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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of NOW )  
Communications, Inc. for a Certificate of )  
Public Convenience and Necessity to )  
Provide Local Exchange Telecommunications )  
Services Throughout the State of Ohio. )

Case No. 98-1466-TP-ACE

In the Matter of the Application of Telstar )  
Telecom Company, LLC for a Certificate )  
of Public Convenience and Necessity to )  
Provide Local Exchange Telecommunications )  
Services Throughout the State of Ohio. )

Case No. 98-1480-TP-ACE

In the Matter of the Application of Phone )  
Reconnect of America, Inc. for a Certificate )  
of Public Convenience and Necessity to )  
Provide Local Exchange Telecommunications )  
Services Throughout the State of Ohio. )

Case No. 99-524-TP-ACE

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REPLY BRIEF OF SURETEL, INC.

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## **I. Introduction**

On November 2, 1999, Staff of the Public Utilities Commission of Ohio (“Commission”) and numerous parties that had intervened in this proceeding filed initial post-hearing briefs addressing the Commission’s inquiry of whether prepaid local exchange service is in the public interest and should be provided in Ohio. Suretel, Inc. (“Suretel”) hereby files its reply brief, wherein it once again establishes that, despite attempted assertions to the contrary, the public policy concerns raised by the Commission in its May 28, 1999 Entry initiating this generic proceeding, have been successfully addressed. The Commission should move forward with the individual certification proceedings and open the opportunity for Ohio customers to choose prepaid local telephone service.

By relying on evidence not included in the record before this Commission<sup>1</sup> and withdrawn applications, the Consumer Parties<sup>2</sup> attempt to draw a picture of prepaid local exchange service that is inconsistent with the service proposed by those intervening parties actively participating in this proceeding and ready to provide another service choice to Ohio consumers. While acknowledging that the OCC is the statutory representative of all residential

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<sup>1</sup> This included substantial reliance on discovery obtained and cross-examination from a separate proceeding that took place more than a year ago. Although relying on this type of evidence in their brief, the Consumer Parties did not attempt to present this evidence at hearing. This raises significant due process concerns, as the evidence is from a separate proceeding, at which the parties of this proceeding had no opportunity to cross-examine witnesses, and is being used by the Consumer Parties for the truth of the matter asserted. In addition to the due process concerns, the Supreme Court of Ohio recently noted that, “The Public Utilities Commission must base its decision in each case upon the record before it.” Tongren v. Public Utilities Commission of Ohio, 706 N.E.2d 1255, 1258 (Ohio 1999). Clearly, the U.S. Telco case relied on by the Consumer Parties is not part of this record, and, as such, cannot be considered here.

<sup>2</sup> As indicated in their brief, the Consumer Parties consist of the Ohio Consumers’ Counsel (OCC), Edgemont Neighborhood Coalition, Appalachian People’s Action Committee, City of Toledo, City of Cleveland and Parkview Areawide Seniors, Inc.

utility customers, consistent with their testimony presented at hearing,<sup>3</sup> the Consumer Parties focus opposition to prepaid local service solely on whether it is in the public interest to provide such service to low-income consumers who are eligible for telecommunications assistance programs.

Further, and without substantiation, the Consumer Parties consistently assert that choice must be removed from low-income consumers (arguing that the decision must be made by the Commission), as these consumers are incapable of evaluating and making decisions when information regarding available choices is disclosed to them. In reality, and as also shown in their testimony and brief, the Consumer Parties continue to be displeased with the incumbent local exchange carrier's failure to live up to its commitment to promote its universal service programs – a failed commitment that the Consumer Parties apparently are suggesting prepaid providers are obligated to correct. Based on this distorted picture of prepaid local exchange service and a limited consumer focus, the Consumer Parties then assert that prepaid local exchange service is not in the public interest for all Ohio consumers.

A review of the entire record before this Commission shows that the conclusions drawn by the Consumer Parties are incorrect. Exemplifying a willingness to consider the entire record, the Staff concludes that prepaid local exchange service is in the public interest. Consumer Parties, however, reach the opposite conclusion by ignoring record evidence that those prepaid carriers who actively participated in this proceeding have not focused their market on customers eligible for telephone assistance. In fact, testimony from potential prepaid providers

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<sup>3</sup> The Edgemont Neighborhood Coalition and Appalachian People's Action Committee actively participated in cross examination of witnesses at the hearing, but only the OCC presented testimony in this proceeding, with the City of Toledo and City of Cleveland merely making appearances on the record. Based upon the jointly filed briefs, it is assumed that the Consumer Parties other than the OCC are in agreement with the testimony presented by the OCC at hearing.

indicated a willingness to refer eligible consumers to the telephone consumer assistance programs created for low income eligible consumers.

Likewise, acceptance of the Consumer Parties' conclusions would require this Commission to ignore the evident need of a significant number of Ohio consumers, currently without telephone service and ineligible for public assistance, to have another choice in obtaining and maintaining local telephone service. In spite of consistent acknowledgement by the Commission and consumers alike that customer choice in residential telephone service is important to Ohioans,<sup>4</sup> three years after the enactment of the Telecommunications Act of 1996 ("96 Act"), there is virtually no competition, and, therefore, no customer choice in the provisioning of local residential phone service.

As demonstrated in Suretel's initial brief and as will be shown herein, prepaid local service is consistent with the telecommunications policies of Ohio and the mandate of the 96 Act. Suretel respectfully requests this Commission find in favor of providing Ohio consumers with another choice for service -- prepaid local telephone service.

**II. As Recognized by the Commission's Staff, the Record in this Proceeding Establishes that Prepaid Local Service is in the Public Interest, Notwithstanding Asserted Conclusions of the Consumer Parties to the Contrary.**

**A. Prepaid local telephone service is in the public interest, as it serves an important consumer need that is currently unfulfilled.**

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<sup>4</sup> Case No. 95-845-TP-COI, Finding and Order, June 12, 1996 ("In light of the telecommunications policy of this state and the realities of the evolving telecommunications marketplace, the staff recommends that the Commission consider a framework to permit effective competition in the provision of basic local exchange service in order to move this state from one of monopoly provision to one of customer choice."). To be sure, the Commission adopted this staff recommendation and customer choice is now a policy goal of this state. In addition, Robert Tongren, Ohio Consumers' Council, has said, "The people I represent... want competition, and they want it now." *DeWine Wants to Speed Up Local Phone Competition*, Columbus Dispatch, April 7, 1998, p. 1D. Furthermore, as recently as this year, Mr. Tongren was quoted emphasizing the need for local telephone service competition. *Phone Companies Seek Settlement*, Plain Dealer, January 23, 1999, p. 1C.

All parties to this proceeding agreed that access to local phone service meets a fundamental need. OCC's witness, Mr. Oppenheim, recognized, "it's an enormous hardship not to have a telephone in the home clearly." Oppenheim Cross, Tr. Vol. 1, pp. 53-54. Prepaid local telephone service provides individuals that access to the public switched network who currently do not have basic telephone service in their homes because they have been unable or unwilling, for various reasons, to purchase telephone service from the ILEC. Suretel Brief at 5. This service provides customers access to emergency services, such as 911, fire, police and medical facilities. Id. at 9. In addition, prepaid service customers also receive the sociological benefits of easy access to family, friends, economic opportunities and the Internet. Id.

The state and federal governments have developed some solutions through various telephone assistance programs that, at least arguably, help those individuals with incomes below 150% of the poverty level. Likewise, the USA Program, which Ameritech committed to provide to obtain alternative regulation, also has 150% of the poverty level as an eligibility requirement. No such programs exist, however, for people with incomes falling outside that range. Suretel Brief at 6. Given this, it is important to note that, as discussed more fully below, even the Consumer Parties' own data indicates that there may be as many as 79,000 Ohio households without basic local telephone service that are ineligible for telephone assistance. As such, prepaid local telephone service will fill a definite need for many Ohio consumers. Id.

According to the U.S. Census Bureau, the average household size in Ohio is 2.59 individuals. Suretel Ex. 2, p. 4. For these households to qualify for the telephone assistance programs, their annual household income must fall below 150% of the poverty line, which equates to \$16,275 for a two-person household and \$20,475 for a three-person household. Id. at

18. Using these dollar figures and the 1998-dollar equivalents in the study presented by the OCC, even the Consumer Parties acknowledge that as many as 43% of the households in Ohio without telephone service may not qualify for some type of Lifeline services.<sup>5</sup> Consumer Parties Brief at 57. This 43% equates to as many as 79,000 Ohio households being above the eligibility standard and still without basic telephone service.

Ignoring the possibility of there being close to 79,000 unserved and assistance-ineligible households in Ohio, the Consumer Parties erroneously assert that the target market for prepaid local service is the low-income, assistance-eligible households. *Id.* at 11-13. Record evidence does not support this assertion. Rather, the testimony filed in this proceeding and cross-examination conducted at hearing illustrate that prepaid local providers will not pursue, much less target, this classification of households.

Despite the arguments presented by the Consumer Parties, prepaid local service providers do not prey on, or even target, low-income consumers who would otherwise be eligible for telephone assistance. The Consumer Parties' assertion to the contrary is not based on any evidence presented at hearing regarding the prepaid local carriers intending to provide service in Ohio, but rather the Consumer Parties' argument is premised on Mr. Oppenheim's assessment of a withdrawn applicant's advertisement. Moreover, this assessment by Mr. Oppenheim was not even based on concrete statements within that advertisement, but rather centered around the messages that Mr. Oppenheim believed were implied therein.

The prepaid providers that participated in this proceeding, however, made it clear that they are not targeting individuals eligible for telephone assistance. It is the 79,000 potential

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<sup>5</sup> Despite the Consumer Parties' efforts to provide an exact breakdown of the households without telephone service by income, there is insufficient data in the record to perform such an analysis. At best, the record evidence allows an analysis of groupings within ranges of approximately \$15,000. There is no evidence, however, of how the households are broken down within those large ranges.

households – households unable and/or unwilling to get service from the incumbents yet ineligible for the low-income telephone assistance programs – that comprise the target market for prepaid local service providers. To be sure, it is Suretel's experience that individuals with incomes above 150% of the poverty level, which necessarily prohibits their participation in telephone assistance programs, make up the bulk of the unserved customers that desire the prepaid local service being offered by Suretel in other states. Riley Cross, Tr. Vol. 3, p. 183, lines 12-15. Likewise, Larry Seab of NOW Communications testified, "We do not want the low-income customer that is entitled to the USA program." Seab Cross, Tr. Vol. 3, p. 27, lines 21-22.

Given this, the concern expressed over and over by the Consumer Parties that prepaid telephone service should not be provided to low-income consumers that are eligible for telecommunications assistance programs is not relevant to the determination of whether prepaid local service is in the public interest. Regardless of the public policy considerations behind the Consumer Parties' assertions, the record does not support their concern. The low-income individuals that the Consumer Parties are trying to protect are simply not in the target market being pursued by the prepaid local service providers.<sup>6</sup>

Despite the Consumer Parties' claims to the contrary, this Commission should not and cannot ignore the significant number of Ohio households for whom prepaid local service may provide the only means to acquire and maintain local telephone service. The General Assembly has clearly stated that the telecommunications policy of Ohio is to ensure the availability of local telephone service to all Ohio citizens. As established through the remainder of this reply brief, in addition to fulfilling this policy, prepaid local service also fulfills several

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<sup>6</sup> This is not to say, however, that these individuals should not have the right to choose prepaid local telephone service, if they so desire. If, after being referred to the telephone assistance programs for which they may be eligible, a customer still elects to use a prepaid service provider, that customer should have that right. After all, consumers, regardless of their income levels, should have the fundamental right of choice.



other designated state policies. The fact that the record before the Commission demonstrates this service furthers the goal of providing local telephone service to all Ohioans is, however, in and of itself, substantiation that prepaid local service is in the public interest.

**B. Prepaid local telephone service helps to ensure the availability of adequate local exchange service, and the waivers, if any, that may be sought by prepaid local service providers will not affect the adequacy of this service.**

As discussed in Suretel's initial post-hearing brief, there are twenty-five sections in the Minimum Telephone Service Standards ("MTSS"), each of which contain numerous rules. Suretel Brief at 18. In addition, the Local Services Guidelines ("Guidelines") add additional requirements for local telecommunications service providers. *Id.* Out of all these rules, Suretel has testified that it does not expect to request any waivers, and the remaining participating prepaid local service providers testified that they can comply with the vast majority of the current restrictions and regulations. *Id.* at 18-19. Concerning some of the waivers that may be sought by the prepaid providers, Staff reiterated in its brief that "waiver of certain of the Commission's MTSS and Guidelines may be possible without otherwise violating the intent or the spirit of those requirements, which provide for an adequate basic level of local telephone service for customers, as part of an overall package." Staff Brief at 7 (emphasis added).

Throughout this proceeding, Staff has clearly indicated a willingness to consider waivers that would not hinder the adequacy of the service provided; "Staff remains willing to discuss with any party applications for waivers of certain Commission rules and regulations." Staff Ex. 1, p. 7. Ironically, despite the Consumer Parties' assertions that additional weight should be given to the testimony of the Staff's witnesses, the Consumer Parties argue that no waivers of the MTSS or Guidelines should be granted. Consumer Parties Brief at 57. This

explicitly contradicts the opinion of the Staff, the very entity that, according to the Consumer Parties, should be given more weight. Id. at 8.

Regardless of the Consumer Parties' unfounded conclusions, prepaid local service will not undermine the MTSS or Guidelines. Suretel addressed several of the Consumer Parties' concerns with respect to the MTSS and Guidelines in its initial brief, and will not repeat all of them here. Suretel Brief at 18-22. There are a few specific assertions made by the Consumer Parties regarding waivers which need to be addressed, and dismissed.<sup>7</sup> First, concerning training, the Consumer Parties argue that prepaid providers should be required to use only specially trained agents and customer service representatives. Consumer Parties Brief at 15, 69. The basis behind this assertion is unclear, as even the MTSS and Guidelines do not contain provisions or requirements pertaining to training. While the Guidelines do indicate that the Commission staff will oversee marketing practices of a LEC and monitor such practices when deemed necessary,<sup>8</sup> there is nothing in the Guidelines requiring a particular method of training or oversight of such training. Certainly prepaid providers should not be subjected to rules and regulations that do not currently exist for the incumbents or other NECs. Suretel Brief at 22-25. Requiring additional compliance with extra requirements would violate the mandate of the 96 Act for competitively neutral requirements. Id. at 25.

Second, with respect to unlimited access to long distance providers, the Consumer Parties allege that failure to provide access to all toll providers violates the letter and spirit of the Guidelines. Consumer Parties Brief at 30. In contrast, Staff has already indicated that it is

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<sup>7</sup> As discussed more fully in Suretel's post-hearing brief, the Guidelines, themselves, provide for waivers "for good cause shown." Guidelines, § II.A.2.a; Suretel Brief at 19. As such, the Consumer Parties' attempt to argue that absolutely no waivers should be granted, based only on the record from this generic proceeding, is inconsistent with the Guidelines. The "good cause" provided for in the Guidelines will be shown in each individual application. A generic proceeding is not the proper forum to conclude whether such good cause is present.

<sup>8</sup> Guidelines § XVII.B.10

willing to consider recommending that the Commission approve a waiver regarding access to “1+” long distance providers, as long as access to other prepaid toll service is available. Staff Ex. 1, p. 7. The basis for Staff’s position is consistent with current ILEC practice and positions taken by Staff in other proceedings, and necessarily rejects the Consumer Parties’ assertions.

For example, current incumbent LEC practices allow a customer with no credit history to obtain local service without deposit if the customer agrees to accept a toll-restricted service. Kreiger Cross, Tr. Vol. 4, p. 179, lines 21-23. This service offering, while limiting the customer’s access to toll providers has still been determined to be compliant with the Guidelines, and was acknowledged to be in the public interest. *Id.* at p. 180, lines 12-13. Furthermore, as highlighted in Suretel’s post-hearing brief, such a waiver is consistent with the Staff’s recent proposal to allow universal toll blocking of a customer who has been disconnected from toll service due to unpaid long distance bills unless that customer can demonstrate that a “1+” carrier is willing to accept the customer. Case No. 96-1175-TP-ORD, Entry, September 30, 1999. In the Commission’s entry requesting comments on this Staff proposal, the Commission clearly indicated that it was concerned with universal availability of toll service for credit risk customers, stating that its current regulatory regime is problematic. *Id.* at 3.

Third, the prepaid providers do not object to, nor have they requested waivers from, O.A.C. § 4901:1-5-06(D), which provides customers and applicants the necessary information to obtain the most economical LEC service. As this Commission has already clarified, the duty imposed by the rule requires a LEC “to inform customers only as to the most economical rates it has available for its own customers.” Case No. 96-1175-TP-ORD, Finding and Order, June 26, 1997, p. 22. Prepaid providers, in fact, have offered to go one step further than this MTSS requirement and assist in directing the

low-income customers who are eligible for telephone assistance to the necessary programs. For example, Mr. Riley testified that Suretel “would be more than happy in a courteous and dignified manner to assist our interested customers with the Lifeline services of Ameritech.” Riley Cross, Tr. Vol. 3, p. 156, lines 18-20; See also, Seab Cross, Tr. Vol. 3, p. 27, lines 15-16. This offer of assistance, however, should not be expanded into a requirement of price comparisons with other providers.<sup>9</sup> The Commission has never intended to impose price comparison requirements on LECs. Imposing such a requirement on only one segment of LECs (new entrants, prepaid carriers) would be discriminatory and in violation of the 96 Act.

In addition, the Consumer Parties also assert that additional requirements should be placed on prepaid providers concerning Extended Area Service (“EAS”). Consumer Parties Brief at 33. Again, however, there is no support for this assertion in either the Guidelines or MTSS. In fact, the Consumer Parties are essentially requesting that, on this issue, the Commission ignore the Guidelines, which allow new entrants to establish their own local calling areas, which may be different than the incumbents. Guidelines, § II.D.2; Kreiger Cross, Tr. Vol. 4, p. 162, lines 6-10. This is a perfect example of the Consumer Parties’ inconsistency throughout their brief. Repeatedly the Consumer Parties assert that prepaid providers must comply with the Guidelines and MTSS. Yet, as the last two points indicate, the Consumer Parties then turn around and request this Commission to ignore those very same MTSS and Guidelines. The Consumer Parties cannot have their proverbial cake and eat it too.

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<sup>9</sup> The OCC’s witness, Mr. Oppenheim, agreed that what is necessary in a competitive rather than monopoly marketplace, is disclosure of information by a carrier sufficient for the consumer to make an apples-to-apples comparison. Oppenheim Cross, Tr. Vol. 1, p. 247.

Contrary to Consumer Parties' assertions, prepaid local telephone service providers will not undermine the low-income telephone assistance programs. The record in fact shows that prepaid local service could assist in fulfilling a long-held goal of the Consumer Parties – to promote already-existing universal service programs in Ohio.<sup>10</sup> Prepaid local telephone service helps to ensure the availability of adequate local service for all Ohio citizens. The record evidence clearly indicates that the services provided by the prepaid local telephone companies are consistent with the regulatory requirements, and those waivers suggested by Staff for consideration will not reduce this adequacy of service.

**C. Suretel's method of providing prepaid local telephone service furthers the state policy of encouraging innovative alternatives within the telecommunications industry and minimizes any risks associated with the alleged inability of low-income individuals to make educated decisions.**

The telecommunications policy of Ohio, as adopted by the Ohio General Assembly, encourages innovation in the supply of public telecommunications services. Suretel Brief at 10. Current providers, such as Ameritech, do not maintain local offices where customers

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<sup>10</sup> It is clear that the Consumer Parties are displeased with the incumbents' failure to promote the telephone assistance programs. For example, Mr. Oppenheim testified at hearing that:

The State of Ohio has provided some excellent protections for low-income people in order to permit them to subscribe to Lifeline service . . . the incumbent carrier has done a less than adequate job at getting the word out about the availability of that service . . .

Oppenheim Cross, Tr. Vol. 1, p. 167, lines 17-22 (emphasis added).

Furthermore, the Consumer Parties argued in their brief that "the Commission should ensure that new entrant carriers ("NECs") are not allowed to take advantage of the failure of incumbent carriers to promote and administer their Lifeline programs properly." Consumer Parties Brief at 3 (emphasis added). Likewise, the Consumer Parties also note that "[u]ntil last year's USA Order there was little formal pressure applied to Ameritech Ohio to meet its universal service obligations." Id. at footnote 19 (emphasis added). Although the prepaid providers have testified as to their willingness to assist consumers eligible for these programs, it is not their obligation to correct these failures of the incumbent.

can meet with personnel to discuss the types of services available to them. *Id.* at 10-11. Suretel, however, establishes retail outlets where it assists customers in the provision and explanation of telephone services and collection of payments. *Id.* It is Suretel's experience that being face-to-face and in the neighborhood with its customers makes the customers more likely than they might be with a corporate image to come in and discuss their service arrangements. Riley Cross, Tr. Vol. 3, p. 149, lines 16-19.

The significant advantages presented by this face-to-face contact were completely overlooked by the Consumer Parties. Instead, the Consumer Parties reiterated unfounded assertions that low-income individuals are incapable of making rationale comparisons when presented with information about available services. Consumer Parties Brief at 16, 41. In an attempt to convince this Commission that low-income individuals are not capable of making these decisions and, thus, prepaid service is not in the public interest, the Consumer Parties rely on the testimony of Mr. Oppenheim. *Id.* In particular, Consumer Parties give great weight to the studies discussed by Mr. Oppenheim. *Id.* This reliance is misplaced, however, as the studies relied upon, and the conclusions drawn therefrom, lack credibility.

Concerning the particular studies referenced by Mr. Oppenheim, the most obvious problem is the age of the studies. The most recent study relied upon by the Consumer Parties to attack the ability of low-income individuals to make rational decisions is more than 11 years old. *Id.* This aged data lacks credibility, as the utility marketplace has changed dramatically since the 1980's. Not only is there significantly more consumer choice in the telecommunications industry, this Commission also implemented statewide gas choice less than three years ago. As such, consumers today are much more aware of their options regarding utility services. This

increased awareness brings into question the reliability of any study conducted when the marketplace was so different.

Furthermore, even if the age of these studies is ignored, the conclusions drawn therefrom have obvious deficiencies. For example, Consumer Parties cite to a 1988 Connecticut study for the proposition that low-income individuals are exceptionally uninformed and vulnerable. *Id.* Yet, at hearing, when Mr. Oppenheim was confronted with the results of this study as compared to a second study he cited, Mr. Oppenheim acknowledged that the studies, when analyzed together, indicate that low-income individuals may actually be more knowledgeable of their telephone services and options than the general public as a whole. Suretel Brief at footnote 9. In addition, Mr. Oppenheim's testimony at hearing indicated his unfamiliarity with the studies that he and the Consumer Parties rely on.

Moreover, the Consumer Parties' failure to acknowledge the benefits provided by the face-to-face services offered by prepaid providers is ironic in that it may actually help consumers increase their knowledge concerning telecommunications options. Assuming the Consumer Parties' unproven assertion that low-income consumers are at a disadvantage with respect to their ability to make informed decisions, the method by which Suretel conducts its business would help alleviate this problem. Despite the Consumer Parties' assertions, low-income individuals are not *per se* incapable of making rationale comparisons when presented with information on services.

- D. The record does not support imposing conditions upon prepaid local service providers that are not imposed upon all new entrants and, therefore, would be discriminatory.**

As already indicated, the Consumer Parties propose that if the Commission allows the provisioning of prepaid local service in Ohio, it should impose conditions on such service. The Consumer Parties fail, however, to acknowledge that their recommended conditions would be inconsistent with the Guidelines they otherwise suggest must be followed, as well as inconsistent with the manner in which the Commission has regulated other new entrants. The Guidelines are clear; new entrants “may charge end-user rates based upon the marketplace and are not required to document their end-user rates by means of developing and submitting TELRIC studies.” Guidelines, § VI.C.2. The only additional requirement for end-user rates charged by new entrants is that the rates must be above the new entrant’s cost of service. *Id.*

Numerous Commission-approved tariffs have been filed by new entrants in compliance with these requirements without public opposition from the Consumer Parties. Yet, the Consumer Parties now suggest that a price cap should be imposed upon one group of new entrants – prepaid local service providers. The Consumer Parties attempt to support this discriminatory application of the Guidelines with three arguments. Record evidence does not support any of the arguments presented by the Consumer Parties. Implementation of conditions upon prepaid local service providers that, without a doubt, are not competitively neutral cannot be justified.

The Commission has been clear in the telecommunications arena, as well as with other public utility services (e.g., gas choice and electric deregulation), that we are moving toward a competitive marketplace where the consumers are to have a choice. In such a competitive paradigm, with disclosure of services and rates to be charged for those services, it is the customer that determines if the offered rates are “affordable.”



The fact that approximately 500,000 households nationwide are using prepaid local services suggests that customers have decided that this service is affordable. Suretel Brief at 5. To be sure, Suretel's experiences bolster this conclusion:

Our initial projections for customers in Oklahoma projected that in a three-year time frame we hoped to have 10,000 customers; we had 19,000. We projected our first month in Michigan to have 400 customers, and we got 2,000 customers.

Riley Cross, Tr. Vol. 3, p. 141, lines 1-4. It is evident from these figures that Suretel's prepaid local telephone service, and prepaid local service in general, has been well received by consumers. Consumers have concluded that these services are priced affordably and reasonably.

Interestingly, OCC's witness, Ms. Hardie, testified that she believed that for other new entrants, the consumers and new entrants should be allowed to make the decision as to what is a reasonable and affordable rate. Apparently, however, the Consumer Parties agree that this same decision for prepaid services should not be given to consumers. For example, when MCI came in with their application containing a maximum rate of \$50 per month for basic telephone service, Ms. Hardie indicated that

[The OCC] sat down and we said, "What residential customer is going to take service at \$50 a month?" And we said, "Well, you know, if that's what the company wants, then we don't have any information to disagree with that," but, you know, we thought it was odd.

Hardie Cross, Tr. Vol. 4, p. 70, lines 18-22 (emphasis added). This \$50 rate, which the OCC could not disagree with, is in the same range as, if not more than, many of the proposed rates for the participating prepaid providers. Not only did the OCC recognize its lack of information to determine if a proposed rate is affordable, it acknowledged that customers were capable of making that decision by choosing not to buy. What is apparent from the record is that over

500,000 households nationwide have made the determination that prepaid local service is affordable by choosing to buy it.

To the extent that the Consumer Parties challenge the conscionability of prepaid rates as a whole, it is important to emphasize that the Consumer Sales Practices Act (“CSPA”) does not apply to transactions between public utilities and their customers.<sup>11</sup> O.R.C. § 1345.01(A). Yet, even after acknowledging the Act’s inapplicability, the Consumer Parties still suggest that the Commission should nonetheless “seek guidance” from §1345. Consumer Parties Brief at 20. This suggestion is clearly improper. The CSPA explicitly states that the Act does not apply to public utilities. O.R.C. § 1345.01(A). Furthermore, the Supreme Court of Ohio recently reiterated that “[t]he Commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly.” Tongren, 706 N.E.2d at 1256 (citations omitted); Time Warner AxS v. Pub. Util. Comm., 75 Ohio St.3d 229 (Ohio 1996). Furthermore, “the Commission cannot *sua sponte* enlarge its statutory authority by rule.” *Id.* at 240-41 (citations omitted). Certainly, this must also mean that the Commission cannot enlarge its authority by “guidance.” In this instance, the General Assembly was clear; § 1345 is not to be applied to telecommunications companies. O.R.C. § 1345.01(A). As such, it would be inappropriate for this Commission to rely on § 1345 to regulate prepaid providers.

Support to impose more stringent rate requirements on only one segment of new entrants likewise cannot be garnered from the general challenges made by the Consumer Parties. The Consumer Parties failed to establish that proposed rates for prepaid local service are either

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<sup>11</sup> In addition, Mr. Oppenheim admitted at hearing that his argument of “unconscionability” is also based upon the Uniform Commercial Code (“UCC”) standard adopted by courts in other states. Oppenheim Cross, Tr. Vol. 1, p. 131. Importantly, no Ohio court has applied the UCC to telecommunications services. Also of interest is the admission by Mr. Oppenheim that some of Ameritech’s pricing for enhanced services would meet his “unconscionability” standard, *id.* at p. 221. Yet, the Consumer Parties’ fail to address how, based on this admission, the imposition of price caps only upon prepaid providers could possibly be competitively neutral regulation by the Commission.

unjust or unreasonable. To be sure, the rates addressed in this proceeding meet the Guidelines' requirements and fall within the range of rates already approved by this Commission.<sup>12</sup> In addition, the evidence relied upon by Consumer Parties to support their assertions regarding the "unreasonableness" of the proposed rates is improper and flawed. As a general matter, it should be noted that the Supreme Court of Ohio has stated, "comparing the rates charged by one utility with another is not a proper standard to determine their reasonableness. In addition, there is no statutory basis for such a procedure." Duff v. Public Utilities Commission of Ohio, 384 N.E.2d 264, 269 (Ohio 1978).

Even if such comparisons were permissible, however, the comparisons relied on by the Consumer Parties are faulty. The ILEC wholesale rates used to argue the "unreasonableness" of the prepaid providers' rates include only Ameritech's retail, recurring monthly rates less the resale discount. No other costs that will be incurred by prepaid providers, such as taxes, surcharges, marketing, installation fees, operational support systems, call centers or storefront facilities, were considered. Hardie Cross, Tr. Vol. 4, p. 76, lines 9-14. Yet, without all these essential inputs, the Consumer Parties claim prepaid providers' rates result in "huge margins." The charts prepared by Ms. Hardie were incomplete, making her conclusions neither reasonable nor logical.

Furthermore, the Consumer Parties' assertion that it is cheaper for individuals to reconnect to the ILEC once disconnected as opposed to switching to a prepaid service provider is also flawed. This erroneous claim is based on the assumption that installation charges will be waived and a plan for repayment provided. Consumer Parties Brief at 18. The problem with

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<sup>12</sup> For example, as was acknowledged by Ms. Hardie at the hearing, the NECs are currently permitted to charge rates as high as \$100 per month for flat-rate residential service. Hardie Cross, Tr. Vol. 4, p. 68. All of the participating prepaid service providers' proposed rates are well below that mark. In fact, there was no evidence presented suggesting that any prepaid provider, participating or not, has rates near that already approved amount.

this, however, is that these benefits are not provided unless the customer is eligible for low-income telephone assistance. Oppenheim Cross, Tr. Vol. 1, p. 225, lines 20-24. As discussed above, the Consumer Parties' own data suggests that there may be as many as 79,000 Ohio households without basic local telephone service that are ineligible for telephone assistance. It is these households that the prepaid providers indicated are their market for whom the comparison must be made. Such a comparison would require payment of installation charges to the incumbent and full payment of arrearages. Ms. Hardie's comparison fails to take this into account and is, therefore, flawed.

Prepaid rates have been established as affordable and the record does not establish that the proposed rates are either unjust or unreasonable. Thus, the proposed rates cannot be a basis to support a determination that such service is not in the public interest. As important, the Consumer Parties cannot justify imposition of more severe rate regulation on prepaid provider new entrants.

**III. In a Generic Proceeding, Such as This, All Parties Have the Same Burden of Proof, and the Consumer Parties' Arguments Are Entitled to No Additional Weight or Consideration.**

While the Consumer Parties would like to shift the burden-of-proof to the prepaid service providers, the June 3, 1999 Entry clarified that all parties were on the same burden-of-proof footing, with each party having only the burden of presenting its own position. Entry, June 3, 1999 at 2. Requiring a higher burden-of-proof for only certain parties would blur the distinction between a generic public policy proceeding and a hearing on the merits of each application. *Id.*

In addition to the Consumer Parties' erroneous assertions regarding the burden-of-proof, the Consumer Parties also attempt to argue that "additional weight should be given [to] the testimony of the OCC." Consumer Parties Brief at 8. This argument is flawed for two reasons. First, pursuant to the intervention statute, § 4903.22.1, all of the parties that intervened in this proceeding satisfied the same criteria. O.R.C. § 4903.22.1(B). One of those standards was "whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues." *Id.* All intervenors satisfied this criteria; all were found to have knowledge that would significantly contribute to the record.

Second, the Consumer Parties are attempting to argue that those parties with the most knowledge should be given the least amount of credence. This argument is counterintuitive. The prepaid service providers have substantial knowledge and insight to offer the Commission with respect to how prepaid telephone service will be conducted in Ohio. In contrast, the Consumer Parties have no such knowledge. For example, OCC's witness, Mr. Oppenheim, whose testimony is heavily relied upon by the Consumer Parties, was unable to provide any significant amount of specific information regarding prepaid telephone service, and the little that he did provide was extremely dated.

Furthermore, the bulk of Mr. Oppenheim's pre-filed direct testimony was not even directed at the prepaid local telephone industry. Instead, the majority of his testimony was spent expounding on Mr. Oppenheim's foreseen evils of the check-cashing and rent-to-own industries. Interestingly, Mr. Oppenheim's familiarity with even these unrelated industries was called into question at hearing. For example, despite all of the time Mr. Oppenheim devoted to preaching on the evils of the check-cashing industry, when asked the simple question of whether check-cashing establishments are permitted to operate in Ohio, the most definitive answer Mr.

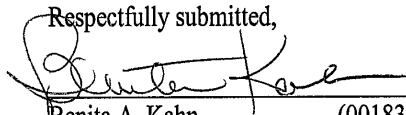
Oppenheim could provide was "So far as I know." Id. at p. 196, lines 13-15. Likewise, despite Mr. Oppenheim's continual comparison of the services and rates charged by check-cashing facilities and banks, Mr. Oppenheim was unable to identify any information concerning the rates charged by banks in Ohio to cash checks. Id. at pp. 201-204.

Given this, it seems clear that the Consumer Parties' assertion that its arguments are entitled to additional weight should be dismissed. There is no basis for this assertion. The Attorney Examiner made it clear that all parties were on the same burden-of-proof footing, and, as discussed above, the Consumer Parties' arguments are certainly no more, if not less, reliable than those of the other intervenors.

#### **IV. Conclusion**

The record is replete with substantial evidence supporting a finding that prepaid local telephone service is in the public interest despite the Consumer Parties' assertions to the contrary. As discussed in Suretel's post-hearing brief, and reiterated herein, the additional choice made available by prepaid local telephone service is consistent with the telecommunications policies of Ohio and the 96 Act. Given this and all of the evidence submitted at hearing, Suretel respectfully requests this Commission find in favor of adding the choice of prepaid local service for Ohio consumers.

Respectfully submitted,



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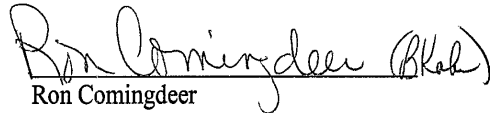
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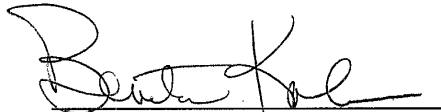
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of Suretel, Inc. was served on all parties listed on the attached service list via regular U.S. mail, postage prepaid, this 19<sup>th</sup> day of November, 1999.

  
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