BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of Chapter 4901:1-7, of the Ohio Administrative Code, Local Exchange Carrier-to-Carrier Rules.	))))	**Case No. 12-922-TP-ORD**

OHIO CABLE TELECOMMUNICATIONS ASSOCIATION MEMORANDUM CONTRA TO THE APPLICATIONS FOR REHEARING OF THE OHIO TELECOM ASSOCIATION AND THE AT&T ENTITIES

I. Introduction

Pursuant to Section 4901-1-35(B) of the Ohio Administrative Code, Ohio Admin. Code § 4901-1-35(B), The Ohio Cable Telecommunications Association ("OCTA")[1] files this memorandum contra to and opposes the Applications for Rehearing of the Commission's October 31, 2012 Finding and Order in the above-captioned matter filed by The Ohio Telecom Association ("OTA") and the AT&T Entities. In their respective Application for Rehearing, the OTA and AT&T Entities object to new language included in Rules 4901:1-7-06(A)(1) and (2) and 4901:1-7-12(A)(1)(a) that specifies the applicability of the rules "regardless of the network technology". Both assert this language is unfair or unwarranted as it goes beyond the Commission's authority under the Ohio Revised Code. As will be shown herein, the language objected to by the OTA and the AT&T Entities is neither unfair nor unwarranted. As such, the Applications for Rehearing of the OTA and the AT&T Entities should be denied.

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[1] This Memorandum Contra of the Ohio Cable Telecommunications Association is filed on behalf of the following members of the Association: Armstrong Cable Service, Buckeye CableSystem, Clear Picture, Inc., Cox Communications, Inc., G.L.W. Broadband, Inc., Massillon Cable TV, Inc., Suddenlink and Time Warner Cable.

II. The Arguments of the OTA and the AT&T Entities Are Not Supported by the Rulings of the Federal Communications Commission

The OTA and the AT&T Entities (jointly, the "Rehearing Applicants") argue that inclusion of the phrase "regardless of the network technology underlying the interconnection" included in Rule 4901:1-7-06(A)(1) and (2) and the phrase "regardless of the network technology utilized by the telephone company to transport or terminate that traffic" in Rule 4901:1-7-12(A)(1)(a) exceeds or is inconsistent with federal law, and, more specifically, the rulings of the Federal Communications Commission ("FCC") in its *ICC/USF Order.*[2] The Rehearing Applicants argue that inclusion of "regardless of the network technology underlying the interconnection" in Rule 4901:1-7-06(A)(1) and (2) violates O.R.C.§4927.16(A) because this language exceeds or is inconsistent with or prohibited by federal law, including federal regulations. The AT&T Entities further argue that inclusion of this phrase also violates O.R.C. §4905.042 because the Commission is exercising jurisdiction over IP-enabled service in a manner that is prohibited by, or inconsistent with the Commission's jurisdiction under, federal law including federal regulations. Thus, the focus of the Applications relates to IP-to-IP interconnection and the belief of the Rehearing Applicants that this Rule, as approved by the Commission, is inconsistent with federal law.

Likewise, with respect to Rule 4901:1-7-12(A)(1)(a), the Rehearing Applicants argue that inclusion of the phrase "regardless of the network technology utilized by the telephone company to transport or terminate that traffic" is unfair and unwarranted because it violates Ohio law. They argue this phrase exceeds or is inconsistent with or prohibited by federal law, including federal regulations and/or the Commission has exceeded its jurisdiction by including this phrase for

[2] *Connect America Fund*, et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*ICC/USF Order*").

reciprocal compensation. It is argued by the Rehearing Applicants that this is, therefore, a violation of O.R.C. §§4927.16 and 4905.042.

In both cases, as the main basis to support their position, the Rehearing Applicants cite to the FCC's initiation of a further notice of proposed rulemaking ("FNPRM") which, among other things, will consider some elements of the policy framework for the transition to all IP-enabled networks. The AT&T Entities argue that in the *ICC/USF Order* the FCC did not do anything to allow the Commission to extend its authority under Section 251 of the Communications Act of 1934, as amended, to information services. However, this ignores the actual language in the phrases that the Rehearing Applicants object to and also ignores specific language of the FCC in its *ICC/USF Order* with respect to the FNPRM.

At the outset and with respect to the argument that the addition of the phrase "regardless of the network, technology" exceeds or goes beyond federal law, the phrase used is technologically neutral. It does not in either Rule 4901:1-7-06 or Rule 4901:1-7-12 single out IP-enabled services for any unique treatment. Further, there is no language in these Rules that specifies the Rules apply to information services and, in fact the FCC has never answered specifically what services are information services. Rules 4901:1-7-06(A)(1) and (2) and 4901:1-7-12(A)(1)(a) are appropriately generic, reflecting the technology neutral interconnection provisions of the Communications Act of 1934, as amended.

In addition, while citing to language in the portion of the *ICC/USF Order* regarding the FNPRM, the Rehearing Applicants ignore other FCC statements specifically addressing interconnection. In the section of the *ICC/USF Order* on Interconnection, the FCC acknowledges that interconnection among communications networks is critical and that historically this has

enabled competition and the associated consumer benefits.[3] And, the FCC further points out that it is this competition that has brought about innovation and reduced prices.

The FCC further observed in its *ICC/USF Order* that the voice communications marketplace is transitioning from traditional circuit switched telephone service to the use of IP services.[4] After acknowledging this history and current status, the FCC did not state that it had changed its position on the importance of IP-to-IP interconnection, but rather stated:

> We anticipate that the reforms we adopt herein will further promote the deployment and use of IP networks. However, IP interconnection between providers also is critical..... We make clear, however, that our decision to address certain issues related to IP-to-IP interconnection in the FNPRM should not be misinterpreted to suggest any deviation from the Commission's longstanding view regarding the essential importance of interconnection of voice networks. (emphasis added)[5]

The argument that the Rehearing Entities raise only reflects the Rehearing Entities continued assertions that for IP-to-IP interconnection there are no federal rights and, therefore, any requirement in the Commission's Rules exceeds federal law and regulations. As the above statement of the FCC demonstrates, that is simply not correct. In fact, the FCC expressly states in the ICC/USF Order that it agrees with commenters that "nothing in the language of [s]ection 251 limits the applicability of a carrier's statutory interconnection obligations to circuit-switched voice traffic" and that 251 is technology neutral.[6] Contrary to what the Rehearing Entities argue, the

[3] *See, ICC/USF Order* at ¶1009.
[4] Id.
[5] *See, ICC/USF Order at ¶1010.* This cited language was supported with the following footnote in the *ICC/USF Order: See, e.g., Interconnection Clarification Order*, 26 FCC Rcd at 8265-66, paras. 12-13; *CLEC Access Charge Order*, 16 FCC Rcd at 9960, para. 92; *Local Competition First Report and Order*, 11 FCC Rcd at 15506, para. 4; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Third Report and Order, Transport Phase II, 9 FCC Rcd 2718, 2724, para. 25 (1994); *MTS & WATS Market Structure*, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980); *Lincoln Tel. & Tel. Co.*, Declaratory Order, 72 FCC 2d 724 (1979).
[6] *See, ICC/USF Order at ¶1342.*

FCC would actually have to abandon its current regime and everything it has done at the federal level to make their argument valid. To date the FCC has not done so.

Despite what the Rehearing Applicants indicate to the contrary, the FCC specifically stated in its *ICC/USF Order* that the duty to negotiate in good faith does not depend upon the network technology underlying the interconnection and is required for TDM, IP and other network technology.[7] These Rules for which the Rehearing Entities are requesting rehearing apply to the interconnection arrangements for the facilities-based exchange of regulated telecommunications-service traffic on the public switched telephone network to which Section 251 clearly applies. In fact, the FCC further indicates in its *ICC/USF Order* that the duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act --- clearly indicating, therefore, that these negotiations are subject to Section 251 of the Act.

The Rehearing Applicants reliance on the FNPRM to support their position that the "regardless of network technology" language in Rules 4901:1-7-06 and 4901:1-7-12 violates Ohio law is further weakened by the FCC's statement in the section of its *ICC/USF Order* addressing the FNPRM. When requesting comments in the FNPRM, the FCC stated that it wanted comments "on the particular statutory authority that provides the strongest basis for the right to good faith negotiations for IP-to-IP interconnection." (emphasis added)[8] Thus, contrary to what the Rehearing Applicants argue, with respect to the FCC's FNPRM, the FCC is not looking to determine whether good faith negotiations for IP-to-IP interconnection are required by the Communications Act, but rather the strongest means to support this requirement.

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[7] *See, ICC/USF Order* at ¶1011.

[8] *See, ICC/USF Order* at ¶1348.

Finally, it is important to comment on the statement of the AT&T Entities that they do not oppose inclusion of the "regardless of network technology underlying the interconnection" in Rule 4901:1-7-06(A)(3). It must be noted that in comments filed at the FCC, the AT&T Entities argued that the FCC has no authority to impose a duty on AT&T Entities to negotiate in good faith.[9] This may shed some light and further explain the position taken by the AT&T Entities on this particular subsection of Rule 4901:1-7-06, as these two positions would only appear to make sense if the AT&T Entities expect to later argue that this provision does not apply to any IP-enabled services.

As shown above, the basis of the arguments made by the Rehearing Entities that the Commission has violated Ohio law is that inclusion of the phrase that the duty to interconnect and make interconnection available is required regardless of the technology underlying the interconnection is not supported in the *ICC/USF Order*. Rather, the FCC makes clear in its Order that interconnection is a significant factor in the ongoing viability of competition in a transitioning market and is required for TDM, IP and other network technology. The Rehearing Applicants have not demonstrated that Rules 4901:1-7-06(A)(1) and (2) and 4901:1-7-12(A)(1)(a) violate Ohio law. The Applications for Rehearing of the OTA and the AT&T Entities should be denied.

[9] *See,* February 24, 2012 Comments of AT&T filed with the FCC in *In re Connect America Fund, et. seq., FCC WC Docket No. 10-90, et. seq.*

III. Conclusion

For the reasons set forth above, the Commission should deny the Applications for Rehearing of The OTA and the AT&T Entities.

Dated this 10th day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra to the Applications for Rehearing of the Ohio Telecom Association and the AT&T Entities was served upon the following parties of record by electronic mail on this 10th day of December, 2012.

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Summary: Memorandum Memorandum Contra to the Applications for Rehearing of the Ohio Telecom Association and the AT&T Entities electronically filed by Benita Kahn on behalf of Ohio Cable Telecommunications Association