

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion,)
to consider AMERITECH MICHIGAN's compliance)
with the competitive checklist in Section 271 of) Case No. U-12320
the Federal Telecommunications Act of 1996.)
_____)

**COMMENTS OF THE MICHIGAN PAY TELEPHONE ASSOCIATION TO
AMERITECH MICHIGAN'S CHECKLIST INFORMATIONAL FILING**

On May 9, 2001, Ameritech Michigan filed its Notice of Intent to submit a Section 271 application to the FCC no sooner than the fourth quarter of 2001, and proposed a filing by Ameritech of a Checklist Informational Filing with a public comment period to follow with regard to whether Ameritech has met the checklist requirements subject to successful OSS testing. On May 15, 2001, pursuant to Ameritech's request in the Notice of Intent and to a response to the Notice of Intent filed by several CLECs, the Commission issued an Opinion and Order establishing a filing schedule, with comments to the Checklist Informational Filing due 45 days after filing, and response comments due 30 days after the initial comments.

Ameritech filed its Checklist Informational Filing on May 15, 2001. Ameritech's filing took the form of a proposed brief it would intend to file at the FCC, supported by proposed affidavits that were unsigned because they are not in final form. Ameritech indicated the proposed affidavits were "in substantially the form that Ameritech intends to subsequently file them at the FCC."

Initial comments to Ameritech's Checklist Informational Filing are due June 29, 2001. These comments are respectfully submitted by the Michigan Pay Telephone Association

("MPTA"). Consistent with the format employed by Ameritech, these comments are supported by the attached proposed affidavit of Gary Lee Pace.

I. Interest of the MPTA

The MPTA is a trade association of payphone service providers. Payphone service providers are providers under the MTA. MPTA's members are significant users of Ameritech's local exchange services as Ameritech is the dominant provider of dial tone to payphones. In addition, Ameritech is itself the dominant provider of payphone services to end users in Michigan, thereby making itself the biggest competitor to the very MPTA members to which it provides dial tone. As such, MPTA members are situated in a similar manner to the CLECs who must interconnect with Ameritech in order to compete for local service with its own provider of service.

II. There Is No Significant Competition In The Local Services Market

Ameritech claims in its Executive Summary that local competition has taken root and is growing rapidly in Michigan. Then, in the public interest section of its brief, it rests its case for competition on the supposed benefits that will arise if further long distance competition is allowed. Ameritech has it backwards.

What this Commission should consider and stress is the existence, or lack thereof, of competition in the local services market. What is lacking for consumers of local services is not more options for long distance service, but more and more reliable options for local service. That is the competition that is most assuredly not thriving in Michigan, and adding one more long distance competitor to an already competitive market is not suddenly going to make local competition thrive.

In fact, this Commission has already found that, contrary to Ameritech's claims, competition in the local market is not thriving. In the Commission's own *Annual Report and Annual Report of the Status of Competition in Telecommunication Services in Michigan*, the Commission concluded:

"The marketplace for local telecommunication services in Michigan continues to be dominated by Ameritech Michigan and GTE (now Verizon), and a truly competitive marketplace remains a goal, not a reality." [at page 15]

The same report found that number of CLEC lines compared to total lines is only 3.99%, based on the Commission Staff's survey, and only 5% under more recent FCC figures. This is not an instance of thriving competition. In fact, both the MPSC and FCC reports indicate a lack of real competition, and that giving a blanket approval to Ameritech's policies at this time would not meet the FCC's public interest test.

Ameritech also tries to turn the competition argument on its head in the public interest section of its draft brief by focusing on the perceived benefits of its own entry into the interLATA toll market. This Commission's focus should be on the competition in the market in local services, and only then address a market that already has significant competition.

Consider the payphone industry for an example. As Mr. Pace points out, payphone providers have "hundreds of choices" for long distance service from their payphones. As a result, long distance rates have dropped in half over the last three years for MPTA members. Yet, despite an era that Ameritech considers one that is "growing rapidly" the local service rates paid by MPTA members have increased. What is needed is more choices for local service, which cannot be measured by the number of licensed carriers or by the number of long distance competitors. If there were true local service competition, the local rates that MPTA members would pay should have gone down, as long distance rates for members have gone down.

The public interest here is not confined to Ameritech's ability to compete, but to the competition actually available to customers. More local competition NOW is what is in the public interest, not another long distance provider. The Commission should not grant Ameritech entry into the long distance market until competition in the local services market is thriving in fact and demonstrated by real options and truly competitive prices, not when the fledgling competitors are languishing at 4%-5% of the market.

III. Ameritech has failed to meet Checklist Item 2

Section 271(c)(2)(B) requires that Ameritech's access or interconnection arrangements meet all of the 14 checklist items. Item 2 of the Checklist requires that Ameritech must provide:

Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).¹

Ameritech has failed to meet this requirement. First, Ameritech is not providing nondiscriminatory service to CLECs in the form of UNE combinations or UNE Platform. Such service, offered in a nondiscriminatory manner, would allow MPTA members to obtain service from Ameritech's competitors, thereby decreasing members' reliance on obtaining payphone dial tone from its chief competitor.

It is a truly effective and ready availability of UNE combinations that can allow CLECs to easily serve small businesses, such as MPTA members, that will most benefit these businesses. Currently, most MPTA members have no real options in Ameritech's service territories since most CLECs are resellers or have limited geographic scope for facilities-based competition. With a readily available UNE combinations option at TSLRIC pricing, more CLECs could economically serve small businesses and provide a truly competitive option for MPTA members.

¹ Section 251(c)(3) requires unbundled access to UNEs on terms that are just, reasonably, and nondiscriminatory. Section 252(d)(1) requires pricing to be based on cost.

However, Ameritech has dragged its feet on providing UNE combinations, rejects orders in a discriminatory fashion, and eliminates services. Ameritech should be ordered to offer a UNE combination that will allow CLECs to offer all payphone and IPP line functionalities using UNE Platform that Ameritech is able to offer at the same TSLRIC based prices at which other combinations are made available, and make those combinations work in practice, before Ameritech can be considered to have met this checklist element.

Second, Ameritech cannot be considered to provide nondiscriminatory access to network elements so long as Ameritech continues to violate Section 276 of the FTA. Indeed, Ameritech to this day does not comply with the new services test requirements for providing service to payphones.

A. Nondiscriminatory Access to UNEs and UNE Combinations by CLECs Is Necessary For Competition. Ameritech Has Not Established That Such Access is Being Provided.

As users of local exchange services provided by Ameritech and by CLECs, it is in the interest of all payphone providers that competitors thrive in the local services market. MPTA members not only purchase dial tone from Ameritech (and potentially CLECs, so long as CLECs are given nondiscriminatory access to UNEs and UNE combinations); MPTA members also compete directly against Ameritech's own internal division that provides payphone services to the public. And, as is addressed in the next section, MPTA members must acquire service from Ameritech at business retail rates, which are not cost based despite FCC direction that they be cost based.

Only if CLECs are able to obtain the UNEs necessary to provide payphone line services at TSLRIC prices can the CLEC rates to payphone providers become more competitive, allowing MPTA member prices to end users to be more competitive as well. Conversely, if those UNEs or UNE combinations are not available, or if available in theory but not in practice due to Ameritech

roadblocks to UNE combinations, CLECs may elect not to offer payphone line services or do so at rates that are not competitive, thereby reducing competitiveness in the payphone industry as well.

Consequently, MPTA supports the efforts of CLECs to have nondiscriminatory access to UNEs and to UNE combinations, and to have orders to those services filled as expeditiously as possible so that MPTA members can compete in the payphone business whether they receive service from Ameritech or from a CLEC. All such UNE combinations should be made readily available, with orders filled promptly, at least at the level required by the FCC.

Unfortunately, it appears that UNEs and UNE combinations are not readily available to the CLECs. First, it is unclear if Ameritech makes all features necessary to provide a coin line and an independent payphone provider line available to CLECs as UNE combinations at TSLRIC-based rates. Ameritech should establish that such is the case before it can even be considered to be in compliance with Checklist Item 2.

Second, it is apparent that UNE combinations orders are not being filled expeditiously, and that Ameritech drags its feet in providing UNE combinations. For example:

- In order to serve a new or additional line at a location, Ameritech requires the CLEC to enter into a specific, time-limited contractual amendment to its interconnection agreement, requiring MPSC approval, rather than simply being able to order a tariffed UNE combination. Ameritech will only allow migration of an existing line to UNE combinations under tariff. This is true even though such new or additional lines can be readily provided by Ameritech to its own end users. Thus, in order to serve customers, the CLEC must weigh different types of orders (existing lines vs. new or additional lines) in deciding whether to serve payphone providers (or other classes of customers, for that matter) and in pricing the service. The result

is fewer CLECs electing to serve payphone providers and less competitive pricing alternatives, thereby resulting in a less competitive payphone service market as well.

- Service quality to CLECs is poor. At least one CLEC, LDMI, reports that CLEC repair problems were three times as high in April 2001 as in April 2000. If customers of CLECs cannot have confidence that CLECs will themselves receive adequate service from Ameritech, competition is not being supported.
- Customers who have switched to a CLEC and having their line migrated to a UNE combination service have been erroneously taken out of service.
- Electronic orders for UNE combinations that are supposed to be handled in a fully automated manner are not being handled properly, resulting in dropped or delayed provisioning of UNE combinations lines. One CLEC, LDMI, has reported that only 42% of orders are processed properly.

These problems suggest that the bugs have not even begun to be ironed out on the provision of UNE combinations. Not until it is established that CLECs are able to use UNE combinations to serve small businesses at competitive rates, and until significant levels of actual service experience can be analyzed, should this Commission find compliance with this item. The availability of UNE combinations to serve payphone providers has the greatest potential to benefit payphone providers, so it is most important for this Commission to assure that Ameritech is fulfilling its obligations to provide UNE combinations before approval can be granted. At this point there is significant evidence from the CLECs that Ameritech is not fulfilling its obligations, and so the Commission's approval should be denied.

In order to address these provisioning deficiencies by Ameritech, Ameritech should be ordered to provide UNE and UNE combinations using the UNE Platform that would allow

competing carriers to provide services to an existing or a new customer. Furthermore, UNEs and UNE combinations should be available to competing carriers in a way that allows requesting telecommunications carriers to combine network elements to provide a telecommunications service.

Ameritech should be ordered to not separate network elements that are currently combined, except at the explicit direction of the requesting carrier. In addition, upon request, Ameritech must combine any sequence of unbundled network elements that it ordinarily combines for itself in providing services to payphone providers or its own payphone division, consistent with the Commission's earlier ruling in this proceeding clarifying the definition of existing combinations. CLECs should be permitted to use a network elements platform consisting solely of combined network elements to provide end to end telecommunications service for the provision of services to existing and new payphone provider customers, that would include local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA without the requesting CLEC's use of any other facilities or functionalities.

Finally, when a CLEC requests a network elements platform to provide services to payphone providers where there is no requirement for field work outside of the central office, or for a payphone provider that has existing local exchange telecommunications service provided by Ameritech, Ameritech must be ordered to provide the CLEC with the requested network elements platform within 3 business days for at least 95% of the requests for each CLEC for each month. A CLEC may order the network elements platform as is for a payphone provider that has such existing local exchange service without changing any of the features previously selected by the end user, and Ameritech must be ordered to provide the requested network elements platform

without any disruption to the end user's services. On the third business day after placing the order for a network elements platform, the requesting CLEC shall be the presubscribed primary local exchange carrier for that end user line and shall be entitled to receive, or to direct the disposition of, all revenues for all services utilizing the network elements in the platform, unless it is established that the end user of the existing local exchange service did not authorize the requesting carrier to make the request.

B. Ameritech Has Not Met The New Services Test For Network Elements Used In Providing Payphone Services

Just as Section 271(c)(2)(B)(ii) of the FTA requires that Ameritech provide nondiscriminatory access to network elements, Section 276 of the FTA provides that a Bell Operating Company may not discriminate in favor of its own payphone services. This means that, just as CLECs must obtain cost-based pricing of UNEs and UNE combinations, payphone providers must be able to obtain cost-based pricing of payphone lines, independent payphone provider lines, and other services made available to payphone providers and/or Ameritech's own payphone division. As competitors who use payphone lines and independent payphone provider lines to directly compete against Ameritech, those lines are in effect a type of combination of elements that must be provided at cost-based rates (albeit at another section of the FTA). Anything less is discrimination against payphone providers in the same manner as overpriced UNEs or UNE combinations would be discriminatory under the checklist. It is unfathomable that such discrimination could be overlooked in deciding whether Ameritech is providing nondiscriminatory access to all network elements.

The members of the MPTA, like Ameritech, provide competitive pay telephone services to end users throughout the state of Michigan. In order to provide their services, payphone providers purchase noncompetitive network services from local exchange carriers, combine these

network services with the IPP's own facilities (such as the payphone equipment, computer hardware and software systems, and rate tables), and sell telephone calls to end users.

In order to promote end-user competition in the payphone industry, the FCC has held that prices for network services used in the provision of payphone service to end users must be set based on a relationship to the costs associated with the services:

Tariffs for payphone services, including unbundled features and functions filed with the states, pursuant to the Payphone Reclassification Proceeding, must be cost-based, consistent with Section 276, nondiscriminatory, and consistent with Computer III tariffing guidelines. [*In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233 (1996)) (“*Payphone Reconsideration Order*”), at ¶163, n. 492; Order, 12 FCC Rcd 20997 (1997) (“*Payphone Clarification Order*”), at ¶10]

The FCC held specifically that intrastate tariffs are subject to the “New Services Test” as the standard to assure that rates are cost-based. (*Bureau Waiver Order*, fn. 5.) The New Services Test is intended to establish a price ceiling for network services provided to payphone providers, and is codified at 47 C.F.R. §61.49(g)(2). Essentially, the New Services Test requires that network services be priced no greater than the sum of the service’s TSLRIC plus a reasonable amount to recover the overhead expenses of the LEC. 47 C.F.R. §61.49(g)(2). Under the New Services Test, local exchange carriers are required to price network services at a level that “*will not recover more than a reasonable portion of the carrier's overhead costs.*” 47 C.F.R. § 61.49(g)(2) [emphasis added.] The FCC adopted the New Services Test as an objective pricing standard because it recognizes that LECs have the incentive and ability to charge its payphone competitors excessive rates for network services, just as the LECs have the incentive and ability to charge CLECs excessive rates for UNEs and UNE combinations. The New Services Test is therefore very similar to the TSLRIC cost test employed by the Commission in cost cases, the

same test used in pricing UNEs and UNE combinations under Checklist Item 2 (albeit with an alternative forward looking cost methodology for calculating the direct costs of the services).

In Case No. U-11756 (currently on appeal to the Michigan Court of Appeals, Case No. 219950, and subject to a pending declaratory ruling request at the FCC in Docket 96-128),² it was clear that Ameritech did not even make an attempt to comply with the New Services Test in pricing its services, instead taking the position that pre-existing prices met legal requirements. However, when the prices were established, there was no methodology employed to determine how much overhead should be allocated to the costs to identify the appropriate prices. Nor was there a change in setting these prices at a TSLRIC-based rate or other cost-based rate after the Ameritech costing case in Case No. U-11831. To this day, MPTA members are charged based on the business line retail rate.

From a comparison of the language of Section 276 and the FCC orders applying the New Services Test, it is clear that TSLRIC-based pricing must be applied to payphone lines and independent payphone provider lines, at least as a starting point to set the prices under the New Services Test. Until such cost-based pricing is actually applied, Ameritech cannot be said to be providing nondiscriminatory access to all network elements required to be provided under the FTA. Until Ameritech cures its discriminatory practices in the pricing of network services made available to payphone providers, the Commission must conclude that Ameritech does not qualify for Section 271 authorization in Michigan.

² The Commission denied New Services Test relief, finding that the “FCC has not specified any particular methodology for determining costs or reasonable overheads for purposes of compliance with the [new services] test.” *Opinion and Order*, Case No. U-11756, March 8, 1999, p. 8. MPTA has requested such specification in its declaratory ruling request at the FCC.

IV. Relief

For the above stated reasons, the Commission should find that there is insufficient competition in the local services market to allow Section 271 authorization in Michigan. The Commission should also find that Ameritech does not currently comply with Checklist Item 2. Before such a finding can be made, Ameritech should establish routine and seamless provision of UNE combinations at TSLRIC prices, which must allow CLECs to purchase from Ameritech all network functionalities to provide service to payphone providers, and must allow CLECs to purchase network functionalities in UNE combinations as described herein. Those UNE combinations must be readily available to allow CLECs to provide service to existing payphone sites as well as to new sites and additional lines at existing sites. In addition, Ameritech should also be required to establish nondiscriminatory provision of all network elements, including those supplied to payphone providers under Section 276 of the FTA. Ameritech has shown neither form of compliance in its Checklist Informational Filing, and the Commission should therefore find that Ameritech is not in compliance with Checklist Item 2.

Respectfully submitted,

Leland R. Rosier (P33827)
Clark Hill PLC
2455 Woodlake Circle
Okemos, MI 48864-5941
(517) 381-9193
(517) 381-0268 (fax)
lrosier@clarkhill.com
**Attorney for Michigan Pay Telephone
Association**

Dated: June 29, 2001