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December 20, 2010

Via Electronic Filing

Renee Jenkins, Secretary of the Commission
Attn: Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

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

Dear Secretary Jenkins:

Enclosed for electronic filing in the above-captioned docket please find the Comments of the Small Local Exchange Carriers Group.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

THOMAS, LONG, NIESEN & KENNARD

By
Norman J. Kennard

NJK:tlt
Attachment
cc: Per Certificate of Service

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	)	

COMMENTS OF THE SMALL LOCAL EXCHANGE CARRIERS GROUP

I. INTRODUCTION

The Small Local Exchange Carriers Group[1] ("SLEC Group" or "SLECs") commends the Ohio Public Utilities Commission ("Commission" or "PUCO") and its Staff for the well-considered and proactive approach to access reform proposed in the Entry dated November 3, 2010, in at the above-captioned docket ("Entry").

All stakeholders and interested parties have been provided the opportunity to submit initial responses and/or comments on the proposed Access Restructuring Plan ("ARP") described in Appendix A to the Entry, including responding to specific questions posed in Appendix B.

[1] SLECs participating in this filing are the following: Arcadia Telephone Company, Arthur Mutual Telephone Company, Ayersville Telephone Company, Bascom Mutual Telephone Company, Benton Ridge Telephone Company, Buckland Telephone Company, Champaign Telephone Company, Chillicothe Telephone, Columbus Grove Telephone Company, Conneaut Telephone Company, Continental Telephone Company, Doylestown Telephone Company, Farmers Mutual Telephone Company, Fort Jennings Telephone Company, Germantown Independent Telephone Company, Glandorf Telephone Company, Kalida Telephone Company, Inc., Little Miami Communications Corporation, McClure Telephone Company, Middle Point Home Telephone Company, Minford Telephone Company, New Knoxville Telephone Company, Nova Telephone Company, Oakwood Telephone Company, Orwell Telephone Company, Ottoville Mutual Telephone Company, Pattersonville Telephone Company, Ridgeville Telephone Company, Sherwood Mutual Telephone Association, Sycamore Telephone Company, Telephone Service Company, Vanlue Telephone Company, Vaughnsville Company, and Wabash Mutual Telephone Company.

The SLEC Group submits these Comments to the Commission in accordance with the schedule established.

Overall, the SLECs believe that the rules proposed in Appendix A are fair and reasonable and should be implemented by the Commission with few modifications. These Comments offer a limited number of suggested changes and identify a few additional refinements that the Commission may wish to consider. Overall, the SLECs believe that the structure of the ARP is a well thought out reform that will further promote a continued vibrant and financially sound telecommunication market in Ohio that benefits all customers.

II. <u>THE OHIO SLECS</u>

The SLECs are very small carriers, serving between 300 and 30,000 access lines. In aggregate, the SLECs serve (2009) a total of approximately 95,000 voice access lines, comprising only 2.5% of all *ILEC* access lines in Ohio[2] and considerably less than that of all access lines if CLEC and wireless lines are included. However, the SLECs continue to be vital members of the communities they serve, being a source of both local service and local employment. While stalwart stewards of traditional service, they are also dynamic, progressive companies that are responsive to their customers' needs and changes in technology.

All SLECs are rural carriers under the Telecommunications Act of 1996 ("TCA-96"). Most have been in existence for over 100 years. As the Commission is aware, the SLECs serve the more sparsely populated areas of Ohio and have fewer large, high-volume customers than non-rural carriers. The isolation of rural carrier service areas obviously creates numerous

[2] Ohio Telecom Association, *Telecom Competition in Ohio*, April 2009, at 6 ("*Telecom Competition in Ohio*"). Published on the web at http://ohiotelecom.com/files/2009%20Report%20on%20Competition%20-%200402092_0.pdf. Statistics published based upon publically available data sources as described in report.

operational challenges, including longer loop lengths.[3] In addition, rural carriers generally have fewer customers per switch, higher total investment in plant per loop, and higher plant specific expenses per loop than non-rural carriers, all of which may vary dramatically depending on how many lines they serve. Rural carriers also generally have a customer base that includes fewer high-volume users and a lower business customer density, depriving the RLECs of economy of scale.[4]

As this Commission recognized in its Entry, intrastate access charges "comprise a significant portion of the revenue received by small incumbent local exchange carriers (ILECs) as well as three mid-size ILECs[,]" and loss of carrier access support has eroded "a significant pillar of their financial support."[5]

Competition is continuing to expand in their territories. The SLECs are subject to intense competition from a variety of alternative providers, including CLECs, wireless, cable, and Internet-based VoIP. Fifty-four CLECs are actively marketing in Ohio, [6] and have increased their market share to 25% (2008) from 15% (2005).[7] Fourteen wireless carriers served 9.6 million users in Ohio (2008), making the wireless segment of the market larger than combined land lines of all the ILECs (4.3 million) and CLECs (1.5 million).[8] Indeed, 80% of all Ohio residents have wireless service, up 50% since 2005, and approximately 15% now rely

[3] The FCC formed a "Rural Task Force," an independent advisory panel appointed by the Federal-State Joint Board on Universal Service, which was tasked with reviewing issues affecting rural carriers. The Rural Task Force prepared a series of six white papers. The Rural Task Force White Paper No. 2, dated January 2000 and titled "The Rural Difference" provides a complete assessment of issues faced by RLECs in serving their rural customers. Available at http://www.wutc.wa.gov/rtf/old/RTFPub_Backup20051020.nsf/?OpenDatabase

[4] *Id.*

[5] Entry at 1.

[6] *Telecom Competition in Ohio* at 8.

[7] FCC *Trends in Telephone Service,* Industry Analysis and Technology Division, Wireline Competition Bureau, September 2010 *(FCC September 2010 Trends Report).* The report can be downloaded from the Wireline Competition Bureau Statistical Reports Internet site at: www.fcc.gov/wcb/iatd/trends.html.

[8] *FCC September 2010 Trends Report* at Tables 8.5 and 11.2.

exclusively on their wireless carrier for service.[9] The level of wireless penetration is also reflected in the end user revenues, which for the Ohio ILECs combined was $2.2 billion, as compared to Ohio wireless revenues of $4.4 billion.[10]

Video in Ohio is provided by twenty-one cable companies and two satellite providers.[11] Since the 2007 legislative changes authorizing statewide franchising, thirty-seven additional companies having applied for and received approval to provide video service in Ohio.[12] Included in video service is cable telephony, a VoIP offering. Finally, there is "Vonage-type" VoIP, which does not use the public switched telephone network ("PSTN") to make outbound calls, but does connect to the PSTN to connect those calls to originate or terminate any calls to or from any telephone number.[13]

Notwithstanding the variety of choices, however, competition for customers of rural carriers is not ubiquitous. Customers located outside of the "denser" town centers served by the SLECs generally are more likely to lack competitive alternatives and continue to rely upon the SLECs for service. It is the SLECs who are the designated Eligible Telecommunications Carriers ("ETCs") for their service territories and they are the carrier of first (and only) resort. The SLEC network also remains a backbone of service for each of these competitors, since without the SLEC network, access to rural customers and their use of the internet, wireless service, and data transfer would all be diminished.

The SLECs are the "carrier of last resort" throughout their territories. Although S.B. 162 deregulated quality of service and the service rates, terms, and conditions for

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[9] *FCC September 2010 Trends Report* at Table 11.2 and *Telecom Competition in Ohio* at 9.
[10] *FCC September 2010 Trends Report at Table 15.7.*
[11] *Telcom Competition in Ohio* at 11-12.
[12] *Id.*
[13] *Id.* at 10.

telecommunications services provided by telephone companies,[14] and authorized telephone companies to withdraw or totally abandon service upon thirty days' notice,[15] the right to withdraw/abandon does not apply to basic local exchange service ("BLES") provided by incumbents,[16] which must make BLES available to everyone in their territories on a reasonable and nondiscriminatory basis within 5 business days absent a waiver on extraordinary conditions.[17] As noted previously, all of the SLECs are certificated as ETCs in their service areas.

III. COMMENTS AND RESPONSE TO APPENDICES B AND C

A. Administration of the Fund

The SLECs believe that the Commission's initial position to vest administration of the Access Restructuring Fund ("ARF") in a third-party, with oversight and audit authority remaining with the Commission, is well-founded.[18] The Administrator will develop the processes necessary for the fund to function, collect the contributions from the contributing carriers and disburse funds to eligible carriers, and be the overall manager of the fund's cash flow.

According to a report of the National Regulatory Research Institute ("NRRI"), twenty-two states had functioning or transitioning intrastate funds in 2006.[19] Since NRRI published its 2006 statistic, at least three more states have implemented explicit functional funding sources for

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[14] R.C. 4927.03(D).
[15] R.C. 4927.07(A) and (B).
[16] R.C. 4927.07(C)(1) and (D).
[17] R.C. 4927.08(B)(1); 4927.11(A), (B), and (C).
[18] Appendix A at ¶ 5.
[19] The information is publically available at http://nrri.org/pubs/telecommunications/06-09.pdf.

universal service support including for access restructuring.[20] A variety of third-party administrators are available throughout the country, and are currently used by a number of state commissions that have established explicit funding sources to support access restructuring.[21] In addition to use of a third-party to administer the fund, the Commission could also consider a third-party for purposes of audit of the fund as well. Of course, ultimate oversight of the ARF would remain within the PUCO's authority, as contemplated in the Entry.

A third-party administrator should be selected through competitive bidding, requests for proposals, or individual negotiation, depending on the particular contract terms sought (e.g., term of the contract and contemplated level of compensation) and the correspondingly applicable public contracting requirements for service contracts.[22] In considering the selection of a third-party administrator, the Commission should seek an entity that is, and will remain, neutral, impartial, and independent; unaffiliated with any eligible or contributing carrier; and willing not to advocate on behalf of specific parties or interests before the Commission on other telecommunications issues.

Were the Commission to contemplate administering and auditing the ARF itself, it should be aware that assuming these duties in-house would likely require a dedicated staff with the expertise and time necessary to solicit, collect, and review, on a regular basis, the data that will

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[20] These states are Indiana, Louisiana, and Michigan. *See Re Universal Service Reform*, Cause No. 42144, 2006 WL 3798724 (Ind. U.R.C. 2006); *In Re: Review of the Existing State Universal Service Fund as Established by LPSC General Order dated April 29, 2005, as amended May 18, 2005*, Docket No. R-30480 (Order entered February 9, 2009); and Michigan statute MCL 484.2310, amended December 17, 2009, specifically Section 310(7) (establishing an intrastate switched toll access rate restructuring mechanism as a separate interest-bearing fund to restructure intrastate access rates and requiring contributions from all providers of retail intrastate telecommunications services including wireless).

[21] For example, GVNW Consulting, Inc. has provided fund administration services in Kansas and Illinois; Solix, Inc. provides third-party administration services to the states of Arizona, Connecticut, Indiana, New Mexico, Nevada, Oklahoma, Oregon, and Pennsylvania; the firm of Rolka Loube Saltzer Associates assists in the administration of funds in Arkansas, Vermont, and Maine.

[22] Appendix B at ¶ 5.

be required, as well as to follow through with carriers that are remiss or delinquent in their submissions, since the administrator is the financial caretaker of the fund.

The Commission is wise to factor a cash reserve, administration costs, and an uncollectibles expense, in addition to the access reductions, into the Fund's size. Without an adequate cash reserve to cover at least one month's operation of the Fund, and an assessment for uncollectibles, the Fund could easily run into a deficit in the event there is any disruption in contributions, leaving eligible carriers with a potentially severe cash flow problem in their daily operations. Additionally, the Commission should consider the assessment of late payment fees on contributors that are delinquent in their contributions in order to deter any activity that could impair the financial soundness of the Fund. Finally, as addressed further in the SLECs discussion of the formula, the Commission should consider a factor to allow for the SLECs to recover their own contributions to the Fund so that the Fund's operations would be truly revenue-neutral.

The initial calculation of administrator costs can be based upon an informal canvassing of those costs typically assessed by third-party administrators that already manage existing state funds.[23] Subsequent years' assessments should be based upon an actual experience.

B. The Parity Objective and Revenue Neutrality

The SLEC Group generally agrees with the objective of parity if all other issues such as revenue neutrality are concomitantly and adequately addressed.[24] The reasons are two-fold. First, some forms of arbitrage, specifically the misreporting of the jurisdiction of toll calls are a

[23] See note 21, *supra,* for identification of three current third-party administrators. The states listed there are also clearly a source of information regarding their experiences.

[24] Appendix A at Definitions and ¶ 2. The SLECs also agree with the inclusion in the Fund of all ILECs that are not currently at intrastate parity with their interstate rates.

notable problem for the SLECs.[25] As set forth in their tariffs, when terminating calls, the SLECs frequently rely upon the delivering interexchange carrier to identify the "percent interstate use" otherwise known as the PIU. Most carriers accurately report their usage, but some do not. Lowering intrastate access to the interstate level removes any incentive to misreport the PIU. Additionally, maintaining a unified rate makes billing easier and more understandable for the SLECs' switched access customers.

In summary, there is no overwhelmingly compelling reason to set intrastate rates specifically at unity, but it is reasonable to do so, provided that the lost revenues are recovered via the ARF, as proposed in Appendix A consistent with universal service. Parity is simply a form of rate benchmarking, which has been set as a goal in numerous states in the last several years.

The SLEC Group is supportive of the design of the ARF that recovers revenues lost as a result of the switched access redesign associated with achieving parity. The SLEC Group is not seeking recovery of local revenues lost to competition,[26] but does strongly believe that revenue neutrality provisions of the Ohio Revised Code legally requires that the Commission provide the SLECs with a realistic and achievable means of making up their lost dollars. Not only is it a legal requirement, recovery from the ARF is fair and good public policy. The legislation that is the catalyst for this access reform was crafted with the foresight and sound public policy goals to provide the SLECs with the resources to ensure all their customers have access to BLES and the ARF accomplishes that goal.

[25] It is worth noting, however, that parity is not a panacea to many of the arbitrage schemes that certain carriers have concocted. For example, some carriers refuse to pay any access charges whatsoever on various grounds, VoIP-origination, for example. Nor does parity resolve issues relating to phantom traffic (i.e., the absence of call detail regarding the originating number).

[26] Response to Appendix B at ¶ 1.

The SLECs' access rates and revenue continue to be defined by the Commission as a regulated utility business and confiscation will occur if the Commission simply takes that money away. The access revenues that the SLECs receive are extremely important to their day-to-day operations and maintenance of their carrier-of-last-resort networks. Moreover, the SLECs' customers rely upon the Commission to maintain reasonable and just local rates, particularly those that have no options. These are not matters to be addressed lightly.

The Ohio Code reflects these concerns. While "[t]he public utilities commission ***may order*** changes in a telephone company's rates for carrier access in this state[,]"[27] the exercise of this discretion is limited:

> In the event that the public utilities commission reduces a telephone company's rates for carrier access that are in effect on the effective date of this section, that reduction ***shall be on a revenue-neutral basis*** under terms and conditions established by the public utilities commission and any resulting rate changes necessary to comply with division (B) or (C) of this section shall be in addition to any upward rate alteration made under section 4927.12 of the Revised Code.[28]

Revenue neutrality involves completely substituting the dollars lost to interstate parity in order to maintain the financial position of the ILECs. Revenue neutrality must provide the SLECs with the *realistic* opportunity to increase revenues from sources that are regulated by this Commission, in a manner which will offset access reductions on a dollar-for-dollar revenue basis. The proposed ARP accomplishes this legislative objective.

In terms of calculating the size of the ARF, Appendix C is sufficient to capture the access reduction revenues that will be experienced by the SLECs. The use of calendar year 2009 data proposed in the structure of Appendix A for capturing information to undertake this calculation is not opposed by the SLECs.[29]

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[27] R.C. 4927.15(B) (emphasis added).
[28] *Id.* (emphasis added).
[29] Appendix A at ¶¶ 7 and 16.B.

However, the SLECs do oppose the proposed biennial recalculation set forth in Appendix A as not revenue neutral, inasmuch as the calculation includes the development of a ratio of the decline in access lines, so that ARF receipts by the SLECs will be reduced, if access lines are further lost between 2009 and 2011 (the biennial recalculation year).[30] As the SLECs understand the equation, were there to be a 10% reduction in the number of access lines served by a non-price cap ILEC over the two-year period preceding the recalculation date, then ARF receipts would be reduced by a similar amount. The SLEC Group submits that a reduction in receipts is not revenue neutral and, therefore, violates the Ohio Revised Code.[31]

Nor would a reduction in receipts be fair public policy. The SLECs' costs are not reduced when access lines are lost, rather they are stranded. The investment to provide service was undertaken as a result of a long-standing regulatory compact, which requires the SLECs to provide ubiquitously available universal service. Even as the SLECs lose lines to competition, they must still maintain the associated plant and stand ready to serve. The revenue losses directly and adversely affect their ability to perform public policy functions in an era of competition and universal service. Having met their carrier of last resort obligations over a period of decades, the SLEC Group submits that public policy should acknowledge the stranded cost problem. Certainly, the SLECs will most likely continue to experience the adverse revenue consequences of line loss, because their tariffed local service and access revenues will continue to erode as lines are lost. So, it is only this one aspect of rate design, the ARF, which the SLECs suggest should be maintained as a fixed and predictable source of revenue. In this way, one aspect of the "pillar of financial support" referred to in the Entry is maintained.

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[30] *See* Appendix A at ¶ 16.D(ii).

[31] R.C. 4927.15(B).

In the event that the Commission, nevertheless, believes that periodic recalculation should occur, the SLECs request that their recalculation be performed at the longer interval of five years. A longer recalculation period has the benefit of capturing predictable receipts over a longer period and is similar to that used for capital expenditure purposes.[32]

C. Contributing Companies and Assessed Revenues

1. Contributing Carriers

The definition of contributing carrier posed in Appendix A is appropriate.[33] Contributions to the ARF by CLECs, wireless carriers and providers of toll service is necessary, inasmuch as these entities all use the public switched telephone network ("PSTN").

The SLEC Group also urges that all service providers originating (or terminating) calls in Internet protocol ("IP") be expressly included within the definition of "Contributing Carrier" in the definitional section. Appendix A recognizes the existence of interconnected voice over internet protocol ("VoIP") services and the potential for including them as contributors at some future point. This delay was never necessary for fixed VoIP services (i.e., cable telephony) and is no longer necessary with respect to nomadic VoIP service providers in view of the recent ruling by the Federal Communications Commission ("FCC"). There is now no reason not to include interconnected VoIP into the contributing carrier base.

As with the contributing carriers expressly identified by the Commission (i.e., CLECs, wireless and IXCs), interconnected VoIP carriers also rely heavily upon the PSTN. The definitions proposed in Appendix A appropriately refer to the FCC's regulations which expressly recognize that interconnected VoIP (as opposed to peer-to-peer VoIP) services:

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[32] *See* Appendix B at ¶ 3.
[33] Appendix A at Definitions.

> ... [p]ermits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.[34]

Ohio statutory law permits the Commission to assess an ARF contribution requirement upon interconnected VoIP service providers where "necessary for the protection, welfare, and safety of the public."[35] This is clearly the case here, as many carriers have sprung up that offer IP-based voice services and many existing carriers are transitioning to this next generation technology.

Fixed VoIP service providers, because their service is provided to a fixed point that is not mobile, definitively know the jurisdiction of a call, so that traffic is readily separated into its intra and interstate components.[36] Indeed, in almost all respects, fixed VoIP service of the type provided by cable companies, for example, is almost indistinguishable from traditional telephone service, except that internet protocol is used; instead of traditional time division multiplex ("TDM"). Numbers assigned to cable companies are associated with a fixed address and calling area. Fixed VoIP service suffers from none of the jurisdictional confusion that had surrounded the nomadic, Vonage-type services, where customers can transport their interface device along with their laptop to other locations, thus rendering call jurisdictionalization difficult. Cable companies (or their wholesale CLEC service providers) are already required to pay into most other state funds.[37]

The only real question surrounding the payment of IP-based service providers into state funds has involved those carriers offering "nomadic VoIP" service. Customers subscribing to nomadic VoIP service are permitted to transport their interface device to any location with an

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[34] 47 CFR § 9.3 (Definition of "Interconnected VoIP service").
[35] R.C. 4927.03(A).
[36] "A fixed interconnected VoIP service can be used at only one location, whereas a nomadic interconnected service may be used at multiple locations." See FCC *State USF Declaratory Ruling*, infra, at ¶ 3.
[37] As noted subsequently, the SLEC Group recommends that the Commission use fixed VoIP providers' end-user revenues as a basis for calculating the ARF contribution and not rely upon the wholesale revenues received by a carrier that assists the VoIP provider with obtaining telephone numbers and other aspects of PSTN interface.

internet connection and, using the Internet as the transport for the call on the initial leg, prior to it reaching the PSTN (and *vice versa* on a VoIP-terminated call).[38] Because of its mobility, nomadic VoIP services have presented a classification challenge. While the FCC ruled that Minnesota and other states could not regulate nomadic VoIP as a utility due to the "jurisdictionally mixed" nature of its traffic,[39] it did not rule on the ability of a state to assess nomadic VoIP for intrastate USF purposes and, absent such a ruling, some VoIP providers have resisted payment.

In 2006, the FCC required interconnected VoIP service to contribute to the *federal* Universal Service Fund.[40] The FCC recognized that traffic studies can be utilized to jurisdictionalize traffic that is handled by interconnected VoIP service providers for the purpose of ascertaining the proper level of contribution assessments to the federal USF. In the absence of traffic studies, interconnected VoIP service providers can utilize a "safe harbor" allocation of 64.9% as a proxy for their interstate revenues.[41] Appellate courts agreed that VoIP service providers are analogous to wireline services and may be required to contribute to the Federal Universal Service Fund:

> We conclude that the Commission has statutory authority to require VoIP providers to make USF contributions and that it acted reasonably in analogizing VoIP to wireline toll service for purposes of setting the presumptive percentage of VoIP revenues generated interstate and internationally.[42]

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[38] A nomadic VoIP customer can use the service by connecting with a broadband internet connection anywhere in the world to place a call; *fixed* means that the call is associated with a particular physical location and equipment tethered to that location. *Minnesota P.U.C. v. FCC*, 483 F.3d 570, 575 (8th Cir. 2007) ("*Minnesota Nomadic VoIP Preemption*").
[39] *Minnesota Nomadic VoIP Preemption*, supra.
[40] *In re Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122 *et al.*, (FCC June 27, 2006), Report and Order and Notice of Proposed Rulemaking, FCC 06-94, ¶¶ 53-58, at 27-30 ("*VoIP Universal Service Decision*"); *See* 47 C.F.R. at § 54.706(a)(18).
[41] *Id.* at ¶ 53.
[42] *Vonage v. Federal Communications Commission*, Docket No. 06-1276, U. S. Court of Appeals for D.C. Circuit, Opinion issued June 1, 2007 at 3.

Any confusion over the *states' ability* to also assess of nomadic VoIP providers for state ARF funding , however, has been removed in the FCC's *Nomadic VoIP State USF Declaratory Ruling* released November 5, 2010,[43] wherein the FCC held that the assessment by the states of universal service contribution fund requirements on nomadic interconnected VoIP is appropriate because:

- The goals of universal service are advanced;
- A USF system that is "equitable and non-discriminatory" is maintained;
- State assessment does not conflict with federal rules; and
- Nomadic interconnected VoIP utilizes the PSTN.[44]

Therefore, the FCC ruled "that states may extend their universal service contribution requirements to future intrastate revenues of nomadic interconnected Voice over Internet Protocol (VoIP) service providers so long as a state's particular requirements do not conflict with federal law or policies."[45]

Therefore, consistent with the FCC's decisions and its own state authority, this Commission should require that all nomadic, interconnected IP voice service providers earning Ohio intrastate revenues contribute to the ARF *using the same the FCC-approved option* that it does for federal USF purposes, namely :

> 1) The interim safe harbor allocation factor set forth in the FCC's *VoIP Universal Service Decision*, 35.1% intrastate revenues;
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> 2) Actual intrastate revenues; or
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> 3) An FCC-approved traffic study to identify intrastate traffic or any other formula that may be approved in any future FCC decision and authorized by this Commission.

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[43] *In the Matter of Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Interstate Revenues*, WC Docket No. 06-122, Declaratory Ruling Released November 5, 2010 ("*Nomadic VoIP State USF Declaratory Ruling*").
[44] *Id.* at ¶¶ 1, 2, 6 and 17.
[45] *Id.* at ¶ 1.

Although, not expressly required in the FCC's Order, the Commission may wish to also mirror the FCC's *de minimus* exemption, so that if the VoIP carrier is not required to pay into the Federal USF programs, they are also exempt from paying into the ARF.[46]

With respect to the contribution from fixed VoIP service providers, the SLECs do not believe that the Commission needs to go through the additional step of calculating and collecting contribution from the VoIP provider's wholesale carrier, which is defined in Appendix A as the "contributing carrier providing telecommunications services to a provider of interconnected [VoIP]."[47]

Collecting a contribution from the wholesale provider as a proxy for or on behalf of the retail provider will likely be problematic, inasmuch as the wholesale carrier charges its own (wholesale) rates and, typically, is not involved in the billing or collection of retail service revenues. Moreover, there may be multiple wholesale service providers involved, making the assessment calculation more difficult. Thus, the SLECs suggest that fixed VoIP carriers pay directly based upon their intrastate retail revenues.

Finally, the Commission may prudently wish to require VoIP providers to register with it. The FCC's web site identifies, by state, the carriers submitting Form 499-A (Federal USF) to the Universal Service Administrative Company ("USAC").[48] Among them, identified by name and address, there are currently 197 Interconnected VoIP carriers reporting activity in Ohio as of December 6, 2010.[49] A minor, administrative requirement that interconnected VoIP providers

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[46] FCC rules specify that "[i]f a contributor's contribution to universal service in any given year is less than $10,000 that contributor will not be required to submit a contribution or Telecommunications Reporting Worksheet for that year unless it is required to do so to by our rules governing Telecommunications Relay Service (47 CFR 64.601 *et seq.* of this chapter), numbering administration (47 CFR 52.1 *et seq.* of this chapter), or shared costs of local number portability." 47 C.F.R. § 54.708; *See also* the FCC's *VoIP Universal Service Decision* at ¶ 61.
[47] Appendix A at ¶ 8.
[48] http://fjallfoss.fcc.gov/cgb/form499/499a.cfm.
[49] *Id.*

register with the PUCO is justified under the Ohio Revised Code as "necessary for the protection, welfare, and safety of the public."[50]

2. Assessed Revenues

It is appropriate, as proposed in Appendix A, that the basis of the contribution calculation be intrastate, retail (i.e., end-user customer received) revenues. Retail revenue is the basis of federal USF programs and most, if not all, of the states' programs.

Appendix A also includes, in the definition, reference to the revenues as being associated with "telecommunications services,"[51] which may be problematic. As this Commission is aware, one aspect of the controversy over VoIP service is whether it is a "telecommunications" service, and therefore a Title II service, or "information," and a Title I service before the FCC.[52] Some carriers have used the distinction to argue that nomadic VoIP traffic need not pay access charges at all. Of course this argument is specious, but the regulatory terminology, nevertheless, has led to dispute and controversy. Therefore, the SLEC Group recommends that the term "telecommunications" be removed in the various references to the revenues assessed for

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[50] R.C. 4927.03(A).

[51] Appendix A at ¶¶ 10, 11, 14, 16.C, and Appendix D.

[52] One of industry's basic legal dilemmas is that the Telecommunications Act of 1996 ("TCA-96") did not capture the dynamic of convergence. The TCA-96 presumes continuation of separate and distinct industries (telephone, cable, interexchange), operating under their own unique rules. The FCC has found, and the courts affirmed, that the TCA-96 continued the FCC's *Computer Inquiry* distinctions between "information" (Title I) and "telecommunications" (Title II) services. "Information" service is lesser regulated under Title I of the Federal Communications Act (FCC regulation is minor or non-existent). Title II, "telecommunications service," on the other hand, is common carrier, utility-style regulation.

The FCC has expressly declined to rule whether interconnected VoIP is an "enhanced" or "information" service:

- "[W]e have not decided whether interconnected VoIP services are telecommunications services or information services." *In the Matters of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36 and 05-196 (First Report and Order and Notice Of Proposed Rulemaking, released June 3, 2005) (*"FCC VoIP 911"*) at ¶ 22.
- "The Commission has not yet classified interconnected VoIP services as 'telecommunications services' or 'information services.'" *In re Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122 *et al.* (Report and Order and Notice of Proposed Rulemaking released June 27, 2006) (*"FCC VoIP* USF") at ¶ 35; *See also*, *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, MD Docket No. 07-81 (Report and Order and Further Notice of Proposed Rulemaking, released August 6, 2007).

contribution purposes. Instead, the Commission should consider identifying and excluding those services which it does not intend to assess, such as broadband, internet access, television programming and other services that do not utilize the PSTN.

Finally, contributions by recipient companies, such as the SLECs, should be exempted from assessment or the amount included in the ARF distribution and, in effect, zeroed out. Requiring uncompensated contribution by the recipient companies is a form of self-funding of access charge reductions. For example, if a company is required to implement $100.00 of access reductions, but pay $1.00 to the fund, the result is $99.00 of revenue neutrality and $1.00 of revenue shortfall. Alternatively, the SLECs' calculated contribution might be included in the receipts paid them by the ARF, so in effect, the contribution required is funded and the mechanism consistent with the revenue neutrality required in the Ohio Revised Code.

Otherwise, the SLECs believe that Appendix D is sufficient to calculate the contribution base and the carriers' respective share.

3. Contribution Administration

There are several additional questions posed in Appendix B which are not responded to above.

Mergers and acquisitions should not create a problem to collection, inasmuch as most of this activity occurs at the parent level without any impact at the operating company level.[53]

Additionally, the SLECs do not believe that Appendix A needs to be modified to specifically recognize that carriers/service providers will continue to enter and exist in the

[53] Appendix B at ¶ 8.

market.[54] Realized revenues are the basis of the contribution assessment. So as carriers enter and exit the market, their contribution waxes and wanes with their efforts.

With respect to disputes over contribution liability,[55] the SLEC Group believes that Appendix A contains sufficient specificity and enforcement mechanisms as drafted. Disputes are submitted to the Commission for resolution pursuant to the Code.[56] If a carrier fails to make contribution or provide information, then the Commission recognizes its authority to initiative enforcement proceedings and impose remedies and penalties.[57] Moreover, the SLEC Group believes that the refinements in the definitions of assessed revenues suggested above are explicit enough to limit the scope of any dispute.

D. Timing of Access Reductions and ARF Implementation

The Commission has proposed a specific schedule for the development of the ARF, including its initial sizing, collections, and distributions, and the corresponding commencement of intrastate access charge reductions. Within forty-five days of the effective date of the Commission Order adopting the Access Reduction Plan ("ARP"), eligible ILECs are required to submit the access rate and demand data necessary to size the revenue-neutral component of the intrastate access reductions. No later than forty-five days after that data submission, the Commission has charged itself with informing each eligible ILEC of its applicable individual calculation.[58] Also within that initial forty-five days, contributing carriers will be required to report their intrastate retail telecommunications services revenues, which will provide the basis for the assessment to fund the ARF for one year. The Commission again has charged itself with

[54] Appendix B at ¶ 8.
[55] Appendix B at ¶ 9.
[56] Appendix A at ¶ 18.
[57] Appendix A at ¶ 19.
[58] Appendix A at ¶ 7.

calculating and informing the contributing carriers of their contribution assessment percentage, in this instance, within ninety days of its Order.[59] Actual tariff filings implementing the rate reductions must be filed no later than forty-five days prior to the effective commencement date of the ARF, which tariffs shall have as effective date that coincides with the commencement of the operation of the ARP.[60] Finally, the ARF shall commence 120 days from the effective date of the Commission Order adopting the ARP,[61] with both contributions[62] and disbursements[63] made on a monthly basis.

The SLECs support the Commission's dedication to a time-frame for development and implementation of the ARP that is expeditious. As addressed elsewhere in these Comments, the SLECs believe the Commission has developed a formula that, with minor modification, will achieve neutrality. However, it is absolutely critical that the Commission ensure that actual access rate reductions do not become effective until adequate contributions have been received and the processes for distributions are in place. In other words, the timing of the collection and disbursement activities must be coordinated so that collections are received and accounted for, and disbursements transfer-ready, no *later* than the date when reductions in tariffed rates take effect.

The data required to be submitted by both the eligible and contributing carriers is relatively straight-forward – tariffed rates, demand units, and intrastate revenues. With all carriers' cooperation, the Commission should be able to obtain and readily verify this information, and thus calculate the actual contributions and disbursements. However, not until the necessary contributions to the ARF are actually determined, contributing carriers are notified,

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[59] Appendix A at ¶¶ 10 and 11.
[60] Appendix A at ¶ 12.
[61] Appendix A at ¶ 13.
[62] Appendix A at ¶¶ 8 and 14.
[63] Appendix A at ¶ 4.

contributions are submitted, and initial collections are received, cashed, and distributable, should tariff reductions become effective.

For these reasons, the SLECs suggest that the Commission alter the provision regarding the access tariff filings' effective dates to coincide not with the effective date of the commencement of the operation of the Access Restructuring *Plan*, but rather with the actual commencement of the operations of the Access Restructuring *Fund* as measured by the Fund's ability to make actual disbursements.

The SLECs recognize that because the ARF is a *component* of the overall Plan, this likely is already the intention of the Commission. However, in order to avoid the effective implementation of rate reductions until the *Fund* is actually funded and capable of disbursements, the SLECs suggest that Paragraph 12 of Appendix A be clarified so that the access tariff rate reductions will be effective upon the commencement of the operation of the restructuring *Fund*.

The SLECs also agree with the submission of contributions and distribution of disbursements on a monthly basis, as that would likely impose the least disruptive impact on either carrier's actual monthly cash flow needs and operations.

E. ARF Termination

While providing for access restructuring on a revenue-neutral basis, the Commission has also built into its proposal an anticipated termination of the Fund based upon the earlier action of either the FCC regarding intercarrier compensation or the establishment by the Commission of a state high cost support fund pursuant to Section 4927.15(C) of the Revised Code.[64] The SLECs believe the inclusion of such language is unnecessary, unduly restrictive and may fuel baseless

[64] Appendix A at ¶¶ 14 and 15.

efforts and unnecessary litigation to terminate the Fund prematurely based simply on the appearance of that language.

Inclusion of a trigger that is based upon either the Commission's own action (implementation of a high cost fund), or an action that is outside the Commission's control but readily ascertainable by the Commission (a final non-appealable decision on intercarrier compensation by the FCC) is, at most, a statement of existent Commission authority. If the Commission decides to establish a state high cost fund, and determines that such a fund could appropriately replace the existing ARF, the Commission already has the power to so act. Therefore, establishing an explicit trigger is, at best, superfluous. Similarly, if the Commission determines that the FCC has acted in a final manner with respect to intercarrier compensation, and that such action could appropriately modify the existing ARF, again, the Commission already has the power to so act.

Since the Commission already has the power to determine when and if the ARF should end, inclusion of language to that effect in the ARP serves no legitimate end, and likely will only lead to abuse by those who oppose establishment of the Fund in the first place. The Commission should retain the flexibility to make its own decisions, in its own time frame, based upon the circumstances known and available to it and other parties at the time. Accordingly, subparagraphs (a) and (b) of paragraph 15 should be eliminated, and the Commission provide solely for the periodic review of the Fund's calculation. In the alternative, if the Commission prefers some language recognizing that other events could generate review of the Fund's existence, the language in paragraph 15, subparagraphs (a) and (b) should be replaced with language that acknowledges that recalculation will be conducted periodically until the Commission determines it should be modified, terminated, or continue as is.

Finally, the SLECs suggest that Appendix A should recognize that, if ARF funding is discontinued, access rates will return to their current, pre-ARF levels. Such a result is required under the revenue neutrality provisions described previously. While obvious, the statement should be made to avoid any future doubt.

F. **<u>Federal Access Reform</u>**

Finally, the Commission has included a provision in the Plan that, in the event the FCC takes any action which "causes or requires a significant change in interstate switched access service rates,"[65] the Commission may initiate a proceeding. Any interested party may also file an application requesting the Commission take such action "within 60 days of the final, nonappealable action by the FCC[.]"[66]

The SLECs understand and support the Commission's desire to timely address actions that the FCC may take materially affecting interstate access rates, and presumably intrastate access rates or their restructuring. For reasons similar to those expressed above in Section E of these Comments, the SLECs believe that both the Commission and interested parties already have the ability to take the actions set forth in paragraph 17, and that therefore any procedural triggers are unnecessary. If, and when, actions merit Commission review, the Commission is always free to initiate it, as is any party to petition for it.

In addition to being unnecessary, the triggers are also vague. What comprises a "significant" change? Is it a percentage change? Would changes to federal funding of access restructuring also be considered significant? And must an interested party file a petition seeking a Commission action strictly within 60 days or forever be barred? Given the likelihood of an appeal (FCC decisions are always appealed), will the parties be able to timely determine what is

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[65] Appendix A at ¶ 17.
[66] *Id.*

a "final, non-appealable action" and what happens in the event the FCC revises its order on remand? Are all parties precluded from petitioning the Commission to act because they did not act *within* 60 days? The SLECs believe that paragraph 17 in its entirety is unnecessary and restrictive and should be deleted. The Commission should retain the flexibility to act, and likewise afford interested parties that same flexibility to petition the Commission to act, when action by the FCC warrants a revisit of the ARF by this Commission. If the FCC's actions do not rise to the level of PUCO action, the Commission is always free to so conclude. Simply stated, there is too much uncertainty over future FCC action and the appellate response.

IV. CONCLUSION

The SLEC Group thanks the Commission for its proactive and well-considered initiative to reduce intrastate switched access rates and requests that it adopt the suggestions made in these Comments.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of the Small Local Exchange Carriers Group was served by electronic mail and first class mail to the persons listed below, this 20th day of December, 2010.

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