

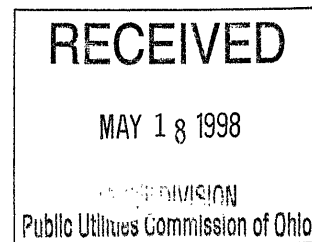
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BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF OHIO

In the Matter of the Complaint of)
ICG Telecom Group, Inc. Against) Case No. 97-1557-TP-CSS
Ameritech Ohio Regarding the Payment)
of Reciprocal Compensation)

RESPONSE OF
ICG TELECOM GROUP, INC.
TO AMERITECH OHIO'S NOTICE
OF SUPPLEMENTAL AUTHORITY



ICG Telecom Group, Inc. ("ICG"), through its undersigned counsel, hereby files its Response to Ameritech Ohio's Notice of Supplemental Authority. While the provision of supplemental authority is not designed to further brief a case that has been submitted, ICG feels the need to respond to Ameritech Ohio's filing in light of the unfounded and distorted assertions made by Ameritech Ohio and to bring additional supplemental authority to the Commission's attention.

1. In *Ameritech Illinois v. WorldCom Technologies, Inc.*, Case No. 98 C 1925 (N.D. Ill.), the Hon. David Coar did stay the effectiveness of the Illinois Commerce Commission's Order directing Ameritech Illinois to pay reciprocal compensation to WorldCom, but in doing so did not address the merits of the appeal. In announcing the stay of the Illinois Commission's Order, Judge Coar said not one word about the merits of Ameritech Illinois's position; instead, he simply decided to stay the Order pending an expedited resolution of the merits. Judge Coar stated this view as follows:

I'm not going to make detailed findings of fact here not even on a preliminary basis in large part because I'm going to put this on an expedited basis and get this resolved once and for all,

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Technician *Asa M. [signature]* Date Processed *May 19, 1998*

perhaps not within the 30 days we talked about, but soon thereafter.

Transcript, at pp. 3-4.

Thus, there is nothing in this decision which has any impact whatever on the deliberations of this Commission and it properly should be given no weight whatever.

2. Ameritech Ohio also chose to bring to the Commission's attention the FCC's recent Report to Congress. *In re Federal-State Joint Board on Universal Service*, FCC 98-67, C.C. Docket No. 96-45 (rel. April 10, 1998). Ameritech Ohio, however, has selectively cited portions of that report. As before, Ameritech Ohio continues to misconstrue the impact of FCC determinations of the nature of the Internet and the service provided by Internet Service Providers ("ISPs"). In the Report to Congress, the FCC affirmed the distinction between the services provided by ISPs--which it termed an *information service*--and the local telephone call by which end-users access the Internet--which it reaffirmed is a *telecommunications service*, *Report to Congress*, at p. 20, ¶ 39, and further affirmed that those categories are mutually exclusive. *Id.* at p. 7, ¶ 13. Ameritech Ohio ignores this distinction, yet it is critical to the resolution of the instant dispute: Plainly, an ISP *uses* telecommunications to provide its information service, but that does not turn the local call an end-user makes to an ISP into an interstate call outside the scope of the reciprocal compensation provisions of the interconnection agreement at issue here.

More troubling is the inference Ameritech Ohio seeks to assert that the "the FCC stated that it is now ready to rule on 'the question of whether competitive LECs that serve [ISPs] are

entitled to reciprocal compensation for terminating Internet traffic . . .” *Notice*, at p. 2. The Report to Congress says nothing of the sort. The actual footnote reads as follows:

We make no determination here on the question of whether competitive LECs that serve Internet service providers . . . are entitled to compensation for terminating Internet traffic.

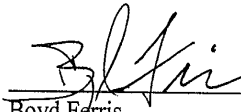
Report to Congress, p. 54, n.220. The italicized words were omitted by Ameritech Ohio in its selective editing of the Report to Congress. To be sure, the issue is before the FCC, but nowhere does the FCC “state[] that it is now ready to rule” on the issue as Ameritech Ohio suggests.

3. Finally, the Commission should be aware that, several days prior to Ameritech Ohio’s submission here, and in the course of an open session on May 7, 1998, the Public Service Commission of Wisconsin, in a nearly identical complaint proceeding between Ameritech Wisconsin and TCG of Milwaukee, Inc., affirmed its staff recommendation and reiterated that “calls to an Internet service provider are local traffic--not switched exchange access service--under the agreement and subject to the reciprocal compensation provisions of that agreement.” A copy of the Wisconsin decision, and the Staff Recommendation it adopts, is attached as Exhibit A.

With the addition of Wisconsin, every state commission that has considered this issue, including Michigan, Illinois and Wisconsin, 18 state commissions in all, now have concluded that calls to Internet service providers, which otherwise meet the definitions of local traffic in the

various interconnection agreements, are local calls and subject to the reciprocal compensation provisions of those agreements. This Commission should join the growing number of state commissions and reach the same conclusion.

Respectfully submitted,



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Dated: May 15, 1998

MAY 14 1998



Public Service Commission of Wisconsin

Christy L. Perrine, Chairman
Joseph P. Metzger, Commissioner

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Madison, WI 53707-7854

Ms. Rhonda Johnson
Boardman, Suhr, Curry & Field
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Mr. Mike Paulson
Ameritech
722 North Broadway, Room 1608
Milwaukee, WI 53202-4996

Re: Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc. 5837-TD-100
6720-TD-100

Dear Ms. Johnson and Mr. Paulson:

At its open meeting on May 7, 1998, the Commission affirmed the staff determination issued on March 31, 1998, in the above-captioned docket. Ameritech Wisconsin (Ameritech) had appealed that determination on April 7, 1998.

The Commission determined that the issue before the Commission is the interpretation of the interconnection agreement between Ameritech Wisconsin (Ameritech) and TCG Milwaukee, Inc. (TCG), a matter over which the Commission has jurisdiction under 47 U.S.C. § 252(e) and the Commission's *Interim Procedures for Negotiations, Mediation, Arbitration and Approval of Agreements*, under §§ 196.04, 196.219(3)(a), 196.26, 196.28 and 196.30, Stats., and by the terms of the agreement itself. The Commission found that TCG had exhausted alternative dispute resolution procedures under Section 29.18 of the agreement. The Commission also decided that postponing a Commission decision to await a Federal Communications Commission decision is not in the parties' interest or in the public interest. Finally, the Commission found that calls to an internet service provider are local traffic—not switched exchange access service—under the agreement and subject to the reciprocal compensation provisions of that agreement.

The Commission therefore orders that Ameritech resume immediately reciprocal compensation payments in accordance with the agreement, and pay the past due amounts, with interest as specified in Section 29.10.5 of the agreement, within 10 days.

Dated at Madison, Wisconsin, May 13, 1998

By the Commission:

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights.

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Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in s. 227.53, Stats. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in s. 227.01(3), Stats., a person aggrieved by the order has the further right to file one petition for rehearing as provided in s. 227.49, Stats. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with s. 227.48(2), Stats., and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 4/22/91

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Under Wisconsin law, parties are required to interconnect by §§ 196.04 and 196.219(3)(a), Stats. The Commission is authorized to investigate complaints by §§ 196.26, 196.28 and 196.30, Stats. The Interim Procedures say that "disputes over interpretation and application of existing agreements may be submitted to the Commission for arbitration under these procedures." In this case, staff is attempting to resolve this controversy more informally with a staff determination, which was indicated as the intended process in the staff's October 17, 1997, letter.

Finally, TCG argues that the Commission has authority under the agreement itself to resolve this dispute. TCG cites Section 29.18 of the agreement regarding dispute escalation and resolution. Ameritech argues that Section 29.10 of the agreement, which addresses disputed amounts, is the appropriate section. While both sections cited by the parties include a procedure for alternative dispute resolution, i.e., meetings of designated representatives within short periods before either party files a complaint with the Commission, Ameritech's insistence on Section 29.10 appears to be related to its claim that TCG has not exhausted alternative dispute resolution procedures. As Exhibit 4 of its complaint, TCG provides a letter dated August 19, 1997, from Jim Washington, Vice President of TCG, to Gert Anderson, Director of Account Operations, Ameritech Information Industry Services, in which Mr. Washington confirms impasse between the parties under Section 29.18 of the agreement. TCG does not claim to have exhausted the procedures under Section 29.10.

Staff concludes that the Commission has authority under the agreement itself. The issue in this docket, the meaning of sections relating to reciprocal compensation, invokes the application of Section 29.18 rather than Section 29.10. The question is not the accuracy of TCG's billing but rather a difference in interpretation of what is billable under Section 5.6, which is entitled "Reciprocal Compensation Arrangements - Section 251(b)(5)."

Furthermore, staff agrees with TCG's conclusion in Exhibit 7 of its complaint that the parties did indeed exhaust the procedures under the agreement. In its response, Ameritech states that it became "suspicious" several months before of "improperly" submitted bills. In fact, Ameritech notified TCG about this issue on July 3, 1997, months after the same issue had been raised in another jurisdiction. In its letter dated July 3, 1997 (Exhibit 4, TCG Complaint), Ameritech indicates its willingness to negotiate but only to determine the "specific amounts that have been paid in error." With no prior negotiation, Ameritech began unilaterally withholding payments to TCG for terminating traffic destined for ISPs.

Obviously, the parties are not going to agree about Ameritech's interpretation of reciprocal compensation, no matter how much they negotiate. Ameritech's insistence that TCG exhaust alternative dispute resolution under Section 29.10 only serves to delay an outcome.

Public Service Commission of Wisconsin

Cheryl L. Parrino, Chairman
Daniel J. Eastman, Commissioner
Joseph P. Mettner, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

March 31, 1998

Via Facsimile

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Re: Contractual Dispute About the Terms of an
Interconnection Agreement Between Ameritech
Wisconsin and TCG Milwaukee, Inc.

5837-TD-100
6720-TD-100

Dear Ms. Johnson and Mr. Paulson:

On September 17, 1997, TCG Milwaukee, Inc. (TCG), filed a complaint with the Public Service Commission (Commission) in which TCG contends that Ameritech Wisconsin (Ameritech) has violated the terms of the interconnection agreement between TCG and Ameritech. That agreement was approved by the Commission by order dated March 5, 1997. TCG alleges that—contrary to their agreement—Ameritech has stopped paying, and is still refusing to pay, TCG for terminating traffic destined for internet service providers (ISPs).

By letter dated October 17, 1997, the Commission staff established a briefing schedule. Ameritech's response was filed as ordered, on October 30, 1997. TCG filed a reply by the date ordered, on November 6, 1997.

Commission Authority

The Commission has authority to interpret and enforce the provisions of an interconnection agreement under the federal Telecommunications Act of 1996, Wisconsin statutes and Commission's *Interim Procedures for Negotiations, Mediation, Arbitration and Approval of Agreements* (Interim Procedures), and by the terms of the agreement itself. Section 252(e)(1) of the Telecommunications Act requires that all interconnection agreements be submitted for state commission approval. The United States Court of Appeals for the Eighth Circuit has stated, "We believe that the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved." *Iowa Utilities Board et al. v. FCC and U.S.*, 120 F.3d 753, 804 (8th Cir. 1997).

Federal Communications Commission (FCC) Proceeding

Ameritech cites a pending FCC proceeding, initiated by the Association for Local Telecommunications Services (ALTS) on June 20, 1997, which requests clarification of the FCC's interconnection order. *In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, CCB/CPD 97-30 (*ALTS Request*). The FCC sought comments regarding this request in July 1997, but has not yet issued any decision. Ameritech argues that the Commission should refrain from taking any action on TCG's complaint until the FCC has decided this matter for a number of reasons, including the risk of inconsistent results, the wasting of resources, and the possibility of gaining guidance from the FCC.

Historically, the FCC first distinguished enhanced services, including internet service, from basic services in the FCC's Computer II proceedings. In a 1983 access charge order, the FCC decided that enhanced service providers should not be required to pay interstate access charges, even though they may use the facilities of local exchange carriers to originate and terminate interstate calls. *ALTS Request* at 2-3. In 1997, the FCC decided to maintain that exemption. First Report and Order, *In the Matter of Access Charge Reform*, CC Docket 96-262, FCC 97-158, paras. 344-348 (rel. May 16, 1997). That decision means that enhanced service providers, including ISPs, may purchase services from incumbent local exchange carriers under the same intrastate tariffs available to end users. Such providers pay business line rates and the appropriate subscriber line charge rather than interstate access rates.

Ameritech's argument is that—in exempting these calls from the access charge—the FCC has consistently recognized calls to ISPs as exchange access traffic or interstate. Of course, an exemption like this one is really not a jurisdictional statement about the nature of such calls. Arguably, the FCC exemption can also be interpreted to mean that this traffic is local. Over the years, the FCC has considered such traffic to be local for many purposes, not just for end user tariffs. *ALTS Request* at 2, citing *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2633 (1988). In fact, the FCC repeated the long history of its requirement that calls to ISPs from within local calling areas be treated as local calls, regardless of the ISP's subsequent handling of the call, and requested comments specifically about whether this policy should be reconsidered. Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers, *In the Matter of Access Charge Reform*, CC Docket No. 96-262, FCC 96-488 (rel. December 24, 1996), paras. 282-290.

Recent decisions of the FCC also can be read to support the local nature of these calls. The FCC has concluded that transport and termination of local traffic for purposes of reciprocal compensation are legally distinct from access charges for interstate long-distance. First Report and Order, *In the Matter of Implementation of Local Competition*, CC Docket No. 96-98 (rel. August 8, 1996), para. 1033. And the FCC has recently distinguished between the service used

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to connect to an ISP and the ISP's services. Report and Order, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-147 (rel. May 8, 1997), paras. 83 and 789.

At any rate, staff does not believe that postponing a Commission decision serves either party's interest or the public interest. Although the FCC may someday reach a different conclusion than the Commission, we have no reason to presume in advance that such will be the case. The parties can always bring any FCC decision to the attention of the Commission, so it can consider whether further action is appropriate. Furthermore, the issue in this docket is the interpretation of the interconnection agreement between these parties, a matter which is clearly within the Commission's jurisdiction. Resolution of disputes arising under interconnection agreements and the enforcement of these agreements is sound public policy. An issue of this magnitude should be addressed in negotiations or re-negotiations of an interconnection agreement, not by one party's imposing a unilateral solution on the other party under an agreement which is final.

Compensation for Traffic Bound to Internet Service Providers

The relevant sections of the agreement are as follows:

5.6.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or TCG which a Telephone Exchange Service Customer originates on Ameritech's or TCG's network for termination on the other Party's network. The Parties shall compensate each other for such transport and termination of Local Traffic at the rate provided in the Pricing Schedule.

5.6.2 The Reciprocal Compensation arrangements set forth in the Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all IntraLATA Toll traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

1.43 "Local Traffic" means local service area calls as defined by the Commission.

1.65 "Switched Exchange Access Service" means the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access Services.

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The agreement was approved by the Commission at its open meeting on March 4, 1997. The Commission's letter order of approval was issued on March 5, 1997. The agreement was in effect when Ameritech Information Industry Services, by letter dated July 3, 1997 (Exhibit 4, TCG Complaint), informed TCG that it considers Ameritech's end user traffic destined for ISPs to be exchange access traffic and so not subject to the reciprocal compensation provisions of the agreement. Although the companies had until this time billed and paid each other for reciprocal compensation regardless of the type of end user, Ameritech began paying TCG only the undisputed portions of TCG's bills and excluded reciprocal compensation for charges billed by TCG for traffic destined to ISPs in Wisconsin.

TCG argues that a call to an ISP terminates within the local calling area at the ISP's premises associated with a local number. Ameritech argues that a call to an ISP terminates on the internet and is therefore not a local call, even though Ameritech charges its own ISP customers local business line rates for local telephone exchange service and treats these revenues for its own service to ISPs as local traffic for purposes of separations and ARMIS reporting. The FCC has said that the provision of internet service via the traditional telecommunications network consists of multiple components. Report and Order, *Federal-State Joint Board on Universal Service*, paras. 344-348. We agree. The telecommunications service component, rather than the information service component, should be the basis for determining the jurisdiction of the traffic involved in calls to ISPs. Termination occurs when a call has been received by the telephone exchange service to which it was addressed, a call record has been generated and answer supervision has been returned. See TCG Reply, Exhibits G and H.

In the agreement, reciprocal compensation applies to transport and termination of local traffic. "Local traffic" means local service area calls as defined by this Commission. So this Commission's policies decide this issue rather than the policies of the FCC. As stated above, FCC policies arguable favor a determination that these calls are local anyway. However the FCC decides in the future, this Commission previously determined that customers located in the same exchange, or in exchanges which have Extended Community Calling, are customers making local calls for which local interconnection rates apply.¹ Findings of Fact, Conclusions of Law and First Final Order, *Investigation of the Appropriate Standards to Promote Effective Competition in the Local Exchange Telecommunications Market in Wisconsin*, Docket 05-TI-138 (July 2, 1996). Staff believes that the majority of calls to ISPs are both originated and terminated within a local calling area, in that one company is handing off or terminating such calls to the other company.

Ameritech contends that calls to ISPs are switched exchange access service within the terms of the agreement and thus exempt from the reciprocal compensation provisions under Section 5.6.2; however, this appears to be argument, not fact. These calls are not among the listed services in

¹ Read in the context of the 05-TI-138 order, it is apparent that the Commission also includes exchanges that have extended area service (EAS).

the agreement's Section 1.65 definition of "switched exchange access service" that are exempt from reciprocal compensation. In addition, Ameritech did not build into the agreement an accounting mechanism to separately identify ISP traffic. Nor is there a percentage internet usage factor, as is used elsewhere in the agreement when it is necessary to differentiate and identify differently rated traffic types. In its July 3, 1997, letter which triggered this dispute, Ameritech admits that it cannot determine actual amounts for the termination of calls to ISPs but will be using estimates. Finally, Ameritech's proposal would create a class of traffic, based on type of customer, for which no compensation under this agreement is due.

In this arbitration, one of the three issues in dispute was how to price terminating calls. TCG argued for bill and keep, rather than reciprocal compensation. At the hearing in this matter, Ameritech extensively cross-examined a TCG witness, W. P. Montgomery, to show that a competitive local exchange company could market to customers with disproportionately high out-going volume. Transcript at 64. The panel specifically rejected TCG's bill-and-keep proposal and adopted the pricing mechanism which Ameritech favored, reciprocal compensation. In the aftermath of that decision, TCG has seemingly successfully marketed not to customers with high out-going volumes, as Ameritech had speculated, but to customers with high in-coming volumes. While that is unfortunate for Ameritech, Ameritech won its argument on how to price the termination of calls and, like all of us, has to live with the consequences of its own actions. Ameritech cannot now unilaterally apply bill and keep to ISP traffic by reclassifying it.

Furthermore, Ameritech was aware before the hearing in this arbitration of a disparity in the amount of minutes of use that TCG and Ameritech terminated on the other's local network. Based on a traffic study in Wisconsin for June, July and August of 1996, Ameritech witness Suzanne Springsteen testified that the disparity was approximately 1,200 percent and that Ameritech was terminating more traffic on TCG's network than vice versa. Transcript at 348 and 357. She clearly indicated that her testimony was offered in support of reciprocal compensation, in opposition to bill and keep. Transcript at 358. Ameritech was at that time apparently willing to pay disproportionately under a reciprocal compensation arrangement. Ameritech is now bound by the terms and conditions of its agreement with TCG.

For all of the reasons above, we conclude that (1) the issue before the Commission is the interpretation of the interconnection agreement, a matter over which the Commission has jurisdiction, (2) postponing a Commission decision to await a FCC decision is not in the parties' interest or in the public interest, and (3) calls to an ISP are local traffic under the TCG/Ameritech agreement and subject to the reciprocal compensation provisions of that agreement. Therefore, Ameritech shall immediately resume reciprocal compensation payments in accordance with the agreement and shall, within 10 days, pay the past due amounts, with interest.²

² Although staff does not view this dispute as a matter to address under Section 29.10 of the agreement, we note that Section 29.10.5 does address the issue of interest. We suggest that the percent specified there is appropriate for determining the interest due on these past due amounts.

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This is an informal staff determination. Ameritech has the right to appeal this determination to the Commission. Appeals to the Commission must be filed in writing within five business days. If you have any further questions regarding this matter, please call Gary Evenson at (608) 266-6744 or Mary Stevens at (608) 266-1125.

Sincerely,

Gary A. Evenson
Assistant Administrator
Telecommunications Division

Mary M. Stevens
Legal Counsel
Telecommunications Division

MMS:GAE:slj:t:\staff\mms\tcg agreement dispute

cc: Records Management/Master File