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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Petition of Ameritech For	)	CC Docket No. 98-65
Forbearance From Enforcement	)	
of Section 275(a) of Communications	)	
Act of 1934, as Amended	)	

AT&T CORP. COMMENTS

Pursuant to the Commission's Public Notice (DA-98-965) released May 20, 1998, AT&T Corp. ("AT&T") hereby submits these comments on Ameritech Corporation's petition requesting that the Commission forbear from enforcing Section 275(a) of the Communications Act of 1934, as amended (the "Act"). Ameritech Corporation ("Ameritech") attempts to side step the D.C. Circuit's recent *vacatur* of the Commission's Alarm Monitoring Order[1] by seeking forbearance

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[1] See Alarm Industry Communications Committee v. FCC, 131 F.3d 1066 (1997), (vacating In re Enforcement of Section 275(a)(2) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Against Ameritech Corporation, 12 F.C.C. Rcd. 3855 (1997)) ("Alarm Monitoring Order"). Although Alarm Industry Communications Committee leaves the ultimate question of legality open for Commission interpretation, the court strongly criticized the Alarm Monitoring Order's interpretation of section 275(a):

> According to Ameritech, § 275(a)(2) permits it to purchase all or part of the assets in an alarm monitoring service entity but not the stock of company because Congress wanted to prevent hostile takeovers, yet allow 'voluntary transactions.' This strikes us as far-fetched, for several reasons. One cannot take over a publicly-traded company with one share, yet all parties agree that Ameritech would violate the statute by acquiring just one share. . . . [W]e cannot imagine anything having to do with telecommunications policy that would turn on the method of acquisition. . . . In short, Ameritech's theory does not fit what Congress actually did, which was to impose a far more

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from Section 275(a)(2) rather than a full proceeding on the merits. Whatever the Commission's ultimate interpretation of Section 275(a) in CC Docket No. 96-152, it plainly may not countenance Ameritech's attempt to use Section 10 to obtain retroactive authorization for conduct that may have been illegal when committed. Nothing in Section 10 authorizes the Commission to grant retroactive forbearance, or to waive a carriers' liability for fines or damages for past unlawful conduct. Even apart from this fundamental (and fatal) legal infirmity, Ameritech's superficial analysis purporting to address the standards set out in Section 10 is insufficient, and fails to satisfy either the plain language of that provision, or the Commission's prior interpretation of that section.

ARGUMENT

Section 10 authorizes the Commission to prospectively forbear from enforcing certain portions of the Act if, and only if, specific criteria are met. Section 10, however, does not grant retroactive authority. As the Supreme Court made clear, unless Congress *expressly grants* an agency authority to promulgate legislative enactments with retroactive effect, an agency may not exercise that power.[2] The absence of an express grant of retroactive authority to forbear should

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> extensive bar than, in Ameritech's words, merely forbidding its 'taking over a rival business against the wishes of that business' management.'

Id., at 1070-71.

[2] Ameritech states that it had acquired certain alarm monitoring businesses prior to the passage of the 1996 Telecom Act, and points out here that the Act "grandfathers Ameritech's alarm monitoring services (with certain restrictions)" (p. 4-6). Ameritech then goes on to detail its subsequent acquisition of seven alarm monitoring companies or assets thereof (pp. 6-8). The legality or illegality of these transactions is still at issue. In Alarm Industry Communications Committee, 131 F.3d 1066, the court remanded the interpretation of § 275(a)(2) to the

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unequivocally foreclose the Commission's consideration of forbearance for all of Ameritech's past acts. In Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)[3] the Supreme Court stated:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

Bowen at 208-09 (citations omitted). Indeed, Bowen held that retroactivity was strongly disfavored even if an agency determines "congressional intent and important administrative goals may be frustrated unless an invalidated rule can be cured of its defect and made applicable to past time periods." Id. at 215. In short, there is nothing in Section 10 that suggests Congress intended to authorize retroactive forbearance.

Even to the extent Ameritech seeks prospective relief, its petition is facially inadequate to satisfy a thorough and searching inquiry, as outlined by the criteria set forth in Section 10. Proper analysis of the instant petition under Section 10 cannot be bootstrapped from pre-Act Department of Justice ("DOJ") or District Court findings. Ameritech's assertion that it "entered

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Commission so it can "resolve the ambiguity in the phrase 'alarm monitoring service entity'" and the ultimate question of legality of Ameritech's actions. The Alarm Industry Communications Committee challenged these acquisitions and sought Commission enforcement of the Section 275(a)(2) (p. 7) in emergency petitions which are still pending at the Commission.

[3] A case where a group of nonprofit hospitals brought an action challenging the Secretary of Health and Human Services' authority to retroactively institute corrective adjustments.

the alarm monitoring business with the blessing of the Department of Justice and the courts supervising the administration of the AT&T Modification of Final Judgment" (p. 3) can at most provide a starting point for the analysis at hand.[4] As the Commission held, in the 272 Forbearance Order, a searching inquiry is required in order to grant forbearance under Section 10.

> To forbear, we must determine that each of the three forbearance criteria set forth in section 10 are met. Application of those criteria is not a simple task, and a decision to forbear must be based upon a record that contains more than broad, unsupported allegations of why those criteria are met.

272 Forbearance Order, p. 2637 (citation omitted).

Section 10(a)(1) requires the Commission to determine whether "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." Ameritech asserts (with little substantive support) that "alarm monitoring services are subject to competitive market forces" and it has "no market power in the national alarm monitoring market" (p. 11). With respect to the analysis at hand, these assertions are misplaced and misleading. The Commission's analysis must take into account the undisputed fact that Ameritech is "by far the

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[4] Ameritech's reliance on waivers granted by the District Court and the DOJ's support of such waiver requests is insufficient to demonstrate that its forbearance petition meets the specific criteria required by the Act, because those earlier rulings turned on significantly different and narrower circumstances than required by Section 10. See, Bell Operating Companies' Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd. 2627, 2652 (1988) ("272 Forbearance Order").

dominant provider of local exchange services, with a near monopoly in its service areas."[5] A crucial point in this analysis is Ameritech's ability to leverage its local telecommunications bottle neck, its monopoly market power, into the adjacent market of alarm monitoring. Clearly Congress understood this risk, and sought to guard against it by enacting Section 275(a) to delay Regional Bell Company entry into alarm monitoring for five years – at which time those companies presumably would have opened their local markets to competition and their local market power would have begun to erode.[6] Ameritech implicitly recognizes this issue and tries to deflect the Section 10 inquiry by pointing out "[i]n 45 of the 50 states, Ameritech has no local facilities and is in a position no different than any other alarm monitoring company" (p. 25). However this assertion fails to acknowledge Ameritech's efforts to close a merger with SBC, and that a combined Ameritech-SBC-SNET would possess local facilities in thirteen states, and would control almost one-third of all local lines in the nation.[7]

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[5] In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, Interlata Services in the State of Michigan, Evaluation of the U.S. Department of Justice, CC Docket No. 97-137, June 25, 1997 at p. 32.

[6] In pertinent part § 275(a)(1) provides:

> No Bell operating company or affiliate thereof shall engage in the provision of alarm monitoring services before the date which is 5 years after the date of enactment of the telecommunications Act of 1996.

and, in pertinent part § 275(a)(2) provides:

> . . . Such [grandfathered] Bell operating company or affiliate may not acquire any equity interest in, or obtain financial control of any, unaffiliated alarm monitoring service entity after November 30, 1995, and until 5 years after the date of enactment of the Telecommunications Act of 1996, . . .

[7] Ameritech publicly announced, on May 11, 1998, it intends to merge with SBC. If this transaction and SBC's attempted takeover of SNET are consummated, the combined entities

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Ameritech also posits the idea it "cannot harm its competitors" (pp. 10-11) and could not "engage in unjust or unreasonable discriminatory practices against competitors" (p. 12). These claims are disingenuous at best. Beyond the undisputed existence of Ameritech's monopoly power is its propensity to leverage that power in anticompetitive ways, in particular against the opening of its local markets to local exchange competitors. The encouragement of competition in the local market – the centerpiece of the 1996 Telecom Act – was not even at issue when the Commission adopted the Computer Inquiry rules, the purported compliance with which Ameritech apparently relies on here. Today, among other anticompetitive activities, Ameritech engages in the discriminatory practice of refusing to provide shared transport to potential local exchange competitors – in open violation of a Commission order.[8] Ameritech's repeated assertions that it cannot harm its competitors thus ring utterly hollow.

Section 10(a)(2) requires the Commission to determine whether the "enforcement of such regulation or provision is not necessary for the protection of consumers." Ameritech again

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would control more than 57 million local phone lines (Dow Jones Wire story, May 10, 1998). Yet, Ameritech makes no mention of the merger in its forbearance petition filed two days after the merger announcement.

[8] Ameritech audaciously refuses to comply with the Commission's shared transport orders. At a recent status conference in Ohio, an Ameritech attorney stated, "[w]e believe that the shared transport order is unlawful and we would not -- or, have no intention of complying with that order until its legality is finally determined." See Status Conference, In The Matter of the Application of Ameritech Communications, Inc. for Authority To Provide Competitive Telecommunications Services in the State of Ohio (No. 96-327-CT-ACE); In The Matter of the Application of Ameritech Communications of Ohio, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services Throughout the State of Ohio (No. 96-658-TP-ACE), April 23, 1998, before the Ohio Public Utilities Commission (Statement of Kevin M. Sullivan, Esq., Attorney for Ameritech) at Tr. p. 7.

misleadingly asserts the only market relevant to the Commission's analysis is the alarm monitoring market. Ameritech also avers that the general antitrust laws are sufficient to protect the consumers (pp. 14–18).[9] This twisting of the Section 10 analysis again tries to divert attention away from the crucial linkage with the monopoly position of Ameritech in the local exchange telecommunications market. The special connection in telecommunications between controlling the local bottle-neck network and services, like alarm monitoring, that are transmitted over that same network is the very reason why Congress enacted Section 275(a) and did not merely rely on antitrust laws for consumer protection. Exhibit F to Ameritech's own petition identifies this linkage and raises concerns about dominance by the phone companies: "'At some point, the big phone companies will dominate this business [alarm monitoring]' predicted Robert Rosenberg, president of Insight Research Corp., . . . 'You can do home health monitoring, alarm monitoring, smart house telemetry and other value-added business on the same network.'" (Ameritech's Exhibit F).

Finally, Section 10(a)(3) requires the Commission determine whether "forbearance from applying such provision or regulation is consistent with the public interest." Section 10(b) also instructs the Commission, as part of its public interest analysis, to determine whether forbearance will promote "'competitive market conditions' and 'competition among providers of telecommunication services,' which include both local and interexchange service providers."[10]

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[9] If Ameritech's position were accepted, in most cases, there would be no need for Section 10(a)(2).

[10] 272 Forbearance Order, p. 2652.

Plainly, Ameritech has failed even to address, let alone make a persuasive showing, that forbearance would not adversely affect the local exchange market.

CONCLUSION

For the reasons stated above, the Commission should deny Ameritech's request for forbearance, both as to its past conduct (for which the Commission may not grant forbearance in any event) and any future transactions.

Respectfully submitted,

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June 19, 1998

CERTIFICATE OF SERVICE

I, Terri Yannotta, do hereby certify that on this 19th day of June, 1998 a copy of the foregoing "AT&T Corp. Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.

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June 19, 1998

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