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FOCAL COMMUNICATIONS CORPORATION )  
OF ILLINOIS )  
)  
Petition for Arbitration Pursuant to )  
Section 252(b) of the Telecommunications )  
Act of 1996 to Establish an Interconnection )  
Agreement with Illinois Bell Telephone )  
Company d/b/a Ameritech Illinois )

CHIEF CLERK'S OFFICE

Docket 00-0027

**AMERITECH ILLINOIS' MOTION TO STRIKE ISSUE 8.**

Illinois Bell Telephone Company (“Ameritech Illinois”), by its attorneys, respectfully moves pursuant to 83 Ill. Admin. Code § 200.190 to strike as irrelevant and immaterial Issue 8 in the Petition for Arbitration (“Petition”) filed by Focal Communications Corporation of Illinois (“Focal”). Issue 8 should be stricken because its subject matter is not within the scope of sections 251 and 252 of the Telecommunications Act of 1996 (“1996 Act”), and therefore is not arbitrable under section 252(b) of the 1996 Act. In further support of its motion, Ameritech Illinois states as follows:

1. Focal filed the Petition pursuant to section 252(b) of the 1996 Act.
2. Section 252(b) authorizes either party to the negotiation of an interconnection agreement under section 252(a) to petition the State commission to arbitrate “open issues” in the negotiations.
3. The scope of the section 252(a) negotiations — and thus of the open issues that can be raised in a section 252(b) arbitration petition — is defined in section 252(a): “interconnection, services, [and] network elements pursuant to section 251. ”
4. Focal, then, was entitled under section 252(a) to demand that Ameritech Illinois negotiate the interconnection, services and network element matters that are the

subject of section 251. To the extent those matters were not resolved via negotiation, Focal was entitled by section 252(b) to petition this Commission to arbitrate them. Focal was *not*, however, entitled to demand that Ameritech Illinois negotiate matters that are outside the scope of section 251, or to petition for arbitration of such other matters. Focal could not, for example, demand that Ameritech Illinois negotiate the sale of its headquarters building and then obtain Commission arbitration of the proposed sale under section 252(b).

5. Issue 8 in Focal's Petition poses the question whether the parties' interconnection agreement should require Ameritech Illinois to pay Focal liquidated damages if Ameritech Illinois does not meet due dates for provisioning access services that Focal buys out of Ameritech Illinois' access *tariff*. (See Petition, p. 12.)'

6. The access services that are the subject of Issue 8 are neither interconnection, nor unbundled network elements, nor resale services, nor anything else covered by section 251 of the Act. That is why the parties' current interconnection agreement does not cover them and why Focal buys them out of the tariff ~~---~~ Ameritech's access tariff. (Barnicle Statement, p. 30, lines 6-7.) And it is also why the parties' new interconnection agreement will not cover them and why Focal will continue to buy them out of the tariff.

7. Issue 8 has nothing to do with the matters covered by section 251 of the 1996 Act. Section 252(a) did not (~~and~~ does not) entitle Focal to demand that Ameritech Illinois discuss liquidated damages relating to purchases of access services out of Ameritech Illinois'

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<sup>1</sup> Focal's framing of its position on Issue 8 in the Petition may make it appear that only some of the purchases in question are tariff purchases. Focal's testimony and proposed contract language, however, make clear that Issue 8 concerns *only* access services that Focal buys out of Ameritech Illinois' tariff. (See Verified Statement of John Barnicle, p. 29 et seq.)

access tariffs as part of the parties' interconnection agreement negotiations. Section 252(b) did not (and does not) authorize Focal to ask for arbitration of that subject in its Petition. And Section 252(c) does not authorize this Commission to arbitrate the issue. It is certainly proper to strike from an arbitration petition filed under Section 252(b) an issue that is not subject to arbitration, and, indeed, there is precedent for doing so. (See Arbitration Decision, In re Petition of Low Tech Designs, Inc. for Arbitration, ICC Docket No. 97 AB-001, March 31, 1997)(attached as Exhibit A.) Accordingly, the Commission should strike Issue 8 from Focal's Petition.

8. With Issue 8 out of the case, Focal's evidence concerning the issue is irrelevant and beyond the scope of the Commission's authority to consider in this arbitration. Accordingly, the Commission should also strike the portion of the Verified Statement of John Barnicle that relates to Issue 8 (namely, p. 29, line 5, through p. 37, line 19), and exhibits 1.7 and 1.8 to the Barnicle Statement.

WHEREFORE Ameritech Illinois respectfully requests that the Commission enter an Order striking Issue 8 from the Petition and striking the material relating to Issue 8 from the Verified Statement of John Barnicle and its exhibits.

Dated: February 11, 2000

Respectfully submitted,

AMERITECH ILLINOIS

By: 

Christian F. Binnig  
Dennis G. Friedman  
Mayer, Brown & Platt  
190 S. LaSalle Street  
Chicago, Illinois 60603  
(312) 782-0600

Nancy H. Wittebort  
Ameritech Illinois  
225 W. Randolph St.  
Chicago, Illinois 60606  
(312) 727-4517

# EXHIBIT 1

STATE OF ILLINOIS



**ILLINOIS COMMERCE COMMISSION**

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*April 2, 1997*

Re: 97 As-001

Dear Sir/Madam:

*Enclosed is a certified copy of the Order entered by this Commission.*

*Sincerely,*

A handwritten signature in cursive script that reads "Donna M. Caton".

Donna M. Caton  
Chief Clerk

Enc.

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

LOW TECH DESIGNS, INC. PETITION :  
FOR ARBITRATION PURSUANT TO SEC. :  
252(b) OF THE TELECOMMUNICATIONS :  
ACT OF 1996 TO-ESTABLISH WHOLESAL :  
RATES AND AN INTERCONNECTION : 97 AB-001  
AGREEMENT FOR ACCESS TO AND RATES :  
FOR UNBUNDLED NETWORK ELEMENTS :  
WITH ILLINOIS BELL TELEPHONE :  
COMPANY D/B/A AMERITECH ILLINOIS :

**ARBITRATION DECISION**

**I. PROCEDURAL POSTURE**

On January 30, 1997, Low Tech Designs, Inc. ("LTD") filed a Petition for Arbitration to Establish an Interconnection Agreement ("Petition") with Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech"). The Petition stated that LTD initially intends to enter the local exchange market under the resale provisions of the Telecommunications Act of 1996 (the "1996 Act"). LTD also states that it intends to offer enhanced call processing services by utilizing unbundled network elements. Apparently, LTD intends to offer enhanced call processing services by obtaining access to Ameritech's Advanced Intelligent Network ("AIN") and by interconnecting LTD's software with Ameritech's AIN.

The Petition sets forth seven issues for arbitration. (See LTD Petition, pp. 14-19, pars. A.-G.) Six related to access to and interconnection with AIN, and the seventh related to the ILEC's duty under the 1996 Act to negotiate in good faith. The gist of the LTD Petition involves the use of dialing codes, such as on Ameritech's AIN. The Petition set forth no issues relating to resale, and noted that resale issues, and other issues that the parties had not yet discussed, would be presented at a later time if the parties were unable to arrive at agreement.

On February 14, 1997, the Examiner granted Ameritech's motion pursuant to 83 Ill. Adm. Code Sec. 200.190 to strike portions of the Petition. The granting of the motion disposed of the issue in the Petition relating to the ILEC's duty to negotiate in good faith.

Pursuant to notice and applicable law, the Hearing Examiner conducted an initial pre-hearing conference on February 11, 1997, at which appearances were entered for LTD, Ameritech and Staff. The Examiner set a schedule for the remainder of the proceeding.

At a hearing on February 21, 1997, the parties presented oral arguments and the Hearing Examiner directed LTD to respond to two data requests sought to be answered by Ameritech.

On February 24, 1997, Ameritech filed Ameritech Illinois' Response to Low Tech Design's Petition for Arbitration; Ameritech Illinois' Motion to Deny the Petition; and the verified statements of Wayne Heinmiller, William Palmer and H. Edward Wynn. In response, on February 28, 1997, LTD and Commission Staff filed a response to the Ameritech Motion To

Deny the Petition. Ameritech filed a Reply and a Proposed Order on March 4, 1997. A Proposed Order was duly served on the parties on March 10, 1997. Briefs on Exception and Reply Briefs were filed on March 17 and 21, 1997, respectively.

## II. ISSUES

A. This *case* presents an issue of *first* impression for this Commission: an entity which has not been certified in Illinois, requesting arbitration with an ILEC under the Telecommunications Act of 1996. The fact that LTD is not certified to operate in Illinois is not dispositive of the case. All parties concede that there is no requirement under the 1996 Act that an entity requesting arbitration be certified by a state commission.

Staff and Ameritech contend that LTD must at least be a “telecommunications carrier” as defined under the 1996 Act, and it is not. LTD, while not conceding that it has no arbitration standing if it is not a telecommunications carrier, attempts to explain how it is one.

B. The second issue is whether LTD's Petition relates to interconnection, access to unbundled network elements, resale, or any other matter that is within the scope of the 1996 Act in order to be properly arbitrated.

Ameritech contends that (1) the Petition sets forth no issue having to do with resale, as LTD initially proposed; (2) LTD does not seek interconnection as that term is used in the 1996 Act; and (3) LTD does not seek access to unbundled network elements for any purpose authorized by the 1996 Act. In response, LTD contends that it is seeking interconnection and access to unbundled network elements as permitted under the 1996 Act.

## III. DISCUSSION & CONCLUSIONS

### A. WHETHER LTD MEETS THE “TELECOMMUNICATIONS CARRIER” REQUIREMENT

The following definitions are essential in order to ascertain the meaning of the term “telecommunications carrier” under the 1996 Act:

Telecommunications carrier.--The term “telecommunications carrier” means any provider of telecommunications services . (47 U.S.C. § 3(49)) (emphasis added).

Telecommunications service.--The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. (47 U.S.C. § 3(51)) (emphasis added).

Telecommunications.--The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. (47 U.S.C. § 3(48)) (emphasis added).

Ameritech argues that LTD is a “telecommunications carrier” if, and only if, it offers for a fee the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.

Ameritech also refers to ¶ 992 of the FCC’s First Report and Order for the proposition that, in order to qualify as a telecommunications carrier under the 1996 Act, an entity must be engaged in providing telecommunications. Paragraph 992 provides:

We conclude that to the extent a carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public . . . , the carrier falls within the definition of “telecommunications carrier.” We find that this definition is consistent with the 1996 Act . (Emphasis added).

Ameritech states that there is no evidence of record which indicates that LTD is engaged in providing telecommunications.

While LTD suggests that it is a telecommunications carrier under the 1996 Act, it attempts to dismiss its status as telecommunications carrier as even being relevant to the inquiry of its standing to seek arbitration from this Commission, LTD attempts to reduce this issue as one merely involving the semantic meaning of being engaged in providing telecommunications. LTD states that it not only is engaged in negotiations with Ameritech, but also with BellSouth, GTE, NYNEX, and Pacific Bell for the same purposes. LTD also states that it has participated actively with the Alliance For Telecommunications Solutions, a telecommunications service provider industry forum, and has made extensive filings before the FCC in matters regarding the AIN.

With respect to Ameritech’s argument under ¶ 992 of the FCC’s First Report and Order, LTD points out that ¶ 992 does not state that a telecommunications carrier must be “actively and currently” providing telecommunications for a fee, but only that an entity is a telecommunications carrier “to the extent it is engaged in” providing telecommunications for a fee. LTD also asserts that it is “engaged in” negotiations with several incumbent carriers, and that its president has been “actively engaged as a participant in” an industry forum concerning AM.

As Staff cogently states in its pleading, the duty to interconnect under Sections 251(a) (1) and (c) (2) of the 1996 Act is limited to interconnection with or for the facilities and equipment of telecommunications carriers. 47 U.S.C. Secs. 251(a) (1) and (c) (2). Many other sections of the Act limit duties or obligations to “requesting telecommunications carriers” or “providers of telephone exchange service” or “providers of telecommunications services.” 47 U.S.C. Secs. 251(b) (3), 251 (b) (4), (c) (1), (c) (3) and (d) (2) (B).

Staff also pointed out that while Congress did not state explicitly that every duty under Section 251 be extended only to “telecommunications carriers” or “providers of telecommunications services”, the basis of such an intent subsequently has been established. Staff cites to the FCC finding that “Section 251 (c) (4) does not require incumbent LECs to make services available for resale or at wholesale rates to parties who are not telecommunications carriers’ or who are purchasing services for their own uses.” First Report and Order, Par. 875. The FCC further stated that the negotiation process established by Congress for the implementation of Section 251 requires incumbent LECs to negotiate agreements, including resale agreements, with “requesting telecommunications carrier(s),” not with end users or other entities.” First Report and Order, Par. 875, footnote citing to 47 U.S.C. Sec. 2529 (a) (1) omitted.

## CONCLUSION

There is no record evidence to support LTD’s assertion that it is somehow a telecommunications carrier for the purposes of interconnection under the 1996 Act. To support its assertion that it is a telecommunications carrier, LTD proffered a pleading from a Georgia proceeding within which Bell South stated that LTD is a telecommunications carrier within the meaning of the 1996 Act. Viewed in light of the total pleading, that statement seems to be gratuitous, because it is contained in Bell South’s Motion To Dismiss LTD’s Arbitration Petition. The Bell South concession that LTD is a “telecommunications carrier” was provided for reasons that this Commission may never guess. LTD’s offering of this pleading is confounding, as its ultimate goal is the dismissal of the LTD Arbitration Petition for services which seem to be essentially the same as those covered in the Illinois petition herein. The Bell South pleading is not even a Final Order of which this Commission could take administrative notice, nor is it an admission of a party to this proceeding. Therefore, it will be given no weight.

This stretch to show that it is a telecommunications carrier reveals LTD’s recognition that it is critical to the arbitration process that LTD stand as a telecommunications carrier under the 1996 Act. As Ameritech pointed out, LTD does not dispute that Ameritech’s duties under the 1996 Act run only to telecommunications carriers. Accordingly, LTD asserts that it is one.

As discussed above, LTD directs attention to activities that it is engaged in to prepare to provide service at a point in the future. However, it fails to provide evidence that it is currently engaged in providing telecommunications service.

The goal of the 1996 Act is clear: “... to promote competition and reduce regulation in order to secure lower prices and higher quality services for American consumers and encourage the rapid deployment of new telecommunications technologies.” Preamble to Pub.Law 104-104, February 8, 1996, 110 Section 56. However, in order to protect the consumer, the privilege of market entry is not unbridled. The 1996 Act is replete with references to the threshold standards and ability an entity must possess as a telecommunications carrier to give some measure of assurance that the consumers can rely on it to provide telecommunications services.

Merely to be in the inchoate phase of planning, with a desire to serve the public, is not enough. More must be required of an entity to entitle it to make demands on the public network. It is not a burdensome requirement under the 1996 Act for an entity to show some evidence that it has the financial, managerial, and technical ability to serve the public, by showing that -- at least somewhere in this country -- the entity is a telecommunications carrier actively engaged in

the provision of telecommunications services. This interpretation of the 1996 Act comports with our own statute.

In response to the Proposed Order issued in this matter Staff, in its Brief on Exceptions and Reply Brief on Exceptions, did not take exception to the Proposed Order and recommended that the Commission give consideration to entering the Order. Ameritech also supported the Order in its Reply to LTD's Exceptions. LTD took exception to the Proposed Order's assertion that the Commission's "telecommunications carrier" requirement is both onerous and impermissible under the 1996 Act. Under this reasoning LTD merely continues to confuse the issue. As Ameritech pointed out, in its Exceptions, the "telecommunications carrier" requirement is different from the question of "certification." (Ameritech's Reply to Exceptions, page 3 par.1). Ameritech further pointed out that LTD ignores Section 253(b) of the 1996 Act, which provides, "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis. requirements necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Thus, even if the Act did not require requesters to be telecommunications carriers, Section 253(a) would not prohibit the State from enforcing competitively neutral barriers to entry that ensure the quality of telecommunications and safeguard the rights of consumers

Ameritech also cited a Final Order entered by the Public Service Commission of South Carolina ("PSCSC") denying LTD's Petition for Arbitration. The PSCSC relied on the consumer safety language of Section 253(b) to reject LTD's argument that under Section 253(a) state commissions cannot require an entity to show some indication of an ability to serve the public. (See PSCS Dkt. 97-052-C Order No. 97-153, March 14, 1997).

This Commission agrees with Ameritech and Staff that LTD's Petition must be denied on the ground that LTD does not meet the threshold requirement that it be a telecommunications carrier under the 1996 Act.

#### B. WHETHER THE ISSUES TO BE ARBITRATED ARE WITHIN THE SCOPE OF THE 1996 ACT

Ameritech contends that what LTD's Petition seeks is not within the scope of the 1996 Act, and therefore is not subject to arbitration under the 1996 Act. Specifically, Ameritech contends that (1) the Petition sets forth no issue having to do with resale; (2) LTD does not seek interconnection as that term is used in the 1996 Act; and (3) LTD does not seek access to unbundled network elements for any purpose authorized by the 1996 Act.

While the Petition states that LTD intends to enter the local exchange market using the resale provisions of the 1996 Act, none of the issues presented for arbitration relates to resale. This Commission has ruled in another docket on the wholesale rates to be made available to carriers for resale. LTD concedes the fact that it is free to resort to the previous Commission wholesale discount percentages, without direct Commission involvement in order to provide resale. Therefore, the issue of resale need not be addressed in this proceeding.

With respect to interconnection, Ameritech relies upon Section 251(c)(2), which imposes on ILECs the duty “to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with [Ameritech Illinois’] network. . . , for the transmission and routing of telephone exchange service and exchange access . . .” (Emphasis added.)

Ameritech also relies upon ¶ 176 of the FCC’s First Report and Order, which provides, “[T]he term ‘interconnection’ under Section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic.”

With respect to access to unbundled network elements, Ameritech cites Section 251(c)(3), which imposes on ILECs the duty “to provide . . . for the provision of a telecommunications service . . . access to network elements on an unbundled basis. . . .” (Emphasis added.)

Ameritech contends that LTD does not seek interconnection “for the transmission and routing of telephone exchange service and exchange access” as required by Section 251(c)(2), and that no issue set forth in the Petition relates to the physical linking of two networks for the mutual exchange of traffic. LTD does not have a network (or traffic), and would not have a network (or traffic) even if it obtained everything it seeks in the Petition. Rather, LTD seeks to become an enhanced service provider — i.e., it proposes to offer services (such as “\*11”) to subscribers of LECs to use in telephone calls placed over those carriers’ networks. Ameritech contends that is not the “mutual exchange of traffic” to which the Section 251(c)(2) duty to interconnect refers, or the physical linking of two networks.

Ameritech also contends that LTD is not seeking to interconnect “facilities and equipment” as required by Section 251(c)(2). Rather, LTD proposes to “interconnect” software, which is not equipment. Section 3(50) of the 1996 Act defines “telecommunications equipment” as “equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).” (Emphasis added.) In other words, Ameritech contends, software is not itself equipment, but is included along with telecommunications equipment that has software as an integral component. According to Ameritech, LTD does not propose to interconnect equipment that has software as an integral component. Instead, it proposes to “interconnect” software, which the 1996 Act does not contemplate.

Ameritech contends that the AIN-based services that are the subject of LTD’s Petition do not entail the transmission, between points specified by the user, of information of the user’s choosing, without change in the form of the content of the information as sent and received. That is, LTD does not seek to offer customers the ability to place and receive telephone calls (or faxes, etc.). Rather, LTD proposes to be an enhanced service provider. It does not seek to become a LEC, but to offer enhanced services to subscribers of LECs. Accordingly, because those subscribers receive the ability to place and receive telephone calls not from LTD but from their LECs, LTD is not seeking access to network elements “for the provision of a telecommunications service.” In support of its position, Ameritech lists specific services that LTD has stated it intends to provide, and refers to the

verified statement of Wayne Heinmiller that the services that LTD intends to provide do not meet the definition of "telecommunications service" in the 1996 Act.

LTD presents a strong argument showing that the interrelationship between software and hardware is sometimes impossible to separate equally critical components of "telecommunicationsequipment." LTD also stated that in some instances the software link is the only means of interconnection available to access Ameritech's system. LTD asserts, however, that it seeks interconnection as that term is used in the statute, and that it seeks access to unbundled network elements for the provision of a telecommunications service.

Ameritech continued in its Exceptions to say that the Petition seeks Arbitration for matters that are not within the scope of the Act, and that serves as another independent basis for dismissing the Petition. In its Exceptions LTD did not address the scope of service issue beyond its arguments presented above.

### CONCLUSION

Due to the fact that the LTD Petition for Arbitration is being dismissed on the grounds set forth above, there is no need for this Commission to further analyze and make a ruling concerning the issue of whether what LTD seeks in this proceeding is within the scope of the 1996 Act.

By the Commission this 31<sup>st</sup> day of March 1997.

(SIGNED) DAN MILLER

Chairman

(S E A L)

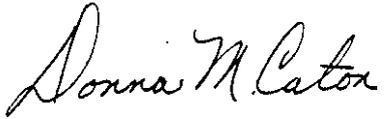
STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION  
CERTIFICATE

Re: 97 AB-001

I, DONNA M. CATON, do hereby certify that I am Chief Clerk of the Illinois Commerce Commission of the State of Illinois and keeper of the records and seal of said Commission with respect to all matters except those governed by Chapters 18a and 18c of The Illinois Vehicle Code.

I further certify that the above and foregoing is a true, correct and complete copy of the order made and entered of record by said Commission on March 31, 1997.

Given under my hand and seal of said Illinois Commerce Commission at Springfield, Illinois, on April 2, 1997.

  
Chief Clerk

**CERTIFICATE OF SERVICE**

I, Michael T. Sullivan, an attorney, hereby certify that I caused a copy of Ameritech Illinois' Motion to Strike Issue 8 to each person on the attached service list, by the means indicated, this 11th day of February, 2000.

*Michael T. Sullivan*

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Michael T. Sullivan

## **SERVICE LIST**

### **VIA MESSENGER DELIVERY**

Jane Van Duzer  
Focal Communications Corporation  
200 N. LaSalle St., Ste. 1100  
Chicago, IL 60601

Carrie J. Hightman  
Schiff Hardin & Waite  
6600 Sears Tower  
Chicago, IL 60606

### **VIA OVERNIGHT COURIER**

Hearing Examiner William Showtis  
Illinois Commerce Commission  
P.O. Box 19280  
527 East Capitol Avenue  
Springfield, IL 62706

Hearing Examiner Donald Woods  
Illinois Commerce Commission  
P.O. Box 19280  
527 East Capitol Avenue  
Springfield, IL 62706

Matthew L. Harvey  
Staff Counsel  
Illinois Commerce Commission  
160 N. LaSalle St., Suite C-800  
Chicago, IL 60601-3104