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**Unredacted version of memorandum contra
Ameritech Ohio's motion to dismiss, filed on
behalf of complainant by R. Rosenberry. (14 pgs.)
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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of)
Time Warner AxS of Ohio, L.P. and Time)
Warner Communications of Ohio, L.P.,)
Complainants,)
v.)
Ameritech Ohio,)
Respondent.)
Relative to Alleged Unjust and)
Unreasonable Rates and Charges.)

Case No. 96-66-TP-CSS

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**TIME WARNER COMMUNICATIONS OF OHIO, L.P.
AND TIME WARNER AXS'
MEMORANDUM CONTRA
AMERITECH OHIO'S MOTION TO DISMISS**

UNREDACTED VERSION

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I. INTRODUCTION

On February 2, 1996 Ameritech Ohio ("Ameritech" or "Company") filed a Motion to Dismiss the Complaint filed against Ameritech by Time Warner Communications of Ohio, L.P. and Time Warner AxS ("Time Warner" or "Complainant"). Ameritech's Motion to Dismiss is based on three principal arguments:

1. The Complaint fails to state reasonable grounds for complaint and lacks the specificity required by R.C. 4905.26;
2. The Time Warner AxS entities have no basis to bring a complaint concerning interconnection negotiations; and

3. The allegations concerning the Commission's order in Ameritech Ohio's alternative regulation case are not properly before the Commission.

As will be shown hereafter, each of these grounds is meritless, and Ameritech's Motion to Dismiss should be overruled forthwith.

II. TIME WARNER'S PLEADINGS STATE REASONABLE GROUNDS FOR COMPLAINT

The statute governing the filing of complaints against public utilities in Ohio is R.C. 4905.26, which provides, *inter alia*, that:

Upon complaint in writing against any public utility by any person, firm or corporation, ... that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by said public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, ... if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof...

R.C. 4905.26.

The statute enacted by the General Assembly creating the jurisdiction of the Commission to consider complaints against public utilities, and the procedure provided for in the statute, do not contain the explicit requirement of specificity as Ameritech asserts in the first argument

supporting its Motion to Dismiss. Rather, a written complaint must allege that a “rate ... or service ... rendered ... or proposed to be rendered, charged, demanded, or exacted ... is in any respect unjust, unreasonable, ... or in violation of law, or that ... any practice affecting or relating to any service furnished by said public utility, or in connection with such service, is, or will be, in any respect unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, or cannot be obtained ...” R.C. 4905.26. The General Assembly used broad terms to define the circumstances giving grounds for the filing of complaints.¹ There is no specificity requirement as implied by Ameritech in its Motion to Dismiss. Instead, the Commission must merely find that “reasonable grounds for complaint are stated” and upon such finding the Commission must order the complaint set for hearing. *Id.*

In several instances, the Commission has dismissed complaints against public utilities, only to have those decisions reversed by the Ohio Supreme Court. In *Coalition for Safe Electric Power v. Pub. Util. Comm.* (1977), 49 Ohio St.2d 207 (“*Coalition*”), the Commission dismissed a complaint against CEI and Ohio Edison. The Supreme Court reversed, saying that appellants had “raised genuine issues of fact relative to the utilities’ compliance with the dictates of R.C. 4905.48(A).” *Id.* at 210. Ameritech’s reliance on this case is curious, since it neither supports the “specificity” argument which Ameritech poses, nor does it suggest that facts must be alleged

¹ While the Ohio Rules of Civil Procedure are not directly applicable in the context of Commission complaint proceedings, they are nevertheless instructive on the reaction of courts to motions similar to the Ameritech Motion to Dismiss. In the context of motions to dismiss complaints under the Ohio Rules of Civil Procedure, “it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” *O’Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242. In construing a complaint upon a motion to dismiss for failure to state a claim, a court “must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.” *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. In this circumstance, the allegations in the Complaint clearly set forth duty, breach of duty, and conscious knowledge of the impropriety of its acts on the part of Ameritech. These allegations, if proven, would sustain a finding of bad faith on the part of Ameritech, and in favor of Time Warner.

which would support a finding of dishonest purpose or conscious wrongdoing by Ameritech Ohio in order to sustain a bad faith finding against Ameritech. All that *Coalition* stands for is that the complaint must "raise genuine issues of fact."

More recently, the Ohio Supreme Court reversed two Commission decisions which dismissed complaints filed by Allnet Communications against Ameritech. In the first, the Court held that "R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO." *Allnet Communications Services, Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117 ("*Allnet I*"); see also, *Ohio Utilities Company v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 153. The Court also noted that reasonable grounds may exist to raise issues which might strictly be viewed as "collateral attacks" on previous orders. *Id.* In *Allnet I*, the complaint alleged that the "mirrored" FCC access charges were unjust and unreasonable because of the unforeseen magnitude of the increases in access charges. *Id.* at 117. Although the Commission dismissed the case on Ohio Bell's motion, the Court reversed and ordered a hearing on the complaint, finding that the complaint stated reasonable grounds for complaint in accordance with R.C. 4905.26. *Id.* at 118.

In *Allnet Communications Services, Inc. v. Pub. Util. Comm.* (1988), 38 Ohio St.3d 195 ("*Allnet II*"), the Commission dismissed a second complaint filed by Allnet against Ameritech. Once again, the Court found that Allnet had stated reasonable grounds for complaint:

In essence, the gravamen of Allnet's complaint is that it is required to pay premium access rates while receiving inferior access services. It appears that these allegations do set forth reasonable grounds for complaints that the services received, the rates for those service, and Ohio Bell's practices affecting or relating

to those services are unreasonable, unjust, discriminatory and unjustly preferential in violation of R.C. 4905.32, 4905.33 and 4905.35. The PUCO's entry dismissing Allnet's complaint acknowledges that these issues need resolution. Thus, the PUCO was required by R.C. 4905.26 to set a hearing to consider the merits of Allnet's allegations.

Id. at 196.

These cases all dictate a broad reading of R.C. 4905.26, and nowhere suggest some or any degree of "specificity" as imagined by Ameritech. To the contrary, these holdings parallel the practice under the Ohio Rules of Civil Procedure which are founded upon notice pleading, and do not require that a complainant meet a burden of proof standard in its complaint. *See*, C.R. 8(A) and (E). In light of the broad language of R.C. 4905.26, and the Court's holdings in *Coalition*, *Allnet I* and *Allnet II*, it is clear that Time Warner's complaint is more than adequate to withstand a Motion to Dismiss.

Moreover, even if a specificity requirement was applicable for complaints under R.C. 4905.26, the Complaint and the January 16, 1996 Motion to Suspend more than adequately set forth reasonable grounds for complaint. First, the Complaint specifically alleges that Ameritech has engaged in a pattern of behavior in the context of interconnection negotiations which violates its duties under R.C. 4905.22 to provide "necessary and adequate service and facilities" and "furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable." Complaint at 2-3. Second, the pleadings alleged that Ameritech's insistence on unreasonable and non-cost justified terms, conditions, and prices for interconnection violate the Company's duty under R.C. 4905.22 that "no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service."

Complaint at 3. Third, the pleadings alleged violations by Ameritech of its alternative regulation plan, and the Commission's order in *Time Warner Communications of Ohio*, Case No. 94-1695-TP-ACE (August 24, 1995), in violation of R.C. 4905.54. Time Warner clearly alleged actions on the part of Ameritech more than sufficient to demonstrate reasonable grounds for complaint sufficient to overcome a motion to dismiss. Therefore, the Commission should overrule the Motion to Dismiss forthwith.

For its part, Ameritech offered its own interpretation of the circumstances surrounding the interconnection negotiations which have thus far occurred. *See* Motion to Dismiss at 4, 6-7. The offering of these facts tends to support Time Warner's argument that the Motion to Dismiss is not well-founded, for it merely points out the inappropriateness of dismissing an action before the complaining party has had the opportunity to put its evidence before the Commission. Obviously, Ameritech would prefer to avoid any review of its actions over the past year, and continue to delay entrance of competitors into its market. However, the Commission has the duty to hear and decide complaints brought to it by those who are harmed by the actions of utilities subject to the jurisdiction of the Commission. Such a hearing should occur in this case.

Ameritech also argues that the Commission, not Ameritech, is the entity having control over Time Warner's certification case, and that in fact Ameritech did not do anything in the certification case to delay issuance of the Commission's decision.² Ameritech Motion to

² In fact, Ameritech did submit objections to the Time Warner application, submitted discovery which sought materials found by the Commission to be irrelevant to the case, and caused the incurrence of additional expense and delay in the certification proceeding. If Ameritech was truly pro-competition as its advertising campaign has claimed, Ameritech would have actively supported Time Warner's application.

Dismiss at 4. However, the fact is that Ameritech did not need to litigate issues in the certification case in order to effectively delay both Time Warner's entry into business and implementation of the state's telecommunications policy. Instead, through its failure to negotiate in good faith Ameritech has accomplished much the same result by withholding interconnection until it suits Ameritech's business goals to do so. As the monopoly with complete control over bottleneck facilities, this behavior is unconscionable, especially given the state's telecommunications policy.

As can be seen from the Complaint, Time Warner alleged facts demonstrating that Ameritech has refused over the past year to negotiate in good faith. For its part, Ameritech argues in effect that the allegations in the Complaint amount to "bad faith" and that "acts must be alleged which would support a finding of dishonest purpose or conscious wrongdoing by Ameritech Ohio." Motion to Dismiss at 2. Notwithstanding Ameritech's argument, the Complaint does contain allegations of fact sufficient to support a finding of duty on the part of Ameritech (as imposed pursuant to R.C. 4905.22, 4905.54, and 4927.02) and a conscious doing of acts in violation of that statutory duty (refusal to offer reasonable services, and reasonable prices, terms and conditions of service, failure to provide timely responses to requests for information about the availability of information, failure to make available personnel capable of making decisions with respect to terms, conditions and rates, and insistence by Ameritech on terms, conditions, prices and other aspects of interconnection arrangements which are unjust, unreasonable, discriminatory and preferential). In the circumstance of a Motion to Dismiss,

Time Warner's allegations on their face demonstrate the existence of factual circumstances sufficient to overcome a Motion to Dismiss.

Even if the Complaint was based on allegations of "bad faith", it would be sufficient to overcome Ameritech's Motion to Dismiss. The Ohio Supreme in *Slater v. Motorists Mutual Ins. Co.* (1962), 174 Ohio St. 148, cited an earlier decision describing "bad faith":

"Bad faith" is a general and somewhat indefinite term. It has no constricted meaning. It cannot be defined with exactness. It is not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will. It partakes of the nature of fraud. *** It means 'with actual intent to mislead or deceive another.'

Id. at 151 (citing *Spiegel v. Beacon Participations, Inc.*, 297 Mass. 398, 416, 8 N.E.2d 895, 907).

As noted previously, Time Warner identified both Ameritech's duties under the law, and its conscious doing of acts in violation of those known duties. Thus, the Complaint is sufficient to overcome a Motion to Dismiss even if it should be construed as alleging "bad faith" on the part of Ameritech. Moreover, although there is no doubt the Complaint is adequate on its face to withstand the Motion to Dismiss, the Complaint also incorporated³ the allegations contained in Time Warner's January 16, 1996 Motion to Suspend, which offers only more detailed evidence of the failure of Ameritech to negotiate in good faith.

³ Ameritech asserts that reference to and incorporation of the Motion in the Complaint (which Ameritech suggests the Commission "has already found to be defective as a complaint") cannot "cure the deficiencies of the complaint." However, the Commission merely found the Motion not to be in "an appropriate complaint format," and directed Time Warner to reformat the Motion to look more like a complaint. Entry of January 24, 1996. The Commission did not find that the Motion failed to assert reasonable grounds for complaint, nor did it deny the Motion.

In further support of its Motion to Dismiss, Ameritech makes the argument that it had no duty to negotiate in good faith imposed on it before the Commission's August 24, 1995 Opinion and Order in Time Warner's certification case. Motion to Dismiss at 3. However, Ohio law forbids any public utility from demanding unjust or unreasonable charges for, or in connection with, any service. R.C. 4905.22. Public utilities also have the duty to furnish necessary and adequate services and facilities, and "provide with respect to its business such instrumentalities as are adequate and in all respects just and reasonable." *Id.* Ameritech's Answer admitted that the Company is subject to R.C. 4905.22, and the duties imposed on Ameritech by that section. Ameritech's obligations under this law obviously predate the Time Warner certification order, and encompass the entire period of time during which Time Warner attempted to reach an interconnection agreement with the Company. Thus, Time Warner's Complaint is sufficient to withstand Ameritech's Motion to Dismiss.

Ameritech also moved to dismiss the TWAXS entities (Western Ohio, Northeast Ohio and Cincinnati) as parties. The Complaint lists Time Warner Communications of Ohio, L.P. and Time Warner AxS of Ohio, L.P. as the complainants. The listing of the three CAP entities was provided at a minimum for information purposes. Clearly, the second ground of Ameritech's Motion to Dismiss does not go to the substance of the Complaint in this case. However, the Motion to Strike does demonstrate the degree to which Ameritech will engage in obstructionism while touting its support of local competition. In point of fact, this era is one of transition to a competitive market. A new entrant such as Time Warner Communications of Ohio may begin as a CAP. An entrenched LEC such as Ameritech may (and does) engage in hypertechnicality as

witnessed here. It will take longer than a year to negotiate interconnection but Ameritech does not need to begin to negotiate with a new entrant until after certification. Negotiations will then take at least a year. Delay serves only the incumbent.

Moreover, Ameritech exacted from the settlement process in its alternative regulation case the ability to enter into contracts with customers who have competitive alternatives, and the ability to deaverage rates in the face of competition. Alternative Regulation Plan at 64, 36, respectively. The Company agreed to not oppose certification requests by alternative providers of basic local exchange services on the basis of a claim to an exclusive right to serve customers in its service area. Stipulation at 70. The Stipulation also bound the Commission to support interLATA relief under conditions which ensure the Company's network is made available for the purpose of dedicated and switched services on an unbundled, non-discriminatory, and just and reasonable basis to local exchange competitors. *Id.* at 70-71. The Alternative Regulation Plan as proposed by Ameritech was clearly founded upon the growing prospect of competition. Alternative Regulation Application at 1-3. Thus, Ameritech anticipated competition, anticipated the need to unbundle and interconnect with competitors, and yet now offers the disingenuous argument that notwithstanding all the benefits (not to mention relief from earnings limitations) it achieved from its alternative regulation case, it did not have to negotiate in good faith with competitors seeking interconnection for the purpose of bringing to telecommunications users the very benefits the Ameritech alternative regulation Stipulation was intended to provide. In this context, therefore, the allegations in the Complaint regarding the Ameritech alternative regulation case are properly before the Commission in this case. This is clearly one of those

circumstances in which an issue has been raised which might strictly be viewed, in the words of the Supreme Court in *Allnet I*, as a “collateral attack” on the alternative regulation order, but is nevertheless properly before the Commission.

START OF CONFIDENTIAL, REDACTABLE PORTION OF MEMORANDUM CONTRA

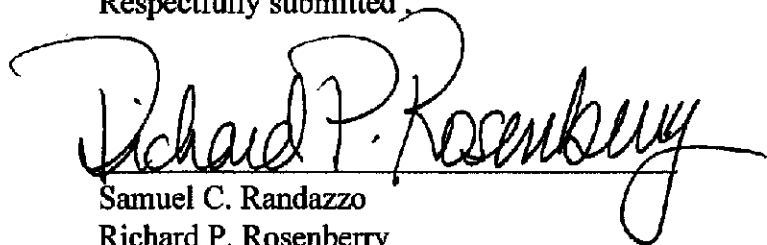
Time Warner’s pleadings stated more than adequate grounds for a finding of reasonable cause under R.C. 4905.26. Time Warner prepared the Complaint filed on January 29, 1996 so that it could be docketed without revealing any information which might be subject to Time Warner’s confidentiality agreement with Ameritech. Additional evidence of Ameritech’s lack of good faith in the negotiations, and its intent to violate duties imposed upon it by statute, are already known to the Staff through its participation in the negotiations. For example, Staff is already aware that Ameritech has insisted on tying the signing of any interconnection agreement to a separate set of business interests, referred to euphemistically in Ameritech’s February 2, 1996 Issues List as “the establishment of certain rights and responsibilities as part of a regulatory framework for Time Warner.” That tying demand is impermissible under antitrust law. Furthermore, in this circumstance, those “rights and responsibilities” include Ameritech’s insistence that Time Warner agree to terms which would limit the ability of other competitors to enter the market and thus subject Time Warner to possible allegations of antitrust violations. Such tying by Ameritech is a twofold “dishonest purpose or conscious wrongdoing” on the part of Ameritech. This second tier of requirement invites Time Warner to collude with Ameritech to control a market, i.e., a second tier of antitrust violation.

END OF CONFIDENTIAL, REDACTABLE PORTION OF MEMORANDUM CONTRA

III. SUMMARY

In summary, the Ohio General Assembly established a limited threshold test which must be met by complainants under R.C. 4905.26. Complainants need set forth only "reasonable grounds for complaint." Standing on its own, Time Warner's Complaint in this case set forth such reasonable grounds for complaint. Coupled with the Motion to Suspend filed January 16, 1996, the pleadings filed by Time Warner clearly establish reasonable grounds for complaint. Thus, the Commission should overrule Ameritech's Motion to Dismiss forthwith.

Respectfully submitted,



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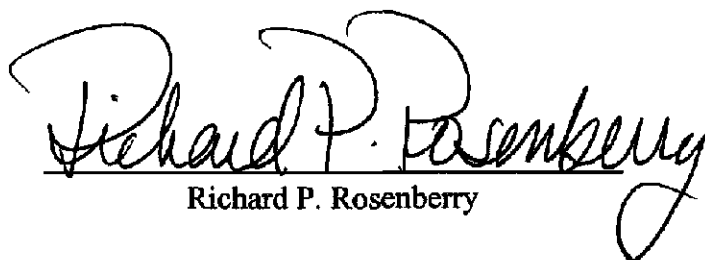
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Ameritech Ohio's Motion to Dismiss (Unredacted Version) was served upon the following parties of record this 6th day of February, 1996, via electronic transmission, hand-delivery or ordinary U.S. mail, postage prepaid.


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