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Exceptions to the arbitration panel's report and requests for clarification filed on behalf of Ameritech Ohio by D. Conway. (19 pgs.) (UNREDACTED COPY - FILED UNDER SEAL)

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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OCT 15 1996

DOCKETING DIVISION
Public Utilities Commission of Ohio

In the Matter of the Petition of	)	
TCG Cleveland for Arbitration of	)	
Open Issues Pursuant to §252(b)	)	Case No. 96-694-TP-ARB
of the Telecommunications Act of	)	
1996 to Establish an Interconnection	)	
Agreement with Ameritech Ohio	)	

AMERITECH OHIO'S EXCEPTIONS TO THE ARBITRATION PANEL'S REPORT AND REQUESTS FOR CLARIFICATION

Ameritech Ohio respectfully takes exception to the Arbitration Panel Report (the Report) issued on October 9, 1996 in this proceeding in several regards. The reasons supporting Ameritech Ohio's exceptions are explained in the exceptions set forth below. In several instances, Ameritech Ohio believes that a simple clarification of the Report may be all that is necessary.

I. Reciprocal Compensation for Transport and Termination of Local Calls

1. At pages 17-22 of the Report, the Panel evaluates the appropriate reciprocal compensation rates for the transport and termination of local traffic. Ameritech Ohio takes exception in several respects to the approach used and the resulting recommendation for the end office termination rate. After appropriate corrections are made to the Panel's evaluation methodology, the results compel setting an interim proxy rate for end office termination at .40¢/min., if the FCC's rules are applicable, and above that rate if the FCC's proxy rules are not applicable.

Ameritech Ohio disagrees in several respects, as described below, with adjustments made by the Panel to the Company's cost study for end office termination. But even assuming that the adjustments to Ameritech Ohio's cost study are appropriate, the Panel misapplied the adjustments by subtracting them from the high end of the FCC proxy range rather than from Ameritech Ohio's TELRIC and joint and common cost study results. Specifically, the Panel found that the Company's cost study for end office termination overstated costs by 31 percent. The Panel then proceeded to subtract 31 percent from the 40¢ per minute rate, which is the high end of the FCC proxy rate range. The Company strongly disagrees with the Panel's conclusion that it overstated costs at all, let alone by 31 percent. But if the Panel believes the costs are overstated by 31 percent, then the 31 percent must be subtracted from the Company's per minute of use cost study results, not the FCC's proxy rate. This is a fundamental flaw in the Panel's approach, which must be corrected regardless of whether one agrees or disagrees with the Panel's recommendations for adjusting particular components of Ameritech Ohio's end office termination cost study.

a. It Would Be Unreasonable To Exclude Customer Service Costs From Costs Recovered Through The Per Minute Of Use Proxy Rate For End Office Termination.

At page 19 of the Report, with regard to customer service costs, the Panel concludes that, "by recovering a cost that appears to be a nonrecurring cost through a per minute recurring charge, there is a risk of over recovery of such costs." The Report recommends excluding customer service costs from the per minute reciprocal compensation costs for purposes of setting the per minute of use proxy rate for end office termination. The exclusion of customer service costs from the end office termination compensation rate clearly is improper.

First, regardless of the reasonableness of a conclusion that customer service costs are nonrecurring and, thus, that including such costs in a per minute of use rate risks over recovering them, there is no basis in logic or the record for completely precluding Ameritech Ohio from recovering them. Even assuming for the sake of argument that there is a risk of over recovery, a remedy that mitigates a risk of over recovery by creating a certain under recovery is not reasonable.

Second, the Report incorrectly assumes, as did TCG's witness who testified on the subject, that the customer service costs in question are not usage sensitive and incorrectly concludes that the costs are nonrecurring. The costs of providing customer service functions to carriers such as TCG that are included in Ameritech Ohio's TELRIC study are the same types of customer service costs that Ameritech Ohio incurs when providing the same types of services to IXCs as part of terminating Feature Group D access service. Dr. Currie testified that the TELRIC study was conducted on the same basis as terminating Feature Group D costs studies are conducted. Tr. Vol. IV-30-31, and 32-33.

The costs of bill inquiry services that Ameritech Ohio will provide to TCG and other local service carriers with whom it interconnects comprise the customer service costs included in the TELRIC study. These costs are usage-sensitive on a per-message basis. Common sense says that the number of inquiries regarding billing and therefore the costs incurred in responding to inquiries regarding billing will increase proportionately with the number of messages billed. In addition, it should be noted that the FCC historically has permitted these same costs to be recovered in Feature Group D access service per minute of use rates. Excluding these costs from the end office termination proxy rate ensures that Ameritech Ohio will not cover its costs of providing end office termination service to TCG.

b. Adjustment To Ameritech Ohio's Depreciation Life Assumption For End Office Equipment.

At page 20 of the Report, the Panel states that the Commission's Local Service Guidelines required the use of forward-looking lives of facilities to determine depreciation expense. The Panel found that Ameritech Ohio's transport and termination cost study effectively deaverages its cost of providing end office transport and termination of local traffic through the depreciation life assumption used. Id.

On the one hand, the Panel observed that, while the FCC's rules allow for geographic deaveraging of unbundled elements into at least three defined geographic areas within the state to reflect cost differences, there was no information regarding which geographic area is representative of the area served by TCG. On the other hand, the Panel noted that the Commission's Local Service Guidelines do not allow Ameritech Ohio to deaverage transport and termination rates at all. The Panel concluded that, under both the FCC's rules and the Commission's Guidelines, some adjustment to the depreciation lives assumption in the Ameritech Ohio cost study was warranted. Id.

The Panel developed an adjustment under the FCC rules based on the assumption that TCG's service area is not limited to urban areas only, as Ameritech Ohio assumed, but rather would cover the FCC minimum of three cost-related rate zones. The Panel "adjusted the depreciation lives stated in Ameritech's Exhibit 6, page 10 (line 11) to reflect a weighted average depreciation life that represents the minimum of the three geographic areas," and noted that "[t]he deviation from that geographically averaged depreciation life equals 20 percent." Report, at page 21. In short, the Panel concluded that Ameritech Ohio's depreciation lives assumption for end office termination required a 20 percent adjustment.

Ameritech Ohio takes exception to the Panel's adjustment to Ameritech Ohio's depreciation lives assumption for end office termination. Underlying the Panel's conclusion that the depreciation lives assumption used by Ameritech Ohio required adjustment is the Panel's belief that it did not receive information as to which geographic area is representative of the area to be served by TCG. On the contrary, TCG's own statements in Late-filed Panel Exhibit 1[1] and the Panel's own belief, at page 16 of its Report,[2] regarding the area to be served by TCG's first switch, demonstrate that the area to be served by TCG's first switch will be the Cleveland area of LATA 320. Accordingly, Ameritech Ohio's depreciation life assumption in its study of end office termination costs precisely matches TCG's plan to enter the local service market in the most highly competitive, densely populated, part of Ameritech Ohio's service area in Cuyahoga County.

c. Ameritech Ohio's Allocation Of Common Costs For End Office Termination Is Reasonable.

At page 20 of the Report, the Panel stated that it could not confirm whether Ameritech Ohio's allocations of common costs to its transport and termination elements are reasonable under the FCC's rules. The Panel based this conclusion on the fact that neither Ameritech nor Arthur Andersen, on Ameritech's behalf, prepared specific stand-alone cost studies for each element to demonstrate that the TELRIC for the element plus the forward-looking common costs allocated to the element did not exceed the stand-alone costs for the element. The Panel recommended that, if the FCC's rules are

[1]In Late-Filed Exhibit 1, TCG states in pertinent part, "TCG expects to begin service in Cuyahoga County initially."

[2]At page 16 of its Report, the Panel states that it believes that "TCG's first switch . . . will serve a geographic area comparable to Ameritech's tandem switch serving the Cleveland area in the LATA 320."

not applicable, the Commission should allow only for a ten percent markup (above LRSIC and joint costs) for recovery of common costs. Id.

Ameritech Ohio takes exception to the Panel's conclusion that the reasonableness of its allocation of common costs cannot be confirmed simply because a specific stand-alone cost study was not conducted for each element. As Mr. Farmer explained, it was not necessary to conduct a specific stand-alone cost study for each element because it was reasonable to assume that the stand-alone costs of any one of the unbundled TELRIC network elements would be much greater than the total cost derived from Ameritech's and Arthur Andersen's joint and common cost studies.

Mr. Farmer testified, in pertinent part, at Tr. Vol. III - 37-38, that:

> [A] stand-alone cost study is based on the somewhat unrealistic assumption that if Ameritech only provided unbundled loops, for example, what would be the cost of unbundled loops?
>
> And so, typically, all of the common costs of the business are included as part of that cost of the stand-alone unbundled network element. And while you might argue that those costs would shrink somewhat because it's a smaller business, <u>they tend to be so much larger than the allocated portions, according to our work, that intuitively we were comfortable that were we to perform those tests that the stand-alone costs would be a large multiple of our cost.</u> (Emphasis added.)

In short, a specific stand-alone cost study for each unbundled element was not necessary to reach the conclusion, based on the work that Arthur Andersen had already done, that stand-alone costs for unbundled network elements would greatly exceed their TELRIC costs.

Moreover, Dr. Currie testified that Ameritech's proposed prices for transport and termination of local calls do not exceed the stand-alone costs of those elements. Ameritech Ohio Ex. 7, at page 16. No witness on behalf of TCG provided any testimony to the contrary. Accordingly, there is a sufficient record basis to confirm that Ameritech Ohio's common cost allocations are reasonable under the FCC's rules.

Ameritech Ohio's common cost allocations are reasonable under the Commission's Local Services Guidelines also. A review of Ex. 4 attached to Ameritech Ex. 7 (Direct Testimony of Dr. Kent Currie) shows that the common costs allocated to end office termination amounts to almost exactly 10 percent of the combined TELRIC and shared costs. Although the common cost allocation was constructed by Arthur Andersen from the "ground up", rather than on the basis of a percentage of TELRIC and shared costs, it is certainly instructive that the ground-up method for allocating common costs produces a result consistent with the rule-of-thumb approach utilized by the Commission's Local Service Guidelines. In any event, this comparison provides further confirmation of the reasonableness of Ameritech Ohio's common cost allocations.

Ameritech Ohio also takes exception to the Panel's recommendation that its common cost allocation for end office termination should be adjusted in a manner that leads to a 7 percent reduction in end office termination costs. Page 21 of the Report states that the 7 percent amount is the result of a three-step calculation. First, the Panel calculated 10 percent of the TELRIC and shared costs for end office termination shown on TAB 12.1 of Ameritech Ohio Ex. 7. Next, the Panel subtracted that amount from the common cost that Ameritech Ohio had included on TAB 12.1 for end office termination. Third, it divided that difference by the total end office termination cost figure shown on TAB 12.1. First of all, Ameritech notes that the calculation described by the Panel does not lead to a differential that amounts to 7 percent of total end office termination costs. Instead, it leads to a differential that amounts to less than 1 percent. Secondly, as noted above, ten percent of the TELRICs and shared costs for end office termination shown on Exhibit 4 to Dr.

Currie's direct testimony and reiterated on TAB 12.1 of Ameritech Ohio Ex. 7 is almost exactly the amount of common costs that Ameritech Ohio has included in its cost study. The Panel's 7 percent adjustment is not supported by the calculation method prescribed in the Report or by logic.

d. Even If the Adjustments Proposed By The Panel To Ameritech Ohio's End Office Termination Costs Were Appropriate, They Do Not Add Up To A 31 Percent Adjustment When Combined.

The percentage adjustments recommended by the Panel Report to the depreciation assumption, the customer service costs, and the common costs allocation cannot simply be added together to develop a total adjustment factor, as the Panel has recommended be done. Even assuming that adjustments are appropriate, the Panel's method of simply adding the percentage adjustments and applying the resulting percentage to the overall rate (or total cost figure) grossly overstates the reduction actually supported by the individual adjustments.

For example, with regard to depreciation, it is patently unreasonable to convert a 20 percent adjust to the depreciation life assumptions into a 20 percent adjustment to total end office termination costs (let alone a 20 percent adjustment to the FCC's proxy rate). Depreciation is a capital cost. There are no capital costs in either the common or shared costs that Ameritech allocated to end office termination. Ameritech Ohio Ex. 12, p. 8 (Farmer Direct Testimony). In addition, capital costs comprise only a portion of the TELRIC component of end office termination costs. By applying the 20 percent adjustment to total end office termination costs, the Panel, in essence, is assuming that all end office termination costs, including common and shared costs, are capital costs.[3]

[3]By applying the 20 percent adjustment to the .40¢/minute FCC proxy rate, the Panel further compounds this error. In essence, applying the adjustment to the FCC proxy rate implies a true depreciation assumption adjustment that is much greater than the 20 percent figure the Panel recommends.

Even if one assumes that all of the end office termination TELRIC costs of .4000¢ per minute of use (i.e., excluding shared and common costs) are all capital costs, and all such costs are related to assets with depreciation lives that merit adjustment under the Panel's approach, the total end office cost adjustment percentage related to depreciation is no more than 15.2 percent. That is, 20 percent of total TELRIC costs equals 15.2 percent of total end office termination costs (i.e., (20% x .4000) ÷ .5248 = 15.2%).

The Panel's 4 percent customer service cost adjustment suffers from a flaw similar to the one affecting the depreciation adjustment. The Panel calculated the 4 percent figure by dividing total customer service costs by total volume-sensitive end office TELRIC costs. The Panel did not calculate an adjustment percentage for customer service costs on the basis of total end office costs, as it did for the common cost adjustment. Of course, if the goal is to remove the customer service costs from the total end office costs, which was the goal with the common cost percentage adjustment, the Panel's approach overstates the adjustment. Properly computed, the customer service costs represent 2.6 percent of total end office costs based on the data in TAB 12 and Tab 12.1 of Ameritech Ohio Ex. 6.

In sum, even if the Panel's adjustments are accepted for purposes of argument, it is clear that the total impact of the adjustments on Ameritech Ohio's end office termination costs is much less than 31 percent. Indeed, if one makes only the simple corrections to the depreciation and customer service adjustment calculations described above, the aggregate percentage reduction to total end office termination costs indicated by the Panel's recommendations is 24.8% (15.2% + 2.6% + 7%), not 31%. When applied to Ameritech Ohio's total end office termination costs of .5248¢/min, this percent reduction produces an adjusted cost of .395¢/min. When the Commission considers that the depreciation study adjustment remains significantly overstated, for the reasons given above, it is clear that the Panel's recommended adjustments, even if accepted, lead to adjusted end office termination costs in excess of the high end of the FCC's proxy range. The significant criticisms of the reasonableness of making these adjustments at all, which we have outlined above in Sections 1.a., 1.b. and 1.c. of these exceptions, lend further support to the conclusion that Ameritech Ohio's costs of end office termination are well in excess of the high end of the FCC proxy range.

<u>Conclusion on the Panel's Recommended Adjustments to Ameritech Ohio's Costs For End Office Termination</u>.

The Panel's recommended adjustments to the customer service costs, depreciation lives assumptions, and common costs allocations for end office termination should not be adopted. Instead, the Commission should utilize the costs and assumptions supported by Ameritech Ohio Exhibits 6 and 7.

If the Commission nevertheless adopts the Panel's recommendations to modify Ameritech Ohio's cost study by adjusting the assumptions and costs, the adjustments should be made correctly as described above. They should not simply be added together in the fashion recommended by the Report.

Moreover, any resulting aggregate adjustment to the cost study can only properly be used to adjust Ameritech Ohio's proposed <u>costs</u> for end office termination. It is both inappropriate and illogical to use the aggregate adjustment as a deduction from the high end of the FCC proxy rate. Ameritech Ohio only proposed a .40 cents per minute as a proxy rate because of the FCC rules preclude a higher rate on a proxy basis. Ameritech Ohio's position is that its cost study supports a rate significantly higher than the high end of the FCC proxy rate.

Even if the adjustments to Ameritech Ohio's end office termination costs recommended by the Panel Report are accepted by the Commission, it is clear that the adjusted costs still significantly exceed the high end of the FCC proxy range. There are only two possible results that are reasonable. If the FCC rules are applicable, the evidence supports an end office termination proxy rate of .40 cents per minute. If the Commission's Local Service Guidelines are applicable, Ameritech Ohio's cost evidence supports an interim rate for end office termination well in excess of that rate.

2. <u>Nothing in the FCC's Order 96-325 Precludes Use of a "True-Up" Mechanism Once Proxy Rates are Replaced by Rates Set Based on the TELRIC Methodology.</u>

At page 22 of the Report, the Panel recommends that, if the FCC's rules are not applicable and if the interim rates differ from the rates established by the Commission as a result of the Commission's further examination of Ameritech Ohio's cost studies in Case No. 96-922, the Commission should allow for a "true-up". The Panel stated that in its opinion, if the FCC's rules are applicable, a true-up would not be available, citing §769 of the FCC's order, which provides that the proxy rates will be replaced on a going-forward basis once the state sets rates under the TELRIC methodology.

There is nothing in the FCC's order 96-325 or rules that precludes use of a true-up mechanism once proxy rates are replaced by rates set based on the TELRIC methodology. Paragraph 769 of the Order simply recognizes that once TELRIC based rates are set they must be substituted immediately in the agreements for the proxy rates and the proxy rates may not be utilized in contracts whose terms extend past the point when TELRIC based rates are established.

The FCC and new entrant carriers recently reinforced the conclusion that the FCC's Order and rules do not preclude the use of a true-up mechanism during recent oral arguments before the

United States Court of Appeals for the 8th circuit in Iowa Utilities Board v. FCC, Case No. 96-3321. During oral arguments on October 3, 1996, counsel for the FCC and new entrant carriers stated that true-up mechanisms are permissible. By Mr. Wright on behalf of the FCC:

> [I]t's quite clear that they can -- there can be renegotiation clauses. There can be truing up clauses. The money that passes between the parties can be fixed.

And by Mr. Carpenter on behalf of new entrant carriers:

> I absolutely agree with everything that Mr. Wright said on the merits . . .
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> ***
>
> But the one thing the state is absolutely free to do in the course of these arbitrations is if it chooses, and its choice if it chooses to rely on these default proxies to set interim rates, it can have the rates take effect subject to accounting obligations so people keep track of what the flow of money is and refund requirements. Obviously, we want this to be a two-way street, but that's something the states are perfectly entitled to do . . . .

3. At page 6 of the Report, the Panel accurately describes TCG's and Ameritech Ohio's positions on the appropriate proxy rates to be used, based on the FCC rules, for reciprocal compensation for transport and termination of local calls. In particular, the Report correctly states that the parties have agreed to the proxy rate to be used for tandem switching (Tr. V. 9, 40), and it also correctly cites to 47 C.F.R. §513(c)(4) as the basis for establishing proxy rates for (shared) transport between tandem switches and offices. However, in the course of stating its recommendation concerning the appropriate rate for tandem switching, the Report, at pages 22, 29 and 30, refers to the tandem switching rate as "(including local transport termination)" (emphasis added). Tandem switching does not include local transport termination.

The proxy rate established by the FCC at 47 C.F.R. §51.513(c)(4) for shared transmission facilities between tandem switches and end offices encompasses charges for both local transport facility (LTF) mileage and local transport termination (LTT). The LTF and LTT which are stated separately in Ameritech Ohio Ex. 6, at Exhibit 4, together comprise the shared transmission facilities between tandem switches and end offices included within 47 C.F.R. §51.513(c)(4). Accordingly, Ameritech Ohio requests that the parenthetical reference at pages 22, 29 and 30 of the Report be corrected, either by revising it to "(exclusive of local transport termination)" or by simply deleting the parenthetical.

4. At page 17 of the Report, the Panel recommends that, under both the FCC's and Commission's rules, the Commission treat TCG's first switch as a tandem switch for the purpose of assessing compensation charges for the transport and termination of local traffic "if, and only if, when such switch becomes operational, it provides service to the geographic area described in TCG's September 19, 1996 response to the Panel's data request". TCG's September 19 response, late-filed Panel Ex. 2, indicated that its first switch will interconnect with an Ameritech Ohio tandem that serves LATA 320 (Cleveland). The Panel's Report, at page 16, based on 47 C.F.R. §51.711(a)(3) and the information provided by TCG, establishes the test for determining the status of TCG's first switch (for purposes of reciprocal compensation) to be whether that switch will serve a geographic area comparable to Ameritech Ohio's tandem switch serving the Cleveland area in LATA 320.

Ameritech Ohio requests clarification of this recommendation in the following respects. The recommendation makes the status of TCG's switch as a tandem switch contingent upon how the switch actually operates after it is in service. Therefore, the Commission should clarify that Ameritech Ohio is not obligated to pay tandem-based transport and termination rates until TCG has demonstrated to the Commission that its first switch is serving customers throughout the Cleveland area and LATA 320, as opposed to only serving customers in a particular portion of that area.

In addition, Ameritech Ohio seeks clarification that the demonstrations TCG must make is not that its customers can terminate their calls throughout the Cleveland area to Ameritech Ohio customers through use of the Ameritech Ohio tandem and Ameritech Ohio transport facilities; but, rather, that TCG must demonstrate that calls originating on Ameritech Ohio's network are terminating via TCG's switch and TCG's transport facilities to TCG customers located throughout the Cleveland area. It is only when TCG's switch and network provide transport and termination of calls to a geographical area comparable to the area served by the Ameritech Ohio tandem that TCG meets the test established by 47 C.F.R. 51.711(a)(3) and the information relied upon by the Panel Report.

II. Indemnification

5. At page 29 of the Report, the Panel recommends permitting "Ameritech to limit its liability in the same manner that it currently limits it liability with its customers." Ameritech Ohio proposed that TCG be required to provide in its tariffs and contracts with its customers traditional limitations of liability such as TCG and Ameritech Ohio currently utilize.

Ameritech Ohio requests that the Panel clarify its recommendation. Section 25.4 of Ameritech Ohio's proposed interconnection agreement provided that such a limiting provision would state "that in no case shall such Party or any of its agents, contractors or others retained by such parties be liable to any Customer for (i) any Loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged the applicable Customer for the service(s) or function(s) that gave rise to such Loss, and (ii) any Consequential Damages (as defined in Section 25.3)." As is common and commercially reasonable, the proposed limitation would serve as a defense to a customer's claim for "consequential damages" defined in Section 25.3 of the proposed agreement as "any indirect, special, consequential, incidental or punitive damages, including but not limited to loss of anticipated profits or revenue or other economic loss . . . ."

Absent such a limitation, TCG is free to warrant perfect service to particularly large or important business customers who are willing to pay a premium to TCG for such a guarantee. While TCG can use a portion of the additional payment from the customer to build backup safeguards against failure in its facilities, Ameritech Ohio would not have this option. Under such an arrangement between TCG and its customers, Ameritech Ohio, without agreement or compensation for doing so, would be exposed to the risk of unlimited consequential damage claims by a TCG customer to the extent Ameritech's network provides less than perfect service on just one occasion.

Consistent with the understanding expressed recently by the Arbitration Panel for the Michigan Public Service Commission in its Decision in the Matter of TCG-Detroit and Ameritech Michigan in Case No. U-11138[4], Ameritech Ohio believes the Panel was cognizant of this very valid

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[4]The Michigan Panel in TCG's proceeding with Ameritech concluded: "[T]he Panel is persuaded that neither party should be required to indemnify the other for damages to the other's customers caused by service problems within its control beyond the traditional limitation to remission of the bill for the service outage period. To require otherwise would also provide a negative incentive--to build duplicative and expensive backup systems to guard against any probability of system failure and possible huge damages for service interruptions. The increased costs due to system buildup, legal costs and damages would be passed on to customers of each party at some point. The Panel further believes that service outage protection may be available in the form of customer insurance policies providing coverage against loss of business. Also, incentives to provide a good quality of service should result from the operation of the

concern when it concluded "that it is reasonable for Ameritech to limit its liability in the same manner that it currently limits its liability with its customers." Although the Panel did not wish to impose upon TCG a contractual obligation to include such a limitation of liability in every tariff or contract, the Panel did recognize, at page 29 of the Report, that "it is commercially reasonable for the indemnification provision to limit the extent of indemnity coverage under such circumstances."

"Such circumstances" in this context naturally would track that portion of the language in Ameritech Ohio's proposed Section 25.4, which states "that in no case shall such party or any of its agents, contractors or others retained by such parties be liable to any Customer for ... (ii) any Consequential Damages (as defined in Section 25.3)." Ameritech Ohio believes the Panel intended to incorporate this reasonable limitation against potentially unbounded consequential liability in the recommended contract provision 24.1.3 in Attachment A to the Panel Report. Therefore, Ameritech Ohio requests that the Commission clarify and confirm that the phrase "and any consequential damages" as borrowed by the Panel from Ameritech Ohio's section 25.4 and inserted in the recommended section 24.1.3 is simply a reference to the cost of the service or function. If so, the phrase should be deleted to avoid confusion since it is superfluous.

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performance standards and liquidated damages portions of the contract agreed to by the parties. In addition to the possibility of being subject generally to liquidated damages for a Specified Performance Breach under paragraph 26.0 of the Agreement, a party also may take legal or regulatory action under paragraph 26.5 based on a pattern or practice of such performance breaches. In addition, an alternative available to TCG over the long term is to continue to build out its facilities so that it is not subject to possible problems due to the quality of service provided it through Ameritech's facilities. Finally, the Panel notes that similar indemnification provisions to those recommended by Ameritech are included in its agreements with both Brooks Fiber Communications of Michigan, Inc. and MFS Intelnet of Michigan, Inc. The Panel concludes that paragraph 24 of the Interconnection Agreement should contain the language which appears at pages 14-16 of Ameritech's PDAP." Id. pp 13-14.

However, if Ameritech Ohio has misinterpreted the Panel's intentions such that Ameritech Ohio is expected to accept liability for all "consequential damages" claimed by TCG's customers, such a recommendation is clearly unreasonable and unfair for the reasons summarized previously. Moreover, if Ameritech Ohio is to become an insurer of TCG's service against all consequential damages of TCG's customers, it will have to completely revise all of its TELRIC studies to account for the extraordinary increase in anticipated costs on a forward-looking basis that it would incur by insuring against such significant additional liabilities that TCG would allow by failing to take reasonable steps to limit liability in its customer contracts or through its tariffs. Ameritech Ohio's current TELRIC study assumes that Ameritech Ohio is not required to incur the costs of insuring against liability for consequential damages.

6. At page 28 of the Report, the Panel recommends that the Commission not adopt Ameritech Ohio's proposal to require a reciprocal hold harmless provision relating to each party's responsibilities under the Communications Assistance for Law Enforcement Act of 1994 (CALEA). The Panel concluded, at pages 28-29 of the Report, that such a provision would be unenforceable because a party cannot obtain indemnification of an illegal act. Although Ameritech Ohio agrees with the Panel's statement of law in this regard, this was not the reasoning underlying its proposal. Ameritech Ohio's proposal would not indemnify the party committing the illegal act. Rather, Ameritech Ohio's proposal would have the party violating CALEA indemnify the innocent party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This shall certify that a true copy of the foregoing "Ameritech Ohio's Exceptions To The Arbitration Panel's Report And Requests For Clarification" was duly served upon the following counsel for TCG by facsimile by 12:00 noon on the 15th day of October, 1996 and also by regular U.S. mail, postage prepaid, on October 15, 1996:

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