**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission’s Review )

Of Chapter 4901:1-7, of the Ohio ) Case No. 12-0922-TP-ORD

Administrative Code, Local Exchange )

Carrier-to-Carrier Rules. )

### **APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF**

### **THE OHIO TELECOM ASSOCIATION**

### Pursuant to Section 4903.10 of the Ohio Revised Code and Rule 4901-1-35 of the Ohio Administrative Code (“OAC”), the Ohio Telecom Association (“OTA”), on behalf of its member companies, respectfully submits this Application for Rehearing of the Public Utilities Commission of Ohio’s (“Commission”) Finding and Order (“Order”) issued on October 31, 2012 in the above captioned case. Specifically, the Commission’s Order is unlawful and unreasonable in that it does not comport with the Federal Communications Commission’s (“FCC”) guidance on this matter as required by Section 4927.04 and 4927.16, Revised Code.

### As further discussed in the attached Memorandum in Support, OTA respectfully requests that the Commission grant this Application for Rehearing and modify the Order so as to comply with the FCC’s guidance in this matter as required by Ohio law.

### Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE OHIO TELECOM ASSOCIATION’S APPLICATION FOR REHEARING**

1. **INTRODUCTION**

On October 31, 2012, the Public Utilities Commission of Ohio (“Commission”) issued its Finding and Order (“Order”) on the review of the Local Exchange Carrier-to-Carrier rules contained in Chapter 4901:1-7 of the Ohio Administrative Code (“OAC”). As the Ohio Telecom Association (“OTA”) asserted in its Initial Comments, the proposed modifications in this Order, on the whole, reflect the Commission’s continued support and understanding of the critical investment and impact that the telecommunications industry has on Ohio’s economy. However, the OTA respectfully asserts that the Commission erred in imposing a Section 251(a) interconnection obligation and a Section 251(b)(5) reciprocal compensation obligation[[1]](#footnote-1) “regardless of the network technology underlying the interconnection”[[2]](#footnote-2) between telephone companies.[[3]](#footnote-3) Ohio law prohibits these mandates—which OTA and most other commenters opposed—because they exceed and are inconsistent with the requirements of federal law, and are therefore, unreasonable and unlawful. OTA thus asks the Commission to modify the Order so as to comply with Ohio law.[[4]](#footnote-4)

1. **ARGUMENT**
2. **Ohio Law Forbids the Commission From Imposing Interconnection Requirements that Exceed Federal Law**

The new rules violate state law by establishing interconnection requirements that exceed and are inconsistent with those required by federal law and regulations.

Section 4927.16(A), Revised Code, provides that “[t]he commission shall not establish any requirements for the unbundling of network elements, for the resale of telecommunications service, or for network interconnection that exceed or are inconsistent with or prohibited by federal law, including federal regulations.”[[5]](#footnote-5) New Rule 4901:1-7-06(A)(1) has been revised to state that telephone companies must interconnect with each other directly or indirectly “for the exchange of telecommunications traffic regardless of the network technology underlying the interconnection pursuant to 47 U.S.C. 251(a).” Subsection (A)(2) of the Rule likewise requires telephone companies to interconnect upon receipt of a request to do so “regardless of the network technology underlying the interconnection.”

The Order adopting the rules states that the revisions are intended “to be consistent with Federal Communication Commission actions” (Order at 2) and points to the FCC’s statement that the duty to negotiate in good faith under the Federal Telecommunications Act includes negotiation for Internet Protocol (“IP”) interconnection, as well as traditional TDM interconnection. (Order at 5.) The Commission concluded that the language reflecting a Section 251(a) obligation to interconnect, “whether in TDM, IP, or otherwise” is acceptable because the Commission found “nothing in federal law” to prohibit it. (*Id.*)

In fact, state lawprohibits imposing a Section 251(a) any-technology interconnection mandate, because there is no such federal mandate. As noted, Ohio Revised Code, Section 4927.16(A) prohibits the Commission from adopting any interconnection requirements that exceed federal law, including federal regulations.[[6]](#footnote-6) The Commission correctly observes that the FCC expects carriers to *negotiate* for interconnection arrangements between IP (as well as TDM) networks (Order at 5)—an obligation embodied in new Rule Subsection 4901:1-7-06(A)(3), which OTA does not oppose here—but then mistakenly assumes the FCC has actually imposed a Section 251(a) interconnection mandate, regardless of the interconnection technology. That is incorrect.

As the FCC’s *ICC/USF Order*[[7]](#footnote-7) makes clear, the FCC has not decided yet whether there is an IP interconnection mandate, or what the legal authority for any such federal mandate might be. The FCC instead intends to resolve “the implementation of the good faith negotiation requirement” in its ongoing rulemaking initiated in the *ICC/USF Order*. (*ICC/USF Order*, ¶ 1335.) Although, as noted, the FCC “expect[s] all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic,” (*ICC/USF* Order, ¶ 1340), it has not decided on the “standards and enforcement mechanisms *we should adopt* to implement our expectation that carriers negotiate in good faith.” (*Id*.)

Plainly, the FCC has not yet imposed any requirement (other than good faith negotiation), let alone an IP interconnection requirement specifically linked to Section 251(a) of the Act, as this Commission’s proposed rule could be construed to do. Indeed, Section 251(a) is just one of several statutes the FCC identified as a *potential* source of authority for a federal IP interconnection obligation – if it determines that one exists at all. (*ICC/USF Order*, ¶¶ 1380-98, listing §§ 251(c)(2), 201, 332, 706, 256, and ancillary authority under Title I of the Act). OTA members do not concede that any of the enumerated sections of the Act grant the FCC authority to impose IP interconnection requirements. Indeed, the FCC has also sought comment on a policy framework that “would leave IP-to-IP interconnection largely unregulated by the Commission.” (*ICC/USF Order*, ¶¶ 1375-77.)

The policy framework that the FCC chooses, along with the statutory authority the FCC identifies as the basis for that framework, will determine the nature and extent of the role the FCC and the states play in implementing that framework. (*ICC/USF* Order, ¶ 1359.) For instance, if the FCC were to decide that there is an IP interconnection requirement under Section 251(c)(2), it would need to address whether “the states and/or the Commission provide arbitration or dispute resolution when providers fail to reach agreement, and what process should apply.” (*ICC/USF Order*, ¶ 1370.) If the FCC opted to require IP-to-IP interconnection under Section 251(a)(1), it would need to decide, for example, whether one carrier should be entitled to insist upon direct (rather than indirect) interconnection; whether either carrier could insist upon indirect interconnection; and, which carrier should bear the responsibility for the costs of any such indirect interconnection. (*ICC/USF* Order, ¶ 1371.) And as noted above, the FCC may decide to leave IP interconnection unregulated and allow carriers to address such arrangements through commercial agreements. These are just a few of the scores of issues upon which the FCC sought comment with respect to IP interconnection—and, as the *ICC/USF* Order makes clear, these questions will be answered by the FCC, not the states.

Because the FCC has not yet decided whether there is any IP interconnection obligation—under Section 251(a) or otherwise—any rule promulgated by this Commission purporting to impose such an obligation under Section 251(a) exceeds the requirements of federal law, is prohibited by the Ohio statutes and is unreasonable and unlawful. Indeed, the Commission itself appears to recognize the lack of underlying statutory authority in its own Order, stating that “adopting the rules as proposed provides us with more flexibility… ***should we maintain such a role in the future***.”[[8]](#footnote-8)

The Commission does not have this regulatory authority or role today and cannot, under Ohio law, assume it will have the authority to do so in the future. In the absence of any present federal IP-to-IP interconnection requirement, under Section 251(a) or any other statute, it would be unlawful and unreasonable for the Commission to adopt a rule embodying such a requirement. The Commission may retain its good faith negotiation requirement “regardless of the network technology underlying the interconnection”, and carriers will continue to exchange traffic between traditional TDM and IP networks, as they are today, without the need for any Commission rule.

1. **The Expansion of State Traffic Compensation Rules “Regardless of The Network Technology Utilized” Is Unreasonable and Unlawful**

The Commission’s carrier-to-carrier compensation rules are inconsistent with federal law in that they include the requirement that all telephone companies establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic regardless of the network technology underlying the networks’ interconnection.[[9]](#footnote-9)

Section 4927.16(B), Revised Code, provides in part that, “The commission shall not establish pricing for... interconnection that is inconsistent with or prohibited by federal law…”[[10]](#footnote-10) Pursuant to 47 U.S.C. § 251(b)(5) of the Federal Telecommunication Act, “… each local exchange carrier has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”[[11]](#footnote-11) Additionally, the FCC is also currently considering federal rules addressing these carrier-to-carrier compensation matters.[[12]](#footnote-12)

In Rule 4901:1-7-12, OAC, the OTA would again respectfully request that the Commission strike the phrase, “regardless of the network technology underlying the interconnection”as it creates an additional regulatory burden that is not imposed under current FCC rules.[[13]](#footnote-13) The Commission’s order in this matter suggests that this language is appropriate so as to give “continued guidance on intrastate access and compensation principles.”[[14]](#footnote-14) However, as OTA pointed out earlier, the FCC has not yet provided guidance on this issue and as such it would, in fact, be inappropriate and unlawful for the Commission to mandate a requirement that has no basis in underlying state or federal law.

Nothing prevents the Commission from amending its rules, if and when the FCC addresses these issues in a final order. However, for the Commission to adopt rules in advance of a final FCC action on these issues is premature and unreasonable. The Commission itself asserted as much when it opined in its Order on this matter, “The FCC’s Transformation Order… is under appeal at the present time…”.[[15]](#footnote-15) Thus, for the Commission to establish compensation requirements on an unsettled matter that is pending before the FCC, is both unreasonable and inconsistent with state and federal law. Therefore, in the absence of any federal requirements to do so, the Commission has acted without the authority to proceed.

1. **CONCLUSION**

For these reasons, the identified rules are unreasonable and unlawful. The Commission should grant rehearing and remove the phrase “regardless of the network technology” clause from the rules noted above and conform its Order to the applicable law.

Respectfully submitted,

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#### Certificate of Service

I hereby certify that a copy of the foregoing *Application for Rehearing and Memorandum In Support of the Ohio Telecom Association,* was served upon the following parties of record this 30th day of November 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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1. *See* 47 U.S.C. §§ 251(a) and 251(b)(5). [↑](#footnote-ref-1)
2. Order at 4, 8 (October 31, 2012). [↑](#footnote-ref-2)
3. OTA members MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. d/b/a Verizon Business Services (together, “Verizon”) join in this Application for Rehearing only with respect to the any-technology Section 251(a) interconnection obligation the Commission imposed (section II.1, *infra*). Verizon specifically excepts from the Application for Rehearing with respect to the Section 251(b)(5) reciprocal compensation obligation (section II.2, *infra*). [↑](#footnote-ref-3)
4. On rehearing, the Commission should also take the opportunity to correct an inadvertent error in the definition of “telephone company” as set forth in 4901:1-7-01(Q). That definition currently cross references “division (A)(1) of section 4905.03 of the Revised Code.” When the Commission initiated this rule review in March of 2012, O.R.C. § 4905.03 did have a division (A)(1) that defined “telephone company.” However, pursuant to 2011 Ohio H.B. 487, effective June 6, 2012, division (A)(1) was renumbered as division (A). As a result, 4901:1-7-01(Q) should reference “division (A) of section 4905.03 of the Revised Code,” rather than division (A)(1). [↑](#footnote-ref-4)
5. Section 4927.16(A), Revised Code. [↑](#footnote-ref-5)
6. Moreover, Ohio Revised Code section 4927.04, limits the Commission’s authority under federal law to those actions “authorized by or delegated to it under federal law,” neither of which is the case here since the FCC has not even determined whether there should be an IP interconnection duty at all, much less authorized or delegated to the states any authority to implement such an obligation. [↑](#footnote-ref-6)
7. *Connect America Fund*, *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*ICC/USF Order*”). [↑](#footnote-ref-7)
8. Order at 4 (October 31, 2012) (*emphasis added*). [↑](#footnote-ref-8)
9. Order at 8 (October 31, 2102). [↑](#footnote-ref-9)
10. Section 4927.16(B), Revised Code. [↑](#footnote-ref-10)
11. 47 USC § 251(b)(5). [↑](#footnote-ref-11)
12. *Connect America Fund*, *et al.,* FCC 11-161, WC Docket No. 10-90 (2012). [↑](#footnote-ref-12)
13. 47 USC § 251(b)(5). [↑](#footnote-ref-13)
14. Order at 7 (October 31, 2012). [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)