

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Ameritech Operating Companies
Tariff FCC No. 2

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Transmittal No. 1312

**PETITION OF MPOWER COMMUNICATIONS CORP.
TO REJECT OR ALTERNATIVELY SUSPEND AND INVESTIGATE**

Mpower Communications Corp. (“Mpower”), pursuant to Section 1.773 of the Commission’s Rules, hereby petitions the Commission to reject or, in the alternative, suspend for the maximum five month period and investigate the above-captioned transmittal filed by Ameritech Operating Companies (“Ameritech “ or ILEC) on August 2, 2002. Such revisions are unjust and unreasonable in violation of Section 201(b) of the Act and unjustly discriminatory in violation of Section 202(a) of the Act.

1. Payment Intervals Are Already Too Short to Audit Chronically Inaccurate Bills Properly.

While carriers, CLECs and ILECs alike, should be paid in a timely fashion for services provided, Mpower believes that ILEC’s proposals will unfairly prejudice competitive carriers like Mpower. The payment intervals for ILEC bills are already compressed to an unreasonable degree. ILEC bills are of very substantial size – 10’s of

thousands of pages – whether in paper or electronic form. From SBC affiliates, Mpower receives at least 50,000 pages of bills each month: PacBell, 25,000 pages of loop bills; Ameritech, 10,000 pages of loop bills; SWBT, 10,000 pages of loop bills; plus an additional 5,000 pages of collocation, transport and SS7 bills from SBC affiliates.

Most often paper bills do not arrive for 7-12 days from the billing date.¹ Although electronic bills may arrive somewhat sooner, they are unlikely to arrive for at least 4-5 days from the billing date. During the last 8 months, with one exception, none arrived earlier than 8 days after the billing date. It is difficult to verify how long paper bills spend in transit, after being sent. Electronic bills, however, may take hours but not days to transmit. Thus, ILECs already are significantly shortening the CLEC payment intervals by not providing bills at the time they are dated.

Then, because the ILEC bills are huge, they take at least 5-10 days to process and review. Changes of any kind lead to chronic billing errors. When there are significant errors, which is usually the case, review and dispute procedures can take considerably longer. Management processes for payment approval and transmission of checks can also be time consuming.

The more ILEC errors the bills contain, the more likely the CLEC is to be “late” if it attempts to properly audit its bills prior to payment. No ILECs make timely changes to bills where rates change or when circuits are disconnected. There is always a delay of several months before rate changes or disconnected circuits are properly reflected on bills. Thus, CLECs must audit bills to avoid paying large amounts of inaccurate charges.

¹ In recent months, Mpower has received SBC affiliate bills, including electronic bills, 0-53 days from the billing date. The median date is more than 10 days from the billing date although many bills are now electronic.

The most conscientious CLEC, trying only to avoid paying these inaccurate charges, will likely have millions of dollars in disputes because of inaccurate billings.

Shortening the CLECs' already restricted time frame for auditing ILEC bills will cause ILECs to benefit from their bad billing behavior. Those with the most egregious billing practices will benefit the most because CLECs will be forced to pay inaccurate, unaudited, or only partially audited, bills to avoid paying late. Thus, to avoid deposits for late payments, CLECs will have to pay large amounts of billed charges that they do not owe. This is not a just and reasonable approach.

2. CLECs Could All Be Made to Pay Deposits Even If They Pay On Time.

One of the ILEC's arguments for deposits – or additional deposits – is “impaired credit worthiness.” What this means according to the proposed tariffs is if the competitive carrier's debt securities are below investment grade or put on review for possible downgrade from investment grade, deposits can be required. Requiring immediate, large deposits to all ILECs could well tip the balance against an already weakened CLEC. Certainly all telecommunications carriers have been buffeted in the markets over the last 18-24 months. All carriers' stock has dropped precipitously regardless of whether they are CLECs, IXC's or ILECs. Obviously, the newer, competitive companies have usually been hurt more than the bigger, older incumbents, however, no carrier has been untouched. For the incumbents to use this fact to further penalize its competitors regardless of whether they have continued to pay their bills in a timely fashion is anti-competitive and unreasonably discriminatory.

A more common criterion for creditor concern is the filing of a voluntary or involuntary bankruptcy or receivership. Today, however, many CLECs are filing

voluntary bankruptcies which do not necessarily have a significant impact on general creditors. Mpower, for example, recently exited a voluntary, pre-arranged Chapter 11 reorganization. The primary purpose of Mpower's reorganization, however, was a transfer of control from stockholders to certain bondholders and preferred shareholders. This reorganization significantly reduced Mpower's debt but had little impact on most general creditors. For the most part, creditors continued to be paid in due course. Under the proposed tariffs, however, Mpower would be significantly penalized for taking steps to strengthen its balance sheet despite the fact that general creditors continued to be paid. This is not a just and reasonable result.

3. Failure to Comply With Unreasonable ILEC Requirements Could Result in Drastic Measures Being Taken

The proposed tariffs do not just require deposits if a CLEC is viewed as being "credit impaired" or after a failure to pay on time – twice during a year. Companies, including ILECs, already have provisions allowing them to obtain deposits for failure to pay on time. The proposed tariffs require that a deposit equivalent to 1-2 month's service be paid within 21 days of ILEC demand. After notice of failure to pay the deposit, regardless of the status of regular payments, the ILEC can take the following series of drastic measures: 1) Refuse any additional applications for service; 2) refuse to complete any pending orders for service; 3) refuse to accept any requests from end users to transfer service to customer; 4) discontinue the provision of all services to the customer, refuse to route any traffic to customer² and assess any potentially applicable charges, including termination charges.

² It is proposed that if the ILEC cannot unilaterally prevent the routing of traffic to customer that other providers would be required to assist in denying service to customer.

This certainly appears to be an easy means of putting competitors out of business! Declare that they are credit impaired based upon whether their securities are deemed investment grade by the market. Assess a large deposit. Since the tariffs would apply to companies with \$1,000,000 or more monthly usage, the deposits would always be at least \$1,000,000. There does not seem to be any means of disputing the ILEC's unilateral determination so if the CLEC does not immediately pay, notify them that the ILEC will immediately refuse to do any further business with them of any kind. Clearly the CLEC cannot do business if their traffic is not switched, their applications are not processed and their customers are not allowed to transfer their service from the ILEC. On top of that, they could be assessed termination charges. That could be adding insult to a fatal injury. Providing the ILEC both unbounded leverage and unilateral decision-making, even in the absence of any failure by the CLEC, is blatantly discriminatory and unfair.

It appears that in the guise of protecting itself, the ILEC is instead taking advantage of the market downturn and the weakness of CLECs to discriminate against its competitors. A \$1,000,000 per month usage requirement for these "impaired credit" deposits is guaranteed to cover most CLECs while having little or no impact on the ILEC's end-user customers. Such an approach is unjustly discriminatory.

4. ILECs Want Complete Protection While Providing Non-Competitive Services

The ILEC bemoans the fact that its existing tariffs permit deposits "only for a history of nonpayment."³ Clearly, the aim here is to transfer competitive risks to

³ ILEC Description and Justification, p. 7.

competitors regardless of their positive payment behavior. The ILEC estimates that WorldCom owes the ILEC over \$300 million dollars that “could” be lost in bankruptcy proceedings. Based on WorldCom’s bankruptcy and the fact that the ILEC’s “top twenty-two” other carrier customers together account for another \$300 million in monthly access service revenues, the ILEC determined those additional 22 carriers should be subjected to the draconian measures outlined.⁴

Mpower too would like to be assured that it would always be paid for its services. It tries to identify credit risks and takes steps to try to protect itself. Mpower, however, is providing competitive services. If it over-reaches, its customers will leave. Where services are competitive, it is generally not possible to avoid the risk that customers who are paying their bills will suddenly stop paying them.

The ILECs, however, are dominant carriers selling bottleneck services. CLECs cannot simply buy UNEs from another carrier. They must buy from the ILEC. ILECs should not be able to leverage their dominant position to demand deposits from all other carriers and to be able to put them out of business if they do not pay immediately, based solely upon the ILEC’s assessment of the possibility that they might become a credit risk. This is inappropriate, unfair and anti-competitive.

5. Conclusion

The ILECs already tend to have a greater ability to protect themselves from potential credit risks than CLECs. They should not be able to use the WorldCom bankruptcy to achieve additional leverage over CLECs, along with the unilateral

⁴ *Id.* at p. 8.

opportunity to put CLECs out of business if they do not comply with the ILEC's determination of their potential credit risk.

ILECs are already able to charge deposits to carriers that delay payments, even if the primary reason is the need to audit error-filled ILEC bills. CLECs' time to audit enormous and often erroneous billings prior to payment should not be reduced. The time is too short already.

Therefore, ILEC's tariff should be rejected or, in the alternative, suspended for the maximum five month period to allow for an appropriate investigation into the proposed tariff provisions.

MPOWER COMMUNICATIONS CORP.

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