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FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Discount Cellular,	)	
	)	Case No. 04-236-RC-CSS
Complainant,	)	
	)	Hearing Examiner Scott Farkas
v.	)	
	)	
Ameritech Mobile Communications Inc. n.k.a. Cingular Wireless; Ameritech Mobile Communications, LLC; and Cincinnati SMSA Limited Partnership,	)	
	)	
Respondents.	)	

RESPONDENTS' MEMORANDUM CONTRA DISCOUNT CELLULAR'S APPLICATION FOR REHEARING

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I. Introduction

Respondents, Ameritech Mobile Communications, LLC and Cincinnati SMSA Limited Partnership (collectively, "Ameritech Mobile"), submit this Memorandum Contra to Discount Cellular's Application for Rehearing of the Commission's August 3, 2005 Entry ("August 3 Entry"). Each of the twelve grounds for rehearing raised by Discount Cellular lack merit and should be rejected. While Discount Cellular has taken a scattershot approach to rehearing that, among other things, reasserts rehearing arguments the Commission rejected more than five years ago in the 97-1700-TP-COI case[1], the Commission's key finding in the August 3 Entry remains undisturbed – from December 16, 1999 forward on a prospective basis, the Commission relinquished jurisdiction over complaints brought pursuant to R.C. § 4905.26 against CMRS providers. Because the August 3 Entry was reasonable and lawful, Discount Cellular's Application for Rehearing should be denied.[2]

II. Discount Cellular's First, Third and Fourth Rehearing Arguments Fail Because They Depend Upon the Incorrect Assumption that the Commission Engaged in Rulemaking When It Exempted CMRS Providers From the Provisions of R.C. § 4905.26.

The Commission issued the *1700 Order*[3] pursuant to special statutory authority authorizing it to grant exemptions from traditional regulatory requirements based upon findings of fact made following a notice and comment process. Although the Commission has adopted

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[1] In the Matter of the Commission Investigation Into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers, Case No. 97-1700-TP-COI, Entry on Rehearing (Feb. 24, 2000) ("*1700 Entry on Rehearing*").

[2] In addition to the failure of Discount Cellular's Application for Rehearing to state valid grounds for rehearing, the Application itself is in violation of Rule 4901-1-31(B) and should be stricken on this independent basis.

[3] In the Matter of the Commission Investigation Into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers, Case No. 97-1700-TP-COI, Finding and Order (December 16, 1999) ("*1700 Order*").

rules setting out the procedure pursuant to which a telephone company may seek alternative regulatory treatment,[4] the Commission's determination to grant a telephone company or companies an exemption from the provisions of Chapters 4905 and 4909 of the Revised Code does not constitute "rule making" within the purview of sections 115 and 119 of the Revised Code. Therefore, the Commission should reject Discount Cellular's claim that the Commission violated the notice and filing requirements of these statutes when it exempted CMRS providers from the provisions of R.C. § 4905.26 in 1999.

Although Discount Cellular argues that the *1700 Order* was not properly adopted as an administrative rule pursuant to R.C. 111 *et seq.* and R.C. 119 *et seq.*, it conspicuously fails to point out that R.C. § 4927.03 does not require the Commission to exercise its alternative regulation authority through an administrative rule-making process. Rather, the statute specifically provides that alternative regulation can be granted by the Commission without a hearing and "upon its own initiative or the application of a telephone company."[5] Alternative regulation of the sort granted in the *1700 Order* is an *exemption* from Chapter 4905 and 4909 and any rules issued thereunder; it is not an administrative rulemaking process. In fact, there is no requirement, language or even a reference in R.C. § 4927.03 to an administrative rulemaking process serving as a prerequisite to the grant of alternative regulation.

Remarkably, Discount Cellular's Application for Rehearing contains no explanation of why the *1700 Order* should be presumed to constitute a rule within the definition of R.C. § 111.15(A)(1) or R.C. § 119.01(C). Discount Cellular merely assumes that the Commission is

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[4] See, e.g., In the Matter of the Commission-Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies, Case No. 00-1532-TP-COI.

[5] R.C. § 4927.03(A)(1). See Stephens v. Pub. Util. Comm., 102 Ohio St. 3d 44, 47-48, 806 N.E.2d 527, 531 (2004).

subject to the provisions of R.C. § 111.15 and R.C. Chapter 119. Yet the Commission can only be subject to these provisions when it is engaged in rulemaking, and Discount Cellular makes no argument that the Commission was doing so here. In fact, Cellnet previously argued, when represented by the same lawyers now representing Discount Cellular, that "[b]y the very nature of what is required under Sec. 4927.03 Ohio Rev Code, the 1700 Case cannot be construed as a rulemaking . . . . This is because the authority to exempt telephone companies can only occur after the Commission has made findings of fact."[6] Ameritech Mobile agrees that an exemption issued following the findings required by R.C. § 4927.03(A) is not rulemaking.[7]

Discount Cellular's reliance upon Appendix B to the Commission's February 5, 1998 Entry in the 1700 Case (at p. 9 of the App. for Rehearing) simply proves that the end result of that case was an exemption, not rulemaking. The Appendix was a proposal by the Wireless Industry Coalition to establish an opt-out process by which CMRS provider could choose regulation under the Consumer Protection Act or this Commission. Because the proposal would establish an on-going regulatory process generally applicable to all CMRS providers, the Wireless Industry Coalition drafted it as a rule. However, in the end, the Commission chose simply to make findings of fact exempting CMRS providers from the provisions of R.C. § 4905.26 instead of further burdening CMRS providers with additional rules.

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[6] Westside Cellular, Inc. v. New Par, Case No. 02-2914-RC-CSS, Mem. Contra of Westside Cellular dba Cellnet to Respondents' Motion to Dismiss Complaint at p. 10 (Mar. 1, 2003).

[7] Discount Cellular's assertion that Cellnet's appeal from the *1700 Order* was dismissed because the Ohio Supreme Court "found" and "held" that the appeal was not ripe (App. for Rehearing at p. 3, fn. 1) is patently false, and Discount Cellular's legal counsel know it to be patently false. The Ohio Supreme Court did not make findings or issue a holding when it dismissed Cellnet's appeal from the *1700 Order*. To the contrary, as Discount Cellular's own lawyers wrote in a brief filed with this Commission on March 1, 2003, "[w]ithout explanation as to its reasons, the Supreme Court granted the Motion to Dismiss. Judgment Entry, September 20, 2000." Id. at p. 5. Such blatant misrepresentations made to this Commission are evidence not only of Discount Cellular's lack of credibility but also of the frivolous nature of its arguments.

R.C. § 111.15 and R.C. Chapter 119 did not apply to the Commission's exemption of CMRS providers from the provisions of R.C. § 4905.26.

III. Discount Cellular's Second Assignment of Error Misinterprets R.C. § 4927.03 By Inventing Phantom Duties Not Intended by the General Assembly.

A. The Notice and Hearing Provisions of R.C. § 4927.03(D) Do Not Apply.

The first part of Discount Cellular's second argument on rehearing (pages 10-15) is premised on an overly narrow and nonsensical reading of R.C. § 4927.03(D). In that section, the General Assembly intended to afford public utilities certain procedural protections against the harm and uncertainty that results when previously granted alternative regulation is diminished or revoked. Discount Cellular has misread and misrepresented both the plain language and clear intent of R.C. 4927.03(D) so as to burden the Commission with requirements that could not possibly apply in this case.

Notably, the Commission has addressed and rejected on more than one occasion the exact argument now made by Discount Cellular:

> We further disagree with the PAO that the notice and hearing provisions of Section 4927.03(D), Revised Code, are automatically triggered when an alternative regulation plan is altered in any way. As recently noted by the Commission in Case No. 97-1700-TP-COI, In the Matter of the Commission Investigation Into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers (Entry on Rehearing, February 24, 2000), we found that an interpretation of the statutory language, similar to the interpretation urged by the PAO herein, is contrary to both the language and the intent of the statute. 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 that 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.* This more comprehensive reading of Section 4927.03, Revised Code, is supported by the last sentence of Section 4927.03(D), Revised Code, which goes on to further limit the Commission's ability to take back regulatory relief by providing that "no such abrogation or modification shall be made more than eight years after the date an order granting an exemption or establishing alternative

requirements under this section was entered upon the commission's journal, unless the affected telephone company or companies consent."

> Read in the context of the rest of Chapter 4927, Revised Code, and, in particular, considering the policy of the state to "recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment", it makes no sense to conclude that the General Assembly intended that every succeeding progressive step that the Commission takes to modify the approved regulatory framework applied to telecommunications service provider would each require a hearing, especially when no hearing is required for the initial steps to deregulate such services. Concluding that the Commission could have reached this result in one step under Section 4927.03(A), Revised Code, without the requirement of a hearing, but cannot now reach the same result without a hearing, is illogical and reaches an absurd result that tends to negate the vitality and purpose of Section 4927.03(A), Revised Code.[8]

The most logical reading of R.C. 4927.03(D), and the one properly adopted by the Commission, is that it applies only in those circumstances when the Commission seeks to revoke or diminish previously granted regulatory relief.

Discount Cellular admits in its rehearing application that the *1700 Order* was much more than an abrogation or modification of the *563 Order*. Instead, according to Discount Cellular, "the Commission has gone from a scheme consisting of regulation of the wholesale CMRS market [the *563 Order*] *to the total deregulation of that market* [the *1700 Order*]." App. for Rehearing at 12 (emphasis added). This act of "total deregulation" can only have been accomplished through use of the Commission's exercise of its power under R.C. § 4927.03(A) to exempt any telephone company or companies from the provisions of Chapter 4905, including R.C. § 4905.26. Given that the *563 Order* did not address the Commission's complaint authority in any way, the *1700 Order*'s exemption of CMRS providers from the provisions of R.C. § 4905.26 was neither an abrogation nor a modification of the *563 Order*.

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[8] 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, 2000 Ohio PUC LEXIS 399, at *46-48 (Op. and Order April 27, 2000). See also *1700 Entry on Rehearing*, at pp. 4-5.

The Commission's decision to deregulate CMRS service in this proceeding because of rampant competition is easily contrasted with the process set forth in R.C. § 4927.03(D). For that provision to apply, the Commission would have had to determine that its previous findings in the *563 Order* of nascent competition in the CMRS market were no longer valid. Logically, such a finding is the first step of the procedure set forth in that section, which is then followed by a notice and hearing process so as to provide the Commission with evidence to make new findings as to what regulatory requirements should be imposed to promote the public interest.[9] Yet the Commission did not determine in the *1700 Order* that its findings were no longer valid. For example, the Commission noted in the *563 Order* that future deployment of PCS would render the two provider structure of the cellular industry a matter of no regulatory concern, and the Commission decided in the *1700 Order* that PCS deployment had in fact eliminated the need for further regulation of CMRS.[10] Instead of determining that the findings supporting the *563 Order* were invalid, the Commission found that by 1999 the forces of competition in the telecommunications industry had fully developed as anticipated and, thus, acted pursuant to R.C. § 4927.03(A) to deregulate CMRS.

Discount Cellular's reliance upon Ohio Bell Telephone Co. v. Pub. Util. Comm., 64 Ohio St. 3d 145, 593 N.E.2d 286 (1992), is surprising, given that its "plain language" test clearly supports the Commission's actions here. In that case, the Ohio Supreme Court determined that a hearing is a prerequisite to a utility rate change made pursuant to R.C. § 4905.26, as specifically required by that statute. In contrast, R.C. § 4927.03(A) does not require that the Commission

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[9] See R.C. 4927.03(D) ("if it determines that the findings upon which the order was based are no longer valid").

[10] Commission Investigation Into the Implementation of Sections 4927.01 Through 4927.05, Revised Code, as They Relate to Competitive Telecommunication Services, Case No. 89-563-TP-COI, Finding and Order at 21 n.1 (October 22, 1993) ("*563 Order*"); *1700 Order* at 17.

conduct a hearing as a prerequisite to exempting a telephone company from the provisions of Chapters 4905 and 4909.[11] Here, the plain language of R.C. § 4927.03(A) authorized the Commission's action taken in the *1700 Order*.

B. The Commission Followed the Notice and Comment Process Required by R.C. § 4927.03(A).

Section 4927.03(A) of the Revised Code establishes "a streamlined 'notice and comment' process" for granting exemptions.[12] In the 1700 Case, the Commission gave notice of the proceeding and the issues to be addressed and then afforded "the public and any affected telephone company"[13] a period for comment. Thus, the Commission should reject Discount Cellular's complaint at pages 15-17 of its Application that the Commission failed to follow the procedural requirements of R.C. § 4927.03(A).

The Commission issued its February 5, 1998 Entry inviting all interested stakeholders to submit comments on further deregulation of CMRS providers at a public meeting and made the entry publicly available. No further notice is required by law. Tellingly, Discount Cellular cites no legal precedent suggesting that the notice given by the Commission was legally insufficient, and it cannot do so. Nevertheless, the Commission went several steps further and provided personal service of the entry to those who had previously notified the Commission in Case No. 89-593-TP-COI that they were interested in alternative regulation of CTS. Among others, this included several resellers, the attorney for the Telecommunications Resellers Association, one of the attorneys representing Discount Cellular in this proceeding, the Consumers' Counsel, and

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[11] See Stephens, 102 Ohio St. 3d at 47-48, 806 N.E.2d at 531.

[12] Id. at 47, 806 N.E.2d at 531.

[13] R.C. § 4927.03(A)(1).

other representatives of the public. Thus, the Commission provided notice that was more than adequate under R.C. § 4927.03(A).

C. The Commission's Findings in the *1700 Order* Were Supported by Record Evidence.

Similarly, Discount Cellular's complaint regarding the alleged lack of a "factual record" (pages 17-23 of the App. for Rehearing) fails to account for the streamlined notice and comment process authorized by statute and applicable here. Discount Cellular's reliance upon decisions involving adjudicatory hearings is simply misplaced. As is its reliance upon Tongren v. Pub. Util. Comm., 85 Ohio St. 3d 87, 706 N.E.2d 1255 (1988), in which the Ohio Supreme Court remanded two Commission orders because the Commission's findings were based on a staff report and work papers that were not made part of the record.[14] In contrast to the Tongren case, the Commission's findings that burgeoning competition in the CMRS market in Ohio eliminated any further need for regulation are based on facts contained in the record.[15] One must ignore the *1700 Order* itself in order to claim, as does Discount Cellular, that the *1700 Order* lacked record support.

The Ohio Supreme Court has made clear, in a case Discount Cellular overlooks, that R.C. § 4927.03(A)'s notice and comment process "necessarily does not involve an adversarial evidentiary hearing and it does not contemplate receiving all information in the form of sworn testimony or hearing exhibits. On the contrary, it simply requires comments by interested

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[14] This failing was corrected on remand when the staff filed a report of its findings and recommendations, as well as its work papers, thereby causing OCC to drop its objection. See In the Matter of the Application of The East Ohio Gas Company and West Ohio Gas Company for Authority to Merge, Case No. 96-991-GA-UNC, Entry at p. 4 (Oct. 12, 2000).

[15] See *1700 Order* at pp. 6-13 (summarizing comments of seventeen entities, including the Telecommunications Resellers Association) and at pp. 14-22 (making specific findings to support further deregulation of CMRS providers).

parties."[16] Complaints regarding the lack of evidence and quality of evidence in the record, such as those raised by Discount Cellular at pages 20-23 of its Application for Rehearing and by the Interim Consumers' Counsel in the *Stephens* case, are "evidentiary arguments" that simply "deal with the propriety, adequacy, and weight of the evidence supporting the commission's decisions."[17] Such arguments are not a basis to invalidate the Commission's well-considered *1700 Order*.

Pursuant to R.C. § 4927.03(A), in order to exempt CMRS providers from the provisions of R.C. § 4905.26, the Commission was required to find, following notice and comment, either that CMRS providers were subject to competition with respect to CMRS or that customers of CMRS have reasonably available alternatives. The Commission determined that both conditions existed.[18] The analysis necessary to reach this conclusion was quite simple, given the circumstances of the CMRS market – the duopoly present in the early 1990s had given way to "vigorous competition" between multiple facilities-based carriers (cellular, PCS, and SMR) and resellers.[19] Given the plain and overwhelming evidence of this vigorous competition, a detailed analysis of market power studies was unnecessary, as has been confirmed by the events of the last six years. Only one with an obvious bias toward reseller companies could conceivably argue that the Commission's further deregulation of CMRS providers was not solidly grounded in fact.

Although Discount Cellular seeks to limit the Commission's review to "wholesale service," which presumably means only those transactions occurring between CMRS providers and resellers of CMRS service, the relevant market is the public telecommunications service sold

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[16] Stephens, 102 Ohio St. 3d at 47-48, 806 N.E.2d at 531.

[17] Id. at 49, 806 N.E.2d at 532.

[18] *1700 Order* at pp. 15-16.

[19] Id. at p. 15.

by facilities-based CMRS providers (*i.e.*, the "telephone companies" subject to R.C. § 4927.03). Ameritech Mobile's telecommunications service was made available to all consumers, including, but not limited to, resellers. Resellers did receive special protections from the FCC and this Commission during the 1990s, but the purpose of those protections was to promote diversity and options for end users while the CMRS market moved from a duopoly to vibrant facilities-based competition. Once that competition was in place and benefiting all CMRS consumers, the special treatment of resellers was no longer necessary. The Commission acted reasonably and lawfully in exempting CMRS providers from the provisions of R.C. § 4905.26.

IV. The Commission's Exemption of Ameritech Mobile from the Statutory Complaint Authority of the Commission Was Reasonable and Lawful.

A. Discount Cellular's Sixth and Seventh Assignments of Error Directly Conflict with Ohio Law Authorizing the Commission to Defer to Competitive Forces When In the Public Interest.

Discount Cellular argues at pages 30 to 33 of its Application that the Commission (1) has no authority to cease reviewing complaints filed under R.C. § 4905.26, and (2) cannot transfer its complaint authority to the FCC. As to the first point, the plain language of R.C. § 4927.03(A) authorizes the Commission to exempt any telephone company, such as Ameritech Mobile, "from any provision of Chapter 4905. or 4909. of the Revised Code."[20] Notably, the General Assembly specifically excluded R.C. § 4905.26 from the streamlined alternative regulation process available to small telephone companies under R.C. § 4927.04(B). In contrast, no such exclusion exists in R.C. § 4927.03(A). Accordingly, as the Commission recognized in the *1700 Order*, the Commission was fully empowered to exempt telephone companies under R.C. § 4927.03(A) from the provisions of R.C. § 4905.26.

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[20] R.C. § 4927.03(A) (emphasis added).

Although Discount Cellular argues that the *1700 Order* "did not purport to affect" the statutory complaint authority of the Commission, this ignores the plain language of the *1700 Order* itself. At page 17 of the *1700 Order*, the Commission specifically determined that the development of facilities-based competition in Ohio had eliminated any further need to apply R.C. § 4905.26 – which is the basis for the Commission's complaint authority – to complaints against CMRS providers. The Commission acted reasonably and lawfully in making this finding.

As to Discount Cellular's second point, the Commission did not "transfer its authority to the FCC." To the contrary, the Commission determined that one of the regulatory tools available to it for controlling the behavior of traditional public utilities – hearing discrimination complaints – was outdated and unnecessary given the competitive environment that had existed for several years in the CMRS market. The Commission simply noted that resellers were not deprived of any remedy for the alleged discriminatory conduct of a CMRS provider because the FCC had promised to take effective and expeditious action against any CMRS provider found violating its resale rule. Although further regulation at the state level was foreclosed as contrary to state policy, resellers with legitimate claims could pursue relief consistent with federal policy.

The special statutory remedies afforded by Chapter 4905 of the Revised Code exist only to benefit the public interest by regulating public utilities when market forces are deemed less effective. When the determination is made that market forces will be more efficient, those remedies must fall away so that the state can fulfill its policies of maintaining just and reasonable rates, encouraging innovation, and promoting diversity and options in the supply of telecommunications services.[21] As a result, the Commission acted reasonably and lawfully when

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[21] R.C. § 4927.02(A).

it refused to hear, on a prospective basis, opportunistic claims dependent solely upon an outdated and counterproductive regulatory scheme that had lacked relevance for many years.

B. Discount Cellular's Miscellaneous Constitutional Arguments Are Meritless And Provide No Grounds For Rehearing.

Discount Cellular next raises a series of largely incomprehensible constitutional arguments in support of its rehearing request. These arguments also are completely baseless.

1. Discount Cellular's eighth and eleventh rehearing arguments fail to describe any conduct rising to the level of a constitutional violation.

Discount Cellular argues in its Eighth and Eleventh Assignments of Error that dismissing its complaint violates constitutional guarantees of open courts, due process, and the right to petition the government for redress of grievances. But these arguments are nothing more than a gloss on Discount Cellular's worn-out argument, addressed extensively in the motion to dismiss briefing, that the Commission cannot use its alternative regulation authority to exempt CMRS providers from the provisions of R.C. § 4905.26 on a prospective basis.[22] The Commission properly rejected this argument and there is no reason to revisit the issue on rehearing.

Exercising authority specifically given to it by the General Assembly,[23] the Commission determined that the development of facilities-based competition in Ohio eliminated any further need to apply R.C. 4905.26 to complaints brought against CMRS providers. That decision does not violate any of the miscellaneous constitutional provisions that Discount Cellular invokes, because Discount Cellular's substantive rights have not been impaired.[24] Nor was Discount

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[22] Discount Cellular's Mot. to File Surreply Br. at 5-7 (Jan. 18, 2005).

[23] R.C. § 4927.03.

[24] See Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (applying a statute that eliminates jurisdiction "is not [a] retroactive application affecting substantive rights, but is a prospective application of a jurisdiction-eliminating statute"); State ex rel. Michaels v. Morse, 165 Ohio. St. 599, 605-06, 138 N.E.2d 660 (1956) ("A party has no vested right in the forms of administering justice that preclude the Legislature from altering or modifying them and better adapting them to effect their ends and objects.").

Cellular left "without recourse," as it suggests in its Application for Rehearing. To the contrary, the *1700 Order* expressly reminded all resellers of the FCC's reseller nondiscrimination rule, emphasizing that the FCC provided an appropriate forum for resolving reseller-related complaints.[25] If Discount Cellular actually believed that Ameritech Mobile had discriminated against it in 1999 and earlier years, the doors of the FCC remained opened to it. There is no constitutional right to duplicative state and federal regulation.

2. Discount Cellular's ninth rehearing argument fails because the Commission had a reasonable basis for excepting Cellnet's complaint from its prospective termination of jurisdiction.

Discount Cellular also argues that the *1700 Order* violates constitutional equal protection and due process guarantees because the order allowed Cellnet alone to invoke the Commission's complaint authority and therefore allegedly "treats similarly situated people in a dissimilar manner."[26] That argument also provides no basis for rehearing.

The factual predicate for this argument – that Discount Cellular was similarly situated to Cellnet – was extensively briefed[27] and properly rejected by the Commission when it granted Ameritech Mobile's motion to dismiss. Moreover, Discount Cellular's argument is constitutionally baseless. Courts have repeatedly held that social or economic classifications are subject to the lowest level of constitutional scrutiny. If a statutory classification "has some 'reasonable basis,'" it does not violate equal protection guarantees.[28] Likewise, a statutory scheme need only bear a rational relation to a constitutionally permissible objective in order to

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[25] See *1700 Order* at 17.

[26] Discount Cellular's Application for Reh'g at 34.

[27] See, e.g., Ameritech Mobile's Reply to Complainant's Memorandum Contra Motion to Dismiss, at 2.

[28] Dandridge v. Williams, 397 U.S. 471 (1970) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)); see also Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) ("it is only 'invidious discrimination' [that] offends the Constitution") (quoting Williamson v. Lee Optical Co., 348 U.S. 483, 4888-89 (1955)).

satisfy the requirements of due process.[29] As long as there are plausible reasons for differential treatment, a classification drawn by the government is not constitutionally impermissible.[30]

Here, the Commission's decision to single out Cellnet for special treatment based on its pending complaint was plainly reasonable. It is one thing for the Commission to refer all *new* complaints to the FCC.[31] It would be something altogether different for it to direct Cellnet, after years of hard-fought litigation, to seek relief from the FCC. Unlike Cellnet, Discount Cellular cannot claim, and has not claimed, that it filed a complaint against Ameritech Mobile in 1993 or that it invested substantial time and expense on its complaint prior to the date of the *1700 Order*. By exempting the only complaint "currently pending before the Commission," the Commission made clear that Cellnet was uniquely situated and reasonably determined that it alone would be allowed to adjudicate before the Commission, as opposed to the FCC.

V. Discount Cellular's Fifth, Tenth and Twelfth Rehearing Arguments Provide No Grounds for Rehearing As They Already Have Been Argued and Rejected.

Discount Cellular raises no new issues for consideration on rehearing in its remaining assignments of error. Discount Cellular cannot rewrite the plain language of the *1700 Order* by claiming now that the Commission is reading its own order incorrectly. The Commission properly determined in its August 3 Entry that it relinquished jurisdiction over any complaint filed against CMRS providers after the effective date of the *1700 Order* – December 16, 1999. This finding operated prospectively, in that it applied equally to all future cellular reseller complaints. Thus, the Commission correctly rejected Discount Cellular's erroneous reliance upon legal principles governing retroactive legislation.

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[29] Williamson, 348 U.S. at 491.

[30] See, e.g., United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 175-79 (1981).

[31] See *1700 Order* at 17.

When the Commission relinquished jurisdiction over complaints brought against CMRS providers, 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.[32] As was fully briefed earlier in this proceeding, statutes or regulations that eliminate or grant jurisdiction apply to any complaint filed after the effective date of the statute or regulation, regardless of when the conduct complained of occurred.[33] When jurisdiction is altered "the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute . . . to prevent any judicial action after the statute takes effect is applying it prospectively."[34] The impact is "prospective" even if it may affect a litigant's substantive right under the general rule cited by Discount Cellular.[35] Thus, the *1700 Order* does apply prospectively, as noted by the Commission therein, by preventing the Commission from exercising its complaint authority over any claims filed after the effective date of the order.[36]

The Commission correctly found in its August 3 Entry that its exemption in the *1700 Order* of CMRS providers from the provisions of R.C. § 4905.26 effectively terminated its jurisdiction over Discount Cellular's complaint, which was filed several years after December 16, 1999.

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[32] *1700 Order* at 17-18.

[33] See Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (noting the "consistent practice" of regularly applying intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed).

[34] Id. at 293 (Scalia, J., concurring).

[35] Id. at 292-93. See Discount Cellular App. for Rehearing, pp. 28-30.

[36] See *1700 Order* at 18.

VI. Conclusion

For the reasons set forth above, Ameritech Mobile requests that the Commission deny Discount Cellular's Application for Rehearing.

Respectfully submitted,

James F. Lang by [signature] per consent

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CERTIFICATE OF SERVICE

The foregoing Respondents' Memorandum Contra Discount Cellular's Application For Rehearing was served via regular U.S. Mail, postage pre-paid, this 12th day of September, 2005, upon the following:

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