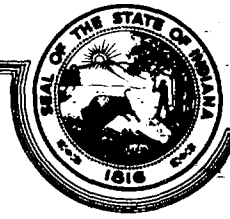
STATE OF INDIANA



INDIANAPOLIS, 46204

INDIANA UTILITY REGULATORY COMMISSION
302 W. WASHINGTON STREET, ROOM E306

FILED

JUN 12 2001

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED, D/B/A AMERITECH INDIANA PURSUANT TO I.C. 8-1-2-61 FOR A THREE PHASE PROCESS FOR COMMISSION REVIEW OF VARIOUS SUBMISSIONS OF AMERITECH INDIANA TO SHOW COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	)	**CAUSE NO. 41657**
		ALJ Decision on First Request for Expedited Dispute Resolution ("ALJ-EDR-1")

You are hereby notified that on this date, the Presiding Administrative Law Judge has caused the following Decision to be made:

On May 22, 2001, ASCENT, AT&T, CompTel, McLeodUSA, Time Warner, WorldCom and Z-Tel (Indiana CLECs) notified the presiding administrative law judge by e-mail, their original notice that they intended to seek expedited informal dispute resolution, consistent with the procedures set forth in the Commission's March 19, 2001 Order in this Cause, and proposed a schedule for filing the issue summaries. On May 24, 2001, Ameritech Indiana responded to the original notice. On May 30, 2001, Indiana CLECs submitted their summary of issues with supporting documentation. Also on May 30, 2001, Ameritech Indiana submitted its statement of position, with supporting documentation. On June 4, 2001, Ameritech Indiana submitted its Reply. On June 7, 2001, Indiana CLECs submitted their Reply. The issue summaries, supporting documentation and replies are hereby incorporated by reference.

Background

On October 8, 1999, the FCC approved a stock-for-stock merger between SBC Communications, Incorporated ["SBC"], and Ameritech Corporation ["Ameritech"] that gave SBC ownership of Ameritech and all of Ameritech's subsidiaries and affiliates, including both Ameritech Advanced Data Services of Indiana, Inc. ("AADS") and the Indiana Bell Telephone Company, Inc. (Indiana Bell, d/b/a "Ameritech Indiana").[1] The FCC imposed many conditions on the merger, including several relating to the provision of advanced services in Indiana and in the other 12 states in SBC's operating territory. Among these

[1] *In re: Ameritech Corp. and SBC Communications Inc., for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 95 and 101 of the [FCC's] Rules*, CC Docket No. 98-141 (FCC 99-279), Paras. 1, 30 (rel. Oct. 8, 1999) (*Memorandum Opinion and Order*) [hereinafter, *SBC/Ameritech Merger Order*].

conditions was a requirement that, if SBC were to provide advanced services, it must do so through a separate advanced services affiliate and not through its operating companies, such as Ameritech Indiana.[2] Furthermore, the FCC found "that a rebuttable presumption is established that SBC/Ameritech's advanced services affiliate will not be a 'successor or assign' of an incumbent LEC or a BOC, and therefore [will] not be subject to incumbent LEC regulation under section 251."[3] In addition to this general exemption from the requirements imposed upon ILECs in Section 251(c), the FCC also explicitly "decline[d] to require the separate advanced services affiliate to make its services available for resale under 47 U.S.C. § 251(c)(4)."[4]

On February 9, 2000, Ameritech Advanced Data Services of Indiana, Inc. d/b/a SBC Advanced Solutions, Inc. [ASI] filed a petition with the IURC, requesting a certificate of territorial authority ["CTA"] to provide facilities-based and resold local exchange telecommunications services in the state of Indiana.

On January 9, 2001, and modified by Order on January 18, 2001, the U.S. Court of Appeals for the DC Circuit issued a decision in Docket No. 99-1441[5] that vacated the FCC's SBC/Ameritech merger order with respect to those provisions of the merger that "authoriz[e] exemption of advanced services provided through the Order's prescribed affiliate structure from the obligations imposed on incumbent local exchange carriers by 47 U.S.C. § 251(c)."[6] The Court found that, "Since Congress presubscribed no such affiliate structure for advanced services, we must assume that Congress did not intend for § 251(c)'s obligations to be avoided by the use of such an affiliate."[7]

The Court further found that:

> [W]hether or not SBC's premise [that the purpose of the requirements of § 251(c) is to prevent an ILEC from abusing its market power over the local loop to prevent competition."] is economically sound it is unfortunately not Congress's premise. . . . Congress did not treat advanced services differently from other telecommunications services. . . . It did not limit the regulation of telecommunications services to those that rely on the local loop. For that reason the [FCC] may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services . . . The [FCC's] interpretation of the Act's structure is unreasonable.

ASCENT v. FCC, 235 F.3d 662, 668 (D.C. Cir. 2001).

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[2] *SBC/Ameritech Merger Order*, Para. 363.
[3] *Id.* Para. 458.
[4] *Id.* n. 836.
[5] *Association of Communications Enterprises [ASCENT] v. FCC et al.*, 235 F.3d 662 (D.C. Cir. 2001) [hereinafter, *ASCENT v. FCC*].
[6] *ASCENT v. FCC*, Order at 2 (Jan. 18, 2001).
[7] *ASCENT v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001).

The "prescribed affiliate structure" refers to the separate affiliate that SBC was required to establish and use for providing advanced services throughout its 13-state region. Ameritech's pre-merger advanced services affiliate, Ameritech Advanced Data Services (AADS) is being folded into the SBC advanced services affiliate, SBC Advanced Solutions, Inc. [ASI].

Analysis

In the OI 2000 Stipulation and Settlement Agreement, AADS agreed that it "will make ADSL (Asymmetric Digital Subscriber Line) service available by December 31, 2003 at each of the wire centers identified in the Confidential Attachment 1 hereto."[8] Mr. James B. Shelley, President of Ameritech, made a similar commitment on behalf of, and as an Officer and authorized representative of, SBC Communications Inc.[9] The initial phase of the ADSL rollout is to be implemented no later than 30 days after the effective date of the March 19, 2001 Order in Cause No. 41660.[10]

AADS and the OUCC further "[r]ecognize[d] that the above-referenced ADSL deployment is directly related to and dependent upon a resolution of IURC Cause No. 41660 and assumes [IURC] approval of the AADS request for a certificate of territorial authority ("CTA") . . . consistent with those conditions normally contained in other CTA orders issued by the Commission for facilities-based local exchange telecommunications services [emphasis added]."[11]

In its post-hearing brief, AADS stated that it "is ready, willing, and able to rollout ADSL service in Indiana. It is waiting, not for resolution of the D.C. Circuit Court case, but for action by this Commission allowing it to move forward. For these reasons, the Commission should proceed to speedily grant Petitioner's CTA and pave the way for its introduction of ADSL service in Indiana."[12] On March 19, 2001, in Cause No. 41660, the Commission took AADS at its word and granted its CTA, subject to certain terms and conditions.

In doing so, the Commission expressed its concern that the deployment of advanced services "has not developed in Indiana as quickly as we had hoped. Nor has competition. In fact, Indiana has experienced slower growth in competition than many other states."[13] As a condition of its CTA, and to help encourage faster deployment of advanced services and the development of

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[8] Stipulation and Settlement Agreement at "Exhibit 1," Para. 1, IURC Consolidated Cause Nos. 40785-S1, 40849, and 41058 (July 10, 2000).
[9] Stipulation and Settlement Agreement at 41, IURC Consolidated Cause Nos. 40785-S1, 40849, and 41058 (July 10, 2000).
[10] Order, at Ordering Para. No. 7, IURC Cause No. 41660.
[11] Stipulation and Settlement Agreement at "Exhibit 1," Para. 2, IURC Consolidated Cause Nos. 40785-S1, 40849, and 41058 (July 10, 2000).
[12] Petitioner's Post-Hearing Brief Regarding D.C. Circuit Opinion at 4, IURC Cause No. 41660 (filed February 7, 2001).
[13] IURC Cause No. 41660, Order, Finding Para. No. 8, at 26.

competition, this Commission echoed the findings of the D.C. Circuit Court of Appeals in the ASCENT decision. It found that, "SBC/Ameritech must comply with TA-96's resale and unbundling requirements in its delivery of advanced services. Therefore, we find as a legal matter that until or unless the D.C. Circuit Court Opinion is overturned or reversed, AADS is subject to the resale obligations of Section 251(c) of TA-96."[14] Therefore, AADS/ASI has the same obligations under Section 251(c) as Ameritech Indiana.

To summarize, based upon the ASCENT decision of the D.C. Circuit Court of Appeals; the commitments made by Ameritech Indiana, AADS, and SBC in the OI Settlement Agreement; the statements of AADS in its legal brief in Cause No. 41660; and our Orders in both Cause No. 41660 and the consolidated OI 2000 cases, **AADS is obligated to deploy and provide stand-alone, end-to-end ADSL service in the selected Ameritech Indiana wire centers, on both a retail and a wholesale basis, pursuant to the deployment schedule set forth at Confidential Exhibit 1 in Consolidated Cause Nos. 40785-S1, 40849, and 41058. By "wholesale basis," we are referring to the requirements of Sections 251(c)(4), 252(d)(3), and 271(c)(2)(B)(xiv) of TA-96.** According to the deployment data that SBC has provided to the FCC on a non-confidential basis[15], Ameritech Indiana had already made 11 wire centers in Indianapolis DSL-capable as of December 31, 2000. Thus, we can think of absolutely no reason why AADS cannot meet the initial phase of this requirement. Indeed, SBC/ Ameritech is already advertising and promoting the availability of DSL service in certain Indianapolis locations – presumably those served by one of the aforementioned 11 wire centers.[16]

In Cause No. 41657, ASI also indicated that it provides DSL transport to ISPs[17] and could offer DSL transport to a few large business customers through customer specific contracts, if requested.

DSL Obligations of Ameritech Indiana

In its March 19, 2001, Order in Consolidated Cause Nos. 40785-S1, 40849, and 41058, the Commission observed that, "The recent [ASCENT Decision] casts additional uncertainty on the future role of AADS in satisfaction of the commitments [in the OI 2000 Settlement Agreement]."[18] In part because of this uncertainty, the Commission stated that "[I]t is our interpretation . . . , that Ameritech Indiana is assuming the obligation of assuring deployment of ADSL by December 31, 2003 . . . Ameritech Indiana is assuming that responsibility without

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[14] IURC Cause No. 41660, Order, Finding Para. No. 8, at 27.
[15] *SBC/Ameritech Merger Order*, Para. 376.
[16] *See, e.g.,* http://www.ameritech.net/dyn/ndNSAPI.nd/ndLoop/pgAvailabilitySBC.
[17] "Affidavit of John S. Habeeb" [attached to "Ameritech Indiana's Statement of Position – Disputed OSS Testing and Performance Issues Regarding Certain DSL Transport Services Provided by ASI"], Paras. 20, 22, 24, Cause No. 41657 (May 30, 2001).
[18] IURC Consolidated Cause Nos. 40785-S1, 40849, and 41058 ["OI 2000 Order"], sec. 6. (b), at 32 (March 19, 2001).

regard to an eventual grant to AADS of a CTA, and with the understanding that the terms of its merger agreement preclude Ameritech Indiana from offering those services. The ADSL deployment commitment is the responsibility of Ameritech Indiana and is subject to the provisions of subsection W. Enforcement."[19]

We agree with the Indiana CLECs that Ameritech Indiana is attempting to avoid its clear section 251 obligations by reliance on its creative corporate structure. Ameritech Indiana is attempting to mask its responsibility by having an affiliate (ASI) provide DSL Transport to another affiliate (Ameritech Interactive Media Services, or "AIMS") who in turn provides it to end-users. Then Ameritech claims protection under the FCC finding that DSL transport services sold to ISPs as an input component for the ISPs high speed Internet access product is not sold at retail.[20] We cannot sanction such structuring and find that the Order issued by the D.C. Circuit Court and our Orders and reliance on Ameritech Indiana's expressed commitments are controlling. Therefore, based upon the filings submitted, the request of the Indiana CLECs is granted, consistent with the foregoing discussion.

IT IS SO ORDERED.

Abby R. Gray, Administrative Law Judge

June 12, 2002

Date

Joseph M. Sutherland
Secretary to the Commission

[19] *Id.*

[20] *Second Advanced Services Order,* 14 FCC Rcd at 19246 para. 19.