



Office of the
Ohio Consumers' Counsel

Robert S. Tongren
Consumers' Counsel

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February 7, 1997

RE
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FEDERAL COMMUNICATIONS COMMISSION

William F. Caton, Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 97-1

Dear Secretary:

Enclosed please find the original and eleven (11) copies of the Comments of the Ohio Consumers' Counsel to be filed in the above referenced proceeding.

Please date-stamp and return the additional copy in the pre-addressed, postage prepaid envelope to acknowledge receipt.

Thank you for your attention to this matter.

Sincerely,

David C. Bergmann
Assistant Consumers' Counsel

DCB/tmb
Enclosure

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of the Application by)
Ameritech Michigan Pursuant to)
Section 271 of the)
Telecommunications Act of 1996 to)
provide In-Region, InterLATA)
Services in Michigan)

CC Docket No. 97-1

COMMENTS OF THE OHIO CONSUMERS' COUNSEL

Robert S. Tongren, in his capacity as the Ohio Consumers' Counsel (OCC), submits these comments to the Federal Communications Commission (Commission) in response to Public Notice DA 97-127, directing interested parties to comment on this application by February 6, 1997.¹ The OCC represents the interests of the residential telecommunications consumers of the state of Ohio pursuant to Ohio Revised Code Chapter 4911. The residential consumers of Ohio have an interest in whether the proper conditions for local competition have been established in their sister Ameritech state of Michigan. The standards set in this first application by a regional Bell operating Company (RBOC) to provide in-region interLATA service pursuant to Sec. 271(d)(1) of the

¹ The comment deadline was originally January 22, 1997. Then Ameritech Michigan amended its filing, due to errors in the original. "Ameritech Corp.'s Long Distance Bid Hits Roadblocks," *Wall Street Journal* (January 16, 1997) at B9. The OCC does not believe that the amendment changes any of the matters that are the subject of these comments.

Telecommunications Act of 1996 will certainly effect the eventual application of Ameritech Ohio.

The OCC has recently filed comments with the United States Department of Justice (DoJ) regarding the proper standards for the Department's consultative role in such applications. The OCC's DoJ comments cover some of the key issues facing this Commission in the instant docket. The OCC attaches and incorporates those comments herein. A few additional remarks are required in this particular context.²

From a residential consumer advocate's perspective, the linchpin of Sec. 271(c) of the Act is the Sec. 271(c)(1)(A) requirement that competitive service actually be provided to residential consumers before an RBOC can enter the interLATA in-region market. Congress could have provided that business competition was enough, but did not do so.

In this case, Ameritech Michigan has the burden of proof to demonstrate to this Commission that it

is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service ... to *residential* and business subscribers. For the purpose of this subparagraph, such telephone exchange service ... may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominately over their own telephone exchange service facilities in combination with the resale of the telecommunications facilities of another carrier.

Sec. 271(c)(1)(A); emphasis added.

As to this requirement that, *via* "its network facilities, competitors actually serve residential -- and the others of Sec. 271 -- the OCC will, as will the Commission and others, review with interest the comments filed by those with direct experience in

² The OCC has been an active participant in the Public Utilities Commission of Ohio's investigation into Ameritech Ohio's compliance with Sec. 271. PUCO Case No. 96-702-TP-UNC, *In the Matter of the Investigation into Ameritech Ohio's Entry into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996*.

Michigan. Having read Ameritech's side of the story as set forth in the Brief to the Application and the accompanying affidavits, one would expect that other interested parties will contest Ameritech's account.³

On the key issue here, from the proof adduced in the Brief, it is clear that neither Ameritech Michigan's arrangement with MFS nor with TCG helps it meet the statutory qualification. Ameritech admits that "Ameritech Michigan is unaware whether any of the Michigan customers of MFS or TCG subscribe to residential service." Brief at 11. Indeed the Brief (at 18-19) makes no claim that TCG even offers service to residential customers. MFS may offer to residential, but Ameritech Michigan must demonstrate that residential customers have accepted the offer.⁴

Evidently some residential customers have accepted Brooks Fiber's offer. Brief at 13, n. Precisely how many is not revealed in the public record.⁵ Although the availability of a competitive alternative is clearly a significant event for residential telephone customers in Michigan, it may not be enough under the Act.

In the first place, Ameritech Michigan has failed to show that this service is provided "predominately over [Brooks Fiber's] facilities," as the Act requires. Yes, Ameritech claims that Brooks Fiber serves residential customers, and yes, Ameritech claims that Brooks Fiber has some facilities. Brief at 16. But the OCC is unable to uncover

³See, e.g., Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan (January 2, 1997) ("Brief") at 26: "The OSS functions have been tested and the results prove that they work 'as advertised.'"

⁴Business customers have also been "first in line" for local service competition in Ohio. The record in PUCO Case No. 96-702-TP-UNC shows that, Ameritech Ohio's only facilities-based competitor, MCI serves only business customers. Indeed, Ameritech Ohio does not claim that any residential customers are served by any competing provider.

⁵Ameritech states, "According to Brooks Fiber, approximately 30% of its lines in service provide service to residential customers..." Brief at 13, n. Ameritech also indicates that Brooks Fiber has installed approximately 6,000 loops, and has purchased some number (undisclosed in the public record) from Ameritech Michigan. *Id.* at 16.

anything in Ameritech's Brief or affidavits that asserts that Brooks' residential service is "predominately" over Brooks' facilities. See Brief at 34; Dunny Affidavit at ¶ 73.

Ameritech repeats here its ingenious theory that the "own facilities" of competitors required by the Act include unbundled network elements purchased from the ILEC. Brief at 15. Yet Ameritech fails to recognize that its position would allow competition from a NEC providing service *exclusively* over unbundled network elements to qualify an RBOC under Sec. 271(c)(1)(A). It is difficult to see how an exclusively unbundled network element-based competitor advances the state of competition any more than a resale competitor. The Act explicitly rejects the latter as a Sec. 271 qualifier for the RBOC, as Ameritech admits (Brief at 15). Surely Congress intended something more than what is proposed by Ameritech to represent facilities-based competition.

The facilities must be currently operating, not just promised for the future. Mr. Dunny's affidavit (at ¶ 9) discusses the implementation of switched access in Traverse City and Lansing, but that is in the future. Thus the test must be met *now* in Grand Rapids, where Brooks owns and operates a switch. Brief at 16.

The key point for the Sec. 271(c)(1)(A) analysis, however, is how many residential consumers are served by Brooks Fiber. Ameritech correctly notes the disclaimer of some members of Congress that the Act was intended to impose a specific "metric" on the level of competition. Brief at 66. Yet read literally, Sec. 271(c)(1)(A) would be satisfied if a facilities-based competitor served one residential and one business customer (or at most two residential and two business customers). Clearly, Congress intended that there be real -- not token -- competition. Whether there is real competition for residential consumers in

Michigan is unclear. The perhaps 1,800 residential customers served over Brooks' loops⁶ - only in the Grand Rapids area --represent *less than 1/10 of 1%* of Ameritech Michigan's 3.6 million residential customer base. A few residential customers in a single geographic area are not enough to meet the standard of the Act.

The importance of a strict standard for Ameritech's entry into the in-region interLATA market is shown by Ameritech's own information. Ameritech describes the current interLATA market as a "tight oligopoly" where the market share of the four largest firms exceeds 50% and the share of the largest firm exceeds 20%. Notably, Ameritech makes no claim that an interLATA in-region market where the dominant local carrier is a player would be *other* than a slightly less tight oligopoly. On the other hand, until recently, the local service market in Ameritech Michigan's territory has been a virtual total monopoly, and now remains, at best, a near-monopoly.

As to the rest of the many issues invoked by this first application under Sec. 271(d), the OCC simply requests that this Commission hold Ameritech to a stringent standard so that the goal of opening up the local market to competition will be well advanced before entry into the interLATA in-region market is allowed. Ameritech fails to discuss the primary reason for the competitive checklist: Once interLATA entry is allowed, Ameritech will no longer have any incentive to cooperate in opening up the local market.⁷

⁶ This perhaps optimistic calculation is based on all 30% of Brooks Fiber's residential customers being served over Brooks Fibers' 6,000 loops. *State Telephone Regulation Report* (January 9, 1997), at 6, says that "Ameritech noted that Brooks is providing service to 8,533 business lines and 3,621 residential lines using its own facilities in seven Grand Rapids exchanges." It is interesting that, according to Ameritech, Brooks can serve 12,154 customers over the 6,000 lines Ameritech says Brooks has built.

⁷ AT&T was reduced to a market share of less than 60% before it was deemed nondominant. Clearly, Ameritech Michigan will dominate the local exchange market for some time to come.

Respectfully submitted,

ROBERT S. TONGREN
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "David C. Bergmann", written over a horizontal line.

David C. Bergmann
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December 13, 1996

Mr. Don Russell
Chief, Telecommunications Task Force
Antitrust Division
U.S. Department of Justice
Room 8104 Judiciary Center Bldg.
555 4th Street, NW
Washington, DC 20001

Dear Mr. Russell:

Re: Letter from Joel Klein dated November 21, 1996

On behalf of Robert S. Tongren, in his capacity as the Ohio Consumers' Counsel representing the state's residential utility consumers, I thank you for the opportunity to respond to the questions posed in Joel Klein's letter concerning the entry of Bell companies into the interLATA in-region market pursuant to Sec. 271 of the Telecommunications Act of 1996 (the Act). The questions --stressing the impact on competition of such entry-- highlight the importance of the Sec. 271 issues.¹

Here in Ohio, we are dealing with these issues on a number of fronts. The Public Utilities Commission of Ohio (PUCO) has before it PUCO Case No. 96-702-TP-COI, *In the Matter of the Investigation into In-Region InterLATA Service under Sec. 271 of the Telecommunications Act of 1996*. In this proceeding, the PUCO is looking to fulfill its consultative role under Sec. 271(d)(2)(A) of the Act. The hearings in this case are only partially complete; by motion of Ameritech Ohio made on December 12, 1996, the hearing will not conclude until sometime in late January.

¹ In your letter, you equate RBOCs' provision of "in-region interLATA services" as entry into the "long distance" market. A significant part of the "long distance" market is the intraLATA market, in which -- in Ohio as elsewhere -- the RBOC (Ameritech Ohio) possesses a virtual monopoly on Dial 1+ calling.

Letter from the Ohio Consumers' Counsel
To Mr. Don Russell
Re: Sec. 271 issues

Another phase of the PUCO's consultative role under the Act is being addressed in PUCO Case No. 96-922-TP-COI, *In the Matter of Ameritech Ohio's Economic Cost for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*. That proceeding will determine whether the prices for Ameritech Ohio's carrier-to-carrier offerings meet the pricing standards of Sec. 251 and hence actually comply with the Sec. 271(c)(2)(B) checklist. Hearing in that docket is scheduled to commence January 6, 1997.

Further, the impact of Bell operating company entry into the interLATA market is key to the pending requests of Ameritech Communications, Inc. (ACI) to be certified as an inter- and intraLATA long distance carrier in Ohio in PUCO Case No. 96-327-CT-ACE. ACI has also requested certification as a provider of local exchange service to compete with, among others, its regulated incumbent affiliate Ameritech Ohio. PUCO Case No. 96-658-TP-ACE. These two applications have been consolidated for hearing and decision; hearing on rebuttal testimony begins December 9, 1996. A briefing schedule has not yet been set.²

Your letter requested a "focus on the relevant facts and specific evidence" that underlie our views. To the extent that the PUCO proceedings relevant to these issues are not complete, neither is the record on these issues complete. We will be happy to send you copies of the OCC's briefs in these proceedings as they are filed.

The PUCO proceedings focus, by and large, on the specific application of the Sec. 271 criteria in the state of Ohio. This is, in fact, required by the Act, which directs a state-by-state analysis. Given that the question in Ohio is *Ameritech's* entry into the interLATA market, Ameritech's actions in the other states in its region are also important. While we concentrate on Ameritech here, it is entirely possible that the same concerns apply to other RBOC's compliance with Sec. 271.

The OCC's responses to the specific questions posed in your letter are as follows:

1. *What potential benefits, if any, do you foresee resulting from Bell Company entry into long-distance? Specifically, what do you see as (a) the present state of competition in the provision of long distance services and the likely development of further competition absent near term Bell entry; and (b) the likely competitive impact of near term Bell entry into the long distance market.*

While there is competition in the long distance market, and such competition has produced benefits for consumers, the OCC sees little evidence that this is an *effectively* competitive market under any analytical framework. The recent lock-step price increases

² The issue of Ameritech's entry into the interLATA market also appears, in one form or another, in many other PUCO proceedings.

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Re: Sec. 271 issues

announced by the market leaders (AT&T, MCI, and Sprint) are graphic evidence of the lack of effective competition in this market. Ideally, the addition of another major player -- the RBOC -- into the market should enhance the level of competition in the market.

However, the long distance market cannot be viewed in isolation. Whatever the level of competition in the long distance market, it is far greater than the virtually nonexistent competition in the local exchange market, particularly for residential consumers. The opening up of the local exchange market -- 60% of which in Ohio is controlled by Ameritech Ohio -- will benefit consumers far more than the addition of one more competitor in the long distance market. Further, the risk of anti-competitive behavior in the long-distance market based upon Ameritech Ohio's likely market dominance is shown in the record of the PUCO cases discussed above.³

Under this framework, the OCC urges the Department to hold Ameritech Ohio and the other RBOCs to a high standard of proof that the conditions of Sec. 271 -- both Sec. 271(c)(1)(A) and 271(c)(2)(B) -- have been met before the Department recommends to the Federal Communications Commission (FCC) that Ameritech Ohio's entry into the long distance market in Ohio is appropriate.

2. *What integrative efficiencies -- to producers or consumers -- are likely to result from the Bell Companies' ability to offer both long distance and local service? To what extent can those efficiencies be achieved by other firms through implementation of the local competition provisions of the Telecommunications Act? In what ways, if any, would Bell Company long distance entry affect the ability of other firms to achieve such efficiencies?*

In both of the PUCO dockets currently in hearing, Ameritech has put forth the notion of customer preference for "one stop shopping" as the main reason for ACI's application to provide local service. Other firms currently operating in the long distance market can provide one stop shopping if and only if the local bottleneck is opened to effective competition. Clearly, Bell operating company entry into the long distance market *before* the local market is open to competition would give Ameritech a tremendous competitive advantage.

3. *How do you anticipate that the Bell Companies will provide their long distance services (e.g., using their existing network, building additional network facilities, reselling other carriers' services, acquiring existing long distance carriers)? To what extent is this expectation relevant to an assessment of the risks and potential benefits of entry?*

³ Specific citations to the record will be provided in the OCC's briefs, to be delivered to the Department upon filing.

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Based on the record in the ACI certification case, it appears that in Ohio ACI will use its own facilities to provide long distance service. This will include the use of existing network where possible, and the building of new facilities where necessary. The use of existing facilities should minimize the risks of entry into the long distance market; however, the fact that the facilities exist may exacerbate the possible impacts on the related local service market explained in the response to question 1, by easing ACI's entry into the long distance market.

4. *What are the risks that the Bell Companies' market power in local markets could be used to hamper competition in the provision of any telecommunications service, including both local and long distance services? Will the Bell Companies' ability or incentive to hamper competition be affected by their entry into long distance? Will the entry of the Bell Companies into long distance affect the incentives of long distance companies to expand into local service?*

The first question has already been responded to, in the response to question 1. Clearly, the Bell Companies' incentive to hamper competition will not be reduced by their entry into long distance; their ability to do so will, however, be reduced by an effective opening up of their local monopoly to competition. Where the terms for local competition are proper, Bell Company entry into the long distance market should be an incentive for long distance companies to enter the local market.⁴

5. *To what extent will the costs and benefits of entry, as felt in any market, vary under an entry standard that supports early entry, versus a standard that is likely to delay entry? Will there be a first mover advantage associated with the ability to offer integrated services, and if so, how significant is that advantage?*

In a single isolated market, under traditional theory, the benefits of early entry are greater than late entry. Yet as mentioned above, we are not dealing with an isolated market here. The connections between the local service market, the interLATA long distance market, and (indeed) the intraLATA long-distance market are so important as to overwhelm the simplistic single-market premise. Clearly, the thrust of the Act is to set the stage for, to enhance, and then to protect competition in the local exchange market. Given the relative market power of participants in the local and long distance markets, if there is a first mover advantage it will be less in the local market than in long distance. Hence, as discussed above, delaying entry of the RBOCs into the long distance market is likely to be less of a problem than delaying competitive entry into the local market.

⁴ Of course, not only long distance companies will be able to enter the local market. Other firms providing local service exclusively will also be important to competition.

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The threshold for ensuring that there will be no delay in local competition, much less that such competition will be impeded, is the meeting of the Sec. 271 competitive checklist.⁵ The Act also requires that there be actual facilities-based competitors providing actual service to actual customers, both business and residential. Sec. 271(c)(1)(A). The record in the PUCO proceeding demonstrates conclusively that no facilities-based competitor is serving any residential customer in Ohio. The establishment of the proper conditions for effective local competition cannot, however, ensure the long run economic viability of such competition. That remains to be seen.

Thank you again for this opportunity to express the interests of residential telecommunications consumers in this process. As mentioned above, we will be forwarding to you copies of the OCC's briefs filed in the PUCO proceedings as those briefs are completed.

Yours truly,

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⁵ Similar conditions are required to ensure that there will be competition for local service in non-RBOC territory.

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A handwritten signature in cursive script, appearing to read "R. Dushette". The signature is written in black ink and is positioned below the typed text.