FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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In order to advance the goal 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 February 23, 2011 ("February 23 Entry"). OCC files this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

OCC asserts that, under the applicable legal standards, the February 23 Entry was unjust, unreasonable and unlawful and erred by:

- Proceeding with this docket given the pendency of a Federal Communications Commission ("FCC") Notice of Proposed Rulemaking ("NPRM") addressing intercarrier compensation.
- Not ordering a hearing in this docket.
- Not a) establishing an inadequate discovery period; and not b) declaring that any discovery will be on submitted data.
- Not establishing an adequate comment period.
- Not granting OCC's Motion to Intervene.

The February 23 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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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In this case, the Commission is investigating the 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).[1] These access charges add to the revenues of LECs, and add to the costs of long-distance carriers. The Commission initially asked for comment on a proposal by PUCO staff that would a) reduce incumbent LECs' ("ILECs'") intrastate access charges to no more than 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").[2] 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 customers who may be subject to proposals for rate increases include the residential customers that OCC represents. The Entry provided that comments were to be filed on December 20, 2010.

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[1] Entry (November 3, 2010) ("November 3 Entry") at 1-2.

[2] The plan was set forth in Appendix A of the November 3 Entry; the questions posed for response were set forth in Appendix B of the November 3 Entry.

OCC moved to intervene in this case.[3] 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.[4] OCC also moved the Commission to require that the data the PUCO staff proposed to be submitted after the plan is approved be filed before the comments, and thus before any hearing, so that the data could serve as a factual basis for those comments and the Commission's decision on a plan.[5] OCC also moved the Commission to provide for a shortened discovery response period.[6] Cincinnati Bell Telephone Company LLC ("CBT") and Verizon filed similar motions on November 12, 2010 and November 18, 2010, respectively.[7]

On December 3, 2010, in "an exercise of caution," OCC filed an application for rehearing of the November 3 Entry, including with regard to the lack of a hearing and the lack of filed data prior to a hearing. The Commission did not rule on OCC's December 3, 2010 application for rehearing.[8] Thus the application was denied by operation of law.[9]

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

[4] Id.

[5] Id.

[6] Id.

[7] Memoranda contra OCC's motions were filed on November 24, 2010 by the AT&T Entities ("AT&T"); CenturyTel of Ohio, Inc. dba CenturyLink ("CenturyTel") and United Telephone Company of Ohio dba CenturyLink ("United") (collectively, "CenturyLink"); Windstream Ohio and Windstream Western Reserve (collectively "Windstream"), and the Small Local Exchange Carriers ("SLECs"). (The SLECs are thirty-four individual ILECs; they are listed in footnote 1 of the SLECs' Memorandum Contra.) The SLECs filed a combined memo contra CBT's and Verizon's motions on November 29, 2010. On December 1, 2010, OCC and Verizon filed reply memoranda.

[8] Only one memorandum contra OCC's application for rehearing was filed, by AT&T. AT&T argued that an Entry issued by the PUCO on December 8, 2010 ("December 8 Entry"), discussed below, made OCC's application for rehearing moot. It should be clear that the issues raised by the December 3 application for rehearing are still far from moot.

[9] R.C. 4903.10.

In a December 8, 2010 Entry, the Commission addressed the procedural motions.[10] The Commission stated,

> The Commission determines that the motions filed by OCC, Cincinnati Bell, and Verizon requesting a hearing are premature and, therefore, will not be ruled upon at this time. ... [W]e envision that the comments are necessary in order to determine the framework for proceeding in this matter. In other words, we want to know from the commentors their views of staff's proposed plan and what data is necessary to obtain, if any beyond what staff has proposed, and then we will direct affected carriers to supply us with the required data. Once the data is submitted to us, we would entertain motions seeking discovery, a request for a technical workshop, and a hearing. Discovery would be focused on the submitted data.[11]

Comments and reply comments were filed according to the schedule initially set forth by the Commission. The comments displayed substantial diversity among the industry; OCC was the only consumer representative to file comments. One theme, however, ran through the majority of the comments: that the Commission need not act in this area, especially given the then-anticipated action of the FCC on intercarrier compensation ("ICC"), which includes the intrastate access charges being addressed in this proceeding.

Based on the (continuing) errors in the December 8 Entry, in a continuing exercise of caution OCC filed an application for rehearing of that Entry on January 7, 2011. OCC again alleged as errors the lack of a hearing, the lack of discovery, and not

[10] As discussed below, the Commission did not discuss OCC's Motion to Intervene.

[11] December 8 Entry at 4 (emphasis added).

granting OCC's motion to intervene.[12] Again, the Commission did not rule on OCC's January 7, 2011 application for rehearing.

The February 23 Entry does not order a hearing for this proceeding, which all the comments showed was needed. Neither does the Entry grant OCC's motion to intervene, in which OCC had shown that it met all the statutory criteria for intervention as well as all those in the Commission's rules. And although the February 23 Entry does provide for discovery, it does so in such a limited fashion as to not fulfill the statutory right to "ample discovery" provided for in R.C. 4903.082. And the other aspects of the process directed by the February 23 Entry are also unreasonable.

More fundamentally, the matters addressed in this case now are likely to later need to be significantly revisited once the FCC rules on its current NPRM.[13] It is also possible that the FCC's action will preempt this Commission's determination. By ordering this further process, rather than simply abandoning or at least postponing this entire proceeding, the Commission is requiring the parties (and itself) to expend scarce resources; thus at the very least, postponement of the processes in this case would be advisable.

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[12] Again, AT&T was the only entity to file a Memorandum Contra OCC's application for rehearing. AT&T asserted that OCC "agree[d] that the Commission adequately addressed these requests first made by OCC in its December 8 Entry." AT&T Memorandum Contra (January 18, 2011) at 2. This is decidedly untrue.

[13] *In the Matter of Connect America Fund*, et al., WC Docket No. 10-90, et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. February 9, 2011) ("FCC USF/ICC NPRM"), accessible at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-13A1.pdf. Initial comments are due to the FCC on one piece of the NPRM on April 1, 2011, with comments on the remainder due April 18, 2011. See id., FCC DA 11-411 (rel. March 2, 2011).

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.

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 February 23 Entry is met by this application for rehearing.

III. ARGUMENT

A. The Commission Should Not Proceed Further Here.

- The Commission erred by proceeding with this docket given the pendency of an FCC NPRM addressing ICC.

In comments and reply comments, many of the commenters urged the Commission to refrain from further action in this docket, because of the expected FCC proceeding on ICC.[14] The FCC NPRM has in fact been issued.[15]

The 289-page FCC NPRM contains extensive discussion of, and requests for comment on "Intercarrier Compensation for a Broadband America"[16]; "Legal Authority to Accomplish Comprehensive Reform"[17]; "Concepts to Guide Intercarrier Compensation Reform"[18]: "Selecting the Path to Modernize Existing Rules and Advance IP Networks"[19]; "Developing a Recovery Mechanism"[20]; and "Reducing Inefficiencies and Waste by Curbing Arbitrage Opportunities."[21] Among the items identified as "Immediate Reforms" are addressing access stimulation, "phantom traffic," and ICC obligations for interconnected VoIP traffic,[22] which were issues raised in the comments in this docket.[23]

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[14] See OCC Reply Comments (January 19, 2011) at 7-9, citing OCC's and others' comments in this regard.

[15] See footnote 13, supra.

[16] FCC USF/ICC NPRM, ¶¶ 490-508.

[17] Id., ¶¶ 509-522.

[18] Id., ¶¶ 523-532.

[19] Id., ¶¶ 533-558.

[20] Id., ¶¶ 559-602.

[21] Id., ¶¶ 603-677.

[22] See id., ¶¶ 35-38.

[23] See, e.g., SLEC Comments at 8.

More importantly, the NPRM proposes two options for the "Federal-State Role."[24] Under the first option, the states would retain their traditional role in setting intrastate access, but the FCC asks for comment on "incentives for the states to complete reform of intrastate access charges."[25] Under the second option – which the FCC spends much effort explaining it has the authority to adopt[26] – the FCC "would use the tools provided by sections 251 and 252 of the 1996 Act to unify all intercarrier rates, including those for intrastate calls, under the framework of reciprocal compensation."[27]

Such FCC efforts would override any action the PUCO might take here. Further, the FCC also addresses numerous questions regarding the need for recovery of reduced ICC revenues,[28] which would also likely override the revenue neutrality aspects of the PUCO staff-proposed plan.[29]

As noted above, comments on the FCC's NPRM are due on April 1 and April 18, 2011. Under these circumstances and with the many demands on the PUCO's time and resources (and those of parties), it would serve administrative efficiency for the Commission to not proceed now with this docket, which may be mooted – or at the very least will be substantially influenced – by action at the federal level. The docket should be held in abeyance pending further developments at the FCC.

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[24] NPRM, ¶ 42.

[25] Id., ¶ 534. From the FCC's perspective, however, "reform" of access charges means bringing them to the lowest level possible. Id., ¶¶ 524-532.

[26] Id., ¶¶ 509-522.

[27] Id., ¶ 534.

[28] Id., ¶ 559.

[29] Indeed, because R.C. 4927.15(B) requires revenue neutrality when the PUCO orders access charge reductions, if the access charge reductions came about as a result of **FCC** action, the much-debated revenue neutrality provision would become irrelevant at the state level.

B. The Need For A Hearing

- The Commission erred by failing to order a hearing in this proceeding.

If the Commission does continue with this process, as stated in OCC's motions and previous applications for rehearing, the Commission clearly has the authority to order a hearing in Commission investigations such as this. OCC noted that a hearing was held in the original investigation into intrastate access charges.[30] OCC also noted that hearings have also been held in various other Commission investigations relating to telephone service.[31] OCC acknowledged that the most recent access charge case, a complaint by Verizon – cited in the November 3 Entry[32] – has not yet had a hearing, but one would be required if it was to proceed.[33]

OCC also noted that 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.[34] 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.

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[30] See *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St.3d 266, 269 (1988).

[31] 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.

[32] November 3 Entry at 1. By Entry of February 23, 2011, that case – Case No. 07-2011-TP-CSS – was ordered held in abeyance.

[33] R.C. 4905.26; new R.C. 4927.21.

[34] *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.

OCC also noted that the Entry and PUCO staff's plan appeared to be based on only two "facts." First, there was the receipt by the Commission of formal and informal complaints from long distance carriers about excessive access charges.[35] Notably, the one formal complaint cited by the Commission[36] has lain fallow for three years and is now in abeyance. And second, the Commission cited a precipitous decline in access minutes of use.[37] The need to determine actual "facts" and their connection to the proposed "relief" demands a hearing for serving the PUCO's adjudicatory role. Subsequent to the November 3 Entry, the Commission has provided no additional justification for the proposed actions.

Under these circumstances, a hearing should have been ordered. The December 8 Entry's assertion that the motions for hearing were "premature," and that "[o]nce the data is submitted to us, we would **entertain** motions seeking discovery, a request for a technical workshop, and a hearing" were unjust and unreasonable, as shown in OCC's January 7, 2011 application for rehearing. And the comments filed with the Commission on December 20, 2010 along with the reply comments filed on January 19, 2011 demonstrated conclusively that it was unreasonable for the Commission not to order a hearing for this proceeding. A hearing should be ordered.

[35] November 3 Entry at 1.

[36] Id., n.1.

[37] Id. at 1.

C. The Right To Ample And Adequate Discovery

- The Commission erred a) by establishing an inadequate discovery period; and b) by declaring that any discovery will be on submitted data.

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."[38] And, as OCC noted, "It should be presumed that these other carriers will attempt to pass those charges on to their own customers."[39] This was confirmed in the "contributing carriers'" comments.[40] And therefore end-use customers are at risk for rate increases.

OCC included in its procedural motion a request for expedited discovery.[41] It is appreciated that the February 23 Entry does provide for discovery with a ten-day turnaround, and electronic service.[42] But the February 23 Entry also limits such discovery, ordering that the discovery period will not begin until March 18, 2010 – the date of the filing of the required data. And the February 23 Entry also directs that "[t]he last discovery request shall be served no later than April 18, 2011,"[43] one month after the discovery period begins. No reason is provided for these constraints – particularly the

[38] OCC Motions at 10.

[39] Id., n.35.

[40] See, e.g., AT&T Comments at 8; Verizon Comments at 20; Windstream Comments at 3.

[41] OCC Motions at 10-11.

[42] February 23 Entry at 6.

[43] Id.

early ending date.[44] The receipt of discovery served at the ending date, if timely received, would come on April 27, 2011 – more than three weeks before the supplemental initial comments are due. There is no need for this gap. The Commission should eliminate the ending date.

The Ohio Supreme Court – only four years ago – reversed a Commission order because of failure to grant OCC its statutory discovery rights. The Court stated,

> The text of Ohio Adm.Code 4901-1-16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 1994 Ohio 324, 635 N.E.2d 331 ("The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding"). See *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479, 664 N.E.2d 532 ("Pursuant to Civ.R. 26(B)(1), a party may obtain discovery regarding non-privileged information relevant to the claim or defense of a proceeding. This includes determining the existence of documents and the identity of persons having knowledge of any discoverable matter").[45]

This constricted period for discovery conflicts with the Supreme Court's recognition of a right to "broad discovery."

Further, the February 23 Entry once again limits discovery to be "on the submitted data."[46] In the December 8 Entry, the Commission had stated that "[d]iscovery

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[44] As the February 23 Entry indicates, ILECs will be able to request confidential treatment of their data. Id. If OCC were able to enter protective agreements with all of the ILECs – an effort in which OCC is currently engaged – **and** if discovery were able to be issued almost instantaneously upon the receipt of the data and subsequent discovery responses **and** if the data and discovery responses were timely provided – four rounds of discovery would be possible for each of the thirty-eight eligible ILECs. Those are substantial contingencies, but would, of course, preclude any meaningful review of the data prior to discovery being issued. Given the need for such review, there may be an opportunity for only one or two rounds of discovery subsequent to the data filing, which is not much discovery for a proceeding involving tens of millions of dollars that customers may be asked to pay.

[45] *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St.3d 300, 320, 2006-Ohio-5789, ¶ 83.

[46] Id.

would be focused on the submitted data."[47] OCC had applied for rehearing on that issue,[48] which the Commission did not address when it did not issue an Entry on Rehearing. Both the above-cited Ohio Supreme Court case and the Commission's own rules stress that discovery may be had "of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[49] Thus, the Commission may not limit discovery to the "submitted" data that the Commission has selected, even though the range of submitted data has been slightly expanded by the addition of the attachment to the February 23 Entry and the inclusion of 2010 data. The Commission should eliminate this restriction on discovery, which will serve the PUCO's interest in making "findings of fact and written opinions" under R.C. 4903.09.

D. The Comment Period Is Unjust And Unreasonable.

- The Commission erred by establishing an inadequate comment period.

As discussed above, the Commission required initial comments to be filed three weeks after the last discovery response can be due. That appears to be too limited of a period of time, given the amount of data that will be submitted.

But what is clear is that the two-week period allowed for reply comments – between May 29 and June 3 – is inadequate.[50] Given the amount of data that will be submitted, the reply comments will need to focus on the analyses of data included in the

[47] December 8 Entry at 4.

[48] OCC January 7, 2011 Application for Rehearing at 1 and Memorandum in Support at 10.

[49] Ohio Adm. Code 4901-16(B).

[50] Especially because that period includes the Memorial Day holiday weekend.

initial comments. Although it would be technically feasible for parties to request a continuance once the initial comments have been filed, the uncertainty of Commission action in that two-week period will cause unnecessary expenditure of resources. The Commission should grant rehearing, and allow at least a month for supplemental reply comments.[51]

E. OCC Intervention

- The Commission erred by failing to grant OCC's Motion to Intervene.

Despite acknowledging OCC's motion to intervene,[52] the December 8 Entry took no action on the motion.[53] Neither did the February 23 Entry. This was error. In OCC's motion, compliance with the statutory (and Ohio Administrative Code) requirements for intervention have been clearly shown.[54] The Supreme Court of Ohio has confirmed OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.[55] The Commission should, on rehearing, grant OCC's motion to intervene.

IV. CONCLUSION

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

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[51] This is consistent with the period allowed for the initial reply comments.

[52] December 8 Entry at 2.

[53] See id. at 5.

[54] See OCC Motions at 2-5.

[55] *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶ 13-20 (2006).

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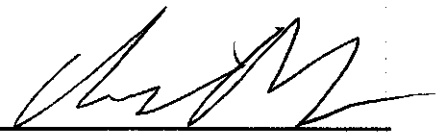

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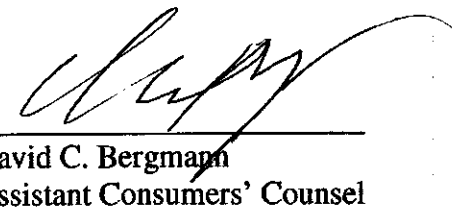
CERTIFICATE OF SERVICE

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 25th day of March 2011.



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