- To facilitate program tracking and fulfillment, Carrier agrees to provide a current End User data file (in a format and medium to be mutually agreed), including at a minimum bill name, address, and telephone number, segregating business End Users from residential End Users
- Ameritech will undertake all marketing, promotional and related training required for its agents and employees and for the marketing of Carrier's Services under this Agreement. Carrier shall provide comprehensive training materials for Ameritech to use in training sales and service personnel on Carrier's Services
- As specified in Section 1.08 of the Agreement, Carrier's co-marketing contributions will be used (1) to facilitate acquisition, retention and re-acquisition of End Users, and (2) to pay Carrier's portion of the following illustrative (but not exhaustive) expenses:

    - The Billing & Collection Agreement start-up expenses assumed by Ameritech
    - Television, newspaper, radio, outdoor and other advertising of the Services
    - Promotional incentives for new customers to enroll in the Services
    - Direct mail and marketing collateral related to the Services
    - Bill messages and/or bill inserts
    - Telemarketing and service ordering expense associated with the Services
    - Marketing initiatives to encourage End Users to remain on the Services
    - Training and channel preparation
    - Systems/IT development, operations planning or M&P development to support the Services
    - Sales incentives

16. <u>Ordering and Provisioning</u>

- Subject to Paragraph 1 of this Attachment A, Carrier must support carrier selection through carrier change orders processed by Ameritech service representatives without specification or a particular Universal Service Order Code ("USOC") through existing CARE processes
- Carrier must support provisioning of USOC-driven Services for orders generated by third party telemarketers/representatives which are passed directly to Carrier. Carrier must then notify Ameritech through existing CARE processes using the AC billing option so that PIC change charges do not appear on the customer's bill
- Carrier must process PIC changes within 24 hours or as mutually agreed.
- PIC response/acknowledgment files (in industry standard PIC/CARE format) must be sent by Carrier back to Ameritech within 24 hours or as mutually agreed.
- All PIC rejects, including errors and PIC freezes, received by Carrier must be processed by Carrier within 24 hours or as mutually agreed.
- Carrier must utilize electronic PIC processing with Ameritech
- Carrier must have demonstrated ability to interface with Ameritech's "legacy" systems and be able to adapt billing procedures and CDR file formats to those standards

17. <u>Customer Service</u>

- Ameritech will serve as the customer service originating point for End Users
- Carrier will identify and dedicate a Single Point of Contact ("SPOC") to enable an Ameritech SPOC refer End User inquiries or trouble tickets to Carrier in the event of a service problem relating to Carrier's Service(s)
- Carrier's SPOC will be able to provide status and resolution information about any trouble ticket referred by Ameritech to Carrier. Status and resolution will be provided back to Ameritech's SPOC so that End User feedback can be provided by Ameritech, as necessary or appropriate.
- Carrier's SPOC will immediately notify Ameritech's SPOC of any known service outages or customer impacting trouble along with estimated resolution information and ongoing status.

- Transfer of calls from Ameritech customer service to Carrier customer service shall occur pursuant to procedures established by the parties, except in the event that this Agreement is terminated, at which time Carrier and Ameritech shall mutually develop a schedule for transition of Carrier's customers to Carrier's customer services facilities.

18. Satisfaction Guarantee

Carrier's Services are to be marketed by Ameritech with Carrier's "Satisfaction Guarantee." Carrier's Satisfaction Guarantee provides that any End User who selects Carrier's Services under this Agreement and wishes to switch back to their prior interLATA carrier within thirty (30) days thereafter will be switched back, and Carrier will pay the PIC Change charge applicable to that End User's carrier switch.

19. Ameritech's Service Expectations

Ameritech's Services provided under this Agreement shall comply with such criteria and service quality standards as are established from time to time by Ameritech and by its state commissions, and Ameritech shall not offer Services in a way that would adversely impact End Users' perceptions of the group of Services being marketed under this teaming arrangement, including the Services offered by Carrier.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COPY

AT&T CORPORATION, et al., Plaintiffs,	)	
v.	)	98 C 2993
AMERITECH CORPORATION, Defendant.	)	

ORDER

Plaintiffs AT&T Corporation, MCI Telecommunications Corporation, the Association for Local Telecommunications Services, McLeodUSA Telecommunications Services, Inc., Focal Communications Corporation, KMC Telecom II, Inc., and NEXTLINK Communications, Inc. seek a temporary restraining order enjoining defendant Ameritech Corporation from marketing, endorsing, or promoting any telecommunications services offered by Qwest Communications International, Inc. within Ameritech's region.[1] Ameritech has moved to dismiss the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6), asserting that injunctive relief under 47 U.S.C. § 401(b) is not available to the plaintiffs. Alternatively, Ameritech opposes the issuance of a temporary restraining order.

For the following reasons, Ameritech's motion to dismiss is denied, the plaintiffs' motion for a temporary restraining order is denied, and this matter is referred to Magistrate Judge Guzman for an expedited hearing on the plaintiffs' motion for a preliminary injunction.

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[1] The plaintiffs also seek to enjoin Ameritech from marketing, endorsing, or promoting any telecommunications services offered by any other carrier providing interLATA services within Ameritech's region (the "LATA" of InterLATA stands for local access and transport areas; interLATA calls are calls between LATAs and are commonly known as long distance calls). Only issues arising from the Ameritech/Qwest alliance, however, are properly before the court.

Availability of Injunctive Relief Under 47 U.S.C. § 401(b)

Plaintiffs seek relief under §§ 251(g) and 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). Section 251(g), which is entitled "continued enforcement of exchange access and interconnection requirements," provides that:

> [o]n and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

In turn, § 271 of the Act limits the provision of interLATA services by Bell operating companies and affiliates of Bell operating companies.

Focusing on the consent decree language in § 251(g), the plaintiffs point to a 1982 consent decree that broke up the former Bell system, described by the parties as a "modification of final judgment," or "MFJ." *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1003 (1983). The plaintiffs' chain of reasoning is as follows: (1) the MFJ allegedly prohibits Ameritech's alliance with Qwest; (2) the MFJ is a consent decree; (3) § 251(g) provides that local exchange carriers must comply with, among other things, applicable consent decrees unless they have been explicitly superceded by Commission regulations; (4) no such regulations have been promulgated, so the MFJ continues to be binding; and (5) "restrictions and obligations" such as the MFJ "shall be enforceable in the

same manner as regulations of the Commission."

Commission regulations are enforceable via § 401 of the Act, entitled "enforcement provisions." Section 401 provides, in pertinent part, that:

> (a) Jurisdiction
>
> The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.
>
> (b) Orders of Commission
>
> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 U.S.C. § 401(a) & (b).

The plaintiffs argue that Ameritech's actions vis-a-vis Qwest violate the MFJ and that the MFJ is enforceable like a Commission regulation under § 251(g). Since § 401(b) addresses violations of Commission orders, the plaintiffs conclude that they are within the ambit of § 401(b), and thus may take advantage of the explicit private right of action to obtain an injunction set forth in § 401(b).

In response, Ameritech argues that only the federal government may request a court order compelling compliance with the Act, citing to 47 U.S.C. § 401(a). Ameritech asserts that the

only avenues of relief open to private parties such as the plaintiffs are 47 U.S.C. §§ 401(b) and 207. According to Ameritech, these options do not help the plaintiffs because: (1) § 401(b) limits the availability of injunctive relief to enforcement of F.C.C. orders, and the plaintiffs have not alleged that Ameritech violated any F.C.C. order; and (2) § 207 creates a right of action for money damages, not injunctive relief.

Judicial decisions interpreting the scope of relief available under § 401(b) are not helpful, as no court has addressed whether relief under § 401(b) is available based on a violation of a court order or consent decree. Instead, courts have considered whether various types of F.C.C. orders are "order[s] of the Commission" under § 401(b). *See Columbia Broadcasting System, Inc. v. U.S.*, 316 U.S. 407 (1942); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 740 F.2d 566 (7th Cir. 1984); *see also New England Tel. and Tel. Co. v. Public Utilities Comm'n of Maine*, 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986); *Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n of Maryland*, 748 F.2d 879 (4th Cir.1984), *vacated and remanded for proceedings consistent with Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355 (1986) & 476 U.S. 445 (1986); *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 744 F.2d 1107 (5th Cir.1984), *vacated and remanded for consideration in light of Chesapeake & Potomac, supra*, 476 U.S. 1166 (1986); *Alltel Tennessee, Inc. v. Tennessee Public Service Comm'n*, 913 F.2d 305 (6th Cir. 1990); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901 (8th Cir. 1984), *vacated and remanded for consideration in light of Chesapeake & Potomac, supra*, 476 U.S. 1167 (1986); *Hawaiian Tel. Co. v. Public Utilities Comm'n*, 827 F.2d 1264 (9th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988); *Brookhaven Cable TV, Inc. v. Kelly*, 428 F. Supp. 1216 (N.D.N.Y. 1977), *aff'd by* 573 F.2d 765 (2d Cir. 1978), *cert.*

denied, 441 U.S. 904 (1979); *In re TAK Communications, Inc.*, 138 B.R. 568, 578 n.6 (W.D. Wisc. 1992), *aff'd by* 985 F.2d 926 (7th Cir. 1993); *Mallenbaum v. Adelphia Communications Corp.*, No. 93-7027, 1994 WL 724981 (E.D. Pa. Dec. 29, 1994); *accord Ambassador, Inc. v. U.S.*, 325 U.S. 317 (1945) (discussing scope of § 401 generally).

The key question with respect to the availability of relief under § 401(b) in this case is whether the plaintiffs have alleged a violation of "any court order, consent decree, or regulation, order, or policy of the Commission." 47 U.S.C. § 251(g). If so, according to the plain language of the statute, if that court order, consent decree, or regulation, order, or policy of the Commission has not been explicitly superseded by Commission regulations, "such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission" – *i.e.*, via § 401(b). *Id.*; *see also People of the State of California v. F.C.C.*, 124 F.3d 934, 942 (8th Cir. 1997).

The plaintiffs have clearly alleged a violation of a consent decree (the MFJ). They also claim that the obligations imposed by the MFJ have not been superceded by Commission regulations. This appears to entitle them to take advantage of § 401(b). Ameritech's arguments to the contrary are unavailing. Section 401(b), contrary to Ameritech's position, does not limit the availability of injunctive relief to enforcement of F.C.C. orders. Section 215(g), as noted above, treats "any court order, consent decree, or regulation, order, or policy of the Commission" like a Commission order. Ameritech has not pointed to, and this court has been unable to locate, any authority supporting its interpretation of the statute.

In light of these considerations, and because § 251(g) makes the MFJ akin to a Commission order for the purposes of § 401(b), § 401(b) relief is available to the plaintiffs. As

this relief is available, the court need not reach the parties' arguments regarding whether injunctive relief under 47 U.S.C. § 207, which addresses claims for damages under the Act, is available pursuant to the court's inherent power to provide equitable relief.

Plaintiffs' Motion for a Temporary Restraining Order

Because the court finds that the relief sought by the plaintiffs is available, it next considers whether issuance of a temporary restraining order is warranted. A temporary restraining order is an emergency remedy issued to maintain the status quo until a hearing can be held on an application for a preliminary injunction. *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.*, 719 F. Supp. 725, 726 (N.D. Ill. 1989). A party seeking a TRO has the burden of establishing: (1) a better than negligible chance of prevailing on the merits; (2) the absence of an adequate remedy at law; and (3) irreparable harm if the TRO is not granted. *See, e.g., Artipresent GmbH Vertrieb Internationaler Collictionen fur den Wohnbereich v. Emruss Corp.*, No. 97 C 5130, 1997 WL 534358 (N.D. Ill.1997). Once the movant establishes these three elements, the court must balance the harm to the movant if the injunction is not issued with the harm to the defendant if it is issued improvidently. *Id.* Like a preliminary injunction, the equitable purpose of a TRO is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit. *Faheem-El v. Klincar*, 841 F.2d 712, 717 (7th Cir.1988).

The plaintiffs claim that the Ameritech/Qwest alliance violates the equal access and nondiscrimination provisions in 47 U.S.C. §§ 251(g) and 271 by: (1) "providing" interLATA services while it has a monopoly on local calls; and (2) giving Qwest preferential treatment, rather than providing equal access to all long distance carriers. For the following reasons, the court finds that the plaintiffs are not entitled to the issuance of a temporary restraining order

based on these arguments.

Is Ameritech "Providing" InterLATA Services?

Section 271(a) provides that "[n]either a Bell operating company ["BOC"], nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section." In other words, § 271(a) prohibits BOCs such as Ameritech from providing interLATA services until they receive F.C.C. authority to do so. The plaintiffs contend that marketing select interexchange carriers is synonymous with providing interexchange service, citing to *U.S. v. Western Electric Co.*, 552 F. Supp. 131, 227 (D.D.C. 1982), *U.S. v. Western Electric Co.*, 627 F. Supp. 1090, 1101-03 (D.D.C. 1990), and *U.S. v. Western Electric Co.*, 675 F. Supp. 655, 666 & n.46 (D.D.C. 1987), all of which interpret the MFJ.

In response, Ameritech points to 47 U.S.C. § 272(g), which is entitled "joint marketing" and provides:

> (1) Affiliate sales of telephone exchange services
>
> A Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.
>
> (2) Bell operating company sales of affiliate services
>
> A Bell operating company may not *market or sell* interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such States under section 271(d) of this title;
>
> (3) Rule of construction
>
> The joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c) of this section.

47 U.S.C. § 271(g) (emphasis added).

Ameritech contends that § 271(g)(2)'s language regarding the marketing and selling of interLATA services would be superfluous if § 271(a)'s language regarding provision of these services actually referred to the marketing of these services. It also argues that § 272(g)(2) refers to services provided by an affiliate and thus does not proscribe the marketing of services provided by a non-affiliate, as long as it complies with the Act's nondiscrimination requirements, citing to the following F.C.C. orders: *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 F.C.C. Rcd. 21905, 1996 WL 734160, CC Docket No. 96-149, FCC 96-489 at ¶¶ 289, 293 (Dec. 24, 1996) ("to the extent that BOCs align with non-affiliates, they must continue to do so on a nondiscriminatory basis"), *In the Matter of Implementation of the Communications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 12 F.C.C. Rcd. 3824, 1997 WL 136310, CC Docket No. 96-152, FCC 97-101 at ¶¶ 37-41 (Mar. 25, 1997) (BOC participation in the marketing of alarm monitoring services does not necessarily constitute the "provision" of those services under § 275(a)), and *In the Matter of Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Service*, 12 F.C.C. Rcd. 6496, 1997 WL 259297, CC Docket Nos. 85-229, 90-623 & 95-20, DA 97-1029 at ¶¶ 35, 38 (May 16, 1997) (nondiscriminatory marketing arrangement regarding alarm monitoring services is not prohibited "provision" of those services).

The court finds the plaintiffs' arguments regarding the "providing" of interLATA services unconvincing for seven reasons. First, the plaintiffs have failed to establish that the MFJ trumps the specific provisions in the Act. Second, the cases cited by the plaintiffs are all

factually distinguishable. Third, the plaintiffs have failed to establish that Ameritech will actually be providing interLATA services itself. Fourth, the evidence presently before the court indicates that Ameritech/Qwest alliance will not entail selection of a long-distance service by Ameritech. Fifth, the plaintiffs have not sufficiently demonstrated Ameritech's involvement with Qwest's provision of long distance services. Sixth, the financial arrangement between Ameritech and Qwest provides financial incentives for the marketing of Qwest's long distance services, but does not allow Ameritech to receive compensation based on Qwest's provision of long distance services. Finally, the Ameritech/Qwest alliance appears to comport with agency interpretations of the Act, which are entitled to deference.

To sum up, the evidence presently before the court regarding the details of the Ameritech/Qwest alliance does not support a finding that Ameritech is "providing" interLATA services in violation of 47 U.S.C. § 271(a). Accordingly, the issuance of a temporary restraining order based on Ameritech's alleged provision of interLATA services is not warranted.

Is Ameritech Discriminating Against the Plaintiffs in Violation of § 251(g)?

As noted above, 47 U.S.C. § 251(g) requires local exchange carriers providing wireline services to "provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996 . . . . " The plaintiffs contend that the Ameritech/Qwest

alliance violates this equal access provision because: (1) the terms and conditions of the agreement between Ameritech and Qwest are undisclosed; (2) Ameritech, by definition, must be wrongfully promoting Qwest because Ameritech cannot simultaneously recommend multiple carriers; (3) Ameritech has improperly given Qwest a "first mover" advantage by announcing the Ameritech/Qwest alliance on the day that its arrangement with Qwest commenced.

With respect to arguments one and three, Ameritech states that it published a request for proposals to all interexchange carriers on its Web page. It also states that it sent the request for proposals to 164 interLATA carriers, including AT&T and MCI, via overnight courier letter in February, 1998. In contrast, the plaintiffs have failed to point to any evidence supporting their conclusions as to the secrecy of the Ameritech/Qwest arrangement. Thus, the plaintiffs' claim that they were sandbagged by the Ameritech/Qwest alliance is unsupported by the record to date.

The plaintiffs' remaining argument – that Ameritech is "urging customers to subscribe" to Qwest and "expressly promoting Qwest long distance service over the long distance service of other carriers, including AT&T and MCI" – is similarly unsupported by evidence at this stage of the proceedings. The parties agree on the major premise underlying the plaintiffs' equal access argument: BOCs may not provide discriminatory information about any long distance carrier. The plaintiffs, however, have failed to provide the court with any evidence supporting a finding that Ameritech is, in fact, discriminating against other long distance carriers.

The plaintiffs have not presented any evidence to date indicating that Ameritech is automatically routing calls via Qwest, or implying that Qwest is the only available or the best long distance option. Moreover, no evidence supports the plaintiffs' argument that the teaming arrangement will inevitably cause Ameritech to degrade the services provided to local carriers,

and thereby enhance Ameritech or Qwest's position. Instead, according to the materials presently before the court, Ameritech is providing consumers who specifically inquire about Qwest with information about Qwest's pricing. Ameritech advises those consumers that long distance is also available via other carriers, and then offers to read a list of the available long distance carriers in random order.

With respect to the plaintiffs' argument that Ameritech cannot "recommend" multiple long distance carriers, the court notes that counsel for the plaintiffs and Ameritech have made differing representations about the information that Ameritech is providing about Qwest. Without evidence about this issue, the court cannot determine the plaintiffs' likelihood of success on their claim that Ameritech's representations violate the Act's equal access provision. However, there is presently no reason to think that Ameritech could not provide specific information about multiple long distance carriers, or offer "one stop shopping" for long distance carriers other than Qwest.

Finally, it does not appear that the Ameritech/Qwest alliance makes Qwest, to paraphrase George Orwell, "more equal than others." The success of this argument hinges on establishing that the Act proscribes teaming arrangements in which a BOC provides consumers with information about one particular long distance carrier, states that long distance is also available via other carriers, and then offers to read a list of those carriers in random order. The plaintiffs have failed to establish this, or to provide evidence supporting their claims about what Ameritech is actually telling consumers.

Thus, the evidence presently before the court regarding the Ameritech/Qwest alliance does not support a finding that Ameritech has violated the "equal access" provision in 47 U.S.C.

§ 251(g). Accordingly, the issuance of a temporary restraining order based on the equal access provision is not warranted.

Conclusion

On the plaintiffs' side of the balance, the issues presented by this case are novel, and the threat to the plaintiffs' business and good will if the Ameritech/Qwest alliance is improper are irreparable. On Ameritech's side of the balance, the plaintiffs have failed to establish that Ameritech's teaming arrangement with Qwest, as the court presently understands it, constitutes the "provision" of interLATA services or violates the Act's equal access requirements. The public interest favors competition in the long distance market, as well as the provision of lawful options regarding long distance service. Balanced together, these factors support the court's denial of the plaintiffs' motion for a temporary restraining order. The plaintiffs' motion for a preliminary injunction is referred to Magistrate Judge Guzman for an expedited hearing.[2]

Accordingly, for the reasons stated above, Ameritech's motion to dismiss and the plaintiffs' motion for a temporary restraining order are denied. This matter is referred to Magistrate Judge Guzman for an expedited hearing on the plaintiffs' motion for a preliminary injunction.

DATE: MAY 18 1998

Blanche M. Manning

Blanche M. Manning
United States District Judge

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[2] In the future, the parties are directed to provide the court with copies of all unpublished orders and F.C.C. orders cited in their briefs.

CERTIFICATE OF SERVICE

I, Toni R. Acton, do hereby certify that a copy of the foregoing Ameritech Motion to Dismiss, has been served on the parties listed below, via courier, on this 4th day of June, 1998.

By: _____
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