1. **AMERITECH CENTREX SERVICE (cont'd)**

F. PRICES

3. Payment Plans (cont'd)

Termination Charges

Under Utilization
In the event the actual number of lines that are billed in a given month is less than the Line Commitment, customer will be billed an Under Utilization charge equal to the monthly charge for the Line Commitment minus the actual lines billed.

Full Termination
If customer terminates service prior to the expiration of the contract period, customer will be required to pay charges calculated as follows:

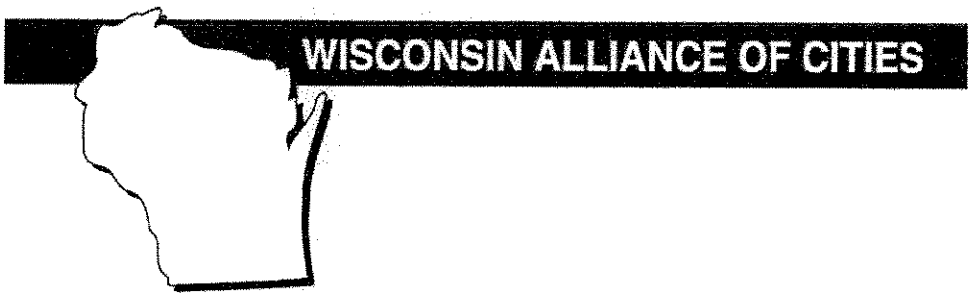
85% x (Line Capacity commitment) x (network access monthly price plus contracted monthly Centrex Line price) x (unexpired portion, in months, of the contract period)

Classroom Termination (N)
Discontinuance of Classroom Lines within the initial service contract period will result in termination charges calculated as follows: (Number of Classroom Lines Terminated) X (Contracted monthly Classroom Line station feature price X 50%) X (unexpired portion (in months) of the contract period). (N)

/2/

/1/ Effective June 14, 1999, the termination charges described above will apply to any new agreement signed by a customer. Requests to terminate service on agreements negotiated prior to June 14, 1999, will be governed by the terms and conditions described on Sheet Nos. 147.1 and 147.2.

/2/ Material now appears on 2nd Revised Sheet No. 147 in this Section.



HIGHLIGHTS OF *CITY OF BRISTOL v. EARLEY*
May 16, 2001 OPINION
U.S. DISTRICT COURT FOR WESTERN VIRGINIA
(Judge James P. Jones)

Bristol, Virginia, sued the state, contending a Virginia statute prohibiting the city from providing fiber optic telecommunications services to the public is preempted by the Telecommunications Act of 1996.

The Telecommunications Act provides that "[n]o state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." (emphasis added by the court)

"The Supreme Court has held that the use of the modifier 'any' in a federal statute precludes a narrow interpretation of the law's application. … Specifically, the Court has held that where Congress uses unambiguous statutory language, such as the word 'any,' it has expressed a 'clear and manifest' intent to preempt a traditional area of state law…

"Simply put, it strains logic to interpret the term 'any entity' in [the law] to mean 'any entity except for municipalities and other subdivisions of states.'

"…The Virginia law prohibits localities from providing telecommunications service in the public marketplace. …As such, the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' and is preempted."

Judge Jones concluded:

"In summary, I hold that the words 'any entity' in the federal statute plainly include a municipality. The issue is not whether allowing local government to compete with commercial providers is good public policy or not. That decision has been made by Congress, and under the Commerce Clause of the Constitution, its decision trumps any conflicting state law."

PUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

CITY OF BRISTOL, VIRGINIA, ETC,	)	
	)	
Plaintiff,	)	Case No. 1:00CV00173
	)	
v.	)	**OPINION**
	)	
MARK L. EARLEY, ATTORNEY GENERAL, ET AL.,	)	By: James P. Jones United States District Judge
	)	
Defendants.	)	

James Baller, The Baller Herbst Law Group, P.C., Washington, D.C. and J.D. Bowie, Bristol, Virginia, for Plaintiff; Judith Williams Jagdmann, Deputy Attorney General of Virginia, and A. Ann Berkebile, Assistant Attorney General of Virginia, Richmond, Virginia, for Defendants Mark L. Earley, Attorney General and Commonwealth of Virginia; Edward J. Fuhr, Hunton & Williams, Richmond, Virginia, for Intervenor-Defendant Virginia Telecommunications Industry Association; Steven R. Minor, Elliott Lawson & Pomrenke, Bristol, Virginia, for Amicus Curiae Congressman Rick Boucher and Amicus Curiae Blue Ridge Power Agency.

In this suit by a municipality seeking a declaratory judgment that a Virginia statute is preempted by the federal Telecommunications Act of 1996, I grant summary judgment in favor of the plaintiff and declare the Virginia statute unenforceable under the Supremacy Clause of the Constitution.

The plaintiff in this case is the City of Bristol, Virginia, doing business as the Bristol Virginia Utilities Board ("City"). The City filed a complaint against Mark L. Earley, Attorney General of Virginia, and against the Commonwealth of Virginia, requesting a declaratory judgment that a Virginia statute prohibiting the City from providing fiber optic telecommunications services to the public is preempted by the federal Telecommunications Act of 1996 ("Telecommunications Act" or "Act"), 47 U.S.C.A. § 253(a) (West 1991 & Supp. 2000). By order dated February 2, 2001, the Virginia Telecommunications Industry Association was added as a party defendant in response to its motion to intervene under Federal Rule of Civil Procedure 24.

At issue is a 1999 Virginia statute providing that

> no locality shall establish any department, office, board, commission, agency or other governmental division or entity which has authority to offer telecommunications equipment, infrastructure, . . . or services . . . for sale or lease to any person or entity other than (i) such locality's departments, offices, boards, commissions, agencies or other governmental divisions or entities or (ii) an adjoining locality's departments, offices, boards, commissions, agencies or other governmental divisions or entities, so long as any charges for such telecommunications equipment, infrastructure and services do not exceed the cost to the providing locality of providing such equipment, infrastructure or services.

Va. Code Ann. § 15.2-1500(B) (Michie Supp. 2000). The effect of this legislation is to prohibit localities in Virginia from competing in the public marketplace with

commercial providers of telecommunications services and equipment.[1] The City contends that this statute thus violates the Telecommunications Act, which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C.A. § 253(a) (emphasis added).

Attorney General Earley and the Commonwealth filed a motion to dismiss the action, and the City moved for summary judgment. Written and oral argument has been presented, and the case is ripe for decision.[2] In summary, I hold that the words "any entity" in the federal statute plainly include a municipality. The issue is not whether allowing local government to compete with commercial providers is good public policy or not. That decision has been made by Congress, and under the Commerce Clause of the Constitution, its decision trumps any conflicting state law.

---

[1] The Virginia statute excepts one locality, described as "any town which is located adjacent to Exit 17 on Interstate 81 and which offered telecommunications services to the public on January 1, 1998. . . ." *Id.* This locality, the Town of Abingdon, is less than 10 miles from Bristol. The record does not disclose why Abingdon, out of the several hundred local governments in Virginia, was excepted.

[2] Jurisdiction of this court exists pursuant to 28 U.S.C.A. § 1331 (West 1993). An action raising a challenge under the Supremacy Clause of the Constitution presents a federal question that can be resolved in federal court. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

II

A

In support of their motion to dismiss, Attorney General Earley and the Commonwealth contend that the City lacks standing to bring suit under federal and state law. It is true that some courts have held that political subdivisions of a state, such as cities, lack standing to challenge a state statute on constitutional grounds. *See, e.g., Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1363 (9th Cir. 1998). The theory behind such a rule is that a state's political subdivisions are "so thoroughly controlled by the body they are suing that the litigation amounts to a suit by the state against itself, [therefore lacking] live adversariness . . . ." *Rogers v. Brockette*, 588 F.2d 1057, 1065 (5th Cir. 1979). However, the majority of courts have rejected this rule, particularly in Supremacy Clause challenges. *See, e.g., Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998) ("[W]e conclude that a political subdivision has standing to bring a constitutional claim against its creating state when the substance of its claim relies on the Supremacy Clause and a putatively controlling federal law."). Where a political subdivision is "legally and practically independent" from the state, the suit presents a genuine adversary contest. *Rogers*, 588 F.2d at 1065. Moreover, without deciding the issue, the Fourth Circuit has expressed doubts as to the validity of any such rule banning suits by cities against

states. *See City of Charleston v. Public Serv. Comm'n of W. Va.*, 57 F.3d 385, 390 (4th Cir. 1995). By virtue of Virginia's broad grant of powers to localities, discussed below, I find that the City is sufficiently independent from state government to assert a Supremacy Clause challenge against it.

The defendants also contend that the City lacks the authority to bring suit under state law. Virginia law grants a locality the power to sue in its own name "in relation to all matters connected with its duties." Va. Code Ann. § 15.2-1404 (Michie 1997). Section 15.2-1102 gives a broad general grant of power to localities to exercise all powers

> necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof . . . .

Va. Code Ann. § 15.2-1102 (Michie 1997). Furthermore, the statute specifies that these enumerated powers are not exclusive, but shall be construed to be in addition to a general grant of power. *See id.* Among the general powers granted to localities is the power to establish, maintain, and operate "public utilities," Va. Code Ann. § 15.2-2109 (Michie 1997), which are defined as including "the furnishing of telephone service." Va. Code Ann. § 56-265.1 (Michie 1995). Therefore, I find that providing

telecommunications services falls within the ambit of the City's duties, and the suit is therefore authorized under state law.

At oral argument, the defendants asserted that the City could not contend that providing telecommunications services was part of its duties because the statute at issue clearly prohibits providing telecommunications services. I reject this argument as circular. Under this reasoning, an unconstitutional statute would be immune to a Supremacy Clause challenge by affected localities. Because the majority of courts addressing the issue have recognized that a political subdivision may bring a Supremacy Clause challenge against a state, the defendants' argument is not persuasive. *See Branson School Dist. RE-82*, 161 F.3d at 630.

Finally, the defendants urge that the City lacks the "injury in fact" required to establish standing because the City has not exercised its ability to lease "dark fibers" under the exception to § 15.2-1500(B). Section 15.2-1500(C) permits a locality to lease dark fibers, defined as "fiber optic cable which is not lighted by lasers or other electronic equipment." Va. Code Ann. § 15.2-1500(C). The Virginia Code further specifies that in order to take advantage of this exception, a locality may only lease to a certificated local exchange telephone company or a non-profit organization "for use in serving their not-for-profit purposes." Va. Code Ann. § 56-484.7:1 (Michie Supp. 2000). Before such a lease would be effective, however, it must be approved by the

State Corporation Commission. *Id.* The defendants argue that because the City has not attempted to use this option, it has suffered no injury in fact.

I find that the City has indeed suffered an injury in fact despite the fact that it has not exercised the "dark fiber" option. The Telecommunications Act prohibits any state or local laws which "may prohibit or *have the effect of prohibiting* the ability of any entity" to provide telecommunications service. 47 U.S.C.A. § 253(a) (emphasis added). Section 15.2-1500(B) specifically prohibits a locality from providing telecommunications service. The "dark fiber" exception imposes severe limitations on the ability of the City to provide telecommunications service and certainly does not permit unbridled competition in the public marketplace. Thus, the challenged statute at least has "the effect of prohibiting" the City from providing telecommunications service to the public. The City would provide telecommunications service but for § 15.2-1500(B). Therefore, it has suffered an injury in fact caused by the defendant that is substantially likely to be remedied by the requested relief, thereby satisfying the requirements for standing in federal court. *See Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 771 (2000).

B

The next issue is whether the Commonwealth and Attorney General Earley are proper defendants under the doctrine of sovereign immunity. It is well-settled that by virtue of the Eleventh Amendment, a state cannot be sued unless it has waived immunity and consented to suit or Congress has abrogated sovereign immunity under § 5 of the Fourteenth Amendment. *See Lynn v. West*, 134 F.3d 582, 587 (4th Cir. 1998). In this case, neither of these conditions has been met, and therefore the Commonwealth of Virginia is immune from this suit. I will dismiss the Commonwealth as a defendant.

Under the doctrine expressed in *Ex Parte Young*, 209 U.S. 123, 157 (1908), however, a state official is not immune in certain actions for injunctive or declaratory relief. *See Alden v. Maine*, 527 U.S. 706, 757 (1999). However, the official is not a proper defendant unless

> it is plain that such officer . . . [has] some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

Ex Parte Young, 209 U.S. at 157. The Court also stated that the necessary "connection with the enforcement of the act" may arise out of general law or the specific law being challenged. *Id.* The Fourth Circuit recently held that the district court is in the best position to evaluate the questions of fact and law necessary to determine whether a

state official has a sufficient connection to the enforcement of a challenged law. *See Lytle v. Griffith*, 240 F.3d 404, 410 (4th Cir. 2001).

I hold that Attorney General Earley does have a sufficient connection to the enforcement of § 15.2-1500(B) to be subject to the City's action in this case. Under the Code of Virginia, the Attorney General advises the Governor in the institution of "requisite and appropriate actions[s], suit[s], motion[s] or other proceeding[s], in the name of the Commonwealth." Va. Code Ann. § 2.1-48 (Michie 1995). Furthermore, the Attorney General serves as the chief executive officer of the Virginia Department of Law. Va. Code Ann. § 2.1-117 (Michie 1995). The Fourth Circuit has held that the Virginia Attorney General is a proper defendant where a party seeks declaratory judgment that a state statute is preempted by federal law. *See Mobil Oil Corp. v. Att'y Gen. of the Commonwealth of Va.*, 940 F.2d 73, 76 n.2 (4th Cir. 1991) ("[W]e think a dispute with a state suffices to create a dispute with the state's enforcement officer sued in a representative capacity.") Therefore, I find that Attorney General Earley has the requisite connection with the enforcement of § 15.2-1500(B), and will not dismiss him as a defendant.

III

The central issue in this case is whether § 15.2-1500(B) is preempted by the Telecommunications Act. That question boils down to whether a city is an "entity" within the meaning of the Act. 47 U.S.C.A. § 253(a). If a city is not an entity, then Virginia's ban on localities providing telecommunications service does not violate the Telecommunications Act's mandate that a state cannot prohibit the ability of "any entity" to provide telecommunications service. *Id.* However, if a city is an entity, then Virginia's law is in direct conflict with the federal legislation, and cannot stand under the Supremacy Clause. U.S. Const. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any . . . Laws of any State to the Contrary notwithstanding."). In determining whether a state law is preempted by federal law, the Supreme Court has acknowledged that "[n]o simple formula can capture the complexities of this determination; the conflicts which may develop between state and federal action are as varied as the fields to which congressional action may apply." *Goldstein v. Calif.*, 412 U.S. 546, 561 (1973). Absent an express preemption provision in the federal legislation, the inquiry turns to whether Congress intended federal law to occupy the field such that state law in that area is preempted, or to whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives

of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In this case, the challenged state law relates to an area traditionally regulated by states, i.e., the relationship between a state and its political subdivisions. *See Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("Political subdivisions of States . . . have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."). Where a federal statute touches on an area traditionally within the exclusive control of states, "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The question, then, is whether § 253(a) demonstrates a "clear and manifest" intention by Congress to preempt state laws such as Virginia Code § 15.2-1500(B). *Id.* Part of this determination is whether Virginia's law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 372.

I find that the broad and unambiguous language of § 253(a) makes it clear that Congress did intend for cities to be "entities" within the meaning of the Telecommunications Act. Therefore, § 15.2-1500(B) is in direct conflict with federal law, and is void under the Supremacy Clause. Section 253(a) is a concise mandate that

no state "may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." 47 U.S.C.A. § 253(a) (emphasis added). Although the word "entity" is not defined in the Act, the plain meaning of "entity" suggests broad application. *See Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997) (supporting proposition that "entity is the broadest of all definitions which relate to bodies or units" (internal quotations omitted)). Such an interpretation is confirmed by the use of the modifier "any." The Supreme Court has held that the use of the modifier "any" in a federal statute precludes a narrow interpretation of the law's application. *See Salinas v. United States*, 522 U.S. 52, 57 (1997); *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning . . . ."). Specifically, the Court has held that where Congress uses unambiguous statutory language, such as the word "any," it has expressed a "clear and manifest" intent to preempt a traditional area of state law, satisfying *Gregory*, 501 U.S. at 461. *See Salinas*, 522 U.S. at 60. ("The plain-statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute's terms.").

Simply put, it strains logic to interpret the term "any entity" in § 253(a) to mean "any entity except for municipalities and other political subdivisions of states." While it is true that such an interpretation is possible, the Supreme Court has cautioned that

"[a] statute can be unambiguous without addressing every interpretive theory offered by a party." *Id.* Because of the broad language chosen by Congress, I find it to be "clear and manifest" that Congress intended § 253(a) to have sweeping application, including areas in which states traditionally enjoyed exclusive regulatory power.

Where the plain and ordinary meaning of a statute gives a "straightforward statutory command, there is no reason to resort to legislative history." *Gonzales*, 520 U.S. at 6. Nevertheless, the legislative history here supports a broad, rather than narrow, interpretation.[3]

Another argument posited by the defendants focuses on the use of the word "prohibit" in the Telecommunications Act. 47 U.S.C.A. § 253(a). The argument is based on Virginia's adherence to the so-called Dillon Rule, which provides that localities "possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable." *City of Richmond v. Confrere Club of Richmond, Va., Inc.*, 387 S.E.2d 471, 473 (Va. 1990). Because the Telecommunications Act speaks in terms of prohibition, rather than withholding authorization, the defendants argue that

[3] The defendants have moved to strike certain of the submissions of the plaintiff concerning legislative history on the grounds that they constitute inadmissible hearsay and are irrelevant. Particularly since I do not rely on the legislative history of § 253(a), I will deny the defendants' motion.

localities cannot fairly be considered within the purview of the Act. As discussed in Section II, A, *supra*, I find it clear that the General Assembly did authorize the City to provide telecommunications service as a public utility in sections 15.2-2109 and 56-265.1 of the Virginia Code. Furthermore, the defendants' argument is weakened by the fact that the Virginia statute also speaks in prohibatory language. *See* Va. Code Ann. § 15.2-1500(B) ("no locality shall establish . . ."). That the General Assembly sought to prohibit localities from engaging in these particular activities implies that such activities were presumed to be a valid exercise of local government prior to the passage of the state statute. Finally, the language of § 253(a) does indicate that Congress, in its prohibition of barriers to entry into the telecommunications field, anticipated that a state might stifle competition without a direct prohibition. The federal statute, therefore, not only mandates that no state statute "may prohibit" telecommunications competition, but also that no state statute "may *have the effect of prohibiting*" telecommunications competition. 47 U.S.C.A. § 253(a) (emphasis added). Thus, even if the Virginia law were couched in terms of a "withholding of authorization" to the City under the Dillon Rule, the effect of prohibition would be the same, and the state law would violate the federal rule.

The defendants next argue this court must defer to the Federal Communications Commission's interpretation of the word "entity" under the principles of *Chevron,*

U.S.A., Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837 (1984). Under *Chevron*, if a statute is silent or ambiguous as to a specific meaning, the court must defer to the interpretation given by the agency charged with administration of the statute. *Id.* at 842-43. As discussed above, however, § 253(a) is not ambiguous. The *Chevron* Court stressed that where "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Therefore, not only is the FCC's interpretation not binding on this court, but it must be rejected as wrong.

The FCC first articulated its erroneous interpretation of "any entity" in *Public Utility Commission of Texas*, 13 F.C.C.R. 3460 (1997). Reasoning that the application of § 253(a) to municipalities would invade an area traditionally controlled by states, the FCC concluded that "the term [any entity] was not intended to include political subdivisions of the state." *Id.* at ¶ 184. On appeal, the District of Columbia Circuit upheld the ruling, finding that the term "any entity" was ambiguous, and that therefore the federal statute cannot preempt a traditional area of state control under *Gregory*. *See City of Abilene v. FCC*, 164 F.3d 49, 52-53 (D.C. Cir. 1999). Rejecting Abilene's argument that the use of the modifier "any" requires a broad application, the court explained that the term is nonetheless ambiguous because the court could not guess Congress's "tone of voice" when dealing with the written, rather than spoken, word.

Both the FCC and other courts have followed the *Abilene* decision without reexamination of the plain language of the Telecommunications Act. *See Mo. Mun. League*, 2001 WL 28068 at ¶ 9 (F.C.C. Jan. 12, 2001); *Mun. Elec. Auth. of Ga. v. Ga. Pub. Serv. Comm'n*, 525 S.E.2d 399, 403 (Ga. Ct. App. 1999); *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W. 2d 245, 252 (Iowa 1999).

The interpretation of the FCC is not binding on this court, and I reject the District of Columbia Circuit's analysis of § 253(a). First, the court did not apply the principle of statutory interpretation, repeated in Supreme Court opinions, that the use of the modifier "any" in a statute precludes a narrow construction of the term it modifies. *See Salinas*, 522 U.S. at 57; *Gonzales*, 520 U.S. at 5. The D.C. Circuit rationalized its narrow reading of the term "any" by explaining that it could not "hear" Congress's "tone of voice" with regard to the word. *City of Abilene*, 164 F.3d at 52. Courts have always been called upon to interpret the written rather than spoken words of the legislature. That judges are unable to hear certain tonal emphases of a legislature has never been an obstacle to statutory interpretation. On the contrary, the Supreme Court has held that where Congress uses the modifier "any," it intends to impose a broad construction. *See Salinas*, 522 U.S. at 57. I find this guidance of the Supreme Court to be binding on my reading of the Telecommunications Act.

As stated in *Salinas*, *Gregory* imposes no barrier on a finding of preemption, even in an area of traditional state authority, where Congress has spoken in unambiguous language. *Id.* at 60. Further, contrary to the suggestion of the D.C. Circuit in *Abilene*, a statute may be subject to alternative interpretations and still be unambiguous. *See id.* at 60 ("A statute can be unambiguous without addressing every interpretive theory offered by a party."). The key is the plain meaning of the statutory language, *see id.*, and the Supreme Court has held that "[r]ead naturally, the word 'any' has an expansive meaning." *Gonzales*, 520 U.S. at 5. As such, I cannot read the term "any entity" in § 253(a) to mean "any entity except for municipalities or other political subdivisions of states."

Because I find that § 253(a) applies to cities, Virginia Code § 15.2-1500(B) stands in direct conflict with the federal statute. Section 253(a) states that "[n]o State . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any . . . telecommunications service." The Virginia law prohibits localities from providing telecommunications service in the public marketplace. Va. Code Ann. § 15.2-1500(B). As such, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and is preempted. *Crosby*, 530 U.S. at 372.

The defendants urge that application of § 253(a) to cities violates the Tenth Amendment's reservation of power to the states. U.S. Const. amend. X. This argument is not persuasive. Congress has the express authority to regulate interstate commerce. U.S. Const. art. 1, § 8. There is no question but that the telecommunications industry constitutes interstate commerce. In fact, the Supreme Court has recognized that with the passage of the Telecommunications Act, the federal government preempted areas traditionally regulated by states. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S 366, 378 n.6 (1999) ("[T]he question is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."). In sum, I "perceive nothing in the [Act] that is destructive of state sovereignty or violative of any constitutional provision." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

IV

For the reasons stated in this opinion, I will declare that Virginia Code § 15.2-1500(B) is preempted by the Federal Telecommunications Act of 1996, 47 U.S.C.A. § 253(a), and is therefore invalid and unenforceable under the Supremacy Clause of the

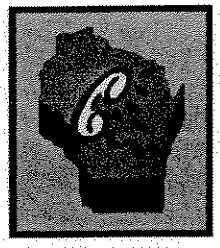
Constitution.[4] Accordingly, I will grant the City's motion for summary judgment and enter a declaratory judgment in its favor.

DATED: May 16, 2001

_____

United States District Judge

[4] In its Complaint, the City also seeks a declaratory judgment invalidating Virginia Code § 56-484.7:1, which delineates the requirements to meet the so-called "dark fibers" exception to the prohibition in § 15.2-1500(B). *See* Va. Code Ann. § 15.2-1500(C). However, the City has indicated that the main relief it seeks is the invalidation of § 15.2-1500(B), which would remove the barrier to entry into the telecommunications market. (Replacement Version of Reply Br. of Bristol Va. Utils. Bd. in Supp. of Its Mot. for Summ. J. at 17.) Indeed, with the declaratory judgment that § 15.2-1500(B) is unenforceable, the City is no longer prohibited from entering the market as it wishes. As such, I find no reason to declare § 56-484.7:1 invalid.



WISCONSIN CALLS

Customers for Affordable Local and Long Distance Service

Making Telecom Competition Work for Wisconsin

September, 2001

In 1994, Wisconsin substantially loosened its regulatory control over its largest telecom monopoly, SBC-Ameritech. State lawmakers took this action because they hoped that competition, and not government intervention, would discipline prices and ensure adequate service. This has not happened. Instead, a deregulated monopolist dominates the market. Something must be done.

Wisconsin's telecommunications industry is at a crossroads. In the months ahead, state policy makers will be considering major reforms in our state's telecom policies. The outcome of that debate will determine whether competition will flourish in local phone markets and whether customers will receive lower prices and the high quality of services they deserve. These decisions also will have a lasting impact on Wisconsin's economic development.

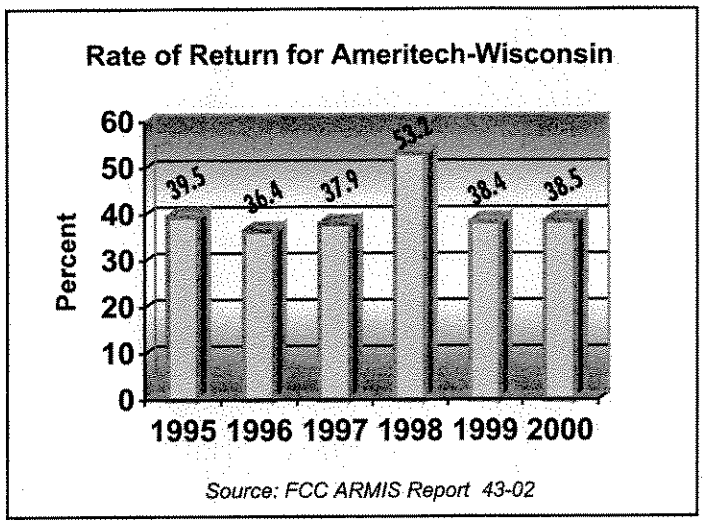
BACKGROUND

Seven years ago, the Wisconsin state legislature passed the Information Superhighway Act, 1993 Act 496, with the hope of spurring innovation and paving the way for competition. Five years ago, Congress passed the 1996 Telecommunications Act, a law premised on the belief that the public interest required competition in the local phone industry.

Today, customers and competitors are frustrated. Service complaints against SBC-Ameritech continue at high levels. Last year, many of the SBC-Ameritech's customers suffered loss of service because of the company's failure to invest adequately in its infrastructure and work force. And yet, in the face of this poor service, SBC-Ameritech continues to enjoy a market share in excess of 90% and a rate of return last year from its Wisconsin operations of 38.5%. Competitors complain that SBC-Ameritech is dragging its feet in opening up "the last mile" of its system to allow access to retail customers. In fact, many believe that the dominance of the old Regional Bell Operating Companies ("RBOCs") is a major reason that so many competitive telecoms and ISPs continue to fall by the wayside.

No one can dispute that our telecommunications infrastructure is vital to our state's economic future. A report issued last year at the Wisconsin Economic Summit sponsored by the UW System highlighted the need to strengthen our telecommu-

For More Information Contact Wisconsin CALLS at 608.204.0065
P.O. Box 1443, Madison, WI 53701-1443



nications infrastructure to ensure future conditions for growth. In addition to serving as a foundation that supports our economy, the telecom industry can also attract new capital investment to our state. Competitive telecommunications providers will determine whether to invest in Wisconsin based on the regulatory and business climate here. Our state can create a market attractive to new capital investment or shut it out completely if we fail to ensure a level playing field between the old monopolies and the new competitors.

SERVICE QUALITY

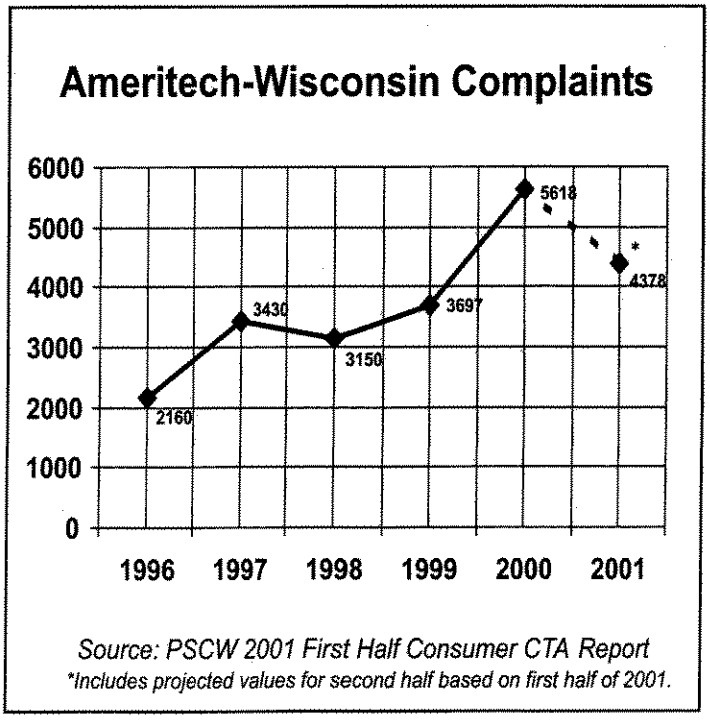
SBC-Ameritech leads all other telecommunications utilities with respect to service quality complaints. A recent PSC report documents that in the first six months of this year, SBC-Ameritech was the only utility in our state which exceeded one complaint per thousand customers. Complaints against it accounted for 52% of the grand total of all complaints filed against all telecommunications utilities and providers. Despite SBC-Ameritech's claims that it has fixed its service quality problems, complaints against the company were actually higher for the first six months of 2001 compared to the same period last year. We need targeted legislation to address this problem.

Fix 1993 Act 496.

Under Act 496, SBC-Ameritech is price-regulated, meaning that its rates for residential and very small business customers are determined by formula with only modest adjustments permitted by the PSC. Only $250 million of SBC-Ameritech's annual income of $1.3 billion in Wisconsin is subject to price regulation. Under current law, the PSC may lower these prices by a maximum of 2% for poor service, a $5 million hit in annual revenues. For a company of its size, that amount is pocket change. We need legislation to permit the Commission to impose a 10% price penalty for poor service.

Establish a system of automatic bill credits for bad service.

Missed appointments, delayed installation, outages that exceed 24 hours–such events cause enormous consumer frustration and can have a devastating impact on small businesses that need to stay in touch with their customers and suppliers. We need legislation that guarantees that residential and business customers receive automatic credits per access line if SBC-Ameritech fails to timely restore interrupted service or install new service, fails to honor appointments, errs in a directory listing or fails to correct a directory assistance error. Customers of SBC-Ameritech's competitors in the local markets should also receive the credits when poor delivery of wholesale service by SBC-Ameritech impacts them. Recently, the PSC ordered SBC-Ameritech to establish service credits, but the order is only temporary and does not permit customers of SBC-Ameritech's competitors to receive the credits. We believe a permanent, more expansive approach is warranted.



Create other strong incentives for good service.

Under current law, customers may not sue SBC-Ameritech for damages in court without first following a "captain-may-I?" procedure in which they must first request the PSC to determine that the company has violated a service quality standard. We need to amend state law to permit customers to sue SBC-Ameritech directly for damages, either at the PSC or in circuit court. We also need legislation that establishes statutory service quality standards with mandatory penalties of up to $50 million if those standards are not met.

COMPETITION

It's no secret that competitors in the local phone markets are struggling against dominant, entrenched monopolies like SBC-Ameritech. A recent *Wall Street Journal* article noted competitors have long complained that the RBOCs have suppressed competition through delays in processing orders, providing phone lines and fixing glitches. That same article noted that since December, 2000, SBC Communications, the parent company of SBC-Ameritech, has paid $69 million to state and federal regulators in penalties for substandard wholesale phone service to competitors.

Time is money, especially for a competitor trying to battle a monopolist. Under current state law, SBC-Ameritech has little incentive to change its way of doing business. Wisconsin should adopt several measures that change this situation.

Pursue structural separation.

Achieving open access by separating common-carrier from competitive functions is not new to the Wisconsin legislature. In 1999 Wisconsin Act 9, the legislature laid the groundwork for the formation of the Wisconsin-based American Transmission Company, the nation's first for-profit transmission company. In doing so, the legislature recognized that vertically integrated electric utilities, compared to a stand-alone transmission company, had little incentive to open up the transmission grid to competitive generation sales.

Similarly, structural separation legislation, if adopted, could require SBC-Ameritech to separate into two companies if competitors had not reached a specified level of market share in SBC-Ameritech's service territory. One company would be a regulated common carrier required to provide telecom providers open access across its system for the benefit of the competitors' customers. The second company would provide SBC-Ameritech's retail services and stand in the same position as its competitors. It, too, would be required to order and receive services from the common carrier.

Oppose long distance entry unless competition exists in the local market.

The 1996 Telecommunications Act prohibits RBOCs from providing interstate long distance service unless those companies can show they have opened up their networks to permit competitive entry. Wisconsin CALLS supports legislation requiring that specified competitive entry levels must be reached in SBC-Ameritech's service territory before the PSC can advise the Federal Communications Commission that the company should be permitted to enter the long distance market. Permitting SBC-Ameritech to prematurely enter the long distance market would remove one of the few incentives SBC-Ameritech has to open up its network to competitors.

Infrastructure Investment Per Access Line Since SBC-Ameritech Election of Price Cap Regulation

Year	1995	1996	1997	1998	1999	2000
*Non-Ameritech RBOCs	$135	$146	$146	$146	$161	$160
*SBC/Ameritech WI	$82	$102	$94	$108	$107	$147
*SBC/Ameritech WI Access Lines (In Millions)	1.9	1.9	2	2.1	2.2	2.3
**Infrastructure Gap (In Millions)	$100.7	$83.6	$104.0	$79.8	$118.8	$29.9

In total, the infrastructure gap in Wisconsin has totaled over a half billion dollars since the election by SBC/Ameritech of price cap regulation. During this same period, the return on equity for SBC/Ameritech in Wisconsin has ranged from 36 to 53%.

*Source: FCC ARMIS and PSCW

**The following method was used to compute the total infrastructure gap for the years 1995-2000: SBC/Ameritech-Wisconsin investment per access line was subtracted from the non-Ameritech RBOC average investment per access line. The resulting number, which constitutes the investment gap per access line, was then multiplied by the total number of access lines held by SBC/Ameritech-Wisconsin for each of the years shown in the chart. The result equals the total infrastructure gap for that year.

Establishing enforceable wholesale service standards.

SBC Communications—the San Antonio-based company that owns SBC-Ameritech — has a long track record of simply paying fines rather than opening up its system to competitors. History suggests that the fines must be substantial—and combined with other measures—to make a difference. The Illinois legislature recently strengthened its own commission's authority in this regard, and the Wisconsin legislature should follow suit. The Wisconsin legislation should permit competitors who have been harmed to receive a portion of the forfeitures as well as damages and reasonable attorney fees.

Adopt fresh-look legislation.

A fresh-look opportunity would enable customers to terminate long-term contracts entered into with SBC-Ameritech to take advantage of competitive options without paying high termination charges that lock customers into higher rates than they could receive from alternative providers. A fresh-look opportunity will permit telecom competitors to have a fair shot at these customers.

CONCLUSION

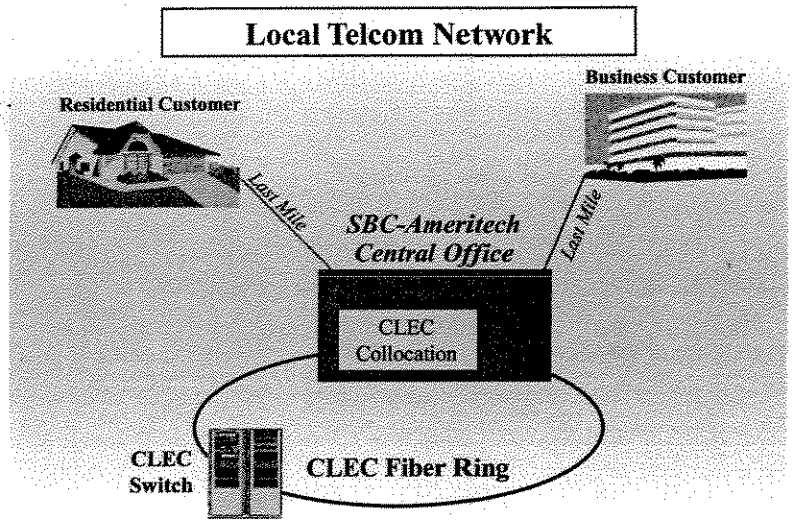
The states of Michigan and Illinois have recently adopted sweeping telecommunications reforms to improve service quality and lower rates through increased competition. As a result, these states are attracting new capital investment by competitive carriers and customers are gaining choices in the telecom market place.

Wisconsin has a choice. It can stand on the wayside and permit the dominant, entrenched monopolies like SBC-Ameritech to control the telecom market, or it can follow the lead of its neighbor states and make changes that will ensure price discipline, improve service, advance competition, attract capital investment and promote economic development. We believe Wisconsin will make the right choice.

LOCAL PHONE COMPETITION–VISION VERSUS REALITY

The federal Telecommunications Act of 1996 requires RBOCs such as SBC-Ameritech to open up their local networks on a nondiscriminatory basis. Requiring competitive local exchange carriers ("CLECs") to duplicate those local networks–which in effect represent many decades of cumulative investment–would be much too costly.

To reach retail customers across "the last mile," CLECs interconnect their facilities to the local network and purchase "unbundled network elements" from the RBOC. As a result, CLECs become captive wholesale customers of the RBOC.



Unfortunately, RBOCs have a strong incentive to deny CLECs access to the network Since the federal act's passage, RBOCs have fought a prolonged war before the FCC and in the courts to minimize their legal obligation to do so. RBOCs can also wage repeated rearguard actions by stalling interconnection agreement negotiations, blocking the collocation of CLECs' equipment on the RBOC's premises and refusing to sell unbundled network elements on reasonable rates, terms and conditions.

Members of Wisconsin CALLS include:

AARP-Wisconsin ■ Citizens' Utility Board ■ Fitness and Health Alliance of Wisconsin ■ Midwest Hardware Association
Funeral Service Alliance of Wisconsin ■ Wisconsin Alliance of Hearing Professionals ■ Wisconsin Apartment Association
Wisconsin Association of Mortgage Brokers ■ Wisconsin Consumer Packaging Council ■ Wisconsin Jewelers Association
Wisconsin Health and Hospital Association ■ Wisconsin Merchants Federation ■ AT&T ■ Norlight Telecommunications ■ POWERCOM
The Competitive Carrier Coalition ■ McLeodUSA ■ Time Warner Telecom ■ Charter Communications

STATE REPRESENTATIVE
JON RICHARDS
REPRESENTING MILWAUKEE'S
EAST SIDE, DOWNTOWN AND
BAY VIEW NEIGHBORHOODS

FOR IMMEDIATE RELEASE

September 6, 2001

For more information contact:
Representative Jon Richards
608/266-0650
rep.richards@legis.state.wi.us

Richards Resigns From Taskforce That Bars Consumer Advocates

Group heavily weighted with business interests

MILWAUKEE – Rep. Jon Richards (D-Milwaukee) today announced he is resigning from a Telecommunication Taskforce after Assembly Speaker Scott Jensen (R-Waukesha) denied Richards' repeated requests to have consumer advocates named to the group.

"Speaker Jensen does not want consumers to have a voice on this taskforce. But, what's the point of a telecommunications taskforce without consumer representation?" Richards said. "It's an unbalanced group that will make unbalanced recommendations. I cannot be a part of that."

Since being appointed to the Telecommunication Taskforce in May, Richards has made three written requests for Jensen to appoint consumer advocates. After several months, Jensen responded to Richards' requests earlier this week. The taskforce, chaired by Rep. Phil Montgomery (R-Green Bay), is charged with recommending changes to Wisconsin's telecommunications laws in light of recent changes in federal telecommunications laws and changes in the telecommunications marketplace.

Telecommunications is the No. 1 consumer complaint in Wisconsin and the number of complaints has risen dramatically over the past several years. The Department of Agriculture, Trade and Consumer Protection (DATCP) received 61 percent more telecommunications complaints in 2000 than in 1997. In 2000, DATCP received 2,174 consumer complaints about telecommunications.

The Bureau of Trade and Consumer Protection, part of DATCP, reports that it won $4 million for telephone customers who complained about rate increases without notice, billing disputes and other problems.

"Telecommunications is by far the No. 1 complaint Wisconsin consumers have," Richards said. "We need stronger protection more than ever, before more people pay out of pocket for services they never wanted. Consumers need to be at the table as we look to change our telecommunications laws."

– 30 –

Legislator criticizes telephone task force

By LEE BERGQUIST
of the Journal Sentinel staff

Last Updated: Sept. 6, 2001

A Milwaukee legislator resigned Thursday from a task force reviewing Wisconsin telephone laws because he said he was unable to persuade Assembly Speaker Scott Jensen to include consumer advocates on the panel.

Rep. Jon Richards (D-Milwaukee) said Jensen rebuffed numerous requests to add the Citizens' Utility Board or other consumer groups to the task force.

The panel is expected to make recommendations that would refine 1994 legislation that relaxed regulation of local telephone companies.

Neglecting consumer groups "is a sad and lost opportunity for Wisconsin," Richards said.

The task force includes more than a dozen telecommunications companies, and business groups that include the Wisconsin Grocers Association Inc. and the Wisconsin Realtors Association.

AP BUSINESS NEWS

AUDIO TIPS Money Matters

Need Help?

Searching Archives
Wireless Access
Site Topics
Table of Contents
Contact Staff
Subscriptions

But Richards said the task force needs more than phone companies and business groups. He said that telecommunications is the No. 1 consumer complaint in Wisconsin. All told, the state Division of Consumer Protection received 2,174 complaints from consumers on telecommunications matters last year, Richards said.

Jensen (R-Town of Brookfield) did not return two calls to his office and a call to his home on Thursday.

But Phil Montgomery (R-Green Bay), the chairman of the task force, sharply disagreed that the panel lacks consumer representatives. He said some of the companies, including AT&T, are part of a group that is promoting a legislative agenda that would place more controls on Ameritech, the largest local telephone company in the state.

Montgomery agreed that groups such as Citizens' Utility Board might offer a different point of view, and he said "my point is that to portray this as 'the consumer is not represented at all' would be at the other end of the extreme."

Appeared in the Milwaukee Journal Sentinel on Sept. 7, 2001.

BACK TO TOP

GO

JS Online Features List

Korbitz, Adam

From: Bob jauch [bjauch@discover-net.net]
Sent: Saturday, September 08, 2001 10:04 AM
To: Korbitz, Adam
Subject: JS Online Phone company customers call on regulators for help

Adam:
I want to schedule a hearing on 496 so we need to agree on a time. Please give me my options.
Thank you
bob

Phone company customers call on regulators for help

Natural gas prices also fuel increase in utility complaints

By LEE BERGQUIST
of the Journal Sentinel staff

Last Updated: Sept. 7, 2001

Consumers continue to find reasons to complain to regulators about Wisconsin utilities.

During the first half of this year, state consumers filed a total of 6,197 complaints against utilities. Most of the problems were tied to telephone companies and high natural gas prices.

Complaints are 14% higher than the same time last year.

Wisconsin Business 411
onwisconsin.com Stocks
The Wall Street Journal Sunday with JS Online
The New Economy
AP Business News
Audio Tips Money Matters

Need Help?

Searching Archives
Wireless Access
Site Topics
Table of Contents
Contact Staff
Subscriptions

according to figures compiled by the state Public Service Commission.

Telecommunications complaints - especially those against Ameritech - continue to be the biggest reason for why consumers call the agency, which regulates Wisconsin utilities.

But another factor was that natural gas complaints rose sharply in the first half of the year. The number of those complaints jumped to 765, a 146% increase over the year before, the PSC reported.

The agency said the growing number of complaints against gas utilities was a "direct result of extremely high natural gas bills," caused by high gas prices and lower-than-normal temperatures.

All told, complaints dipped slightly during the first half of the year compared with the last six months of 2000.

The major reason for the drop: After a woeful year of service troubles in 2000, Ameritech generated 44% fewer complaints during the first half of this year. Complaints against the company rose 26% compared with the same time last year.

Complaints about Ameritech have trended upward since 1993. Last year those complaints were dominated by gripes about poor service. This year, complaints centered around billing problems.

The report "shows that the Legislature must give new enforcement tools to the Public Service Commission to get SBC-Ameritech to clean up its act," said Steve Hiniker, executive director of the Citizens' Utility Board.

CUB is a member of Wisconsin CALLS, a coalition seeking more regulatory control over Ameritech.

Ameritech has repeatedly opposed stricter telephone regulation.

A key player in Wisconsin CALLS is AT&T. The long distance company has had its share of complaints, which jumped from 232 in 1997 to 1,380 last year.

In the first half of the year, the company generated 606 complaints, figures show.

Ameritech spokeswoman Lisa Claybon noted that the PSC has determined that many complaints are not justified.

During the first half of the year, the PSC concluded that 53.9% were unjustified.

"We do take our customer complaints very seriously, and we investigate every one that we receive," she said.

PSC spokeswoman Annemarie Newman said that even though many complaints are thrown out, "if there is a trend like this, regardless of whether there is a regulatory issue, there is a customer service issue."

Appeared in the Milwaukee Journal Sentinel on Sept. 8, 2001.

BACK TO TOP

Wisconsin Merchants Federation

"The Voice Of Wisconsin Retailing"

1 East Main Street, Suite 305
Madison, Wisconsin 53703
Telephone 608/257-3541
Fax 608/257-8755
E-mail wimerfed@execpc.com

FAX TRANSMISSION COVER SHEET

Date: 9/21/01

To: John Haka

FAX: 715-341-4080

Subject:

Sender: Doug Johnson

YOU SHOULD RECEIVE (3) PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL.

NOTES:

Ameritech / SBC
Ameritech Corporate
316 West Washington Avenue
Room 701
Madison, WI 53703
Phone: 608.282.7870
Fax: 608.252.2470

James G. Maurer
Executive Director
External Affairs

Ameritech. | SBC global network

AARP

September 5, 2001

Otto H. Schultz
96 Kessel Court
Madison, WI 53711

Dear Mr. Schultz

As Executive Director of Ameritech Wisconsin, I have been made aware of the concerns that a group known as CALLS (which I understand you are a member of) has raised about Ameritech's business operations. The legislative agenda put forward under the CALLS banner is highly punitive and suggests to me that your organization may have a specific problem with Ameritech that has not been resolved to your satisfaction. It is my sincere hope that you would be willing to work with me to resolve such problems as quickly as possible.

Much of the messaging in support of the CALLS agenda focuses on Ameritech's service challenges during the year 2000. While we acknowledge that the service we provided some customers did not meet their, or our, expectations we remain very proud of the proactive steps we have taken to ensure that our service meets or exceeds the levels our customers expect and deserve.

We will invest a record $350 million in infrastructure in Wisconsin during 2001. This level of spending, along with our 1999 and 2000 capital spending, brings Ameritech's total amount invested in the Wisconsin communications infrastructure to more than $1 billion over three years. That is record investment for Ameritech and for any Wisconsin company.

In an effort to improve our customer service for both wholesale and retail customers we have added more than 1,100 employees in the last 18 months to our Wisconsin based workforce. At a time when the sagging economy has forced many companies to lay workers off, we continue to hire and to train workers to meet the needs of our customers. We now have more than 7,000 workers in Wisconsin alone. That demonstrates our continued commitment to meeting the state's communications needs.

The aggressive hiring, training, and investment efforts we have made during the last year and a half are paying dividends. We have returned to traditional service levels and have even improved upon historical performance. Throughout the summer Ameritech Wisconsin has been able to return almost 98% of customers to service within 24 hours, the best results in more than 5 years. Ameritech has turned the corner and we feel confident that we have the people, the resources, and the investment that will allow us to continue providing world class service to our customers.

I am profoundly disappointed that the CALLS group has not acknowledged the efforts more than 7,000 employees have made in response to the challenges the company faced. Instead, this group funded primarily by AT&T, a chief competitor of Ameritech, has moved forward with a set of legislative proposals designed only to financially harm Ameritech. The results of the CALLS agenda would be devastating for the state of Wisconsin, which would see higher phone rates, a sharp decline in investment, and serious job losses. I have chosen to believe that this is an outcome your organization does not endorse.

In spite of your organization's participation in the CALLS group, Ameritech remains interested in identifying ways to work with and support your group. Unfortunately, it is difficult to generate a great deal of enthusiasm among our employees and managers to make contributions of time and money, however great the cause, when the organization receiving that support is working in a manner so clearly in conflict with Ameritech's business interests.

As our employee base has grown so too has their understanding of how important outcomes in the legislative process are to the interests of both our customers and employees. This reality has produced a much more active and politically engaged workforce willing to mobilize to protect the company's interests and to send a clear message to entities that seek to cause mischief or harm Ameritech through the legislative process. Organizations, such as CALLS and its members, that seek to harm Ameritech or its customers and employees without provocation should understand that in response we will speak not with one voice but with 7,000.

It is my hope that you would be willing to engage in a dialog with me to identify the concerns your organization has with Ameritech. I'd like to work toward resolving them to your satisfaction and thereby remove any reason that your organization might have for continuing its association with the CALLS group.

Your association represents many businesses, large and small, that face difficult challenges and uncertain economic times. It is difficult for me to believe that those members would support an anti-business and anti-job agenda of the type being advanced by the CALLS group. That is why I am confident that we can work together to address our mutual concerns and interests. I look forward to meeting with you. Please feel free to contact me directly with any questions or concerns that you might have.

Sincerely,

James G. Maurer

Korbitz, Adam

From: Stolzenberg, John
Sent: Friday, September 28, 2001 10:27 AM
To: Korbitz, Adam
Cc: Schmidt, Dan; Offerdahl, Mary
Subject: Telecommunications materials

Adam,

Here are electronic versions of my overview of Act 496 (IM 94-27), my summary of post Act 496 telecommunications laws and Rep. Montgomery's staff's list of issues before his Telecommunications Task Force. I also have all of these materials in printed format if you'd prefer a paper medium.

Following our conversation this morning, I checked my notes from this week's WPUI seminar (rather than rely on my memory) and identified issues raised yesterday that are not on the Task Force's issue list or included within the Task Force's issues. I also excluded general topics or concerns, such as "create a level playing field" or "recognize in policies different types, sizes and demographics" of providers, as well as requests to negate another person's issue, such as don't authorize additional PSC enforcement powers. Also, I'll be checking the WPUI web page next week to see what other issues Susan Stratton recorded that I missed. With these caveats, additional issues raised at the WPUI seminar include:

1. Strengthen and expand the definition of "universal service" and the Universal Service Fund (USF). Create a definition of "broadband services," if these services are mandated as part of universal service.
2. Make better use of USF dollars; expand education on the availability of USF funds.
3. Establish a USF line item charge on customers' bills.
4. Increase the availability of broadband services to residential customers.
5. Establish financial reporting parity among all telecommunications providers.
6. Provide additional enforcement tools to the PSC, including putting more revenue at play in variables in the price cap formula, authorizing the PSC to impose forfeitures directly, and authorizing the PSC to order structural separation if specified levels of competition are not met.
7. Rebalance rates, especially for local services, on a cost basis.
8. Require the full disclosure of the prices of telecommunications services upfront.

John

Center for Public
Representation, Inc.

P.O. Box 260049 Madison, WI 53726-0049 608/251-4008 FAX: 608/251-1263 CPR@lawmail.law.wisc.edu

October 11, 2001

To: Chairs: Sen. Jauch and Rep, Pettis, Joint Committee on Information Policy and Technology

From: Louise G. Trubek, Senior Attorney, Center for Public Representation, Inc.

Re: Hearing on Act 1993 496 relating to telecommunications deregulation

We were pleased that the Joint Committee is revisiting the 1993 telecommunications act. Since the act was passed significant changed have occurred in the market and consumer purchases and attitudes. A review by the Committee is entirely appropriate.

The Center for Public Representation was active in the conceptualization and enactment of the initial act. In addition, we served on the Universal Service Fund (USF) Council from the implementation of the act until December 2000. In that capacity we were active in the design and monitoring of the universal service fund. In the summer, 2001 we issued a report on the nonprofit grant program that contains important information about the USF. We have enclosed a copy for your review.

The mandate of the USF is to correct for difficulties that were likely to arise with the radical conceptualization of a new telecommunications system. Decisions on programs to funded by the USF were made by the Public Service Commission with the advice of the council which is a mix of providers and consumers. The programs have been carefully created and administrated and are useful and appropriate. We would like to particularly note the impressive equipment for the disabled program (TEPP) and the nonprofit and telemedicine programs.

The telecommunications market continues to change and different constituencies are affected. As these changes occur the USF had adapted, creating new programs and cutting back others.
As the Committee reviews the Act, we hope that you will maintain and expand this important fund.

WISCONSIN GROCERS ASSOCIATION INC.

NOTES & IDEAS

10/11/01

SENATOR JAUCH -

THANKS FOR HOLDING THE HEARING.

I HAD HOPED TO TESTIFY TODAY, BUT THERE ARE MANY SPEAKERS CONED UP PRIOR TO ME, AND I HAVE ANOTHER COMMITMENT AT 11:30 AM.

I'LL SUBMIT MY COMMENTS TO THE COMMITTEE IN WRITING. PLEASE REMOVE MY SLIP FROM THE PILE.

BRANDON SCHOLZ

BEFORE THE
JOINT COMMITTEE ON INFORMATION
POLICY AND TECHNOLOGY

TESTIMONY OF
JAMES W. BUTMAN, PRESIDENT
TDS METROCOM, INC.

THE STATE OF COMPETITION IN THE WISCONSIN TELECOMMUNICATIONS MARKET

October 11, 2001

INTRODUCTION

My name is James Butman. I am the President of TDS Telecom Inc.'s ("TDS Telecom") Competitive Local Exchange Carrier ("CLEC") Operations. I have over 20 years of experience in the telecommunications industry, including experience with incumbent local exchange, long distance, and competitive local exchange services. I have held numerous positions in finance, regulatory policy, marketing, and operations.

My responsibilities as President of TDS Telecom's CLEC Operations include the overall development, strategy, and leadership for TDS Metrocom, Inc. ("TDS Metrocom") and USLINK, our two CLEC companies. I have ultimate profit and loss responsibility and I am held accountable by Senior Management at TDS Telecom and our investors for all CLEC investments and commitments. In this capacity, I also am the President of TDS Metrocom where, in addition to my other responsibilities, I have day-to-day operations responsibilities.

TDS Metrocom is a Wisconsin facilities-based competitive local exchange carrier, authorized to provide telecommunications services, including local access services, basic access lines, analog, and digital trunks for PBX and other switching equipment as well as dedicated access and private line services. In addition to these services, we provide enhanced products and services including custom and advanced calling features, voice mail, calling cards, and long distance and high speed Internet services using DSL technology. We operate in Wisconsin, Illinois, and Michigan.

While TDS Metrocom provides service over our own facilities, we also provide a significant amount of our services to customers through the purchase of unbundled copper loops from Ameritech Wisconsin. Unbundled copper loops are physical copper network connections running from the customer's premise to TDS METROCOM's network point of interconnect with Ameritech. Simply put, this is part of the network we lease from Ameritech that enables us to connect customers to our network. In Wisconsin alone we provide service to over 115,000 customer access lines---about 45,000 of these are consumers. Over 93% of these 115,000 lines are serviced over these unbundled copper loops of Ameritech.

My testimony will discuss certain barriers to competition that exist in Wisconsin, which, until adequately addressed, will prevent the realization of a truly competitive telecommunications market in the state. I will explain how Ameritech can erect barriers to make competitive entry unattractive from an investment standpoint by, for example, seeking to charge exorbitant unbundled loop rates. I also will discuss Ameritech's special construction charges as another significant price barrier to entry in the Wisconsin telecommunications market. Finally, I will discuss why the enforcement authority of the Wisconsin Commission and the enforcement rights of competitors must be enhanced to remove the barriers to competition erected by Ameritech.

I. AMERITECH'S PRICING BARRIERS TO COMPETITION WILL DETER INVESTMENT IN THE WISCONSIN TELECOMMUNICATIONS MARKET

TDS Metrocom uses a comprehensive planning process, which incorporates detailed financial and business analyses, to support operations in existing markets as well as to justify expansion into new markets. Before we decide to enter any new market, we undertake a detailed review of demographic, competitive, and state regulatory policy climate information. We perform a rating and prioritization process based upon criteria critical to our long-term success. Selected markets then undergo a rigorous business case development process in which detailed sales, revenue, expense, and capital outlays are forecasted. In addition, a discounted cash flow analysis is performed to determine capital investment requirements, cash flow projections, and return projections.

If we decide to recommend a market expansion, TDS Metrocom undertakes an approval process with our Senior Management where all our research, findings, and detailed business cases are scrutinized before any new funding is approved. Included in this scrutiny is a comparison of past business cases compared to actual results to date to show that TDS Metrocom has been able to meet projections and commitments. Consequently, our judgments and credibility are always on the line. The entire review process usually spans numerous months and culminates in a "go" or "no go" decision.

Given the rigor and discipline of this process, and the competing funding alternatives, it is difficult to gain investor approval. The simple fact is that

investors have many options for the commitment of their money. Available capital is allocated to the projects or businesses that produce success and have the most attractive business potential. It comes down to an assessment of risks given the potential future gains. This assessment and modeling process is important in monitoring the overall health and future prospects of the business, and the establishment of priorities among geographic markets, customer segments, and product segments.

As part of this assessment process TDS Metrocom examines, for example, the cost of unbundled network elements ("UNEs") and uses them as cost inputs into our financial models. TDS Metrocom has found no good alternatives to unbundled network elements to provision services to our customers. Approximately 93% of our customer access lines are provisioned by unbundled copper facilities of SBC/Ameritech. Our payments to SBC/Ameritech for the costs of unbundled network elements represent over 30% of our operating costs today. This amount is very high when you consider that we are in the start-up phase of our business and a high percentage of costs in start-ups go to advertising, marketing, sales, and network establishment. As our business matures and as our customer base increases, the cost of unbundled network elements will increase significantly as a percentage of our operating costs.

As we run sensitivity analyses on our business models, we find that it takes very little increase in the unbundled loop rates to deter investor funding support given the risks associated with this business. In Wisconsin, Ameritech has

proposed unbundled loop rates that are higher than Ameritech rates approved in other states by 367% to 1227%. If such high rates were approved in Wisconsin, I would be forced to recommend that TDS Metrocom exit the CLEC business in Wisconsin. Consequently, it is imperative that local loop rates be kept at reasonable levels. In fact, any increase in these rates will be met with significant and adverse reaction by investors. Their expectation is that the rates should go down based upon what regulators have decided in surrounding Ameritech states such as Illinois, Michigan, Ohio, and Indiana. Also given the past communication policy in this country---namely in the transition to long distance competition---their view is that these rates should be discounted given the inferior service that competitors receive from Ameritech. Attached as Exhibit A is a schedule of Ameritech's UNE rates in the Ameritech region and the insupportable level of Ameritech's proposed rates for Wisconsin. Most retail customers do not have monthly local service telephone bills as high as the rates Ameritech is seeking.

TDS Metrocom has over 100,000lines sold and provisioned via unbundled network elements and any price increase will be met with investor reaction, especially given the uncertainty facing the CLEC industry on important revenue streams such as reciprocal compensation and access charges. The CLEC industry has been harmed in the regulatory and legislative arena to the point where there is little or no investment funding available for expansion and development, and we even have witnessed CLEC bankruptcies and forced business sales.

Let me illustrate specifically how the unbundled loop rate impacts our decision to enter a market and the impact on the residential and small business segment in particular. Because we select smaller markets for our CLEC operations, we believe it is essential to serve both business and residential customers to meet our financial model requirements. TDS Metrocom believes the only way to obtain enough access line market share is to serve both segments. Our business model has not allowed us to expand to jurisdictions where unbundled loop rates are high. This is why we could not make our model work in states like Iowa and Tennessee, and why we now are struggling at USLINK in Minnesota given recent regulatory developments.

Our decision to enter the states of Illinois and Michigan were influenced by the cost of unbundled network elements in those jurisdictions. The level of unbundled loop rates has become an important barometer of whether we conclude that there has been progressive movement toward rate rationalization that is essential to competition, especially for the small business and residential segments of the market.

The adverse effects of high loop rates could range from halting residential marketing efforts to refocusing overall investment in other states and other businesses in TDS Metrocom's business portfolio. The most drastic determination would be to exit the CLEC business in the state of Wisconsin.

If Ameritech's loop rates are priced at appropriate levels, the incentive would exist for TDS Metrocom and other providers to invest capital in this

business and develop a truly robust competitive telecommunications environment in Wisconsin. This result is especially important for the survival of competitive local telecommunications services for the residential and small businesses of Wisconsin. Consequently, measures must be taken to ensure that Ameritech is not permitted to erect and expand price barriers, such as unreasonable unbundled loop rates, in order to thwart competition.

II. AMERITECH'S ONEROUS SPECIAL CONSTRUCTION CHARGES

Over the past three years Ameritech has charged CLECs ordering unbundled network elements not only charges approved by state commissions, but also additional "special construction" charges. Ameritech's special construction charges are assessed when Ameritech claims it must modify or supplement its existing network to provision unbundled facilities.

Ameritech's imposition of special construction charges enables Ameritech to significantly impede the entry of its competitors into the local telecommunications marketplace. Ameritech imposes substantial special construction charges – charges not approved or even reviewed by the Commission – upon CLECs trying to win local customers away from Ameritech. In simplest terms, Ameritech's policy of imposing special construction charges allows Ameritech to protect its incumbent customer base and to raise the costs of its rivals by double recovering its legitimate UNE costs.

Special construction charges in many cases have amounted to, and continue to amount to, tens of thousands of dollars that a CLEC must pay before being provided access to an unbundled loop to serve a single customer. If the requesting carrier refuses to pay Ameritech's special construction charges, or early in the process also fails to agree to waive the carrier's rights to dispute the construction charges, Ameritech will not fill the order and the requesting carrier cannot serve the customer whom the facility was intended to serve.

The assessment of special construction charges creates a very difficult situation for TDS Metrocom and our customers. Typically, we communicate a due date for service to our customers as early as possible. If special construction charges are assessed, we have been faced in the past with the dilemma of refusing the charges and losing the customer, or keeping the customer and being subject to unreasonable charges. As a practical matter, we are forced to indicate acceptance of the charges regardless of their amount. Even if the charges are outrageous, it is unacceptable for our business practice to go back to the customer and inform them that we will not be providing service as promised due to excessive special construction charges. As a new CLEC in our markets, we constantly strive to create trust and credibility with our customers. TDS Metrocom has no choice but to follow through on our commitments despite these circumstances.

Moreover, in nearly every circumstance, the activities for which Ameritech is attempting to assess special construction charges already are built into the unbundled loop cost. Further, in nearly every circumstance where Ameritech

attempts to charge CLECs special construction charges, Ameritech does not assess tens of thousands of dollars in similar charges on its retail customers when they order service. Both of these circumstances (*i.e.*, double recovery and discriminatory treatment) serve as major economic and operational obstacles to CLECs attempting to compete with Ameritech in the market for local exchange services.

Consequently, legislation prohibiting Ameritech from imposing special construction charges on telecommunications providers is necessary.

III. ENHANCEMENT OF COMMISSION ENFORCEMENT AUTHORITY AND COMPETITOR ENFORCEMENT RIGHTS

Under current state law, the Commission lacks adequate enforcement authority and CLECs lack adequate enforcement rights to force Ameritech to comply with its contractual obligations and existing telecommunications laws, and remedy those violations. Ameritech has a history of unfair and anticompetitive refusal to honor its agreements. Ameritech also has a highly litigious approach to regulatory issues, and engages in undue litigation and delay tactics. Moreover, because of its monopoly position, Ameritech has little real incentive to comply with Commission directives, such as implementing OSS systems improvements like the "Hot Cut" process. Consequently, CLECs currently are required to engage in protracted and expensive regulatory and legal proceedings, for example, under § 196.199, Stats., to force Ameritech to comply with its contractual and legal obligations. TDS Metrocom was the first and only company to use the dispute

resolution process under § 196.199 and we experienced numerous shortcomings with the law.

Moreover, because Wisconsin case law has held that the Commission does not have authority to directly levy forfeitures and penalties for the violation of telecommunications laws, CLECs often are left without any remedy, or an inadequate remedy, even after engaging in protracted and expensive litigation. Ameritech, in turn, is able to avoid, or delay, performing its obligations and duties without any real consequences.

Accordingly, legislation is necessary to enhance the Commission's enforcement authority and enhance competitor's enforcement rights. Specifically, legislation should be enacted, which enhances the Commission's enforcement powers, including (a) granting the Commission explicit authority to take administrative action and institute all necessary proceedings for the enforcement of existing telecommunications laws; (b) authorizing the Commission to levy forfeitures or penalties directly for violation of existing laws; (c) authorizing the Commission to award forfeitures, penalties or damages to telecommunications providers harmed by violations of telecommunications laws; and, (d) authorizing the Commission to award attorney's fees.

Similarly, legislation should be enacted which authorizes telecommunications providers (a) to bring complaint proceedings before the Commission and before a court; (b) to seek an award for actual damages for harms suffered; and, (c) to seek attorney's fees.

If faced with certain and substantial consequences for its violations of the law and failure to comply with its contractual obligations, Ameritech may be deterred from engaging in anticompetitive behavior.

CONCLUSION

I thank you for the opportunity to provide this testimony.

Exhibit A

COMPARISON OF BASIC BUSINESS / RESIDENCE UNBUNDLED LOOPS

2-Wire Interface Loop Basic

Ameritech State (Rate Group)	Currently Approved	Ameritech WI Proposal	% Difference (WI / other)	Source
ILLINOIS				
Rate Group 1	$2.59	$31.78	1227.03%	note 1
Rate Group 2	$7.07	$36.30	513.44%	note 1
Rate Group 3	$11.40	$45.97	403.25%	note 1
INDIANA				
Rate Group 1	$8.03	$31.78	395.77%	note 2
Rate Group 2	$8.15	$36.30	445.40%	note 2
Rate Group 3	$8.99	$45.97	511.35%	note 2
MICHIGAN				
Rate Group 1	$8.47	$31.78	375.21%	note 3
Rate Group 2	$8.73	$36.30	415.81%	note 3
Rate Group 3	$12.54	$45.97	366.59%	note 3
OHIO				
Rate Group 1	$5.93	$31.78	535.92%	note 4
Rate Group 2	$7.97	$36.30	455.46%	note 4
Rate Group 3	$9.52	$45.97	482.88%	note 4

note 1: ILL. C.C. No. 20, Part 19, Section 2, 2nd Revised Sheet, No. 7

note 2: Ameritech IN Compliance Filing, Cause No. 40611 *UNE Tariff Rate Summary*, Sept. 15, 2000.

note 3: M.P.S.C. No. 20R, Part 19, Section 2, 7th Revised Sheet, No. 7

note 4: P.U.C.O No. 20, Part 19, Section 2, Original Sheet, No. 38