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**BEFORE**  
**THE PUBLIC UTILITIES COMMISSION OF OHIO** 2010 DEC -3 PM 2: 26

In the Matter of the Commission's ) Case No. 10-2387-TP-COI **PUCO**  
Investigation into Intrastate Carrier Access )  
Reform Pursuant to S.B. 162. )

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

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December 3, 2010

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In order to ensure that residential telephone consumers receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing of the Entry issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this proceeding on November 3, 2010 ("Entry"). OCC files this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

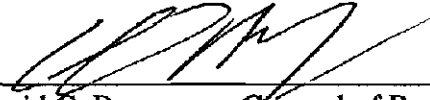
OCC asserts that the Entry was unjust, unreasonable and unlawful in the following particulars:

- The Commission erred, and the O&O was unjust, unreasonable and unlawful, in failing to order a hearing in this proceeding.
- The Commission erred, and the O&O was unjust, unreasonable and unlawful, in failing to order that data be filed before comments are filed or a hearing is held.

The Entry should be modified and/or abrogated to correct these errors. The grounds for this application for rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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In this case, the Commission is investigating the intrastate access charges that carriers pay to Ohio local exchange carriers (“LECs”) for intrastate long distance traffic, purportedly pursuant to recently-adopted R.C. 4927.15(B) and (C).<sup>1</sup> These access charges add to the revenues of LECs, and add to the costs of long-distance carriers. The Commission has asked for comment on a proposal by PUCO staff that will a) reduce incumbent LECs’ (“ILECs”) intrastate access charges to equal their interstate access charges; and b) allow the ILECs to recoup the revenues lost from these access charge reductions through an intrastate Access Recovery Fund (“ARF”).<sup>2</sup> The staff proposal, for the first time, would allow Ohio ILECs to recover lost revenues from other Ohio carriers and, presumably, from the other carriers’ customers. The Entry provides that comments are to be filed on December 20, 2010.

<sup>2</sup> The plan was set forth in Appendix A of the Entry; the questions posed for response were set forth in Appendix B of the Entry.

OCC has moved to intervene in this case.<sup>3</sup> OCC also moved the Commission to hold a hearing prior to ordering any such changes, especially any change involving increases in the rates that customers pay.<sup>4</sup> OCC also moved the Commission to require the data that PUCO staff proposes to be filed once the plan is approved to be **filed** before the comments are filed, and thus before any hearing, so that the data can serve as a factual basis for those comments and the Commission's decision on a plan.<sup>5</sup> OCC also moved the Commission to provide for a shortened discovery response period.<sup>6</sup>

Having made those motions,<sup>7</sup> OCC placed the issues before the Commission. This proceeding cannot reasonably continue without the adjustments proposed by OCC, however. Thus given the importance of these issues, in an exercise of caution OCC is compelled to file this application for rehearing of the Entry.

## **II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "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." As noted above, OCC moved to intervene in this case on November 9, 2010.

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<sup>3</sup> Motion to Intervene and Motion for Hearing and Other Procedural Orders by the Office of the Ohio Consumers' Counsel (November 9, 2010) ("OCC Motions").

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> On November 12, 2010, Cincinnati Bell Telephone Company LLC ("CBT") filed a similar motion. On November 18, 2010, Verizon also filed a similar motion.

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 by this application for rehearing.

### **III. ARGUMENT**

#### **A. The Need for a Hearing**

- The Commission erred, and the O&O was unjust, unreasonable and unlawful, in failing to order a hearing in this proceeding.

As stated in OCC's motions, the Commission clearly has the authority to order a hearing in Commission investigations such as this. Indeed, a hearing was held in the granddaddy of this case, the original investigation into intrastate access charges.<sup>8</sup>

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<sup>8</sup> See *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St.3d 266, 269 (1988).

Hearings have also been held in various other Commission investigations relating to telephone service.<sup>9</sup> The most recent access charge case, a complaint by Verizon – cited in the Entry<sup>10</sup> – has not yet had a hearing, but one would be required if it was to proceed.<sup>11</sup>

Further, as previously noted, the last time this issue was addressed by the Commission, it ordered access charges to be reduced, but did not specifically indicate that lost access charge revenues were to be replaced.<sup>12</sup> Here, in the context of new R.C. 4927.15(B), PUCO staff has proposed a revenue replacement mechanism that will apply to all the ILECs that have their access charges reduced. In addition, PUCO staff's proposal requires all other ILECs, CLECs, interexchange carriers and wireless carriers to contribute to the revenue replacement mechanism.

The Entry and PUCO staff's plan appear to be based on only two "facts." First, the receipt by the Commission of formal and informal complaints from long distance carriers about excessive access charges.<sup>13</sup> Notably, the one formal complaint cited by the Commission<sup>14</sup> has lain fallow for three years. And second, the precipitous decline in access minutes of use.<sup>15</sup> The tenuousness of these "facts" demand a hearing.

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<sup>9</sup> E.g., *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, Opinion and Order (July 20, 2000) at 3.

<sup>10</sup> Entry at 1.

<sup>11</sup> R.C. 4905.26; new R.C. 4927.21.

<sup>12</sup> *In the Matter of the Commission's Investigation Into the Modification of Access Charges*, Case No. 00-127-TP-COI ("00-127"), Opinion and Order at 14.

<sup>13</sup> Entry at 1.

<sup>14</sup> *Id.*, n.1.

<sup>15</sup> *Id.* at 1.

Under these circumstances, it was error for the Commission not to order a hearing in the Entry initiating this case. As argued by OCC, the issues that should be reviewed at a hearing include, but are not limited to:

1. Whether the intrastate access charges of the LECs whose current access charges are in excess of the interstate level should be reduced, and to what level?
2. How should “revenue neutrality” be defined?
3. If reductions in access charges occur, how should the LECs recoup the revenue loss from those reductions in access charges in order to ensure revenue neutrality?
4. Should revenue neutrality be achieved entirely through recoupment from other carriers and their customers (as proposed by PUCO staff), or should some amount of the recoupment come from the carrier whose access charges are reduced?
5. Crucially, what will the financial impact of access charge reductions be on the LECs whose access charges are reduced, and what will the impact of recoupment be on the carriers that are required to contribute to the fund? The ILECs’ assertions as to the latter must be subject to review at a hearing, including cross-examination, especially given the inter-company support mechanism that is now being proposed.<sup>16</sup>

In its motion, for the most part, CBT asserted that these subjects should be covered at a hearing, and aptly proposed additional subjects.<sup>17</sup>

As stated in OCC’s motions,

Given the unique circumstances of this proceeding, it bears repeating that requiring a witness to submit to cross-examination is the “greatest legal engine ever invented for the discovery of truth.” The truth about intrastate access charges, intrastate access charge revenues, whether they should be reduced, and how any reductions should be replaced should be obtained at a hearing.<sup>18</sup>

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<sup>16</sup> OCC Motions at 6-7 (footnotes omitted).

<sup>17</sup> CBT Motion (November 12, 2010) at 4.

<sup>18</sup> OCC Motions at 7-8, quoting *California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970) (quoting 5 J. Wigmore, *Evidence* § 1367, at 32 (J. Chadbourn rev. 1974)).



It was error for the Commission not to order a hearing on commencement of this proceeding. On rehearing, the Commission should correct this error.

**B. The Need for Data Before Deciding on a Plan**

- The Commission erred, and the O&O was unjust, unreasonable and unlawful, in failing to order that data be filed before comments are filed or a hearing is held.

The Commission included with the Entry “data requests that staff proposes be issued with the proposed plan **should the plan be adopted by the Commission....**”<sup>19</sup>

Responses to both data requests are to be “submitted,” not filed.

As stated in OCC’s Motions,

[T]he contributing carriers will not have the information (other than their own, if they are an ILEC) regarding the magnitude of the ARF, for their comments or reply comments, and the eligible ILECs will not have the information for their comments or reply comments. OCC and other non-carrier parties will apparently never have access to this information absent a belated public records request. And, importantly, the Commission will not have this information until after it decides whether to adopt the plan, a modified version of the plan, or no plan at all. To put it bluntly, this makes no sense.<sup>20</sup>

The process ordered for the present case can be contrasted unfavorably with that used in 00-127. In an April 27, 2000 Entry in that case, the Commission required the filing of access charge revenue data and requested the filing of comments to occur on the

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<sup>19</sup> Entry at 2 (emphasis added).

<sup>20</sup> OCC Motions at 9. OCC also noted that “[f]or the Commission to make the decision with this information not being part of the public record would be unlawful. *Tongren v. Pub. Util. Comm’n*, 85 Ohio St.3d 87 (1999).” *Id.*, n.32.

same day.<sup>21</sup> OCC then filed a Motion for Extension of Time, seeking to have the revenue data filing followed by comments one month later.<sup>22</sup> OCC stated,

[T]he time allowed in the Entry for filing comments should be extended, in order to allow adequate time for the preparation of comments on these important issues. The Commission will be better served by receiving the more thorough analyses that an extension of time will allow. Moreover, in order to better organize comments, OCC requests that the informational filings precede the filing of initial comments by one month. This would provide all stakeholders with a reasonable opportunity to review and digest the information and then include that analysis as part of initial comments.<sup>23</sup>

The Attorney Examiner agreed, and granted an extension, stating, “[R]eceipt of the revenue impact information in advance may assist parties in their preparation of comments.”<sup>24</sup> OCC did in fact utilize this information in its comments.<sup>25</sup>

The need for this information is clear. It was error for the Commission not to require the filing – rather than the mere “submission” – of this data, before proceeding with this case.<sup>26</sup>

CBT’s Motion includes a request for “the submission of additional data from all Ohio LECs to assist in these determinations.”<sup>27</sup> This data would, indeed, be helpful, although not as vital as that in Appendices C and D from the Entry. Indeed, if the

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<sup>21</sup> See 00-127 Opinion and Order at 1. In this respect, the original schedule in 00-127 was superior to that ordered in the present case, because parties would at least have had the filed information to use in their reply comments.

<sup>22</sup> 00-127, OCC Motion for Extension of Time (May 4, 2000).

<sup>23</sup> *Id.* at 2-3.

<sup>24</sup> *Id.*, Entry (May 18, 2000) at 2.

<sup>25</sup> See *id.*, Comments of the Ohio Consumers’ Counsel (June 20, 2000), Attachments A and B.

<sup>26</sup> See CBT Motion at 4-5; Verizon Motion at [4].

<sup>27</sup> CBT Motion at 5.

Commission does not require the filing of the data requested by CBT, then parties will likely need to seek that data through discovery.

On a related note, OCC included in its procedural motion a request for expedited discovery.<sup>28</sup> R.C. 4903.082 directs that “[a]ll parties and intervenors **shall** be granted ample rights of discovery.” (Emphasis added.) As OCC stated, “That should be especially true in a proceeding such as this, where some rates are being reduced but the lost revenues are proposed to be recouped from other carriers.”<sup>29</sup> And, as OCC noted, “It should be presumed that these other carriers will attempt to pass those charges on to their own customers.”<sup>30</sup>

When the Commission orders a hearing (as it must), the timing of that hearing may obviate the need for expedited discovery. OCC has already issued discovery to all the Ohio ILECs that largely mirrors the data requests attached to the Entry, but has not yet received responses. When the Commission requires the filing of responses to the data requests well before the hearing, that may make some of OCC’s discovery moot.<sup>31</sup>

### **III. CONCLUSION**

For the reasons stated herein, the Commission should grant OCC rehearing and abrogate the Order.

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<sup>28</sup> OCC Motions at 10-11.

<sup>29</sup> Id. at 10.

<sup>30</sup> Id., n.35.

<sup>31</sup> Other OCC discovery goes beyond the data requests. There will also likely be follow-up discovery.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Application for Rehearing was served by first class United States Mail, postage prepaid, to the persons listed below, on this 3<sup>rd</sup> day of December 2010.



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