BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application	*	
of the Ohio Bell Telephone Company	*	CASE NO. 93-487-TP-ALT
for Approval of an Alternative	*	
Form of Regulation	*	

REPLY BRIEF OF THE EDGEMONT NEIGHBORHOOD COALITION AND THE APPALACHIAN PEOPLE'S ACTION COALITION IN THE UNIVERSAL SERVICE ASSISTANCE PROCEEDING

I. Introduction

Edgemont and APAC hereby respectfully submit their reply brief in this proceeding. This reply brief chiefly address the Initial Brief of Ameritech. In addition, Edgemont/APAC adopt the arguments contained in the initial briefs of OCC, The Empowerment Center and the Commission staff.

II. Edgemont/APAC's Reply

The overarching theme of Ameritech Ohio's brief is that its obligations were limited to setting up a USA Program even if in practice it undermined the purpose and goals of that program through unnecessary enrollment barriers, lack of leadership and coordination, poor promotion, inadequate staffing, and deficient training. Ameritech 4-8. Edgemont and APAC have already, at some length, shown how this violates basic principles of contract law including the principles that contracts should be interpreted in light of the parties' purpose and the public interest, that reasonable terms may be implied and, that all contracts impose upon each party a duty of good faith and fair dealing in performance and enforcement. Edgemont/APAC Initial Brief at 5-13.

In addition, while insisting that it wasn't obligated to promote USA before the 1996

Settlement Agreement, in its brief Ameritech acknowledges that it did make some publicity efforts before that date and that, "all of these efforts were performed at Ameritech's expense and far exceeded anything Ameritech Ohio had ever done to publicize the prior TSA Program." Ameritech at 22, 24. In fact, Sharon Glaspie testified that at the very first Advisory Committee meeting she told the Committee, "we had a communications plan and yes, we were going to do everything we could to get the word out on USA." Tr. 2 (Glaspie) at 194. This invokes another principal of contract law, the rule of practical construction. That rule may be considered as an aid to construction of a contract when the contract is ambiguous, uncertain, or doubtful, or when a dispute has arisen between the parties after a period of operation under the contract.[1] The rule of practical construction has its origin in the presumption that the parties to a contract, at and after the making thereof, knew what they meant by the words used, and that their acts and conduct are consistent with their knowledge and understanding and show the senses in which the words in their agreement were used and understood by them.[2]

Indeed, the conduct Ameritech describes in its brief, however poorly it was ultimately executed, is consistent with the words of Ameritech's Vice President of External Relations, who wrote that the intent of the Plan was to enroll, "a large segment of Ohio's low income residents." Empowerment Center Ex. 2L.

Ameritech's witnesses also understood that Ameritech and the Consumer parties had not

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[1] 18 O. Jr. 3d Contracts, § 160; e.g., In re Estate of Dugid, 24 Ohio St. 2d 137, 141 (1970); State ex rel. Weinberger v. Miller, 87 Ohio St. 12 (1912); Consol. Mgt., Inc. v. Hardee Marts, Inc., 109 Ohio App. 3d 185 (1996).

[2] 18 O. Jur. 3d Contracts, § 160; Cincinnati v. Cincinnati Gas Light and Coke Co., 53 O. St. 278 (1895).

agreed to a hollow program. Sue Drombetta testified that Advantage Ohio didn't spell out all the particulars of implementing the USA Program, it was just the "overall definition of the program." Tr. 3 (Drombetta) at 173. Sharon Glaspie testified that the *Plan* implied that there would be promotion and that Ameritech could not have complied if it did no promotion. Tr. 2 (Glaspie) at 117. Drombetta further acknowledged that where Ameritech was obliged to promote a service, it was also required to handle the response it received as a result of that promotion. Tr. 4 (Drombetta) at 45.

Further, the statutory (R.C. 4905.22) and regulatory (OAC Rule 4901:1-5-06(D)(1)) requirements cited in Edgemont/APAC and OCC's Initial Brief cannot be waived or altered by the terms of the Alternative Regulation Plan. Specifically, under modern contract law, such obligations are implied in law to be terms and conditions of the contract or stipulation. They are imposed irrespective of the intention of the parties. 18 O. Jur. 3d, Contracts § 147. All contracts are subject to the paramount rights of the public, and all contracts, the subject matter of which involves the public welfare, will have read into them with the same force and effect as if expressed in clear and definite terms, all valid public regulations then existing or thereafter enacted, essential for the promotion of the health, safety, and welfare of the people. 18 O. Jur. 3d, Contracts § 165; Akron v. Public Utilities Comm., 149 Ohio St. 347, 356 (1948); see, also, Labate v. National City Corp., 113 Ohio App.3d 182, 185 (1996) (in construing student loan agreement between former dental student and bank, Court of Appeals considered not only the express terms of the contract, but also the relevant federal rules). Valid, applicable statutory provisions are part of every contract. 18 O.Jur. 3d, Contracts § 165; Bell v. Northern Ohio Tel. Co., 149 Ohio St. 157, 158 (1948); Kaneff v. Gantz, 102 Ohio App. 363, 365 (1957).

Ameritech makes other arguments that are not supported by the law or the facts. Below, we address those not already covered in our initial brief.

On page 8, Ameritech argues that, "the scope of this inquiry is limited to Ameritech's performance from the Commission approval of the 1996 Settlement...". This is the first time Ameritech has raised this argument. This matter went to hearing on allegations related to pre 1996 violations and evidence was taken on those issues with no objection from Ameritech. Certainly Ameritech has waived this argument. In any case, there is simply nothing in the 1996 Settlement to support Ameritech's position. Quite to the contrary. The relevant section of the 1996 Settlement begins, "Ameritech Ohio shall implement a plan to enhance the Universal Service Assistance (USA) Program. Such a plan shall provide for...". Case No. 96-532-TP-UNC, *Settlement Agreement,* ¶ 8, (emphasis added). Clearly, the *Settlement Agreement* only "enhances" the *Plan* and in no way limits it.

Further, Ameritech's interpretation would lead to absurd results. For instance, Ameritech Ohio contends that the *Plan's* requirement for "reasonable payment arrangements" was totally superseded by the requirement in the *Settlement Agreement* that negotiations concerning payment arrangements for USA customers take place within 90 days of the Commission's final order. Ameritech at 14. In essence, Ameritech Ohio argues that as of the 1996 settlement it no longer had to provide "reasonable" payment arrangements and that presumably unreasonable arrangements were okay as long as Ameritech engaged in negotiations concerning payment arrangements with the consumer parties. Clearly, the purpose of the language in the second stipulation was to spur on Ameritech Ohio to implement reasonable payment arrangements, not to allow the Company to implement unreasonable arrangements or to greatly delay implementing such arrangements. The

Settlement Agreement enhances and does not limit the *Plan.*

On pages 9-12, Ameritech Ohio claims that it has implemented a "dedicated work group," as required by the Alternative Regulation Plan. However, Ameritech Ohio's tortured interpretation of the term "dedicated work group" cannot stand. The clear purpose of this provision was to make it easier for customers to become USA customers, not to create an additional bureaucratic entity that USA-eligible customers must deal with. Moreover, the language of the *Settlement* must, as a matter of contract law, be interpreted in favor of the promise and against the promisor, Ameritech Ohio. 80. Jur. 3d. Contracts, § 148; e.g. Webster v. Dudling House Inc. Co., 53 Ohio St. 558 (1895), Shaker Medical Center Hospitals v. Philips, 54 Ohio Misc. 21 (Muni. Ct. 1978). Ameritech Ohio's peculiar interpretation of the "dedicated work group" requirements frustrates the purpose of the requirement, contravenes the parties' intentions, and represents "bad faith" on the part of Ameritech Ohio. It is a specific violation of the *Settlement Agreement* in Case No. 96-532-TP-UNC at ¶B.8.

On page 10, Ameritech Ohio proudly describes its current self-verification process, but fails to offer any explanation as to why the Company earlier resisted the use of a self-verification form and only began to use the form in January 1998.

On page 10, Ameritech insists that existing customers need only send in a self verification form to receive USA benefits. Ameritech at 10, 31. In fact, Sue Drombetta testified that her Great Aunt was able to do that but only, " because I talked with her, but under normal circumstances to find out what they need to do, they would have to call the 800 number." Tr. 3(Drombetta) at 160.

On page 11, Ameritech Ohio states that Susan Murtha monitored the performance of the dedicated work group and that there were only, "a few isolated implementation problems." We have already pointed out the highly sporadic nature of Murtha's monitoring efforts and the fact that the

problems she detected with the CCC went unnoticed by CCC supervisors.

On page 15, Ameritech incorrectly claims that there was no testimony regarding problems with implementation of the payment arrangements adopted in June 1997. In fact the Staff found just such problems. Staff Ex. 1 (Puican) at 5. There has been no monitoring since then.

On page 20, Ameritech cites Ms. Glaspie's claim that all ODHS recipients received USA mailings. This claim is controverted by all of the other facts in the record.

Ameritech's own witnesses, including Glaspie, testified that the ODHS mailings were not cumulative and that each mailing intentionally repeated prior mailings. They explained why those arrangements came about. Tr. 3 (Drombetta) at 135, Tr. 1 (Murtha) at 175, Tr. 2 (Glaspie) at 232.

At the hearing, Ms. Glaspie simply could not explain how the mailings, the largest of which was 200,000, could reach the entire ODHS list. Tr. 2 (Glaspie) at 138. She just repeated that someone at ODHS told her it had. *Id* at 139. She further testified that after being told this (which contradicted everything she knew about the mailings up to that point), she did not ask the ODHS person to explain this remarkable result. *Id.* at 139. Certainly, Ameritech has the burden of proof in this proceeding and could have called a witness from ODHS to support Glaspie if one existed. It did not.

On page 22, Ameritech attempts to dismiss its failure to produce a brochure until June of 1995 by claiming that the process, "of seeking comments and returning with revised materials ...was time consuming." The evidence shows that the Committee rewrote the brochure at the same meeting where it was first shown it. Tr. 4 (Gruber) at 221. More to the point, Ameritech cannot blame the Committee for Ameritech's failures.

As Sharon Glaspie testified regarding the committee;

Q They weren't supposed to run the program, right?

A Right

Q Okay. They weren't responsible for the success or failure of the program, right?

A Right

Q Okay. And in fact, if there's anything wrong with the program, it cannot be blamed on the Committee, is that right?

A. Right.

Tr. 2 (Glaspie) at 177.

On page 23, Ameritech claims that delaying the ODHS mailings was a, " reasonable response to higher than expected response rates." The question Ameritech fails to answer is why, with three months to prepare did it not have an accurate estimate of response rates and/or sufficient staff on call to handle the response. Ameritech Ohio had the experiences of Michigan and Wisconsin to draw on yet it allowed itself to be overwhelmed.

Further, a "higher than expected response rate" to an October 1996 mailing does not explain Ameritech's failure to adjust in the two years since. While the mailings continued to be delayed in 1997 and 1998, George Norris, supervisor of the key Cleveland CCC since April 1997 testified that no one ever discussed staffing concerns regarding USA mailings with him. Tr. 1 (Norris) at 34. No one ever asked for his feedback on the CCC's ability to handle USA calls. Tr. 1 (Norris) at 44. According to Norris, the CCC's have 750 employees, take 1 million calls a month, Tr. 1 (Norris) at 33, and are capable of dealing with a 30 to 40% seasonal and holiday related call volume increase. Tr. 1 (Norris) at 35. These facts certainly give reason to doubt just how hard Ameritech tried to solve this problem.

On page 25, Ameritech mentions that in response to the Advisory Committee, a USA incentive program for service representatives was established. According to the Advisory Committee minutes, a program that allowed service reps to get one dollar gift certificates and Ameritech sweatshirts was begun on February 21, 1996. Empowerment 3 (March 18, 1996) at attachment 3.

It's not known how long this program lasted. George Norris described all of the incentive programs available to service representatives and did not mention it. More to the point, Sue Murtha documented the problems with CCC reps refusing to take USA Plan 1 calls in September 1996 and March 1997. OCC Ex. 12, 13, 14, 16. Edgemont/APAC Brief at 35. Either the USA incentive program no longer existed at that time or was so inconsequential that it did not have a positive effect on service representative behavior. Indeed, weighed against the substantial incentives that a representative could not earn while handling USA Plan 1 calls, it appears that this token incentive was another example of Ameritech "tinkering" to appease the Committee rather than a good faith effort to solve the problems of a system which discouraged USA call handling.

On page 26, Ameritech says that Mr. Norris indicated that he had not received any complaints concerning the CCC's handling of USA customers. Mr. Norris did receive a number of e-mail messages concerning the Company's problems handling the USA Program but did not recall any discussion of those problems. Also, based on his testimony he was ill-informed about the USA Program, its benefits and the qualifying programs. It is hard to understand how he could effectively monitor problems with the program.

On pages 27-29, Ameritech Ohio argues that the testimony of Nancy Brockway and Bill Gruber should be given no weight and not be considered in deciding whether the Company violated

the Alternative Regulation Plan. Brockway's testimony, of course, was perfectly proper under Evidence Rule 701 and 702. As for Gruber, he testified to the accuracy of the Committee minutes and offered his firsthand testimony concerning the astoundingly poor USA brochure first developed by the Company and the Company's foot dragging on implementing reasonable payment arrangements. Both Gruber and Steve Wertheim testified concerning Ameritech's pattern of failing to cooperate with the Committee, the Company's abuse of its power to specify terms (e.g., the reasonable payment arrangements), and the Company's lack of diligence in implementing the USA Program. All three of those elements-lack of cooperation, abuse of power to specify terms, and lack of diligence-fall within the definition of "bad faith" regarding the Company's duty of good faith and fair dealing.

On page 29, Ameritech complains that the mishandled calls heard by Staff happened at a time when special USA payment arrangements had just been modified. Mr. Puican testified, however, that the callers were not offered any payment arrangements, not the old ones, not the new ones, - none. They had to "pay their entire bill including toll charges in order to get reconnected." Tr. 5 (Puican) at 94.

On page 31, Ameritech insists that enrollment numbers cannot be used to evaluate the *Plan.* Ameritech ignores the fact that the Advisory Committee was specifically charged to "evaluate the success of the USA Program and the number of eligible customers that participate." Plan, Exhibit G, ¶8. Of course, even in the absence of this specific mandate, enrollment numbers would be a relevant measure of compliance. Outcome measures, such as enrollment numbers, are frequently used to measure the effectiveness, quality or performance of products, services, and programs.

On page 33, Ameritech claims that the enrollment numbers indicate success. Sue Drombetta, however, did not disagree with the characterization that the participation level was low. She testified, "If I compare it to some of the numbers that we've heard, I'd say it's a very small-it's a small percentage." Tr. 4 (Drombetta) at 47. The numbers she heard included Ameritech's own estimate that there would be 200,000 enrollees. Clearly, any program that has such low enrollment (34,950 in July 1998) yet such an enthusiastic response that publicity for it is curtailed, is not being successfully implemented.

On page 34, Ameritech Ohio cites the March 1998 FCC statistics on telephone penetration rates to show the effectiveness of the USA program. In truth, the telephone penetration rate in Ohio has fluctuated up and down since the USA program was implemented. Ameritech Ex. 4 at 15-17. For instance, the last annual average reported by the FCC for Ohio is for 1997, it was 94.6%. Penetration was 94.8% in 1994. *Id.*

Of course, these overall penetration rates mask the seriousness of the problem USA was designed to address. The FCC report shows that among low income households the penetration rate drops as low as 75%. *Id.* at 10. Steve Wertheim testified that between one-third and one-half of the people calling his office currently do not have phones and that one-third of 24,000 families in a welfare work training program in Cleveland do not have phones. Tr. 4 (Wertheim) at 110.

On page 35, Ameritech Ohio compares the participation rates for food stamps and "social security income programs" to the USA Advisory Committee's 50% USA enrollment goal. Ameritech is comparing apples and oranges. There certainly are people who, while eligible, do not want "welfare" benefits, or who can't navigate enrollment systems. They are reflected in the participation rates of those programs. The USA-eligible population however, only consists of people

who have already applied and qualified for welfare or other means-tested benefits. They want assistance and have demonstrated their willingness to get it.

On page 36, Ameritech says that there is, "no reliable source for the number of persons eligible due to the fact that many persons participate in more than one of the benefit programs." Even if you eliminate the issue of overlap by looking at just one program, food stamps for instance, the USA enrollment numbers are very low. There are 531,000 households receiving food stamps in Ohio, approximately 318,000 of them in the Ameritech territory. OCC Ex. 25 (Brockway) at 5. In any event, Brockway's testimony addresses the issue of overlap and her conclusions about the total number of people who are eligible (518,719) is remarkably similar to the numbers Ameritech itself generated. ("Estimates of the numbers of Ohio families that would qualify for our previous plans have ranged as high as 300,000. The expanded eligibility under the USA Plan may act to nearly double that number." Edgemont Ex. 6, *Ameritech's USA Questions and Answers).*

III. Relief Requested

The Commission staff endorses automatic enrollment. Staff at 13. Staff's Brief, however, only mentions programs administered by ODHS. There is no reason why automatic enrollment should not be pursued for all programs, including those not administered by ODHS. Automatic enrollment in Plan 1 and Plan 2 should be implemented as quickly as possible. Automatic Enrollment, however, only helps those families that already have a phone. In order to reach those without phones it must be accompanied by outreach including, mailings to the recipients of qualifying benefits, community outreach groups, targeted advertisements, written application forms, VRU messages, and waiting room dedicated phones.

Ameritech contends that the Commission should only decide whether Ameritech has violated the Alternative Regulation Plan, but should not order any relief. Ameritech at 30. The *Rules for Alternative Regulation of Large Local Exchange Companies,* Case No. 92-1149-TP-COI, Rules XL.E, however, are clear. If after a hearing the Commission finds a failure to comply it may, "modify or revoke any order accepting a plan."

In doing so the Commission's power is not limited to ordering the violating party to begin proper implementation of a delayed commitment. Where a violator has failed to perform it cannot be allowed to keep the benefits of that nonperformance or delay. If allowed to keep those benefits, companies will have no reason to carry out their commitments and the regulatory structure of Alternative Regulation will evaporate.

In adopting the Alternative Regulation Plan the Commission put Ameritech on notice that it would not hesitate to act decisively if the company did not implement the Plan in good faith. Alternative Regulation Plan at 77. The Commission must now hold Ameritech accountable by requiring performance and ensuring that Ameritech does not retain any of the benefits of its non-performance and delay. There are a variety of ways, listed in our initial brief, that this should be done. We also adopt the requests for relief stated in the briefs of the other consumer parties and the Staff.

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