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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Approval) Case No. 97-717-TP-UNC
of Fresh Look Notification)

AMERITECH OHIO'S MEMORANDUM CONTRA TO NEXTLINK
AND TIME WARNER'S MOTION IN SUPPORT

Ameritech Ohio submits this Memorandum Contra to the Joint Motion In Support filed by NextLink Ohio, L.L.C. and Time Warner Communications of Ohio ("Joint Movants"). The Joint Motion raises two issues which are outside the scope of the Hearing Examiner's Entry seeking comments on an earlier motion filed by Brooks Fiber. The first issue concerns the applicability of the Commission's fresh look provisions to Ohio Rev. Code Section 4905.34 contracts. The second issue involves certain contracts for which reduced fresh look termination liability is inapplicable. In those cases where the service is only offered pursuant to multi-year contracts and the customer has not had the service long enough to qualify for the minimum term offered, fresh look termination liability is inapplicable.

The Joint Movants contend that Ohio Revised Code Section 4905.34 contracts should be subject to the Commission's fresh look termination orders. As support for their

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claim, the Joint Movants argue that the decision whether to apply the fresh look provisions is not a contractual issue but a Commission policy issue. (Memorandum In Support, p. 4) They argue that extending fresh look termination rights to Section 4905.34 contracts does not constitute invalidating the contract. The Joint Movants also contend that it is not clear whether Ameritech Ohio's contracts with school districts are subject to Section 4905.34. They point to contractual language in one school district contract that indicates that such contracts may be subject to PUCO approval. (Id., Ex. B) Finally, the Joint Movants argue that the Ohio Supreme Court's decision in Ohio Edison Co. v. Pub. Util. Comm., 78 Ohio St. 3d 466; 678 N. E. 2d 922 (1997) was limited to a finding that Section 4905.34 contracts are not subject to the pricing below-cost restrictions contained in Section 4905.33. (Memorandum in Support, p. 5.)

The Joint Movants' arguments ignore the plain and direct holding of the Ohio Supreme Court in Ohio Edison. That holding specifically found that the Commission has no jurisdiction over Section 4905.34 contracts. In fact, the Commission cannot even entertain Section 4905.26 complaint cases involving Section 4905.34 contracts.

In Ohio Edison, the Court held that:

"R.C. 4905.34 contracts are exempt from R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923 and 4925 including Commission review under R. C. 4905.26."

(Ohio Edison, p. 926.) Since the Commission is a creature of the General Assembly, and can only exercise the powers specifically granted to it, the fresh look orders must be

based on the Ohio Rev. Code.¹ In fact, although it is less than clear which section of the Revised Code the Commission relied on in adopting the fresh look provisions, the Commission's fresh look order did reference Ohio Revised Code Sections 4901.13, 4905.31, 4905.04, 4905.06, 4905.15, 4905.22 and 4905.381 as general authority for its Local Service Guidelines.² Each of these sections, under the holding in Ohio Edison, are inapplicable to Section 4905.34 contracts. As a result, the Commission has no statutory basis to reform, rescind or to interfere in any way with the termination liability provisions of Section 4905.34 contracts.

The Ohio Supreme Court emphasized the Commission's lack of jurisdiction by holding that:

"Once the commission determines that the complaint pending before it involves an R.C. 4905.34 contract, the commission's jurisdiction is at an end and the case must be dismissed."

(Ohio Edison, p. 926.) Since the Commission has no jurisdiction over Section 4905.34 contracts, how then could the Commission set aside the termination liability sections of those contracts and replace them with the reduced fresh look termination liability? The Joint Movants' argument that the Commission's fresh look provisions do not invalidate the contract, that only the customer can terminate the contract, makes no sense. The

¹ Ameritech Ohio has consistently voiced its opposition to the Commission's fresh look orders. Ameritech Ohio continues to believe that the Commission's fresh look policy is unlawful and interferes with the right to contract of incumbent local exchange carriers.

² Finding and Order, Case No. 95-845-TP-COI, June 12, 1996, p. 11.

Commission would be inserting itself and its perceived authority into the contractual relationship between Ameritech Ohio and its contract customers. But for the exercise of that Commission authority the contract and the contractual termination liability negotiated by the customer would apply.

The Joint Movants' contract example attached to the Motion does not and cannot confer jurisdiction on the Commission over the contract. Only the General Assembly can expand the Commission's jurisdiction. In fact, the contract language merely provides that the contract "may" be subject to review and approval by the PUCO.

Moreover, the agreement provides that "If, in the opinion of Ameritech, such approval is required, then Ameritech will submit the Amendment to the PUCO after it has been executed by both parties." (Memorandum In Support, Ex. B.) Ameritech Ohio did not file the contract attached to the Motion with the PUCO for approval because the contract is valid and enforceable by law under Ohio Rev. Code 4905.34. The Commission had no jurisdiction to approve the agreement and has no jurisdiction to reform the contract to include the fresh look termination liability.

The second issue raised by the Joint Movants is that fresh look termination liability has not been applied in the case of certain contracts. The Joint Movants provide no facts to support their allegation that Ameritech Ohio has not followed the Commission's orders. The contract referenced by the letter attached to the Joint Movants' Motion relates to a Centrex contract in which the Centrex service at issue is not offered

on a month-to-month basis but, rather, is only offered pursuant to multi-year contracts. In this case, the customer has not had the service long enough to satisfy the shortest term offered by Ameritech Ohio. As a result, the fresh look termination liability adopted by the Commission is not available since there is no "shorter term offering that would have been available for the term actually used". (Local Service Guidelines, Appendix A, p. 58.)

Ameritech Ohio requests that the Commission deny the Joint Motion filed by Nextlink and Time Warner. Ohio Rev. Code Section 4905.34 contracts are not subject to the Commission's jurisdiction and the fresh look provisions. In addition, reduced fresh look termination liability is not available on contracts where Ameritech Ohio only offers the service pursuant to multi-year contracts and the customer has not had the service long enough to satisfy the shortest term Contract offering available.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Ameritech Ohio's Memorandum
Contra to NextLink and Time Warner's Motion in Support was served upon counsel for
the parties as shown on the attached service list by regular U.S. mail, postage prepaid,
this 29th day of September, 1997.

Michael T. Mulcahy JTK
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