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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Ordered Investigation of the Existing Local Exchange Competition Guidelines.	)))	Case No. 99-998-TP-COI
In the Matter of the Commission Review of the Regulatory Framework for Competitive Telecommunications Services Under Chapter 4927, Revised Code.	)))))	Case No. 99-563-TP-COI

AMERITECH OHIO'S REPLY COMMENTS

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Introduction and Executive Summary

Ameritech Ohio, by its attorneys, and pursuant to the Attorney Examiner's Entry issued on May 15, 2001, submits these Reply Comments in response to the initial comments filed by various parties and interested entities in the above-captioned proceedings. At the request of the Commission, Ameritech Ohio provides below a brief summary of some of its Reply Comments. For ease of reference, the comments are arranged in the numerical order of the proposed Administrative Code number. For example, proposed rule 4901:1-6-01 is referred to as proposed "Rule 1".

Rule 1- Definitions - Ameritech Ohio encourages the Commission to adopt the exact definition of "Basic Local Exchange Service" contained in Section 4927.01, Ohio Revised Code. Any extension of the definition beyond what is explicitly included in the statute is beyond the Commission's supervisory powers and contrary to the intent of the General Assembly.

Rule 3 - General Provisions - Ameritech Ohio encourages the Commission to adopt a rule that would permit ILECs, or their separate CLEC affiliates, to provide local exchange service outside of the ILEC in-territory serving area without being subjected to the discrimination and affiliate transaction requirements.

Rule 4 - Telephone Company Certification - Ameritech Ohio resubmits its proposal regarding carrier of last resort obligations as a reasonable and viable alternative.

Rule 9 - Retail Service Tariffing Requirements - Ameritech Ohio agrees with the Competitive Carriers' Group that the Commission should adopt a simplified process for compliance with the structuring requirements. Specifically, Ameritech Ohio recommends that the Commission modify the proposed rule so as to require the least amount of information that would identify a service within one of the two tiers.

Rules 10 and 11 – Tiers 1 and 2 - Ameritech Ohio urges the Commission to reject the Competitive Carriers Group's demand for preferential treatment and, instead, adopt rules that would reflect regulatory parity for comparable services in order to promote a competitive marketplace. In addition, Ameritech Ohio encourages the Commission not to subject Tier 2 services to MTSS guidelines. These services are discretionary and are not, therefore, essential in the provisioning of basic local exchange service.

Rule 16 - Interconnection Standards - The Commission should adopt or incorporate by reference the FCC's rules wherever possible to avoid creating new obligations for both CLECs and ILECs that may be inconsistent with the Telecommunications Act of 1996 and the authority granted to the states by the Act.

Rule 18 – Collocation – Ameritech Ohio urges the Commission to reject the Competitive Carriers Group's proposals regarding collocation as they are inconsistent with the Act, the FCC's rules, and this Commission's prior rulings. The Commission should retain the simple, straightforward and workable approach set forth in the proposed rules.

Rule 19 - Compensation for the Transport and Termination of Telecommunications Traffic - Ameritech Ohio urges the Commission to modify the proposed rule to require that, in order to be eligible for the tandem rate, a CLEC demonstrate that it is actually terminating calls to a geographic area comparable to the ILEC's tandem switch and that the CLEC switch is performing tandem functionality.

Rule 24 - UNEs - Ameritech Ohio encourages the Commission to focus on the establishment of a performance requirement on all LECs relating to the exchange of information and processing of orders rather than on a technology or OSS process requirement.

Rule 27 - Forward Looking Economic Costs - Ameritech Ohio reiterates its Initial Comments that TELRIC related rules are subject to modification based on the outcome of pending legal challenges to the FCC's rules.

Rule 29 - Resale – The Commission should reject Sprint's suggestion that other services be made available independent of underlying basic dial tone. Sprint's position is inconsistent with the Act and the FCC's rules.

Rule 32 - Discrimination - Ameritech Ohio recommends that the Commission not adopt this rule, which is contrary to the Act and extends beyond the Commission's jurisdiction. Rather, the Commission should mirror the FCC's comprehensive affiliate transaction, CPNI, and non-discrimination rules.

Payphone Comments – Ameritech Ohio agrees with all of the commenters, except the Payphone Association of Ohio, that the issues raised by PAO already had been, or should be, resolved in the Commission's pending payphone docket, Case No. 96-1310-TP-COI.

Rule 1 - Definitions

(A) Basic Local Exchange Service - The definition of "Basic Local Exchange Service" ("BLES") should mirror recently amended Section 4927.01, Ohio Revised Code. Any extension of this definition beyond what is explicitly included in the statute is beyond the Commission's supervisory powers and contrary to the intent of the General Assembly.

Therefore, the Consumer Parties'[1] suggestion that the definition of BLES be broadened to include Caller ID blocking, data capacity, or any other "public interest" service must be rejected. This issue is not open for debate since the General Assembly has already decided the issue.

[1] The Consumer Parties' are the Ohio Consumers' Counsel, AARP, the Appalachian People's Action Coalition, Communities Untied For Action, Edgemont Neighborhood Coalition, the Empowerment Center of Greater Cleveland, the City of Columbus and the City of Toledo.

Rule 2 - Applicability of Retail Service Rules to Providers of Local and Interexchange Service

(C) Ameritech Ohio supports CBT's recommendation that ILECs be permitted to opt into an off-the-shelf alternative regulation plan, as described in Section 4901:1-6-03(B)(5) under a 0-day notice. Such a procedure is reasonable and consistent with the intent of the statute.

Rule 3 - General Provisions

(F) In its initial comments, Ameritech Ohio proposed changes to this rule that would permit ILECs, or their separate CLEC affiliates, to provide local exchange service outside of the ILEC in-territory serving area without being subjected to the discrimination and affiliate transaction requirements set forth in proposed Rule 4901:1-6-32, Ohio Administrative Code. In support of its proposal, Ameritech Ohio recited the business model developed by its ILEC affiliate, Southwestern Bell Telephone Company, for providing facilities-based service outside of its in-territory serving area in Texas. Ameritech Ohio asked the Commission to join the Texas Commission and numerous other states that have adopted similar rules to allow ILECs to operate outside of their traditional service territory as any other non-affiliated CLEC. Ameritech Ohio, p. 10.

Subsequent to filing its initial comments on April 16, 2001, additional information has been provided to this Commission and in the telecommunications trade press, which shows just how common it is in other states for ILECs to provide service as CLECs outside of their traditional serving areas. According to an article published in Telecommunications Reports (April 30, 2001) "almost all large and midsize ILECs have launched CLEC units to offer out-of-region services," including 14 of the 15 largest ILECs in the country. Id., at 6. Some of these ILECs are entering neighboring ILEC serving territories through a process commonly referred to as "edge-out," where the ILEC extends its in-territory network to serve the customers in contiguous out-of-territory exchanges. The ILECs market services under their existing brands in order to reach the new customers. Id.

During a recent arbitration hearing, an employee of Alltel Communications, Inc. ("Alltel") described how its affiliate, Alltel Pennsylvania, employs the "edge-out" strategy in Pennsylvania. See In the Matter of Ameritech Communications Services, Inc.'s Petition for Arbitration Pursuant to Section 251(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with The Western Reserve Telephone Company, Case No. 01-31-TP-ARB, Transcript, Volume III, at 31-37, filed May 7, 2001. Alltel Pennsylvania builds out its facilities from switches located in its existing territory into the contiguous exchanges of Verizon and uses its in-territory switch and other existing facilities (*e.g.*, its SS7 network) to compete for Verizon's customers. Id., Tr. Vol. III, at 32-34.

Alltel has not restricted its efforts to Pennsylvania. According to Telecommunications Reports, the strategy is employed by Alltel in 40 markets in 10 states. The strategy also is employed by several smaller carriers including TDS Telecommunications Corp. in several markets in Wisconsin, Illinois and Michigan; and by FairPoint Communications, Inc. Id., at 6 and 11.

The edge-out strategy provides the obvious benefits of reducing investments in switches and facilities (Id., Tr. Vol. III, at 36-37) and, thus, would serve to fulfill this state's policy of "promot[ing] diversity and options in the supply of public telecommunications services and equipment throughout the state." See R.C. § 4927.02(A)(4). The Commission should recognize these benefits and adopt the modification proposed by Ameritech Ohio in its Initial Comments.

Rule 4 - Telephone Company Certification

(4)(K)(2) Ameritech Ohio's Initial Comments regarding carrier of last resort obligations offer a reasonable and viable alternative. Ameritech Ohio urges the Commission to give its proposal serious consideration.

Rule 9 - Retail Service Tariffing Requirements

In its Initial Comments, Ameritech Ohio urged the Commission to minimize the number and scope of the structural changes that would be required if this rule were to be adopted. Ameritech Ohio also suggested that the Commission require the least amount of information that would identify a service within one of the two tiers. Ameritech Ohio, p. 16.

The Competitive Carriers Group ("CCG")[2] agrees with Ameritech Ohio's position. CCG comments that it would be sufficient for a LEC, in order to comply with the structuring requirements of proposed rule 9(A)(3), to file a list of existing services, identifying which ones are Tier 1 and which ones are Tier 2. In addition, it states that large scale tariff revisions would be very time consuming and financially burdensome. For these reasons, the CCG requests the Commission to accept a simplified process for compliance with this proposed rule. CCG, p. 25.

Ameritech Ohio continues to urge the Commission to modify this rule so that only the minimal amount of information be required to correctly identify any Tier 1 or Tier 2 service, and specifically urges the Commission to allow a LEC to file a letter outlining the Tiers and their associated services.

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[2] The CCG is comprised of: Allegiance Telecom of Ohio, Inc., Association of Communications Enterprises, AT&T Communications of Ohio, Inc., CoreComm Newco, Inc., Global Crossings Local Services, Inc., ICG Telecom Group, Inc., WorldCom, LDMI Telecommunications, McLeodUSA Telecommunications Services, Inc., NuVox Communications of Ohio, Inc., The Ohio Cable Telecommunications Association, TCG Ohio, Time Warner Telecom of Ohio, LP and XO Ohio, Inc.

Rule 10 - Tier 1

(A) Tier 1 Definition - In its Initial Comments, Ameritech Ohio emphasized that BLES was defined in Sub. S.B. 235 to include only the primary line serving the customer's premise, and that it, therefore, reasonably follows that second and subsequent lines should be afforded the pricing flexibility provided under Tier 2. As such, Ameritech Ohio disagrees with CBT that all non-primary residential lines should be classified as Tier 1 Non-Basic. CBT, p. 14. As for Tier 2 services, Ameritech Ohio points out that CBT and the OTIA agree with Ameritech Ohio's position that Caller ID, Centrex lines and PBX trunks should all be moved to Tier 2. CBT, p. 13; OTIA, p. 14.

Further, Ameritech Ohio directs the Commission's attention to the illogical and self-serving statements made by the CCG in its comments regarding this rule. The CCG suggests that the Commission add wording to emphasize that CLECs should be relieved from having additional regulatory requirements imposed upon them in recognition that they are struggling to develop a *competitive* market. CCG, pp. 25-26. The CCG's logic is misguided and undermines the meaning of competition. A competitive market exists when all players play by the same rules, *i.e.* regulatory parity. Giving the CLECs preferential treatment contravenes the very essence of competition. Ameritech Ohio urges the Commission to reject the CCG's position and instead, modify this rule consistent with Ameritech Ohio's position and the General Assembly's intent.

Moreover, Ameritech Ohio is greatly concerned with the Consumer Parties' suggestion that the categories of services subject to greater regulatory oversight should be expanded. Consumer Parties (00-1532), pp. 78-79[3]. The Consumer Parties fail to offer

[3] References to the OCC's comments refer to its Comments filed in this docket on October 2, 2000. Those OCC Comments were adopted in a number of places by the Consumer Parties.

any reasonable rationale for increasing oversight on services that are not essential services. As the proposed rules begin to contemplate, if a competitive free market is the goal, only services established to be "basic local exchange services" should be subject to the most stringent regulatory oversight. As Ameritech Ohio proposed in its Initial Comments, the rules must align with the General Assembly's definition of "basic local exchange service" as provided in Sub. S. B. 235. Since that definition only includes the primary line serving the customer's premises, the Consumer Parties' comments cannot be accepted. Features and services, such as call waiting, per use service blocking, caller ID, call trace, etc., are simply discretionary services, which undeniably enhance the customer's convenience. However, they are not essential to the operation of, or to the availability of, a basic, affordable telephone service that the Commission is attempting to ensure for all Ohio residents.

Further, suggesting that services be more strictly regulated for the simple reason that they are widely used, is no reason at all. Ameritech Ohio would note that repair services are de facto regulated by the Minimum Telephone Service Standards (MTSS). Finally, non-specific and non-telecommunication service charges such as late payment, returned check and similar charges, that are widely assessed in other industries - not just the telecom industry - should not be subject to Commission review.

(B) Tier 1 Regulatory Framework - The Consumer Parties challenge the provision that Tier 1 services may have a maximum rate no higher than double the initial rate. They claim that there is no rationale for such a provision, and that it will result in unfettered rate increases which will price the services at the maximum rate allowable. Consumer Parties (00-1532), p. 81. In order to assess the impact of this framework the

Commission need only look as far as the current Ameritech Ohio tariffs where such a provision already exists. The plain fact is that unfettered rate increases do not automatically result from such a provision. The proposal merely provides the upper limit of a price range that should ultimately be controlled by the competitive market.

(B)(7) and (8) Ameritech Ohio reiterates its Initial Comments regarding the submission of cost studies. Ameritech Ohio, p. 17. The disparity in the proposed requirements between ILECs and CLECs is unjustified. The CCG has not and could not present any rationale for such disparate treatment. Rather, it simply reiterates its self-serving and unsupported position. CCG, p. 27.

Ameritech Ohio urges the Commission to reach parity on this issue. If indeed the Commission would desire to review a particular cost study for a new service application, then it could so request one. If, however, the Commission wishes to expend the resources to always review cost studies, then it should require that all new service applications include a cost study, regardless of who is submitting the application. The Commission should adopt rules that, to the maximum extent possible, define similar rules for similar services. Furthermore, in considering any requirements for cost studies, the Commission should recognize that cost study requirements impose additional overhead costs and delays.

(B)(11) The Consumer Parties also challenge the seven-day customer notice provision. Consumer Parties, p. 17. They fail to provide any rationale as to why that notice period is unreasonable. Ameritech Ohio agrees with the proposed rule and that a seven-day notice is reasonable.

Ameritech Ohio also reiterates its concern with any specific requirement for a specific type of customer notification. Companies should be offered the maximum flexibility to determine the most appropriate medium by which customer notification will be accomplished. Ameritech Ohio, p. 17.

(B)(12) Ameritech Ohio reiterates that the punitive approach provided under (B)(12) should be abandoned. Furthermore, as the OTIA and Verizon assert in their comments, the Commission lacks authority to levy fines. OTIA, p. 15; Verizon, p. 8. Moreover, any "one-size-fits-all" approach is inappropriate in today's environment. If any penalties are to be assessed against a company, which they should not, they should only accrue after a thorough investigation and hearing, based upon the facts and evidence uncovered during that investigation and hearing. Ameritech Ohio, p. 18. Ameritech Ohio urges the Commission to eliminate this proposed rule.

(B)(15) The CCG urges the Commission to impose restrictions only on ILECs' promotional offerings. Once again, the CCG has decided that its definition of parity means shackling its ILEC competitors with regulatory restraints while permitting CLECs to operate as they please. CCG, p. 28. The CCG does so by invoking the self-serving mantra that CLECs should have significant flexibility over and above ILECs in the spirit of competition. The Commission must recognize the CCG's self-serving motives for what they are and dismiss its comments on this issue.

(B)(16) Ameritech Ohio reiterates its Initial Comments that this proposed rule is contrary to sound public policy. Ameritech Ohio, p. 18. Out-of-service means the loss of dial tone and therefore the inability to use the telephone. The loss of a discretionary service such as Caller ID, while important to the convenience of the customer, does not inhibit that customer's ability to place and receive telephone calls. If the Commission adopts this proposed rule, it must understand that it could lead to the development of subjective criteria about whom, or what service, receives repair priority. Such a result benefits no one. The Commission should seriously consider the negative ramifications that may result from the adoption of this proposed rule.

(C) Tier 1 End User Contracts - While few parties objected to the filing of contracts for Tier 1 services, Ameritech Ohio nevertheless urges the Commission to consider streamlining the process beyond what the proposed rules offer. In its Initial Comments, Ameritech Ohio proposed that, as an alternative to the filing of contracts for Tier 1 services, companies entering into customer specific contracts should be required to submit only a letter, on a periodic basis, detailing the date of the last signature on the contract, the type of contract/service, and the customer's name. Ameritech Ohio supports such a process for the sole purpose of eliminating the filing of unnecessary and duplicative information, which, over time, will save the Commission and the company time and resources. There is no intent of withholding any relevant information. In fact, no less information would be submitted through Ameritech Ohio's proposed letter approach than what is currently submitted with a three-page contract. The fact that Ameritech Ohio filed 238 contracts in the first quarter of this year alone lends itself to a more streamlined approach to submitting all pertinent contract information. Ameritech Ohio further proposed that a redacted version of this letter would be filed for viewing in the public docket. Ameritech Ohio, p. 19.

Only the CCG argues that CLECs should be exempted from the requirement to file contracts. It argues that no CLEC should be forced to classify any of its services as

Tier 1 services. CCG, p. 29. The CCG's argument lacks merit. All carriers should be subject to the same regulatory oversight for the same service. Only parity will permit true competition to flourish. The Commission should reject the CCG's argument and adopt Ameritech Ohio's proposal.

(C)(7) Several parties have expressed concern that Rule (C)(7) proposes only a seven-day window for the filing of these contracts. Ameritech Ohio, p. 19; CBT, p. 16; New Knoxville, pp. 8-9. While some parties express the need for a 30-day window (New Knoxville, pp. 8-9) Ameritech Ohio still believes, as does CBT, that a 10-day period is enough time in which to file these contracts. Ameritech would urge the Commission to reject the seven-day period and, at the least, establish a 10-day window for the filing of contracts.

The Consumer Parties suggest that Tier 1 contracts should not be available to residential end users simply because no ILEC in this state has yet entered into such a contract. Consumer Parties (00-1532), p. 83. Such justification is hollow and offers no constructive rationale for the restriction. Ameritech Ohio believes that the flexibility to enter into these types of agreements should be retained.

Rule 11 - Tier 2

(A) Tier 2 Definition - The Consumer Parties challenge the placement of various services in Tier 2, maintaining that the services are, in fact, non-competitive. Consumer Parties (00-1532), p. 83. Their challenge is one born from misunderstanding. Data services are offered by numerous providers and have already been afforded the maximum pricing flexibility in Ameritech Ohio's current Alternative Regulation Plan based on their competitive nature. In addition, various local and toll communications providers offer robust alternatives to any operator services. Any doubt as to the competitive nature of the market is quickly dispelled by the extensive marketing, promotional, and advertising efforts undertaken by the market participants.

Ameritech Ohio disagrees with the Consumer Parties that Tier 2 classification grants an extraordinary degree of regulatory flexibility and freedom for many services that are not competitive. In fact, Ameritech Ohio believes that the 12-month cap on pricing flexibility for these services is unnecessarily restrictive. Tier 2 services should be afforded greater pricing flexibility than what is proposed. Certainly, they should not be subject to any greater restrictions than what are currently in place. The Commission should allow the competitive market to regulate rates for these services rather than imposing artificial restraints that will only impede creative and competitive service offerings.

(B) Tier 2 Regulatory Framework - Ameritech Ohio agrees with CBT that all types of service packages should be included in Tier 2. CBT, p. 16. These packages are discretionary per se, because the underlying services are individually available under the appropriate tier.

Further, the fact that the Commission's proposal requires telephone companies to maintain an electronic tariff on the company's website does not eliminate the requirement to maintain a tariff or the requirement to file various types of modifications to the tariff; it simply eliminates the need to retain a paper version of the tariff and unburdens the Commission from unnecessary paper filings. Contrary to the Consumer Parties' concern that customers will not have access to this pricing information if tariffs are only made available on the internet, (Consumer Parties (00-1532), p. 88) such a channel actually increases the availability of the information because access to the internet is so widely available. For example, access to the Internet is available through the public libraries and other resources, including the numerous Community Computer Centers that were funded by Ameritech Ohio as part of its alternative regulation commitments, which were agreed to and highly endorsed by the Consumer Parties.

(C)(1) Tier 2 end user contracts - Ameritech Ohio restates its opposition to the requirement that it maintain a copy of each specific end user contract on a website. (Ameritech Ohio, p. 21). If the Commission sees fit to adopt this rule, then Ameritech would urge the Commission to adopt CBT's proposal that only unsigned contract forms, that are generally available to similarly situated customers, be placed on the website. CBT, p. 17.

The CCG attacks this rule and argues that there is no legitimate reason for a CLEC to disclose their contracts and " . . .in fact, the disclosure itself may spawn "winback" activities by the ILECs." CCG, p. 30. Does this mean that the CCG would not commence "winback" activities once the ILECs' contracts are posted? Moreover, win back efforts are not inappropriate. Rather, they are a normal part of the competitive marketplace at work and customers ultimately benefit from such competition. Again, the CCG would have the Commission regulate by provider and not by service. The Commission must reject the CCG's self-serving and anti-competitive comments.

(E) Cost Studies - Ameritech Ohio's Initial Comments pointed out the disparity between the treatment accorded CLECs and ILECs for providing cost studies to the Staff. For a competitive market to prosper, similar guidelines must exist for similar services, regardless of who provides the service. The Commission should, therefore, establish regulatory parity for comparable services, by eliminating disparate cost study requirements.

(I) MTSS Applicability - Tier 2 services should not fall under the purview of the MTSS guidelines. These services are discretionary and are not, therefore, essential in the provisioning of basic local exchange service. See, Ameritech Ohio, p. 22; Verizon, p. 9; and OTIA, p. 16.

Rule 16 - Interconnection Standards

The CCG plays an all too familiar game in their comments. When the rules would impose minimal obligations on the CLECs, it argues that the rule should not be adopted because the Commission should strictly adhere to the requirements set forth in the FCC's rules. When there is a perceived benefit to the CLECs or a burden which can be placed on the ILECs, the CCG argues that the Commission should go beyond the requirements set forth in the FCC's rules. This one sided pick and choose approach by the CCG demonstrates the lack of credibility that pervades its proposals. The Commission should reject the invitation to play the CCG's games. Instead, the Commission should reference or adopt the FCC's rules wherever possible and avoid creating new obligations for both CLECs and ILECs that may be inconsistent with the Act and the authority granted to the states by the Act.

(B) The CCG has proposed that the information requirements of proposed section 16(B) be eliminated for the initial request for interconnection. CCG, p. 41. The CCG argues that the basic information set forth in this list is unnecessary to negotiations for an initial agreement. However, the CCG supports the time limits set forth in Rule 16 within which a ILEC must respond with specificity and on an expedited basis to a request for interconnection. Ameritech Ohio recommends that the Commission maintain the current practice which is reflected in Rule 16(B). Basic information such as the location of the requested meet point and collocation points, as set forth in section (B), must be provided in order to permit the ILEC to timely respond with the specificity required in the rule.

(C)(6) Ameritech Ohio believes that various parties have misread the specific language of this section of the proposed rules. Upon close examination, the language of *this section creates an obligation on an* ILEC, *as defined in rule* (1)(A)(4), *to make the* terms and conditions of existing interconnection arrangements available to other interconnecting carriers. Although the proposed section contains a reference to "other jurisdictions" to describe the scope of the ILEC's obligation, that language is inconsistent with the law and does not seem to have any meaning for ILECs such as Ameritech Ohio. The obligation set forth in this section relates to a specific entity, an ILEC, which is defined for any area as the local exchange carrier providing local exchange service in the area on the date of enactment of the Telecommunications Act of 1996. Therefore, the obligation created by proposed section (C)(6) applies only to the specific ILEC entity, i.e. Ameritech Ohio. Since Ameritech Ohio does not operate outside Ohio, the use of the phrase "other jurisdictions" has no applicability.

Moreover, the inclusion of the phrase "other jurisdictions" unlawfully attempts to expand an ILEC's obligation under Section 252(i) of the Act. See, Ameritech Ohio's Initial Comments, pp. 25-27. The rules would require ILECs to make available to any requesting carrier any terms arbitrated by another state commission which the ILEC makes available. Sections 251 and 252 of the Act contemplate that each state has authority to approve negotiated interconnection agreements and to arbitrate disputes between carriers based upon the laws, policies, and regulatory environment in that state. Thus, it is unlawful to apply one state's arbitration decisions in another state. Indeed, Section 252(i) of the Act permits a telecommunications carrier to adopt the interconnection agreement, or a portion thereof, only for use in the same state. Thus, the inclusion of the phrase "other jurisdictions" unlawfully expands the scope of Congress' 252(i) obligation. Moreover, because the proposed rules effectively permit the

Commission to refuse an ILEC's request to arbitrate specific issues, the rules would make the Commission subject to FCC preemption under Section 252(e)(5) of the Act for failing "to act to carry out its responsibility" to arbitrate interconnection agreements.

The proposed rule also violates the Ohio and United State Constitutions by requiring ILECs to make interconnection agreements approved in other states available to requesting carriers in Ohio, the rules seek to control commercial activity outside of Ohio's borders and, thus, violate the Commerce Clause of the United States Constitution. U.S. Const., Art. 1, § 8, cl. 3.

The proposed rules would also delegate and surrender Ohio's sovereignty and the Commission's authority to other States and their commissions. Any arbitration decision made by any state commission would be portable into Ohio for that ILEC without regard to whether it promotes the public interest in Ohio and any record to support the adoption of the agreement in Ohio. Finally, the language ignores that there may be real technical and other issues which weigh against the adoption of an agreement from another state. The Commission should not adopt the proposed rule or at a minimum should delete the phrase "other jurisdictions" from the rule.

(C)(7) A large number of commentors strongly opposed the obligation created by this proposed section as being unlawful and unreasonable. Sprint, p. 14; Alltel, p. 6; CBT, p. 18; OTIA, Rule 16; Small Telephone Companies, p. 11; and Verizon, p. 14. In contrast, the CCG supports the adoption of the requirement set forth in (C)(7) that imposes on ILECs with CLEC affiliates the obligation to make available any terms and conditions of interconnection, service or network element which have been made available to the CLEC affiliate in Ohio or in other jurisdictions. CCG, p. 38. The terms and conditions which must be made available under this requirement can be the product of negotiation between the parties or an arbitration order. The CCG argues that the adoption of this requirement will ease the burden on CLECs imposed by the Act to negotiate and arbitrate issues. CCG, p. 38. The CCG also argues that the provisions will help small CLECs who do not have the resources to negotiate individual agreements. Finally, the CCG argues that the proposed rule creates the same obligation as contained in the SBC/Ameritech merger order. CCG, p. 39. None of the arguments raised by the CCG warrants the unreasonable and unlawful obligation created by the proposed section.

Although the CCG claims that the negotiation and arbitration requirements of Section 252 of the Telecommunications Act are burdensome, the fact remains that the Act sets up a specific process by which individual carriers negotiate agreements with individual ILECs. Merely because the CLECs claim that the Act's requirements are burdensome, does not provide authority to state commissions to create new ILEC requirements in an effort to benefit CLECs at the expense of ILECs. In fact, state commissions have the obligation to review interconnection agreements and to decide only unresolved issues raised in arbitration petitions. If the ILEC does not agree to the CLEC's request for the terms or conditions ordered by another state, it has the right under the Act to contest the issue before the state commission. Moreover, the right to arbitrate issues before state commissions is not limited to the two defenses set forth in proposed section (C)(8). Thus, the process set forth in (C)(7) unlawfully abrogates the state's obligation to resolve issues between parties and the right to seek arbitration under the Act in favor of other state opinions.

In addition, the Act already contains an option for CLECs, small or large, to opt into existing interconnection agreements to which an ILEC is a party. Section 252(i) sets forth the option created by Congress for CLECs that do not wish to negotiate individual agreements. However, unlike the proposed Commission rule, that option does not create a special class of ILECs, those with CLEC affiliates. Under Section 252(i) the ILEC must have been a party to the agreement to which the CLEC is attempting to opt into. The Commission's proposed rule is directly contrary to Section 252(i) and discriminates against ILECs who happen to have CLEC affiliates. In fact, AT&T implicitly acknowledges that the requirement set forth in (C)(7) is not legally required. In its comments, AT&T requests that the requirement set forth in section (C)(7) be adopted as a commitment for ILECs electing to receive alternative regulation. AT&T, p. 5.

CCG's suggestion that the proposed section merely codifies the obligation already created by the SBC/Ameritech merger order is incorrect. The Commission's order in the SBC/Ameritech merger case did not create an obligation to make available terms and conditions which are ordered by other state commissions. The merger order requirement is limited to terms and conditions (not rates) which are voluntarily agreed to by SBC in Ohio or other states.[4] See, Bell Atlantic/GTE merger, April 6, 2000 Entry on Rehearing, par. 8[5]. Moreover, this is a generic rule proceeding which will impact all ILECs. The events and orders occurring as part of an individual LEC's merger case and the numerous

[4] In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware, Inc. Ameritech Corporation and Ameritech Ohio For Consent and Approval of a Change of Control, Case No. 98-1082-TP-AMT, Opinion and Order (April 8, 1999), p. 28.

[5] In the Matter of the Joint Application of Bell Atlantic and GTE Corporation for Consent and Approval of a Change in Control, Case No. 98-1398-TP-AMT, Entry on Rehearing (April 6, 2000), par. 8.

factors that resulted in the merger order make such unique commitments irrelevant to this proceeding.

(C)(8) The CCG also proposes that the ILEC's ability to contest the obligation contained in Section (C)(7) should be eliminated or should be limited to only those instances where the CLEC's election will result in "materially greater costs" to the ILEC. In these instances the ILEC may propose rates to recover the greater costs. CCG, p. 42. The unreasonable nature of the CLECs' position is highlighted by their proposed elimination of the ILEC's ability to demonstrate that the requested interconnection, service or network element is not technically feasible. The CCG merely assumes that all ILEC networks and capabilities are the same. This approach is directly contrary to the Act which requires the evaluation of CLEC requests based on the capabilities of individual ILECs and not a national standard. Even the Commission's SBC/Ameritech merger order requirement recognized that there may be different technical capabilities that prevent the offering of some forms of interconnection or network elements[6]. CCG disregards this reality.

The CCG's proposed language also assumes that ILECs must offer the interconnection, service or network element at the same rate the CLEC affiliate received in Ohio or other jurisdiction. Under the CCG proposal, only if the ILEC can demonstrate

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[6] Id.

that it may incur "materially greater costs" can the ILEC propose different rates. CCG, p. 42. Such a requirement is unlawful since it is directly contrary to Section 252(d) of the Act which requires that the ILEC be compensated for **its** costs of providing the interconnection or network element. Moreover, the CCG's language is inconsistent with the SBC/Ameritech merger order requirement which provided limited MFN type treatment under certain circumstances for "terms and conditions" from other jurisdictions, but did not extend the obligation to rates.

(E) The CCG has proposed a new process for parties to follow in requesting interconnection agreement amendments. CCG, p. 43. The CCG has not provided any support for their proposal or any demonstrated defect in the process currently used by parties. A large number of amendments to interconnection agreements have been negotiated and filed for Commission approval, without the onerous procedures proposed by the CCG and without disputes.

The last sentence of the CCG proposed procedure is also confusing at best. The language proposes a restriction on the availability of the Commission's dispute resolution process to parties who have previously been unsuccessful in negotiating and arbitrating an issue. It is unclear why the CCG feels such language is necessary, since Ameritech Ohio is not aware of any previous contract amendment issues being raised with the Commission that would be resolved by the language.

(F) The CCG argues that the process for adopting a previously approved interconnection agreement should be unilateral in nature. CCG, p. 45. In the CCG's view, CLECs should be permitted to merely send a letter of notice to the ILEC that it is adopting an existing agreement. Moreover, the CCG would eliminate the ILEC's ability to demonstrate that the cost of providing the interconnection or network element supports a different arrangement. Such a proposed rule would be unreasonable.

An interconnection agreement is a contract which reflects the mutual agreement of two parties. It cannot be a unilateral instrument. Parties should be required to jointly submit agreements, including those adopted pursuant to Section 252(i), to the Commission as evidence of the parties' agreement. The CCG's claim that ILECs often say no to CLEC requests pursuant to Section 252(i) lacks any support. CCG, p. 45. Ameritech Ohio has never been a party to a complaint relating to a Section 252(i) election and has numerous agreements with CLECs who have exercised their rights under Section 252(i). The CCG proposed language is ill conceived, without basis in reality, and should be rejected.

Rule 17 - Mediation, Negotiation, and Arbitration of Section 252 Interconnection Agreements

The CCG argues that proposed Rule 17 should not contain a requirement that the parties must have attempted to negotiate an issue before seeking arbitration before the Commission. CCG, p. 48. In other words in CCG's view, a party is free to raise an issue for the first time in its arbitration petition. Such an approach is contrary to the basic structure of Section 252 of the Act, which begins with negotiations between the parties. In fact, the Act requires that the petition for arbitration include information relating to each party's position on the unresolved issue. Section 252(b)(2)(ii). How can one comply with this requirement if there have been no negotiations on the issue? The proposed rule is consistent with the Act and represents good public policy. The CCG's alleged fear that ILECs will drag their feet during negotiations, thereby preventing negotiations from occurring on some issues, ignores the requirement of Section 252 on all parties to negotiate in good faith. No party should be placed in the position of learning of an issue for the first time in an arbitration petition. The CCG's proposal would result in an increase in the number of issues that the arbitration panel would need to decide and, therefore, should be rejected.

Rule 18 - Collocation

The CCG has proposed new detailed collocation rules which would expand the obligations of ILECs to provide collocation in a manner that is inconsistent with previous holdings of this Commission and the FCC. This section provides a good example of an area where the CCG proposes, to their benefit, language and obligations that far exceed the FCC's rules, in direct conflict with other comments in which they again, in self interest, urge the Commissions to stick to the FCC's rules.

Under the Commission's proposal, the collocation rule references the FCC's rules as the guiding language, rather than attempting to provide detailed information on all of the various forms of collocation and their associated terms and conditions. Verizon, OTIA, and Alltel support this approach. Verizon, p. 18; Alltel, p. 7; and OTIA, Rule 18. The FCC has issued hundreds of pages of rulings on the issue of collocation. In fact, the various forms of collocation have been significantly expanded and refined over the past few years. Ameritech Ohio believes that it makes no sense to try and develop detailed rules which cannot physically reflect all of the nuances of the FCC's orders. Moreover, any such rules would have to be reviewed and revised on a regular basis as additional collocation issues are resolved in the future by the FCC. The Commission's proposed rule takes a more reasonable approach by referencing the FCC's rules.

The CCG's proposed language is also inconsistent with previous holdings by the Commission and the FCC. Moreover, it effectively decides the pending Case No. 96-922-TP-UNC collocation issues, not unexpectedly in the CLECs' favor -- all without the benefit of any factual record. For example, the CCG proposal requires ILECs to provide "adjacent collocation" even when the ILEC does not own the adjacent premises. CCG, p.

51. Yet, the FCC has rejected the requirement that ILECs are required to provide "off site" adjacent collocation.[7] In the recent AT&T/Ameritech arbitration case, the Panel rejected a demand by AT&T that Ameritech provide "off site" adjacent collocation.[8] Despite these holdings, CCG would require ILECs, by Commission rule, to provide "off site" adjacent collocation.

In addition, the CCG's language would require an ILEC to provide cageless shared collocation. CCG, p. 51. The FCC has never required cageless shared collocation nor has this contested issue been resolved by the Commission. The Commission should not adopt new forms of collocation in these generic rules.

Another issue raised by the CCG's language is the inclusion of "rating points" as a technically feasible area for collocation, without any definition of the term "rating point" or any details as to the nature of collocation at such "rating points". CCG, p. 51. In many cases, rating points were designed for the application of rates and are associated with V and H coordinates. Those V and H coordinates may not reflect the location of an ILEC premises and therefore the association of collocation obligations with such rating points makes no sense.

The CCG has also developed new language concerning the types of equipment that may be collocated. The CCG has resurrected the phrase "used or useful" for interconnection or access to unbundled network elements to describe the types of equipment which may be placed in collocation space. CCG, p. 52. This language was expressly rejected by the D.C. Circuit which found that allowing "used or useful"

[7] Order on Reconsideration and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-147, (August 10, 2000), par. 40.

equipment for interconnect in collocation space was inconsistent with the Act.[9] Under the Act CLECs may collocate equipment "that is required or indispensable to achieve interconnection or access to unbundled network elements at the premises of the local exchange carrier."[10] Thus, Section 251(c)(6) of the Act provides only for physical collocation of equipment "necessary" for interconnection or access to UNEs. In addition, the CLECs have proposed and Ameritech has vigorously opposed the adoption of this same language in Case No. 96-922-TP-UNC.

Sprint has proposed language that requires virtual collocation of line cards. Sprint Exhibit 1 at 8. No explanation has been provided for this proposal by Sprint. In considering Sprint's proposal, it must be remembered that the collocation of line cards is not necessary for interconnection or accessing unbundled network elements since they provide functionality in conjunction with local switching. Thus, Sprint's proposal is inconsistent with the Act and the FCC's rules and should be rejected.

Another example of the CLECs' opportunistic approach to the rules is the CCG's proposal that virtual collocation can be converted to physical collocation. CCG, p. 54. Ameritech Ohio assumes that CCG is seeking in place conversion of virtual collocation arrangements. As the Commission is well aware, a requirement for in place conversions has not been a requirement and in fact it has been rejected by the Commission.[11] The CCG has also proposed that CLECs be provided with central office floor plans in the event collocation space is not available. CCG, p. 53. However, ILEC floor plans have

[8] In the Matter of AT&T Communications Inc.'s Petition For Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements With Ameritech Ohio, Case No. 00-1188-TP-ARB, Panel Report ("AT&T Arbitration"), p. 84.
[9] GTE Services Corp. et al. v. Federal Communications Comm'n. et al., 205 F. 3d 416 (D.C. Cir. 2000)
[10] Id.
[11] In the Petition for Arbitration of ICG Telecom Group Inc., Case No. 99-1153-TP-ARB (Arbitration Award, February 24, 2000 adopting Panel Report); AT&T Arbitration Panel Report, p. 77.

never been required to be provided to CLECs, rather, they are provided to the Commission to assist in its role of determining whether space is available for collocation.

It is unclear how many other changes the CCG has proposed to the FCC's rules in their proposal and the real impact such language may have on ILECs. What can be said is that the CCG proposal attempts to obtain collocation rights that are not consistent with the Act or the FCC's rules and should be rejected. The Commission should retain the simple, straightforward and workable approach set forth in the proposed rule.

Rule 19 - Compensation for the Transport and Termination of Telecommunications Traffic

(C) The CCG objects to the Commission's current and proposed rule which relies on the ILEC's definition of its local calling area to determine whether a call should be subject to local or toll compensation. CCG, p. 56. CLECs have objected to this standard for measurement in the past and yet they offer little, if any, support for their often repeated argument. The CCG merely states that allowing the CLEC self defined local calling areas to determine the compensation form, whether toll or local, would encourage CLECs to define their local calling areas to be different than the ILEC. However, the only thing that would be created by allowing the CLEC to unilaterally determine the form of compensation to be paid would be yet another regulatory arbitrage opportunity. Under the proposed rules CLECs remain free to self define their local calling areas, while at the same time properly compensating ILECs based on the costs incurred.

(D)(2) The CCG continues the CLEC claim that they are entitled to tandem switching compensation based solely on the geographic area served by the their switch. CCG, p. 57. The CCG claims that the FCC's compensation rules are unambiguous and that no functionality test should be used in evaluating the appropriate compensation rate. In short, the CLEC switch does not have to function as a tandem switch. Nowhere in the CCG's discussion is there any recognition of the FCC's orders or court decisions which require that the functionality of the CLEC switch be considered in determining the appropriate compensation. Nor does the CCG proposal address the need for the CLEC switch to be actually serving a comparable area, as opposed to being capable of serving a comparable area, in order to be eligible for tandem switch compensation.

The FCC's rule, which like the Commission's proposed rule references a CLEC serving a comparable geographic area, has been held to include the requirement that the CLEC switch is actually "serving" a comparable area. See, MCI Telecomm. Corp v. Michigan Bell Tel. Co., 79 F. Supp. 2d 768, 791 (E.D. Mich. 1999) ("The rule focuses on the area currently being served by the competing carrier, not the area the competing carrier may in the future serve."). The FCC's test requires the CLEC to prove that its switch "*serves* a geographic area comparable to the area served by the incumbent LEC's tandem switch," not that it is *capable of serving* such an area.[12] In order to satisfy the FCC's geographic coverage test, a CLEC also must show that its customers, and the calls the CLEC terminates to them, are distributed reasonably comparably to the incumbent's customers and traffic. See, MCI Telecom. Corp. v. Illinois Bell Tel. Co., 1999 U.S. Dist. LEXIS 11418, *22 (N.D. Ill. June 28, 1999) (affirming the Illinois commission's determination that the competing LEC was not entitled to charge the tandem rate). In order to avoid confusion and future disputes, the Commission should clarify that in order to be eligible for the tandem rate, the CLEC must actually be serving an area comparable to the ILEC tandem switch and that calls are distributed in a manner reasonably comparable to the ILEC's traffic.

In addition, the CCG comments ignore the requirement, as set out in the FCC's rules, that the CLEC switch perform tandem switch functions in order to be eligible for tandem compensation. The Commission's proposed rule should explicitly reference a

[12] 47 CFR 51.711a3.

functionality requirement consistent with the FCC's rules, in order to avoid further disputes. Paragraph 1090 of the FCC's First Report and Order provides in pertinent part:

> [S]tates may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end office switch. In such event, states *shall also consider whether new technologies . . . perform functions similar to those performed by an incumbent LEC's tandem switch* and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.[13]

Thus, the Commission's proposed rule, which is modeled after the FCC's rule, must include a similar functionality test.

Switch functionality, along with geographic coverage, is therefore essential in determining whether a CLEC is entitled to charge the tandem rate for terminating calls that originate on the ILEC's network. Moreover, the federal courts, in keeping with ¶ 1090, treat the functionality test, along with the geographic coverage test, as the two keys to determining when a CLEC is entitled to charge the tandem rate for terminating traffic with its switch. See, for example, US West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1124 (9th Cir. 1999) ("The [State] Commission properly considered whether MFS's switch performs similar functions and serves a geographic area comparable to US West's tandem switch"); U.S. West v. Pub. Serv. Comm. of Utah, 75 F. Supp. 2d 1284,

[13] First Report and Order, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; In the Matter of Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185; FCC 96-325 (released August 8, 1996) ("First Report and Order").

1289 (D. Utah 1999) ("This Court also agrees" that "a geographic analysis alone is an insufficient basis upon which to uphold a rate determination" and that the rate should be determined by whether the switch "'functions like a tandem switch, and geography should be considered'"); and U.S. West v. Wash. Util. and Transp. Comm., No. C97-5686JR, 1998 U.S. Dist. LEXIS 22883, *6-7 (W. D. Wash. August 31, 1998) (holding that First Report and Order ¶ 1090 requires consideration of functionality and geography, not geography alone).

Furthermore, without a functionality test, terminating carriers are likely to receive compensation in a manner inconsistent with section 252(d)(2) of the Act. Under the Act terminating carriers are entitled to be compensated for the additional costs of terminating traffic that originates on the paying carrier's network. Ameritech Ohio's network includes end office switches, which connect individual subscribers to Ameritech Ohio's network, and tandem switches, which carry traffic between end offices (trunk-to-trunk connections) and do not directly serve subscribers. The functions performed by tandem switches are different than those of end office switches directly connected to subscribers. The essential function of a tandem switch is the switching of traffic from trunk to trunk, *i.e.*, connecting one switch to another. As the FCC has explained, "The tandem switching functionality network element is defined as: (i) trunk-connect facilities, including but not limited to the connection between trunk termination at a cross-connect panel and a switch trunk card; [and] (ii) *the basic switching function of connecting trunks to trunks* . . . . " (47 C.F.R. § 51.319(c)(2)) (emphasis added).

Based on experience, when a CLEC terminates a call that originates on Ameritech Ohio's network, the CLEC in almost all cases performs only one switching operation –

as opposed to the two switching operations that Ameritech Ohio performs for CLECs when they use the tandem. This is significant for two reasons: *First*, it means that in contrast to the two switching operations and the transport between them that Ameritech Ohio provides (and is compensated for) when it uses its tandem to terminate a CLEC-originated call, the CLEC performs (and should be compensated for) only one switching operation and no transport between switches (which does not exist) when it terminates an Ameritech-originated call. *Second*, it means that the CLEC's switch is not performing the quintessential function of a tandem switch – trunk-to-trunk switching – because it is not switching the call onto a trunk that runs to a second switch, but rather is switching the call onto the loop that runs directly to the CLEC's customer.

The lack of tandem functionality and corresponding tandem costs is highlighted by the fact that CLECs do not provide both tandem and end office interconnection options. Ameritech Ohio gives CLECs the option to interconnect to its network at both the tandem office switch and the end office switch. If the CLEC chooses to interconnect at the tandem office switch, then Ameritech Ohio performs two switching operations to terminate the call (one at the tandem and one at the end office that serves the called party) and also provides transport between the two switches. Accordingly, the tandem and transport rate elements apply in addition to the end office termination rate element. If the CLEC chooses instead to interconnect at the end office switch, then only the end office termination rate element applies. The CLEC's switch cannot fairly be said to be functionally equivalent to an Ameritech Ohio tandem if the CLEC does not offer Ameritech Ohio this same choice. Only by demonstrating that it provides tandem functionality and confirming that fact by offering Ameritech Ohio the ability to bypass the asserted tandem functionality and connect directly to the end office functionality, does the CLEC properly demonstrate that it incurs the costs that warrant the symmetrical application of the ILEC's tandem rate.

The Commission should reject the CCG's proposal and should modify the proposed rule to clarify that it includes both a requirement that the CLEC demonstrate that it is actually terminating calls to a geographic area comparable to the ILEC tandem switch and that the CLEC switch is performing tandem functionality (trunk to trunk switching) in order to be eligible for the tandem rate.

Ameritech Ohio would also note that the CCG's comments concerning ISP traffic compensation have been rendered moot by the recent FCC decision in Docket Nos. 96-98, 99-68 (released April 27, 2001).

Rule 20 - Transit Traffic Compensation

The CCG has assumed, without any support, that TELRIC based compensation is required for transit traffic. CCG, p. 61. As Ameritech Ohio has pointed out and as the Staff has previously acknowledged[14], transit traffic is not a legal requirement under the Act. Transit traffic is not required to be provided under the Act since the intermediate carrier is not terminating the local call. Nor has the CCG cited any requirement under Ohio law which requires a carrier to provide transit traffic or that TELRIC based pricing is required under Ohio law. TELRIC is a costing methodology which the FCC developed under Section 252 of the Act for reciprocal compensation and unbundled network elements. Clearly, transit traffic is not subject to the reciprocal compensation provisions of the Act since the intermediate carrier is not "terminating" the traffic. Nor are the facilities used by the intermediate carrier to pass traffic to another carrier unbundled network elements under the Act.

In reality, the CCG's and the Commission's proposed rule would create a new form of traffic, to be treated as an unbundled network element. Yet, the demonstration required by the Act for the establishment of new unbundled elements has not even been attempted. No showing of compliance with the "necessary and impair" test set forth in the Section 251(d)(2) of the Act has been provided for transit traffic. In fact, such a showing could not be made since carriers can readily make arrangements with the terminating carrier in the same manner as the intermediate carrier. The Commission should reject the CCG's comments and should modify the proposed rule to permit carriers to negotiate mutually acceptable rates, terms and conditions for transit traffic.

[14] Preliminary Proposal for Comprehensive Telecommunications Rule Reform From the Staff of the Public Utilities Commission of Ohio, Case Nos. 99-998-TP-COI, 99-563-TP-COI, p. 41.

Rule 23 - Carrier to Carrier Tariff or Model Interconnection Requirements

The CCG has argued that all ILECs must file a carrier to carrier tariff. CCG, p. 61. By its silence, CCG apparently does not believe that ILECs should have the option of filing a model interconnection agreement rather than a tariff. CCG offers no explanation for its exclusive preference for a tariff requirement. Yet, all of the arguments advanced in support of a tariff apply with equal force to the filing of a model interconnection agreement. The model interconnection agreement provides carriers a quick and inexpensive means of obtaining services or elements, in the same manner as a tariff. Moreover, the model interconnection agreement is consistent with the basic structure of individual carrier contracts established by Section 252 of the Act. The Commission should retain the option for ILECs to file either a carrier-to-carrier tariff or a model interconnection agreement.

Rule 24 - Unbundled Network Elements

(A) Ameritech Ohio supports the adoption of a requirement that all LECs must process requests for customer pre-order information and orders for the transition of customers between LECs in a timely, accurate and efficient manner. In order to provide customers with the ability to move between LECs, after the initial move from the ILEC, there must be a requirement on all LECs to exchange information and to process orders in a timely, accurate and efficient manner. Ameritech Ohio has experienced difficulties in attempting to compete for CLEC customers as a result of the lack of timely responses to requests for information and orders to transition customers to Ameritech Ohio from CLECs. Ameritech Ohio believes that the Commission should focus on the establishment of a performance requirement on all LECs relating to the exchange of information and processing of orders rather than a technology or OSS process requirement. Such a performance requirement will be essential as competition continues to develop.

(B) Sprint has presented suggested language changes to Section 24(B) that would require ILECs to make packet switching available as an unbundled network element. The Sprint language would also require the high frequency portion of the loop, including copper fed and fiber fed components and combinations, to be made similarly available. Sprint, Exhibit 1, p. 10. Sprint's language is inconsistent with the FCC's requirements. Although packet switching must be made available by an ILEC, the FCC has established defined limitations on the obligation to provide packet switching.[15] The

[15] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (released Nov. 5, 1999)("UNE Remand Order"), par. 306; 47 CFR 51.319(c)(4).

Sprint language contains no such limitations and therefore the proposed language is inconsistent with the FCC's rules and cannot be adopted.

Moreover, although acknowledging that the Commission has not addressed issues associated with Ameritech's Project Pronto architecture, Sprint nevertheless goes on to propose language that would impose unbundling obligations on Ameritech Ohio, without regard to those pending issues or the many technical issues associated with Project Pronto unbundling.[16] Sprint, pp. 20-12. This request presents a good example of why the Commission should reference the FCC's rules rather than making decisions on contested issues under the Act a part of this generic rulemaking docket.

(E) CCG, AT&T and Sprint provide separate but similar arguments concerning the requirement for ILECs to provide combinations of network elements. Sprint argues that the rule should require ILECs to provide "ordinarily combined" elements. Sprint, Exhibit 1, p. 10. In their view ordinarily combined means the same as currently combined. Sprint, p. 22. AT&T goes further and argues that the requirement to provide combinations should include the construction of new elements that do not exist. AT&T would require new combinations as a commitment required before an ILEC could achieve alternative regulation. AT&T, pp. 7-9. The CCG engages in a convoluted series of half truths to support a claim that ILECs should be required to provide combinations that "could" exist or could be provided without extraordinary effort. CCG, p. 69. The CCG claims that the recent AT&T/Ameritech Panel Report supports their view.

However, in reality all of the CLEC arguments represent attempts by the CLECs to

[16] In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic, Entry (September 1, 2000), Case No. 96-922-TP-UNC, p. 4.

resurrect a requirement to provide network element combinations that are "ordinarily combined", as the CLECs have defined that term. However, the CLECs' interpretation of the Act cannot be sustained. As the AT&T/Ameritech Panel Report found, Ameritech Ohio is not required to provide "ordinarily combined" network elements. The Panel Report stated:

> It is apparent that the 1996 Act and the FCC rules require Ameritech to provision UNEs, and not combinations, to AT&T in order to allow AT&T to do the combining. At the same time, 47 C.F.R. §51.315(b) does not allow Ameritech to separate existing or "currently combined" combinations. Specifically, Section 51.315(b) of the FCC's rules states that "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." Therefore, it is logical to conclude that where Ameritech does not currently have facilities or current combinations of facilities, there is nothing to separate, and in fact, nothing to provide. On the other hand, its is clear to the Panel that where a combination of UNEs does exist, Ameritech is required to make them available to AT&T. Where a combination of UNEs does not exist but rather, the separate UNEs do exist, Ameritech is required to provide the UNEs in a manner that allows AT&T to combine them in order to provide service to its end users. Therefore, in order for the Panel to agree with AT&T's position, we must ignore both Eighth Circuit Court determinations to vacate 47 C.F.R. §51.315 (c)-(f) of the FCC rules and the court's July 18, 2000 decision, which affirmed this determination. The vacated paragraphs (c)-(f) of Section 51.315 would have required Ameritech to re-combine UNEs, in the manner that AT&T is requesting here. The Panel recommends that, like the Supreme Court and the FCC, the Commission should not enforce this vacated rule. AT&T Arbitration Panel Report, p. 32.

None of the CLECs focus on the definition actually proposed by the Commission in proposed Rule 24(E)(1). In particular, none of the CLEC parties note that the proposed rule requires ILECs to offer an "**existing** network element combination that is currently combined in its network upon request". (emphasis added). This definition is consistent with the current state of the law and requires network element combinations to be provided to the extent that the network elements are actually combined (existing) in the ILEC network. To the extent the elements are not connected, the CLEC has the same opportunity to combine the elements to provide service as the ILEC.

An ILEC's obligation to provide the unbundled network element platform ("UNE-P") derives from Section 251(c)(3) of the Act, which provides, in relevant part, that an ILEC has a duty to provide CLECs "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . . An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." In August of 1996, in furtherance of this provision, the FCC adopted rules mandating both that an ILEC provide UNEs in a manner that allows CLECs to combine them and that ILECs not separate requested UNEs that the ILECs currently combine:

> (a) An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.
>
> (b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

47 C.F.R. 51.315(a), (b).

Importantly, Rule 51.315, as originally adopted by the FCC, also included other provisions mandating that an ILEC affirmatively act to combine UNEs at the request of CLECs.[17] Rule 51.315(b) was challenged on appeal to the Eighth Circuit Court of Appeals and the U.S. Supreme Court, which upheld the FCC's authority to adopt such a rule governing "previously connected elements" consistent with 47 U.S.C. 251(c)(3);[18] however, the FCC's rules imposing a duty upon ILECs to affirmatively combine UNEs for CLECs—51.315(c)-(f)—were struck down by the Eighth Circuit as being wholly inconsistent with the plain language of 47 U.S.C. 251(c)(3).[19] This latter ruling was not overturned by the Supreme Court and, in fact, was reaffirmed by the Eighth Circuit on remand.[20]

In IUB I, the Eighth Circuit Court of Appeals held that Section 251(c)(3) of the Telecom Act "unambiguously indicates that requesting carriers will combine the

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[17] 47 C.F.R. 51.315(c)-(f):

(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:

(1) Technically feasible; and

(2) Would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commission that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

[18] AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 394-395 (1999) (hereinafter, "IUB II").

[19] Iowa Util. Bd. vs. FCC, 120 F.3d 753, 813 (8th Cir. 1997) (hereinafter, "IUB I"), aff'd in part and remanded, AT&T v. Iowa Utils. Bd., 525 U.S. 366 (1999).

[20] Iowa Utilities Board v. FCC, 219 F.3d 744, 758 (8th Cir 2000) (hereinafter, "IUB III"), cert. granted in part, 148 L. Ed. 2d 788, 121 S. Ct. 877 (Jan. 22, 2001).

unbundled elements themselves" and that the language of that section "can[not] be read to levy a duty on the incumbent LECs to do the actual combining of elements."[21] As the court bluntly put it, "the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do all of the work."[22] Thus, the court vacated rule 51.315(c)-(f) because it conflicted with Section 251(c)(3)'s directive that any combining of elements be done by CLECs, not by ILECs.

The Eighth Circuit also vacated Rule 51.315(b) because, according to the court, Section 251(c)(3) requires an ILEC to provide access to network elements only on an unbundled (as opposed to bundled) basis.[23] However, the U.S. Supreme Court reversed the Eighth Circuit's decision with respect to Rule 51.315(b). The Court described this rule as forbidding "an incumbent to separate *already-combined* network elements before leasing them to a competitor."[24] The Court determined that this rule had a rational basis, in that it would prevent ILECs from engaging in the anti-competitive practice of "disconnecting *previously connected* elements" simply to impose wasteful reconnection costs on CLECs.[25] Importantly, the Court did not decide that ILECs were obligated to combine network elements for CLECs that were not "previously connected" or "already combined."

[21] IUB I, 120 F.3d at 813.
[22] Id.
[23] Id.
[24] IUB II, 525 U.S. at 393 (emphasis added).
[25] Id. at 395 (emphasis added).

On remand, the CLECs asked the Eighth Circuit Court of Appeals to reconsider its decision vacating Rule 51.315(c)-(f) on the basis of the Supreme Court's discussion of Rule 51.315(b), but the court rejected the CLECs' arguments. It emphatically stated that "Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall 'combine such elements.' It is not the duty of the ILECs." IUB III, 219 F.3d at 759.[26] The court therefore held that Rules 315(c)-(f) were impermissible because they "*violate the plain language of the statute*."[27] Thus, while the Supreme Court decided in IUB II that ILECs could be prohibited from separating previously combined elements, the Eighth Circuit decided in IUB I and again in IUB III that ILECs could not be compelled to combine elements for CLECs that are previously uncombined.[28] In short, the Eighth Circuit's decisions make it clear that an incumbent LEC may not be required to affirmatively combine UNEs.

The CLECs ask the Commission to circumvent these decisions by arguing that, regardless of the plain language of Section 251(c)(3) and Rule 51.315, ILECs should be required to combine network elements whenever the ILEC would "ordinarily combine" those elements, regardless of whether those elements are previously connected. However, any requirement that ILECs combine the elements to provide new combinations of UNEs would violate federal law and therefore be preempted. The courts clearly have determined that Congress saw the nation's telecommunications policy as

[26] The Eighth Circuit also criticized and rejected a decision from the Ninth Circuit Court of Appeals, U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999), cert. denied, 2000 U.S. LEXIS 4680 (June 29, 2000), that followed IUB II but preceded IUB III. In that decision, the Ninth Circuit upheld as not inconsistent with Section 251(c)(3) a term of an interconnection agreement under which U.S. West agreed to combine network elements for MFS. As the Eighth Circuit noted, the Ninth Circuit mistakenly believed that the Eighth Circuit used the same rationale for invalidating parts (c) through (f) of Rule 51.315 as it did in vacating part (b). IUB III, 219 F.3d at 759.

[27] IUB III, 219 F.3d at 759 (emphasis added).

[28] Id.

better served if CLECs were left to combine the elements they leased from the ILECs. Under binding federal precedent, an ILEC's only obligation is to provide "access" to its existing UNEs (and, likewise, existing combinations of UNEs).[29] Once access is provided, it is the CLEC's job to combine the UNE or UNEs with other facilities to provide a telecommunications service.[30]

The Eighth Circuit's IUB III ruling on UNE combinations is binding on the CLECs (and every other carrier and state commission nationwide) by virtue of the Hobbs Act, 28 U.S.C. § 2342(1). Under the Hobbs Act, the Eighth Circuit has exclusive jurisdiction to determine the legality of the FCC's attempt to require incumbent LECs to provide new combinations. The basic purpose of the Hobbs Act is simple: to ensure the uniform interpretation and application of a federal statute implemented by a federal agency.[31] The Hobbs Act "avoids the possibility of conflicting litigation where two courts have concurrent jurisdiction to resolve the same issues"[32] by concentrating all petitions for review of FCC orders interpreting and/or implementing the Act in a single court of appeals. As the Supreme Court has made clear, the Hobbs Act's jurisdictional preclusion is broad in scope. It not only bars direct attempts to review agency action in courts other than the designated Hobbs Act court of appeals, but also forbids indirect challenges that necessarily question the validity of the agency's action.[33]

[29] 47 U.S.C. § 251(c)(3).
[30] IUB III, 219 F.3d at 758-59; IUB I, 120 F.2d at 813.
[31] See, e.g., Carpenter v. Department of Transp., 13 F.3d 313, 316 (9th Cir. 1994) (noting Congress' intent "to increase the speed, efficiency and consistency of judicial review").
[32] Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901, 907 (8th Cir. 1984), vacated on unrelated grounds, 476 U.S. 1167 (1986).
[33] See FCC v. ITT World Comm., Inc., 466 U.S. 463, 468 (1984); Wilson v. A.H. Belo Corp., 87 F.3d 393, 399-400 (9th Cir. 1996).

Simply put, because Congress itself has prohibited the imposition of a new combination obligation on incumbent LECs as discussed above, the Commission's ability to impose such a requirement in this proceeding has been "taken . . . away" by the federal government.[34] As the U.S. Supreme Court has stated, the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from" the States "[w]ith regard to the matters addressed by the [Telecom] Act."[35] Even in those areas in which a state commission *can* regulate, the Telecom Act expressly requires state commission actions to be "consistent" with the Telecom Act—or, put another way, "not inconsistent" with the Telecom Act and the FCC's rules. 47 U.S.C. §§ 251(d)(3), 261(b), 261(c). These limitations on state commission authority under the Telecom Act preclude the imposition of a state law requirement that ILECs combine UNEs for competitive LECs because such a requirement would be inconsistent with controlling federal law.

This conclusion is compelled by the Eighth Circuit's analysis in IUB I and IUB III. Under the Hobbs Act, the Eighth Circuit had exclusive jurisdiction to determine the legality of the FCC's attempt to require incumbent LECs to provide new combinations, and the court determined that such a requirement violates the plain language of Section 251(c)(3). Notwithstanding the FCC's broad grant of power to implement the pro-competitive objectives of the Telecom Act, the Eighth Circuit has held squarely that under the plain language of the Act, the *FCC* could not require ILECs to provide new combinations of network elements to their competitors. *A fortiori*, the Telecom Act bars this Commission from imposing that same requirement upon ILECs. Under these

[34] IUB II, 525 U.S. at 378 n.6.
[35] Id.

circumstances, any contention that a state commission may impose a new combination requirement is simply wrong.

The Eighth Circuit has now twice held that a rule that requires ILECs to combine UNEs for competing LECs violates the plain language of the Telecom Act. Given those decisions, and the Supreme Court's decision in between, no state law imposing the same requirement could ever be consistent with the Telecom Act. Indeed, it would make a mockery of the Eighth Circuit's role as the Hobbs Act reviewing court if, notwithstanding its unequivocal holding that a requirement to combine UNEs violates the plain language of the Telecom Act, a state commission were to impose the very same requirement under the guise of "filling gaps" now left by the FCC's rules. There is no gap. The FCC *did* adopt a requirement to combine UNEs, but the Eighth Circuit struck it down as patently violative of the Telecom Act.

Thus, the Eighth Circuit did not create a regulatory gap that state commissions were free to fill. Rather, it drew a line beyond which neither the FCC nor state Commissions—which, as to Telecom Act matters, must always be consistent with the FCC, and which certainly cannot have *greater* authority than the FCC—can step. A state commission cannot do indirectly the very thing that the FCC cannot do directly. Indeed, if the limits the Telecom Act places on the FCC's rulemaking authority did not also apply to the states with equal vigor, the Telecom Act inevitably would become "a federal program administered by 50 independent state agencies"—an outcome that the Supreme Court described as "surpassing strange."[36]

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[36] Id.

The United States District Court for the Western District of Michigan in Verizon North, Inc. v. Strand,[37] recently confirmed that a state commission order that an ILEC assemble new combinations of elements for CLECs violates the Telecom Act. The Michigan commission had ordered Verizon to provide a tariffed UNE-P offering to CLECs, and Verizon challenged this order in federal court to the extent that it required Verizon "at the request of new entrants to assemble new combinations of elements that do not already exist."[38] The district court agreed that any state commission requirement that an ILEC combine UNEs for CLECs conflicts with and is preempted by Section 251(c)(3) of the Telecom Act.[39] As the court noted, "*Iowa Utilities II* makes it clear that the FCC cannot insert a bundling requirement consistent with the terms of the FTA. For the same reasons the state is precluded from imposing such a requirement." For the same reasons here also, the Commission is precluded from imposing such a requirement upon ILECs.

The CLECs' argument that the absence of a new combination requirement would negatively impact the CLECs' ability to compete for second lines is nonsense. CLECs have the ability to combine elements themselves (as Ameritech Ohio would be required to do) or to provision the network elements themselves. Each of these options is available for second lines and would increase the level of CLEC facilities based investment in Ohio -- something the CLECs have gone to great lengths to avoid.

Merely because the CLECs claim that ordering ILECs to provide new combinations (assuming that the Commission had the authority to order ILECs to provide

[37] File No. 5:98-CV-38, 2000 U.S. Dist. LEXIS 18620 (W.D. Mich. Dec. 6, 2000) (appeal pending) ("Verizon").
[38] Id. at *16.
[39] Id. at *19-20.

new combinations -- which it cannot) would increase competition does not warrant the adoption of the CLECs' proposal. No less than Justice Breyer, in his opinion concurring in part and dissenting in part in IUB II, noted that, "[i]ncreased sharing by itself does not automatically mean increased competition."[40] Thus, measures that have the effect of increasing CLECs' access to an ILEC's network—including new combinations—should not be reflexively imposed by regulators. To the contrary, sharing, unbundling, and combination requirements "require balance," for "[i]t is in the *unshared*, not in the shared, portions of the enterprise that meaningful competition would likely emerge."[41] "Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may not make the game worth the candle."[42]

The practical effect of a Commission rule that implements the balance of interests adopted by Congress in the Telecom Act—*i.e.*, that approves the proposed language on existing combinations and rejects calls for mandated new combinations—may well be that CLECs are actually incented to compete, to invest further in Ohio, and to react freely and innovatively to market forces. Such a rule does not mean that CLECs would be unable to provide competitive services using UNE-P for new and second lines; instead, it means that the CLECs will be incented to provide those services using the least-cost and most efficient method, which could be self-provisioning by CLECs, contracting out to

[40] 525 U.S. at 429.
[41] Id.
[42] Id. at 430.

third-parties, or self-connection of those elements as provided by ILEC's pursuant to the terms of an interconnection agreement.

(G) The CCG has once again proposed broad and unlawful obligations in their proposed language requiring ILECs to construct unbundled network element facilities upon CLEC request. The CLECs have also included not only a requirement that ILECs construct facilities for CLECs but that the ILEC must recover the costs associated with such construction through "existing rates". The CCG has proposed new section 24G as a remedy to unproven claims of anti-competitive behavior by ILECs. No specific ILEC is named by CCG and no specific facts are presented to support the remedy they seek to impose.

In the CCG's view of the world, severe Commission remedies for anti-competitive behavior are warranted based on general and unsubstantiated allegations that ILECs are engaging in such behavior -- without identifying the ILEC or any facts. Moreover, the CCG proposal assumes that "existing rates", whatever that term is intended to reference, allows all ILECs to recover CLEC requested construction costs. However, there has been no showing to support such a finding and therefore any rule which is based on such a funding would be defective.

The CCG's language is also built on the faulty assumption that ILECs must construct new facilities whenever the CLEC requests network elements. However, the Act requires ILECs to provide access to its existing network and not to a superior or unbuilt network.[43] ILECs are not required to become the construction company and financier for the CLEC. If the elements exist in the ILEC's network, then the ILEC must

[43] Iowa Utilities Board v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), aff'd in part and rev'd in part on other grounds sub nom., AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

make such network elements available. However, the CCG language does not contain any limitation on the obligation of the ILEC to construct. Such a requirement exceeds any legal obligation imposed by the Act and should be rejected.

The CCG language also assumes that CLECs requesting network elements are similarly situated to retail customers ordering end-to-end services from the ILEC. That assumption is incorrect in most cases. CLECs order distinct network elements that the CLEC may use as it wishes to provide services. There are different rate structures and obligations associated with network elements and retail services. Moreover, the ILEC provides the retail customer with an end to end service. The facilities which are used to provide that end to end service remain under the ILEC's control and the retail customer has no say in the selection of the facilities used by the ILEC to provide the service. As a result, in most cases there is no valid comparison of CLEC orders and retail services and therefore discrimination claims must fail.[44] In addition, the TELRIC studies that have been approved by the Commission for Ameritech Ohio do not include the construction assumptions proposed by the CLECs. Thus, their suggestion at p. 73 that such construction activities be recovered through existing rates will not allow the ILECs to recover the costs associated with such construction.

The language proposed by the CCG could also be interpreted to eliminate the requirement imposed on CLECs by the FCC to pay for loop conditioning or IDLC/RSU construction activities.[45] This issue is currently pending in Ameritech Ohio Case No. 96-922-TP-UNC where an extensive record was developed detailing the costs which are

[44] For example, the FCC has held that there is no retail analog to the ordering of unbundled loops. In Re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, CC Docket No. 97-137, FCC 97-298 (August 19, 1997), par. 141.
[45] First Report and Order, par. 382, 383, 384, 745; UNE Remand Order, par. 192-193.

incurred by Ameritech Ohio in performing loop conditioning. The Commission should not decide those issues for all ILECs or Ameritech Ohio in this generic case.

The CCG's remedy is also based on an implied claim that all ILECs treat retail customers and CLECs differently for construction purposes. No evidence has been presented concerning the construction policies of any ILEC, let alone evidence that would support a discrimination conclusion and broad remedy. As a result, the CCG language could create a preference for the CLECs by imposing a requirement that would exceed the ILEC's construction policy for its retail customers. A blanket requirement on all ILECs, as set forth in the CCG proposal, is unwarranted and unlawful and should not be adopted.

The CCG's proposal that unbundled transport must be made available between the same points that the ILEC makes access transport available should also be rejected. CCG, p. 74. This requirement is inconsistent with the FCC's rules.[46] Moreover, the CCG definition is outside the scope of shared transport as defined by the FCC since access transport can include loops where transport is provided between two points that contain one or more premises. The CCG's proposals should be rejected.

[46] 47 CFR 51.319; UNE Remand Supplemental Order (Nov. 24, 1999).

Rule 27 - Forward-Looking Economic Costs

As Ameritech Ohio indicated in its Initial Comments, the Commission should indicate as part of its adoption of rules that the TELRIC related rules are subject to modification based on the outcome of various legal challenges to the FCC's pricing rules. In particular, the FCC's and the Commission's rules, which essentially mirror the FCC's, require a cost calculation based on a hypothetical network concept which has been found to be unlawful and contrary to Section 252 of the Act.[47] Although that decision is on appeal to the United States Supreme Court, the Commission should acknowledge in its adoption of rules the potential that pricing and costing related rules may need to be substantially modified. Not surprisingly, the CCG has failed to mention the Eighth Circuit's decision which undermines the concepts it and the CLECs have advocated. In fact, in a number of respects the CCG now argues for new and additional language that clearly mandates the development of costs based on a hypothetical network and ILEC. The Commission should refrain from adopting new and expanded language that is clearly unlawful and contrary to recent court decisions.

(B)(5) The CCG has proposed language that assumes that a TELRIC analysis should be based on the ILEC's "last authorized depreciation lives". CCG, p. 81. This proposal wrongly assumes that the depreciation portion of a TELRIC analysis must start with lives prescribed by the Commission or the FCC. Although some companies may elect to use previously prescribed depreciation lives, it is unreasonable to mandate that depreciation lives that most likely are outdated, to serve as the basis for calculating "forward looking" lives. Moreover, as the FCC and the Commission move away from

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[47] IUB III, 219 F. 3d at 749-751.

frequent depreciation proceedings for companies, the use of previous findings will create clear inconsistencies with the forward looking view being projected by TELRIC studies. The Commission's proposed rule correctly reflects the appropriate economic principle for using depreciation lives in a TELRIC study and should be adopted.

(B)(9) The CCG has proposed modifications to the proposed language relating to fill factors which is inconsistent with the current state of the law. The CCG proposal is similar to its hypothetical network proposal in that it seeks to require fill factors which reflect "plant operating in an optimally efficient manner". CCG, p. 82. The justification for this language is a claim that ILECs have previously proposed fill factors based on embedded investment concepts. CCG, p. 82. Contrary to the CCG's comments, Ameritech Ohio has never proposed fill factors based on embedded investment. Ameritech Ohio has always proposed forward looking fill factors consistent with the FCC's rulings and this Commission's guidelines. Moreover, the Commission's proposed rule (as well as the existing guideline, Section V.B.4.b.8) is consistent with the fill factor requirements of the FCC's First Report and Order, par. 682. ("Per unit costs shall be derived from total costs using reasonably accurate "fill factors" estimates of the proportion of a facility that will be "filled" with network usage)".[48] No deviation from the FCC's language is warranted.

No explanation or justification has been provided by CCG that would define its proposed phrase or its use to develop quantifiable fill factors. It appears to be yet another example of the CLEC's hypothetical network approach to TELRIC costing since it has no relationship to the forward looking fill factors that the ILEC being studied can reasonably

[48] First Report and Order, par. 682.

expect to experience on a forward looking basis. As a result, the CCG language is inconsistent with Section 252 of the Act and must be rejected.

In addition, adoption of such a proposal would be counter productive in that it would hinder the ability of ILECs and others to develop and evaluate TELRIC studies and will lead to endless disputes as to the appropriate quantification of plant fill factors representing an "optimally efficient use." A more reasonable approach, as reflected in the proposed rule, is a requirement that reasonably accurate fill factors be used that reflect the proportion of a facility that will be filled with network usage during the study period. This language properly captures the actual use of facilities during the forward looking period being studied and should be adopted.

Rule 29 - Resale

(A)(2) Sprint has proposed modifications to the proposed rule to require that vertical and other services be made available, independent of any underlying basic dial tone. Sprint, Exhibit 1 at 12. This requirement is directly contrary to the Act and the FCC's resale obligations. Section 251(c)(4) imposes on ILECs an obligation to offer for resale at wholesale rates any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. The FCC has held that carriers reselling the ILEC's services are limited to offering the same service an incumbent offers at retail.[49] Ameritech Ohio does not offer services, such as vertical features, independent of dial tone to its retail customers. As a result, the Sprint proposal would improperly create an obligation for ILECs to offer to CLECs for resale at wholesale rates, services that Ameritech Ohio does not offer its retail customers. Thus, the language is inconsistent with the FCC's First Report and Order and must be rejected.

[49] First Report and Order, pars. 872-875.

Rule 30 - Rights of Way, Poles, Ducts and Conduit

(B)(1) and (5) The CCG has recommended that the Commission modify proposed 30(B) to require that rates for conduit space and right of way should be based on TELRIC. CCG, p. 87. The FCC has developed a rate formula for conduit space which Ameritech Ohio applied and the Commission approved in Case No. 96-922-TP-UNC for establishing conduit and duct rates. There is no basis presented by the CCG for departing from the approach approved by the Commission and as prescribed by the prevailing FCC formula. Moreover, Ameritech Ohio would note that the proposed rule limiting pole attachment rates to the maximum allowed by the FCC formula should be read to include conduits, duct or right of way since the definition of pole attachment in Section 224 of the Communications Act includes conduit, ducts and right of way. Unlike pole attachments and conduit space, however for rights of way, the FCC has not established a formula for pricing rights of way, since rights of way are dependent on contract and ordinance terms and can vary substantially in size, cost and use. The Commission should also refrain from prescribing specific TELRIC rates or a formula for rights of way due to the need to consider the unique facts surrounding each individual request for access to rights of way.

(B)(2) The CCG also proposes an amendment concerning a utility's ability to reserve space for the provision of telecommunications, video or for its core utility service. CCG, p. 88. However, it is not clear why the CCG amendment is necessary since the proposed second sentence of this section prohibits any reservation of space to the detriment of a CLEC. Thus, potential issues over space reservation could be addressed through this provision without the amendments proposed by the CCG.

Rule 32 - Discrimination, Affiliate Transactions, and Anti-Competitive Behavior

Ameritech Ohio agrees with and joins the chorus of Ohio incumbent local exchange companies in recognizing that proposed Rule 32 is generally unnecessary, ambiguous, burdensome, inefficient, beyond the Commission's authority, and in conflict with federal requirements. The rule, as drafted, represents a step backwards into increased, iron fisted regulation precisely at the time when Congress has declared reduced regulation to be a fundamental national telecommunications policy. See Preamble to Act ("An act to promote competition and reduce regulation"). As the Commission knows, the FCC has already promulgated comprehensive affiliate transaction, CPNI, and non-discrimination rules. Those rules could simply be mirrored or incorporated into the local service rules adopted by the Commission. In any event, Ameritech Ohio urges that the proposed Rule 32 not be adopted.

(A) Definitions - Ameritech Ohio agrees with Verizon North that the proposed definition of employees is overly broad and, if not modified, would impose overly burdensome requirements on ILECs. It also agrees that the term "Affiliate" should be conformed to that contained in the Act.

(B) Violations - Ameritech Ohio, like Verizon North and Sprint, believe this provision is unlawful, unnecessary and punitive. It should be eliminated.

(C) Code of Conduct - Ameritech Ohio, as its initial comments reveal, has numerous concerns with the proposed rule. Like CBT, it sees little need for the code of conduct requirement of the proposed rule. The anti-discrimination and complaint provisions set out in the Revised Code provide adequate vehicles to assure reasonable, non-discriminatory, competitive behavior. If a rule is adopted, Ameritech Ohio would urge the Commission to incorporate the changes suggested in its Initial Comments. Among other things, the rule should, as CBT correctly points out, apply to all LECs since the behaviors sought to be regulated by the proposed code of conduct should not be any more acceptable when carried out by one local exchange carrier as opposed to another. Ameritech Ohio also agrees with Verizon North that, as to customer information, the FCC's CPNI rules should be the standard followed by the Commission.

(C)(2) Disclosure of Information - Verizon North and CBT argue that the FCC's CPNI rules comprehensively regulate this issue and would most likely preempt any differing state regulation. Ameritech believes that this argument has merit. The Commission should defer to the FCC's CPNI rules, or at a minimum, revise the proposed disclosure section of the rule in a manner consistent with Ameritech's initial comments.

(C)(3) Competitor Information - Ameritech Ohio, like Verizon North, believes that all carriers should be subject to this requirement. Any Commission rule must be consistent with the Act. See 47 USC § 222.

(C)(4) Retail/Wholesale Transfer of Information - Interestingly, even the CCG recognizes the overreach of this portion of the proposed rule. The CCG's implicit recognition of the need for consistency with the federal rules should be followed. This and all other portions of Rule 32 should be eliminated or, at least conformed to, federal requirements.

(C)(5) Tying Arrangements - CBT correctly notes that as to tying agreements, current anti-trust laws provide adequate standards and remedies. However, if the Commission does address such arrangements, the rule should, consistent with Ameritech Ohio's previous comments, expressly allow the offering of packages of services at a single price.

(D) Cost Allocation Manual (CAM) - Ameritech Ohio believes that Sprint's, Verizon North's, and CBT's comments, that the FCC's CAM requirements sufficiently regulate the field, are well taken. Obviously, duplicate or unnecessary regulatory requirements should be avoided. The CCG's suggestions, on the other hand, merit little consideration. As usual, the CCG and its members employ the same tired, unreasoned, rhetoric of alleged anti-competitive conduct. Because the CAM is a record maintained for verification purposes, as opposed to a record of day-to-day operations, continual Commission access is unnecessary. Maintaining the CAM on a website would provide no substantial benefit and would add needless cost to telephone company operations.

Contrary to the CCG's assertion, there is no logical connection between sharing of employees and public access to the CAM. Employee sharing allows carriers to take advantage of economies of scope which, in turn, permits them to be more competitive. Obviously, the CCG and its members seek to game this process to give their local exchange operations a competitive advantage achieved through imposition of unnecessary regulatory requirements on ILECs. Their proposals should be rejected.

(D)(2) Cost Allocation Data - CBT proposes that if a CAM is required, any cost allocation data contained therein should only relate to ILEC data. Ameritech Ohio agrees. As Verizon points out, it would be burdensome to include non-ILEC data in the CAM.

(D)(4)(a) Board of Director Minutes - As noted in its original comments, Ameritech Ohio sees no benefit to be gained by maintaining Board of Directors' meeting minutes in the CAM. It also agrees with CBT that, to the extent it reaches beyond the regulated utility, this requirement exceeds the Commission's jurisdiction.[50]

(D)(4)(b)-(d) Other CAM Data - Ameritech Ohio, like CBT and the other Ohio telephone companies that have experience maintaining CAMs, believes that any Ohio affiliated transaction pricing rules should mirror the FCC's requirements.

(D)(4)(e) Transferred or Shared Employees - Ameritech Ohio shares the concerns of CBT and Verizon North. The section is unclear and overreaching. The Commission should weigh the slight potential benefits of the section against the cost of maintaining the required records. If some form of the proposed section is to be adopted, Ameritech Ohio would respectfully suggest that the modifications proposed in its initial comments should be incorporated.

(D)(4)(f) Complaint Log - Ameritech Ohio believes that the concerns raised by CBT and Verizon North are well taken. A record of complaints is likely to serve no purpose other than providing CLECs a tool to "paper the file" with unproven claims of discrimination. Complaints of any substance will be publicly filed under R.C. 4905.26 at the PUCO. The complaint log requirement should be eliminated.

[50] Ameritech Ohio is an Ohio closed corporation, which is managed by its sole shareholder, Ameritech Corporation. Hence, there is no Board of Directors. All corporate actions are initiated through Ameritech Corporation.

(E) Affiliate Transaction Safeguards - Sprint points out that the requirements of this section impose yet another layer of regulation on telephone companies. Ameritech Ohio is also concerned with unnecessary and burdensome CAM requirements. Ameritech Ohio agrees with Sprint that transferred employee job descriptions and data should not be included in the CAM.

(E)(2) OSS Performance Reports - CBT and Sprint suggest that imposing an obligation to provide OSS performance reports to CLECs is better left to interconnection agreements and collaborative sessions rather than an administrative rule proceeding. Obviously, if no interconnecting CLEC desires such reports, requiring that they be made available and updated would be unnecessary. On the other hand, such carriers should be able to easily obtain such reports. Perhaps the section could be made conditional--unless the interconnection agreement provides otherwise, reports would be provided.

(E)(3) Method of Charging and Transferring Assets - Ameritech Ohio agrees with the comments of CBT, Verizon North, and Sprint. The FCC's affiliate transaction pricing rules should be followed and such rules should only apply to the regulated entity's records. Ameritech Ohio would additionally note that in order to promote comparability of data, all LECs should be subject to the same pricing requirements.

(F) GAAP Accounting - Ameritech Ohio, like Verizon North and CBT, believes ILECs should have the option to use GAAP accounting.

Rule 34 - Enforcement

While most commenting parties (Ameritech Ohio, OTIA, Verizon North, CCG) expressed concerns that the Commission lacks jurisdiction to invoke the sanctions and processes listed in this rule, the Consumer Parties' main concern seems to be that it will be left out of the party. The Consumer Parties' involvement must be evaluated on a case by case basis consistent with Commission rules and intervention statutes. As set out in its initial comments, Ameritech Ohio shares the other parties' jurisdictional concerns.

Rule 35 - Notice of Non-Compliance

The Consumer Parties contend that such notices should be public records. While Ameritech Ohio does not understand the reason for this comment, it does reinforce one of Ameritech Ohio's concerns in this respect. Clearly, such notices, since they are public records, will have adverse impacts. They, therefore, should be only issued after thorough staff inspection or investigation, an opportunity for the company to be heard, and only after a staff determination is made that a violation has most likely occurred. Mere allegations should never be sufficient to issue a Notice of Non-Compliance.

Rule 37 - Settlement Agreements and Stipulations

The Consumer Parties propose that any settlement process be open to the public and to public participation. Since the disputes that are covered by the rule are most likely to be carrier-to-carrier disputes, one must ask what useful purpose, except perhaps an opportunity for the Consumer Parties to grandstand, will be served by such openness and public participation. In fact, the usefulness and effectiveness of the mediation and settlement process could be diminished if those with no stake in the proceeding are allowed to be part of the settlement process. In addition, a public process will constrict the flow of information and frank discussion that occurs many times during settlement discussions. Ameritech Ohio respectfully submits that disputes are more likely to be settled in private meetings among the real parties in interest. Those parties are carriers. Neither OCC, AARP, the other Consumer Parties nor the public need be present.

Rule 38 - Commission Proceedings

For the reasons set out in its initial comments, Ameritech Ohio agrees with CBT, OTIA, Verizon North, and the CCG that the Commission has no jurisdiction to impose the forfeitures, remedies and penalties set out in the rule. As to the Consumer Parties' ambiguous suggestion about publication of some form of performance measures, Ameritech Ohio would simply note that the industry focus going forward should be less, not more regulation. The competitive market is the best regulator and the Consumer Parties should let it do its work. The Consumer Parties' proposal should be rejected.

Rule 39 - Payment of Forfeitures and Other Payment

As described in its initial comments, Ameritech Ohio believes that much of this rule is beyond the authority granted the Commission by the General Assembly and it accordingly supports the well-taken comments of OTIA and Verizon North.

Payphone Reply Comments

I. Introduction

A. The Consensus Among the Divergent Body of Commenters is That This is Not the Proper Forum to Entertain the PAO's Proposed Rules for Payphone Service Providers.

A divergent body of commenters responded to the Commission's inquiry concerning whether the rules initially proposed by the Payphone Association of Ohio's ("PAO") ex parte filing of January 26, 2001 should be adopted in this proceeding.[51] With the exception of PAO, the commenters were unanimous that this rulemaking was not a proper forum to consider such proposals. Indeed, the commenters overwhelmingly agreed with Ameritech Ohio that the issues raised by PAO already had been, or should be, resolved in the Commission's pending payphone docket.[52] See <u>In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services</u>, Case No. 96-1310-TP-COI (" 96-1310"). Accordingly, Ameritech Ohio continues to urge the Commission to reject PAO's continued collateral attacks on the determinations made in 96-1310 and find, once again, that 96-1310 is the proper forum in which to consider the issues raised by PAO.

[51] The entities filing comments on payphone issues include, in addition to Ameritech Ohio, the Ohio Consumers' Counsel; the American Association of Retired Persons ("AARP"); The Appalachian People's Coalition; Communities for Action; Edgemont Neighborhood Coalition; The Empowerment Center of Greater Cleveland; the City of Columbus; the City of Toledo; the City of Cleveland; Alltel Communications, Inc.; Alltel Ohio, Inc.; Western Reserve Telephone Company; United Telephone Company of Ohio, d.b.a. Sprint; Cincinnati Bell Telephone Company; Verizon North Incorporated; and the Ohio Telecommunications Industry Association.

[52] The City of Cleveland, AARP, and Alltel Communications, Inc. commented that this rulemaking proceeding was an inappropriate forum to consider PAO's proposals, but did not specify the alternative proceeding in which review should be undertaken.

In its reply comments prematurely filed on May 18, 2001, PAO attempts to distinguish this rulemaking from 96-1310 by claiming that the purpose of this proceeding is to establish policy on a statewide basis (*i.e.*, adoption of the new services test) which then should be applied to the individual ILECs in 96-1310. PAO Reply Comments, p. 3.[53] This attempted distinction is without merit. As Ameritech Ohio explained in its Initial Comments, the Commission already embraced the FCC's new services test as early as 1997 in 96-1310. The purpose of the current phase of 96-1310 is to ensure that the applicable FCC standards continue to be appropriately applied. There simply is no need for the Commission to independently codify the same FCC rules under which it currently is operating in 96-1310 before proceeding further in that case. PAO's request that the Commission do so is nothing but a thinly veiled attempt to force the Commission to reconsider the rulings it made in 96-1310, as set forth in more detail subsequently. The issues that already have been determined in 96-1310 are the proper subject for reconsideration, or appeal, if PAO is dissatisfied with the Commission's findings. Similarly, those issues that have not been decided already have been developed and are nearly ripe for decision,[54] making it unnecessary and administratively inefficient to develop these issues again in the context of a rulemaking. Thus, the Commission should reject the rules proposed by PAO in this proceeding.

[53] PAO attempts to support this distinction by claiming that statewide policy issues can only be determined in rulemaking proceedings, not in Commission-ordered investigations ("COIs") such as 96-1310. PAO's argument demonstrates its misunderstanding of this Commission's procedures and its use of COIs to determine policy in this state, as the Commission consistently has done in 96-1310. Contrary to PAO's assertion, the policies determined in 96-1310 are applicable to all carriers in Ohio.

[54] The ILECs' pre-filed direct testimony in 96-1310, was filed on June 2, 2000 and, pending resolution of outstanding discovery matters and the submission of PAO's pre-filed testimony, the case is prepared to proceed to hearing at which PAO's claims can be further tested through cross examination.

Because the other parties providing comments are in agreement with the vast majority of Ameritech Ohio's Initial Comments filed April 16, 2001, Ameritech Ohio will direct its reply comments to the positions taken and the rules proposed by PAO.

II. Specific Comments

A. PAO's Proposed Rules Improperly Expand the New Services Test.

In its Initial Comments, PAO cites a number of orders issued by the FCC and the FCC's Common Carrier Bureau, and argues that this Commission should codify these "obligations" in the Ohio Administrative Code. In the furtherance of its argument, PAO proposes the following rule:

> ILECs shall price network services made available to Telephone Companies that provide Payphone Services consistent with the methodology adopted by the Federal Communications Commission under 47 U.S.C. § 276 in CC Docket 96-128 and *FCC DA 00-347 (Com. Car. Bur. Released March 2, 2000).* The ILEC shall demonstrate that the proposed rates do not recover more than the direct costs of the service plus a just and reasonable portion of the carrier's overhead costs.

PPAO Proposed Rule 4901:1-6-45(F) (emphasis added).

On its face, PAO's proposal appears to benignly request that the Commission merely recognize the FCC's new services test adopted in Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 ("Docket No. 96-128"). However, by inserting the italicized language into the proposed rule (a reference to a ruling by a deputy chief of the FCC's Common Carrier Bureau), PAO actually is asking the Commission to broaden the scope of the new services test[55] and to adopt TELRIC pricing for payphone service

[55] The Commission also limited the services subject to the new services test to the COCOT Coin Line, COCOT Line and Answer Supervision (96-1310, Entry of April 27, 2000; aff'd Entry on Rehearing of June 22, 2000). PAO would expand the test to include local usage, toll usage and directory assistance.

providers. Indeed, PAO's overriding objective in this proceeding, as in 96-1310, is for this Commission to adopt TELRIC pricing.

In its reply comments, PAO attempts to downplay its quest for TELRIC pricing, explaining that payphone service providers ("PSPs") are entitled to cost-based pricing pursuant to 47 U.S.C. § 276. PAO Reply Comments, p. 8. However, PAO conveniently neglects to mention the distinction between the cost-based pricing to which it is entitled under the applicable new services test and that which it improperly seeks under the TELRIC methodology. As PAO surely knows, TELRIC prices are lower than new services test prices because the overhead loading permissible under the new services test is higher than that under TELRIC.

The deputy chief's ruling, on which PAO bases its argument, misconstrues the requirements of the new services test by suggesting that basic payphone access line services be treated as unbundled network elements ("UNEs") [56] and provided to payphone service providers at TELRIC rates. These findings are directly contrary to the established precedent of the FCC and this Commission that permit the incumbent LEC in the first instance to develop and justify costing methodologies for the new services test, including the justification of a reasonable allocation of overhead independent of UNE overhead

[56] See PAO Proposed Rule 4901:1-6-45(F)(2).

loading.[57] The FCC already has approved payphone service rates with overhead loadings far in excess of those permitted for UNEs. See Local Exchange Carriers' Payphone Functions and Features, Memorandum Opinion and Order, 12 FCC Rcd 17996, 18002 ¶ 13 (1997).

As explained by Ameritech Ohio in 96-1310, the deputy chief's ruling is pending review by the FCC on the basis that it violates the provisions of the Telecommunications Act of 1996 and the FCC's orders implementing it, and has not been adopted by the FCC. See 96-1310, Ameritech Ohio's Memorandum Contra the Payphone Association of Ohio's Motion to Compel, filed June 23, 2000, at 4-5. Considering that the deputy chief's ruling has not been approved by the FCC, the Commission hardly is "obligated" to adopt or otherwise follow it, as PAO suggests. The Commission should not permit PAO to improperly use the deputy chief's ruling to circumvent this Commission's and the FCC's established precedent and procedures.

Moreover, even if the offending language of the proposed rule were removed, there simply is no need for this Commission to independently codify the new services test in the Ohio Administrative Code. Ameritech Ohio and numerous other commenters explained in some detail in their initial comments why it is unnecessary to consider the adoption of the new services test in this proceeding: because it already has been adopted

[57] See Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, Amendments of Part 69 of the Commission's rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4531, ¶¶ 42 and 44; Memorandum Opinion and Order, Expanded Interconnection with Local Telephone Company Facilities, 9 FCC Rcd 5154, 5187, ¶ 118 (1994). See, also, NPRM, 11 FCC Rcd at 6740-41, ¶ 46 (stressing the flexibility of the new services test); Second Further Notice of Proposed Rulemaking, Price Cap Performance Review for Local Exchange Carriers, 11 FCC Rcd 858, 878, ¶ 41 919950 (same); Second Report and Order, Provision of Access for 800 Service, 8 FCC Rcd 907, 911, ¶ 30 (1993) (same); Memorandum Opinion and Order on Second Further Reconsideration, Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 7 FCC Rcd 5235, 5238, ¶ 19 (1992) (same).

by the Commission in 96-1310; because the ILECs to which it has been applied have been operating under it since 1997; and because the Commission currently is investigating it in 96-1310 (upon PAO's complaint) to determine whether the ILEC rates previously approved under the new services tests are cost based, discriminate against payphone service providers, or inappropriately subsidize ILEC payphone operations.

As explained in its Initial Comments, Ameritech Ohio provided this Commission with the information requested under the new services test on May 16, 1997 for the COCOT Line, COCOT Coin Line, and Answer Supervision, as well as Restricted Coin Access. Each service subsequently was introduced with a tariff filing developed in accordance with the new services test, was reviewed by the Commission Staff, and was allowed by the Commission to become effective. See 96-1310, Pre-Filed Direct Testimony of Carey Caldwell, at 17. Ameritech Ohio has been operating pursuant to the applicable standard ever since. Thus, nothing would be accomplished by codifying the new services test in Ohio, and PAO's proposal to do so should be rejected for what it is -- an attempt to expand the new services test beyond the standards established by the FCC and this Commission.

B. The Commission Already has Rejected the Need for Imputation Studies.

The imputation standard relied upon by PAO (Local Service Guideline V.D.1) applies only when an ILEC offering a service uses the same essential input used by a competitor to provide its comparable service. Imputation is not appropriate when, as here, an ILEC and a competitor use the same ***tariffed service***. Considering as much, this Commission explicitly refused to require ILECs to submit an imputation study where payphone service providers and the ILEC's retail payphone operation purchased the same services (business lines) from the same ILEC tariff, correctly reasoning that there is simply nothing to impute in such circumstances.[58] 96-1310, Entry of April 27, 2000 at 12.

To the extent that PAO seeks a rule[59] that prohibits ILECs from discriminating against payphone service providers, the Commission already has adopted such non-discrimination provisions in 96-1310 and has explicitly stated that the PAO's allegations of discriminatory treatment will be examined at the hearing to be held in that docket. As with the other issues addressed the CC Docket 96-128, there is simply no need to codify these provisions separately in the Ohio Administrative Code.

C. The Commission is Prohibited From Setting Interim Rates Based Upon TELRIC.

As stated previously, the overriding objective of PAO in this proceeding and in 96-1310 is not so much the codification of the new services test in Ohio, but for this Commission to adopt TELRIC pricing standards for payphone services. PAO attempts to introduce this concept as an interim measure in 96-1310, and further proposes that PSPs have a right to reimbursement of any overcharges that may have resulted from "the effective date of any ILEC's obligation to provide cost-based rates." See PAO Proposed Rule 4901:1-6-45(F)(3). As stated above, the effective date for such cost-based pricing was 1997. PAO's proposed rule clearly runs afoul of this Commission's pronouncement

[58] Moreover, PAO's Proposed Rule 4901:1-6-45(G) would distort the very imputation methodology it relies on by extending the analysis of prices from an "essential input" of a service, as required by Local Service Guideline V.D.1., to the revenues derived from total payphone operations (or, as stated in the proposed rule, "aggregate revenue derived from the sale of telecommunications services to end users through payphones").

[59] See PAO Proposed Rule 4901:1-6-45(H).

in 96-1310 that such refunds "amount to improper retroactive ratemaking." Entry of April 27, 2000, ¶ 22.[60]

Moreover, insurmountable authority exists that, because payphone service providers are not "telecommunications carriers," they are not entitled to TELRIC pricing. See, First Report and Order in CC Docket No. 96-98 (August 8, 1996) (independent public payphone providers are not telecommunications carriers); CC Docket No. 96-128, at ¶ 147 ("We decline to require, as proposed by AT&T, that the pricing regime under Sections 251 and 252 apply to all Section 276 payphone services offered by incumbent LECs. Section 276 does not refer to or require the application of Section 251 and 252 to LEC payphone services. In addition, the elements and services to be offered under Section 251 and 252 are not available to entities that are not telecommunications carriers."); In the Matter of the Commission's Investigation Into the Regulation of Customer Owned Coin Operated Telephone Service, Case No. 84-863-TP-COI (Order, January 29, 1985) (this Commission has exercised only indirect supervision of payphone service providers as providers of customer premises equipment ("CPE"), not as telecommunications carriers).

As Ameritech Ohio stated in its initial comments, not only would it be inappropriate for the Commission to consider PAO's collateral attack of its prior orders in this docket, it would be unlawful for it to apply TELRIC pricing to payphone services, on either a permanent or interim basis. As with the other issues already decided in 96-

[60] In its reply comments, PAO denies that it is attempting to seek such a refund through its proposed interim pricing rules. PAO Reply Comments, p. 15. However, the language of proposed Rule 4901:1-6-45(F)(3) betrays this claim. As with its proposed pricing rule (proposed Rule 4901:1-6-45(F)(1)), discussed previously), PAO is inappropriately using this rulemaking proceeding to effectively overrule the Commission's prior determination in 96-1310, through the insertion of thinly veiled language into the proposed rules. The Commission should dismiss PAO's tactics.

1310, the issue on interim TELRIC pricing is reviewable only upon a request for reconsideration of the Commission's orders or through appeal.

D. Payphone Service Providers Are Neither Telecommunications Carriers nor Telephone Companies and, Therefore, May Not be Certificated.

It is inconceivable how payphone service providers can be considered telephone companies subject to certification pursuant to R.C. § 4905.02 and 4905.03, when the FCC and this Commission have found that they are not telecommunications carriers. Indeed, as stated by Ameritech Ohio and other commenters on this issue, the Commission has recognized its lack of authority over payphone service providers as telephone companies and has exercised only indirect supervision of them as providers of CPE which purchase standard business lines from the ILEC. See In the Matter of the Commission's Investigation Into the Regulation of Customer Owned Coin Operated Telephone Service, Case No. 84-863-TP-COI (Order, January 29, 1985) ("84-863"). See also First Report and Order in CC Docket No. 96-98 (August 8, 1996); CC Docket No. 96-128, at ¶ 147. To find now that payphone service providers are telecommunications carriers and/or telephone companies would be contrary to this Commission's and the FCC's established precedent and the fundamental reality that PAO's members are clearly only CPE providers.

In its initial comments, PAO attempts to justify its suggestion that the Commission depart from its established precedent by claiming that the telecommunications landscape has changed such that payphone service providers have become the providers of basic local service to low income users that otherwise cannot afford monthly telephone service. PAO attempts to support its claim through a self-serving study attached to its comments ("Assessment of the Impacts of the Cleveland Pay Telephone Ordinance"), the validity of which the City of Cleveland challenges in its initial comments. Ameritech Ohio notes that the report was prepared on behalf of PAO and, before its accuracy is accepted, should be tested through cross-examination, for which the forthcoming hearing in 96-1310 is the proper vehicle rather than this rulemaking. Indeed, the City of Cleveland recognizes that PAO's ulterior motive in submitting to the jurisdiction of the Commission is guided less by philanthropy than by the desire to evade local regulation through the hope that the Commission's exercise of jurisdiction would preempt local authority.

As stated in its Initial Comments filed April 16, 2001, Ameritech Ohio believes that PAO's willingness to submit to the Commission's jurisdiction, i.e., its willingness to accept the "burdens" of regulation along with its "opportunities," also is guided by an ulterior motive -- to obtain TELRIC pricing as a telecommunications carrier. Interestingly, while PAO is more than willing to accept this benefit, it is quick to abandon the burdens of regulation by developing special "certification" rules applicable to payphone service providers, which amount to little more than a registration with the Commission. PAO does so under the guise that payphone service providers operations are similar to those of commercial mobile radio service ("CMRS") providers. However, the distinctions between the two are staggering. CMRS providers are telecommunications carriers that have significant investments in network facilities over which they move the traffic of their end user customers. Payphone service providers, on the other hand, merely provide customers premise equipment and have no contractual relationship with the end users of that equipment.[61] Thus, while a case can be made that CMRS providers should be subject to less stringent certification or registration measures as telecommunications carriers, it does not follow that the fundamentally different payphone service providers should be subject to the same regulatory treatment. Indeed, as stated previously, they should not be subject to certification at all because they are not telecommunications carriers.

Ameritech Ohio urges the Commission to recognize PAO's scheme for what it is--an attempt to circumvent the established precedent of the Commission and FCC in an attempt to obtain TELRIC pricing that is, as to payphone service providers, inappropriate and unlawful.

E. Compliance With Dial Around Payment Obligations.

Ameritech Ohio continues to believe that the issue of dial around payments has been adequately addressed in the FCC's Second Order on Reconsideration in CC Docket No. 96-128, issued April 5, 2001, and that there is no present need for the Commission to interfere with the federal enforcement of its orders by separately codifying PAO's proposal in the Ohio Administrative Code.

F. Should the Commission Permit Payphone Service Providers to Impose "Property Imposed Fees" ("PIFs"), Set Intrastate Non-Coin Sent Call Rates, and Charge for Local Calls in Measured or Metered Time Increments?

Ameritech Ohio continues to believe, like OTIA and Verizon, that the Commission should not interfere on issues that the FCC has addressed, including the

[61] PAO's intimation in its reply comments that 84-863 is no longer good law, apparently because it was decided in 1985, is devoid of merit. It remains that PSPs furnish customer premises equipment and are not "telephone companies" pursuant to R.C. § 4905.03(A)(2), because they cannot be considered "common carriers," as the statute requires.

deregulation of local coin calling rates, and further believes that market conditions should be allowed to determine pricing.

CONCLUSION

Ameritech Ohio urges the Commission to adopt rules consistent with the Company's Initial Comments and these Reply Comments.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Reply Comments was served via first class mail, postage prepaid, on the parties listed below on this 25th day of May, 2001.

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