ORIGINAL

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before: John Wine, Chair
Cynthia Claus, Commissioner
Brian Moline, Commissioner

In the Matter of a General Investigation into Winback/Retention Promotions and Practices.	)))	Docket No. 02-GIMT-678-GIT

MCI'S COMMENTS IN SUPPORT OF STAFF'S MOTION TO INITIATE INVESTIGATION

COMES NOW MCIMetro Transmission Access Services, Inc. (MCI), and respectfully submits the following comments in support of Staff's Motion to Initiate Investigation:

1. MCI supports Staff's request for an order establishing a generic proceeding to evaluate whether SWBT's winback/retention promotions and practices are in the public interest or anticompetitive and contrary to the public interest. *Staff's Motion to Initiate Investigation of Winback/Retention Promotions and Practices (Staff's Motion) at 1.*

2. Staff is concerned that SWBT's "winback/retention promotions and practices may constitute discriminatory treatment of customers . . . [and] may lead to anticompetitive results" because SWBT may have "a competitive advantage with respect to market power." *Staff's Motion at p. 4, ¶ 8.* Indisputable is the fact that SWBT — with its over 90 percent[1] market share in Kansas — has market power. The SWBT tariff filings of which Staff takes

[1] Based on access line counts provided in the Commission's *Telecommunications Report to the 2000 Kansas Legislature*, MCI has determined that SWBT provides service to 1,432,773 total access lines — or 92.6 percent — compared to the 105,995 total access lines to which competitive LECs provide service. *Telecommunications Report to the 2000 Kansas Legislature* at p. 25, 27.

note[2] further establish that rates, terms, and conditions between current SWBT customers and end users who have an offer from a competitive local exchange carrier (LEC) or are considering switching service providers are significantly dissimilar and, thus, are discriminatory. The remaining issue is whether the rates, terms, and conditions for SWBT's promotional offerings are unjust, unreasonable, unjustly discriminatory or unduly preferential. The Commission is authorized to make the determination whether Kansas law permits the proposed discriminatory offerings.

3. The Commission, pursuant to Section 66-1,191, "***upon its own initiative***, may investigate all rates, joint rates, tolls, charges and exactions, classifications or schedules of rates or joint rates and rules and regulations of telecommunications public utilities (emphasis added)." After full hearing and investigation, upon finding that rates, terms, and conditions are "unjust, unreasonable, unjustly discriminatory or unduly preferential," the Commission shall order just and reasonable substitutions. *K.S.A. 66-1,191.* Staff's request simply is consistent with the authority granted the Commission. SWBT's contention that neither consumers nor competitive LECs have complained about winback/retention offers in Kansas, *Response of Southwestern Bell Telephone Company to Staff's Motion to Initiate Investigation of Winback/Retention Promotions and Practices (SWBT's Response) at p.2, ¶ 2,* is irrelevant.

4. With this filing, moreover, MCI raises an anticompetitive winback issue of which it has become aware in Texas and that it requests be investigated in Kansas. SWBT's activity responds both to SWBT's claim that no competitive LEC has complained of SWBT winback/retention offers in Kansas and Staff's concern that SWBT may be engaged in discriminatory treatment of consumers. Within days of identifying residential end users who have determined to switch providers — disconnection information that is

---

[2] [2] Staff describes the CompleteLink, SimpleLink, and Business Line NRC Waiver Promotion filings in its Motion to Initiate Investigation of Winback/Retention Promotions and Practices. *Staff's Motion at pp. 1-2, ¶¶ 2-4.*

available solely to SWBT because of its monopoly incumbent LEC position — SWBT sends a winback letter advising of service offerings with rates that discriminate between winback customers and existing end users. Under the guise of a public service, SWBT also leaves voicemail advising that the end user's service provider has been switched and asking for a return call to what appears to be a SWBT marketing telephone number.[3] MCI requests that the Commission investigate whether SWBT sends out winback letters and/or voicemail in Kansas and whether any attendant SWBT service offerings discriminate in rates, terms, and conditions from those available to existing SWBT customers.

5. The Commission is authorized to investigate whether a telecommunications utility's ***rules and regulations*** are anticompetitive. K.S.A. 66-1,191. SWBT's rules and regulations do not permit CLECs access to the disconnect information[4] — for all end users regardless of the service provider — that is available to SWBT and that it uses to send out winback letters and voice mail. SWBT is afforded this advantage because of its monopoly incumbent LEC status.

6. In a self-serving statement, SWBT asserts that "[t]argeting promotions to specific groups of customers does not make them 'unjust, unreasonable, unjustly discriminatory or unduly preferential.'" *SWBT's Response at p. 6, ¶ 7.* Citing to *Jones v. Kansas Gas and Electric Co.*, SWBT claims that Kansas law only prohibits discrimination or preference that "burdens one class of customers with costs created by another." *Jones v. Kansas Gas and Electric Co.* 222 Kan. 390, 565 P.2d 597 (1977). SWBT claims that *Jones* found "no discrimination or unreasonableness in charging different late payment

---

[3] Most egregious about the voice mail about which MCI has obtained information is that the end user's telephone number is non-published. For the Commission's information, MCI includes as Attachments A and B a copy of the letter and a transcript of the voice mail, respectively.

[4] To identify end users willing to chance competitive telecommunications offerings, SWBT appears to use the disconnect information of end users making the switch in providers. The disconnect information is the billing name, address, and telephone number of end users who have determined to switch service provider.

penalties against customers based on how late they pay their bills." *SWBT's Response at pp. 6-7, ¶ 7.* SWBT's reliance on *Jones* appears to miss the mark, however.

7. With a rationale that appears applicable to SWBT's discriminatory pricing, the *Jones* Court found:

> The [late penalty] charge which is levied, however, must be reasonably related to the purpose to be achieved; and if the purpose is to recover collection costs the utility company must collect from the class of customers creating the costs. The penalty charged the late payer who causes the utility company to incur collection costs should reflect those costs and should be more than the penalty charged the late payer who does not cause collection costs.

Jones, 222 Kan. at 402, 565 P.2d at 606. *Jones*, thus, appears to stand also for the proposition that cost causers must pay for the costs they cause. The contrary is the case with SWBT's promotional offerings: cost causers, who require SWBT resources to identify and then market to,[5] via letter and voice mail, receive lower rates than do end users who do not cause such costs. These winback/retention and lower service costs, in turn, are borne by end users who do not cause the costs.

8. In response to SWBT's assertion that the Federal Communications Commission (FCC) "has firmly acknowledged the desirability of winback offers in a competitive telecommunications marketplace," *SWBT's Response at p. 5, ¶ 6*, MCI agrees with Staff that "the Commission must ascertain whether these practices are likely to limit competition in a manner that harms the developing competitive market and thus consumers in the long run." *[Staff's] Reply to Southwestern Bell Telephone Company's Response to Staff's Motion to Initiate Investigation (Staff's Reply) at p. 2, ¶ 3.*

---

[5] Competitive LECs are required to expend greater resources than the incumbent LEC to determine whether an end user is willing to chance competition, including sales staff calling on potential customers either personally or via telephone.

MORRIS, LAING, EVANS, BROCK
& KENNEDY, Chartered

By _____
Michael Lennen, #08505
200 West Douglas, 4th Floor
Wichita, Kansas 67202-30084
(316) 262-2671; Telephone
(316) 262-5991; Fax

VERIFICATION

STATE OF KANSAS)
) ss:
SEDGWICK COUNTY)

Michael Lennen, of lawful age and being first duly sworn upon his oath, deposes and states:

That he is one of the attorneys for MCIWORLDCOM; that he has read the within and foregoing **COMMENTS**; and that the statements therein contained are true and correct to the best of his knowledge and belief.

_____
Michael Lennen

Subscribed and sworn to before me this 25th day of April, 2002.

_____
Notary Public

My appointment expires:

KIM ASTON
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Exp. 9-7-03

9. The FCC, moreover, has not given *carte blanche* approval to winback offers. Its order addressing the use of customer proprietary network information [6] cautioned, "Assuming incumbent LECs have sufficient market power to engage in ***predatory strategies***, they are constrained in their ability to raise and lower prices by our tariff rules and non-discrimination requirements." *FCC Order ¶ 70 (emphasis added).* Winback and/or retention offers, thus, need not be limited to establishing solely predatory pricing, as SWBT claims. *SWBT's Response at 9, ¶ 10.* The FCC contemplates that lower prices and discrimination are factors that may establish predatory strategies depending on whether the incumbent LEC wields market power.

9. MCI disagrees with the Staff recommendation that the decisions made in the requested docket "apply equally to all companies," *Staff's Motion at p. 4, ¶ 9,* and SWBT's agreement, *SWBT Response at p. 2, ¶ 2.* Absent market power — which competitive LECs clearly do not possess in Kansas — applying the decisions reached in this docket is not in the public interest. Competition will remain stagnant. Moreover, as noted above by the FCC, the Commission has its tariff and nondiscriminatory authority to review any competitive LECs filings that raise anticompetitive concerns or appear against the public interest.

10. MCI appreciates the opportunity to provide input in this proceeding and respectfully requests that the Commission consider MCI's position herein.

Respectfully submitted,

Patricia Ana Garcia Escobedo,
Associate Counsel
MCIWORLDCOM Communications, Inc.
701 Brazos, Suite 600
Austin, Texas 78701
(512) 495-6721; Telephone

and

[6] Order on Reconsideration and Petitions for Forbearance, CC Docket Nos. 96-115 and 96-149, released September 3, 1999 (FCC Order).

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2002, the foregoing **COMMENTS** were filed via fax to:

(785) 271-3357
Jeff Wagaman, Executive Director
KANSAS CORPORATION COMMISSION

that the original and seven true and correct copies were mailed via United States first class mail, postage prepaid, to:

Jeff Wagaman, Executive Director
KANSAS CORPORATION COMMISSION
1500 S.W. Arrowhead Road
Topeka, Kansas 66604

and that one copy was mailed to each of the following:

Eva Powers and Bret Lawson
KANSAS CORPORATION COMMISSION
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027

Michelle B. O'Neal
SBC Southwestern Bell Telephone Co.
220 SE Sixth Street, Room 515
Topeka, Kansas 66603-3596

Rose Mulvany Henry
BIRCH TELECOM OF KANSAS INC.
2020 Baltimore Avenue
Kansas City, Missouri 64108

James Caplinger & Mark Caplinger
CAPLINGER CHARTERED
823 West 10 Street
Topeka, Kansas 66612

Robert A. Fox
FOULSTON & SIEFKIN LLP
555 South Kansas Ave, Suite 101
Topeka, Kansas 66603-3423

Walker Hendrix
CURB
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027

Lisa Creighton Hendricks
SPRINT
Mailstop KSOPHN0212-2A253
6450 Sprint Parkway Bldg 14
Overland Park, Kansas 66251

Rachel Lipman Reiber
Everest Midwest Licensee, LLC
d/b/a Everest Connections
4740 Grand, Suite 200
Kansas City, Missouri 64112

Thomas E. Gleason, Jr.
GLEASON & DOTY Chartered
P O Box 490
Ottawa, Kanss 66067-0490

Mark P. Johnson
Trina LeRiche
SONNENSCHEIN NATH & ROSENTHAL
4520 Main Street, Suite 1100
Kansas City, Missouri 64111

MICHAEL LENNEN

SBC Southwestern Bell

ATTACHMENT A

March 15, 2002

$27.95

Get Your Telephone Line, Caller ID, Call Waiting, CallNotes® Plus and a *Guaranteed* Low Long Distance Rate!

Come Back Home

Dear

We understand that your telephone account has been disconnected from SBC Southwestern Bell Telephone Company. As employees who value your business, we want to be sure that this information is correct.

If you did not intend to cancel your service with SBC Southwestern Bell, please contact us, toll free, at 1-888-483-9340 and we will update our records immediately and re-establish your service.

If you intended to cancel your service, **please reconsider and come back home!** We realize there are many choices for local telephone service. But, you may also find out what others have told us....

Experience Counts!

SBC Southwestern Bell Telephone Company has provided reliable local service for over 100 years. Friendly customer service, a reliable network and outstanding products like CallNotes® and DSL Internet bring our customers back home. And all on one simple bill!

A marketing survey indicates a majority of our customers return to SBC Southwestern Bell Telephone Company for our service, products and price.

Plus, we also have some new offers! For only $27.95 per month you can have your telephone line, Caller ID, Call Waiting and CallNotes® Plus! Ask about our other great plans when you call.

LONG DISTANCE PACKAGES: SBC Southwestern Bell Long Distance offers a variety of packages, with rates as low as 5¢ per minute! Plus SBC Southwestern Bell Long Distance has international plans as well. All are designed to save you money!

INTERNET SPECIAL: Sign up for Prodigy® Dial-Up Internet Service and you'll receive unlimited time on the internet at a discounted rate of only $15.95 per month!

DSL INTERNET: Faster, easier, smarter-that's what you get by ordering SBC Southwestern Bell DSL High-Speed Internet Access Service. You can *Surf the Web up to 25 times faster than a 56K modem and Download CD-quality music in seconds!* Call to find out what special offers are available.

Please call us today! We want you back!

1-888-483-9340

I look forward to hearing from you.

Lynn Lehew

Lynn Lehew
Director Consumer Winback - SBC Southwestern Bell

Offers for new subscribers only. Some services not available in all areas. SBC Southwestern Bell Long Distance provides this domestic direct-dialed service, where necessary billing arrangements exist with local providers, in the SBC Southwestern Bell Telephone Company service area. Plan requires $24.95 a month for up to 800 minutes per month. Calls over 800 minutes billed at 7¢ per minute. Excludes taxes, fees, and state and federal universal service funds. Reconnection fees may apply. Monthly rates vary by area and are subject to change. SBC Long Distance calling card calls are not billed at the same rates. SBC Southwestern Bell is a registered trademark of SBC Communications Inc. ©2002 SBC Southwestern Bell Telephone, L.P. All rights reserved. * DSL Internet access service billing begins when your service is activated. Actual throughput speed will vary. DSL Internet access service provided by SBC Southwestern Bell Internet Service, Inc. DSL Internet access service is an information service that requires DSL transport with Internet Access. * Dial-up Internet service provided by Prodigy Communications, L.P. Visit www.sbc.com for conditions. Prodigy® is a registered trademark of Prodigy Communications L.P. Compatible display equipment required for Caller ID. When you call CallNotes® Plus from outside your local calling area to pick up your messages, you will incur toll or long distance charges for the call. If you have Measured Rate Service, you will incur usage charges for every call CallNotes® Plus takes, as well as usage charges for every call you make from home to pick up your messages. CallNotes® is a registered service mark of, and is provided by, SBC Southwestern Bell Messaging Services, Inc.

ATTACHMENT B

Message 4. 12:51 p.m. March 14.

[Unintelligible]

Please contact a customer service representative for assistance toll free at 1-866-877-1091 Monday through Friday 8 a.m. to 7 p.m. or Saturday 9 a.m. to 6 p.m.

Thank you from Southwestern Bell.

This is Southwestern Bell Telephone calling with an important message regarding your service.

Your local service has been changed from Southwestern Bell to another local service provider.

If your requested the change, no action is required.

If the change was made without your knowledge, you may have been slammed.

Please contact a customer service representative for assistance toll free at 1-866-877-1

BEEP.

ORIGINAL

TX

OPEN MEETING COVER SHEET

RECEIVED
02 APR 12 AM 9:18
FILING CLERK

MEETING DATE:	April 18, 2002
DATE DELIVERED:	April 12, 2002
AGENDA ITEM NO.:	24
CAPTION:	Project No 24948 – Investigation of Winbeck/Retention Offers By Chapter 58 Electing Companies
ACTION REQUESTED:	Discussion and Possible Action on Staff Recommendation

Distribution List:
Commissioners' Office (5)
Featherston, David
Hinkle, Martha
Journeay, Stephen
Lanford, Lane
Mueller, Paula
Durso, Susan
Renfro, Mike
Hunter, Tom (2)
Whittington, Pam
Dempsey, Roni

Public Utility Commission of Texas

Memorandum

RECEIVED
02 APR 12 AM 9:18
FILING CLERK

TO: Commissioner Brett A. Perlman
Commissioner Rebecca Klein

FROM: Bih-Jau (BJ) Sheu – Telecommunications Division B.J.S.
Randy Klaus – Telecommunications Division
Tina Ghabel – Policy Development Division
Roger Stewart – Legal Division

DATE: April 12, 2002

RE: Agenda Item No. 24, Project No. 24948 – Investigation of Winback/Retention Offers by Chapter 58 Electing Companies

---

Summary

Staff proposes that the Commission conclude this investigation with a finding that certain winback/retention promotions by Chapter 58 electing companies can have anti-competitive impacts. Staff thus recommends amending SUBST. R. 26.226 to limit such impacts until such time that Chapter 58 ILECs are no longer dominant carriers. Staff's analysis leading to that recommendation is found below. Attached to this memorandum please find a procedural history and a summary of parties' positions (Attachment A).

Staff Recommendation

Staff again recommends against a blanket prohibition of winback and retention offerings, consistent with Staff's response to the rulemaking petition in Project No. 24597. Such a restriction would undoubtedly deprive customers of one of the intended benefits of competition. Insulating CLECs from that form of price competition would deny customers of price reductions that might otherwise occur when competitors woo each other's customers. Nevertheless, Staff agrees with CLEC commenters that winback/retention offers can be used to selectively target marginally competitive market segments to the detriment of competition, especially in the early stages. The market reality that prices of many vertical features are above super-competitive levels today is

evidence that Chapter 58 ILECs continue to possess significant market power. Staff further recognizes that dominant carriers are able to use narrowly-tailored winback/retention promotions to keep competition sufficiently weak so that prices generally can be maintained or raised above the competitive level without losing so many sales so rapidly that the price increase proves unprofitable and must be rescinded.

Staff also notes that PURA permits Chapter 58 companies pricing flexibility with the following caveat – such pricing flexibility may not be preferential, prejudicial, discriminatory, predatory, or anticompetitive. PURA § 51.004(a). Given current market conditions and the State of Texas policy to "(1) promote diversity of telecommunications providers" and "(2) encourage a fully competitive telecommunications marketplace" (PURA § 51.001; *see also* § 58.001(5)), Staff believes that the intermediate and long-term benefits of encouraging and maintaining market viability and provider choice for customers in general can outweigh certain short-term benefits to certain individual customers. Staff therefore recommends that the Commission direct Staff to initiate a rulemaking amending SUBST. R. 26.226 regarding certain types of promotions until such time that Chapter 58 ILECs are no longer dominant carriers.

Staff envisions that a "straw man" rule language would impose certain time and term/discount restrictions on winback and retention promotions. The "straw man" rule language could include:

- A time restriction on winback promotions (e.g. a Chapter 58 ILEC must wait 30 days after a former customer has switched to a competitor to offer such promotions.)
- A limit on discounts and terms provided in winback promotions.
- Restrictions placed on retention offers.

As mentioned above, provided in attachment A are a procedural history and a summary of parties' positions drawn from the oral and written comments before, at, and after the workshop.

Attachment A

Procedural History

On September 4, 2001, Southwest Competitive Telephone Association, IP Communications Corporation, XO Texas, Inc., Association of Communications Enterprises, Competitive Telecommunications Association, Sage Telecom, Inc., Z-Tel Communications, Inc, and Birch Telecom Of Texas, LLP (Petitioners) filed a petition (assigned to Project No. 24597) to amend P.U.C. SUBST. R. 26.226. Petitioners sought to amend SUBST. R. 26.226 relating to Requirements Applicable to Pricing Flexibility for Chapter 58 Electing Companies by incorporating a blanket prohibition of winback and retention programs to curtail what they believed to be anticompetitive and discriminatory behavior.

On October 12, 2001, Southwestern Bell Telephone Company (SWBT) and Verizon Southwest (Verizon) filed comments opposing that petition. Time Warner Telecom of Texas, L.P., Ionex communications, Inc., KMC Telecom, Inc. and Talk America, Inc. filed comments supporting the petition.

On November 8, 2001, the Commission denied the petition in Project No. 24597 but directed Staff to hold a workshop to further investigate the issues raised by the Petition. In response to Staff questions issued in this project, a number of carriers and trade associations filed comments on November 30, 2001. Staff held a workshop on December 12, 2001. Parties filed post-workshop comments on January 18, 2002. In light of "new" comments from SWBT, Staff invited reply comments, which were filed on March 15, 2002.

Summary of Parties' Positions:

(Note: Comments regarding the alleged misuse of customer proprietary network information (CPNI) are omitted intentionally, because Project No. 22490 dealt specifically with that issue and resulted in Subst. R. 26.122(c)(3) regarding the use of CPNI in a retention or winback context)

CLEC commenters:

CLEC commenters contended that marketing practices by incumbent local exchange carriers (ILECs) directing special "winback" and "retention" promotions and practices constitute price discrimination. CLEC commenters opined that ILECs as former monopolists intend to squelch developing competition and withhold the benefits of competition from all but a few customers. CLEC commenters stated that ILECs are able to maintain high rates for a certain group of customers while limiting price reductions to only those customers that have sought competitive choice due to the ILEC's market dominance.

According to CLEC commenters, the foundations for this investigation are the competitive protections in PURA and the continued market dominance of ILECs in Texas. CLEC commenters stated that pricing flexibility is prohibited for Chapter 58 companies if the promotion is preferential, prejudicial, discriminatory, predatory, or anticompetitive, and that the Commission has repeated those restrictions in Subst. Rule 26.226. Furthermore, CLEC commenters urged the Commission to look at the reality of the market today and to recognize the substantial market share and market power enjoyed by the ILECs.

CLEC commenters defined winback and retention offers as ILEC offerings that contain favorable price or contractual terms to a CLEC's customer previously served by the ILEC in order to induce the customer to return to the ILEC. Such inducements are however, not offered to other similarly situated ILEC customers. CLEC commenters claimed that all special pricing promotions as part of winback/retention activities that meet the definition above are anticompetitive and/or discriminatory when offered by an entity with market power.

CLEC commenters emphasized that the Legislature, recognizing that competition remains in the early stages in Texas, tempered the availability of pricing flexibility with a requirement that such pricing flexibility not be exercised in a manner that is preferential, prejudicial, discriminatory, predatory, or anticompetitive.

CLEC commenters stated that, although the magnitude of the problem of winback/retention activities is hard to gauge, ILECs are able to deter entry by

demonstrating their ability to "chill" aggressive entry and expansion through a multitude of promotions to winback or retain their customers. Thus, unchecked anticompetitive behavior will have a chilling affect on the development of competition, even though the number of Texas relevant winback/retention offers may currently be low.

CLEC commenters contended that winback/retention promotions by ILECs with substantial market power are a form of "price discrimination" and will lead to concentration/preservation of market power, especially when offered only to CLEC customers and/or prospective CLEC customers. CLEC commenters averred that restricting offers only to CLEC consumers discriminated against those consumers who have not received service from a CLEC. Furthermore, it is such discrimination that constitutes the exact nature of the anticompetitive affect of the winback/retention promotions. By targeting CLEC customers, ILECs increase their existing market power while at the same time using existing market power to continue to obtain the higher and likely super-competitive rates from the remaining and overwhelming majority of consumers. CLEC commenters urged the Commission to prohibit such market power-driven winback/retention promotions, and to create an environment that will allow market development to discipline prices and force down monopoly rates that the winback/retention offers seek to perpetuate.

CLEC commenters argued that retention offers discriminate between existing customers with competitive choice and existing customers without competitive choices because competition generally develops in pockets, either in market segments or geographic areas. The anticompetitive winback/retention promotions by ILEC may stifle the CLECs' opportunities to expand to new segments and locations, thus delaying the development of competitive choice to new customer locations and classes. As a result, the price discipline that competition would otherwise provide has little chance to materialize. This is especially true of local exchange telephone services, where customer concentration drastically reduces the cost of deploying central office facilities and facilities over the last mile.

CLEC commenters disagreed that restricting winback eligibility to former customers is for a reasonable business purpose. CLEC commenters stated that the

industry is in transition and that former monopolists' use of market power to perpetuate the benefits of that power must be deemed illegitimate and discriminatory.

CLEC commenters opined that for the theory of "functionally availability" to exist, consumers would require perfect information, perfect service conversions, and negligible transaction costs. Moreover, for a winback/retention offer to be "functionally available" to all customers, there must be competitive choice effectively available to every customer of an ILEC. Otherwise, the issue of "functional availability" remains a hypothetical discussion.

CLEC commenters stated that "meeting competition" is not a term of economics but of rhetoric. The economic outcome of a winback/retention promotion is determined by the effect of market power on developing markets and the use of that market power to keep the benefits of competition from developing in a manner that would exist in the absence of market power. Moreover, ILECs have other venues to "meet competition" that are permissible and without resorting to practices that take advantage of their market power. For example, ILECs can offer system wide price reductions on those services that they deem to be under competitive pressure, provided that those reductions do not drop prices below the threshold of predatory pricing. CLEC commenters urged the Commission to encourage broad-based rate reductions and bring the benefits of competition to all customers.

CLEC commenters stated their belief that it is permissible to ban or limit winback/retention offers made by dominant carriers while not likewise banning or limiting such offers made by non-dominant carriers. CLEC commenters stated that the Commission is obligated pursuant to PURA § 58.152 to disallow any attempt to exercise pricing flexibility by dominant carriers that is preferential, prejudicial, discriminatory, predatory, or anticompetitive. Not only did PURA impose no similar statutory requirement for CLECs, but also, because CLECs have no market power, CLECs as "price takers" cannot manipulate the market to obtain inflated rates. The sole benefit for CLECs when initiating a winback offer is to regain the customer. However, with a dominant ILEC, there exists the secondary benefit of distorting the market by obtaining monopoly profits from its broader customer base. It is exactly this secondary benefit that causes the dominant ILEC's promotion to be anticompetitive and discriminatory.

CLEC commenters claimed that no forums other than a rule clarification/modification are available for addressing the oversight of potential market power abuse in the winback/retention activities. CLEC commenters stated that filing a complaint on a case-by-case basis in the tariff review process is extremely limited in the scope of each case and burdensome for an individual competitor to justify. CLEC commenters sought further definition within the Commission's rules to specifically define the anticompetitiveness of such promotional activity. CLEC commenters believe there is no other forum with a similar breadth of application and administrative efficiency to allow competitors to bring this issue before the commission.

CLEC commenters posited that there is no lesser remedy other than a ban of winback/retention promotions that will remove or mitigate the discriminatory or anticompetitive aspects of such offers. No time restriction or price restriction will prevent ILECs from utilizing market power to thwart the development of competition with one hand while perpetuating continued super-competitive rates with the other.

Filing separately from other CLECs, VarTec asserted that the commission should prohibit ILEC winback offers from the time the CLEC places the conversion order up to at least the first 30 days after the customer converts to a competitive provider. VarTec opined that this window of time will allow the competitive provider a more reasonable time to establish the consumer's service and resolve any initial service impairments. Furthermore, this extra time will allow the consumer a more meaningful opportunity to experience having service with a company other than the ILEC, giving them the ability to know the benefits of competition first-hand.

Finally, CLEC commenters suggested that a HHI (Herfindahl-Hirschman Index) of 1000 is evidence of lack of market power. However, said the CLEC commenters, the current HHI is in excess of 8,000, and the threshold HHI for a determination that winback/retention promotional activities are no longer anticompetitive should be 1,000, 2,500, or somewhere in between, but such a determination is not immediately relevant.

Chapter 58 ILECs:

SWBT countered that retention/winback programs are pro-competitive and pro-consumer so long as they are not predatory. SWBT argued that discounts specifically targeting certain customer groups are not unlawfully discriminatory, because those discounts have a "reasonable business purpose" – "meeting competition." SWBT said that CLEC commenters' requested relief would insulate CLECs from normal competitive pressures and would deny CLEC customers the benefits of competition. SWBT contended that the Commission should either disregard the retention/winback offers in other states, because those programs are neither offered in Texas nor governed by Texas law, or the Commission could observe that such offers are being demonstrated throughout the country as a reasoned response to competition. SWBT further stated that competition is significant, and that the Commission should disregard CLEC commenters' inflammatory allegations that local competition is in a fledgling state and that retention/winback offers are an abuse of market power.

SWBT defined a winback offer as "a promotional offer or discount that is available to former customers who voluntarily terminated their service and subscribed to another service provider." [1] SWBT also defined retention offer as "a promotional offer or discount that is available to existing customers who have an offer from another company available to them and are considering switching their service to another company."

SWBT argued that winback/retention activities can be anticompetitive only if they involve predatory pricing. SWBT also contended that winback/retention activities are not unlawfully discriminatory if they (a) do not draw "status-based distinctions among classes of protected entities that are arbitrary with respect to the policies that PURA is meant to advance," (b) are a direct response to competition, or (c) provide discounts that are "functionally available to all similarly situated customers."

SWBT averred that there is no "problem" with winback/retention activities now or in the foreseeable future. According to SWBT, winback and retention programs are fundamental tools for obtaining and retaining customers in a competitive market.

[1] Project 24948, Comments of SWBT in Response to Questions Posed by the Commission's Staff, p.1. November 30, 2001

Moreover, winback and retention activities result in price decreases and service value increases, consistent with the objectives of a competitive market. Customers would be denied the benefit of a competitive market–reduced price if any carrier is barred from making rationally responsive offers such as winback and retention offers.

SWBT claimed that if it is prohibited from making competitive winback or retention offers, then customers considering using or are already using an alternative provider will wrongly view SWBT's unresponsiveness as an indication that SWBT is not interested in providing service to them and/or is unable to viably compete for their business. Eliminating a service provider's ability to offer such competitive options would be contrary to customer expectations about how a competitive market works and harm the competitive market's ability to function as it should.

SWBT maintained that winback/retention promotions do not lead to "concentration of market power." Rather, having to respond to the offer of another competitor is substantial evidence that "market power" does not exist. Furthermore, the existence of winback/retention promotions shows that no provider controls the market price in a way that permits monopoly profits and there is no capacity constrain in the marketplace.

SWBT averred that winback offers do not discriminate between new-but-not former customers and new-but-former customers. The former group lacks experience and a past relationship with SWBT and may not have any experience with CLECs in Texas. In contract, the latter group has had experience with both SWBT and at least one CLEC in Texas. Furthermore, to the extent that this different treatment can be characterized as "discrimination" because SWBT can only "win back" a former customer, then such "discrimination" is reasonable in view of the differences in customers' experiences and relationships with SWBT.

SWBT argued that retention is not discriminatory between existing customers with competitive choice and existing customers without competitive choices because all customers have competitive choice in Texas due to the proliferation of CLECs, satellite providers, wireless providers, and Internet telephony, and with ubiquitous CLEC market coverage available via SWBT's unbundled network element platform.

SWBT claimed that restricting winback eligibility to former customers is legitimate and not discriminatory because it is for a reasonable business purpose. Customers that have switched to another carrier demonstrate a relative lack of brand loyalty and tend to care more about price than about other product attributes such as particular brand names or quality characteristics. It is therefore a common business practice to appeal to their preferences by attempting to attract them via price offers. Other customers tend to care more about other service attributes, and it is a common and reasonable business practice to appeal to different customers on the basis of their different revealed preferences.

SWBT contended that under the federal Robinson-Patman Act, promotional incentives are not discriminatory if they are "functionally available" to all similarly situated customers. SWBT's winback/retention promotions are functionally available to all customers and not unlawfully discriminatory.

SWBT posited that meeting competition is a reasonable business purpose regardless of whether the offeror is a dominant carrier or allegedly has "market power."

SWBT argued that consumers would be left with fewer choices and competition would be inhibited if limitations were placed on dominant carriers only. SWBT claimed that straight-jacketing the allegedly "dominant" carrier might artificially increase CLEC profits and diminish CLECs' incentives to price their services competitively, to the detriment of competition and consumers.

SWBT asserted that no forum is necessary to address winback/retention promotions. Rather, the Commission should be concerned abut "regulatory process abuse" by which one or more competitors tries to convince a regulator to unfairly and unlawfully shackle another competitor, solely for the purpose of minimizing the level of competition to the detriment of consumers and competition. SWBT argued that ILEC winback/retention should not be prohibited or limited; therefore there is no need to consider a trigger for review or termination of any prohibitions or limitation.

SWBT's hired economist Dr. Aron claimed that the appropriate basis to evaluate a winback/retention offer is by its anticipated effects on consumer welfare and economic efficiency. According to her, the remedy sought by CLEC commenters would create a price umbrella to protect the inefficient competitors from price competition to the

detriment of consumers. Dr. Aron also stated that market power is a red herring because it is relevant only in evaluating whether a producer or cartel of producers can increase and maintain its prices above a competitive level without losing so many customers as to make the behavior unprofitable. Dr. Aron further stated that SWBT is not pricing predatorily and does not undercut its rivals' prices. Dr. Aron concluded that there is no public benefit – in the long run or the short run – gained from limiting winback/retention offers.

Additionally, Verizon claimed a rule amendment to prohibit winback/retention would violate the federal Telecom Act of 1996 requirement that consumer safeguards be competitively neutral. Verizon posits that the Texas Legislature has already addressed consumer safeguards in PURA Chapter 60. Verizon also argued that market share is not synonymous with market power and ILECs do not posses market power. Verizon stated that market power is defined as the ability to increase and sustain prices significantly above competitive levels without losing so many customers that the increase in price is unprofitable. Verizon contended that ILEC price reductions through winback and retention offers constitute evidence that ILECs do not possess market power.

Akron Beacon Journal (OH)
(c) Copyright 2002, Akron Beacon Journal. All Rights Reserved.

Friday, April 12, 2002

D

Ameritech's pitch must wait PUCO orders phone company to allow 30 days before trying to win back customers from rivals

By Betty Lin-Fisher
Beacon Journal business writer

The Public Utilities Commission of Ohio yesterday told Ameritech that it must wait 30 days after a local telephone competitor is notified that a customer has switched providers before it can try to "win back" that customer.

The ruling is an interim decision until a hearing is heldMay 8.

Ameritech's rivals, CoreComm and MCI, had alleged that Ameritech's actions to "win back" customers were illegal and anti-competitive because its computer system that switches customers is flawed.

Officials from CoreComm and MCI and Rob Tongren of the Ohio Consumers' Counsel praised the decision.

But Ameritech spokesman Greg Connel called the ruling "unconstitutional and bad for Ohio's consumers."

"It violates our free speech right to communicate with our customers," he said, adding that the company likely will appeal the decision and seek legal remedies, if necessary.

Ameritech's competitors had complained of problems with Ameritech's systems. Customers sometimes lost a dial tone after they switched providers, they said. Another glitch caused consumers to be double-billed because Ameritech failed to promptly notify its rivals that the customer switched providers.

The rivals also said Ameritech had an unfair advantage in winning back customers. Because of the flawed computer systems, they said, there were times when Ameritech's retail division knew that a customer had switched before the competitor knew.

Ameritech officials have said that they are fixing the problems, which happened in only a small number of cases.

CoreComm and MCI had asked the PUCO to place a "cease and desist"

PRODUCT: Telecommunications (DTE)

REGION: United States; United States; United States - Ohio; Midwest U.S.; North American Countries; Ohio; North America (US USA USOH USC NAMZ OH NME)

EDITION: 4X

Word Count: 522

4/12/02 AKRONBJ 10

END OF DOCUMENT

Copr. © West 2002 No Claim to Orig. U.S. Govt. Works

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of CoreComm Newco, Inc.,	)	
Complainant,	)	
v.	)	Case No. 02-579-TP-CSS
Ameritech Ohio,	)	
Respondent.	)	

ENTRY

The attorney examiner finds:

(1) On March 1, 2002, CoreComm Newco, Inc. (CoreComm), a competitive local exchange carrier (CLEC), filed a complaint and a request for an immediate order against Ameritech Ohio (Ameritech). In its complaint, CoreComm alleges that Ameritech is illegally providing inadequate, unjust, and unreasonable service by engaging in an aggressive winback program directed at the newly acquired customers of CoreComm while at the same time providing grossly inadequate wholesale service to CoreComm, thereby giving Ameritech an unreasonable and undue competitive advantage to the detriment of competition in Ohio. CoreComm further avers that Ameritech's aggressive winback campaign is discriminatory inasmuch as the promotions included in the winback campaign do not appear to be equally available to all Ameritech customers, but targeted specifically to the newly acquired customers of CoreComm and possibly other CLECs. Finally, CoreComm maintains that through certain winback efforts, Ameritech appears to be furnishing service for less than actual cost for the purpose of destroying competition.

As relief in this matter, CoreComm requests an immediate order, pursuant to Rule 4901-1-12(C), Ohio Administrative Code (O.A.C.), from the Commission requiring Ameritech to cease and desist from engaging in its winback program until such time as Ameritech can demonstrate that the level of wholesale service quality it provides to CoreComm is commensurate with the level of wholesale service quality that it provides to itself. Further, CoreComm seeks a determination precluding Ameritech from any type of direct marketing to a newly acquired CLEC customer for a period of 30 days subsequent to the date on which Ameritech completes the

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
Technician ____ Date Processed 03/28/02

wholesale provisioning process for a new CLEC customer. CoreComm also requests an immediate order requiring Ameritech to divulge sufficient information to allow the Commission and other interested parties to determine whether Ameritech's use of winback programs produces prices that are below total service long run incremental cost and are predatory in addition to other relief.

(2) Pursuant to the provisions of Rule 4901-1-12(C), O.A.C., the attorney examiner directed Ameritech to file its response to the motion for an immediate order on or before March 12, 2002. Additionally, the attorney examiner determined that, pursuant to the provisions of Rule 4901-9-01(A), O.A.C., Ameritech should file its answer to CoreComm's complaint no later than March 12, 2002.

(3) Ameritech filed its response to the motion for an immediate order and its answer to CoreComm's complaint on March 12, 2002. In its answer, Ameritech admits that the company engages in a winback program offering customer credits, offering to waive certain non-recurring reconnection fees, and offering to provide discounted service and/or services at no charge. In all other respects, Ameritech denies the allegations of the complaint. Further, Ameritech submits that the relevant provisions of the Ohio Revised Code cited by CoreComm fail to confer subject matter jurisdiction on the Commission. Consequently, Ameritech avers that the complaint fails to state reasonable grounds for proceeding to hearing pursuant to Section 4905.26, Revised Code.

In its memorandum contra CoreComm's motion for an immediate order, Ameritech states that the motion must fail for two reasons. First, Ameritech asserts that CoreComm has failed to raise issues concerning line loss notification as required by the parties interconnection agreement. Second, Ameritech claims that the company is voluntarily addressing the line loss notification issues that are the subject of the CoreComm complaint and the motion. More specifically, Ameritech notes that, as a result of an Illinois Commerce Commission order adopted on February 27, 2002, Ameritech in Illinois has delayed the solicitation of customers through winback mailings, telemarketing efforts, or through its channel sales representatives for 15 days from the date that Ameritech switches a customer to a CLEC as signaled by the line loss notification. Ameritech has agreed to institute the same practice here. Finally, given these voluntary activities, Ameritech submits that the Commission should not pursue the

emergency relief sought by CoreComm or the requested examination of Ameritech's winback program.

(4) The attorney examiner finds that reasonable grounds exist for proceeding to hearing in this matter. Pursuant to the expedited complaint process set forth in Attachment 1 of the Stipulation and Recommendation adopted by the Commission extending Ameritech's alternative regulation plan, this matter should proceed to hearing within 70 days of the filing of the complaint. See Case No. 93-487-TP-ALT, Opinion and Order issued April 27, 2000. Consequently, this matter is scheduled for hearing to commence at 10:00 a.m. on Wednesday, May 8, 2002, in hearing room 11-D at the offices of the Commission. The parties are also reminded that, pursuant to the aforementioned expedited complaint process, discovery responses are to be provided within 10 business days of service. Further, pursuant to Rule 4901-1-29(A)(1)(h), Ohio Administrative Code (O.A.C.), expert testimony shall be filed and served no later than seven days prior to the commencement of the hearing.

(5) On March 12, 2002, MCImetro Access Transmission Services, Inc. (MCIm) filed a motion for leave to intervene or, alternatively, a memorandum in support of the CoreComm complaint and motion for immediate order. In support of its motion to intervene, MCIm states that the company very recently launched its entry into the residential local exchange service market in Ohio but that within days of the effective date of the MCIm tariff and the initial transfer of certain test customers, Ameritech had contacted these customers with winback letters similar to the ones described in CoreComm's complaint. MCIm further submits that, in Illinois and Michigan, where MCIm has been providing residential local exchange service for many months, MCIm has experienced the same Ameritech wholesale provisioning inadequacies as described in the CoreComm complaint. As a result, MCIm maintains that it is similarly situated to CoreComm and has been placed at the same competitive disadvantage by Ameritech's wholesale provisioning and winback tactics. Thus, MCIm submits it has fulfilled the requirements for intervention pursuant to Rule 4901-1-11(B), O.A.C. Further, MCIm claims a real and substantial interest in the outcome of this case and there are no other parties to the proceeding who can adequately represent MCIm's interests. MCIm also claims that its participation will contribute to a just and expeditious resolution of the issues raised in the complaint and MCIm's intervention will not unduly delay the proceeding nor prejudice any party. MCIm concludes by claiming that should the Commission determine that intervention in a two-party

complaint is not desirable, the Commission should convert the complaint proceeding into an investigation and permit interested parties to participate.

(6) Ameritech filed a memorandum contra MCIm's motion to intervene on March 15, 2002. In its memorandum contra, Ameritech argues that MCIm's intervention is premature under the applicable statute and rule and, consequently, cannot be granted at this time. Moreover, as stated in its opposition to CoreComm's complaint, Ameritech avers that the company has voluntarily implemented changes to its line loss notification practices and, as a result, there simply is no basis for proceeding in this matter.

(7) The attorney examiner finds that MCIm's motion to intervene should be granted. MCIm has satisfied the requirements for intervention pursuant to Rule 4901-1-11(B), O.A.C. Therefore, MCIm's intervention is appropriate in this matter. MCIm and CoreComm are, however, encouraged to coordinate the presentation of witness testimony and the examination of witnesses so as to not duplicate efforts and needlessly prolong the proceedings in this matter.

(8) As a final matter, the attorney examiner notes that a ruling on CoreComm's request for an immediate order will be forthcoming in the near future.

It is, therefore,

ORDERED, That a hearing is scheduled in this matter to commence on Wednesday, May 8, 2002, at 10:00 a.m. in hearing room 11-D at the offices of the Commission. It is, further,

ORDERED, That expert testimony be filed in accordance with finding 4. It is, further,

ORDERED, That MCIm is granted intervention in accordance and to the extent set forth in finding 7. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Jeffrey R. Jones
Attorney Examiner

RPC/vrm

Entered in the Journal
MAR 28 2002
A True Copy
Gary E. Vigorito
Secretary

Entered in the Journal

CASE NUMBER: 02-0579-TP-CSS
CASE DESCRIPTION: CORECOMM NEWCO, INC vs AMERITECH, OHIO
DOCUMENT SIGNED ON: 3/28/2002
DATE OF SERVICE: 3/28/02

PARTIES SERVED

PARTIES OF RECORD	**ATTORNEYS**
COMPLAINTANTS	
CORECOMM NEWCO, INC. ELLEN CRAIG, REGLATORY AFFAIRS 6505 ROCKSIDE ROAD ROOM 3547 CLEVELAND, OH 44131-2342	THOMAS J. O'BRIEN, ESQ. BRICKER & ECKLER 100 SOUTH THIRD STREET COLUMBUS, 43215
INTERVENORS	
MCIMETRO ACCESS TRANSMISSION JOAN CAMPION, DIRECTOR PUBLIC POLICY 205 NORTH MICHIGAN AVENUE CHICAGO, IL 60601 Phone: (312) 470-4943	JUDITH B. SANDERS BELL, ROYER & SANDERS CO., L.P.A. 33 SOUTH GRANT AVENUE COLUMBUS, OH 43215-3927
RESPONDENTS	
AMERITECH OHIO JON F. KELLY 150 E. GAY STREET ROOM 4-C COLUMBUS, OH 43215	JON F. KELLY LEGAL DEPARTMENT AMERITECH OHIO 150 E. GAY STREET, ROOM 4-C COLUMBUS, OH 43215 Phone: (614) 223-7928