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The Staff of the Illinois Commerce Commission ("the Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Brief the above-captioned matter.

## I.

### **STATEMENT OF THE CASE**

#### A. Procedural History

The Citizens Utility Board (hereafter "CUB") brought this complaint on January 19, 2000, alleging generally that the Illinois Bell Telephone Company (hereafter "Ameritech") has marketed its SimpliFive and CallPack plans in a misleading or affirmatively deceptive manner, representing to customers that, if they subscribe to either the plans, they will realize savings over Ameritech's regular tariffed rates, when, in truth and fact such is rarely or never the case. CUB Complaint, ¶¶ 1-14, 17. CUB set its Complaint forth in three counts, raising Count I as a misrepresentation claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, which, CUB averred, the Commission has the authority to hear under Section 4-101 of the Public Utilities Act, 220 ILCS 5/4-101; Count II as a claim of "unjust, unreasonable, unsafe [or] improper" practices under Section 8-501 of the Public Utilities Act, 220 ILCS 5/8-501; and Count III as a claim of impeding the development of competition in violation of Section 13-514 of the Public Utilities Act, 220 ILCS 5/13-504. *See, generally, CUB Complaint.*

CUB requested in its Prayer for Relief that the Commission investigate Ameritech's practices associated with SimpliFive and CallPack services; and that the Commission order Ameritech to cease and desist from the use of the misleading and competition-impeding practices alleged, and to cease and desist from charging residential customers

rates for non-competitive services which are higher than tariffed rates. In addition, CUB sought “damages and/or reparations” to affected consumers, and payment of CUB’s attorney’s fees and costs. Finally, CUB sought an order in the nature of a mandatory injunction which would require Ameritech to provide sufficient information to consumers to enable them to make “an informed choice” regarding various rate options. *See, generally, Relief Requested, CUB Complaint.*

On March 2, 2000, Ameritech filed a Motion to Dismiss Counts I and III of the Complaint, asserting that the Commission had no authority to hear Count I of the complaint, and that Count III was both substantively and procedurally defective. *See, generally, Ameritech Motion to Dismiss.*

The Staff asserted that the Commission had no authority to enforce the Consumer Fraud Act, and that CUB’s Section 13-514 claim was procedurally defective. *See, generally, Staff Response to Motion to Dismiss.* The Staff, however, argued that, in evaluating CUB’s Section 9-250 claim, the Commission could and should consider the Consumer Fraud Act, and should evaluate the claim based in part upon that Act. *Id.* The Hearing Examiner deferred formal ruling on the Motion then pending, but stated that “information ... associated with violations of [the Consumer Fraud] Act would be appropriate to the issue of whether or not Ameritech’s marketing practices are just and reasonable.” Tr. 24 . At the same time, he ordered stricken those portions of the relief sought by CUB which are available only under the Consumer Fraud Act, most specifically, CUB’s prayer for attorney’s fees. *Id.* Hearings were set for, and held, on May 31 and June 1, 2000, in the Commission’s Chicago office. *See Tr. 20 et seq.*

B. Summary of Evidence  
1. CUB's Evidence

CUB introduced the testimony of the following witnesses: Charlotte TerKeurst, CUB Exhibit Nos. 1.0, 1.1, Tr. 30 -108; Aleen Bayard, CUB Exhibit Nos. 2.0, 2.1, Tr. 109 - 144; Martin Cohen, CUB Exhibit Nos. 3.0, 3.1; Jonathan Goldman, CUB Exhibit Nos. 4.0, 4.1, Tr. 146 - 179; and Pamela Steigman, CUB Exhibits No. 5.0, 5.1.

Ms. TerKeurst testified, in summary, that she had reviewed Ameritech's basic rates and rates for SimpliFive and CallPack, and had calculated gross customer minutes of use for each of Bands A, B, and C. CUB Exhibits No. 1.0, 1.1. Based upon these calculations, she concluded that hypothetical customers with statistically average use patterns, and with low, moderate and high usage, would not save money by subscribing to SimpliFive or CallPack. Id. She consequently gave it as her opinion that Ameritech's marketing of SimpliFive and CallPack were deceptive and misleading, inasmuch as Ameritech allegedly failed to disclose to customers the fact that either plan was likely to increase the cost of calling in non-competitive Bands A and B. Id. Ms. TerKeurst further testified that, in her opinion, Ameritech should be required to give refunds to customers, make disclosures to customers regarding the rates for each of the Ameritech rate plans, and be prohibited from advertising and marketing the plans in an unfair, deceptive, or misleading manner. Id.

Aleen Bayard testified in her capacity as a advertising and marketing professional, and gave it as her opinion that Ameritech's advertising and marketing of SimpliFive and CallPack was misleading and deceptive. Ms. Bayard claimed that it created, and indeed was intended to create, the impression that customers would save money by subscribing to

SimpliFive or CallPack, when in fact, this was rarely if ever likely to be the case, based upon Ms. TerKeurst's calculations. CUB Exhibit Nos. 2.0, 2.1.

Martin Cohen testified that he had been contacted on five occasions by Ameritech telemarketers, and on each occasion, had been advised that he would save money by subscribing to SimpliFive, when in truth and in fact, this was not the case. CUB Exhibit Nos. 3.0; 3.1. Mr. Cohen further testified that, in each case, the telemarketer with whom he spoke made some other false representation to him. Id.

Jonathan Goldman testified that he had received the telephone bills of Pamela Steigman, and determined that she would have saved money had she subscribed to basic rates, rather than to the CallPack, and thereafter the SimpliFive plans to which she did subscribe during several months during 1999-2000. CUB Exhibit 4.0, 4.1.

Pamela Steigman testified that she was and is an Ameritech customer, and that Ameritech customer service representatives, in response to her requests for information, advised her to subscribe to SimpliFive and thereafter to CallPack. She further testified that the customer service representatives stated to her that these plans were optimal for her and would save her money, when in truth and in fact this was not the case. CUB Exhibit Nos. 5.0, 5.1.

## 2. Ameritech's Evidence

Ameritech presented the testimony of Urvi Shah, Ameritech Exhibit Nos. 1.0, 1.1, 1.2, Tr. 243 - 351; David Sorenson, Ameritech Exhibit Nos. 2.0, 2.1, 2.2, Tr. 194 - 236; Jeffrey Fargo, Ameritech Exhibit Nos. 3.0, 3.1, Tr. 385 - 402; and Derek Curtis, Ameritech Exhibit Nos. 4.0, 4.1, Tr. 352 - 384.

Ms. Shah testified as Ameritech's Director of Local Toll and Usage, in which capacity she supervised the marketing and advertising of SimpliFive and CallPack. Ameritech Exhibits No. 1.0, 1.1. She testified regarding the manner in which SimpliFive and CallPack were developed, the customers to whom they were marketed, and the substance of the advertisements, solicitations, and marketing materials used. Id. She gave it as her opinion that the methods and practices Ameritech used in marketing and advertising the two calling plans were not deceptive or misleading, and, with respect to truthfulness and disclosure, met or exceeded the standards prevailing in the telecommunications industry. Id.

David Sorenson testified that he prepared and conducted a study of the January, 2000 usage of SimpliFive and CallPack customers, to determine whether those customers in fact saved money over basic rates, both individually and in the aggregate. Ameritech Exhibit Nos. 2.0, 2.1, 2.2. Based upon the results of this study, Mr. Sorenson testified that \*\*\*\*\* such customers saved money over basic rates, and that customers of the two plans also saved substantial sums of money on an aggregated basis. Id.

Jeffrey Fargo testified that he supervised Ameritech's contract telemarketers who solicited "winback" customers to return to Ameritech Band C service, often along with the SimpliFive rate plan. Ameritech Exhibit Nos. 3.0, 3.1. Mr. Fargo stated that such telemarketers were trained not to represent to consumers that they would realize savings from subscribing to the SimpliFive plan, but rather to stress the program's other asserted virtues and benefits. Id. Mr. Fargo stated that, as a quality control measure, he listened to solicitations made by contract telemarketers, and that such solicitations were, in almost all cases, conducted in a manner consistent with Ameritech's training and procedures. Id.

Derek Curtis testified that he supervises customer service representatives at a large Ameritech Customer Care facility in Chicago. Ameritech Exhibit Nos. 4.0, 4.1. Mr. Curtis stated that Ameritech customer service representatives were trained to respond to customer inquiries regarding rates by recommending the rate plan optimal for each customer, a result achieved through the use of on-line calculator tools which enable the representative to easily calculate the rates for each plan based on the individual customer's use patterns. Id. Mr. Curtis further stated that Ameritech has in place procedures which are designed to prevent customer service representatives from making misleading or improper representations regarding rates. Id. Mr. Curtis overhears, as a quality control measure, numerous calls between customer service representatives and customers, and states that, in almost all cases, the representatives act in a manner consistent with their training and Ameritech procedures. Id.

### 3. Staff's Evidence

The Staff sponsored the Testimony of Cindy Jackson, Staff Exhibit No. 1.0; and Robert Koch, Staff Exhibit No. 2.0, Tr. 183 - 194.

Cindy Jackson testified in her capacity as a member of the Consumer Services Division of the Staff. Staff Exhibit No. 1.0. Ms. Jackson testified that customers of local telephone service are generally not well-informed regarding their choices in the market, and that it is important to the development of a competitive market that they become better informed. Id. She testified regarding her review of Ameritech's marketing and advertising practices and materials, and gave it as her opinion that the practices and materials were generally inoffensive. Id. However, Ms. Jackson stated that, in her opinion, certain specific Ameritech practices were neither just nor reasonable, a trait common in the industry. Id.

She gave it as her opinion that the remedial disclosures advocated by Ms. TerKeurst were reasonable, and ought to be implemented. Id. She also proposed alternative remedial measures. Id.

Robert Koch testified that he reviewed Ms. TerKeurst's calculations regarding the application of basic rates, SimpliFive rates, and CallPack rates to the use patterns of the hypothetical average customers she described in her testimony. Id. Mr. Koch stated that he determined that two of Ms. TerKeurst's six hypothetical average customers would save money by subscribing to SimpliFive. Id. Mr. Koch stated that Ms. TerKeurst's calculations did in fact show that the typical low and average volume consumers would not benefit by one of the plans. Mr. Koch concluded that improving customer awareness of their calling patterns would help eliminate the problem of choosing a usage plan incorrectly. Id.

#### 4. Involvement of the Attorney General

The Attorney General of Illinois' Petition for Leave to Intervene in the docket was granted on February 15, 2000, and the Attorney General appeared at hearing. Tr. 21.

After the close of hearings, and the resolution of a discovery dispute between CUB and Ameritech, the record was marked "Heard and Taken", and a briefing schedule set.

## **II.**

### **LEGAL STANDARDS**

#### A. Standard of Proof

Section 10-15 of the Illinois Administrative Procedure Act provides that "[u]nless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under this Act by an agency shall be the

preponderance of the evidence.” 5 ILCS 100/10-15. As neither the provisions of the Public Utilities Act governing complaints, *see, generally* 220 ILCS 5/10-108 *et seq.*, nor the Commission’s rules, *see generally*, 83 Ill. Admin. Code 200.100 *et seq.*, specify any other standard, the standard of proof in this case is the preponderance of the evidence.

**B. Burden of Proof**

The party seeking relief generally bears the burden of proof. People v. Orth, 124 Ill. 2d 326, 337 (1988). The term “burden of proof” includes the burden of going forward with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d. 38, 43 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. Ambrose v. Thornton Twp. School Trustees, 274 Ill. App. 3d 676, 690 (1<sup>st</sup> Dist 1995), *app. den.*, 164 Ill. 2d 557 (1995); Chicago Board of Trade v. Dow Jones & Co., 108 Ill. App. 3d 681, 686 (1<sup>st</sup> Dist. 1982).

As CUB is the complainant here, and the party seeking relief, it bears the burden of proof and persuasion here.

**III.**

***POSITIONS OF THE PARTIES***

In Count II of its Complaint, CUB alleges that, in its advertising and marketing of its SimpliFive and CallPack calling plans, Ameritech has engaged in “unjust, unreasonable, unsafe [or] improper” practices within the meaning of, and in violation of, Section 8-501 of the Public Utilities Act, 220 ILCS 5/8-501. CUB’s complaint in this matter sounds essentially in consumer fraud.

A. CUB's Argument

CUB's argument has, as its central premise, the assertion that for a customer with statistically average use patterns, subscribing to either CallPack 100 and SimpliFive will experience higher telephone charges than he or she would under basic rates. CUB Brief at 4, *et seq.*; CUB Exhibit No. 1.0 at 6-11, Attachments 2-7. CUB bases this premise upon the testimony of its witness Charlotte TerKeurst, who determined that a statistically average customer makes **\*\*%** of his or her local calls within Band A (0-8 miles from the central office serving his or her home); **\*\*%** of his or her local calls to Band B (8-15 miles from the central office); and **\*\*%** of his or her local calls to Band C (15 or more miles from the central office). CUB Exhibit 1.0P at 3, 7. Using these percentages as a basis, Ms. TerKeurst then calculated monthly telephone bills under each rate plan, and under basic rates, for hypothetical average customers in MSA-1, and outside of MSA-1, with weekly usage of 9, 30, and 90 Band A calls, and the corresponding number of Band B and C calls. See CUB Exhibit No. 1.0P, Attachments 2 - 7. Her conclusion was that, for each such hypothetical average customer, subscribing to either SimpliFive or CallPack would result in higher monthly telephone bills than subscribing to basic rates<sup>1</sup>. *Id.*

CUB concludes generally that, since a statistically average customer generally cannot save money by subscribing to either CallPack or SimpliFive, representations by

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<sup>1</sup> Ms TerKeurst based this conclusion in part upon CUB's interpretation of the tariffed discount applicable to the SimpliFive plan, which CUB believed involved a discount of 15% on all use between \$15.00 and \$29.99, and 30% on all use of \$30.00 or greater. CUB Exhibit No. 4.0, Appendix A; Staff Exhibit 2.0 at 4. This, however, was not the manner in which the Staff interpreted the tariff, Staff Exhibit No. 2.0 at 4-6, nor is it the manner in which Ameritech administers it. Ameritech Exhibit No. 2.1 at 1. Both the Staff and Ameritech interpret the discount to be applicable to the entire amount billed under the plan (i.e., 15% discount on all billings if they exceed \$15, 30% discount on all billings if they exceed \$30). *Id.* Accordingly, the hypothetical average users with high usage (customers with 90 or more Band A calls per week) described in Attachments 4 and 7 to Ms. TerKeurst's direct testimony would in fact save money if they

Ameritech, whether express or implied, that customers can in fact save money, or which cause confusion regarding whether customers can save money, constitute unfair or deceptive acts or practices within the meaning of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, and by extension an unfair, unjust or unreasonable practice within the meaning of Sections 8-501 and 9-250 of the Public Utilities Act, 220 ILCS 5/8-501, 9-250.

B. Ameritech's Response

Ameritech's response to this assertion is, in summary, the following (1) the optional calling plans were designed to, and do, meet a customer need for simple and predictable pricing structures, *see generally*, Ameritech Exhibits 1.0, 1.1; (2) Ameritech's advertising and marketing practices for the optional calling plans are not deceptive or misleading, *see generally*, Ameritech Exhibit Nos. 1.0, 1.1, 1.2, 3.0, 4.0; (3) Ameritech's advertising and marketing practices for the optional calling plans call for at least as much, if not more, disclosure than do the advertising and marketing practices of other industry participants, *see generally*, Ameritech Exhibit Nos. 1.0, 1.1; and (4) the optional calling plans have resulted in substantial savings to customers, and concomitant losses of revenue to Ameritech, *see generally*, Ameritech Exhibit No. 2.0.

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subscribed to SimpliFive, Staff Exhibit No. 2.0 at 5-6, which Ms. TerKeurst concedes in her rebuttal testimony. CUB Exhibit No. 1.1, Attachments 1.1 and 2.1.

## IV.

### **ANALYSIS AND ARGUMENT**

#### A. Section 2 of the Consumer Fraud Act

Section 2 of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS

505/2, provides that:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, [815 ILCS 510/2] in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act [15 U.S.C. § 45(a)].

Section 1 of the Act, 815 ILCS 505/1, provides, in relevant part, that, for purposes of the Act, the following terms will be defined as:

(a) The term "advertisement" includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise ... ;

(b) The term "merchandise" includes any ... commodities, intangibles, ... or services;

(c) The term "person" includes any ... corporation (domestic and foreign), company, ... business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, [or] associate ... thereof.

(d) The term "sale" includes any sale, offer for sale, or attempt to sell any merchandise for cash or on credit.

(e) The term "consumer" means any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household.

(f) The terms "trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State.

....

The Consumer Fraud Act therefore prohibits all of the conduct which CUB alleges that Ameritech has engaged in: (1) deceptive practices; (2) unfair practices; and (3) unfair methods of competition. Further, "information ... associated with violations of [the Consumer Fraud] Act would be appropriate to the issue of whether or not Ameritech's marketing practices are just and reasonable." Tr. 24 (remarks of HE Gilbert). However, Consumer Fraud Act jurisprudence is rather more complex than CUB's Opening Brief would suggest. See CUB Opening Brief at 17-22 (CUB asserts that the Consumer Fraud Act analysis is a relatively simple one, which in all cases assesses capacity for deception of advertising). Accordingly, an examination of Consumer Fraud Act (and, by extension, FTC) jurisprudence is warranted.

#### B. Construction of the Consumer Fraud Act

The Consumer Fraud Act is a remedial statute, and is to be liberally construed to effect its remedial purpose, which is to "eradicate all forms of deceptive and unfair business practices." Lee v. Nationwide Cassel, L.P., 277 Ill. App. 3d 511, 518 (1<sup>st</sup> Dist. 1995), *rev'd in part on other grounds*, 174 Ill. 2d 540 (1996). Conduct which violates the Illinois Consumer Fraud Act need not, and does not always, constitute common law fraud;

the Consumer Fraud Act provides broader protection than that available under common law fraud actions. Connor v. Merrill Lynch Realty, 220 Ill. App. 3d 522, 530; 581 N.E. 2d 196 (1<sup>st</sup> Dist. 1991); see also First Security Bank of Glendale Heights v. Bachelda, 165 Ill. App. 3d 725 (1<sup>st</sup> Dist. 1987) (plaintiff bringing action under Consumer Fraud Act need not show all elements of common-law fraud). Indeed, *intent* to deceive is usually not a material factor in a Consumer Fraud Act claim. People ex rel. Hartigan v. Knecht Services, 216 Ill. App. 3d 843, 859; 575 N.E. 2d 1378 (2<sup>nd</sup> Dist. 1991). The Act, however, prohibits deception rather than error. People ex rel. Hartigan v. Maclean Hunter Pub. Corp., 19 Ill. App. 3d 1049, 1059 (1<sup>st</sup> Dist. 1983).

Unfair trade practices cannot be justified merely because other competitors engage in similar or identical practices. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 623 (1953); see also L.G. Balfour v. Federal Trade Comm'n, 442 F.2d 1 (7<sup>th</sup> Cir. 1971); Nat'l Candy Co. v. Federal Trade Comm'n, 104 F. 2d 999 (7<sup>th</sup> Cir. 1939), *cert denied*, 308 U.S. 610 (1939) (Federal Trade Commission order requiring only one firm to cease and desist from industry-wide practice is not prejudicially discriminatory). Consequently, Ameritech witness Shah's assertions that Ameritech's competitors engage in similar (or worse) marketing and advertising practices cannot be given weight. See Ameritech Exhibit No. 1.0 at 41 *et seq.* (Ameritech witness Shah discusses what she suggests are telecommunications industry advertising standards, which, in her opinion, Ameritech meets or exceeds). Ameritech's practices must be judged by themselves.

However, the Commission has at its disposal at least one significant aid to determining whether an advertisement is unfair or deceptive. Specifically, the Attorney

General has promulgated certain administrative rules governing retail advertising, which are codified at 14 Ill. Admin. Code 470.110 *et seq.* Of these, one in particular will be referred to herein, specifically 14 Ill. Admin. Code 470.260, which provides in relevant part, that:

It is an unfair or deceptive act or practice for a seller to compare his price with a price currently being offered by another seller for an identical product (for example: “Sold elsewhere at \$99, our price \$69”) unless the stated higher comparative price is at or below the price at which the identical product is being offered in the sellers trade area by:

- a) a reasonable number of other sellers in the same trade area; or
- b) another seller(s) is specifically identified in the advertisement.

C. Consumer Fraud Act Standard for Affirmative Deception

To establish a deceptive practice under the Consumer Fraud Act, a plaintiff must demonstrate (1) a deceptive act or practice; (2) undertaken in the course of defendant’s trade or commerce; and (3) an intent by defendant that plaintiff rely upon the deception.

Knecht Services, 216 Ill. App. 3d at 843. The “intent” requirement is satisfied if the defendant intended that plaintiff rely on the information he gave him, rather than intended to deceive the plaintiff. Hoke v. Beck, 224 Ill. App. 3d 674, 679 (3<sup>rd</sup> Dist. 1992). Actual reliance by plaintiff on the defendant’s statements is not a necessary element of a deceptive practice claim, Connor, 220 Ill. App. 3d at 530, and damages or actual consumer harm need not be demonstrated. 815 ILCS 505/2. In determining whether a representation is deceptive under the Consumer Fraud Act, the correct inquiry is not whether the representation actually results in deception, but rather whether it creates the likelihood of deception, or has the capacity to deceive consumers. Knecht Services, 216 Ill. App. 3d at 857.

In determining whether an advertisement has the capacity to deceive, the test is what net impression the advertisement will have upon the general populace. Garcia v. Overland Bond & Investment Co., 282 Ill. App. 3d 486, 491 (1<sup>st</sup> Dist. 1996). In determining the impression an advertisement would make upon the general public, a court is not restricted to considering the impression it would have upon an expert or careful reader but may also consider the effect upon the ignorant, unthinking, and credulous. Niresk Industries, Inc. v. Federal Trade Comm'n., 278 F. 2d 337, 342 (7<sup>th</sup> Cir. 1960); *cert denied*, 364 U.S. 883 (1960). Indeed, in determining whether an advertisement has the capacity to deceive, it may be considered from the point of view of its least sophisticated reader. Exposition Press, Inc. v. Federal Trade Comm'n., 295 F. 2d. 869, 872 (2<sup>nd</sup> Cir. 1961); *cert denied*, 370 U.S. 917 (1962). It is immaterial to this issue that a phrase may not constitute a misrepresentation when considered technically. Overland Bond, 282 Ill. App. 3d at 491. Likewise, the deception may be accomplished by innuendo or suggestion, as well as by affirmative misrepresentation. Id.

However, courts analyzing the Consumer Fraud Act have drawn a distinction between misrepresentations of fact, and subjective descriptions and statements of opinion, affording protection to the latter. Subjective descriptions or opinions are considered “puffery,” and are not actionable as fraudulent misrepresentations of fact. Connick v. Suzuki Motor Co., 275 Ill. App. 3d 705, 723 (1<sup>st</sup> Dist. 1995); *rev'd in part on other grounds*, 174 Ill. 2d 482 (1996). In Connick, the court found that the defendant’s statements that Suzuki automobiles “never let[] you down[,]” and that no other make “comes close to giving you a better run for your money[,]” were non-actionable “puffing,” as were statements that the Suzuki Samurai model was “a funmobile,” with “fun written all over it,” capable of providing

its fortunate owner with “a million laughs,” and with fun which “won’t [be] spoil[ed] ... [by] knowing that the Samurai handles differently than an ordinary passenger car,” having as it did “a nifty go-getter engine.” Connick, 275 Ill. App. 3d at 723. Similarly, it has been held that describing a house for sale as “magnificent” and “comfortable” was puffing, rather than fraudulent misrepresentation. Zimmerman v. Northfield Real Estate, Inc., 156 Ill. App. 3d 154, 163 (1<sup>st</sup> Dist. 1987). Likewise, puffing, but no misrepresentation, was found when a seller stated that a photocopier made “picture perfect copies,” and would “reduce error and waste.” Spiegel v. Sharp Electronics Corp., 125 Ill. App. 3d 897, 901-02 (1<sup>st</sup> Dist. 1984); *but see* Knecht Services, 216 Ill. App. 3d at 857 (misrepresentation in violation of the Consumer Fraud Act found when defendant advertised that his plumbing services could be obtained for a “minimum charge” when, in fact, he charged prices considerably higher than the usual rate for plumbers).

D. Analysis of Ameritech’s Affirmative Representations Under Consumer Fraud Act

1. Ameritech intended that its customers rely on its representations

The intent requirement is satisfied here. This matter is entirely concerned with advertising, marketing, and sales practices. See Complaint, ¶¶1-14, 17; *see, also*, *generally* CUB Exhibit No. 1.0P; Ameritech Exhibit No. 1.0P (respectively, testimony of marketing consultant, and of Director of Local Toll and Usage, charged with development and implementation of marketing plans). Moreover Ameritech initiated its advertising and marketing plan in a concerted, carefully thought out manner, based upon extensive market research. CUB Exhibit 2.0P at 8 *et seq.*, Schedule A; Ameritech Exhibit No. 1.0P at 19 *et seq.* Ameritech did not go to such considerable effort and expense to create and

implement an advertising and marketing campaign that it did not believe would induce its customers to rely on the representations made in its advertising and marketing pieces, and purchase the products it was advertising. Ameritech intended its customers to rely upon the representations it made in its advertising and marketing materials, and which its customer service representatives made, using scripts and policies it prepared.

2. Ameritech is engaged in trade or commerce

Likewise, Ameritech was engaged in its trade or commerce when it undertook the advertising and marketing plans complained of, since it was engaged in the “advertising, offering for sale, sale, or distribution of ... services[,] ... property, ... and other thing[s] of value[,]” namely its telecommunications products. *Cf.* 815 ILCS 505/1(f).

3. Some of Ameritech’s representation were deceptive or had the capacity to deceive

Consequently, the issue before the Commission is whether Ameritech’s advertising and marketing practices were deceptive, or had the capacity to deceive. Resolving this issue requires a close analysis of, first, Ameritech’s direct mail solicitations; and, second, the representations made by its customer service representatives and telemarketers, to the extent that the content of the latter can be ascertained.

CUB argues that Ameritech’s advertising and marketing practices are deceptive, or have the capacity to deceive. *See, e.g.,* CUB Opening Brief at 20 *et seq.* However, CUB bases its claim on small portions of the various advertising and marketing pieces and solicitations which it considers to be deceptive or misleading, without placing them in context. CUB Opening Brief at 8, 10, 13, 14, 20 *et seq.* Moreover, CUB does not treat any

one solicitation in isolation or in any detail, despite the fact that it believes that the “test to be used in interpreting advertising is the *net impression* [an advertisement] is likely to make on the general populace.” CUB Opening Brief at 19, *citing Williams v. Bruno Appliances and Furniture Mart*, 62 Ill. App. 3d 219 (1<sup>st</sup> Dist. 1978)(emphasis added). Likewise, Aleen Bayard, its own witness, conceded that Ameritech customers might reasonably be expected to see or hear only a few or even only one of Ameritech’s solicitations, Tr. 124-26, and that, consequently, the advertising messages must be reviewed *individually* to determine whether they are deceptive or misleading. Tr. 128. Consequently, a careful and detailed analysis of individual solicitations must be undertaken.

a. Direct Mail Solicitations

One of the direct mail solicitations used by Ameritech is deceptive. Specifically, Ameritech sent direct mail solicitations to its customers in MSA-1 and the Springfield area, which offered its customers the opportunity to purchase CallPack products and “[e]njoy 0¢/minute” rates. CUB Exhibit No. 2.0P, Schedule B, Exhibits 14,15. Likewise, a similar solicitation sent by Ameritech stated that “[o]ur best customers deserve 0¢/minute.” Id. Both of these statements were printed on the front of the envelopes which contained the solicitation, and were not qualified in any way. Id.

The solicitations themselves were slightly more accurate. Each disclosed the fact that there was a monthly charge associated with CallPack products, Id., but also made the statement to the customer that “you can talk all you like, because all the minutes are free !” Id. In one case, Ameritech did not disclose the per-call rate. CUB Exhibit No. 2.0P, Schedule B, Exhibit 15.

These statements are deceptive, or have the capacity to deceive. The minutes used by customers who responded to this solicitation were not, in fact free, and the effective rate per minute was never, in fact, 0¢.

This is an important distinction, because it has long been an accepted tenet of consumer-protection law that effective, as opposed to stated rates must be disclosed. See, e.g., 15 U.S.C. §§1604 - 1606 (Truth in Lending Act) (creditor must disclose effective rate of interest, as annual percentage rate, which includes stated interest rate, origination or other finders fees, brokerage fees, and other costs of credit). The reason for this is to enable customers to shop around for the most favorable terms available. Streit v. Fireside Chrysler-Plymouth, Inc., 697 F.2d 193, 197 (7<sup>th</sup> Cir. 1983).

The analogy is important, because the representations made by Ameritech in these solicitations make it very difficult for consumers to make an “apples to apples” comparison. While Ameritech can certainly make price comparisons, they have to be truthful. This solicitation, however, resembles a gas station offering to fill customers’ gas tanks for a fixed price, and then placing the legend “\$0.00 PER GALLON” in large characters on its marquee. Accordingly, all promotional materials claiming a “0¢/minute” rate should be found to be deceptive, or to have the capacity to deceive.

Such a finding is supported by the general concurrence of the parties that local telephone customers do not understand their telecommunications choices well. Staff Exhibit No. 1.0P at 9; CUB Exhibit No. 2.0P at 13; see *also*, Ameritech Exhibit No. 1.0P at 14-15, (Ameritech market research indicates that customers value simple billing and rate plans). Customers’ confusion regarding choices (as clearly shown by their desire for some level of simplicity) renders them susceptible to advertising, sales and marketing practices

which are misleading. When determining how the marketing and advertising plans at issue affected the “general populace,” this is the “general populace” which the Commission should consider. Its individual members are uncertain regarding which services they have a choice of providers for, or what those services cost. Consequently, the “general populace” should be considered to be poorly informed and not very knowledgeable regarding their local telecommunications choices. This is to be expected in a market in which consumers have had any degree of choice for less than five years. Nonetheless, this fact must be considered when evaluating advertising in such a market. A price misrepresentation which is obviously false to experienced, trained persons is unlawful if it tends to deceive persons less experienced and trained. Federal Trade Comm’n v. Standard Education Society, 302 U.S. 112, 116 (1937); Giant Food, Inc. v. Federal Trade Comm’n, 322 F. 2d 977, 982 n. 13 (D.C. Cir. 1963), *cert dismissed*, 376 U.S. 967, 12 L. Ed. 2d 82 (1964).

Moreover, even a relatively sophisticated customer might conclude that a 0¢ per minute rate, when offered by a company to people it describes as its “best customers,” might be a promotional “loss-leader” type rate, or might be defrayed somehow in the subscriber line charge, thereby resulting in an actual rate of 0¢ per minute. Customers lack a detailed understanding of telecommunications rates and charges, and thus, even a relatively sophisticated customer might reach such a conclusion.

Ameritech’s informational brochures and bill inserts, however, do not appear to be deceptive or misleading. The CallPack / SimpliFive informational brochure, CUB Exhibit No. 2.0, Schedule B, Exhibit 1, encourages customers to “[s]implify your calling and save money with an Ameritech Answer Calling Plan.” *Id.* It further enjoins readers to “[c]hoose the plan that’s right for you[.]” and sets forth, apparently truthfully, the rates for the two plans. *Id.*

It describes the advantages of SimpliFive as “simple 5¢ pricing for all of your local calls[,]” along with “automatic volume discounts[.]” Id. The CallPack plan is described as permitting the subscriber to “pay by the call, not by the minute[,]” with the option of “talk[ing] as long as you want, whenever you want ... for just 10¢ per call.” Id. The bill insert gives a toll-free number for customers to call to order a plan, “and receive easy, predictable, and affordable local toll calling.” Id. the bill insert further indicates that “[a]n Ameritech representative will be happy to help you choose which plan is best for you.” Id.

All of the above referenced statements appear to fairly set forth the terms, conditions, and benefits of the two plans. The emphasis appears to be on simplicity and predictability, and, to the extent that there is a representation that customers will save money, this arguably is true for \*\*\*\*\* customers who subscribe to the plans, if one accepts Mr. Sorenson’s study as reliable and accurate<sup>2</sup>. See Ameritech Exhibit No. 2.2P at 7-8, Table 6 (\*\*% of CallPack customers and \*\*% of SimpliFive customers save money over basic rates; \*\*% of total subscribers to both programs do). Likewise, the optional nature of the plans is made clear, as is the fact that Ameritech personnel are available to

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<sup>2</sup> The Staff believes that Mr. Sorenson’s study has certain flaws which might significantly affect its reliability. For example, Mr. Sorenson used only one month’s usage data, instead of several. Tr. 200. Had Mr. Sorenson used several months’ usage data, his study would have reflected the experience of short-term subscribers who subscribe based on the belief that they will save money, do not in fact save money, and therefore leave the plan within one or two months. Tr. 204, 206. Mr. Sorenson testified that including data from such customers would “bias” his survey. Tr. 207-08. Mr. Sorenson agreed, however, that, to the extent that the purpose of his survey was to determine the effect of subscribing to OCPs on all customers who had ever subscribed to an OCP, it would have been preferable to study more than one month’s data. Tr. 208-09. Since Ameritech assumes that a customer who makes a “bad decision” in subscribing to an OCP will promptly call Ameritech after receiving his first monthly bill, and discontinue subscribing to the OCP, Ameritech Exhibit No. 1.0 at 37, it is fair to assume that there is a substantial population of such short term subscribers. See Tr. 310.

The Staff views Mr. Sorenson’s study as being akin to a customer satisfaction survey which is conducted using a sample of people already identifiable as satisfied customers. The results are likely to be encouraging, but less accurate than might be wished. The record, however, lacks any other significant evidence of actual customer satisfaction or dissatisfaction. The Staff, therefore, sees no alternative but to

discuss the matter. The graphic, which consists of a person using a telephone, cannot be said to impart any message other than that the solicitation involves telephone service.

Thus, the bill insert in question does not appear to be deceptive.

The bill insert which offers SimpliFive also appears to be neither deceptive nor invested with the capacity to deceive. CUB Exhibit No. 2.0P, Schedule B, Exhibit 2. The cover of the circular, a folded piece, states on its cover “Announcing Simple 5¢ Pricing - A Change for the Better[.]” with a graphic of a U.S. five-cent coin. Id. When the circular is opened, the five-cent coin graphic is repeated, along with the assertion, “[i]t’s simple. Local calls close to home are 5¢ a call. Local toll calls are 5¢ a minute.” Id. The text then encourages customer who “[w]ant simple pricing[.]” to enroll in the service. Id. The terms and conditions of the service are accurately stated, and the advantages of the plan are represented to be “simple 5¢ pricing [at all times],” “no monthly fee,” and an “[e]asy to understand phone bill.” Id. The only aspect of the circular which appears to bear the interpretation of offering savings is the graphic of a five-cent piece. The circular appears to truthfully state the terms, conditions, incidents, and particulars of the plan. In the Staff’s view, this circular does not suggest to customers that they are likely to save money.

The bill insert advertising the CallPack plan appears somewhat more troublesome. Again, it is a folded bill insert, the cover of which enjoins customers to “[b]uy yourself some time.” CUB Exhibit No. 2.0P, Schedule B, Exhibit 3. Ameritech contends that this, and other CallPack solicitations, were directed to customers who generate a substantial number of Band C (local toll) calls. Ameritech Exhibit No. 1.0 at 33. Persons opening this

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accept Mr. Sorenson’s study, with the *caveat* that it probably somewhat overstates customer savings, and the percentage of customers who save.

solicitation, rather than throwing it out , are entreated to “[g]et an Ameritech CallPack. And talk all you want for one low price.” Id. The solicitation further states, correctly, that CallPack subscribers “pay by the *call*, not by the minute[,] ... for one flat price.” Id. (emphasis in original). The circular further advises that “[b]ased on the number of calls you make, this could be a great value for you.” Id. A graphic shows a map of the calling area to which the rates in question apply. Id. The only allusion to savings, other than the “great value” language (arguably puffing in any case), is a statement (incontrovertible when applied to most customers) that people are generally “looking for ways to make [their] money go further.” Id. The most problematic aspect of this solicitation is the representation that the *number* of calls a customer makes is the chief factor the customer should consider when deciding to enroll in CallPack, since, in fact, whether the calls the customer usually makes are *timed* or *untimed* appears to be a more important consideration. However, the rates are clearly stated (with the exception of the rate for calls in excess of the allocated number), and a toll-free number is given. Id. Likewise, since a customer who subscribes to basic rates receives a calculation of cost per call on his or her monthly bill, a comparison possible. This solicitation while troublesome, does not appear to be deceptive.

Ameritech’s “winback” letters, see CUB Exhibit No. 2.0P, Schedule B, Exhibit 4, are discussed in some detail below. They appear, nonetheless, to be truthful and non-deceptive.

Other Ameritech circulars, in letter form, see CUB Exhibit No. 2.0P, Schedule B, Exhibits 5 - 12, are generally quite similar to one another, with the difference being in the date, the first one or two lines of text, and the toll-free number given. Each letter, intended to be sent to customers who had switched their Band C service to another carrier, Ameritech

Exhibit No. 1.0 at 29-30, bears the highlighted statement “[a] simple way to save money in Illinois[.]” and the following text:

You asked and we delivered. Many Illinois customers have asked for easy-to understand local and local toll rates. So, we’ve introduced the Ameritech SimpliFive plan, a calling plan that gives you simple pricing for all your local and local toll calls.

CUB Exhibit No. 2.0P, Schedule B, Exhibits 5 - 12

This text is followed by a statement, apparently correct, regarding the rates, terms, conditions, and applicable discounts of the SimpliFive plan, as well as the fact that there are no monthly fees associated with the plan, and that Ameritech will undertake to switch customers back without charge. Id.

The first paragraph of each letter is somewhat different in each case, making such statements as “[a]t Ameritech, we value you as a customer and can offer you the savings you’re looking for[.]” CUB Exhibit No. 2.0P, Schedule B, Exhibit 5; “[m]any customers want affordable local toll rates. Are you paying more than 5¢ a minute for local toll calls that you make? And, if you’re on a calling plan, are you getting charged each month just for having that calling plan?” CUB Exhibit No. 2.0P, Schedule B, Exhibit 6; “we’re writing to you to tell you about a great savings opportunity[.]” CUB Exhibit No. 2.0P, Schedule B, Exhibits 7, 9, 11; “[d]o you know how much you’re actually paying for your local toll calls?” CUB Exhibit No. 2.0P, Schedule B, Exhibit 8, 10, 12.

These solicitations contain only three representations regarding savings, specifically that Ameritech is offering “[a] simple way to save money in Illinois[.]” “can offer you the savings you’re looking for[.]” and “a great savings opportunity[.]” Each of these statements is somewhat conditioned, for example “*simple way to save,*” “*great savings opportunity,*” “*Ameritech can offer you the savings you’re looking for[.]*” Thus, they do not

unequivocally offering savings. Moreover, the letters were sent to customers who were then taking Band C service from an Ameritech competitor, and therefore might be presumed to be more interested in lower Band C rates than in other rates. Likewise, statements like “great savings opportunity,” “no gimmicks, just low rates,” and “great news” all appear to be protected puffing.

The remaining CallPack solicitations, CUB Exhibit No. 2.0P, Schedule C, are, in one case, a “winback” type of letter, and in the other, a fairly simple promotion. The first states, after the standard “winback” language, that “Ameritech offers better savings.” CUB Exhibit No. 2.0P, Schedule C. The CallPack plans being offered are described as the predictable affordable way to manage your local toll calls.” Ameritech states that “with our competitors, you could be paying as much as 15¢ a minute for your local toll calls.” Id. The terms and conditions are correctly stated, after which Ameritech asserts that “[n]o other phone company offers this kind of value.” Id. Customers are encouraged to “[c]ome back free and begin saving now.” Id. Ameritech offers the services of customer service representatives to compare rates on frequently made calls. Id.

This solicitation is more problematic. Ameritech states that its competitors charge as much as 15¢ per minute for local toll calls, compared conspicuously to Ameritech’s offer of “as little as 8¢ per call,” Id. , without indicating which competitors those might be. Such representations, which make rate comparisons without stating a basis for such comparisons, violate 14 Ill. Admin. Code 470.260, to the extent that the 15¢ per minute rate is not offered by “a reasonable number of other sellers in the same trade area[.]” which is not clear from the record. Thus, an argument can be made that this solicitation is deceptive. Likewise, the statement that “Ameritech offers better savings[.]” does not state a

basis for the comparison. This solicitation might well have the capacity to deceive. However, without more information, this conclusion cannot be made.

The final solicitation contains the representation, to a specific customer, that “[w]e’ve analyzed your [the recipient’s] most recent phone bills, which show the 250 pack as the best option for you.” CUB Exhibit No. 2.0, Schedule C. This is problematic, as it is a specific recommendation. However, as nothing more is known about the customer’s calling patterns, it is not clear what, if any, conclusions can be drawn from this.

In summary, then, Ameritech’s direct-mail solicitations contain a small number of actionable deceptive representations, but are generally neither deceptive nor invested with the capacity to deceive.

b. Telemarketing Solicitations

The issue of whether Ameritech’s telemarketing solicitations contain misrepresentations or have the capacity to deceive is a more difficult one to resolve. This is partly because it is difficult to show that Ameritech’s customer service representatives and contract telemarketing agents adhere in all cases to the policies and procedures which Ameritech has promulgated, and which its supervisors assert are mandatory. See, *generally*, Ameritech Exhibit Nos. 3.0, 4.0. CUB, through the testimony of Martin Cohen and Pamela Steigman, asserts that compliance with the policies in question is less than total. See, *generally*, CUB Exhibits No 3.0, 3.1, 5.0, 5.1. Thus, the Commission is confronted with a two-part analysis: whether the official policies implemented by Ameritech result in customers being deceived or misled, and, if they do not, whether customer service

representatives and contract telemarketing agents routinely comply with those policies and procedures.

The procedures themselves are a matter of record. It is further the case that Ameritech customer service representatives are expected to use different procedures than the company's contract telemarketers. In addition, the procedures in question have changed somewhat over time. Ameritech Exhibit No. 1.0 at 26. Consequently, each must be analyzed in turn.

i. Customer Service Representatives

Ameritech expects its customer service representatives to sell services to customers, despite the fact that many representatives consider this inappropriate. Ameritech Exhibit No. 1.1 at 16; Tr. 328. It offers monetary incentives to customer service representative to sell Ameritech services and win back customers to Ameritech, although optional calling plans are not subject to such incentives. Tr. 335, 337. Nonetheless, 92-3% of optional calling plan sales are made by customer service representatives. Tr. 300. Although Ameritech has very specific procedures which customer service representatives are expected to use in selling optional calling plans, see, e.g., CUB Cross-Examination Exhibit No. 1 (Shah); CUB Exhibit No. 1.0, Schedule D; these procedures are difficult to ascertain for each individual contact. Tr. 291. The company asserts that its customer service representatives do not proactively market optional calling plans, Ameritech Exhibit No. 1.1 at 16, but rather offer them to a customer after he or she specifically requests information regarding rate options or how to reduce his or her phone bill. Tr. 301. Although it has not always done so, Ameritech Cross-Examination Exhibit No. 2 (TerKeurst), Ameritech now provides its customer service representatives with special on-line

calculators which, when combined with the customer's usage information, conducts calculations that determine which rate plan is optimal for that customer<sup>3</sup>. Ameritech Exhibit Nos. 1.0 at 22, 2.0 at 4-5. Customers appear to believe, based on Ameritech survey data, that SimpliFive rates are nearly equal to basic rates. CUB Exhibit No. 2.0 at 9-10. This is not now true, id., although it appears to have been very nearly true when Ameritech introduced SimpliFive, the difference having resulted from a decrease in Band A and Band B basic rates required under the Alternative Regulation plan to which Ameritech is subject. Ameritech Exhibit No. 1.0 at 16-17.

Ameritech asserts that its customer service representatives are trained to recommend to customers the rate plan that will result in the customer saving the most money, and that Ameritech customer service representatives act in a manner consistent with this training, Ameritech Exhibit No. 4.0 at 3, 5, 6. Ameritech asserts that it disciplines customer service representatives who fail to make required disclosures. id., at 11. CUB contends that Ameritech customer service representatives do not, as a general matter, advise customers about basic rates, and attempt to induce customers to subscribe to optional calling plans even where they know that an individual customer will save money with basic rates. CUB Exhibit Nos. 1.0 at 11-12, 2.0 at 13. Ameritech contends that it offers SimpliFive only to customers whose bill will increase by \$3 or less under the plan. Ameritech Exhibit No. 4.0 at 8. Ameritech further asserts that it does not routinely offer CallPack when it is attempting to win back a Band C customer, Ameritech Exhibit 1.0 at

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<sup>3</sup> To the extent possible, there might be merit in modifying the calculators in such a manner as to allow customer service representative to compare all three plans (as well as any other residential plans Ameritech offers) and be in a position to categorically state to customers which plan is optimal. This seems especially true where, as here, Ameritech encourages customers to call its customer service representatives to obtain recommendations regarding rate plans.

35, because of its belief that the SimpliFive plan has greater appeal to such customers, who Ameritech considers to be more sophisticated than average regarding rate structures generally. Id., at 29-31.

CUB also presented evidence of a customer who, it submits, received misinformation from Ameritech customer service representatives or telemarketers. See, generally, CUB Exhibit Nos. 5.0, 5.1. Specifically, this witness, Pamela Steigman, states that Ameritech customer service representatives with whom she spoke (1) represented to her that, based upon her calling pattern she would benefit from subscribing to the CallPack 100 plan, which representation proved to be incorrect, partly because she subscribed to MCI Band C service at the time, CUB Exhibit No. 5.0 at 1-4; (2) stated to her that the SimpliFive plan would offer her better rates than MCI, when in fact the rates were equal, at least during the hours in which she typically made Band C calls. Id., at 6; and (3) failed to disclose to her various material facts, including the fact that under either plan, the cost of her Band A and Band B service, which constituted the greater part of her local calling, would increase, and failed entirely to inform her of the existence of basic rates. Id., at 3-7.

Ameritech responds by asserting that, to the extent that this is anyone's fault, it is Ms. Steigman's, since, in Ameritech's estimation (1) CallPack 100 was appropriate for Ms. Steigman at the time she subscribed, Ameritech Exhibit No. 4.0 at 9; (2) she had necessary information, such as the fact that CallPack calls were untimed, which should have enabled her to change calling patterns and benefit from the plan, Id., at 10; (3) she was advised that voice mail retrieval incurred local usage charges, but ignored this information, Id.; and (4) although dissatisfied with the CallPack plan, she subscribed to it for at least one month after getting a large bill without contacting Ameritech. Id., at 10.

With respect to representations made by customer service representatives, the record is therefore ambiguous and contradictory. Virtually nothing is known about the experience of any actual customer other than Ms. Steigman. Moreover, Ms. Steigman's testimony is that Ameritech failed to disclose material facts to her, rather than affirmatively misrepresented material facts to her. It is cannot be concluded from this transaction that Ameritech committed a deceptive act. While Ameritech appears to have been rather sparing with information in its dealings with Ms. Steigman, to do it justice, the converse appears to have been true as well. This course of dealings speaks volumes, however, for the need for consumer education if the market is to work effectively.

It does not appear that Ameritech's practices for marketing SimpliFive and CallPack are necessarily unfair or deceptive, at least to the extent that customer service representatives follow them, a fact which cannot be ascertained from this record. Customer service representatives do not receive any monetary incentives for selling these products to customers, and therefore presumably have no incentive to recommend the wrong plan to customers. The only exception to this general statement may be the practice of automatically marketing SimpliFive to "winback" customers (which is a sale for which a customer service representative receives an incentive). This practice could potentially result in overreaching by customer service representatives, and should be carefully examined, both by the Commission and Ameritech.

Likewise, the two programs have not resulted in increased revenues for Ameritech. Thus, it appears likely that Ameritech's marketing of the programs has not been intentionally deceptive. If Ameritech intended to increase its revenues as a result of the plans, it appears, based upon Mr. Sorenson's calculations, to have failed quite significantly

to do so. Ameritech has no incentive to deceive its own customers in the hope that it will thereby reduce its revenues from those customers.

One source of concern to the Staff remains Ameritech's practice of marketing products and services to customers in the course of customer service calls. Ameritech encourages its customers to contact customer service by telephone. Tr. 327. In the course of such calls, the representatives are expected to look for opportunities for the marketing of additional products and services. Staff Exhibit No. 1.0 at 16-17. Many of Ameritech's customer service representatives appear to object to this practice, Tr. 328, and the practice could have much to do with the fact that customers dislike making multiple<sup>4</sup> calls to Ameritech customer service. Ameritech Exhibit 1.1 at 12. Ameritech believes that customers ought to call its customer service representatives to determine which rate plan is the right one for them. Ameritech Exhibit No. 1.0 at 36. Ameritech's assertion that there is nothing objectionable about marketing such customers is difficult for the Staff to accept. Ameritech believes that, by resolving customer problems, it has "earn[ed] the right to sell." Staff Exhibit No. 1.0 at 17. In fact, it has not earned the right to sell; in many cases, it has done no more than fulfill a legal obligation. This practice should be scrutinized by the Commission.

ii. Contract Telemarketers

This issue will be dealt with rather summarily, in light of the fact that contract telemarketers appear to be the source of a relatively small number of sales of SimpliFive, and none of CallPack. Tr. 300; Ameritech Exhibit No. 3.0 at 4. Ameritech states that it uses

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<sup>4</sup> The Staff is somewhat skeptical of the proposition that customers are pleased with the need to make any calls whatever to Ameritech customer service, let alone "multiple" calls.

contract telemarketers to conduct “winback” programs, which involve contacting customers who have, to use Ameritech’s unfortunate term, “defected” from Ameritech Band C service, Ameritech Exhibit No. 3.0 at 2, and attempting to induce them to return to Ameritech service. Id. Outside telemarketing representatives are trained to use a specific script, with some latitude for “ad libbing” to seem unforced and natural. Id., at 3. It is, however, made clear to them that they are not to convey false or misleading information. Id. Specifically, they are told not to assert that customers will realize savings from subscribing to the SimpliFive plan, Id., at 4, and \*\*\*\*\*  
\*\*\*\*\*Id. Telemarketers have access to the SimpliFive rates, and to the basic rate structure. Id. at 3, 5. The telemarketers are permitted to assert that the SimpliFive plan has certain non-savings related advantages, and describe those advantages. Id., at 4. Representatives who violate these rules are subject to discipline. Id., at 5.

CUB asserts that contract telemarketers do not, in all cases, follow these instructions. See CUB Exhibit Nos. 3.0, 3.1. Martin Cohen, the Executive Director of CUB, testified that he received five telephone calls from Ameritech contract telemarketers over a period of several months; in each case, the telemarketer, in his opinion, made misleading representations or failed to disclose material information. See, *generally*, CUB Exhibit Nos. 3.0, 3.1. Specifically, Mr. Cohen states that on October 9, 1999, he was contacted by a telemarketer who advised him that he would “definitely save money” on the SimpliFive plan, because the rate was “only five cents per call,” as opposed to “eight cents per minute.” CUB Exhibit No. 3.0 at 2-3. The telemarketer stated that she was based in Montreal. Id., at 3.

Thereafter, on January 21, 2000, Mr. Cohen was contacted by another telemarketer soliciting business for SimpliFive, who stated that featured “predictable 5 cent pricing” along with a rate of 5 cents per minute for local toll calls, and 5 cents per call for local calls. Id. The telemarketer stated that, under SimpliFive, Mr. Cohen would only pay for the calls he made, and would receive automatic volume discounts. Id. The telemarketer indicated to Mr. Cohen that he had no information about what Mr. Cohen paid for local service, but that his rates would not increase, and that he would save money on local toll calls. Id.

On April 11, 2000, Mr. Cohen was called by another telemarketer, who stated that Mr. Cohen’s local rates would not change. CUB Exhibit No. 3.1 at 5. Mr. Cohen received another call on April 14; in this instance, the marketer, who purported to be an Ameritech employee, stated that SimpliFive was the company’s “best plan,” and that Mr. Cohen’s “rates other than local toll” would not change. Id. Finally, on April 29, 2000, Mr. Cohen was contacted by a telemarketer who stated that Mr. Cohen would save money by subscribing to SimpliFive, although local rates were “private information,” to which she did not have access. Id.

This testimony has disturbing implications. First, in each call chronicled by Mr. Cohen, Ameritech contract telemarketers represented to him that he would save money. This is certainly contrary to Mr. Fargo’s representations regarding the training given to telemarketers, and is also, according to Mr. Cohen, not true. CUB Exhibit No. 3.1 at 6. As such, it appears that these telemarketers made deceptive representations. The telemarketers in question are not Ameritech employees, and this record contains no information about how they are compensated. Accordingly, contract telemarketers might misrepresent the benefits of SimpliFive in order to win sales.

During the October 9 call, the telemarketer made affirmative misrepresentations to Mr. Cohen regarding savings and rates. Likewise, the April 11 and 23 calls appear to have contained representation likely to cause confusion or misunderstanding. Based upon this record, however, it cannot be determined that telemarketers made misleading or deceptive representations to customers other than Mr. Cohen, although it is distinctly possible. In any case, the Staff is concerned that outside telemarketers are being used for this purpose. It is possible that the compensation structure for such telemarketers, which is not a matter of record and may not be currently within the control of Ameritech, encourages them to win back customers without a great deal of regard for how they do so.

#### E. Consumer Fraud Act Standard for Concealment, Omission or Failure to Disclose Material Facts

A crucial distinction exists under the Consumer Fraud Act between *affirmative* misrepresentations, as discussed above, and misrepresentation by *concealment, omission, or failure to disclose* a material fact. The distinction is important in this case, since CUB bases much of its claim upon Ameritech's alleged failure to disclose important information to customers. See, e.g., CUB Opening Brief at 7, 8, 11, 12, 13, 23, 25, 26, 28, 36 (CUB asserts that Ameritech unlawfully failed to make important disclosures, specifically, that subscription to an optional calling plan would, depending upon use patterns, result in an increase in Band A and Band B rates). Thus, it warrants fairly detailed treatment here.

Where a Consumer Fraud Act claim asserts that the defendant concealed, omitted, or failed to disclose a material fact, as opposed to made deceptive or false affirmative statements, the plaintiff must show that the defendant concealed, omitted, or failed to

disclose a material fact, with the intent that plaintiff rely upon such concealment, omission, or failure to disclose; and must also show justifiable reliance upon such concealment, omission, or failure to disclose. Lidecker v. Kendall College, 194 Ill. App. 3d 309, 314 (1<sup>st</sup> Dist. 1990). The Consumer Fraud Act cannot be used to transform omissions which are neither deceptive nor fraudulent into actionable affirmations. Mackinac v. Arcadia Nat'l Life Ins. Co., 271 Ill. App. 3d 138, 142 (1<sup>st</sup> Dist. 1995). A fact is "material" if the defendant would have acted differently had he been aware of it. Mackinac, 271 Ill. App. 3d at 141. In order to state a claim under the Consumer Fraud Act for omitting to disclose a material fact, the plaintiff must show that the defendant remained silent under circumstances which created a duty to speak. Mackinac at 143. Absent a fiduciary or other legal relationship between the parties, there is no duty to speak. Neptuno Treuhand-und Verwaltungsgesellschaft MBH v. Arbor, 295 Ill. App. 3d 567, 573 (1<sup>st</sup> Dist. 1998).

The scope and character of such a duty to disclose is demonstrated in Randels v. Best Real Estate, Inc., 243 Ill. App. 3d 801 (2<sup>nd</sup> Dist. 1993). There, a real estate broker acting for the seller failed to disclose to plaintiffs, prospective buyers, the fact, known to the broker, that a residential property the buyer was interested in purchasing would, as a result of a recently enacted municipal ordinance, have to be disconnected from its existing septic system, and connected to a municipal sewer system, at considerable cost to whoever owned the property. Randels, 243 Ill. App. 3d at 802-03. When plaintiffs discovered this, having subsequently purchased the house, they brought suit against the broker, alleging a violation of the Consumer Fraud Act for failing to disclose the existence of the ordinance. Randels at 806.

The trial and Appellate courts both refused to find that the defendant had a duty to disclose to the plaintiffs the existence of the ordinance. Id. at 806-07. The Appellate Court reasoned that the ordinance was a matter of public knowledge, which was readily discoverable by anyone who exercised ordinary prudence. Id. at 807. Hence, there was no violation of the Consumer Fraud Act. Id.

Similarly, in Lidecker v. Kendall College, *supra*, defendant college failed to inform prospective enrollees in its nursing school that the college's nursing program had not received an important academic accreditation. Lidecker, 194 Ill. App. 3d at 312. The plaintiffs, who thereafter enrolled in the college's nursing program, claimed to have been adversely affected by this non-disclosure, and brought suit under the Consumer Fraud Act. Id. at 311-12. The trial and Appellate courts both found that the defendant college had no duty to make such a disclosure. Id. at 313, 315. In so finding, the Court noted that a duty to disclose is premised upon a "special or fiduciary relationship" between the parties. Id. at 317.

Likewise, in Mackinac v. Arcadia Nat'l Life Ins. Co., *supra*, the plaintiff purchased an insurance policy contemporaneously with the purchase of a car, which the defendant seller, a car dealer who sold policies actually underwritten by another, represented to her would pay her car payment for her if she became ill or disabled and could not work. Mackinac, 271 Ill. App. 3d at 140. The policy, however, specifically excluded coverage in the event that the insured was unable to work as a result of a medical condition that existed at the commencement of the policy. Id. Inevitably, the plaintiff became disabled as a result of such a preexisting condition. Id. When the defendant insurance company refused, based upon the exclusion, to indemnify the plaintiff, she brought suit under the Consumer Fraud Act,

claiming, *inter alia*, that the defendants failed to orally disclose the exclusion to her. Id. at 143. Both the trial and Appellate courts found that the Consumer Fraud Act imposed no duty to make such a disclosure, in this case because no fiduciary relationship existed between the car dealer and plaintiff such as would impose such a duty. Id.

Finally, in Guess v. Brophy, 164 Ill. App. 3d 75 (4<sup>th</sup> Dist. 1988), *cert. denied*, 121 Ill. 2d 569 (1988), the defendants were engaged in the dubious trade of finding deceased persons' heirs who were unaware of their status as such, and offering them, in exchange for the heirs signing over a percentage of the estate, to advise them regarding how to claim their legacy. Guess, 164 Ill. App. 3d at 77. One such heir signed away one-third of his interest in his deceased cousin's estate before defendants would reveal to him the identity of the deceased, the fact that the deceased had in fact died, the fact that a proceeding to administer the estate was pending, or the identity of the attorney for the estate. Guess at 82. The heir thereafter brought suit, alleging, *inter alia*, that defendants' failure to disclose such information to him violated the Consumer Fraud Act. Id. at 77. The Appellate Court found that defendants had no duty under the Consumer Fraud Act to disclose such information to the plaintiff, adding that the plaintiff's entering into such a contract without seeking to determine whether a relative had died leaving him as heir was "very unwise[.]" Id. at 82-83.

These cases all stand for the proposition that a plaintiff claiming under the Consumer Fraud Act that a defendant concealed, omitted, or failed to disclose a material fact must demonstrate the defendant's affirmative duty, based on a fiduciary or other special relationship, to disclose the fact. In addition, the courts appear to resist imposing a duty to disclose in situations where the party alleging an actionable failure to disclose has

failed to take such steps to discover the actual facts as a reasonably prudent person would take under the circumstances.

Exactly what sort of relationship gives rise to a duty to disclose a material fact was discussed in some detail in Connick v. Suzuki Motor Co., 174 Ill. 2d 482 (1996). In Connick, the Illinois Supreme Court stated that such a duty could arise from a fiduciary or other confidential relationship, in which case the defendant would have a duty to disclose all material facts. Connick, 174 Ill. 2d at 500. In addition, such a duty might arise from a situation where the plaintiff reposes trust and confidence in the defendant, which puts the defendant in a position of influence and superiority over the plaintiff. Id. Such a relationship might arise as a result of friendship, agency, or experience. Id. The duty of proving the existence of such a relationship lies with the party seeking relief. Neptuno, 295 Ill. App. 3d at 573.

F. CUB has not alleged that Ameritech had a duty to disclose CUB has not articulated, pled, or proven any fiduciary, or other type of special relationship which might exist between Ameritech and its customers such as would impose a duty upon Ameritech to disclose to customers the rates associated with all of its plans. If CUB intends to pursue its claim that Ameritech actionably failed to disclose important facts, it must do so.

Likewise, CUB appears to assert that consumers have at most, a limited obligation to inform themselves regarding telecommunications services. Illinois consumer protection law, however, imposes a duty on consumers to exercise a reasonable degree of prudence in ascertaining material facts. This supports the existence of an obligation on the part of

customers to inform themselves regarding telecommunications choices, explained as follows by Staff witness Cindy Jackson in her testimony:

[C]onsumers must educate themselves regarding their telecommunications use and product and service choices, just like they would do when making other purchases, such as housing, cars, insurance, clothing, groceries and other household goods. A customer service representative or sales agent may make recommendations to consumers, which in his or her opinion, meets the consumers' needs, in the light of such customers' past calling patterns. When determining which calling plan best serves their needs, individual consumers must consider the destinations which they call, the length of their conversations, the number of calls that they make per month/year, the number of people in their household, and past or future lifestyle changes which may affect calling patterns. Consumers who uncritically accept a customer service representative's recommendation without any thought or investigation may not choose the best option for their income or lifestyle or current/future calling needs.

Staff Exhibit No. 1.0P at 7-8

It is clear that the Illinois courts agree with Ms. Jackson: consumers must exercise a reasonable degree of prudence. CUB cannot argue that consumers are passive non-actors in the telecommunications marketplace.

Thus, CUB has not established the existence of a duty under the Consumer Fraud Act on the part of Ameritech to disclose material facts, and appears to reject the idea that customers have a duty to exercise reasonable prudence in discovering facts not disclosed. Until such time as it is able to establish the existence of a duty to disclose, the Commission cannot, as a matter of law, grant CUB relief based on its claim that Ameritech failed to provide customers with adequate information regarding rates.

In observing that CUB has failed to meet its burden of articulating a legal duty on the part of Ameritech to make disclosures under the Consumer Fraud Act, the Staff does not suggest an opinion that no such duty exists. CUB might be able, in subsequent pleadings,

to establish the existence of such a duty. Moreover, the Staff believes that ready customer access to accurate and complete information regarding rates, terms, and conditions of service is critical to the development of a competitive market for local telecommunications services. Finally, the Staff believes that the disclosures advocated by CUB would be a proper measure to *remedy* any deceptive or misleading practices that the Commission might find Ameritech to have committed. Staff Exhibit 1.0 at 14, 15, 21.

G. Consumer Fraud Act Standard for Unfairness

Under the Consumer Fraud Act, a practice may be unfair without being deceptive.

Knecht Services, 216 Ill. App. 3d at 853. In fact, it has been held that the terms “unfair practice” and “unfair method of competition” are inherently not capable of being precisely defined. People ex rel. Fahner v. Testa, 112 Ill. App. 3d 834, 837 (1<sup>st</sup> Dist. 1983)<sup>5</sup>.

Consequently, what is “unfair” within the meaning of Section 2 must be determined on a case-by-case basis “because of the futility of trying to anticipate all the unfair methods and practices a fertile mind might devise.” Testa, 112 Ill. App. 3d at 837. However, the U.S. Supreme Court, in Federal Trade Comm’n. v. Sperry & Hutchinson Co., articulated a test which has been adopted in Illinois. To determine whether a practice is unfair within the meaning of Section 2 of the Consumer Fraud Act, a court must determine:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common

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<sup>5</sup> The facts of the Testa case are intriguing, if not entirely germane here. Testa, the owner of a mobile home park, was accused of unfair practices, which included refusing to permit his tenants to sell their mobile homes *in situ*, after which he would purchase them at extremely reduced prices (being the only potential buyer) and sell them *in situ* himself. Testa at 836. The Attorney General’s Consumer Fraud Act claim was dismissed by the Circuit Court, in part because Testa had subsequently “died as a result of injuries suffered when a bomb exploded in his car[,]” which the Circuit Court judge felt ought to abate the action. Id.

law, or otherwise – whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Knecht Services, 216 Ill. App. 3d at 854, *citing* Federal Trade Comm'n. v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n. 5 (1972)<sup>6</sup>.

Overcharging for goods or services, or charging for goods or services not provided, is an unfair practice within the meaning of Section 2. Griffin v. Universal Casualty Co., 274 Ill. App. 3d 1056, 1070 (1<sup>st</sup> Dist. 1995); Knecht Services, 216 Ill. App. 3d at 856. However, it appears that actionable overcharging will be found where the defendant's conduct has been particularly egregious in some way. *See, e.g., Knecht Services* at 856 (defendant charged for services not rendered, charged for the time of servicemen who were unnecessary or not present, and used intimidation and threats to exact payment).

H. CUB has not demonstrated that Ameritech's advertising and marketing practices were unfair

CUB has not shown that Ameritech's practices could be found to be unfair under this standard. While Ameritech's knowledge and hence bargaining position is generally superior to that of its customers (a factor to be considered; *see Knecht Services* at 856), there seems generally to have been no offense to public policy as a result of Ameritech's practices. Based upon the reasoning in Knecht, it appears that a practice must be quite egregious to qualify as "immoral, unethical, oppressive, or unscrupulous" under the Sperry standard. Finally, the only evidence in the record regarding the amount of injury caused by the practice is equivocal. Ameritech witness Sorenson's testimony purports to show that

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<sup>6</sup> The Sperry unfairness standard has essentially been overruled in federal practice by amendments to the Federal Trade Commission Act. *See* 15 U.S.C. § 45(n)(enacted 1994). However, it remains the standard

Ameritech customers in general realized substantial benefits from subscribing to the SimpliFive and CallPack plans, on the order of \$\*\*\* \*\*\*\*\* per year. Ameritech Exhibit 2.2P at 6. CUB argues, supported by Mr. Sorenson's study results, that \*\*% of SimpliFive customers and \*\*% of CallPack customers pay more under their respective calling plans than they would under basic rates. CUB Opening Brief at 31. Certainly, if it could be ascertained that many or most of these customers had subscribed to an optional calling plan based upon representations of lower rates, this would support a finding of "substantial consumer harm." However, such a finding cannot be made on the basis of this record, which contains no evidence regarding *why* customers who do not save money continue to subscribe to SimpliFive, or CallPack, or, indeed, why any customer who currently subscribes to either plan elected to do so. See Tr. 316 (Ameritech does not know why customers who are paying more to subscribe to an optional calling plan than they would if they subscribed to basic rates).

I. Consumer Fraud Act Standard for Unfair Competition

The Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 *et seq.*, incorporated by reference into the Consumer Fraud Act, see 815 ILCS 505/2, has been held to be a codification of the common law doctrines of unfair competition, and applies generally where a competitor claims actual or potential harm resulting from the trade practices of another. Brooks v. Midas-International Corp., 47 Ill. App. 3d 266, 274 (1<sup>st</sup> Dist. 1977). Thus, CUB's contention that Ameritech has, in its marketing and advertising of SimpliFive and CallPack, committed anti-competitive practices within the meaning of Section 13-514 of

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in Illinois state courts for determining whether a practice is unfair. See Saunders v. Michigan Avenue Nat'l

the Public Utilities Act may be considered in the light of the Uniform Deceptive Trade Practices Act.

Section 2 of the Consumer Fraud Act provides in relevant part that “the use or employment of any practice described in Section 2 of the ‘Uniform Deceptive Trade Practices Act’ [815 ILCS 510/2] ... in the conduct of any trade or commerce [is] hereby declared unlawful[.]” 815 ILCS 505/2.

Section 2 of the Uniform Deceptive Trade Practices Act, 815 ILCS 510/2, provides in relevant part that:

A person engages in a deceptive trade practice when, in the course of his business, vocation or occupation, he:

- ...
8. disparages the goods, services or business of another by false or misleading representation of fact;

...

  11. make false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions;
  12. engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding. This Section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State.

Subsection 2(8) of the Uniform Deceptive Trade Practices Act, 815 ILCS 510/2(8), has been held to have substantially codified the tort of commercial disparagement. Allcare, Inc. v. Bork, 176 Ill. App. 3d 993, 1000 (1<sup>st</sup> Dist. 1988); see *a/so* Doherty v. Kahn, 289 Ill. App. 3d 544 (1<sup>st</sup> Dist. 1997); Crinkley v. Dow Jones and Co., 67 Ill. App. 3d 869 (1st Dist. 1978). Commercial disparagement protects property interests, and is thus distinguishable from defamation, which protects interests of personality. Allcare, 176 Ill. App. 3d at 999. To

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Bank, 278 Ill. App. 3d 307, 313 (1<sup>st</sup> Dist. 1996).

constitute commercial disparagement, a statement must attack the quality of a competitor's goods and services. Allcare at 1000. A statement which imputes to a party a want of integrity in business, but does not disparage the quality of goods or services, does not state a claim for commercial disparagement. Allcare at 999.

CUB appears to assert that Ameritech's "winback" letters disparages the products and service of its competitors<sup>7</sup>. CUB Exhibit No. 1.0P at 15; Tr. 64-65. Based upon the facts adduced, however, there is no basis for a finding that the "winback" letters disparage the services of Ameritech's competitors. First, there is no specific mention of any single competitor; rather, the letters merely indicate that "many customers have been switched [from one carrier to another] without their permission." CUB Exhibit No. 2.0P, Schedule B, Exhibit No. 4. In addition, the letter is truthful in its particulars since CUB and Ameritech agree that many customers are, in fact, switched from one carrier to another without their permission. Ameritech Exhibit No. 1.0 at 40-41; Tr. 61. Thus, the winback letter cannot be said to "disparage[] the goods, services or business of another by false or misleading representation of fact[,] " in violation of 815 ILCS 510/2(8), since it neither disparages any specific competitor's services nor makes any false or misleading assertions.

Subsection 2(11) of the Deceptive Trade Practices Act has not been the subject of much litigation in Illinois. The National Conference of Commissioners on Uniform State Laws, however, which drafted the Uniform Act, stated in its Comments to Section 2 that Section 2(11) "applies to spurious 'fire' and 'liquidation' sales, as well as to spurious price cuts." Comments of National Conference of Commissioners on Uniform State Laws, 815

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<sup>7</sup> CUB does not raise this argument in its Brief, thereby arguably waiving it. However, to the extent that such an argument is not waived, it is untenable for the reasons stated.

ILCS 510/2(11) (Smith-Hurd 1998); see *a/so* Illinois Fraudulent Sales Act, 815 ILCS 350/0.01 *et seq.* (prohibits the conduct of fraudulent liquidation, fire, going-out-of-business, and “lost our lease” sales).

When subsection 2(11) is viewed as a tool to prohibit the false advertising of price reductions, Ameritech does not appear to have violated it in this case. Ameritech’s advertising and marketing of CallPack and SimpliFive can be summarized as statements that customers might save money if they subscribe to one of those services, *rather than* to Ameritech’s basic rate plan, or another carrier’s services. Ameritech did not, and could not, in light of the prohibitions of Section 9-240 of the Public Utilities Act, 220 ILCS 5/9-240, untruthfully assert that its rates were in some way discounted or reduced, which appears to be the practice prohibited by subsection 2(11).

The Retail Advertising Regulations promulgated by the Illinois Attorney General are useful in demonstrating the nature of the practice subsection 2(11) addresses. See 14 Ill. Admin. Code 470.220 (prohibit sellers from advertising reductions from “regular prices” that they have not ever actually charged); see *a/so* 14 Ill. Admin. Code 470.250 (prohibits advertising reductions from “list price” or “manufacturer’s suggested retail price” unless a reasonable number of sellers in the trade are have actually charged that price<sup>8</sup>). Both of these regulations prohibit a seller from falsely representing that a product or service is being offered for sale at a price lower than the seller has previously charged, rather than asserting that a service may, under certain circumstances, result in savings.

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<sup>8</sup> In certain retail trades, such as Oriental rugs, furs, pianos, and mattresses, few if any sellers have ever charged manufacturers’ suggested retail prices for the products they sell. Instead, sellers use such prices as the basis for claiming that they are selling the product at a steep discount. Oriental rug dealers

Subsection 2(12), however, has a broader and more general application. In its Comments to subsection 2(12), the National Conference of Commissioners on Uniform State Laws declared that:

This subsection permits the courts to block out new kinds of deceptive practices. The broad language of Cal. Civ. Code § 3369<sup>9</sup> (Supp. 1963) has been interpreted as creating the *analogous general standard of “likelihood of public deception.”* (citation omitted; emphasis added).

Comments of the National Conference of Commissioners on Uniform State Laws, 815 ILCS 510/2(12) (Smith-Hurd 1998).

It appears, therefore, that, to the extent that a practice is found likely to deceive the public, it violates subsection 2(12). Accord California Dental Ass’n. v. Federal Trade Comm’n., 526 U.S. 756, 143 L. Ed. 2d 935, 951 n. 9 (1999) (false or misleading advertising has been found to have an anti-competitive effect). The analysis appears to be no different from that under Section 2 of the Consumer Fraud Act. If Ameritech’s practices are deceptive or misleading within the meaning of Section 2, they also violate subsection 2(12) of the Uniform Deceptive Trade Practices Act.

J. Ameritech engaged, *de minimus*, in unfair trade practices within the meaning of Section 2(12) of the Uniform Deceptive Trade Practices Act

As has been seen, a small number of Ameritech solicitations and practices, specifically the “0¢ per minute” solicitation, and the telemarketing solicitations received by

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are particularly notorious for this, as well as for claiming to have lost their leases, to be going out of business, or to be bankrupt, on a more or less continuous basis.

<sup>9</sup> Cal. Civ. Code § 3369 is considered by the National Conference of Commissioners on Uniform State Laws to be “a rough prototype” for the Uniform Deceptive Trade Practices Act. Prefatory Note of National Conference of Commissioners on Uniform State Laws, Uniform Deceptive Trade Practices Act, 815 ILCS 510 (Smith-Hurd 1998).

Mr. Cohen, have the capacity to deceive, although the majority of Ameritech's solicitations and practices are not. Thus, a finding that Ameritech violated Section 2(12), on a *de minimus* basis, appears to be warranted.

K. Consumer Fraud Act and Uniform Deceptive Trade Practices Act - Conclusion

Based upon the foregoing, the Commission should find that Ameritech's "0¢ per minute" solicitation, and the telemarketing solicitations received by Mr. Cohen, constitute conduct which violates Section 2 of the Consumer Fraud Act, Section 2(12) of the Uniform Deceptive Practices Act, and unfair, unjust, or unreasonable practices within the meaning of Sections 8-501 and 9-250 of the Public Utilities Act.

**V.**

**REMEDY**

Having determined that Ameritech has committed the violations described above, the Commission must determine what remedy is both within its authority to impose, and appropriate under the circumstances.

A. Commission's Authority to Grant Relief

Section 8-501 provides, in relevant part, that:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, [or] practices ... of any public utility ... are unjust, unreasonable, [or] improper ... the Commission shall determine the just, reasonable, ... proper, [or] adequate ... rules, regulations, practices, ... or methods to be observed, ... enforced or employed and it shall fix the same by its order, decision, rule or regulation. The Commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility.

Section 9-250 provides, in relevant part, that:

Whenever the Commission ... upon complaint, shall find that ... the rules, regulations ... or practices ..., affecting ... rates or other charges, or classifications, ... are unjust, [or] unreasonable ... , or in any way in violation of any provisions of law, ... the Commission shall determine the just, [and] reasonable ... rules, regulations, ... or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

The Commission shall have power, ... upon complaint, to investigate a single ... rule, regulation, ... or practice ..., and to establish new ... rules, regulations, ...or practices ... in lieu thereof.

1. The Commission Cannot Award Attorney's Fees and Costs

CUB seeks its fees and costs under the authority of the Consumer Fraud Act. As has previously been determined, this relief is outside the Commission's authority to grant, and must, accordingly, be denied.

2. The Commission Can Award Reparations but Cannot Award Damages

CUB further seeks "reparations and/or damages" on behalf of customers misled by the acts or practices alleged. The Commission's authority to order reparations is specifically provided for by statute. See 220 ILCS 5/9-252. This Section provides in relevant part, that:

When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

...

All complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the produce, commodity or service as to which complaint is made was furnished or performed, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the proper court within one year from the date of the order .... The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies in this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission.

220 ILCS 5/9-252

While Section 9-252 uses both “reparations” and “damages” in its text, it appears that the measure of damages or reparations available under the statute must be the difference between the amount the utility charged the customer for the service, and the amount that it was authorized to have charged pursuant to its tariff. This is because, under the “filed rate doctrine,” which has been codified in Illinois as Section 9-240 of the Public Utilities Act, 220 ILCS 5/9-240, a utility cannot lawfully charge more or less than the tariffed amount for its services. 220 ILCS 5/9-240; see also, e.g., Marcus v. AT&T, 138 F. 3d 46, 58 (2<sup>nd</sup> Cir. 1998).

The filed rate doctrine is intended to prevent common carriers and utilities from engaging in price discrimination, and also to keep courts out of the ratemaking process, preserving the authority of regulators to perform this function, which is within their sphere of competence. Marcus, 138 F. 3d at 58. Under the filed rate doctrine, customers are conclusively presumed to know the lawful rate for a service set forth in a utility’s tariff. Marcus, 138 F. 3d at 63. Moreover, the filed rate doctrine applies even where a carrier misquotes or misrepresents rates to a customer. Fax Telecomunicaciones, Inc. v. AT&T, 138 F. 3d 479, 488 (2<sup>nd</sup> Dist. 1998); Marcus, 138 F. 3d at 60. This doctrine prevents

carriers and utilities from “accidentally” misquoting rates to favored customers. Marcus, 138 F. 3d at 59.

The courts recognize that any presumption that modern telecommunications customers review filed tariffs “is little more than a legal myth[,]” which does not “reflect[] current reality.” Marcus, 138 F. 3d at 63. Likewise, in Katz v. MCI, 14 F. Supp. 2d 271 (E.D.N.Y. 1998), the court observed that “the filed rate doctrine is a trap for today’s residential phone customer in the face of aggressive and wide ranging sales tactics that are symptomatic of the current highly competitive telecommunications marketplace.” Katz, 14 F. Supp. 2d at 277. However, courts are compelled to apply the filed rate doctrine “regardless of equitable circumstances suggesting [they should do] otherwise.” Marcus v. AT&T, 938 F. Supp. 1158, 1170 (S.D.N.Y. 1996); *affirmed* 138 F. 3d 46 (1998).

The application of the filed rate doctrine leads to some arguably inequitable results. A customer who pays the filed rate, regardless of what representations were made to him by the carrier or utility, does not suffer cognizable legal damages. Marcus, 938 F. Supp. at 1170. Thus, as Ameritech provides the SimpliFive and CallPack services at issue here pursuant to tariff, and Ameritech’s customers paid the tariffed rate for such services, the Commission cannot award damages.

3. 3. The Commission May Order Ameritech to Cease and Desist From Conduct in Violation of the Consumer Fraud Act, and May Order Remedial Practices

In addition to fees and damages, CUB seeks various forms of what is best described as injunctive relief. Specifically, it seeks a Commission order compelling Ameritech to: (1) cease and desist from the use of allegedly misleading representations

and materials in the promotion of CallPack and SimpliFive; (2) cease and desist from the allegedly unjust and unreasonable practices of using allegedly misleading representations and materials in the promotion of CallPack and SimpliFive; (3) cease and desist from charging or attempting to charge residential customers of non-competitive services higher than regularly tariffed rates; (4) cease and desist from the use of allegedly misleading representations and materials in the promotion of CallPack and SimpliFive, in such a manner as to protect the development of competition in Bands A, B, and C (it is unclear to the Staff what, if any, difference exists between the first, second, and fourth requests for relief); (5) provide customers with itemized billing under SimpliFive and CallPack, as well as regularly tariffed rates, for purposes of comparison; and (6) provide customers with sufficient information regarding its rates, including bill comparisons, so that customers can make informed choices regarding what service to use.

CUB seeks this relief under the authority of Section 8-501 of the Public Utilities Act, 220 ILCS 5/8-501, as set forth above.

This Section affords ample scope for the Commission to order the cessation of unreasonable or unjust practices, and the undertaking of just and reasonable ones.

Ameritech might argue that the filed rate doctrine, as expressed in Cahnmann v. Sprint Corp., 961 F. Supp. 1229 (N.D. Ill. 1997), somehow prohibits any inquiry into whether its marketing practices are deceptive or misleading. However, Cahnmann does not bear that interpretation, based upon subsequently decided cases concerning the filed rate doctrine as it affects the alleged deceptive marketing practices of telecommunications carriers. The Marcus court indicated that “we do not hold that AT&T could avoid the

imposition of injunctive relief if it affirmatively misrepresented to consumers as a whole what its rates are[.]” Marcus, 138 F. 3d at 65. Likewise, the Katz court noted that “ratepayers are free to file complaints with the proper regulatory agencies,” which would then “presumably take appropriate action to curb improper sales pitches.” Katz, 14 F. Supp. 2d at 277. Consequently, Ameritech cannot be heard to argue that its sales practices are beyond the review of the Commission.

**B. Staff’s Proposal for an Appropriate Remedy**

Ameritech’s conduct, as described herein, has the capacity to deceive, create confusion, and cause misunderstanding. Such conduct, however, was not widespread, nor was it apparently undertaken by Ameritech with the intent to deceive. Moreover, the deceptive or misleading acts Ameritech engaged in did not result in any pecuniary advantage to it, in fact quite the opposite appears to be the case. Accordingly refunds, even if they were lawful, would not be appropriate.

The Staff considers that, in this case, the appropriate remedy is for Ameritech to take steps to undo confusion and misunderstanding. This can be achieved by the prospective remedies proposed by Ms. TerKeurst, and endorsed by Ms. Jackson. Specifically, Ameritech should be ordered to (1) cease and desist from the use of allegedly misleading representations and materials in the promotion of CallPack and SimpliFive; (2) cease and desist from the unjust and unreasonable practices of using misleading representations and materials in the promotion of CallPack and SimpliFive, based upon Staff’s analysis of what those actually are; (3) cease and desist from the use of allegedly misleading representations and materials in the promotion of CallPack and SimpliFive, in such a manner as to protect the development of competition in Bands A, B, and C, again, based

upon Staff's analysis; (4) provide customers, on a periodic basis, with itemized billing under SimpliFive and CallPack, as well as regularly tariffed rates, for purposes of comparison; and (5) provide customers with sufficient information regarding its rates, including bill comparisons, so that customers can make informed choices regarding what service to use.

Ameritech appears to have no objection, in general concept, to some aspects of item (5). Ameritech Exhibit No. 1.0 at 51.

### C. Staff's Alternative Proposal

If the Commission considers this proposal to not constitute a proper remedy, the Staff proposes, in the alternative, the following, as outlined by Staff witness Cindy Jackson:

The Commission should enter an order directing Ameritech, henceforth, to:

1. insure that all claims must be a) truthful, b) non-misleading, and c) substantiated;
2. disclose all costs consumers may incur, such as per-call minimum charges, monthly fees, and universal service charges;
3. disclose, in advertising, any time and/or geographic restrictions on the availability of advertised rates;
4. disclose the basis for comparative price claims and use only current information in making claims; and
5. disclose, in a clear and conspicuous manner, and without distracting elements, such information as consumers need to understand options, and make fully informed choices.

Staff Exhibit No. 1.0 at 16

Several witnesses, Ms. TerKeurst, Ms. Bayard, and Ms. Shah, agreed that one or more of these conditions were appropriate for telecommunications advertising. Tr. 88-90; 116-120; 306-307.

In addition to the alternative remedial measures set forth above, the Commission should adopt some additional conditions described by Ms. Jackson, as follows:

Ameritech representatives marketing calling packages to customers must disclose to the customers :

1. Information regarding basic monthly service, before making recommendations regarding calling packages;
2. That calling packages are optional;
3. Information regarding the components of the package;
4. That products in the package can be purchased individually; and
5. That access lines can be purchased without option services.

Staff Exhibit No 1.0 at 15.

WHEREFORE , the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully Submitted,

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