BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Direct Communications, Inc. for a Certificate of Public Convenience and Necessity for Authority to Provide Competitive Telecommunications Services in Ohio.	)))))	Case No. 97-716-CT-ACE

FINDING AND ORDER

The Commission finds:

(1) On May 22, 1997, the Commission issued a decision in a complaint case involving Ohio Direct Communications, Inc. (ODC). *Ohio Direct Communications, Inc. v. ALLTEL Ohio, Inc., et al.*, Case No. 95-819-TP-CSS (95-819). In that case, the Commission determined that ODC is a telephone company as defined by Section 4905.03(A)(2), Revised Code, and ODC must obtain a certificate of public convenience and necessity in order to continue its operations in Ohio. Also, the Commission concluded that, before it would decide what the appropriate service and compensation arrangements between the companies would be, the parties would have the opportunity to meet and devise creative compensation agreements. The Commission stated that, if the parties were not able to reach agreement regarding appropriate compensation arrangements, each party should file their individual proposals for compensation in ODC's certificate application case. In its Entry on Rehearing issued July 10, 1997, in 95-819, the Commission clarified that it did not make any determination in its May 22 order regarding what compensation is appropriate between the parties, but only that the parties should have the opportunity to develop a compensation arrangement that appropriately balances their interests, in light of the other conclusions reached by the Commission.

(2) On July 1, 1997, ODC filed an application for a certificate of public convenience and necessity as a competitive communications provider. That application was docketed as Case No. 97-716-CT-ACE. On that same day, ODC, the ALLTEL companies, and Ameritech filed proposals for the Commission's consideration in reviewing the above-noted compensation issue.

(3) In accordance with the Commission's Entry on Rehearing of December 22, 1993, in *In the Matter of the Commission Investigation Into the Implementation of Sections 4927.01 Through 4927.05, Revised Code, as They Relate to Competitive Telecommunication Services*, Case No. 89-563-TP-COI, approval of the certification application was subject to a 30-day approval process.

(4) On July 30, 1997, the ALLTEL companies filed a motion to intervene in this case and a motion to suspend automatic approval of ODC's application.

(5) Approval of ODC's certification application was not suspended by the Commission. On August 1, 1997, a certificate of public convenience and necessity was issued to ODC.

(6) On August 28, 1997, the attorney examiner found the ALLTEL companies' motion to suspend the application moot. Also, she concluded that the ALLTEL companies' request to intervene should be granted as to the sole remaining issue in this docket -- the appropriate compensation for the service that ODC purchases from the ALLTEL companies and Ameritech in ODC's provision of service to its customers.

(7) On October 17, 1997, ODC filed a motion, asking the Commission to:

(a) Decide the compensation issue. ODC presents several possible procedural avenues for consideration of the compensation issue (listed in ODC's descending preferential order):

1. Order the compensation as ODC proposes in the October 17, 1997 filing, which will result in revenues to the ALLTEL companies that are roughly four times what ODC currently pays (this proposal differs from what ODC filed on July 1, 1997). ODC spells out why the Commission should not accept parts of the July 1, 1997 proposals of the ALLTEL companies and Ameritech. As for Ameritech, ODC acknowledges that it uses essentially the

same facilities as with the ALLTEL companies and suggests that a proxy rate be set for Ameritech on that basis (since Ameritech has not provided rate information). ODC also proposes seven terms and conditions that it thinks must be adopted by the Commission.

2. Allow the underlying carriers to provide written statements of their current positions on the rates, terms and conditions and then order compensation as the Commission determines is fair, just, and reasonable.

3. Allow all companies to submit final positions on the rates, terms, and conditions for service at a status conference before the attorney examiner and, then, the Commission should issue its decision.

4. Set an evidentiary hearing with witness testimony and cross-examinations, from which the Commission can decide the rates, terms, and conditions. ODC wants the opportunity to do discovery regarding the companies' cost of service if an evidentiary hearing is held, but will forego such discovery if the Commission would simply decide the case based on the record already before it. ODC does not want to incur the costs of a hearing.

(b) Apply the compensation decision to all network transfer service (NTS) providers (including the "arrearage" between May 22, 1997 and the date the compensation issue is determined).

(c) Require all similar companies to compensate the underlying carrier under the same schedule as

ODC. ODC is seeking a payment schedule because it will "not be able to remain in business and would not be able to continue to provide service to its customers, if required to pay any substantial arrearage in a lump sum payment." ODC further states that it "needs to adjust its current rates upward to cover any such arrearage and it cannot do so until it knows what that arrearage will be and until its current competitors are also required to adjust their rates to pass on to their customers a similar arrearage obligation."

(d) Modify the Entry on Rehearing in 95-819 so as to not require ODC to compensate the ALLTEL companies and Ameritech for arrearages since they did not negotiate a solution. ODC notes that the companies' proposals are "based on their access tariffs, which the Commission has previously determined were not appropriate for the service" that ODC receives from them and that ODC has had to bear the regulatory burden for all companies, while the others have sat back and waited.

(e) Require the underlying companies to provide the additional lines and service that ODC needs (that additional capacity was previously requested by ODC and rejected by the ALLTEL companies, pending the outcome of the complaint case).

(f) Issue an expedited ruling on these requests.

(8) Ameritech states, in its October 24, 1997 memorandum contra, that ODC's newest rate proposal is improper and that access charges are the only appropriate mechanism for compensation in this situation. Ameritech points to the 1996 Telecommunications Act (1996 Act), the Commission's decision in 95-819, two Washington Commission cases, an Idaho Commission decision, and an Indiana Commission decision for support. Next, Ameritech states that the appropriate compensation rates cannot be determined without a hearing, per Section 4905.381, Revised Code, and *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d. 145.

Ameritech argues that ODC is providing interexchange access, subject to access charges but, in the alternative, Ameritech states that ODC can request interconnection under the 1996 Act. Ameritech believes that any compensation arrangement must be consistent with the provisions of state law and the 1996 Act. Also, Ameritech states that in no event should the Commission alter its conclusion that ODC should compensate Ameritech and the ALLTEL companies for arrearages. Ameritech argues that ODC cannot seek rehearing of that determination by this motion in a separate case. Moreover, Ameritech states that it has not refused to provide additional services when requested by ODC.

(9) The ALLTEL companies state, in their October 27, 1997 memorandum, that their access tariffs apply and that the Commission cannot lawfully or reasonably order the institution of any other rates than access. They note that their July 1, 1997 proposal is consistent with that approach. They do not think that a status conference is necessary or that further evidence is necessary. They state that the validity and applicability of their access tariffs has already been demonstrated.

As for the other ODC-like companies, the ALLTEL companies state that they should not be permitted to operate at all but, if they do operate, they should pay appropriate compensation (i.e., access charges). ODC's request for a time table under which ODC (and others) can compensate the underlying companies is, in the ALLTEL companies' view, an untimely and unlawful collateral attack on the Commission’s Entry on Rehearing in 95-819. The ALLTEL companies do not believe that additional services should be provided until compensation is established. Finally, the ALLTEL companies do not object to an expedited ruling on ODC's motion.

The ALLTEL companies suggest that the Commission ignore ODC's complaints of unfairness about it having to pay an arrearage. They state that, if ODC had a complaint about the arrearage, it should have sought rehearing on that aspect of the Commission's decision. If ODC's revenues are insufficient to cover an arrearage, ODC should have raised its rates, but it has not done so. The ALLTEL companies state that the Commission should not entertain these untimely complaints.

(10) We have considered all of the proposals and arguments submitted by ODC, the ALLTEL companies, and Ameritech. We

believe that the compensation issue should be decided without further hearing (after all, the evidentiary hearing in 95-819 did involve the question of compensation, among other issues, but we deferred our conclusion on the compensation issue until now). As we have stated before, we had hoped that the parties could mutually agree upon the compensation issue. However, a mutual agreement has not been reached. Thus, we must decide the compensation question for the parties.

In our opinion, ODC should be purchasing the service(s) it needs from the ALLTEL companies and Ameritech from their access tariffs.[1] The Commission determined in 95-819 that ODC is a telephone company because it is engaged in the business of transmitting telephonic messages. ODC filed an application for, and was granted, a certificate as a network transfer provider. As summarized in 95-819, ODC is involved in the transmission of calls from the Elyria and North Eaton exchanges to the Cuyahoga County exchanges, from the Akron Exchange to the Cuyahoga County exchanges, and from the Lancaster and surrounding exchanges to the Franklin County exchanges.

Calls between the Akron Exchange and the Cuyahoga County exchanges and calls from the Lancaster and surrounding exchanges to the Franklin County exchanges are not recognized as local calls in either the tariffs of the ALLTEL companies or Ameritech, nor has the Commission ever determined that such calls constitute local traffic. Interexchange carriers involved in the transmission of calls between these exchanges, and that use the facilities of local exchange companies such as the ALLTEL companies and Ameritech to complete the calls, are required to purchase appropriate services from the access tariffs of the local exchange companies. Therefore, we find that, in order to provide such competitive telecommunications services, ODC is required to purchase the appropriate service from the access tariffs of the ALLTEL companies and Ameritech.

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[1] As we noted in finding 7(d) above, ODC claims that we previously concluded in 95-819 that the companies' access tariffs are not appropriate. However, that is not correct. We determined in 95-819 that compensation was not a clear-cut issue and that the parties should have the opportunity to develop a compensation arrangement that appropriately balances their interests (Opinion and Order at 25 and Entry on Rehearing at 5 and 7-8). We never rejected the companies' access tariffs.

ODC had proposed a compensation package that, in its estimation, would have provided the ALLTEL companies revenues approximately four times what ODC currently pays. The basis for this proposal, as stated by ODC's counsel at the Commission's January 21, 1998 Commission meeting, is ODC's estimate of what it could afford to pay to the ALLTEL companies and still make a profit. ODC proposed that a proxy rate be established for Ameritech similar to that proposed for the ALLTEL companies. The Commission cannot find any merit to ODC's proposed rate justification. Adoption of the ALLTEL companies and Ameritech proposals will insure that ODC is paying comparable rates.

The Commission recently determined that extended area service should be granted for calls made from the Elyria and North Eaton exchanges to the Cuyahoga County exchanges. ODC may continue to transmit calls between these exchanges if it purchases the appropriate services from the access tariffs of the local exchange companies. However, ODC may also request certification as a new entrant carrier and transmit such calls pursuant to interconnection agreements reached with the existing local exchange carriers or ODC may elect to resell local service within an incumbent local exchange carrier's local calling area, by purchasing such service under the local exchange carriers' approved resale tariffs.

(11) ODC shall have 40 days from the date of this Finding and Order, or ten days after the issuance of an Entry on Rehearing if ODC files an application for rehearing, to order access tariff service from the ALLTEL companies and Ameritech for calls from the Akron Exchange to the Cuyahoga County exchanges, and from the Lancaster and surrounding exchanges to the Franklin County exchanges.

If ODC does not order access tariff service from the ALLTEL companies and Ameritech for such calls within 40 days of the date of this Finding and Order, or ten days after the issuance of an Entry on Rehearing if ODC files an application for rehearing, then on those same dates ODC shall file a proposed plan to notify its customers that it intends to cease its operations and to refund to its customers any funds due them. This plan shall include a proposed customer notice. Assistance in this endeavor may be sought from the Commission's Consumer Services Department. The Commission reminds ODC that it

will continue to be subject to the jurisdiction of the Commission until cancellation of its certificate and that compliance with this directive is essential to an orderly termination of service. If ODC files a proposed plan to notify its customers that it no longer intends to provide service in Ohio, the Commission will review the plan and issue an entry to effectuate an appropriate plan.

Similarly, ODC shall have the same 40 or ten-day period to file a proposed plan to notify its customers in the Elyria and North Eaton exchanges if it does not request certification as a new exchange carrier for the purpose of transmitting calls from the Elyria and North Eaton exchanges to the Cuyahoga County exchanges. If ODC does not request certification as a new exchange carrier, then the ALLTEL companies and Ameritech may pursue service termination in accordance with the relevant provisions of their tariffs.

However, if ODC files notices with the Commission that it intends to cease its operations, then the ALLTEL companies and Ameritech shall not terminate service until an entry is issued to effectuate an appropriate plan. If ODC does not order access service or file the closure of service notice, then the ALLTEL companies and Ameritech may pursue service termination in accordance with the relevant provisions of their tariffs.

(12) Additionally, we wish to specifically address a few additional matters in order to avoid any confusion regarding our decision today. First, we are issuing this decision because the compensation dispute arose from the ODC complaint case, but we consider this conclusion to be applicable to all other companies that are operating in a similar manner to ODC. Thus, not only are those other companies required to seek certification from this Commission, those other companies are also required to pay appropriate compensation to the involved underlying carrier from whom they purchase service. Nothing in our decision today should be construed as being limited solely to ODC. Second, ODC and any other similar companies are required to comply with all provisions of the underlying companies' tariffs (to the extent they are applicable). Third, prior to serving disconnection notices upon any company that operates in a manner similar to ODC and that fails to comply

> with these conclusions, the ALLTEL companies and Ameritech shall inform the Commission's Legal Department of such company. The ALLTEL companies and Ameritech shall not serve a disconnection notice upon such company until the Commission's staff has investigated to determine: (1) if such company is operating in a manner similar to ODC, (2) that the company does not have a certificate for the service being provided, and (3) that the company is not paying the appropriate compensation for the service it receives. Finally, we believe that the ALLTEL companies and Amertiech should evaluate their tariffs and determine if any revisions may be appropriate in light of our conclusion today. The companies should work with our staff in implementing any necessary revisions. However, we clarify that our conclusions today are fully applicable during any interim period in which the tariff evaluation may take place.

It is, therefore,

ORDERED, That, in order to provide the competitive telecommunications service for which ODC has been certified, it should purchase the appropriate service from the access tariffs of the ALLTEL companies and Ameritech. It is, further,

ORDERED, That this compensation conclusion is applicable to all other companies that are operating in a similar manner to ODC. It is, further,

ORDERED, That ODC and any other similar companies are required to comply with all provisions of the underlying companies' tariffs (to the extent they are applicable). It is, further,

ORDERED, That ODC comply with Finding 11. It is, further,

ORDERED, That the ALLTEL companies and Ameritech comply with all provisions of this order relevant to termination of ODC or a company that they believe may be operating in a manner similar to ODC. It is, further,

ORDERED, That the ALLTEL companies and Amertiech evaluate their tariffs and determine if any revisions may be appropriate in light of our conclusion today. The companies should work with our staff in implementing any necessary revisions, but the conclusions reached today are fully applicable during any interim period in which the tariff evaluation may take place. It is, further,

ORDERED, That this case be closed of record. It is, further,

ORDERED, That a copy of this Finding and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Craig A. Glazer, Chairman

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Jolynn Barry Butler

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Ronda Hartman Fergus

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Judith A. Jones

GLP;geb

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January 22, 1998

Gary E. Vigorito
Secretary