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BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of Ameritech Advanced Data Services of
Wisconsin, Inc. for Authorization to Resell Frame Relay
Switched Multimegabit Data, and Asynchronous Transfer
Mode Services on an Intrastate Basis and to Operate as an
Alternative Telecommunications Utility in Wisconsin 7825-TI-100

Investigation into the Digital Services and Facilities of
Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin) 6720-TI-154

FINAL DECISION AND CERTIFICATE

Proceedings

On May 21, 1993, Ameritech Advanced Data Services of Wisconsin, Inc. (AADS), 225 West Randolph Street, Chicago, IL 60606, petitioned for certification as an alternative telecommunications utility (ATU) reseller to provide specified data services. Hearings were held on February 13-14, 1995. The application was denied by the Commission in a decision issued September 1, 1995. AADS sought judicial review. The denial was upheld by the circuit court on February 26, 1997, but that decision was vacated by the court of appeals on April 16, 1998.¹ The court of appeals remanded the case to the Commission for consideration of the effects of newly-enacted § 253(a) and (b), 47 U.S.C. § 253(a) and (b), created by the Telecommunications Act of 1996.²

In response to the remand, and in light of industry and technological changes since the 1995 hearings, the Commission opened this consolidated docket in a Notice of Investigation

¹ *Ameritech Advanced Data Services of Wisconsin, Inc. v. Public Service Comm'n*, 218 Wis. 2d 831, 581 N.W.2d 594 (Ct. App. 1998).

² Pub. L. 104-104, 110 Stat. 56 (1996) (codified at scattered sections throughout Title 47 U.S.C.) (hereinafter "Act") ("§" denotes statutory section in Title 47 created by the Act).

Upon Reopening, Prehearing Conference, Assessment of Costs, and Order dated September 4, 1998. The Commission also considered AADS' request for temporary authority. After taking comments, the Commission, on November 16, 1998, tentatively classified AADS as a reseller and granted temporary authorization to AADS to provide specified data services, subject to conditions. The conditions were those AADS had accepted in the February 1995, proceeding and certain "substitute interim conditions" that the Commission has imposed upon ATU resellers and competitive local exchange carriers (CLECs) affiliated with incumbent local exchange carriers (ILECs).

On November 25, 1998, AADS filed an amended application for certification as a reseller in compliance with the Commission's September 4, 1998 Order. Prehearing conferences were held on September 17 and December 3, 1998. Hearings were held on March 22-23 and June 9-10, 1999. Briefing concluded on September 3, 1999, and an issue list was distributed on September 15, 1999.

On October 8, 1999, the Federal Communications Commission (FCC) issued its order (Merger Order) effectively approving, with conditions, the merger of Ameritech Corporation (Ameritech), the parent of AADS and Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin (AW), and SBC Communications, Inc., (SBC)³. On October 26, 1999, the Commission issued an Order Reopening Hearing and Taking Judicial Notice with respect to the Merger Order. The Commission gave the parties an opportunity to contest the taking of official notice and to make oral argument on the effect of the Merger Order on this case. No party contested the official

³ *In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, CC Docket No. 98-141, FCC 99-279 (Rel. October 8, 1999) (Merger Order).

notice or asked for oral argument. The Commission proceeded to discuss the dockets at its open meetings of October 28, 1999 and December 16, 1999.

FINDINGS OF FACT

THE COMMISSION FINDS:

1. AADS is a Delaware corporation qualified to do business in Wisconsin.
2. AW is a Wisconsin corporation and a public utility providing telecommunications services regulated under Wis. Stat. ch. 196.
3. AADS and AW are wholly owned subsidiaries of Ameritech Corporation (Ameritech).
By virtue of the common parent, AADS and AW are affiliates.
4. AW, an incumbent local exchange carrier (ILEC), is the largest provider of local exchange telecommunications services in Wisconsin, serving over half of the access lines in the state. AW's exchanges are in most of the urban areas of the state, the Fox River Valley, and southeastern Wisconsin.
5. AADS, as set forth in its amended application, is fit, willing, and able, to provide its proposed services, specifically, intrastate frame relay, asynchronous transfer mode (ATM) services, switched multimegabit data service (SMDS), and asymmetrical digital subscriber line (ADSL) services used for permanent virtual circuits (PVCs).
6. ADSL service is a newly-developed technology, one of a number of variants of digital subscriber line (xDSL) technologies which permit a copper loop to simultaneously transmit both voice and data traffic. ADSL is asymmetrical in that its download speed, typically desired for Internet access, is approximately 1.5 Mbps, while its upload speed is not as fast, but still

substantially more than currently available from dial-up services, such as integrated switched digital network services (ISDN).

7. Other telecommunications providers in Wisconsin offer the same services that AADS seeks to provide.

8. Classification of AADS as a competitive local exchange carrier (CLEC), rather than as an ATU-reseller, affords the Commission more regulatory flexibility while still allowing AADS to engage in its proposed services.

9. The interim conditions placed on the certificate of AADS, as discussed in the Opinion below, are necessary for the protection and promotion of competition in the provision of broadband data services to customers in Wisconsin. The conditions are competitively neutral, and do not advantage or disadvantage AADS.

10. AW's current pre-ordering and ordering operational support systems (OSS) for competitor procurement of unbundled loops for xDSL services are inadequate because of their inconsistent delivery performance and the potential for discriminatory treatment of competitors.

11. In Wisconsin, AW's pre-ordering and ordering OSS have the effect of unfairly hindering competitors to the advantage of AADS' ultimate entry in the market for xDSL services.

12. The continued use of AW's identified OSS, without modifications for improvement in performance and to remove opportunities for discrimination, would be unreasonable and would impair the availability and development of advanced telecommunications in a competitive market.

13. AADS and AW are commonly controlled by Ameritech.

14. Ameritech placed its advanced data services business in AADS and, apart from a belated offering of frame relay service in AW (required to be transferred to AADS), refused to develop advanced data service business in AW, favoring AADS with all major investment and development of the advanced data services technologies.

15. AW knew or should have known that its loop pre-ordering and ordering OSS were inadequate and not in compliance with current requirements for facilities and services set forth in Wis. Admin. Code §§ PSC 165.08(4) and 165.081(2) (current through Wis. Admin. Reg. No. 528, Dec. 1999).

16. Temporarily barring AADS from jointly marketing advanced services with AW will mitigate the harm to robust and innovative development of xDSL services caused by Ameritech's maneuvering of AW and AADS data service offerings and prevent Ameritech from unfairly slowing access to AW's unbundled local loops that are needed by competitors in the xDSL services market.

17. AW's special charge-pricing for conditioning of unbundled loops for advanced services is unreasonable because it is inconsistent with telecommunications industry understanding of a "special construction charge."

CONCLUSIONS OF LAW

THE COMMISSION CONCLUDES:

The Commission has authority under Wis. Stat. §§ 196.02, 196.03(1) and (6), 196.04, 196.196, 196.203, 196.218, 196.219, 196.26, 196.28, 196.37, 196.395, 196.40, 196.44, 196.52, 47 U.S.C. §§ 251 to 253 as administered under the Commission's jurisdiction and discretion under state law, and Wis. Admin. Code chs. PSC 160, 165, and 168, to grant or deny certification

of an entity, determine a statutory category for certification, impose conditions, determine that a service or practice of an ILEC is unreasonable and impose a remedy, and to act or refrain from acting as set forth below.

OPINION

AADS Certification

AADS sought certification as a statewide ATU reseller to provide certain advanced data services. AADS proposed frame relay, ATM, SMDS, and, for work-at-home, ADSL service in private virtual circuit connections. ADSL service is a newly developed technology, one of a number of variants of digital subscriber line (xDSL) technologies which permit a copper loop to simultaneously transmit or receive both voice and data traffic.

The ATU application process under Wis. Stat. § 196.203(3) and Wis. Admin. Code ch. PSC 168 allows the Commission, on its own motion, to investigate whether or not the public interest requires imposition of any provision of Wis. Stat. ch. 196 or any other condition required by the public interest.

This case represents a difficult balancing between public interest concerns and the promotion of competition. See Wis. Stat. 133.01; Act, preamble (promoting both competition and deployment of new telecommunications technologies). The Commission finds that, on balance, the evidence of promotion of competition is sufficient to justify certifying AADS. The Commission finds that advancement of competition, especially in the advanced services area at this time, requires permitting a measure of freedom to providers to innovate and market their services as they see fit.

In this particular proceeding, the Commission finds that granting certification to AADS will promote delivery of advanced telecommunications services, increase infrastructure development, and give consumers additional choices. The promotion of these factors is consistent with Wis. Stat. § 196.03(6). Other factors cited in that statute are not relevant or not overcome by the other evidence of record.

The Commission is satisfied that AADS should be certified for the services described in its amended application filed November 25, 1998: frame relay, ATM, and SMDS, and ADSL services for private virtual circuits.

Finding that AADS should be certified, the Commission is nonetheless mindful of the legitimate concerns raised on this record regarding public interest objectives. The availability of affordable advanced services in rural as well as urban areas, the need for continuing investment in the quality of the public switched network, and the prevention of unfair competitive advantages related to AADS' affiliation with AW are concerns that weigh in favor of proceeding cautiously. In fact, the balancing of competition and public interest objectives is most difficult in this situation because the consequences of foreseeable legal and technological changes are more difficult to predict due to the transition to competitive markets and the fast pace of changes in technology and customer needs and demands. The balance of this decision addresses additional terms and conditions that the Commission believes are necessary to provide basic protection of the public interest in light of the potentially enormous consequences.

Category for Provider Certification

The Commission finds that the appropriate classification of AADS is as an ATU-other under Wis. Stat. § 196.01(1d)(f), otherwise known as a CLEC. Approximately 56 applications

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for CLEC authority have been granted, with interim conditions, pending resolution of the level of regulation in rulemaking docket 1-AC-186, and, where appropriate, pending the treatment of affiliate relationships between ILECs and sister CLEC and reseller affiliates in docket 05-TI-158 or any successor rulemaking to that docket.

The Commission has the power to determine the appropriate category for an entity.⁴ In this case, the appropriate category is that of CLEC because the Commission needs flexibility not available in the reseller rules, Wis. Admin. Code ch. PSC 168, to monitor the effects of this certification. A CLEC category also gives AADS the added flexibility to offer a mix of resold and facilities-based services not possible under the reseller rules.

The Commission authorizes AADS as a CLEC for the services specified above, in the local exchange areas of AW, GTE North, Incorporated (GTE), and Mid-Plains, Inc., (MP). Upon Commission receipt of a consent letter, the territories of CenturyTel of the Midwest-Kendall, Inc.,⁵ are also hereby authorized to AADS. Territories of small telecommunications utilities are excluded because of Wis. Stat. § 196.50(1)(b), but statewide authorization of reselling of services authorized for resale is permitted under the interim CLEC authorizations.

⁴ *Application of Midwest Video Electronics, Inc., for a Certificate to Provide Intrastate Telecommunications Service in Wisconsin*, Docket No. 3665-NC-100, p. 4 (September 15, 1995), affirmed sub nom. *Wisconsin State Telephone Ass'n. v. PSC*, No. 95-CV-2609 (Wis. Cir. Ct. Dane County December 12, 1996)

⁵ CLEC authorizations for the territories of CenturyTel of the Midwest-Kendall, Inc.(Kendall), have been effected upon that company supplying a letter indicating no objection to the new entrant. This record does not contain such a letter. If the customary consent letter is secured and filed with the Commission in this docket, AADS shall be automatically authorized in those exchange areas of Kendall.

Level of Regulation

AADS' certification must be subject to certain interim conditions because the Commission's regulation of CLECs in local exchange competition is still under consideration in rulemaking docket 1-AC-186. The Commission intends in such proceedings to define the requirements and rights of new entrants, such as AADS, in the local exchange market. Until such time, the rights and responsibilities defined in this order shall apply to AADS. The CLEC authorization provisions regarding applicable statutes, access, and interconnection and mutual compensation arrangements are the typical CLEC provisions. The portion regarding conditions on certification reflect the typical conditions imposed upon a CLEC affiliated with an ILEC, but with modifications to reflect the unique concerns raised in this proceeding

The modifications to the conditions reflect the public interest concerns identified in the FCC Merger Order and raised in staff testimony in this proceeding. The Commission finds that AW could have substantial incentive and opportunity to advantage AADS, with respect to provisioning of data services. Wisconsin has a legitimate interest in regulating AADS differently from other CLECs offering advanced data services because of the increased entanglement between AW and AADS and because of AW's lack of incentive to innovate and invest in the public switched network.⁶ Therefore, additional conditions on certification are warranted in this case.

Given AW's current system for satisfying xDSL loop orders and the extensive need for manual intervention to provision xDSL loops, the Commission has serious concerns as to whether AW will provide xDSL loops on a nondiscriminatory basis. AW's lack of an effective

⁶ See *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, etc. 13 F.C.C.R. 24011 (August 7, 1998).

loop prequalification operational support system (OSS) or preorder process for xDSL loops, directly and negatively impacts on competitors' ability to fulfill customer orders. Also, as discussed in more detail below, AW's unreasonable application of special construction charges further negatively affects competitors' ability to price xDSL services for the purpose of effective marketing as to both price and timeliness of installation.

The conditions that are ordinarily imposed on CLECs are only a starting point as those conditions were primarily designed for CLECS and resellers affiliated primarily with small telecommunications utilities. This docket involves certification of an affiliate of the largest ILEC in the state. This docket also involves an affiliate intending to use, for data services, the digital and protocol technologies that will likely be the next major technology for the public switched network. That network is inextricably intertwined with the fundamental statutory assumptions implicit in Wis. Stat. § 196.218 as to how essential and advanced services components of universal service are to be delivered in a competitive telecommunications market. In order for the Commission to protect its ability to effect the public interest goals identified in Wis. Stat. § 196.03(6), the Commission finds the modified conditions upon AADS set forth below to be necessary to implement with specificity the statutes otherwise imposed on CLECs under the interim arrangements that were established by the Commission in mid-1995. In addition, the factors noted above satisfy the standards of competitive neutrality and necessity under § 253(b) of the Act by protecting the rights of consumers, including competing carriers purchasing ILEC services, by preserving the Commission's ability to protect and promote universal service, and by assuring a minimum quality of service among competitors supplying xDSL services through use of ILEC network components.

Applicable Statutes: Subject to the limitations as noted below, the Commission affirms the following provisions of Wis. Stat. ch. 196, should apply on an interim basis to AADS in their entirety:

196.01 - Definitions: The Commission has determined that these definitions apply to the certification of AADS.

196.02(1) - Commission's powers: Jurisdiction. The Commission retains its jurisdiction to supervise and regulate AADS.

196.02(4) - Commission's powers: Information Required; Stockholders. The Commission retains the right to inquire into the management of the business of AADS.

196.02(5) - Commission's powers: Inspect Books. The Commission retains the right to inspect the books, accounts, papers, records, and memoranda of AADS.

196.03(6) - Utility charges and service; reasonable and adequate: The Commission will consider the stated factors, at a minimum, when determining what is a just and reasonable telecommunications service or rate to the extent of the Commission's jurisdiction.

196.04 - Facilities granted other utilities; physical telecommunications connections; petition; investigation: AADS will have to offer interconnection to providers other than AW, GTE, MP, and Kendall (upon authorization), according to the requirements of the Act and the level of regulation to be established by the Commission, upon further order in rulemaking docket 1-AC-186. The Commission reserves the right to hear complaints, under Wis. Stat. § 196.04 (or Wis. Stat. § 196.199, noted below), from those parties who desire to interconnect with AADS if there is a failure to agree upon the terms and conditions for interconnection.

196.07 - Balance sheet filed annually: The public interest requires AADS to close its annual accounts on December 31. The Commission has also decided to require AADS to annually file an abbreviated report form. Staff will provide AADS with a copy of this form at a later date. The report will, at a minimum, require AADS to file a Wisconsin-specific operating income statement. Considering the present level of competition in the Wisconsin intrastate local exchange market, the Commission believes that the abbreviated annual report form for AADS represents the appropriate level of financial information for the Commission to monitor the activities of AADS.

196.14 - Public record exception: The Commission retains the right to withhold from public inspection any information that would aid a competitor of AADS.

196.199 – Interconnection Agreements: The Commission has determined that the public interest in negotiated interconnection agreements and efficient, uninterrupted service favors application of the dispute resolution mechanisms in this statute to CLECs as well as ILECs.

196.20 - Rules on service: changes in rates: The Commission has determined that it would be premature to require AADS to file tariffs and associated pricing methods before making a decision on the level of regulation in the follow-up order in docket 1-AC-186. In the interim, however, the Commission does find it is in the public interest to require AADS to:

- a. Keep on file with the Commission any tariff, or agreement that it has entered into, for interconnection arrangements. The tariff shall contain all the rules, a range of rates including the maximum rate for interconnection, and classifications used to provide its interconnection service. The tariff shall be effective when filed or on a date indicated by AADS, unless

suspended by the Commission. The tariff shall also contain a map defining AADS' service territory, as established or modified from time to time.

b. AADS shall provide advance notice to affected customers of all price increases for, and material changes in, its local exchange services. Notice shall be in writing to all affected customers prior to billing for a changed service or billing a service at a higher price.

196.203 - Exemption of alternative telecommunications utilities: The Commission retains the right to impose on AADS any provision of Wis. Stat. chs. 196 or 200.

196.204 and 196.015 – Cross-subsidization limited: The Commission determined that these provisions are in the public interest as supporting the conditions regarding cross-subsidization as set forth below and prohibiting any subsidization from AADS to AW that may hinder traditional voice local exchange competition.

196.207 and 196.208: The Commission has determined that, to the extent AADS may eventually provide the services addressed by these statutes, it is in the public interest to retain these sections for telephone caller identification services and telecommunications pay-per-call and toll-free calls.

196.209 - Privacy considerations: The Commission has determined to require AADS to adhere to the privacy guidelines established by this section.

196.218 - Universal service fund: The Commission has determined that AADS is subject to Wis. Stat. § 196.218, and shall file any information required for assessment of universal service funding obligations under this section.

196.219 - Protection of telecommunications consumers: The Commission has determined to apply to AADS Wis. Stats. §§ 196.219(1), (2)(b), (2)(c), (2)(d), (3)(a), (3)(c), (3)(d), (3)(e),

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(3)(h), (3)(j), (3)(m), and (3)(n). Wis. Stat. § 196.219(3)(L), also applies with respect to minimum technical service quality. Application of any other subsections would be premature before the Commission makes a decision in rulemaking docket 1-AC-186.

196.25 - Questionnaires: The Commission has determined that it is in the public interest to retain this section and require AADS to respond to any Commission questionnaires.

196.26 - Complaint by consumers; hearing; notice; order; costs: The Commission retains jurisdiction over any complaint respecting any aspect of AADS and its services within the Commission's jurisdiction.

196.28 - Summary Investigations: The Commission has determined that it is in the public interest to retain its investigatory powers under this section.

196.39, 196.395, 196.40, 196.41, 196.43, 196.44, 196.65, and 196.66: The Commission has determined that it is in the public interest to retain these sections for a coherent administrative framework applicable to AADS as an ATU.

196.81 - Abandonment; commission approval required: The Commission has determined to apply this section only to the extent that AADS shall provide written notice to the Commission not less than 60 days before its abandonment of basic local exchange service within AADS territory.

196.85 and 196.858: The Commission has determined that it is in the public interest to retain these sections. AADS shall file any information for regulatory (both direct and remainder) and telephone relay service assessments, as applicable.

The Commission has determined that any rules promulgated to implement any of these aforementioned statutes shall apply to AADS to the extent detailed above.

Access: The Commission further finds that it is in the public interest to require AADS, as appropriate to its offerings, to provide equal access to all telecommunications carriers within the parameters defined in the *Investigation Into the Extent of Competition in the IntraLATA Toll Telecommunications Market and of the Level of Regulation for IntraLATA Toll Telecommunications Service*, docket 05-TI-119.

Interconnection and Mutual Compensation Arrangements: AADS, subject to the interconnection provisions, will have customers who desire to place calls with customers served by AW, GTE, MP, and Kendall. Likewise, AW, GTE, MP, and Kendall customers will want to connect with customers served by AADS. To complete these communications, the companies' networks will have to be interconnected. Rather than setting rates for interconnection, the Commission found in its docket 05-TI-138, *First Final Order*, that such rates should be determined through voluntary negotiations, as described in 47 U.S.C. § 252. If insufficient progress is being made in negotiations, any party may petition the Commission to arbitrate any open issue during the period from the 135th to the 160th day after an interconnection request is received.

Monitoring Development of Local Competition: To monitor the development of competition in the local exchange market, the Commission has determined to mandate additional reporting requirements for the competitors in the local exchange market, such as AADS. The Commission also deems it necessary to require AADS to file, by April 1 of each year, a competitive market report, the format for which will be developed by the Commission. The report may include, but is not limited to, the following information: (1) a map of all leased or

owned facilities in Wisconsin; (2) a description of facilities and switches used to provide intrastate Wisconsin telecommunications services, including as necessary, facilities located in other jurisdictions; (3) the number of customers and total revenues received from the provision of local exchange service, each broken out by applicant territory, type of service, and type of customer (e.g., business or residential customer); (4) an average of rates charged for local exchange services broken out by business and residential customers; and (5) a description of services and a comparison to equivalent competitor service(s).

Conditions on Certification: AADS is affiliated with AW, the single largest local exchange carrier in Wisconsin, with over half of the state's access lines, and serving most of the major population centers. Within its service area, AW is the dominant local exchange service provider and has the incentive and capability of exercising market power. This certification will be subject to whatever additional order may issue in docket 05-TI-158 or any successor rulemaking that may be instituted to address affiliate relationships. Also, for the reasons noted above, additional conditions consistent with Wis. Stat. § 196.203(3)(a) are necessary to protect the public interest. Though they are based on the Commission's experience and the record in this proceeding, the conditions mirror many provisions required by the FCC Merger Order for the operation of a structurally separate data services affiliate.

Condition 1. AADS' certificate is temporary in nature for so long as AADS' separate existence is required by the Merger order, plus 60 days.

Condition 2. AADS shall not seek or obtain terms, conditions, or prices for a service or service component from AW that are more advantageous than what any other similarly-situated nonaffiliated customer would obtain for that service or service component.

Condition 3. AADS shall not seek or obtain any service or service component from its affiliated local exchange companies, including service ordering, service availability, service installation, service maintenance and testing, and operational support systems on terms more favorable than the equivalent service or service components could be obtained from the affiliate by other providers of digital data services.

Condition 4. Except as permitted by the Commission, AADS is prohibited from creating with the direct or indirect cooperation of AW any service offering that ties AADS' unregulated services with any tariffed telecommunications service offered directly by AW to an end-user customer.

Condition 5. AADS shall not seek, accept, or use any inside or unpublished facilities or network information respecting any procedure, feature or capability in or associated with the services of AW.

Condition 6. AADS shall not directly or indirectly solicit or accept a subsidy from AW. AADS shall not accept or request any advantage from its affiliated local exchange companies through cross-subsidization. Dividend payments by a subsidiary to its parent that may, in turn, fund an affiliated subsidiary do not constitute improper indirect subsidization. AADS shall maintain USOA-based books and records in a manner that permits verification of its compliance with this requirement. AADS shall be subject to Wis. Stat. § 196.52(5) and file affiliated interest agreements it enters into with AW and any other non-regulated affiliates of SBC Communications, Inc. Such agreements shall be in sufficient detail as to enable the Commission to reasonably compare the nature of the goods and services that are the subject of the agreement and the prices therefore. The Commission may reject agreements for lack of sufficient

specificity to enable the Commission to perform minimal supervisory jurisdiction to enforce Wis. Stat. §§ 196.204 and 196.219.

Condition 7. AADS shall have no access to any customer proprietary network information associated with or attributable to its affiliated local exchange companies' provision of local exchange or access services that would assist AADS in developing, designing, marketing, or otherwise providing its services, unless that information is obtained with the express permission of the customer or is also made available to other providers of digital data services. AADS shall not seek or accept any other customer proprietary information from AW unless the information is available on a nondiscriminatory basis to both affiliates and non-affiliates or a customer has provided to AADS prior affirmative written consent to secure the information.

Condition 8. AADS may not jointly engage with AW in solicitation, advertising, events (of any kind), or the provision of information, for the purpose of encouraging telecommunications users to choose AADS over other providers. This condition shall remain in effect until improved AW preordering and ordering OSS have been deployed, tested, and approved by the Commission as satisfying this condition.

Condition 9. AADS shall not accept, solicit or use, except upon appropriate monetary compensation (including royalties or license fees) and under Commission jurisdiction pursuant to Wis. Stat. § 196.52(5)(b) any proprietary technology owned or paid for by AW, book assets intended to be used to provide non-regulated or competitive services, or any "non-book" assets, such as, but not limited to, goodwill, patents, copyrights, corporate brand names, service and trademarks, etc.

Condition 10. AADS shall not, for its benefit, seek or accept from AW unreasonable preference or discriminatory treatment in the development, design, or implementation of services (including network facilities) of AW. In effect, an unreasonable preference or discriminatory treatment of applicant exists if the interests of AW would not be advanced as if AW were a stand alone entity giving due regard to the interests of all present and potential customers, affiliated or otherwise.

Condition 11. AADS shall not encourage, advise, or communicate to AW in any manner, any information that is intended to influence AW to research, develop, design, or implement its services (including network facilities) to prefer or unjustly discriminate in favor of AADS.

Condition 12. AADS shall comply with the provisions of Wis. Stat. ch. 196 listed previously in this order.

Condition 13. Within 90 days of the mailing date of this order, AADS shall file tariffs, as described below, to make available any digital subscriber line access multiplexer (DSLAM) or other technical equipment necessary to provide access to advanced telecommunications services (and any related accessory equipment) that is located in any AW central office, controlled environment vault, or digital subscriber (DSA) hut, or any equivalent of the foregoing, if the DSLAM or other technical equipment occupies the only usable AW collocation space available to competitor telecommunications providers, to provide an economically viable competitive xDSL telecommunications offering. The provision of interconnection and the use of the AADS facilities so interconnected shall be charged according to tariffs approved by the Commission. The tariffs shall be initially filed by AADS with the Commission under Wis. Stat. § 196.19(1),

and contain just and reasonable rates supported by cost studies, unless said studies are waived per request and Commission order. Tariffs filed under this condition shall be subject to Wis. Stat. § 196.20(2m). This condition may be waived in any particular installation upon a good faith showing of technical infeasibility, which includes harm to AADS facilities, harm to services to other AADS customers, or a detriment to an AADS offering.

Condition 14. AADS shall file with the Commission all information that the Merger Order requires of SBC with respect to compliance with the Conditions I through VI of Appendix C of the Merger Order regarding the promotion of advanced services.

Condition 15. The Commission reserves its jurisdiction to reopen this record, or conduct new proceedings, as it sees fit, in order to impose additional conditions upon AADS as may be warranted by the public interest.

Ameritech Wisconsin

The Commission finds it reasonable, necessary, and in the public interest, in light of the record in this proceeding to impose certain requirements upon AW, as follows:

1. Any reports AW is required to file with the FCC under the terms of the Merger Order shall also be filed with this Commission.
2. AW shall not aid or promote a violation of any condition imposed on AADS. AW shall affirmatively cooperate with, or assist, AADS to fulfill conditions imposed on AADS by this order.
3. Within 90 days of the mailing date of this order, AW shall file a plan to provide within six months improved procedures for handling unbundled loop requests. Until a satisfactory

improved pre-ordering and ordering OSS are in place, AW may not provide any xDSL loops to AADS apart from limited private virtual circuit connections.

4. Consistent with the purposes of the Merger Order, AW shall file, as soon as practicable but not later than 75 days, tariffs for the conditioning and availability of xDSL-compatible unbundled loops, accompanied by cost studies. Pursuant to Wis. Admin. Code § PSC 160.035(3), the Commission shall investigate and determine the propriety of the tariffed rates for this advanced service capability.

As a necessary complement to AADS Condition 14 above, AW, under the first condition above, shall simultaneously file with the Commission its FCC Merger Order reports for the purpose of assuring that AW's services do not degrade through favoritism of AADS. The FCC Merger Order omits any discussion of the implications for universal service for affected states. It will be necessary for this Commission to monitor AW closely to assure existing AW services are not impaired. AW is directed to promptly meet with staff to identify the duties of AW and coordinate the filing of reports to implement this monitoring.

The second condition is a necessary complement, in view of Ameritech's (the parent's) common control of AW and AADS, to assure Commission full oversight powers with respect to the conditions imposed upon AADS. The second sentence of the condition is necessary to insure that AW will cooperate with, and assist AADS, in making available AADS-owned DSLAMs in remote terminal locations owned by AW.

The third and fourth conditions address two key issues on this record going to the adequacy of AW's services in its role as a supplier of loops for voice grade services and for xDSL services, the latter being a capability for advanced services.

The record demonstrates legitimate intervenor concerns that AW's unbundled loop ordering system is too inconsistent in its results and a substantial impediment to competitors who need installation and pricing information to deal with customers. TDS Metrocom and AADS both expressed dissatisfaction with the performance they received from the Unbundling Service Center that handles loop requests for AW and its sister operating companies in the former five-state Ameritech region. Confidential information cited in the briefs of the intervenors and the staff further support the Commission's finding here that the operational support systems, both pre-ordering and ordering, for handling requests for unbundled loops, including xDSL compatible loops, are inadequate as a matter of law as well as fact. The Commission finds that the system described in the record by Mr. Daniel Kocher of Ameritech did not meet minimum requirements for adequate assignment of facilities and ongoing review to determine the adequacy of that system, as required by Wis. Admin. Code §§ PSC 165.08(4) and 165.081(2), respectively.

AW shall forthwith (within 90 days) file a plan to provide improved procedures for handling unbundled loop requests within 6 months. This time frame, shorter than anticipated in the FCC Merger Order, is necessary to respond to the competitor and public demands for better service through competition, and to correct an ordering system that will become inadequate, just as the January 1, 2000, deadline for advance services capabilities arrives. Wis. Admin. Code § PSC 160.035. This requirement for improvements does not seek a perfect plan because of anticipated broader OSS investigation proceedings for AW just commenced in docket 6720-TI-160. Rather, this requirement expects an interim plan that substantially reduces inconsistencies and installation times in a manner responsive to the complaints noted on this

record. Modifications to the loop handling system should reasonably look to creating manual or electronic shortcuts to take advantage of information already available regarding AW's network.

Unlike the prospective prescriptions of the FCC Merger Order, this proceeding entailed a review of the effects of AW's OSS for ordering unbundled loops over approximately the past 20 months. The public and confidential portions of the record indicate that AW's unbundled loop processes were inadequate for competitors to effectively determine whether loops were xDSL compatible or needed "conditioning" to satisfy the competitor requests. The confidential portion (especially witness Fournet's description of his work for AADS) indicates that AADS was essentially compensating for the impediments of AW's unbundling system problems.

The Commission infers that Ameritech management could not have been unaware of the foregoing effects of its control of the two subsidiaries. Corporate management clearly decided to choose AADS over AW as the vehicle for advanced data services in Wisconsin. The factual record supports this finding. For example Mr. Terry Appenzeller testified that he appeared for Ameritech "corporate" in support of AADS providing data services over AW, and indicated that Ameritech would not invest in advanced data services in AW because of the unbundling obligation under § 251.⁷ Dr. Robert Harris was unaware of whether AW or AADS had retained him. The FCC Merger Order also facially demonstrates that Ameritech managed the strategic interests of both AW and AADS in order to secure FCC approval of the merger of Ameritech with SBC. AW was clearly subordinated to AADS as the vehicle for delivery of data services in Wisconsin.

⁷ Significantly, Mr. Appenzeller also testified in relation to Condition No. 13 that if AW owned a DSLAM in the only space available in a remote terminal, it would probably mean AW would be obliged to unbundle the DSLAM in order to permit CLEC access to customers in the digital serving area subtended by the remote terminal.

However, by assigning data services investment to AADS and denying the development of the same to AW, Ameritech controlled its subsidiaries to unreasonably curtail the logical development of services and facilities for digital and protocol-based data telecommunications services adequate to comply with AW's basic public telecommunications utility responsibilities under Wis. Stat § 196.03(1) and administrative code sections noted above. This strategic management choice considered the parent's interests only, without evaluating on a stand-alone basis the responsibilities of AW as a public telecommunications utility under Wis. Stat. ch. 196.⁸

The Commission may properly look behind the corporate entities in order to prevent "evasion of reasonable regulation,"⁹ and concludes that the public interest as framed by Wis. Stat. § 196.03(6) warrants imposition of the above conditions upon AW. In particular, the conditions will promote *fair* competition, protect consumer choices of alternative providers who rely upon AW network components, promote the deployment of advanced telecommunications service capabilities as a part of universal service, and foster efficiency and productivity. These factors outweigh Ameritech's choice of entities. The other factors in Wis. Stat. § 196.03(6) were either not relevant to this proceeding or were outweighed by the foregoing factors.

Consequently, until a satisfactory improved ordering system is in place, tested, and approved by the Commission, AW may not provide any ADSL loops to AADS apart from the limited private virtual circuit connections. This is a necessary condition on AW to assure that quality of services afforded competitors is fairly established to prevent potential discrimination and assure competitive neutrality on the part of AW with respect to AADS and competitor

⁸ *Notification by Forestville Telephone Company, Inc., That It Intends to Increase Telephone Rates*, PSCW docket 2050-TR-101, slip opinion at p. 36-41, 51(January 5, 1994).

⁹ *See, e.g., General Motors Acceptance Corp. v. Commissioner of Banks*, 258 Wis. 56, 46 N.W.2d 328 (1950), *appeal dismissed* 341 U.S. 945, (1951)(holding that separate corporate entities under common ownership may be disregarded by courts "if reasonable regulation is hampered.").

demands for xDSL unbundled loops. This condition also safeguards the rights of consumers in terms of receiving adequate service from CLECs who are dependent upon AW's timely and non-discriminatory wholesaler provisioning of network elements. Moreover, the condition gives AW an incentive to expedite improvement of its pre-ordering and ordering systems for unbundled loops.

Another concern regarding AW's role as a supplier of network elements is AW's practice of assessing special construction charges for xDSL-compatible loops. Special construction charges are, in most situations, intended for the non-recurring, initial installation of principal lines and facilities to provide service. In contrast, "conditioning" of existing loops to be compatible with xDSL services is a repetitive activity readily susceptible to cost quantification typically used to support tariffed pricing. One of the chief aims of tariff pricing is to prevent discrimination among similarly situated purchasers of the tariffed service. AW's special charge-pricing for conditioning of unbundled loops for advanced services is unreasonable because it deprives competitors of the ability to effectively market their services which rely upon AW loops for connection to the customers' premises, especially in the case of xDSL services. AW's construction is inconsistent with industry understanding of a "special construction charge," as testified to by Sprint's witness and staff. This record supports the conclusion that tariff pricing is reasonable and necessary to prevent injury to competition by the potential discrimination inherent in pre-ordering and ordering OSS that are excessively reliant upon subjective, human intervention and that lack strong controls.¹⁰

¹⁰ Avoidance of discrimination is an obvious motivation in the Merger Order's requirement for separate data affiliates. The Commission observes, but does not find, that even though the Merger Order requires a 25% discount off loops to be used for advanced services, the actual rates may nonetheless be discriminatory because the discounts are applied to the variable, order-by-order special construction

The Commission requires that AW file, as soon as practicable, but not later than 60 days, tariffs for unbundled xDSL loops, accompanied by cost studies. Pursuant to Wis. Admin. Code § PSC 160.035(3), the Commission shall investigate and determine the propriety of the tariffed rates for this advanced service capability.

The Commission finds that conditions three and four do not cause AW to violate any minimum requirement of the FCC Merger Order, and therefore are permissible state action.¹¹ The conditions on AW assure basic loop ordering as matters of service quality and consumer protection, which a state commission may protect under § 253(b). The conditions also essentially re-set the starting blocks to provide an equalized starting position for all competitors in the race for the xDSL market. In this regard, the Commission's order is truly supportive of the FCC's ultimate objectives in the Merger Order regarding data services deployment.

ORDER

THE COMMISSION ORDERS:

1. This order shall be effective upon mailing.
2. In the absence of timely petitions for rehearing, AADS' temporary authority issued November 16, 1998, shall expire twenty days after the mailing date of this decision. If a petition for rehearing is filed, the temporary authority shall be automatically extended subject to termination only if the petition for rehearing is denied by the Commission or is deemed denied by operation of law, whichever occurs first.

charges.

¹¹ Merger Order, at ¶ 358.

3. Commencing upon expiration of its temporary authority as provided in Para. 2 above, AADS shall be authorized to provide specified digital and protocol-based data services to residential and business customers in the present AW, GTE, MP, and Kendall (upon letter filing as described above) local service exchange areas (not including foreign exchange services, cross-LATA boundary services, or non-affiliate local calling areas). If AADS wishes to provide facilities-based services in a territory served by a small telecommunications utility having 150,000 or fewer access lines in service (except MP and Kendall), AADS shall file a petition for further certification to extend its service territory.
4. Notwithstanding Para. 3 above, AADS' certification shall be temporary in nature and shall expire 60 days after the expiration of the requirement for AADS (or any successor) as a separate data affiliate, as provided in the Merger Order.
5. AADS' certification is also subject to the interim terms and conditions specified in the Opinion, and subject to the conclusion of the last of (a) the rulemaking in docket 1-AC-186 on the level of CLEC regulation, and (b) docket 05-TI-158 (or any rulemaking successor thereto) regarding regulation of relationships between ILECs and affiliated providers.
6. As specified in the Opinion, AADS shall be subject to the following provisions of Wis. Stat. ch. 196,: Wis. Stat. §§ 196.01; 196.015; 196.02(1), (4), and (5); 196.03(6); 196.04; 196.07; 196.14; 196.19(1); 196.199; 196.20; 196.203; 196.204; 196.207; 196.208; 196.209; 196.218; 196.219; 196.25; 196.26; 196.28; 196.39; 196.395; 196.40; 196.41; 196.43; 196.44; 196.52; 196.65; 196.66; 196.81; 196.85 and 196.858.
7. The certification granted below is subject to Conditions 1 through 15 set forth in the Opinion, and is conditioned upon the Commission's reserved power to impose through rule or

other proceeding any terms or conditions necessary to protect and promote the public interest.

8. AADS shall file with the Commission affiliated interest contracts or arrangements that it enters into with an affiliate company.

9. AADS shall comply with the reporting requirements under the terms and conditions set forth in the Opinion.

10. AADS shall notify the Commission of the date on which it begins local exchange operations to residential customers.

11. Except as provided herein, AADS shall have the right to determine where and on what schedule it will install its facilities and extend service, and it shall not be required to have the same service territory as the incumbent telecommunications utility.

12. AADS shall offer its services to all customers within reasonable proximity of its facilities and to whom access is available on reasonable terms and conditions considering technical and economic factors.

13. AW shall file with the Commission copies of all reports relevant to Wisconsin that its parent is obliged to file in compliance with the Merger Order. AW shall promptly meet with staff to identify and coordinate the specific responsibilities it has under this provision.

14. AW shall not aid or promote a violation of any condition imposed on AADS by this order. AW shall affirmatively cooperate with, or assist, AADS to fulfill conditions imposed on AADS by this order.

15. As set forth in the Opinion within 90 days of the mailing date of this order, AW shall file a plan to provide, within 6 months, improved procedures for handling unbundled loop requests. Until satisfactory improved pre-ordering and ordering OSS are in place, AW may not provide

any xDSL loops to AADS apart from limited private virtual circuit connections.

16. As set forth in the Opinion, AW shall file appropriate tariffs and cost studies to tariff the provisioning of xDSL compatible loops, and shall thereupon cease treating such requests as matters involving special construction charges.

17. The Commission retains jurisdiction.

CERTIFICATE

THE COMMISSION CERTIFIES:

Ameritech Advanced Data Services of Wisconsin, Inc., is an alternative telecommunications utility, per Wis. Stat. § 196.01(1d)(f), authorized in Wisconsin to: (1) offer facilities-based intrastate digital and protocol based data telecommunications services (except intrastate interLATA services), specifically frame relay, switched multimegabit data services, asynchronous transfer mode services, and ADSL services for permanent virtual circuits, to business and residential customers in the present obliged-to-serve local exchange territories (not including foreign exchange services, cross-LATA boundary services, or nonaffiliated local calling areas) of AW, GTE, MP, and, upon consent, Kendall; and (2) resell statewide such data services that are authorized for resale.

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The specified services certificated above are subject to the interim conditions set forth in paragraphs 2 through 12 of the Order.

Dated at Madison, Wisconsin, _____

By the Commission:

Lynda L. Dorr
Secretary to the Commission

LLD:MSV:g\order\pending\7825-TI-100, 6720-TI-154 Final & Cert

Attachments:

Opinion Concurring in Part and Dissenting in Part of Chairperson Bie
Concurring Opinion of Commissioner Mettner
Attachment A (Service List)

See attached *Notice of Appeal Rights*

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

CONCURRING IN PART AND DISSENTING IN PART

I approve of the Commission's decision to grant AADS' application. Since 1993, when the Commission first received AADS' petition, both the Wisconsin Legislature and the Congress have enacted Telecommunications Acts to promote competition. In fact, it was in light of the federal Act that the court of appeals asked the Commission to examine its denial of AADS' original application. With today's Order, the Commission attempts another step forward in promoting competition in the advanced telecommunications market and ensuring that such advanced services become a reality for the citizens of this State.

I say that the Commission attempts to close this docket and attempts to promote competition because, while the Commission's public policy goals are laudable, I believe that the resulting Order imposes remedies that may frustrate that objective. I agree that the Commission should certify AADS. I also agree that given AADS' status as an affiliate of the largest ILEC in this state, the Commission should closely regulate AADS to prevent any unfair advantage that may harm competition. In so doing, however, the majority decidedly weights the scales against AADS in favor of mitigating the perceived harm from Ameritech's business decision to place advanced data services in an affiliate that the FCC mandated in its Merger Order.

I disagree with the majority's imposition of two restrictions on AADS that are dependent on Ameritech Wisconsin (AW) improving its operational support systems (OSS). First, the majority bars joint marketing between AADS and AW. Second, the majority bars AW from providing ADSL loops to AADS. I believe that both restrictions run contrary to the Merger Order. I also believe that the majority's restrictions are ill suited to promote competition.

The Commission correctly finds that promoting competition is sufficient to justify certifying AADS as an affiliated CLEC. However, the majority departs from conditions on certifying affiliated CLECs that until today had been consistent and even-handed. By these two conditions placed on AADS, the majority seeks to reset the starting blocks for all competitors in the race for the xDSL market.

I. The Commission Lacks Jurisdiction to Bar Joint Marketing

The condition barring AADS from joint marketing until AW improves its OSS essentially treats both AADS and AW as one entity. Wisconsin law recognizes AADS and AW as separate corporate entities. I agree that the Commission may look beyond corporate forms and treat affiliates and parents as one entity if affiliates and parents collude to evade regulations. However, in light of the FCC's mandate for incumbent local exchange carriers provisioning advanced data services through affiliates, the majority's imposition of restrictive conditions is unwarranted. The majority bases its impositions on AW's potential to discriminate in the future, not on some evidence of discrimination found in the record. Furthermore, the potential for discrimination flows to AW not AADS. Prohibiting AADS from joint marketing unfairly punishes the affiliate for AW's poor OSS and perceived future capacity for misdeeds. Ironically, AADS also complains about AW's poor OSS. AADS testified that it was dissatisfied with AW's OSS. This demonstrates that AADS has little or no control over AW's OSS.

I believe that the Commission lacks jurisdiction under the Merger Order to impose restrictions conditioned on OSS improvements. Not only does the Merger Order specifically allow joint marketing, it reserves for the FCC final enforcement authority over SBC/Ameritech's OSS. In its Merger Order, the FCC found that joint marketing was consistent with 47 USC § 272(g)(3) and with the 1996 Act's objective. Additionally, the FCC declined to require third party testing of OSS enhancements and interfaces. The FCC stated that it maintained final enforcement authority over SBC/Ameritech's implementation of the OSS enhancements, interfaces, and business requirements under the Merger Order. To the extent that the Commission requires OSS improvements duplicative of the Merger Order, I believe that the FCC preempts state action.

I do not suggest that the Commission is powerless to order OSS improvements. The Commission has initiated a docket to look at AW's OSS. That proceeding will offer an opportunity for any provider to air its grievances regarding AW's OSS and develop recommendations to improve those services. That proceeding will also offer an opportunity for the Commission, under state law, to order those improvements that the record deems necessary. I believe that the OSS proceeding is the appropriate forum in which to institute those improvements that the majority seeks to impose in this Order.

Permitting joint marketing as the Commission has done with all other affiliates can help accelerate the introduction of advanced telecommunications in Wisconsin. Customers benefit from joint marketing through economies of scale and services that translate into savings. The majority has not adequately explained how the bar against joint marketing benefits the public. The majority may be concerned that joint marketing will target higher revenue generating customers for migration from AW's public switched network to AADS' advanced services. Assuming that AW targets this narrow market, there is no evidence to suggest that such a narrow market has a greater impact on the public switched network than does the residential market. Moreover, it cannot be determined what impact, if any, prohibiting joint marketing will have on AW's incentive to discriminate. Banning joint marketing deprives the public of the advantages that joint marketing would bring.

II. The Commission Cannot Condition AADS' Certificate on AW's Actions

The Commission grants AADS' certificate but the majority orders AW not to provide ADSL loops to AADS, apart from those for virtual private networks, until AW gets its OSS in gear. This condition effectively prohibits AADS from providing ADSL services to competing Internet service providers who in turn provide ADSL services to its end users. I believe that this condition, however temporary, conflicts with 47 U.S.C. § 253 and the Merger Order.

The Commission may set conditions under 47 USC § 253(b) but nothing in § 253 grants the states authority to deny an entity the ability to provide telecommunications services. The Commission may only deny certification to the extent that the applicant fails to meet statutory certification requirements and only until such requirements are satisfied. Today's action clearly has the effect of prohibiting AADS from entering the ADSL market until AW's OSS comes into

compliance. Although, against what standard do we measure compliance? The record clearly illustrates that AW's OSS has serious deficiencies. I note again, however, that the Commission's OSS proceeding is the best forum in which to gather the specific evidentiary findings that would support a Commission Order for OSS improvements.

Furthermore, I believe that the Commission lacks jurisdiction to prohibit AW's provisioning of ADSL loops to AADS. In its Merger Order, the FCC stated that it declined to limit the affiliate's ability to purchase unbundled network elements (UNEs) from the ILEC. Nothing in the record persuades me that this condition remedies any identified harm such that the majority may impose this condition. Arguably, this condition conflicts with the Merger Order.

III. Conclusion

The Commission has authority to regulate competition, not to manage competition. While I support the bulk of today's Order, I do not support the ban on joint marketing or the ban on the provisioning of ADSL loops pending OSS improvements. By those conditions, the majority attempts to manage competition to determine a particular outcome. By its zeal to create either a regulated or a competitive market, the majority may have created no market at all.

Ave M. Bie
Chairperson

CONCURRING OPINION OF COMMISSIONER JOE METTNER

This concurring opinion is offered for the limited purpose of clarifying certain inaccurate statements offered in the dissenting opinion concerning the jurisdiction and authority of the Public Service Commission of Wisconsin (Commission) to act to impose conditions on the relationship between an Incumbent Local Exchange Company (ILEC) and its Advanced Data Services Affiliate in light of the Federal Communications Commission's Merger Order issued in response to the SBC/Ameritech merger petition, or consistent with otherwise applicable provisions of federal and state statutes. It is important that the public not be left with inaccurate statements concerning the extent, if any, to which FCC action in merger cases alters, modifies or preempts the federal statutory scheme of shared responsibility between the state commissions and the FCC over matters relating to opening local exchange markets to competition and the monitoring of the terms and conditions of interconnection agreements entered into by the ILEC's with competitors.

In its own Merger Order concerning the SBC/Ameritech petition, the FCC was clear in its assertion that the adoption of conditions relating to the merger proposal was in no way an interpretation of substantive provisions of the Communications Act, "especially sections 251, 252, 271 and 272..." *See, Memorandum Opinion and Order, FCC 99-279*. Par. 357, at p. 146. The succeeding paragraph of the Merger Order goes on to note that the merger conditions are "also not intended to limit the authority of state commissions to impose or enforce requirements that go beyond" those conditions found in the merger order. *Id* at Par. 358, p. 146.

It is fundamental to the scheme of shared regulation found in the Telecommunications Reform Act of 1996 that state commissions and the FCC preserve their respective spheres of authority to ensure that the general obligations of ILEC's to provide nondiscriminatory interconnection features to requesting entities, and that the states retain a particularly important role in the review and approval of interconnection agreements. 47 U.S.C. ss. 251 (c) and (d), 252 (e). This latter responsibility includes the ability of state commissions to impose additional state law requirements upon interconnecting entities where necessary to ensure the quality of intrastate telecommunications service quality. 47 U.S.C. s. 252 (e)(3).

In light of the foregoing, the dissent's statement indicating that the Commission "lacks jurisdiction under the Merger Order to impose restrictions conditioned on [Ameritech's provision of] OSS improvements" is misplaced. The Merger Order simply doesn't stand as any valid extra-jurisdictional reconfiguration of state vs. federal authority in these matters, as the FCC has been careful to indicate in its own Merger Order.

Secondly, it may well be true, as the dissent has noted, that the FCC in some sense has "final enforcement authority" over issues concerning SBC/Ameritech's OSS, to the extent that the FCC may preempt any state commission failing to fulfill its responsibilities under 47 U.S.C. 252 in reviewing interconnection agreements. It is not true, however, that the Merger Order does anything (as indeed it may not) to alter the primary authority of state commissions in review of interconnection agreements, and the terms and conditions of same. Accordingly, the applicable statutes requiring nondiscriminatory provision of interconnection by ILEC's for competitors, which is, *inter alia*, at least equal in quality to those features ILEC's provide to themselves or

affiliates as wholesale inputs, as well as those sections requiring access to unbundled network elements under nondiscriminatory rates, terms and conditions remain a matter of primary jurisdiction for state commissions, whose authority in these matters remains unaltered by the Merger Order.

Finally, it is acceptable to the undersigned that the effect of the majority decision in this matter may perhaps result in “manag[ing] competition to determine a particular outcome.” As long as those outcomes are nondiscriminatory access by competitors to interconnected features and unbundled elements on terms and conditions and at a level of service quality no better or worse for SBC/Ameritech affiliates than for any unaffiliated entity, this commission will have done its job consistent with the federal statutes which delineate our mission in this regard.

Joseph P. Mettner
Commissioner

APPENDIX A

To comply with s. 227.47, Stats., the following parties who appeared before the agency are considered parties for purposes of review under s. 227.53, Stats.

SERVICE LIST
(September 1, 1999)

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(Not a party, but must be served)
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