

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of United       )  
Telephone Company of Ohio d/b/a Embarq       )   Case No. 08-1118-TP-WVR  
for Out-of-Service Grace Period under       )  
Minimum Telephone Service Standards.       )

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**REPLY COMMENTS  
REGARDING EMBARQ’S REQUEST TO AVOID PAYING CREDITS  
TO CERTAIN CUSTOMERS FOR SERVICE OUTAGES  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**I. INTRODUCTION**

The Office of the Ohio Consumers’ Counsel (“OCC”), an intervenor in this proceeding on behalf of residential utility consumers,<sup>1</sup> replies to the response submitted by the United Telephone Company of Ohio d/b/a Embarq (“Embarq” or “Company”) in this proceeding on November 24, 2008. To avoid paying credits to customers in 55 exchanges for outages experienced during the September 15-19, 2008 period, Embarq is seeking a “grace period” under Ohio Adm. Code 4901:1-5-08(D) (“Rule 8(D)”) because of a windstorm that occurred on September 14, 2008. The rule allows telephone companies to add 48 hours to the calculations for customer credits for service outages under the Minimum Telephone Service Standards (“MTSS”) if the outage occurs during “an extreme, unique, or unforeseeable weather-related incident.” Adding the grace period of 48 hours that Embarq seeks would thus allow it to avoid paying credits to customers until the outage lasts 120 hours, i.e., five days.

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<sup>1</sup> OCC’s motion to intervene was granted by an Entry issued on November 6, 2008 (at 3). The Entry (at 3) also suspended the “grace period” request.

In Comments filed on November 13, 2008, OCC recommended that the Public Utilities Commission of Ohio (“Commission” or “PUCO”) significantly reduce the timeframes under which nearly all of the 55 exchanges would qualify for a “grace period.” OCC noted that several exchanges did not have eleven or more out-of-service trouble reports, as required to qualify for a “grace period” under Ohio Adm. Code 4901:1-5-08(D)(2) (“Rule 8(D)(2)”), for most or all of the timeframe specified by Embarq.<sup>2</sup> In addition, OCC pointed out that some exchanges did not meet the threshold for Rule 8(D)(2) until several days after the windstorm, and thus do not appear to be related to the weather incident.<sup>3</sup> OCC also suggested that the Commission examine the normal levels of out-of-service trouble reports for several exchanges to determine whether they routinely meet the threshold for Rule 8(D)(2).<sup>4</sup>

In its response, Embarq addressed the first two issues, but not the last point made by OCC. Embarq asserted that Rule 8(D)(2) does not require that a “grace period” be allowed for only those days when an exchange has at least eleven out-of-service trouble reports.<sup>5</sup> Embarq also claimed that trouble reports submitted several days after the windstorm could be storm-related.<sup>6</sup>

As OCC shows in this Reply, Embarq’s interpretation of Rule 8(D)(2) is flawed. On the other hand, OCC’s position is supported by Commission precedent. In addition, Embarq has ignored the fact that it has the burden of proof in this proceeding, and has failed to meet that burden. The Commission should not allow Embarq to avoid paying

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<sup>2</sup> OCC Comments at 4-6.

<sup>3</sup> Id. at 6-8.

<sup>4</sup> Id. at 9.

<sup>5</sup> Embarq Response at 2.

<sup>6</sup> Id. at 2-3.

customer credits as Embarq proposes. The Commission should instead apply Rule 8(D) as suggested in OCC's Comments, so that consumers will receive the credits required under Commission rule.

## **II. EMBARQ'S INTERPRETATION OF RULE 8(D)(2) IS FLAWED AND IS NOT SUPPORTED BY COMMISSION PRECEDENT.**

Embarq asserted that OCC misinterpreted Rule 8(D)(2).<sup>7</sup> According to Embarq, it would be "illogical" for the Commission to approve a "grace period" in an exchange for only those days in which the exchange had more than ten out-of-service trouble reports.<sup>8</sup> In reality, Embarq's interpretation of Rule 8(D)(2) is the illogical one. Following Embarq's "logic" would allow a company to have a "grace period" to avoid paying customer credits that lasts weeks, or even months, even though the company experienced eleven or more out-of-service trouble reports on only one day after a weather-related incident.

Contrary to Embarq's view, the Commission's stated intent is that Rule 8(D)(2) would "indicate that only exchanges with more than ten **daily** out-of-service requests are eligible to be considered as among those to which a request for an additional 48-hour grace period could apply."<sup>9</sup> The rule, therefore, defines a "grace period" as those only days in which an exchange experienced more than ten out-of-service trouble reports due to a weather-related incident.<sup>10</sup>

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<sup>7</sup> Id. at 2.

<sup>8</sup> Id.

<sup>9</sup> *In the Matter of the Commission's Review of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 05-1102-TP-ORD, Opinion and Order (February 7, 2007) at 54 (emphasis added).

<sup>10</sup> The rule may provide too low of a threshold for those large exchanges that normally experience eleven or more out-of-service trouble reports daily.

Although this case presents the PUCO with one of its first opportunities to actually apply Rule 8(D),<sup>11</sup> the Commission, at Verizon's suggestion, applied the Rule 8(D) criteria to a Verizon request to be excused from meeting certain performance benchmarks of the stipulation in Verizon's service quality case, 07-511.<sup>12</sup> The benchmarks did not involve customer credits, and Verizon filed the request before Rule 8(D) became effective. As explained here, the Commission's application of Rule 8(D)(2) in 07-511 supports OCC's interpretation of the rule.

The performance benchmarks in 07-511 required Verizon to repair out-of-service conditions within 24 hours at least 85% of the time in each of its four service districts.<sup>13</sup> Verizon asserted that its repair efforts were hampered by severe weather, and asked the Commission to exclude from the performance benchmark calculations 153 out-of-service conditions that Verizon claimed it could not repair within 24 hours because of the weather.<sup>14</sup> In applying the Rule 8(D) criteria, however, the Commission reduced to 58 the number of missed repairs that were excluded from the benchmark calculations.<sup>15</sup>

In 05-711, the Commission excluded missed repairs in only six exchanges and for only those days that had more than ten trouble reports:

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<sup>11</sup> In addition to Embarq, Cincinnati Bell Telephone Company filed a "grace period" request in Case No. 08-1024-TP-WVR on September 26, 2008 and Windstream filed a similar request in Case No. 08-1042-TP-WVR on October 1, 2008 due to the September 14 windstorm. Windstream withdrew its request on October 20, 2008. The Commission has yet to act on CBT's request. Prior to these requests, Verizon twice sought "grace periods" under Rule 8(D). *In the Matter of the Commission's Review of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 05-1102-TP-ORD and *In the Matter of the Settlement Agreement Between the Staff of the Public Utilities Commission of Ohio and Verizon North Inc. Relating to the Minimum Telephone Service Standards*, Case No. 07-511-TP-UNC ("07-511"), Motion for Waiver (March 18, 2008); *id.*, Motion for Waiver (April 2, 2008). Verizon, however, withdrew both of the "grace period" requests (on April 30, 2008 and May 2, 2008, respectively) before the PUCO acted on them.

<sup>12</sup> 07-511, Finding and Order (March 5, 2008) ("07-511 Order") at 2-3.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> See *id.* at 1.

<sup>15</sup> *Id.* at 8.

Applying all of the criteria of Rule 4901:1-5-08(D), O.A.C, to Verizon's application for limited exemption results in a conclusion that, at most, only six exchanges met the 300 percent or greater threshold or were in a county under a disaster declaration. Verizon Exhibit 1 attached to its application for limited exemption reveals that only the Crestline and Galion exchanges were both in a county that was under a disaster declaration and had more than ten OOS reports on a given day during the period in question. Additionally, Verizon Exhibit 1 reveals that the Bryan, Hicksville, Montpelier, and Ney exchanges had at least a 300 percent increase in OOS trouble reports over a two-year period and had more than ten OOS trouble reports on a given day between August 20 and August 29, 2007. The total OOS misses between these six exchanges is 58 misses.<sup>16</sup>

The following table, compiled from data in Verizon's Exhibit 1 (attached to these Reply Comments),<sup>17</sup> shows the six exchanges and dates for which missed repairs were excluded from the benchmark:

<b>Exchange</b>	<b>Date</b>	<b>Total OOS Daily Trouble Reports</b>	<b>Total OOS Misses</b>
Crestline	8/21/2007	11	4
Galion	8/21/2007	16	8
Bryan	8/20/2007	18	14
Bryan	8/21/2007	25	9
Hicksville	8/20/2007	15	4
Montpelier	8/20/2007	20	2
Montpelier	8/21/2007	11	7
Ney	8/20/2007	11	10
<b>Total OOS misses allowed by the Commission</b>			<b>58</b>

Thus, the Commission excluded only those missed repairs that occurred on days when an exchange had more than ten trouble reports.

Further, as shown in the attachment to these Reply Comments, the Commission did not count out-of-service misses from the Galion and Montpelier exchanges on August 22, 2007 and the Crestline exchange on August 29, 2007 because those exchanges had

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<sup>16</sup> Id. at 7-8.

<sup>17</sup> Verizon filed the original waiver request, which included the attachment, in Case No. 00-1265-TP-ORD on October 23, 2007.

fewer than eleven trouble reports on those days, even though those exchanges had more than ten trouble reports on one or two days of the period in question. The Commission's application of the Rule 8(D)(2) criteria in the Verizon case is consistent with OCC's suggested application of the rule in this proceeding.

In concluding its argument against OCC's suggested application of Rule 8(D), Embarq stated "it is more reasonable to conclude that the intent of the Rule is to allow a waiver for exchanges that had more than ten out-of-service reports during the entire waiver period and not for each and every day of the period."<sup>18</sup> Because "the entire waiver period" is comprised of "each and every day of the period," this statement seemingly contradicts Embarq's position and supports OCC's position that the "grace period" consist only of those days that had eleven or more out-of-service trouble reports in an exchange.<sup>19</sup> Embarq's proposal to deny credits to consumers should be rejected.

### **III. EMBARQ HAS THE BURDEN OF PROOF IN THIS PROCEEDING, BUT HAS NOT SHOWN THAT THE PUCO SHOULD ALLOW A "GRACE PERIOD" FOR THE COMPANY TO AVOID PAYING CUSTOMER CREDITS FOR OUTAGES REPORTED SEVERAL DAYS AFTER THE WINDSTORM.**

OCC recommended that the Commission deny a "grace period" for avoiding paying credits for outages that occurred in seven exchanges several days after the windstorm, because the outages do not appear to have been caused by the storm.<sup>20</sup> OCC also questioned whether "spikes" in the number of outages reported in the Lexington,

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<sup>18</sup> Response at 2.

<sup>19</sup> Embarq stated that Rule 8(D)(2) "excludes exchanges that did not have 11 or more out-of-service reports during any day in the entire grace period" (id.), and thus does not appear to be advocating that the rule allows a waiver in an exchange that had at least eleven total trouble reports during the entire "grace period," which is the only other logical reading of Embarq's statement.

<sup>20</sup> OCC Comments at 6-7. The exchanges are Cortland, Eaton, Fredericktown, Hebron, Holmesville, McConnelsville and Sunbury.

Warren and Wooster exchanges several days after the windstorm were storm-related, and recommended that the Commission deny Embarq a “grace period” to avoid paying customer credits regarding those outages.<sup>21</sup>

In response, Embarq stated that “[b]ecause of the electrical outages caused by the storm, it is a reasonable expectation that not all reports would be made the day after the storm.”<sup>22</sup> Embarq also stated that “[t]here is no reason to believe that all outages would occur immediately after the windstorm. And it is even less likely that every outage that occurred immediately after the windstorm would be reported in the day after the windstorm.”<sup>23</sup> These assertions, however, are directly contradicted by Embarq’s own statement in defense of its Rule 8(D)(2) interpretation: “Force majeure events may occur on just one day, as was the case with the windstorm. **Therefore, most out-of-service reports are likely to be made the day of or the day after the event, not spread over the entire grace period.**”<sup>24</sup> Embarq’s arguments lack credibility.

Obviously, both of these contradictory positions cannot be accepted. The logical position is that trouble reports received several days after a weather-related incident that lasts a single day are not related to the incident.

Embarq has the burden of proof in this proceeding. Under Ohio Adm. Code 4901:1-5-08(D)(3), Embarq was required to submit “[s]upplemental documentation sufficient to justify the request for the grace period....” The documentation that Embarq submitted does not support Embarq’s assertions that outages reported to the company

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<sup>21</sup> Id. at 7-8.

<sup>22</sup> Embarq Response at 2.

<sup>23</sup> Id. at 3.

<sup>24</sup> Id. at 2 (emphasis added).

days after the windstorm were storm-related. Embarq's documentation does not justify the "grace period" the Company seeks so as to avoid paying credits to its customers. The Commission should limit the "grace period" as OCC suggested in its Comments, and ensure that customers receive the credits to which they are entitled for Embarq's noncompliance with the rules.

#### **IV. CONCLUSION**

Embarq's response presented rule interpretations that are flawed and inconsistent with Commission precedent. Embarq's arguments are internally inconsistent and without credibility. Embarq has not justified its "grace period" request, as required by the PUCO rules. In order to ensure that consumers receive the credits provided under the MTSS, the Commission should reject Embarq's position, and instead apply Rule 8(D) as recommended by OCC in its Comments.

Respectfully submitted,

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CONSUMERS' COUNSEL

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Reply Comments by the Office of the Ohio Consumers' Counsel was sent by First Class United States Mail, postage prepaid, to the persons listed below on this 8<sup>th</sup> day of December 2008.

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**Verizon North Inc.  
Out-of-Service Data**

Create Date	CO_DESC	TOTAL Daily Trouble	TOTAL OOS Daily Trouble	Total OOS Misses	2-YR Aug TOTAL TRBL Daily Avg	2-YR Aug TOTAL OOS Daily Avg	Percent Change from 2-Year Total OOS Daily Average
8/21/2007	LOUDONVILLE	12	10	2	3.0	2.3	335%
8/22/2007	GALION	11	8	2	3.0	1.7	371%
8/21/2007	GALION	18	16	8	3.0	1.7	841%
8/22/2007	EVANSPO	8	5	1	0.7	0.5	900%
8/21/2007	EVANSPO	8	8	2	0.7	0.5	1100%
8/20/2007	EVANSPO	4	4	3	0.7	0.5	700%
8/20/2007	HICKSVILLE	18	15	4	3.4	2.5	900%
8/20/2007	NEY	13	11	10	2.4	2.0	450%
8/21/2007	FAYETTE	4	4	1	0.8	0.5	700%
8/23/2007	FAYETTE	2	2	1	0.8	0.5	900%
8/26/2007	FAYETTE	2	2	1	0.8	0.5	900%
8/27/2007	MCCOMB	5	5	1	1.3	0.9	488%
8/22/2007	MCCOMB	8	7	2	1.3	0.9	878%
8/21/2007	CURTICE-OREGON	15	8	1	2.9	2.0	900%
8/22/2007	CURTICE-OREGON	11	8	3	2.9	2.0	900%
8/21/2007	ELMORE	6	3	1	1.1	0.7	329%
8/20/2007	PORT CLINTON MAIN	13	10	2	3.1	2.0	400%
8/22/2007	PUT IN BAY	3	2	1	0.6	0.4	400%
8/20/2007	ANTWERP	5	5	3	1.3	0.9	488%
8/21/2007	SCOTT	2	2	2	0.6	0.4	400%
8/29/2007	CRESTLINE	7	8	1	2.1	1.4	329%
8/21/2007	CRESTLINE	11	11	4	2.1	1.4	586%
8/21/2007	CLYDE	10	10	3	1.9	1.3	669%
8/20/2007	GIBSONBURG	10	8	1	1.1	0.8	900%
8/22/2007	GIBSONBURG	8	4	2	1.1	0.8	400%
8/20/2007	HELENA	9	9	2	0.9	0.7	1186%
8/21/2007	HELENA	4	3	2	0.9	0.7	329%
8/21/2007	ATTICA	4	4	1	0.6	0.3	1233%
8/22/2007	BLOOMVILLE	2	2	1	0.6	0.4	400%
8/22/2007	REPUBLIC	5	4	2	0.6	0.4	900%
8/24/2007	REPUBLIC	2	2	2	0.6	0.4	400%
8/22/2007	BETTSVILLE	4	4	1	1.2	0.9	344%
8/21/2007	BRYAN	37	25	9	4.5	3.1	706%
8/20/2007	BRYAN	23	18	14	4.5	3.1	481%
8/22/2007	EDGERTON	8	5	2	1.4	1.0	400%
8/20/2007	EDGERTON	9	7	4	1.4	1.0	600%
8/21/2007	EDGERTON	9	8	7	1.4	1.0	700%
8/20/2007	EDON	2	2	1	0.7	0.4	400%
8/23/2007	EDON	5	4	1	0.7	0.4	900%
8/20/2007	MONTPELIER	22	20	2	2.3	1.6	1150%
8/22/2007	MONTPELIER	12	9	4	2.3	1.6	483%
8/21/2007	MONTPELIER	12	11	7	2.3	1.6	588%
8/24/2007	PIONEER	9	9	1	1.0	0.7	1186%
8/22/2007	PIONEER	6	5	2	1.0	0.7	814%
8/20/2007	PIONEER	5	5	3	1.0	0.7	614%
8/24/2007	WEST UNITY	6	4	1	1.0	0.6	567%
8/25/2007	WEST UNITY	4	4	1	1.0	0.6	567%
8/27/2007	WEST UNITY	8	8	1	1.0	0.6	1233%
8/21/2007	WEST UNITY	5	4	2	1.0	0.6	587%
8/23/2007	WEST UNITY	8	6	2	1.0	0.6	900%
8/22/2007	WEST UNITY	7	7	5	1.0	0.6	1067%
8/21/2007	HASKINS-TONTOGANY	4	4	2	1.4	0.9	344%
8/22/2007	NORTH BALTIMORE	5	5	1	0.9	0.5	900%
8/23/2007	NORTH BALTIMORE	6	4	2	0.9	0.5	700%
8/21/2007	WAYNE-BRADNER	11	9	3	2.7	2.0	350%
8/21/2007	WESTON	8	4	2	1.1	0.7	471%
8/21/2007	CAREY	4	4	1	1.1	0.8	400%
		473	391	153			

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Summary: Reply Reply Comments Regarding Embark's Request to Avoid Paying Credits to Certain Customers for Service Outages by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Etter, Terry L Mr.