

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion, )  
to consider **AMERITECH MICHIGAN'S** compliance ) MPSC Case No. U-12320  
with the competitive checklist in Section 271 of )  
the federal Telecommunications Act of 1996 )  
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**TDS METROCOM, INC.'S COMMENTS WITH RESPECT TO THE BEARINGPOINT  
INCORPORATED REPORT AND SBC AMERITECH MICHIGAN'S SUBMISSIONS  
OF SEPTEMBER 5 AND OCTOBER 30, 2002**

**I. INTRODUCTION**

TDS Metrocom, Inc. ("TDS") is a facilities-based competitive local exchange carrier ("CLEC"), which provides service in various exchanges in which SBC Ameritech Michigan ("Ameritech") is the incumbent local exchange carrier. Pursuant to the September 16, 2002 Opinion and Order of the Michigan Public Service Commission ("Commission"), TDS and others have been given the opportunity to submit comments regarding the BearingPoint Incorporated ("BearingPoint") report and respond to Ameritech's September 5 and October 30, 2002 filings. The BearingPoint report discusses the testing that was ordered by the Commission as part of "a comprehensive test of SBC Ameritech's OSS and its CLEC-facing operations to assist the Commission in assessing whether SBC Ameritech is meeting . . . [the] requirements of the [federal Telecommunications] Act [of 1996]." (BearingPoint report at p 8.) Ameritech's September 5, 2002 filing, among other things, presents Ameritech's assessment of competition in Michigan and other

alleged support for its 271 application. The October 30, 2002 filing is Ameritech's "compliance plan," in which Ameritech presents illusory promises of future compliance with the master test plan criteria that Ameritech is currently unable to satisfy.

Ameritech's claims regarding the existence of competition and its OSS operating at commercial volumes rests solely upon the number of access lines served by CLECs utilizing the unbundled network element platform or UNE-P. In making these claims with respect to competition and its OSS operating at commercial volumes, Ameritech conveniently ignores the substantial resources it is expending to eliminate the viability of UNE-P. These efforts include, but are not limited to, actions to limit the availability of unbundled switching and to significantly increase UNE-P rates. If Ameritech is successful in eliminating or reducing the viability of UNE-P, then the factual underpinnings for its arguments supporting the existence of competition and its OSS operating at commercial volumes disappears.

Ameritech's strategy is transparent: in one docket announce the birth of competition in support of its 271 application, while in other dockets relentlessly seek to kill that baby in its crib. Because of Ameritech's strategy, it is essential for this Commission to not be distracted by Ameritech's claims of competition and, instead focus upon whether Ameritech is in actual compliance with the requirements of the 271 checklist. Unless this 14-point checklist is satisfied, the existence of competition in Michigan will be short-lived and fleeting. Notwithstanding the fact that some level of access lines are served by CLECs due to the existence of the UNE-P, Ameritech

must satisfy the requirements imposed by Section 271 or long-term competition will not exist in Michigan.

It is simply not enough for Ameritech to show some level of access lines to be served by CLECs. The legal mandates of the Act could not be clearer. In order to meet the 271 checklist, Ameritech must, among other things, show “nondiscriminatory access to network elements.” Section 271(c)(2)(B)(ii). The BearingPoint report, however, demonstrates that Ameritech is unable to even measure its performance provided to CLECs. Therefore, Ameritech is unable to establish it provides nondiscriminatory access to network elements. As discussed below and in the attached affidavit, while Ameritech makes unsupported claims based on unreliable data that it is providing nondiscriminatory access, TDS’ real world experience proves otherwise.

## **II. AMERITECH’S SEPTEMBER 5, 2002 FILING DOES NOT SUPPORT THE GRANT OF 271 RELIEF**

In its September 5, 2002 filing, Ameritech asserts that competition exists in Michigan and as a result, it is operating its OSS at commercial volumes. In making these arguments, Ameritech readily acknowledges that the vast majority of these access lines served by CLECs are through the UNE-P. (Ameritech’s September 5, 2002 filing, p. 7.) Ameritech asserts that as of June 2002, there are over 750,000 access lines being served by UNE-P, as opposed to only 181,000 being served through unbundled loops. (Id. at p 8-9.) Thus, approximately 80% of the access lines in Michigan served by CLECs are being provisioned through the UNE-P. In an effort to support its 271 application, Ameritech utilizes the UNE-P to support both its claims

that Michigan is open to competition and that Ameritech's OSS systems are operating at commercial volumes.

In this 271 proceeding, Ameritech conveniently ignores its substantial and relentless efforts to eliminate and/or severely restrict its obligation to provide UNE-P to CLECs. For example, at the FCC, Ameritech seeks to eliminate or reduce its obligation to provide unbundled switching. Before this Commission, Ameritech has and will be seeking to substantially increase UNE-P rates. If Ameritech is successful in eliminating or severely limiting the viability of UNE-P, then its claims of competition in the State of Michigan and claims that its OSS is operating at commercial volumes become empty and meaningless.

Ameritech's strategy is to allow competition no stronger than a house of cards. Once its 271 approval is granted, Ameritech intends to pull the proverbial rug out from underneath this competition and watch the house of cards fall. This Commission should not be bemused by this egregious strategy and it should flatly reject any claim by Ameritech that it is opening its market to competition due to the availability of UNE-P, when at the same time it's undertaking every effort to eliminate the viability of UNE-P.

No one but an RBOC apologist could argue with a straight face that there is too much competition in the local phone market in Michigan today. While a fully competitive market based policy is certainly a laudable goal in the abstract, it must be remembered that for 62 years the FCC and the state commissions undertook a "monopolistic, anti-competitive, highly regulatory national policy framework" which has resulted in the establishment of four of the largest, most pervasive, most

entrenched monopolies in the history of the United States economy. To even pretend that CLECs compete in an open competitive market is to ignore reality. The FCC's own report on the state of competition shows, despite the FCC's attempts at spin, a rather grim picture. (FCC Report, *Local Telephone Competition: Status as of December 31, 2001*, released July 23, 2002 "*Local Telephone Competition Report.*")

The Telecommunications Act of 1996 spawned dozens of would be competitors, including companies backed by such well established capital as Paul Allen, cofounder of Microsoft, (RCN) and the Kiewit Sons Construction conglomerate and Warren Buffet (Level 3) as well as some of the largest non-ILEC companies in the telecommunications industry. Despite the efforts of these competitors, and despite what are purported to be the earnest efforts of the FCC, the United States Justice Department and all 50 state Commissions, the entrenched monopolists have surrendered just 10% market share in 6 years since the passage of the Telecommunications Act of 1996. (*Local Telephone Competition Report*, page 1.)

This must be contrasted with what has happened in the long distance market related to 271 approval. In Texas, SWBT gained over 2 million long distance customers in less than 6 months after 271 approval. Meanwhile, the efforts of 25 CLECs have resulted in just over 2.1 million lines being served by CLECs in the territories of all 15 Texas ILECs, in nearly 6 years since the passage of the Telecommunications Act. (*Local Telephone Competition Report*, Table 6.) Put another way, SWBT took a 14.5% market share of Texas long distance customers in *less than 6 months*, while all 25 CLECs together have just 16% market share of Texas local customers *after 6*

years.<sup>1</sup> Likewise, the largest long distance carrier in New York is now Verizon, with a larger share of the long distance market than AT&T. In fact Verizon is now the fourth largest IXC in the nation.

The question this Commission must ask in response to SBC's argument about commercial volumes is: "What would the CLEC market share be if the OSS system really worked?" To do otherwise puts the CLECs in an untenable position. If, despite the significant obstacles thrown up by SBC, CLECs are able to gain a foothold in the market, SBC asks the Commission to accept this as proof that the obstacles did not exist. Yet CLECs should not be forced to allow themselves to be driven out of business just to avoid waiving the argument that SBC is trying to put them out of business. Put more colloquially, the fact that CLECs were able to stay alive might mean that SBC is not guilty of the murder of the CLEC industry, but it is surely no defense to the charge of attempted murder.

### **III. BEARINGPOINT'S REPORT DOES NOT SUPPORT AMERITECH'S 271 APPLICATION**

To protect the viability of long-term competition in Michigan, this Commission must be diligent in ensuring that Ameritech demonstrates actual compliance with the 271 checklist. There should be no substitute. If Ameritech is unable to satisfy a checklist item, then its application must be rejected.

The BearingPoint report demonstrates that Ameritech is unable to meet its burden of proof that it satisfies the 271 checklist. It is not enough to show some level of competition to satisfy the checklist. The statutory obligation imposed on

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<sup>1</sup> At the recently concluded NARUC meetings in Chicago, the Texas commission reported preliminary results that show that the CLEC market share in Texas actually declined during

Ameritech is clear. Item 2 of the checklist requires “nondiscriminatory access to network elements.” Here, the BearingPoint report establishes that Ameritech is hopelessly unable to even measure the performance it provides CLECs let alone establish nondiscriminatory access to network elements. A review of the high-level test results of the BearingPoint report shows that Ameritech has satisfied very few of the evaluation criteria relating to performance metrics. With respect to performance metrics reporting, Ameritech satisfies only 30 evaluation criteria, one hundred and eight (108) are indeterminate and **136 are not satisfied!** Despite years of testing, Ameritech has managed to satisfy approximately 10% of the actual evaluation criteria. There simply is no basis whatsoever for Ameritech to argue that its performance shows nondiscriminatory access to network elements. Until Ameritech is able to demonstrate that it is able to measure its performance, any assertions are based on wholly unreliable and meaningless data.

#### **IV. TDS’ REAL WORLD EXPERIENCE CONTRADICTS AMERITECH’S PERFORMANCE MEASUREMENT CLAIMS**

The purpose of the performance measurements is to provide objective data to the Commission to show that Ameritech has provided nondiscriminatory access to network elements. The inability of Ameritech to satisfy the performance metric evaluation criteria means that any performance measure data presented by Ameritech is unreliable. This is demonstrated by TDS’ real world experience. Attached to these comments is the Affidavit of Rod Cox, Carrier Relations Manager for TDS Metrocom. (Attachment A.) This Affidavit demonstrates that Ameritech is not meeting the performance measurements set forth with respect to Loop Make up

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the prior six months to 15%.

information (PM 1.2), despite reporting 100% compliance. While Ameritech continues to report that it meets the benchmarks for these performance measures, TDS' experience shows the exact opposite. This demonstrates the critical importance and need for Ameritech to first satisfy the performance metrics evaluation criteria before any conclusion is reached as to whether it is providing nondiscriminatory access to network elements.

#### **V. AMERITECH'S OCTOBER 30, 2002 FILING SHOULD BE REJECTED**

On October 30, 2002, Ameritech filed a compliance plan relating to certain evaluation criteria that Ameritech has not been able to satisfy through the BearingPoint testing. By seeking approval of this compliance plan, Ameritech is acknowledging that it cannot satisfy the master test plan criteria. Instead of implementing permanent and meaningful improvements to its OSS systems, Ameritech once again seeks to lower the bar in order to meet its own 271 goal. Competition is not served by Ameritech's never ending efforts to lower the standards and the compliance plan should be rejected. Such a scheme is directly in conflict with the requirements of Section 271. There is nothing in Section 271 that allows compliance with the checklist items to be prospective. Yet SBC would have this Commission approve its 271 application after an admitted failure to comply with certain items, based on a promise to come into compliance at some time in the future. One must assume that Congress could have drafted Section 271 differently had such an outcome been intended. Instead of saying :

“Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:”

Congress could have stated:

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if THE BELL OPERATING COMPANY SAYS IT WILL TRY REALLY HARD TO MAKE SURE THAT, AT SOME TIME IN THE FUTURE, such access and interconnection includes each of the following:

Of course Congress said nothing of the kind in drafting the Act. A promise to meet the checklist items in the future is not good enough. The Act is quite clear that the checklist items must be met, in the here and now, before 271 approval may be granted.

## **VI. CONCLUSION**

Any claim by Ameritech that competition exists in Michigan is based on the number of access lines provisioned through the UNE-P. In this proceeding, Ameritech seeks to utilize UNE-P access lines as evidence of competition and the commercial operation of its OSS. Ameritech conveniently ignores its considerable efforts to eliminate the viability of UNE-P. Only by ensuring compliance with the checklist will the long-term viability of competition be secured. This requires, at the minimum, completion of the BearingPoint testing and an actual showing of compliance with each checklist item.

To quote the extremely striking phrase used by SBC Communications in the recent Microsoft anti-trust litigation, only by fully completing the test will the Commission, be sure that Ameritech will not be like “the most successful monopolists, which are able to kill each nascent threat before it can leave the crib.” (SBC Communications Reply Memorandum, dated March 11, 2002, at p6,

Attachment B.) At oral argument, SBC further stated: “If you have a situation where a proven monopolist is time and time again able to reach out and, to use the words of the Court of Appeals, extinguish, perhaps forever, the threats to the . . . monopoly in this case or other monopolies in other cases, it means that the especially rapacious and especially successful monopolist will consistently be immune from remedies that are effective to dissipate market power, and to remove incentive and the ability to engage in predation.” (March 6, 2002 Hearing at Tr 150-151, Attachment C.) SBC further stated in its brief: “unless and until these embryonic paradigms can grow into full fledged competitors, Microsoft will enjoy the economic rewards of its monopoly power for ‘several years,’ bilking consumers during that period (i.e., the present) with high prices or using its monopoly power to degrade service or raise rivals’ costs.” (Id., p 13; Attachment C.) Substitute “SBC/Ameritech” for “Microsoft”, and you could not ask for a better statement of the problem confronting this Commission, nor a better reason to continue the performance test to its full conclusion.

While there are CLECs *attempting* to enter the Michigan market, this competition is truly nascent. This competition is beginning because of the actions of this Commission, and perhaps most importantly, because of the promise that this Commission would continue to hold Ameritech to its market opening conditions in the future. As a result, Ameritech must be required to show that its OSS actually works (which it does not) before it is granted 271 relief. The OSS test is one of the best ways this Commission has available to make sure that Ameritech does not kill this fledgling competition before it can leave the crib.

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