Ameritech PPC customer information before such information is disseminated and/or the marketing is implemented. We impose this requirement upon Ameritech for a period of one year from the date of this Entry on Rehearing. Simply put, we believe that this directive is necessary to help avoid similar problems from developing in the future. We still require Ameritech to meet with the chief of the Commission's Public Interest Center to discuss the details of how this review process can be carried out. Nothing in this Entry on Rehearing should be construed to mean that we have altered our conclusion to require Ameritech to submit a notice

(which will be sent to all current PPC customers) or to require Ameritech to include information about PPC in its intraLATA presubscription notice. The second assignment of error raised by Sprint and MCI is granted.]

(25) In Sprint's and MCI's final assignment of error, they argue that the Commission should have required Ameritech to provide a list of PPC customers to competitors who request it. AT&T also raised this assignment of error. Sprint and MCI state that provision of a list is not burdensome and will help reduce the burden on Ameritech by avoiding three-way conference calls. AT&T states that Ameritech will have a competitive advantage when it begins to market its intraLATA services because it will have knowledge of the customers who have a propensity to select PPC and, thus, the list will level that playing field.

(26) We recognized that Ameritech, by virtue of it owning the equipment in which the carrier selection information is stored, has a unique ability to assess what customers have which carriers and what customers have selected PPC. We specifically determined in our Opinion and Order that Ameritech should be prohibited from using information that it obtains as the owner of the bottleneck equipment (i.e., which customers have PPC or which customers have requested a carrier change) for purposes of marketing its services or an affiliate's services. This means that such information cannot be shared with or utilized in any way by Ameritech's marketing personnel or affiliate marketing personnel. We have precluded an advantage from developing by our explicit prohibition on that point.

In our Opinion and Order, we did not require Ameritech to provide PPC customer lists to its competitors. We felt that it would be burdensome and unnecessary, since the competitors can ask potential customers if they have PPC. We believe that customers will be able to readily answer that question because we have required Ameritech to provide regular updates to its customers who have selected PPC. We continue to believe that ruling is correct. Sprint, MCI, and AT&T have not raised any arguments that we did not consider before.[2]

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2 We do, however, believe that competitors could address the provision of PPC customers lists when they enter into negotiations with Ameritech for a slamming protection service agreement so that the competitor can offer its own slamming protection program to its customers.

It is interesting that Ameritech is now willing to provide PPC customer lists. However, Ameritech's proposal would make the requirement apply to all carriers, not just it. We do not believe that it is appropriate at this time to comment upon this proposal. We will address this matter upon receipt of the FCC's ruling. The parties should keep this Commission informed of the status of that proceeding.

It is, therefore,

ORDERED, That the September 11, 1997 Opinion and Order is clarified to the extent set forth above and the applications for rehearing of Ameritech, Sprint, MCI, and AT&T are granted and denied to the extent set forth above. It is, further,

ORDERED, That this case is closed of record. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

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Entered in the Journal
NOV 6 1997
A True Copy
Gary E. Vigorito
Secretary

SERVICE NOTICE PAGE 1

CASE NUMBER 96-142-TP-CSS

CASE DESCRIPTION SPRINT COMMUNICATIONS/AMERITECH OH

DOCUMENT SIGNED ON November 6, 1997

DATE OF SERVICE Nov. 7, 1997

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