# BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's )

Investigation into Intrastate Carrier Access ) Case No. 10-2387-TP-COI

Reform Pursuant to S. B. 162. )

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**AT&T'S MEMORANDUM IN OPPOSITION TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S APPLICATION FOR REHEARING**

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# **Introduction**

The AT&T Entities[[1]](#footnote-1) ("AT&T"), by their counsel, hereby submit their Memorandum in Opposition to the Application for Rehearing filed by Ohio Consumers' Counsel ("OCC") on March 25, 2011. OCC seeks rehearing of the Commission's Entry, dated February 23, 2011, asserting that the Entry was unjust, unreasonable and unlawful for the following reasons: 1) not delaying this case pending the Federal Communications Commission's ("FCC") Notice of Proposed Rulemaking ("NPRM") addressing intercarrier compensation; 2) again not ordering a hearing in this case; 3) not establishing an inadequate (sic) discovery period and not (sic) declaring that any discovery will be on submitted data; 4) not establishing an adequate comment period; and 5) again not granting OCC's Motion to Intervene. OCC's application for rehearing should be denied.

The public policy goals and consumer benefits to be achieved in this case are a result of the enactment of Sub. S.B. 162, which became effective September 13, 2010. To implement this legislative policy, the Commission initiated this docket by an Entry issued on November 3, 2010, setting forth a procedure to gain stakeholder and interested parties' input on the staff's access restructuring plan. On December 3, 2010, OCC filed its **first** application for rehearing of the initial Entry. On December 8, 2010, the Commission issued an Entry addressing OCC's request for intervention, hearing, and other procedural motions. OCC, alleging a number of continuing errors such as lack of hearing, lack of discovery and not granting OCC intervention, filed a **second** application for rehearing on January 7, 2011. On February 23, the Commission further expounded on the procedural framework for discovery and the filing of supplemental comment and reply comments by interested entities. In order to "advance" their goal, OCC filed a **third** application for rehearing.

 OCC's goals are counterproductive and in conflict with the clear pro-consumer public policy in Ohio. OCC's aim is to significantly delay the access reform restructuring authorized by the Legislature in Sub. S. B. 162 and initiated by the Commission in its November 3, 2010 Entry. OCC's tactics undermine the Commission's objective, which is straightforward: to establish a **framework** pursuant to Sub. S.B. 162 to enable access reform in a **timely** manner, which includes a comprehensive integrated discovery and supplemental comment cycle for interested parties. Expanding and/or delaying this proceeding any further serves no valid purpose.

 The mirroring of interstate and intrastate access charges is not a novel idea. Indeed, it seems that OCC has lost sight of the fact that the PUCO established the policy of mirroring over 24 years ago in its original access charge proceeding:

"effective May 1, 1987, each LEC for intrastate purposes shall adopt access charges which are either at or below its interstate rates in effect on the date ofthis Order, except that there will be no end-user charges." (Case No. 83-464, 3/12/87, p. 9).

While the interstate/intrastate mirror was "broken" because of FCC action in 1998 (i.e., moving revenue from Local Switching DEM Weighting into the Federal USF), the four largest ILECs' (AT&T Ohio, Cincinnati Bell, the former Verizon, and the former Embarq) intrastate switched access rates have mirrored their interstate rates for many years. Four "medium-sized" ILECs (Windstream Western Reserve, Windstream Ohio, the former CenturyTel, and Chillicothe) have mirrored Traffic Sensitive rates for years. Sub. S. B. 162 enables the Commission to reestablish interstate and intrastate parity – in a revenue neutral manner – on a state-wide basis, and thus re-attaining its 24-year old policy. The staff's proposal should be viewed in this context, and not in the manner propounded by OCC.

# **The FCC's *2011 NPRM* Is A Call To Action, Not An Excuse For Inaction**

OCC asserts that the Commission erred by proceeding with this docket given the pendency of the FCC's 289-page NPRM. (OCC at 6, citing FCC 11-13, released February 9, 2011) OCC believes that this docket should be held in abeyance pending further developments at the FCC. OCC lists various issues that the FCC seeks comment on, specifically mentioning a few that are being currently addressed by this Commission. OCC at 6. OCC attempts to support its position by citing to time and resources of the Commission and the parties, and speculates that the Commission's efforts in this docket may be "mooted" based on a potential future FCC action. (OCC at 7) OCC's assignment of error should be denied.

Yes, the FCC has just issued a notice of *proposed* rulemaking saying that access charges are a significant problem and that something needs to be done. The FCC's discussion of intercarrier compensation ("ICC"), and particularly intrastate switched access charges, confirms everything the AT&T Entities have advocated in this proceeding and supports the Commission continuing to proceed with this case and reform intrastate access charges without further delay.

 OCC makes the untenable suggestion that this Commission should *do nothing*. And that is where OCC is wrong. The FCC's notice is simply another reason why this Commission should act – and act now – not an excuse for still more inaction and delay. Indeed, the *2011 NPRM* expressly solicits up-to-date information on the progress of state reforms, along with comments on how to encourage the states that adopt reforms and avoid rewarding states that lag behind. *2011 NPRM*, ¶¶ 543-44. Further, the FCC made a point of singling out intrastate rates as the biggest problem, stating the "general industry sentiment that intrastate rates should be reduced first because they are the highest, and because eliminating the discrepancy between intrastate and interstate access charges could reduce arbitrage." *Id*. ¶ 552. The FCC certainly did not mean to stall state *action* to reduce those intrastate rates, as OCC apparently prefers. Just the opposite, the FCC's concern is that "*lack of action*" by a state "could frustrate our national goals." *Id*. ¶ 548 (emphasis added).

It is beyond dispute that the intrastate access regime is broken. The choice before the Commission is simple: either (1) do nothing, continue to lag behind the FCC (which adopted partial reforms for interstate rates over a decade ago) and over 20 states (which have tracked the FCC's reforms), and remain part of the problem, or (2) continue to move forward with the access reform initiative it has already set in motion in response to Sub. S. B. 162. Or, put another way, the Commission can sit back and watch some of the LECs continue to devour implicit subsidies of high access charges that harm consumers and hinder this country's broadband future, or it can give consumers meaningful relief that is long overdue. Regardless, the answer is obvious. The Commission should accordingly continue to move forward.

The Commission's framework in this case is a simple and straightforward step that will bring meaningful and long-overdue relief to Ohio's consumers. Timely relief can be obtained if the Commission adopts the proposed changes to the Staff's framework suggested by the AT&T Entities in their initial comments. If and when the FCC does move forward on its own with respect to intrastate rates, *this* state would be in a better position, because it will simply have taken the same first step the FCC already took a decade ago and expects the states to take now, putting it in perfect alignment with the FCC if and when the FCC's next steps do come.

As stated in the FCC's 2011 NPRM, action on intrastate rates is expected to be the first step that the FCC anticipates states will take as part of its national plan. The latest NPRM is simply one of some 60 separate rulemakings under the *Connect America* umbrella, and many of those rulemakings began well before the one on intercarrier compensation. Even in the intercarrier rulemaking, the FCC's first priority is a series of stop-the-bleeding initiatives for the federal universal service fund and to curb arbitrage in the *inter*state arena. *2011 NPRM*, ¶¶ 162-388, 603-677. If and when the FCC ever does turn to access charges, the FCC's "first option" will be to rely "on the existing roles played by the states and the Commission with respect to regulation of rates." *Id*. ¶ 537. In other words, the FCC would look only to reforms of rates for interstate traffic, while "[s]tates would otherwise continue to be responsible for reforming intrastate access charges." *Id*. ¶ 534. So if OCC's do-nothing preference prevails, it is quite likely this Commission will spend years waiting for the FCC, only to hear the FCC say "we're waiting for *you*."[[2]](#footnote-2)

 Finally, OCC takes the absurd position that the FCC's *2011 NPRM* somehow endorses or excuses the states that do nothing about the "broken" regime of intrastate switched access charges. The FCC's actual words compel the opposite conclusion. The FCC is fully aware that some states "have undertaken intrastate access charge reform measures," including the interstate-intrastate parity approach that *this* Commission has adopted. *2011 NPRM*, ¶ 543 & nn. 816, 819. Far from disapproving of such measures, the *2011 NPRM* "seek[s] comment on what steps the Commission should take to *encourage* states to reduce intrastate intercarrier compensation rates and how we could do so *without* penalizing states that have already begun" to reform intrastate rates. *Id*. ¶ 544 (emphasis added). The FCC has even proposed that states that have adopted meaningful access reforms would be first in line (or perhaps the only states in line) for the first phase of federal broadband funds, and has "request[ed] accurate information concerning the status of intrastate access state reform activity to determine which states" have implemented enough reform to qualify for federal funds. *Id*. ¶ 544 & n.819.

Just as the FCC is seeking to encourage state *action*, it offers no support for state *inaction*. The *2011 NPRM* (¶ 544) seeks comment on how to encourage reform "without . . . rewarding states that have not yet engaged in reform." Its principal concern is that "lack of action" by the states on intrastate rates "could frustrate our national goals associated with intercarrier compensation reform." *Id*. ¶ 548. No one could read the *2011 NPRM* as endorsing the do-nothing approach that OCC advocates here. The Commission did not err by failing to bring to a halt its practical and meaningful effort for access reform. OCC's request for rehearing should be denied.

# **A Hearing in this Proceeding Would Unnecessarily Delay and Undermine the Commission's Objectives**

OCC argues that the ILECs' assertions must be subject to a review at a hearing, including cross-examination, especially given the inter-company support mechanism that is now being proposed. (OCC at 8) OCC's arguments are baseless. The financial impact of access charge reductions for those carriers whose access rates are decreased is not needed to evaluate the parameters of the proposed Plan. The revenue neutrality component of the Plan, as mandated by Sub. S. B. 162, negates the need for financial analysis. Accordingly, the Commission does not need to conduct a formal hearing or assess detailed financial impacts to make the necessary determinations to comply with the statutory mandate. Hearings would indefinitely and unreasonably delay these long overdue proceedings, contrary to the legislative intent. The Commission should not fall prey to this delay tactic. OCC will not be prejudiced by any determinations made by the Commission in this case outside of a hearing.

# **The Commission's Procedural Framework Provides for Ample and Adequate Discovery and Sufficient Time for Filing Comments**

There is no basis to grant OCC's other request to modify the procedural schedule. OCC seeks to extend the one month long discovery window by "eliminating the ending date." (OCC at 10) Again, OCC is seeking to transform this docket from the access restructuring plan envisioned by the Commission staff into a lengthy and unnecessarily complicated proceeding. With the data requested and the knowledge and experience of its staff, the Commission would be able to ensure the revenue neutrality required by Sub. S.B. 162 without the further delay of additional unnecessary data gathering.

OCC, in its third assignment of error, takes issue with the limitation of discovery on "the submitted data." (OCC at 11) OCC's real challenge here is to the revenue neutrality component of the legislation. This case is not about profitability. Rather, it is about ensuring revenue neutrality given the prospective rate changes. OCC believes that the Commission needs to lift the restriction in order to assist in preparing its "findings of fact and written opinions under R.C. 4903.09." (OCC at 12) This is not the forum to challenge the legislation. Revenue neutrality was mandated by Sub. S.B. 162. OCC takes the time to highlight the Supreme Court's position that discovery may be had "of any matter, not privileged, which is relevant to the subject matter of the proceeding." (OCC at 11) The Commission determined what the subject matter of the proceeding is and, therefore, can readily determine what is relevant. Again, the Commission has set forth a very straightforward procedural framework. The Commission has met its statutory duty under R.C. Section 4903.082 and has provided "ample rights of discovery."

OCC's fourth assignment of error is the time frame allowed for comments, due to the amount of data submitted. (OCC at 12) OCC's latest attempt to further delay this docket must be rejected. OCC must limit its efforts to the revenue neutrality mandate of Sub. S. B. 162. The timeframes established by the Commission are reasonable if OCC would limit its inquiry to revenue neutrality. The Commission has considered and is aware of all aspects that an expedited time frame causes on participating entities. OCC is not harmed or prejudiced, as it is not treated any differently than any other participant.

OCC's final assignment of error is the Commission's failing to grant OCC's motion to intervene. (OCC at13) As stated earlier in this proceeding, while it is not necessary to be granted intervention in this proceeding in order to participate, the AT&T Entities do not oppose OCC's request for intervention.

# **Conclusion**

OCC's underlying complaint in this case is the revenue neutrality aspect of the legislation. OCC seeks to expand the Commission's objective far beyond the revenue neutrality limitation which would cause unnecessary and unreasonable delay in achieving the public policy goals and consumer benefits in this case as a result of Sub. S.B. 162. Ten years has lapsed since the Commission reestablished its 24-year old mirroring policy for the four largest ILECs. It is high time for the Commission to extend that policy to the remaining ILECs. For the foregoing reasons, the AT&T Entities urge the Commission to deny OCC's third Application for Rehearing.

Respectfully submitted,

 The AT&T Entities

 \_\_\_\_\_\_/s/ Mary Ryan Fenlon\_\_\_\_\_\_\_\_\_\_\_\_

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1. The AT&T Entities are The Ohio Bell Telephone Company d/b/a AT&T Ohio, AT&T Communications of Ohio, Inc., TCG Ohio, SBC Long Distance d/b/a AT&T Long Distance, SNET America, Inc. d/b/a AT&T Long Distance East, AT&T Corp. d/b/a AT&T Advanced Solutions, Cincinnati SMSA, L.P., and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility. [↑](#footnote-ref-1)
2. Even if the FCC does decide that it should tackle intrastate access rates, it has acknowledged the "risk of litigation and disputes" over its legal authority to regulate intrastate charges, which could lead to further delay and uncertainty. *2011 NPRM*, ¶ 537. Thus, the FCC has acknowledged that allowing the states to handle rates within their long-established jurisdiction would minimize litigation risk and "provid[e] greater stability regarding the reform." *Id*. [↑](#footnote-ref-2)