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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Commission's)
Investigation into the Implementation of)
Section 276 of the Telecommunications Act)
of 1996 Regarding Pay Telephone Service)

Case No. 96-1310-TP-COI

APPLICATION FOR REHEARING OF UNITED TELEPHONE
COMPANY OF OHIO D/B/A EMBARQ, CENTURYTEL OF OHIO, INC.,
VERIZON NORTH, INC., WINDSTREAM WESTERN RESERVE, INC., AND
WINDSTREAM OHIO, INC.

Pursuant to Ohio Rev. Code Section 4903.10 and Ohio Administrative Code
Section 4901-1-35, United Telephone Company of Ohio d/b/a Embarq, CenturyTel of
Ohio, Inc., Verizon North, Inc., Windstream Western Reserve, Inc., and Windstream
Ohio, Inc. (collectively, "non-BOC ILEC Respondents") respectfully seek rehearing of
the Commission's Entry of March 19, 2008 ("Entry"). The Entry is unreasonable and
unlawful for the reasons described in the Memorandum in Support, *infra*.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

A. The Entry is unlawful because the Commission did not hold a public hearing after proper notice.

The Commission has conducted this proceeding as a paper proceeding. No public hearing was held, and no evidence introduced. Notwithstanding those deficiencies, the Commission has ordered a number of ILECs to reduce the rates they charge to members of the Payphone Association of Ohio ("PAO"). Instead of being allowed to continue to charge the previously approved tariffed rates, the ILECs must charge either a safe harbor rate equal to AT&T's highest rural rate band with an additional 10 percent markup or a rate that complies with the New Services Test ("NST").¹

But the Commission cannot lawfully reduce a rate that an ILEC charges a payphone provider without conducting a public hearing pursuant to proper notice.² In *Ohio Bell*, the Commission ordered a number of ILECs to stop charging customer-owned, coin operated telephones for directory assistance service. There, as here, the Commission ordered the rate reduction based on policy grounds. The Ohio Supreme Court reversed the Commission because the Commission violated Ohio Rev. Code § 4905.26. As the Court stated:

There is no indication in the record, and the commission does not argue, that a formal evidentiary hearing was held on the issue of directory assistance reimbursement. The notice and comment format, which was employed instead, has been approved by this court in a generic rate-making process only as an expedient means of following up an actual public hearing. . . . This casual approach does not, by itself, satisfy the detailed requirements of R.C. 4905.26.³

¹ Entry at 15.

² *Ohio Bell Tel. Co. v. Public Util. Comm. of Ohio*, 64 Ohio St. 3d 145, 593 N.E.2d 286 (1992) ("Ohio Bell").

³ Id at 148 [citation omitted].

B. The Entry is unreasonable because it does not limit the rate reductions to public interest payphones.

The PAO has emphasized the benefit that payphones provide for universal service, arguing that the placement of payphones in low-income neighborhoods is important.⁴ The Commission accepted the PAO's claim that payphones provide an essential, alternative communications option for those who cannot afford wireline or wireless services.⁵ Thus, the Commission concluded that steps must be taken to maintain the presence of payphones and determined that those steps require a reduction in the rates ILECs charged the PAO for the access line.⁶ But the Entry unreasonably failed to focus on payphones located in low-income areas or other areas where payphones may be needed to support universal service or provide access to emergency services for those without wireline or wireless phones. Instead, the Entry determined that it was appropriate to order a reduction in the ILEC access line rate for *all* payphones, regardless of where they are located. This is unreasonable because there is no evidence that the current access line rates are preventing the placement of payphones in areas not charged with a public interest. For example, payphones continue to be widespread in heavily traveled public areas such as airports. For those areas, there has not been, and could not be, any showing that a reduction in the payphone access line rate is appropriate.

If the goal is to increase the number of payphones located in areas where the public interest requires a payphone, then the Entry should have been much more narrowly tailored. It should have required the reduced rate to be charged to PAO members only for payphones that are located in public interest areas rather than creating a subsidy

⁴ Entry at 10.

⁵ Id at 13.

⁶ Id at 14, 15.

mechanism for all payphones, regardless of whether they are imbued with any public interest.

To promote payphone availability in areas where the public interest warrants a payphone, the Commission could create a Public Interest Payphone ("PIP") program, as an alternative to reducing ILEC access line rates and subsidizing the business of PAO members. A PIP program would be better targeted and likely more effective than indiscriminately reducing rates. If PIPs are deemed to serve the public interest, a PIP program would by necessity be publicly funded, transparent, and targeted to individual phones that merit such support.

Regarding PIPs, the experience in Indiana may be instructive. On April 10, 2002, the Indiana Utility Regulatory Commission ("IURC") issued an Interim Order on PIPs determining:

[F]rom the evidence provided, it appears there has been a decline in the number of payphones in Indiana. Whether this decline has reduced the ability of the general public to access the public telephone network, and whether the availability of alternative communications devices offsets any reduction in payphone access, or even enhances the general public's access to the public telephone network, is unclear. The effect this decline has had on the public's need for access to the telephone network could have been measured by a change in public demand for PIPs.⁷

On January 12, 2005, the Indiana Utility Regulatory Commission issued a Dismissal Order on the PIP program. The Order stated:

Following the issuance of the Interim Order on PIPs, the Commission made the Order and a PIP application available on its website. To date the Commission has received four PIP applications. In three cases, the applicants were facility managers scheduled to lose payphones that they wanted available for patrons of a building or employees. These applicants were able to negotiate with telecommunications vendors for additional "house phones" or to create a budget line item for a convenience line to compensate for the loss of the payphone. The fourth application did not qualify as a PIP, as the applicant was not sponsored by

⁷ IURC Order in Cause No. 40785, dated April 10, 2002 at 2.

a government entity, had no specific location in mind, and interpreted the PIP program as seed money to start a payphone business.⁸

We thus find since the IURC has had only four applications, none which have met the PIP criteria, it is in the interest of judicial economy to close this cause.⁹

The experience in Indiana suggests that the need for payphones in areas of public interest is likely more illusory than real.

C. *The Entry is unreasonable because the safe harbor rate that it adopts is completely arbitrary and not supported by any evidence.*

In lieu of the NST, the Entry has offered the ILECs a safe harbor rate based on AT&T's highest rural rate band plus ten percent.¹⁰ The Entry adopted the safe harbor rate in a purely arbitrary manner. There was no evidence to support it. The Entry asserts:

The ten percent markup reflects any advantages in economies of scope and scale that AT&T may possess relative to other ILECs.¹¹

The Entry itself recognizes the arbitrariness of the safe harbor rate when it admits that the ten percent markup is "not supported by objective data."¹² But notwithstanding the lack of any objective data or testimony, the Entry unreasonably concludes: "At the same time, it offers a reasonable approximation of economic realities."¹³

D. *The Commission Erred By Ordering Embarq, CenturyTel, and Other non-BOC ILECs to Reduce Their Payphone Rates Because They Are Not Parties to this Proceeding.*

The Commission's Entry of November 26, 2002 dismissed all ILECs other than AT&T Ohio from this proceeding. None of these ILECs has been rejoined as a party since their dismissal, so no order is effective as to them.

The Commission's rules define who is a "party" to a Commission proceeding:

⁸ IURC Order in Cause No. 40785, dated January 12, 2005 at 1-2.

⁹ Ibid at 3.

¹⁰ Entry at 15.

¹¹ Id.

¹² Id.

¹³ Id.

- (A) The parties to a commission proceeding shall include:
- (1) Any person who files an application, petition, long-term forecast report, or complaint.
 - (2) Any public utility, railroad, or private motor carrier against whom a complaint is filed.
 - (3) Any public utility, railroad, or private motor carrier whose rates, charges, practices, or actions are designated as the subject of a commission investigation.
 - (4) Any person granted leave to intervene under rule 4901-1-11 of the Administrative Code.
 - (5) Any municipal corporation which has enacted an ordinance which is subsequently challenged in a complaint filed under section 4909.34 of the Revised Code.
 - (6) Any person cited for failure to maintain liability insurance as required by section 4921.11 or 4924.08 of the Revised Code.
 - (7) Any other person expressly made a party by order of the commission.¹⁴

None of these provisions describes the current status of the non-BOC ILEC Respondents. While the non-BOC ILEC Respondents were parties during the initial phases of this proceeding, after their payphone tariffs were approved and it became clear that nothing was left to be done except to use the NST to set rates for AT&T Ohio, The non-BOC ILEC Respondents were dismissed as parties. Since its 2002 dismissal, no steps have been taken to formally add the non-BOC ILEC Respondents back as parties. Most importantly, the non-BOC ILEC Respondents have not filed applications pursuant to R.C. § 4909.18 to change their payphone rates, nor has the PAO filed a complaint pursuant to R.C. § 4905.26 asserting that the non-BOC ILEC Respondents rates are unreasonable. Therefore, The non-BOC ILEC Respondents are not parties to this proceeding and the Commission's March 19, 2008 Entry is ineffective to require a change in any of their payphone rates.

¹⁴ Ohio Admin. Code § 4901-1-10(A).

Respectfully submitted,

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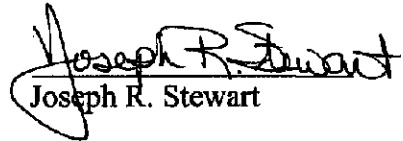
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Application for Rehearing of United Telephone Company of Ohio d/b/a Embarq, Windstream Ohio, Inc., Windstream Western Reserve, Inc., CenturyTel of Ohio, Inc., and Verizon North, Inc. has been served upon all parties listed below by ordinary U.S. Mail, postage prepaid, this 18th day of April 2008.

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