

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of United)
Telephone Company of Ohio d/b/a Embarq) Case No. 08-1118-TP-WVR
for an Out-of-Service Grace Period under)
the Minimum Telephone Service Standards.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In order to ensure that Ohio residential telephone consumers receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC"), an intervenor on behalf of residential telephone customers,¹ files this application for rehearing of the Opinion and Order ("Order") that the Public Utilities Commission of Ohio ("Commission" or "PUCO") journalized on April 1, 2009 in this proceeding. In the Order, the Commission granted in part an application filed by United Telephone Company of Ohio d/b/a Embarq ("Embarq") that could allow Embarq to avoid paying customer credits for service outages as required by the PUCO's Minimum Telephone Service Standards ("MTSS").²

OCC files this Application for Rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The Order is unreasonable and unlawful for the following reasons:

1. The PUCO erred by granting Embarq a "grace period" for the Kidron exchange on September 16, 2008, even though Embarq did not have enough trouble reports in the Kidron exchange on that day to meet the requirements of Ohio Adm. Code 4901:1-5-08(D)(2) ("Rule 8(D)(2)").

¹ OCC was granted intervention in this proceeding by Entry dated November 6, 2008, at 3.

² Application (September 24, 2008).

2. The PUCO erred by granting Embarq a “grace period” for the Fredericktown and Holmesville exchanges for days where the trouble reports do not appear to be related to an extreme, unique, or unforeseeable weather-related incident, as required by Ohio Adm. Code 4901:1-5-08(D) (“Rule 8(D)”).
3. The PUCO erred by granting Embarq a “grace period” for the Chesterville exchange for September 15, 2008, even though the exchange did not have a 300% increase in trouble reports over the three-year average for September on that day, as required by Ohio Adm. Code 4901:1-5-08(D)(1)(a) (“Rule 8(D)(1)(a)”).

The reasons for granting OCC’s motion are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The MTSS require local exchange carriers (“LECs”) to provide credits to customers whose service is out more than 72 hours or if the LEC fails to keep a repair commitment or repair appointment with a customer.³ A LEC may seek to add 48 hours to the timeframes for calculating these customer credits if, “due to an extreme, unique, or unforeseeable weather-related incident,”⁴ either of two conditions exists: the LEC experienced at least a 300% increase in out-of-service reports as compared to the average number of out-of-service reports in the exchange for the same month during the three previous years,⁵ or the governor or a duly authorized official for the county in which the exchange is located declared a state of emergency.⁶ In addition, an exchange must have at least eleven daily out-of-service reports to be eligible for a “grace period.”⁷ A “grace period” could have the effect of eliminating credits for which customers, who had to endure service outages during the period in question, would be eligible under the MTSS.

³ Ohio Adm. Code 4901:1-5-08(C)(1) and (C)(2).

⁴ Rule 8(D) (emphasis added).

⁵ Rule 8(D)(1)(a).

⁶ Ohio Adm. Code 4901:1-5-08(D)(1)(b) (“Rule 8(D)(1)(b)”).

⁷ Rule 8(D)(2).

In its Application, Embarq sought a “grace period” under Rule 8(D)(1)(b) to avoid paying customer credits for outages that occurred between September 15 and 19, 2008. Embarq cited Governor Strickland’s declaration of a state of emergency for Ohio due to a windstorm that occurred in the state on September 14.⁸ In a supplemental filing, Embarq identified 55 exchanges that were covered by the Application.⁹

OCC filed comments and reply comments showing that Embarq did not meet Rule 8(D)(1)(b) on several days during the September 15-19 period in many exchanges.¹⁰ OCC urged the Commission to deny a “grace period” for the Glouster and Holmesville exchanges, and to approve, at most, a limited “grace period” in the other exchanges.¹¹

In the Order, the Commission applied both Rules 8(D)(1)(a) and 8(D)(1)(b) to the Application, although Embarq had sought a “grace period” only under Rule 8(D)(1)(b). The PUCO applied Rule 8(D)(1)(b) to the outages that occurred on September 14, and Rule 8(D)(1)(a) to the outages that occurred during September 15-19.¹²

As discussed in the Order, the Commission granted Embarq a “grace period” to avoid paying customer credits for the following exchanges and days:

- ▶ September 14: Greenville.
- ▶ September 14 and 15: Mansfield.
- ▶ September 14-16: Lebanon, Mason, Morrow, Warren and Wooster.

⁸ Application at 1.

⁹ See Embarq’s Supplemental Waiver Information (October 24, 2008) (“Supplement”) at 2.

¹⁰ On November 13, 2008, OCC filed Comments on the Application and the Supplement (“November 13 Comments”). After Embarq filed a Response on November 24, 2008, OCC filed reply comments on December 8, 2008. On March 30, 2009, OCC filed Comments regarding additional information that Embarq docketed on March 24, 2009, in response to a PUCO Staff data request (“March 30 Comments”). Because the Application specifically mentioned only Rule 8(D)(1)(b), OCC did not address the merits of the Application regarding Rule 8(D)(1)(a).

¹¹ See March 30 Comments at 10-11.

¹² Order at 4-5.

- ▶ September 14-17: Centerburg.
- ▶ September 14-18: Mount Vernon.
- ▶ September 15: Alexandria, Bartlett, Berlin Center, Bradford, Cardington, Chesterville, Cortland, Eaton, Hebron, Junction City, Lake Milton, McConnelsville, Mount Gilead, New Lyme, New Paris, Orrville, Pataskala, Sunbury, Utica-Homer and Wayland.
- ▶ September 15 and 16: Adario, Croton, Fazeysburg, Kidron, Kinsman, Lucas, Rittman, and Shreve.
- ▶ September 15-17: Danville, Gambier, Killbuck, Lexington, Millersburg, Mount Sterling and Waynesville.
- ▶ September 15-17 and 19: Fredericktown.
- ▶ September 16: Adamsville, Bellville, Camden, Glenmont, Martinsburg, Newton Falls and Shiloh.
- ▶ September 18: Holmesville.

The Commission denied Embarq a “grace period” entirely for the Glouster and Johnstown exchanges.

Although the Commission limited Embarq’s “grace period” for avoiding customer credits, the Order is unlawful and unreasonable in three respects. First, the Commission disregarded Rule 8(D)(2) by granting a “grace period” for the Kidron exchange for September 16, although the exchange had only six trouble reports on that day. Second, the PUCO contravened Rule 8(D) by granting a “grace period” for the Fredericktown and Holmesville exchanges for days on which the trouble reports do not appear to be related to an extreme, unique, or unforeseeable weather-related incident. Third, the PUCO misapplied Rule 8(D)(1)(a) by granting Embarq a “grace period” for the Chesterville exchange for September 15, a day on which there was less than a 300% increase in trouble reports over the three-year daily average for September in the exchange. To protect consumers, the PUCO should modify and abrogate the Order, as discussed herein.

II. STANDARD OF REVIEW

R.C. 4903.10 governs applications for rehearing. Under the statute, within 30 days after a PUCO order is issued, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” OCC filed comments and reply comments in this case.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” In addition, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.” As shown herein, the statutory standard for abrogating and modifying the Order is met here.

III. ALLEGATIONS OF ERROR

A. The PUCO erred by granting Embarq a “grace period” for the Kidron exchange for September 16, 2008, even though Embarq did not have enough trouble reports in the Kidron exchange on that day to meet the requirements of Rule 8(D)(2).

Rule 8(D)(2) contains a specific limitation on the granting of “grace periods” under Rules 8(D)(1)(a) and 8(D)(1)(b): “Exchanges with ten or fewer daily out-of-service

reports during the requested grace period are not eligible for this grace period.”

Nevertheless, the PUCO granted Embarq a “grace period” for the Kidron exchange for September 16, even though Embarq’s trouble report data shows that the Kidron exchange had only six trouble reports on September 16.¹³ In granting Embarq a “grace period” for September 16 for the Kidron exchange, the PUCO has ignored its own Rule 8(D)(2).

Because they ordinarily have few trouble reports and thus may easily reach a 300% increase, small exchanges, like Kidron, are susceptible to unfair application of Rule 8(D)(1)(a).¹⁴ For this reason, the PUCO adopted Rule 8(D)(2), in order to ensure that customers in such exchanges are not unreasonably denied credits for service outages.

The PUCO should correct its error. The Commission should abrogate and modify its Order, and deny Embarq a “grace period” to avoid paying credits to customers in the Kidron exchange for outages that occurred on September 16.

B. The PUCO erred by granting Embarq a “grace period” for the Fredericktown and Holmesville exchanges for days where the trouble reports do not appear to be related to an extreme, unique, or unforeseeable weather-related incident, as required by Rule 8(D).

Under Rule 8(D), a telephone company may receive a “grace period” for the repair of service outages “due to an extreme, unique, or unforeseeable weather-related incident.” As OCC pointed out, the 47 trouble reports in the Holmesville exchange on September 18 and the 17 trouble reports in the Fredericktown exchange on September 19 do not appear to be related to the September 14 windstorm.¹⁵ Embarq’s trouble report

¹³ See November 13 Comments at 5. Embarq docketed only cumulative trouble report data for the September 14-19 timeframe. OCC’s Comments were based on daily trouble report data that Embarq provided to OCC upon request.

¹⁴ Indeed, the three-year daily average for the Kidron exchange was 1.2 trouble reports. See March 30 Comments at 6.

¹⁵ See November 13 Comments at 6-7.

data showed that Holmesville had **no** trouble reports on September 14, 16 and 17, and only three on September 15 – the day after the windstorm. Although Fredericktown had considerably more trouble reports during September 14-17, there were only six trouble reports on September 18. The spike in trouble reports on September 19 in Fredericktown obviously was not related to the September 14 weather-related incident.

Under Ohio Adm. Code 4901:1-5-08(D)(3), Embarq was required to file “[s]upplemental documentation sufficient to justify the request for the grace period....” Thus, Embarq has the burden of proof in this proceeding. Embarq, however, has not filed any **documentation** to support its assertion that these trouble reports were caused by the September 14 windstorm.

Instead, Embarq provided only the supposition that “[t]here is no reason to believe that all outages would occur immediately after the windstorm. And it is even less likely that every outage that occurred immediately after the windstorm would be reported in the day after the windstorm.”¹⁶ This assertion, however, was directly contradicted by Embarq’s own statement in defense of its Rule 8(D)(2) interpretation: “Force majeure events may occur on just one day, as was the case with the windstorm. **Therefore, most out-of-service reports are likely to be made the day of or the day after the event, not spread over the entire grace period.**”¹⁷

Embarq provided nothing to show that the trouble reports in the Holmesville exchange and September 18 and the Fredericktown exchange on September 19 were caused by any weather condition. Embarq did not meet its burden of proof.

¹⁶ Embarq’s Response (November 24, 2008) at 3.

¹⁷ Id. at 2 (emphasis added).

Indeed, the logical inference to be drawn is that the spikes in trouble reports in the Holmesville exchange on September 18 and the Fredericktown exchange on September 19 were **not** weather related. The Commission should thus abrogate and modify its Order, and deny Embarq a “grace period” to avoid paying credits to customers for outages that occurred in the Holmesville exchange on September 18 and the Fredericktown exchange on September 19.

C. The PUCO erred by granting Embarq a “grace period” for the Chesterville exchange for September 15, 2008, even though the exchange did not have a 300% increase in trouble reports over the three-year average for September on that day, as required by Rule 8(D)(1)(a).

Under Rule 8(D)(1)(a), a “grace period” may be allowed in an exchange if on a given day, due to an extreme, unique, or unforeseeable weather-related incident and subject to Rule 8(D)(2), the exchange experienced a 300% increase in trouble reports over the three-year daily average for the month. A 300% increase in trouble reports means that the exchange must have had four times the three-year daily average in order to qualify for a “grace period.”

The Commission misapplied Rule 8(D)(1)(a) to the Chesterville exchange for September 15. According to Embarq’s trouble report data obtained by OCC, the exchange had 11 trouble reports for September 15, 2008. On the other hand, the exchange had a total of 265 trouble reports during the month of September for three previous years, a daily average of 2.9.¹⁸ Thus, a 300% increase in trouble reports in the exchange would equal 12 trouble reports.¹⁹ Embarq did not meet the requirement under Rule 8(D)(1)(a).

¹⁸ See March 30 Comments at 6.

¹⁹ 2.9 times 4 equals 11.6, which rounds up to 12.

The Commission erred in its application of Rule 8(D)(1)(a) to the Chesterville exchange for September 15. The Commission should abrogate and modify the Order, and deny Embarq a “grace period” to avoid paying credits to customers in the Chesterville exchange for outages that occurred on September 15.

IV. CONCLUSION

The Commission erred in granting Embarq a “grace period” for the Chesterville exchange for September 15, the Kidron exchange for September 16, the Holmesville exchange for September 18 and the Fredericktown exchange for September 19. In order to protect consumers from losing credits that are required under the MTSS, the Commission should abrogate and modify the Order as discussed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Application for Rehearing by the Office of the Ohio Consumers' Counsel was sent electronically and by First Class United States Mail, postage prepaid, to the persons listed below on this 1st day of May 2009.

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