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IN THE SUPREME COURT OF OHIO

CASE NO.

05-2209 PUCO

DISCOUNT CELLULAR, INC.,

Appellant,

v.

THE PUBLIC UTILITIES COMMISSION
OF OHIO,

Appellee.

Appeal from the Public Utilities
Commission of Ohio

Public Utilities Commission of Ohio Case
No. 04-236-RC-CSS

**NOTICE OF APPEAL OF APPELLANT
DISCOUNT CELLULAR, INC.**

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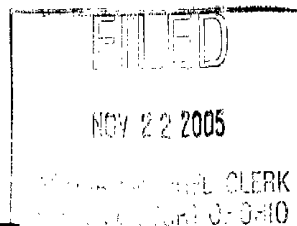
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IN THE SUPREME COURT OF OHIO

CASE NO. _____

DISCOUNT CELLULAR, INC.

Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Appellee.

Appeal from the Public Utilities Commission of Ohio
PUCO Case No. 04-236-RC-CSS
In the Matter of the Complaint of
Discount Cellular, Inc. v. Ameritech Mobile Communications, et al.

NOTICE OF APPEAL

Appellant Discount Cellular ("Discount Cellular" or "Appellant") hereby gives notice of its appeal, pursuant to R.C. 4903.11 and 4903.13, to the Supreme Court of Ohio, from an *Opinion and Order* of the Public Utilities Commission of Ohio ("PUCO" or "Commission"), entered on August 3, 2005, in PUCO Case No. 04-236-RC-CSS (the "236 Case"). A copy of the Commission's August 3, 2005 *Opinion and Order* is attached hereto as Exhibit A.

Appellant was, and is, a party of record in PUCO Case No. 04-236-RC-CSS, and timely filed its Application for Rehearing of the Appellee's August 3, 2005 *Opinion and Order* in accordance with R.C. 4903.10. Appellant's Application for Rehearing is part of the PUCO record in this case and is incorporated herein by reference as if fully rewritten herein. Appellant's Application for Rehearing was denied, with respect to the issues on appeal herein by

Commission *Entry* dated September 28, 2005. (Attached hereto as Exhibit B is Appellee's *Entry on Rehearing*).

The Appellant complains and alleges that Appellee's August 3, 2005 *Opinion and Order*, and Appellee's September 28, 2005 *Entry on Rehearing* in the 236 Case are unlawful, unjust, unreasonable and against the manifest weight of the evidence in the following respects set forth more fully in Appellant's Application for Rehearing:

I. **Assignment of Error No. 1:** The Commission erred in dismissing the Complaint and the 236 Case based on the December 16, 1999 *Finding and Order* in *In the Matter of the Commission Ordered Investigation Into the Alternative Regulatory Treatment of Commercial Mobile Radio Service*, PUCO Case No. 97-1700-TP-COI (the "1700 Order") because it erroneously relied on the 1700 Order which is invalid for the following reasons:

a. The Commission's dismissal was based on its incorrect determination that the 1700 Order was not a "rule" and, thus, did not need to meet the requirements contained in R.C. 111.15. The 1700 Order purportedly abolished rules that had been ratified by the General Assembly and which were otherwise applicable to cellular telephone providers in Ohio. Therefore, the Commission was required to comply with R.C. 111.15 in promulgating the 1700 Order. By failing to file the 1700 Order with the Joint Committee on Agency Rule Review (JCARR), the Legislative Service Commission (LSC) and the Secretary of State, the Commission did not meet the requirements in R.C. 111.15.

- b. In promulgating the 1700 Order, the Commission failed to comply with the requirements of R.C. 4927.03 because it did not do each, or any, of the following: (1) hold a hearing; (2) provide public notice; (3) permit public comment; (4) create a factual record; or (5) implement the alternative regulation provided for in R.C. 4927 by adopting “rules”.
- c. In promulgating the 1700 Order, the Commission failed to comply with the requirements of R.C. 119 by failing to do each, or any, of the following: (1) provide public notice; (2) provide notice of a public hearing; (3) identify the rule that was to be rescinded or modified; (4) provide a public hearing; (5) designate the effective date of any rule change; or (5) otherwise comply with R.C. 119.06; R.C. 119.07 and R.C. 119.09.
- d. The 1700 Order was never codified in the Ohio Administrative Code, or ratified by the General Assembly, and thus, cannot be enforced.
- e. The Commission’s actions amount to a new and retroactive amendment of the 1700 Order.

II. **Assignment of Error No. 2:** In dismissing the Complaint and the 236 Case, the Commission has erred by violating the Ohio and United States Constitutions.

- a. The Commission’s dismissal violates Ohio and Federal Constitutional guarantees of due process and equal protection and state prohibitions against special privileges when by permitting only one company, Cellnet,

to enforce its rights, but prohibiting all other similarly-situated entities from enforcing their rights for violations of Ohio utility law.

- b. The Commission's dismissal violates the Ohio and Federal Constitutional guarantees of: (1) open courts; (2) due process; and (3) the right to petition the government for redress of grievances. The Commission has unlawfully created a situation which leaves injured plaintiffs with no remedy for damages caused by violations of Ohio utility law.
- c. The Commission's dismissal violates the Ohio and Federal Constitutional due process guarantees by exempting Commercial Mobile Radio Service ("CMRS") providers from lawsuits for violations of Ohio utility law. The Commission has unlawfully prevented any adjudication of claims against CMRS providers for violations of Ohio law to be brought in any Ohio forum.
- d. The Commission's dismissal violates the Ohio and Federal Constitutional due process guarantees by (1) recognizing that CMRS providers are public utilities and thus are exempt from lawsuits under the Ohio Consumer Sales Practices Act; (2) exempting such utilities from lawsuits in Ohio and then (3) permitting such companies to engage in conduct that would otherwise violate Ohio utility law.
- e. The Commission's dismissal constitutes the repeal of the majority of R.C. Title 49 as it relates to CMRS providers and as such violates the Ohio and Federal constitutional separation of powers. In taking such action, the

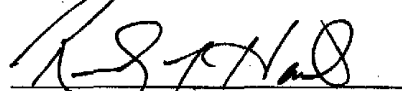
Commission has performed a function that is solely within the province of the General Assembly.

- III. **Assignment of Error No. 3:** The Commission erred because its dismissal of the Complaint and the 236 Case violates the Ohio and Federal Constitutional prohibitions against retroactivity. Section 28, Article II of the Ohio Constitution prohibits retroactive application of the 1700 Order which was relied upon by the Commission and which was applied by the Commission retroactively. Retroactive application of the 1700 Order also violates the due process and takings provisions of the Ohio Constitution. Likewise, the Federal Constitution prevents the retroactive application of rules like the 1700 order. Similarly, the Uniform Statute and Rule Construction Act, U.S.R.C.A. § 16 provides that a repeal of a civil statute or rule does not affect a right accrued before the repeal takes effect and that a right accrued may be enforced as if the statute or rule had not been repealed.
- IV. **Assignment of Error No. 4:** The Commission erred in dismissing the Complaint and the 236 Case and in holding that only the Federal Communications Commission can now address violations of state law on the part of CMRS providers operating in Ohio. The Commission has been given exclusive jurisdiction by the General Assembly to adjudicate violations of Ohio utility law. The Commission has no power to transfer that jurisdiction to any other state or federal body. Through R.C. 4905.26, the Commission is statutorily required to hear complaints involving violations of Ohio utility law.

WHEREFORE, Appellant respectfully submits that the Appellee's August 3, 2005 *Opinion and Order* and denial of rehearing by the Appellee's September 28, 2005 *Entry on Rehearing* in PUCO Case No. 04-236-RC-CSS are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to the Appellee with instructions to correct the errors complained of and order Appellee to hear the case on its merits.

OF COUNSEL:

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Notice of Appeal has been filed with the Public Utilities Commission of Ohio and served upon Alan Schriber, Chairman of the Public Utilities Commission of Ohio (via hand-delivery), the Office of the Public Utilities Commission and upon the entities listed below (via regular U.S. mail) this 22nd of November, 2005.

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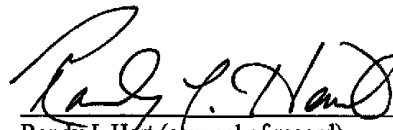
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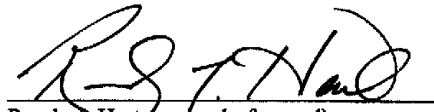
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CERTIFICATE OF FILING

I certify that a Notice of Appeal has been filed with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.



Randy J. Hart (counsel of record)
Attorney for Appellant

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Discount Cellular, Inc.,)	
)	
Complainant,)	
)	
v.)	Case No. 04-236-TP-CSS
)	
Ameritech Mobile Communications, Inc.,)	
n.k.a. Cingular Wireless, Ameritech Mobile)	
Communications, L.L.C., and Cincinnati)	
SMSA Limited Partnership,)	
)	
Respondents.)	

ENTRY

The Commission finds:

- (1) On February 24, 2004, Discount Cellular, Inc. (Discount or complainant) filed a complaint against Ameritech Mobile Communications, Inc., n.k.a. Cingular Wireless, Ameritech Mobile Communications, L.L.C., and Cincinnati SMSA Limited Partnership (respondents) alleging that, between January 1, 1999, and December 31, 1999, respondents failed to maintain separate wholesale and retail operations and separate accounting records of their wholesale and retail operations, in violation of Commission orders, unlawfully cross-subsidized their retail operations with profits generated through their entire operations, charged wholesale rates to Discount that, as compared to that of its affiliate, were higher and that such rates were discriminatory and anti-competitive and provided service to their retail operations at rates lower than those which they offered to Discount. These actions, Discount claims, violate Sections 4905.22, 4905.32, 4905.33, 4905.35, and 4905.54, Revised Code.
- (2) After receiving an extension of time, respondents filed their answer on April 14, 2004, denying the material allegations of the complaint. In their answer, respondents argue, in part, that the Commission's requirements for commercial mobile radio

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service (CMRS) providers¹ regarding separate wholesale and retail operations were eliminated by the Commission in 1999, and, therefore, any allegations based on a violation of these requirements have no basis in law and should be dismissed.

- (3) A settlement conference was held on November 4, 2004; however, the parties failed to resolve this matter.
- (4) On November 5, 2004, Discount filed a motion to amend its complaint to add the years 1997 and 1998 to the time period covered by the complaint. On November 23, 2004, respondents filed a memorandum contra Discount's motion to amend the complaint and, on December 13, 2004, respondents filed a notice of supplemental filing in support of their memorandum contra.
- (5) On November 19, 2004, respondents filed a motion to dismiss the complaint. Discount filed a memorandum contra the motion to dismiss on December 20, 2004. Respondents, in turn, filed a reply to complainant's memorandum contra on January 7, 2005. For the reasons set forth below, we find that the pending complaint should be dismissed.
- (6) Critical to our determination of respondents' motion to dismiss is the evolution of the Commission's regulatory treatment of CMRS providers. The Commission has, since the Commission's first orders concerning cellular service in 1985, subjected cellular providers to less regulation than more traditional wireline telecommunication providers. In fact, the Commission's first order on the regulation of cellular providers set up the wholesale/retail distinction and found that cellular resellers, even those affiliated with the wholesale provider, would not be considered a telephone company/public utility subject to Commission jurisdiction. See *In the Matter of the Commission Investigation into the Regulatory Framework for Telecommunication Services in Ohio*, Case No. 84-944-TP-COI (84-944), Opinion and Order issued June 4, 1985. This relaxed regulation was continued in the Commission proceeding that reevaluated the regulatory framework for competitive telecommunication offerings. See *In the Matter of Phase II of the Commission's Investigation into the Regulatory Framework for Competitive Telecommunications Services in Ohio*, Case No. 86-

¹ The term CMRS provider refers to mobile telephone, mobile cellular telephone, paging, personal communication service (PCS) and specialized mobile radio (SMR) service providers.

1144-TP-COI (86-1144), Finding and Order issued August 2, 1988.

- (7) The Commission loosened the regulatory requirements on wholesale cellular providers even further with its October 22, 1993 Finding and Order in *In the Matter of the Commission Investigation into Implementation of Sections 4927.01 Through 4927.05, Revised Code, as They Relate to Competitive Telecommunications Services*, Case No. 89-563-TP-COI (89-563). This decision also further relaxed the requirements for separation between the retail and wholesale operations and determined that only functional separation, rather than legal separation, had to exist between the wholesale and retail operations of cellular companies. In our June 19, 1997 entry in 89-563, we further concluded that, based on the state of competition in the CMRS segment of the telephone industry, existing relaxed regulation should be extended on a more permanent basis.
- (8) On December 23, 1997, the Commission issued an entry initiating a docket, *In the Matter of the Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, Case No. 97-1700-TP-COI (97-1700), for the purpose of investigating the extent to which the interim relaxed regulatory treatment provided to CMRS providers, pursuant to 89-563, should be modified or extended on a more permanent basis. This entry also extended the status quo for the regulatory treatment of CMRS providers. By entry of February 5, 1998, in 97-1700, the Commission sought public and industry comments on a staff proposal that recommended that the current exemption granted to CMRS providers offering service be continued on a permanent basis and that the current certification process should be replaced with a simple requirement to register with the Commission. Following the filing of comments in 97-1700, the Commission issued its finding and order on December 16, 1999. The Commission found that the regulatory flexibility in the treatment of CMRS providers should be further relaxed. In that finding and order, the Commission stated:

Since the time the Commission last considered the regulatory treatment to be afforded CMRS, the level of competition has grown dramatically. With the introduction of PCS and

SMR providers, the wholesale mobile wireless market has been transformed from the duopoly cellular market structure that previously existed when we enacted the current CMRS regulatory requirements to one now characterized by vigorous competition between multiple facilities-based carriers. (97-1700 at 15).

- (9) This development of competition that had been experienced led the Commission to conclude that the prior level of regulatory oversight of CMRS providers was no longer needed. In its December 16, 1999 Finding and Order in 97-1700, the Commission determined, based on the development of competition within the CMRS market, that even further relaxed regulatory treatment of CMRS providers was warranted. In that order, the Commission exempted CMRS providers from the requirement to file non-utility customer/end user contracts; determined that it was no longer necessary to require that CMRS providers continue to maintain structurally separate wholesale and resale operations and eliminated the requirement that CMRS providers maintain separate wholesale and retail operations;² eliminated the requirement that CMRS providers maintain records of all transactions between their affiliated and unaffiliated customers for period of greater than 18 months; and determined that it was no longer necessary to apply Sections 4905.26, 4905.33, 4905.34, and 4905.35, Revised Code, to the CMRS wholesale market.

In making these determinations, the Commission specifically found in the context of the CMRS resale market that cellular resellers, such as the complainant herein, should pursue remedies related to alleged anti-competitive conduct of wholesale providers at the FCC. 97-1700 order at 17-18. In making the determination that the cellular resale complaints should be pursued at the FCC, the Commission specifically distinguished a cellular resale complaint that had, at the time, already been pending before this Commission for six years. See *In the Matter of the Complaint of Westside Cellular, Inc., d.b.a. Cellnet v. GTE Mobilnet, et. al.*, Case No. 93-1758-TP-CSS (Cellnet complaint). The Commission's December 16, 1999 Finding and Order in 97-1700 reflected that the order would apply on a

² The Commission's orders in 84-944, 86-1144 and 89-563 had required the mandatory separation of wholesale and retail entities.

prospective basis, meaning that all future cellular resale complaints were to be brought before the FCC. Thus, for the foregoing reasons, the Commission finds that this complaint should be dismissed and closed of record. Should the complainant wish to pursue this matter, Discount should make the appropriate filing at the FCC.

- (10) Having dismissed Discount's complaint, we similarly deny its request to amend its complaint to add the years 1997 and 1998 as the same rationale for dismissing its complaint applies to the requested years sought to be amended to the complaint.
- (11) On January 12, 2005, Discount also filed a motion requesting that the Commission issue an entry in this case that reaffirms its prior findings in the Cellnet complaint and makes analogous findings that respondents' violations constitute unlawful discriminatory conduct toward Discount. On January 26, 2005, respondents filed a memorandum contra Discount's January 12, 2005 motion claiming that there are a number of material disputes concerning basic facts surrounding the complaint. Having determined that there is no basis to go forward with Discount's complaint, we deny Discount's request to adopt any findings from the Commission's decision in the Cellnet complaint and apply such findings to Discount's complaint.

It is, therefore,

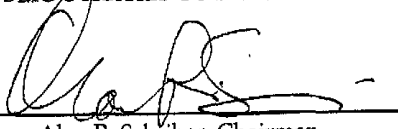
ORDERED, That respondents' motion to dismiss the complaint is granted and this case be closed of record. It is, further,

ORDERED, That Discount's November 5, 2004 motion to amend the complaint is denied. It is, further,

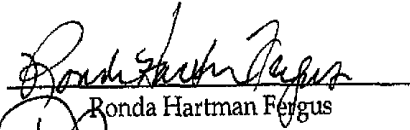
ORDERED, That Discount's motion to adopt the findings from the Cellnet complaint is denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



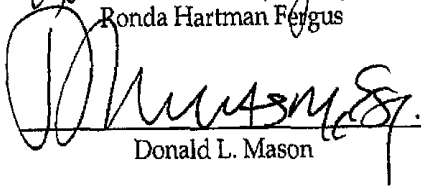
Alan R. Schriber, Chairman



Ronda Hartman Fergus



Judith A. Jones



Donald L. Mason

Clarence D. Rogers, Jr.

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Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Discount Cellular, Inc.,

Complainant,

v.

Ameritech Mobile Communications, Inc.,
n.k.a. Cingular Wireless, Ameritech Mobile
Communications, L.L.C., and Cincinnati
SMSA Limited Partnership,

Respondents.

ENTRY ON REHEARING

The Commission finds:

- (1) On February 24, 2004, Discount Cellular, Inc. (Discount or complainant) filed a complaint against Ameritech Mobile Communications, Inc., n.k.a. Cingular Wireless, Ameritech Mobile Communications, L.L.C., and Cincinnati SMSA Limited Partnership (respondents) alleging that, between January 1, 1999, and December 31, 1999, respondents failed to maintain separate wholesale and retail operations and separate accounting records of their wholesale and retail operations, in violation of Commission orders, unlawfully cross-subsidized their retail operations with profits generated through their entire operations, charged wholesale rates to Discount that, as compared to that of its affiliate, were higher and that such rates were discriminatory and anti-competitive and provided service to their retail operations at rates lower than those which they offered to Discount.
- (2) After receiving an extension of time, respondents filed an answer on April 14, 2004, denying the material allegations of the complaint and a motion to dismiss. In their answer and motion to dismiss, respondents argued that the Commission's requirements for commercial mobile radio service (CMRS) providers regarding separate wholesale and retail operations were eliminated by the Commission in 1999, and therefore,

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any allegations based on a violation of these requirements have no basis in law and should be dismissed. Respondents also filed a motion to dismiss the complaint.

- (3) By entry issued August 3, 2005, the Commission granted respondents' motion to dismiss the complaint. As its basis, we cited to the historical evolution of our regulatory treatment of CMRS providers, which culminated in a proceeding which investigated the extent to which the interim relaxed regulatory treatment provided to CMRS providers should be modified or extended on a more permanent basis. See: *In the Matter of the Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, Case No. 97-1700-TP-COI (1700 proceeding or 1700 order). Among other findings in the 1700 order, we determined that the development of competition that had been experienced led to the conclusion that the prior level of regulatory oversight of CMRS providers was no longer needed. Finally, in the 1700 order we found that, in the context of the CMRS resale market, cellular resellers, such as Discount, should pursue remedies related to alleged anti-competitive conduct of wholesale providers at the Federal Communications Communication (FCC).
- (4) Section 4903.10, Revised Code, states that, within 30 days after the entry of the order upon the Commission's journal, any party who has entered an appearance in a proceeding may apply for rehearing with respect to any matters determined in said proceeding.
- (5) On September 2, 2005, Discount filed an application for rehearing of the Commission's August 3, 2005 entry. On September 12, 2005, respondents filed a memorandum contra Discount's application for rehearing.
- (6) In its application for rehearing, Discount raises 11 assignments of error. With respect to its first, second, third, fourth, and ninth assignments of error, Discount has based its application for rehearing on the merits of the Commission's decision in the 1700 proceeding. Much of the discussion on the remaining assignments of error also references the 1700 proceeding. The Commission's decision in the 1700 proceeding was appealed

by Cellnet which made the same argument that are raised here by Discount and that appeal was dismissed by the Ohio Supreme Court on September 20, 2000. The Commission has taken a light regulatory approach to Cellular since its inception in the mid-1980's. As such, Discount's arguments attacking the 1700 order are not timely and otherwise lack merit. Nevertheless, we will address many of these arguments.

- (7) Discount argues that the 1700 order is invalid because it adopted rule changes but was not approved by the Joint Committee on Agency Rule Review (JCARR), it was not filed with the Secretary of State, and it was not filed with the Legislative Service Commission (LSC). Discount argues that, in order to comply with Section 111.15, Revised Code, the Commission's rule-making activities that occurred in the 1700 order were subject to legislative review and would have applied prospectively only. Further, Discount claims that the Commission was aware that any decision in the 1700 order which altered the regulations previously enacted had to comply with the requirements contained in Section 111.15, Revised Code, because, in its initial entry commencing the case issued February 5, 1998, the Commission included in an appendix a proposed change in Section 4901:1, Ohio Administrative Code (O.A.C.), which is the document that would normally be submitted by the Commission to JCARR in order to codify any rule or rule change.
- (8) In its memorandum contra, Respondents claim that the Commission's determination to grant an exemption from the provisions of Chapters 4905 and 4909, Revised Code, does not constitute rule-making within the purview of Chapters 111 and 119, Revised Code. Therefore, the notice and filing requirements of these statutes are not applicable. Respondents also argue that Section 4927.03, Revised Code, does not require the Commission to exercise its alternative regulation authority through an administrative rule-making process. According to respondents, there is no requirement in Section 4927.03, Revised Code, to an administrative rule-making process as a prerequisite to the grant of alternative regulation. Respondents also contend that the appendix attached to the Commission's February 5, 1998 entry in the 1700 proceeding

only proves that the case was an exemption and not rule-making. The appendix was drafted by the wireless telephone industry as a proposed rule but not adopted by the Commission.

- (9) We find no merit to Discount's first assignment of error. As noted by respondents, the purpose of the 1700 proceeding was not a rule-making proceeding, but rather, a proceeding to investigate the extent to which the interim relaxed regulatory treatment provided to CMRS providers, should be modified or extended on a more permanent basis. *See: In the Matter of the Commission Investigation into Implementation of Section 4927.01 through 4927.05, Revised Code, as they relate to Competitive Telecommunication Services, Case No. 89-563-TP-COI (89-563).* As such, Section 4927.03, Revised Code, does not require the Commission to provide alternative regulatory authority through an administrative rule-making proceeding. Chapters 111 and 119, Revised Code, are inapplicable where there is no rulemaking.

In the 1700 proceeding, the Commission sought public and industry comments on a staff proposal that recommended that the then current exemption granted to CMRS providers offering service be continued on a permanent basis and that the then current certification process be replaced with a simple requirement to register with the Commission. As we noted, the development of competition that had been experienced led the Commission to conclude that the prior level of regulatory oversight of CMRS providers was no longer needed. In its December 16, 1999 finding and order in the 1700 proceeding, the Commission determined that, based on the development of competition within the CMRS market, even further relaxed regulatory treatment of CMRS providers was warranted. In that order, the Commission exempted CMRS providers from the requirement to file non-utility customer/end user contracts; determined that it was no longer necessary to require that CMRS providers continue to maintain structurally separate wholesale and resale operations and eliminated the requirement that CMRS providers maintain separate

wholesale and retail operations;¹ eliminated the requirement that CMRS providers maintain records of all transactions between their affiliated and unaffiliated customers for period of greater than 18 months; and determined that it was no longer necessary to apply Sections 4905.26, 4905.33, 4905.34, and 4905.35, Revised Code, to the CMRS wholesale market. Thus, having not conducted a rule-making in the 1700 proceeding, Chapters 111 and 119, Revised Code, approval by JCARR or a filing at LSC was not required. Further, the appendix to the Commission's February 5, 1998 entry in the 1700 proceeding was, as we stated in Finding (5) of that entry, a proposal prepared by the Wireless Industry Coalition and for which we sought comments. Because we were considering relaxing the regulatory requirements on the wireless industry, we thought it appropriate to seek comments on the industry's proposals including comments on the Coalition's proposal. Had the Commission proposed amended rules, it would have initiated a rule-making procedure and followed the procedures required for such a proceeding.

- (10) In its second assignment of error, Discount argues that the Commission erred because the 1700 order failed to comply with the requirements of Section 4927.03(D), Revised Code, to hold a hearing and that the Commission must provide public notice, have a comment period, and establish a factual record on which to base its findings. In its memorandum contra, respondents argue that Discount has misread and misrepresented the intent and language of Section 4927.03, Revised Code, and that the Commission has followed the notice and comment process required by Section 4927.03, Revised Code. Respondents also argue that the Commission's decision was supported by the record evidence.
- (11) We find no merit to Discount's second assignment of error. First, Section 4927.03, Revised Code, provides that, after notice, and after affording the public and any affected telephone company a period for comment, and after a hearing if it considers one necessary, the Commission may, by order, exempt any telephone company as to any public

¹ The Commission's orders in Case Nos. 84-944-TP-COI, 86-1144-TP-COI and 89-563 had required the mandatory separation of wholesale and retail entities.

telecommunications service except basic local exchange service from any provision of Chapters 4905 or 4909, Revised Code. In the 1700 proceeding, the Commission gave notice of the proceeding to affected entities and sought comments from the public and any affected telephone company. Thus, there is no merit to this assertion.

Section 4927.03(D), Revised Code, also provides, in part, that the Commission, after notice and hearing, may abrogate or modify any order granting an exemption or establishing alternative requirements if it determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest. This section has been historically read to apply only in those circumstances when the Commission seeks to rescind or eliminate regulatory relief that previously has been granted. In *In the Matter of the Application of Ameritech Ohio (Formerly Known as The Ohio Bell Telephone Company) for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, (Opinion and Order April 27, 2000), the Commission specifically addressed this argument and rejected it. "When Section 4927.03(D), Revised Code, is read in context, it is clear that the purpose of that section was not to require the Commission to hold a hearing every time we consider further alternative regulatory relief; rather, the intent was the Commission hold a hearing in the event that we were to abrogate or modify an exemption or alternative regulation such that regulatory relief previously granted to a telephone company, by the Commission, was being diminished or revoked."

We also find no merit to Discount's claim that the Commission's findings in the 1700 proceeding were not supported by the evidence. As we noted in the 1700 order, the record showed that the wholesale mobile wireless market had been transformed from the duopoly cellular market structure to one characterized by vigorous competition between multiple facilities-based carriers, including up to as many as nine facilities-based wireless carriers in each market area, including two cellular carriers, six PCS carriers, and one enhanced specialized mobile radio carrier. The evidence also showed that consumers in every major Ohio city, and in rural

areas, were able to choose from at least five facilities-based providers. That evidentiary record formed the basis for the Commission's decision and the Supreme Court upheld our decision in the 1700 proceeding.

- (12) Discount argues in its third assignment of error, that the 1700 order is invalid because it did not comply with Chapter 119, Revised Code, which requires that an agency must undertake specific efforts at notice and comment before seeking to modify or rescind a rule. We find no merit to this assignment of error. As we have noted previously, Section 4927.03, Revised Code, does not require that the Commission provide alternative regulatory authority through a rule-making proceeding. Section 4927.03, Revised Code, specifically provides that the Commission can provide alternative regulatory treatment without a hearing and upon its own initiative or application of a telephone company. Thus, the requirements set forth in Chapter 119, Revised Code, were inapplicable in the 1700 proceeding.
- (13) In its fourth assignment of error, Discount claims that the 1700 order was never codified in the O.A.C. and cannot be enforced. This assignment of error also should be rejected. As we have previously noted, there was no requirement that the 1700 order be codified as it was not a rule-making proceeding.
- (14) In its fifth assignment of error, Discount argues that rehearing should be granted because the Commission's decision violates the prohibition against retroactivity in Section 28, Article II of the Ohio Constitution. Discount argues that the Commission's decision eliminates its right to redress. Discount also claims that the Commission's decision to change the law that applied to respondents' conduct, eliminates any ability to redress for past wrongs, and violates the Ohio and federal prohibitions against retroactive legislation. In its memorandum contra, respondents claim that the Commission properly determined that it relinquished jurisdiction over any complaint filed against CMRS providers after the effective date of the 1700 order. That finding operated prospectively, in that it applied equally to all future cellular reseller complaints. According to respondents, when the Commission relinquished jurisdiction

over such complaints, it recognized that the continuation of state regulation was unnecessary and inconsistent with the competitive wireless market and the ongoing FCC oversight of wireless providers.

- (15) We find no merit to Discount's fifth assignment of error. Our decision to dismiss the complaint was based, in part, on our finding that it was no longer necessary to apply Sections 4905.26, 4905.33, 4905.34, and 4905.35, Revised Code, to the CMRS wholesale market. "The development of facilities-based competition in the Ohio CMRS markets has in our view, obviated the need for separate state oversight of resale requirements." Furthermore, as was noted, our findings in the 1700 proceeding operated prospectively by applying equally to all cellular reseller complaints filed after the 1700 order.

The development of competition that had been experienced led the Commission to conclude that the prior level of regulatory oversight of CMRS providers was no longer needed. In the 1700 order, the Commission determined, based on the development of competition within the CMRS market, that even further relaxed regulatory treatment of CMRS providers was warranted. In that order, the Commission exempted CMRS providers from certain requirements and eliminated other requirements. In that entry we also determined that, because the FCC would "...take effective and expeditious enforcement action against any carrier that fails to comply with its obligations under the resale rule", we saw no reason to duplicate efforts on the state level. Finally, we note that Section 4905.26, Revised Code, necessitates a finding by the Commission that there are reasonable grounds for the complaint, as a prerequisite to proceeding with such complaint. In this case, the Commission never made a finding that reasonable grounds existed for Discount's complaint.

- (16) In its sixth assignment of error, Discount argues that the Commission cannot transfer its complaint jurisdiction to allow the FCC to determine violations of Ohio law. Similarly, in its seventh assignment of error, Discount claims that the Commission is required by Section 4905.26, Revised Code, to hear complaints alleging violations of Ohio utility law. According to Discount, the complaint authority of the

Commission may be invoked to determine whether a practice is unjust, unreasonable, unjustly discriminatory, or unjustly preferential or in violation of law. Discount claims that the Commission has exclusive jurisdiction to determine such violations and cannot vest jurisdiction over to the FCC. Furthermore, Discount claims that the Commission must hold a hearing and render a substantive decision on the merits of Discount's complaint.

In its memorandum contra, respondents claim that, pursuant to Section 4927.03(A), Revised Code, the Commission is authorized to exempt any telephone company from any provision of Chapters 4905 and 4909, Revised Code. And the Commission was fully empowered to exempt telephone companies from the provisions of Section 4905.26, Revised Code. Further, respondents claim that the Commission did not transfer its authority to the FCC, but rather recognized that an appropriate remedy was in place with the FCC and that further regulation at the state level was contrary to state policy.

- (17) We find no merit to Discount's sixth and seventh assignments of error. As provided by Section 4905.26, Revised Code, the Commission must find reasonable grounds for the complaint prior to taking jurisdiction and, as we have previously stated, no such finding was made in this case. Furthermore, absent a finding of reasonable grounds there is no right to a hearing before the Commission. With regard to Discount's seventh assignment of error, we have previously addressed these arguments concerning the availability of redress by carriers such as Discount regarding claims of discrimination before the FCC.
- (18) In its eighth, tenth, and eleventh assignments of error, Discount claims that dismissing the complaint violates its guarantee of access to open courts found in the first, fifth and fourteenth amendments and due process clause of the Constitution, and there is no statute of limitations on complaints filed with the Commission. Discount argues that the Commission's entry also violates state and federal equal protection guarantees and state prohibitions against special privileges. Respondents argue that the Commission

determined that the development of facilities-based competition in Ohio eliminated any further need to apply Section 4905.26, Revised Code, to complaints brought against CMRS providers and that decision does not violate any of the miscellaneous constitutional provisions that Discount invokes. Further, respondents claim that Discount was not left without recourse as it was and able to file its complaint with the FCC.

- (19) We find no merit to this assignment of error. Our decision that Section 4905.26, Revised Code, was no longer applicable to complaints filed against CMRS providers did not violate Discount's constitutional guarantees as its substantive rights have not been impaired. The 1700 order spelled out that Discount had access to redress before the FCC if it so chooses. In addition, notwithstanding the constitutional arguments of Discount, for any complaint filed against a public utility, there must be reasonable grounds for the complaint, as set forth in Section 4905.26, Revised Code. As we have previously noted, in this case, there was never a finding by the Commission that there were reasonable grounds for the complaint.
- (20) In its ninth assignment of error, Discount claims that the Commission's entry violates equal protection guarantees. Discount also argues that the 1700 order specifically allowed another complaint case, *In the Matter of the Complaint of Westside Cellular, Inc., d.b.a. Cellnet v. GTE Mobilnet, et. al.*, Case No. 93-1758-TP-CSS (Cellnet) which contained the same allegations as are made in this case, to be adjudicated. Respondents claim that this argument was extensively briefed and properly rejected by the Commission. According to respondents, courts have repeatedly held that social or economic classifications are subject to the lowest level of constitutional scrutiny. And, as long as there are plausible reasons for differential treatment, a classification drawn by the government is not constitutionally impermissible.
- (21) In our decision, we allowed the Cellnet complaint to proceed as it had been in litigation for many years. As we noted,

In making the determination that the cellular resale complaints should be pursued at the FCC, the Commission specifically distinguished Cellnet

because, in part, it had already been pending before this Commission for six years. The 1700 order reflected that the order would apply on a prospective basis, meaning that all future cellular resale complaints were to be brought before the FCC."

Further, unlike Cellnet, Discount had not filed its complaint in 1993, but rather waited until 1999, to file its complaint. Finally, the 1993 Cellnet complaint pertained to a time when facilities-based competition in the CMRS market had not yet fully developed unlike the more competitive market the Commission was re-evaluating in the 1700 proceeding. Thus, Cellnet's unique status warranted the treatment given by the Commission.

It is, therefore,

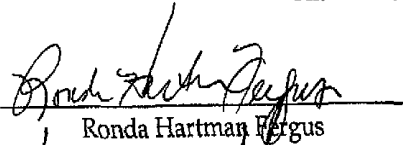
ORDERED, That Discount's application for rehearing be denied. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

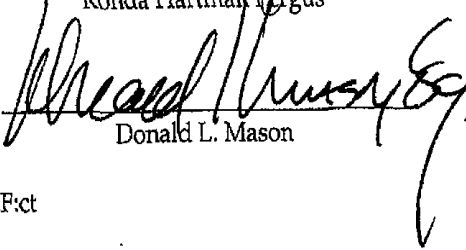


Alan R. Schriber, Chairman



Ronda Hartman Fergus

Judith A. Jones



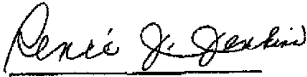
Donald L. Mason

Clarence D. Rogers, Jr.

SEF:ct

Entered in the Journal

SEP 28 2005



Renee J. Jenkins
Secretary