BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	**)**	
Cincinnati Bell Telephone Company LLC	**)**	Case No. 10-3108-TP-BLS
For A Commission Determination Pursuant to	**)**	
Ohio Revised Code Section 4927.12(C)(3).	**)**	

MEMORANDUM IN OPPOSITION TO THE OFFICE OF THE OHIO CONSUMER COUNSEL'S APPLICATION FOR REHEARING

I. INTRODUCTION

Pursuant to Ohio Admin. Code. § 4901-1-35(B), Cincinnati Bell Telephone Company LLC ("CBT") submits this memorandum in opposition to the application for rehearing filed by the Office of the Ohio Consumers' Counsel ("OCC") on February 18, 2011.

The OCC makes two arguments, one procedural and one substantive. Both are wrong. On the procedural point, the OCC contends that the Commission erred by not issuing findings of fact and a written opinion explaining its decision. But Revised Code § 4903.09 does not apply to this case and there is no requirement for the Commission to issue any findings or an opinion in a case subject to automatic approval. On the substantive side, the OCC contends that CBT did not show that alternative providers offer competitive services. On this issue, the OCC is also wrong, as it fails to appreciate the distinction between "offering" and "providing" competing services. The OCC would hold ILECs to proof that services are being provided, but the law has changed and that proof is no longer necessary.

The OCC made the identical arguments in Case No. 10-1412-TP-BLS as it does here with respect to a substantially similar application by AT&T Ohio. The Commission denied the

OCC's application for rehearing in that case by operation of law.[1] The Commission should do the same here as the application has no merit.

II. REVISED CODE § 4903.09 DOES NOT APPLY TO THIS CASE

The OCC contends that the Commission violated R.C. § 4903.09 by not issuing findings of fact and a written opinion setting forth the reasons for its decision. But the OCC's argument is based on selective quotation from the statute, which does not apply in this case. The OCC argues that R.C. § 4903.09 "requires the Commission 'in all contested cases' to file 'findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon such findings of fact.'" But the OCC left the critical word "heard" out of its argument. The statute actually provides as follows:

> In all contested cases ***heard by the public utilities commission***, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

R. C. § 4903.09 (emphasis added). Setting aside the issue of whether a case becomes "a contested case" simply by virtue of the OCC filing a motion opposing the application, this case was not "heard" by the Commission. No hearing was ordered and no hearing was held. There were no proceedings to record or from which to make a transcript. Rather, CBT's application was approved by operation of law under R. C. § 4927.12(C)(3)(b). That new statutory provision directs that:

> Upon the filing of an application under division (C)(3)(a) of this section, the commission shall be deemed to have found that the application meets the requirements of that division unless the commission, within thirty days after the filing of the application, issues an order finding that the requirements have not been met.

[1] Pursuant to Revised Code § 4903.10(B), if the Commission does not grant or deny an application for rehearing within thirty days after its filing, it is denied by operation of law.

R. C. § 4927.12(C)(3)(b). The automatic approval process of the new law dispenses with the need for a Commission order. In the absence of an order, the application is deemed approved. And in the absence of a Commission order to hold a hearing on an application, the procedure in R.C. § 4903.09 does not apply. The law creates no requirement to make findings of fact or to issue a written opinion just because a case is "contested," as the OCC suggests. Therefore, the OCC's procedural objection to the Commission's approval of CBT's application is groundless and should be rejected.

The OCC's argument that R.C. §§ 4903.09 and 4927.12(C)(3) are "at odds with one another" and, thus, must be reconciled, is simply wrong. Statutes are only at odds with each other when they both apply but dictate different results. In this case, only § 4927.12(C)(3) applied and § 4903.09 had no application at all.

Acceptance of the OCC's argument would undermine any automatic approval process that has been established by the Commission's rules. The mere filing of a motion to intervene and an objection does not take a case off an automatic approval track and require a Commission order that complies with R. C. § 4903.09. Only if the Commission takes action to remove an application from the automatic approval track and orders a hearing would R. C. § 4903.09 apply. There is no automatic right to a hearing unless a statute provides for it.[2] Under the statute that is applicable here, an application is deemed to have met the statutory requirements "unless the commission, within thirty days after the filing of the application, issues an order finding that the requirements have *not* been met." R. C. § 4927.12(C)(3)(b) (emphasis added). The Commission did not do so, so the law provides that the Commission "shall be deemed to have found that the

[2] *Discount Cellular, Inc. v. Pub. Util. Comm'n*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 38; *Office of Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St.3d 244, 248-49, 1994-Ohio-469, 638 N.E.2d 550.

application meets the requirements of that division . . . ." *Id.* There is no requirement to have a hearing, so there is no basis upon which to invoke R.C. § 4903.09. The OCC cannot force the Commission to make findings of fact or to hold a hearing in every case simply by interjecting groundless objections where there is no statutory entitlement to a hearing.

III. CBT'S APPLICATION COMPLIED WITH THE STATUTORY REQUIREMENTS

The OCC's "substantive" argument regarding the content of CBT's application is equally groundless. The OCC argues that CBT has not shown that alternative providers are offering competing service to CBT's basic local exchange service in the four exchanges at issue.

This time, at least the OCC accurately quotes the statutory requirement that "the application demonstrates that two or more alternative providers offer, in the exchange area, competing service to the basic local exchange service offered by an incumbent local exchange carrier in the exchange area . . ."[3] OCC Memo, p. 7. But, the OCC still misinterprets it. CBT's application did demonstrate that alternative providers offer competing services to CBT's basic local exchange service. In Exhibit 2 to its application, CBT listed at least three alternative providers that offer service in each of the four exchanges (only two were required). Application, December 22, 2010, Exhibit 2, p. 2. Exhibit 2 also contained evidence of those competing carriers' offerings.

The OCC argues that CBT did not prove that the alternative providers' services compete with CBT's BLES service. But, the services shown in Exhibit 2 to CBT's application (Time Warner Cable, AT&T Wireless and Verizon Wireless) are some of the very same ones that the Commission judged in prior CBT BLES alternative regulation cases as being competitive to

[3] Revised Code § 4927.12(C)(3)(a).

CBT's BLES service.[4] The OCC posits no reason why the very same services offered by the very same alternative providers that were deemed competitive in those cases are no longer acceptable competitive alternatives. Thus, the OCC resorts to an argument that CBT has not proven that BLES customers have actually switched to those alternative services. But, the requirement to show actual provision of service would go too far, as CBT is only required to show that the services are offered, which it has done.

The OCC argues that the same analysis and same documentation should be required under Sub. S.B. 162 as was previously required under the now-revoked BLES alternative regulation rules. OCC Memo, p. 7. In applications filed under the previous rules, the Commission's rules required evidence that each of the alternative providers was actually providing service to residential customers. But that requirement no longer exists. The new law eliminated from consideration many of the issues that OCC previously used to oppose the implementation of BLES alternative regulation under the Commission's rules.

In the cases that CBT brought previously under competitive market test four of the prior BLES rules, it was required to prove the presence of at least five unaffiliated facilities-based alternative providers ***serving*** the residential market.[5] The new law has eliminated those previous rules,[6] reduced the number of competing carriers from five to two, and interposed the less rigorous "offer" requirement in lieu of "serving." The new statutory requirement only requires an application to:

> . . . demonstrate[] that two or more alternative providers ***offer***, in the exchange area, competing service to the basic local exchange service offered by an incumbent local exchange carrier in the exchange area, regardless of the technology and facilities used by the alternative provider, the alternative provider's location, and the extent of the

[4] Case No. 06-1002-TP-BLS; Case No. 08-1007-TP-BLS.
[5] See former Ohio Admin. Code § 4901:1-4-10(C).
[6] See Sub. S. B. 162, Section 3.

> alternative provider's service area within the exchange area. An alternative provider includes a telephone company, including a wireless service provider, a telecommunications carrier, and a provider of internet protocol-enabled services, including voice over internet protocol.

R. C. § 4927.12(C)(3)(a) (emphasis added). CBT made the necessary showing.

The OCC argues that "no less" than the previous showings and tests should be applied here. OCC Memo, p. 7. There is no legal basis for the OCC's demand because the new law replaced those rules and requires a substantially reduced showing, when compared to the Commission's now-obsolete BLES alternative regulation rules. For example, under the old standard, information such as ported numbers was included in the application to demonstrate that carriers were not only offering to provide service but were actually doing so. The requirement to demonstrate actual provision of service has been replaced with the requirement only to demonstrate the offering of service. The new statute makes this clear. In addition, the mandatory rescission of the BLES alternative regulation rules confirms that intent.[7]

The OCC's effort to interpret the new law as imposing the same criteria that existed under the BLES alternative regulation rules must be rejected. To impose the requirements proposed by OCC would nullify the streamlined process that the General Assembly has created and would be contrary to the express intent of the statute.

[7] Sub. S. B. 162, Section 3.

IV. CONCLUSION

For all of the foregoing reasons, the OCC's application for rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Terry L. Etter and David C. Bergmann, Assistant Consumers' Counsel, Office of the Ohio Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3485 by electronic service at etter@occ.state.oh.us and bergmann@occ.state.oh.us, this 28th day of February, 2011.

/s/ Douglas E. Hart

Summary: Memorandum Memorandum in Opposition to the Office of the Ohio Consumer Counsel's Application for Rehearing electronically filed by Mr. Douglas E. Hart on behalf of Cincinnati Bell Telephone Company LLC