

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Citizens Utility Board)	
)	
-vs-)	ICC Docket No. 00-0043
)	
Illinois Bell Telephone Company)	
Ameritech Illinois)	
)	
Complaint to stop Ameritech from using)	
misleading marketing and advertising))	
materials and statements concerning)	
Simplifive and CallPack rates.)	

**REPLY BRIEF OF
THE STAFF OF
THE ILLINOIS COMMERCE COMMISSION**

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I. INTRODUCTION

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 Reply Brief the above-captioned matter.

Two parties filed Brief's in response to the Citizens Utility Board's (hereafter "CUB") Opening Brief, namely, Illinois Bell Telephone Company (hereafter "Ameritech") and the People of the State of Illinois, by and through the Attorney General of Illinois (hereafter "the AG"). This Reply Brief will respond to the arguments raised by those parties.

II. ARGUMENTS

A. The Attorney General

The AG's argument can be summarized as follows: first, the AG asserts that the Commission lacks any jurisdiction to interpret or enforce the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* AG Brief at 1-4. Next the AG argues that the Commission, in deciding this matter, should be guided by the decisions of Illinois courts, federal courts, and the Federal Trade and Communications Commissions. *Id.*, at 4-6. The AG further asserts that Ameritech's advertising and marketing practices for SimpliFive and CallPack are deceptive or have the capacity to deceive within the meaning of Section 2 of the Consumer Fraud Act, 815 ILCS 505/2, AG Brief at 7-16, and in consequence are unjust and unreasonable within the meaning of Sections 8-501 and 9-250 of the Public Utilities Act, 220 ILCS 5/8-501, 9-250. AG Brief at 16-17. Finally, the AG observes that, based upon the filed rate doctrine, the Commission lacks authority to order refunds to consumers under Section 9-252 of the Public Utilities Act. AG Brief at 17-19. With that exception, and also excepting CUB's claim for attorney's fees, and for annual

disclosures, the AG supports the recommendations made by CUB as to an appropriate remedy. AG Brief at 19-20.

The Staff's response to these arguments is as follows: the Staff concurs in the AG's assertion that the Commission has no authority to enforce the Consumer Fraud Act, *qua* Consumer Fraud Act, having made the identical argument in its Response to Ameritech's Motion to Dismiss. The Staff likewise concurs, and indeed believes it to be the law of the case at this point, *see* Tr. 24, that the Commission should be guided in its decision by judicial (and, to the extent applicable, administrative) interpretations of the Consumer Fraud Act. *See* Staff Initial Brief at 11-16, 21-22, 35-39, 41-48. The Staff further concurs generally with the AG's recommendation regarding the appropriate remedy, having made an essentially similar recommendation. Staff Initial Brief at 53-54; AG Brief at 19-20.

The Staff's chief disagreement with the AG's analysis is identical to its response to arguments raised by CUB in its Opening Brief: specifically, that: (1) the AG, like CUB, refers to Ameritech's marketing and advertising of SimpliFive and CallPack as deceptive or having the capacity to deceive, without dealing specifically with precisely *which* individual advertising and marketing solicitations or pitches he considers to be deceptive or misleading, and how they are deceptive or misleading, *see* Staff's Initial Brief at 18; (2) the AG, like CUB, alleges that Ameritech actionably failed to disclose important information about different rate plans to consumers, without attempting to demonstrate, as is required under the Consumer Fraud Act, that Ameritech had any duty to make such affirmative disclosures, *see* Staff Initial Brief at 35-41; and finally, (3) the AG, like CUB, declines to acknowledge the fact that, as a matter of law, so-called "puffing" (i.e.,

expressing opinion, or describing one' product or service in highly subjective or superlative terms) is not actionable under the Consumer Fraud Act. See Staff Brief at 15-16; see also Ameritech Brief at 21 *et seq.*

The Staff believes that the AG's arguments in this regard were fully addressed by the Staff's response to CUB's similar arguments. Accordingly, the Staff stands on its Initial Brief in response to those arguments. See Staff Initial Brief at 15-16, 18, 35-41. Likewise, the Staff stands on its analysis of Ameritech's practices as set forth in its Initial Brief. See Staff Initial Brief at 16-35.

B. Ameritech

Ameritech asserts that its advertising and marketing practices for CallPack and SimpliFive are neither deceptive nor misleading. Ameritech Brief at 15 *et seq.* Ameritech's premises in support of this assertion are as follows: (1) CUB relies on the unsupported opinions of its witnesses, and isolated language from Ameritech promotional materials, to reach the conclusion that Ameritech attempted to convince customers that they would save money by subscribing to one of the plans, Ameritech Brief at 16; (2) Ameritech's marketing and advertising materials do not, in fact, represent that customers *will* save by subscribing to one of the plans, but rather express a general, subjective (and hence non-actionable) opinion that they *might* do so, Ameritech Brief at 20-23; (3) the FCC/FTC Joint Policy Statement permits precisely the sort of advertising and marketing that Ameritech has engaged in, Ameritech Brief at 24-27; (4) Ameritech's marketing and advertising of the two plans is reasonable within the meaning of Sections 8-501 and 9-250 of the Public Utilities Act, and Ameritech does not, contrary to CUB's assertions, have any duty to exceed this

standard, Ameritech Brief at 27- 30; and (5) accordingly, CUB's claim should be denied in its entirety. *Id.* at 31 *et seq.* In particular, Ameritech asserts that the filed rate doctrine prohibits refunds. *Id.* at 33-34. Finally, Ameritech asserts that its advertising and marketing activities did not impede competition, and that, even if they did, the method CUB chose to assert its claim of impeding competition, specifically a complaint under Section 10-108 of the Public Utilities Act, was procedurally infirm because such a claim must be brought under the procedures set forth in Section 13-514 of the Act. Ameritech Brief at 34-36

The Staff, as has been noted, concurs in Ameritech's assertion that the filed-rate doctrine prohibits refunds. The Staff generally concurs with Ameritech's statement of the law with respect to expressions of opinion and "puffing". The Staff believes, however, that certain statements contained in Ameritech promotional material, such as representations that CallPack customers receive "0¢ [per] minute" rates, see Staff Initial Brief at 19-21, are not in any way protected statements of opinion (i.e., "this is our best plan. It's a great plan for you.") or statements regarding contingent future events (i.e., "you'll certainly save money by subscribing to this plan") but rather deceptive statements regarding an ascertainable present material fact ("the rate which applies to the plan to which we hope this solicitation will induce you to subscribe is 0¢ per minute"). Likewise, the representations made to Mr. Cohen in the course of telemarketing calls were not expressions of opinion, but rather false assertions regarding material facts. The telemarketers to whom Mr. Cohen spoke stated that his current rates were 8¢ per minute, CUB Exhibit No. 3.0 at 3, and that, if he subscribed to SimpliFive, his rates other than local toll would not change. CUB Exhibit No. 3.1 at 5. Neither representation was true. CUB Exhibit No. 3.1 at 6.

Ameritech asserts that Mr. Cohen's testimony is somehow unreliable because it "was brief and conclusory[.]" Ameritech Brief at 17, and, in Ameritech's view, lacking in detail, which means that the Commission cannot evaluate all of the facts and circumstances surrounding the transactions, as, Ameritech asserts, it must before it can find that representations made to Mr. Cohen by Ameritech telemarketers violated the law. Id.

The Staff cannot concur in this line of argument. If, in Ameritech's opinion, the facts to which Mr. Cohen testified were somehow inadequate or bore an interpretation other than the one Mr. Cohen attested to, the company had a number of methods by which it could have addressed this. First, it could have, but did not, cross-examine Mr. Cohen, and challenged his recollections. Second, it could have, but to Staff's knowledge, did not, seek to obtain through data requests any contemporaneous notes which Mr. Cohen might have made with respect to the calls, also for the purpose of challenging his recollection of the details of each call. Third, it could have attempted to locate the telemarketers in question (who are, after all, employees of Ameritech contractors, and who, if Mr. Fargo's testimony is to be credited¹, Ameritech closely supervises) to determine whether they had any recollection of, or records regarding, the calls. Apparently, it either failed to do this; or did this, but obtained no information helpful to its position. In any case, Ameritech cannot now be heard to assert that Mr. Cohen's testimony -- which it has taken no steps to rebut, other than to indicate that its procedures and policies prohibited such representations being made -- ought to be discounted. In short, Mr. Cohen's testimony should be relied upon.

¹ Or, indeed, if Ameritech's Brief is to be credited. See Ameritech Brief at 18, n. 10.

It bears consideration that Ameritech telemarketers called one Ameritech winback customer, Mr. Cohen, five times in six months, and misrepresented material facts in a minimum of two such conversations. The Commission could infer from this that Ameritech's efforts to ensure that telemarketers were not misrepresenting the rates, terms, and conditions of SimpliFive to winback customers are less effective than Ameritech has indicated.

Ameritech raises other points which are of significant concern to the Staff. First, it asserts that the Consumer Education Committee should administer any consumer education ordered as a result of this proceeding, using the existing Consumer Education Fund which Ameritech is required to establish and fund pursuant to the Merger Order. Ameritech Brief at 41-2. This, however, is a suggestion which the Staff must oppose. To the extent that Ameritech is required, as a result of the Commission's decision in this proceeding, to undertake consumer education, any such consumer education is properly a *remedy* for such unlawful practices as Ameritech might be found to have committed. In other words, if Ameritech commits unlawful practices – indeed, unlawful deceptive practices which might reasonably be viewed as hindering and retarding consumer education initiatives – it cannot assert that a remedy ought to be funded by contributions it was required by Commission order to make in another, prior, proceeding. This argument is similar to suggesting that one ought not to be compelled to pay a parking ticket because one has, in the past, incurred and paid others.

In addition, the Committee established to administer the Consumer Education Fund established in the Merger Order is an independent, not-for-profit corporation formed to achieve the merger condition. The Merger Order specifically provides that:

(8) Consumer Education Fund - SBC/Ameritech will establish, within three months after the Merger Closing Date, a Consumer Education Fund ("CEF") and will make \$1 million available to the CEF for disbursement by Ameritech Illinois in each of the three consecutive 12-month periods following the date the CEF is established, for a total of \$3 million. All allocated funds remain available to the CEF for the purposes described herein until they are disbursed. Funds shall be allocated to the CEF by Ameritech Illinois, and the use of the funds will be controlled by the CEF Committee. The Committee shall consist of one voting representative each from Ameritech Illinois, Commission Staff, and such other entities as appointed by the Commission and shall make decisions by majority vote. Tie votes, if any, will be decided by the Commission Staff representative. CEF Committee decisions as to how funds should be distributed and expended are subject to Commission review. At its first meeting, the Committee shall establish rules of governance for the operation of the Committee. No funds shall be disbursed until 30 days after the committee files with the Commission a report of such proposed expenditures. Payments made under this subsection should not be included in the revenue requirement or costs studies of Ameritech Illinois[.]

Joint Application of SBC and Ameritech, ICC Docket No. 98-0555, *Final Order* at 241 (October 5, 1999)

While the Commission must approve expenditures of funds under this provision, it is not clear to the Staff that the Commission can order the Committee to undertake any specific act. Having the authority to approve or veto an expenditure is assuredly not the authority to direct what the Committee does.

Ameritech further asserts that the proper avenue for dealing with marketing practices is a general rulemaking. See Ameritech Brief at 40, n. 19. While the Staff does not dispute the proposition that *one* appropriate way² to address deceptive marketing practices is through the promulgation of rules of general application, the issue before the Commission in *this* proceeding is whether Ameritech's advertising and marketing of SimpliFive and CallPack plans were unfair, deceptive or unlawful. Moreover, Ameritech's

argument that it alone is being called to account for industry-wide practices simply will not bear scrutiny.

First, this assertion, even if true, is irrelevant. As the Staff demonstrated in its Initial Brief, unfair trade practices cannot be justified merely because other competitors engage in similar or identical practices. Staff Initial Brief at 13. Second, the assertion in question is simply not true. On Thursday, July 20, 2000, the Attorneys General of eight states brought consumer fraud actions, alleging deceptive and unfair advertising and marketing practices, against *all* of Ameritech's largest IXC competitors: AT&T, MCI Worldcom, and Sprint. See, e.g., "Sprint Sued over Long-Distance Ads," Chicago Sun-Times, July 21, 2000 at NP-21 (Sprint sued by Connecticut and Illinois; AT&T sued by Connecticut, Idaho, and Maine, and MCI sued by California, Connecticut, Maine, Minnesota, Missouri, and New Jersey). The notion that Ameritech is being singled out is not the case.

In addition, Ameritech, although it has vehemently denied it and doubtless will continue to do so, is unique in its service territory. While its "competitors" fight to obtain some small percentage of market share in residential Band C usage³, Ameritech maintains a virtual monopoly over Residential Band A and Band B service. While the Staff agrees that it is desirable to maintain a "level playing field" in regulatory matters, any notion of what constitutes a "level playing field" has to take into account the fact that Ameritech Illinois controls 96.9% of in-region market share, with almost all competition for business

² Indeed, perhaps, *the best* way, but not one which the Commission has authorized, or is at issue here.

³ Residential Band C usage constitutes 8% of total residential usage. CUB Exhibit No. 1.0 at 3, 7.

customers⁴. See Testimony of Richard L. Mathias before the Illinois Senate Committee on Environment and Energy, March 23, 2000 at 7. If the Commission adopted rules which applied to all carriers' marketing practices, it would scarcely be more effective (in terms of the local market) than adopting rules which governed only Ameritech's practices, or indeed, ordering Ameritech to reform its practices in this proceeding.

This, of course, is the ultimate point. The case presented to the Commission for decision is this one, not a hypothetical rulemaking. If Ameritech believes that the marketing practices of its putative competitors are unlawful, it can, of course, complain to the Commission, just as CUB did, or as any other party which believes him-, her-, or itself aggrieved can. What it cannot do, however, is defend itself by asserting that its conduct is comparable to others, or that a remedy will require it to do things that others do not have to.

Ameritech asserts generally that the relief sought by CUB is "inappropriate." Ameritech Brief at 37. It then details the manner in which it views the proposed relief as inappropriate. Ameritech's arguments in this regard are based, in part, on the assertion that its practices regarding billing and customer information are consistent with, or superior to, those common in the telecommunications industry, and therefore need not be altered. Ameritech Brief at 37, 40. Ameritech objects to other remedial proposals because, in its view, benefits would be outweighed by costs of implementing the remedy in question, the cost of implementing the remedy in question would be high, or that customers do not want such information. Ameritech Brief at 37-38, 40-41.

⁴ Ameritech's share of the residential market is virtually 100%. See Testimony of Richard L. Mathias before the Illinois Senate Committee on Environment and Energy, March 23, 2000 at 7.

None of these objections are cognizable. First, as has been seen, other carriers' practices are irrelevant to this case, which concerns Ameritech's. Second, the fact that a remedy is costly is not the point; rather, the issue is whether the proposal will rectify the harm caused by the practices in question. Obviously, subjecting a remedy to cost-benefit analysis is improper. Finally, it might be observed that what customers want appears, in a significant way, to be lower rates. CUB Exhibit No. 2.0, Schedule A. Ameritech's desire to avoid disclosing to customers what phone rates would be under different calling plans appears in this context to be disingenuous and self-interested.

III. CONCLUSION

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, and in its Initial Brief herein.

Respectfully Submitted,

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