BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Investigation into Intrastate Carrier Access Reform Pursuant to Sub. S.B. 162	: : :	**CASE NO. 10-2387-TP-COI**

REPLY COMMENTS
OF THE
OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

I. Introduction

Pursuant to the November 3, 2010 Entry, the Ohio Cable Telecommunications Association (the "OCTA") submits these Reply Comments to the Initial Comments submitted by others regarding the Commission's investigation of intrastate carrier access reform. The OCTA appreciates the opportunity to provide its Reply Comments.

The OCTA would first note that in the Initial Comments filed in this docket, support for the Access Reform Fund ("ARF") came only from those entities whose revenues are protected by the plan and AT&T, whose profits will most benefit by the mirroring of switched access rates, also supported the ARF.[1] Other parties filing Initial Comments include a variety of players involved in or having concerns with local telecommunications, from the Ohio Consumers Counsel to ILECs such as Cincinnati Bell to CLECs providing service through various technologies.

As will be noted throughout these Reply Comments, all of the remaining Initial Comments opposed to the ARF or some aspect of the ARF raised concerns that were similar to those raised by the OCTA in its Initial Comments.[2] Some of the concerns raised with respect to the ARF included i) the anti-competitive effect of failing to

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[1] *See,* Initial Comments filed by Windstream, CenturyLink, AT&T and the SLEC Group.
[2] *See,* Initial Comments filed by Sprint, T-Mobile, Verizon, Cincinnati Bell Telephone Company ("Cincinnati Bell"), the OCTA and the Ohio Consumers' Counsel.

require eligible carriers to recover from services provided to their own end users; ii) that the ARF allows the continuation of artificially low retail service rates that undermine competition; iii) that the ARF creates guaranteed, unconditional and unquestioned revenue recovery for a select group of service providers; iv) that benefits to customers from reduced toll rates seem unlikely; and v) that there was not sufficient data made available to those providing comments to conduct the analysis that should be conducted before implementing a plan that is such a significant departure from standard economics and policy, representing nothing more than an inter-corporate tax system.

The OCTA Reply Comments will focus on three key conclusions that can be drawn from the Initial Comments:

i. There is no emergency that requires immediate action in place of informed analysis.

ii. The Commission should next collect the data needed to determine the pattern of local rates, establish an affordability benchmark, determine the size of the access reduction and implement access reductions coinciding with the implementation of higher end-user rates. There is significant support for this being the better policy choice.

iii. Many of the Initial Comments point to the November 5, 2010 Declaratory Ruling of the Federal Communications Commission ("FCC")[3] to support direct assessments and contributions to the ARF by providers of local service through interconnected VoIP. However, the Declaratory Ruling merely indicated that the FCC will not *preempt* a state assessing VoIP. It does not create a federal *grant* of authority to the Commission that overrides Ohio law.

II. There is No Emergency that Should Override Informed Analysis

The Commission acknowledges that it has been particularly concerned with intrastate carrier access charges for small ILECs for the past several years.[4] The

[3] Declaratory Ruling, *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 Intrastate Revenues,* WC No. 06-122, rel. November 5, 2010 (Declaratory Ruling).

[4] Commission Entry, Case No. 10-2387-TP-COI, ¶ 2.

Initial Comments of the Ohio Consumers' Counsel and Verizon both spend pages discussing the long history of intrastate carrier access reform in Ohio and the complexity of resolving these issues for the remaining ILECs that do not mirror their interstate carrier access rates. Yet, in the face of this history, the Commission staff has approached this complex issue as though there is a sudden emergency in need of an immediate solution. The problem with this expedited approach to implementing the ARF was recognized in many of the Initial Comments --- the ARF plan is being proposed without necessary data to analyze the issue.

Even more difficult to understand is the expectation that interested parties can provide substantive analysis on the proposed plan and ARF at this early stage. It is not possible to evaluate the net effect of the access reduction and whether it is in the public interest without having such basic information as the magnitude of the reduced access revenues and the alternative choices for offsetting revenues. Yet that has not been made available.

The revisions to Chapter 4927 through Sub. S.B. 162 created no such emergency. The Commission is authorized to order reductions in telephone company access charges in R.C. § 4927.15(B), but it does not *require* that the Commission do so. Further, the statute requires that, *if* the Commission does reduce carrier access charges, "that reduction shall be on a revenue-neutral basis under terms and conditions established by the public utilities commission."[5] The legislature neither required nor imposed a timeline on the Commission to address intrastate carrier access reform. And certainly, as recognized in several of the Initial Comments, there

[5] *See*, R.C. § 4927.15(B).

is no emergency that requires access charges be shifted to a governmentally imposed tax without a full analysis of alternative methods of recovery.[6]

As pointed out in the Initial Comments, no one knows the amount of the revenue shortfall that would result from mirroring interstate carrier access rates, or the extent to which offsetting revenue can be generated from other services. Yet the proposed plan has made the Commission nothing "more than a mere calculator on how much to pay the eligible ILECs."[7] While several of the comments expressed the belief that it was premature to address the need for a third party administrator, those who did comment supported this concept, which could result in additional costs of several hundred thousand dollars annually. This type of expenditure will affect consumers who will pay the tax necessary to fund this as part of the costs for the ARF. These expenditures require a more thorough analysis than has been possible without the necessary data.

Access reform has been a problematic issue for many years. Now is the time for useful data to be gathered and thoroughly analyzed, so future decisions will be based on facts and not intuition. There is nothing that requires rushing to make decisions about the ARF and plan by relying on concepts rather than obtaining useful information. Once sufficient data and information are made available to all those filing comments, interested parties will be able to provide substantive input on intrastate carrier access reform, the need for it and how best to approach revenue neutrality.[8]

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[6] *See,* Initial Comments of Cincinnati Bell, the MACC Coalition and the Ohio Consumers' Counsel.
[7] Id., p. 7.
[8] As indicated by Cincinnati Bell, "[a]ll participants in this proceeding should have access to the data (subject to a reasonable protective order as necessary) in order to independently test assertions that more revenue is necessary." Initial Comments of Cincinnati Bell, p. 6

III. The Commission Should First Evaluate Rate Rebalancing Before Considering Additional Steps, If Any

A. The Better Policy Choice is to Offset Access Reductions with Increases in Local Rates.

As noted by the OCTA in its Initial Comments:

> The economically preferred approach would be for the Commission to fundamentally examine alternative methods of revenue recovery, specifically higher retail prices (beyond those subject to the Section 4927.12 exclusion). Shifting access revenues to retail prices would maintain competitive pressures, opportunity and accountability – that is, the incumbent ILECs would still be held to market-standards (customer satisfaction, for instance), and not merely have the government collect its revenues for them.[9]

This policy choice was supported by a variety of others in their Initial Comments.[10] As Verizon stated, "[s]hifting the revenue burden from one carrier-funded source (access rates) to another (an ARF) does nothing to solve the fundamental economic inefficiencies and competitive harms caused when ILECs rely on their captive competitors for their operating revenues, instead of looking to their own end-user customers."[11] This would mean that rather than recouping lost revenues from other carriers, the eligible ILECs would rebalance their retail rates for services.

As noted in other Initial Comments, until a necessity for subsidies is proven, the subsidies that are created by a plan that includes a fund like the ARF should not be considered. Creation of these types of explicit subsidies "perpetuates the incentive to extract income from their competitors rather than focusing on efforts to increase end user adoption of other services."[12]

T-Mobile "urges the PUCO to establish a statewide benchmark rate for all basic local exchange service and require all qualifying RLECs to price their services at that

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[9] *See,* Initial Comments of OCTA, Declaration of Joseph Gillan, ¶ 16.
[10] *See* Initial Comments of Sprint, T-Mobile, Verizon, Cincinnati Bell, OCC.
[11] *See,* Initial Comments of Verizon, p. 2.
[12] *See,* Initial Comments of T-Mobile, p. 6.

statewide benchmark before granting access to a state fund."[13] Taking a similar position, Cincinnati Bell suggests that eligible ILECs should raise their own end user rates first to those of the proposed contributing carriers and urges the Commission to "obtain as much data as necessary to determine that an eligible carrier has exhausted internal revenue opportunities before assessing other carriers to provide that revenue."[14]

Even the Ohio Consumers' Counsel ("OCC") believes that consideration of rates for all ILEC services that use the ILEC network is the better public policy. The OCC correctly points out that under revised Chapter 4927, ILECs have complete freedom to price their non-BLES services. Therefore, the OCC indicated that the ILECs' first recourse should be to their own non-BLES rates.[15] The concept of a rate rebalancing through retail rate flexibility, rather than an immediate move to the ARF, is supported by AT&T in its Initial Comments.[16] There is broad support for adoption of a policy that establishes a benchmark for local rates and increases rates to that level to achieve revenue neutrality in intrastate carrier access reform. The Commission must give serious consideration to this policy.

B. The Commission has Clear Authority to Offset Reduced Access Reductions with Local Rate Increases.

Not only is this policy of rate rebalancing broadly supported, the legislature recognized this as a means to address revenue neutrality and gave the Commission the necessary authority. In R. C. § 4927.15(B) a specific exception is made to the otherwise strict limitations on BLES price increases and allows an ILEC to increase its

[13] *See,* Initial Comments of T-Mobile, p. 3.
[14] *See,* Initial Comments of Cincinnati Bell, p. 6.
[15] *See,* Initial Comments of OCC, p. 5.
[16] *See,* Initial Comments of AT&T, pp. 7 and 8.

BLES rates as much as necessary to recoup revenues lost due to access charge reductions.

As Cincinnati Bell succinctly stated, "[t]he statute uses the phrase 'any resulting rate changes necessary to comply with division (B) or (C) of this section.' That plainly indicates that the General Assembly believed that rate increases would be *necessary* to maintain revenue neutrality. It certainly did not indicate that it expected the primary method for maintaining revenue neutrality would be an external fund collected from other parties."[17]

This authority of the Commission to authorize rate increases, and, thus, rate rebalancing, was also recognized by AT&T. As it indicated in its Initial Comments in support of such rate rebalancing and surcharges, "[c]onsistent with Sub. S. B. 162, the retail rate rebalancing necessary to achieve revenue neutrality and the surcharge can and should be incremental to the $1.25 annual BLES rate increase cap for ILECs.[18]

The Commission has the authority to collect the data that are necessary to determine what approach would best serve the interest of telecommunications competition, as the Ohio legislature directed. Rather than jumping to an ARF that fundamentally distorts competition and forces *consumers* in some (undisclosed) parts of Ohio to support *companies* in others, the Commission should exercise this rate rebalancing authority to address revenue neutrality when reforming intrastate carrier access.

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[17] *See,* Initial Comments of Cincinnati Bell, p. 5 (emphasis in the original).
[18] *See,* Initial Comments of AT&T, p. 8.

C. The Commission Must Next Collect Information to Determine the Pattern of Local Rates in Ohio and the Revenue Opportunities from Rebalancing

The Commission's next step is not to implement the ARF, but rather as suggested in the Initial Comments, the Commission should collect information in various areas.[19] As noted by the Ohio Consumers' Counsel, "[d]ata from carriers that are subject to access charge changes must be provided so that trends in access charge revenues, access minutes, and access lines can be clearly defined."[20]

There were also many comments describing the need to collect and analyze data on existing local rates to determine the level at which rates are truly affordable, not merely presumably affordable on their face (that is, there is no existing threat to universal service). Concern was expressed in the Initial Comments that the current BLES rates for many of the eligible ILECs are artificially low and that there is no proof that higher BLES rates would not be affordable.[21] A benchmark is needed for local rates. The Commission should not start with a plan "that requires all Ohioans to contribute towards keeping local service rates low for this small subset of consumers without a thorough analysis of the impact of the access charge reductions on the eligible carriers, exploration of all possible alternative revenue sources within the affected companies, and a comparison of rates of the companies to be subsidized with the rates of companies that would be required to contribute."[22]

To correct the data gap in the record, the Commission should issue a data request to obtain the information suggested by both the OCTA and Cincinnati Bell in their Initial Comments and provide an opportunity for this data to be reviewed, and where necessary, questioned by all parties:

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[19] *See,* Initial Comments of Sprint, T-Mobile, Verizon, Cincinnati Bell, OCC, and the MACC Coalition.
[20] *See,* Initial Comments of the OCC, p. 28.
[21] *See,* Initial Comments of Sprint, T-Mobile, Verizon, Cincinnati Bell, and the OCC.
[22] *See,* Initial Comments of Cincinnati Bell, p. 3.

1. A list of all rates for every type of local switched service offered, including BLES and any bundles that include BLES, whether the rates are set by tariff, contract or otherwise;

2. The number of lines in service for each such category of local switched service, both business and residential;

3. The billed revenue of each such category of local switched service;

4. Switched access minutes by company, by month, for the past five years;

5. Average interstate and intrastate switched access charges per minute, by company and identification of differences in rate structures between interstate and intrastate tariffs;

6. The current level of BLES charges to establish an Ohio benchmark for local rates;

7. The amount of any interstate or intrastate SLC for each such category of local switched services.

This information will allow the Commission to first evaluate alternative approaches to revenue neutrality suggested in the Initial Comments. Only in light of this information should the Commission consider the possible need for and amount of a new tax to fund an ARF.

D. The Additional Advantage of Collecting the Necessary Data and, Thus, Allowing for Substantive Input, is that as the Commission Collects and Evaluates Ohio data, the FCC Proceedings Will Provide Parallel Guidance.

There was broad support in the Initial Comments for revisiting the plan and ARF once the FCC issues its guidance on intercarrier compensation.[23] Stepping back and collecting the data necessary for all parties to fully evaluate intrastate carrier access reform will not only provide the all important data, but will also allow for the opportunity to review the FCC guidance before landing on a solution for Ohio.[24] As

[23] *See,* Initial Comments of Windstream, Sprint, T-Mobile, Verizon, MACC Coalition, Cincinnati Bell, AT&T and the OCC.

[24] *See,* for example, Initial Comments of Windstream, p.1 ("Windstream believes that state regulatory commissions should await the Federal Communications Commission's comprehensive national intercarrier compensation reform efforts...").

indicated by Frontier in its Initial Comments, "[w]ithout knowledge of the components of upcoming federal action, any further state effort should be suspended until the federal direction is known."[25]

IV. The FCC Declaratory Ruling is Not Sufficient Authority to Override Ohio Law

Initial Comments suggesting that the FCC's Declaratory Ruling provides the authority to impose direct assessments for contributions to the ARF on interconnected VoIP, have misconstrued the Declaratory Ruling and ignored Ohio law.[26] The FCC concluded only that "state universal service fund contribution rules for nomadic interconnected VoIP are not preempted."[27] Preemption prohibits a state from taking action that would be inconsistent with federal law. So, while the FCC's Declaratory Ruling does not forbid state actions regarding universal service contribution obligations for interconnected VoIP services, it *does not require such actions and in no way authorized* a state to do so if contrary to existing state law.[28]

Thus, whether the Commission is *allowed* to impose contributions to the ARF on interconnected VoIP is ultimately an issue that requires review of Ohio law, as amended in Sub. S.B. 162. In this regard, R.C. § 4927.03 is explicit --- "except to the extent *required* to exercise authority under federal law, the commission has no authority over any interconnected voice over internet protocol-enabled service..." unless the commission first finds that the exercise of the commission's authority is *necessary for the protection, welfare, and safety* of the public.

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[25] *See,* Initial Comments of Frontier, p. 3.

[26] Initial Comments that reference the Declaratory Ruling as support for this position include those of Windstream, Sprint, CenturyLink, Cincinnati Bell, AT&T and the SLEC Group.

[27] *See,* Declaratory Ruling at ¶ 1.

[28] The FCC also provided in its Declaratory Ruling that if a state elected to regulate VoIP for universal service purposes, such regulation was subject to specific requirements specified in the Declaratory Ruling. It is unlikely that the methodology for calculating contributions to the ARF by interconnected VoIP fully complies with these requirements, which further supports the need for additional data. See, Declaratory Ruling, ¶¶ 17-21.

There is nothing in the staff's proposed plan or ARF that attempts to provide justification that a contribution by interconnected VoIP is necessary for the protection, welfare and safety of the public. There is also nothing in the comments to support this specific finding. Further, while R.C. § 4927.15 requires that any reduction in intrastate carrier access rates must also include some plan for offsetting revenues, it does not address the specifics of such plan or speak to the protection, welfare and safety of the public, much less requiring contributions from interconnected VoIP services.

The position the legislature took with respect to wireless service and carrier access reform emphasizes the importance of a finding of necessity for the protection, welfare and safety of the public before the Commission can exercise authority over interconnected VoIP, either directly or indirectly. In R.C. § 4927.03, the legislature made clear that the Commission has authority over wireless service and resellers of wireless with respect to the creation and administration of mechanisms for carrier access reform.[29] No similar language was included in Chapter 4927 with respect to interconnected VoIP services. This sheds light on the data and investigation that would be necessary to support a conclusion that such a contribution is necessary for the protection, welfare and safety of the public, and neither the data nor the investigation exist here.[30]

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[29] *See,* R.C. § 4927.03(B).

[30] Because the "necessary for the protection, welfare, and safety of the public" language was added to R.C. 4927.03 in Sub. S.B. 162, there is no case law interpreting this language in R.C. 4927.03. However, the Ohio Supreme Court has reviewed this same "protection, welfare, and safety" standard that is needed to support orders issued under R.C. 4905.04. In looking at this standard in *Akron & Barberton Belt Rd. Co. et al. v. Public Utilities Commission of Ohio,* the Court cited to prior decisions that the authority granted in this section provided the Commission the power to issue orders, "providing, of course, there was *evidence* to support the *findings* upon which the order was based." *Akron & Barberton Belt Rd. Co. et al. v. Public Utilities Commission of Ohio,* 165 Ohio St. 316, 319 (1956) (emphasis added). Here, there is no evidence to support a finding that exercising jurisdiction over interconnected VoIP for contributions to the ARF is necessary for the protection, welfare and safety of the public. *See, also, Ideal Transp. Co. V. Public Util. Comm. (1975) 42 Ohio St. 2d 195, 71 Ohio Op. 2d 183, 326 N. E. 2d 861.*

The references to the Declaratory Ruling in Initial Comments also ignore that this ruling specifically addressed assessments for a state *universal service* fund. As the OCTA pointed out in its Initial Comments through the Declaration of Mr. Gillan, the ARF cannot be considered a universal service fund as "there is no nexus between the support payments and reasonably affordable phone services".[31]

Parties cannot cite to FCC guidance in the Declaratory Ruling that (if satisfied) provides protection from federal preemption as support for a Commission requirement that interconnected VoIP contribute to the ARF. The FCC's Declaratory Ruling does not change the fact that nothing in this carrier access reform docket meets the requirements set under Ohio law necessary for the Commission to extend authority to require interconnected VoIP services to contribute to the ARF, either directly, or indirectly via special assessments on providers of telecommunications services used in conjunction with interconnected VoIP services.

V. Conclusion

The OCTA understands the effort and appreciates the time that the Commission staff put into drafting the access reform plan and ARF. The OCTA, however, respectfully suggests that the staff has been premature in its creation of the plan and the ARF proposal. The OCTA requests that the Commission give serious consideration to the issues raised in these Reply Comments and particularly the need for data and analysis *before* there can be a serious review and comment on the proposed plan and ARF. What has been clearly demonstrated through the Initial Comments, is that the adoption of any regulatory policy as radical as the ARF – that is, a state fund whose

[31] *See,* Initial Comments of OCTA, Gillan Declaration, ¶ 15.

sole function is assuring perpetual revenues for certain legacy entities -- requires more data and more input than mere filed comments.[32]

As the OCTA and others have noted, the Commission cannot move forward to evaluate – and the parties cannot reasonably advise on – the central question as to whether the net effect of the access reduction (including its offset) is in the public interest without having basic information as to the magnitude of any reduced access revenues and the alternative choices for offsetting revenues. The Commission must delve more deeply into all issues and facts relevant to a determination of revenue neutrality, the appropriate mix of access reductions, higher retail rates, the efficacy and fairness of inter-company subsidies and the degree to which the ARF would lead to an increase in revenue for certain companies, not just revenue neutrality. The OCTA suggests the following as a better process for the determination of carrier access reform that takes all of these issues into consideration:

1. Collect the data to establish a statewide benchmark for end-user rates for BLES;
2. Adopt a plan to increase end-user BLES rates to the benchmark;
3. Offset higher end-user revenues with access reductions;
4. Only then investigate – with known empirical metrics – whether additional access reductions are appropriate.

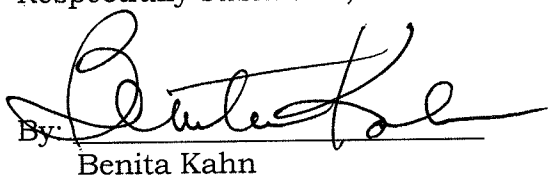
The further advantage of this process is that it would allow the Commission to monitor federal developments while this analysis was being conducted.

The Commission must ensure that its actions with respect to carrier access reform are consistent with the competitive market that the legislature acknowledged

[32] As further evidence that the ARF will become an entitlement to some, consider the suggestion by the SLEC Group that the fund should be permanent and unchanging. *See,* Initial Comments of SLEC Group, pp. 7-10. Markets change. People change. But according to the SLEC Group, to the standard exceptions -- death and taxes -- should be added the "revenues formally known as access."

with its implementation of Sub. S.B. 162. This can be accomplished with the review and analysis of data suggested by the OCTA.

Respectfully submitted,



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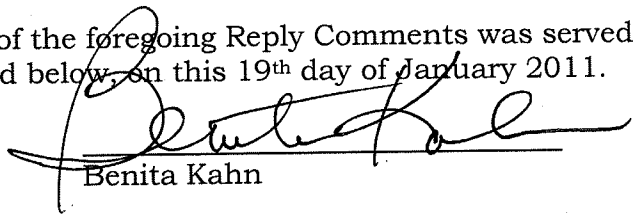
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was served by electronic mail to the persons listed below, on this 19th day of January 2011.



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Summary: Comments Reply Comments of the Ohio Cable Telecommunications Association electronically filed by Benita Kahn on behalf of Ohio Cable Telecommunications Association