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April 4, 2011

***Via Electronic Filing***

Renee Jenkins, Secretary of the Commission
Attn: Docketing Division
Public Utility 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 on behalf of the Small Local Exchange Carriers ("SLECs") in the above-captioned docket please find the SLEC Memorandum Contra to the Application for Rehearing filed by the Office of the Ohio Consumers' Counsel.

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**

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

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**SMALL LOCAL EXCHANGE CARRIERS'**
**MEMORANDUM CONTRA**
**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**
**APPLICATION FOR REHEARING**

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NOW come the Small Local Exchange Carriers ("SLECs" or "SLEC Group"),[1] pursuant to the regulations of the Public Utilities Commission of Ohio ("PUCO" or "Commission") at Ohio Adm. Code §4901-1-35(B), and provide this Memorandum Contra the Application for Rehearing ("Application") filed by the Office of the Ohio Consumers' Counsel ("OCC") on March 25, 2011, seeking abrogation or modification of the Commission's February 23, 2011 Entry in the above matter. For the reasons more fully stated below, the SLECs assert that the OCC's application should be rejected as no more than the OCC's fourth attempted bite at the same apple. The OCC has presented nothing new in its current pleading, which should be rejected outright or allowed to fail by operation of law.

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[1] The SLECs comprise 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.

## I. INTRODUCTION

By Entry dated November 3, 2010, at the above-captioned docket ("November 3 Entry"), the Commission opened a generic investigation into intrastate carrier access reform. The motivation behind the PUCO's Entry was the enactment of S.B. 162, effective September 13, 2010, particularly Section 4927.15(B), which provided the PUCO the discretion to entertain changes in intrastate carrier access charges. The statutory authority under S.B. 162 is clearly discretionary: "The public utilities Commission ***may order*** changes in a telephone company's rates for carrier access in this state[.]"[2] In the Entry, the Commission established a process by which any interested party could provide comments on the Commission's proposed Access Restructuring Plan ("ARP"). The Commission also provided an opportunity for parties to files replies to comments.

The Commission has issued three Entries in this proceeding. To each of these, the OCC has filed a motion in response seeking rehearing.[3] At every turn, the OCC has filed renewed pleading after pleading in its unyielding attempt to convert this Commission investigation into complex, burdensome, and costly litigation that is both unnecessary and unwarranted given the statutory scheme of Substitute Senate Bill 162 ("S.B. 162") and the Commission's powers thereunder.

In its most recent filing, the OCC raises five issues: (1) potential action by the Federal Communications Commission ("FCC"); (2) the alleged need for formal evidentiary hearings; (3) the scope of discovery; (4) the comment period; and (5) OCC's intervention. The Commission is already aware of and has addressed, or has stated that it will address, each of these issues. Nothing warrants different Commission action now.

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[2] S.B. 162, § 4927.15(B) (emphasis added).
[3] See OCC's Memorandum in Support at 1-4.

### A. FCC Action

The Commission is well aware that the FCC is and has been considering the issues of intercarrier compensation, universal service, and access restructuring. The history of the FCC's lengthy process with respect to interstate access charges was well detailed by the OCC in its 111 pages of comments. Moreover, many other parties have specifically addressed the potential for FCC action in their comments, including whether this proceeding should be delayed to await that outcome.[4] That issue is only one of the many raised in the original Entry that will be addressed by the Commission as part of its overall review.

The PUCO has developed a detailed plan under authority of S.B. 162, specifically enacted while the FCC's action was pending, which it has published for comment and consideration. It is wholly within the Commission's discretion to proceed to develop and implement a plan for Ohio intrastate carrier compensation. There is no preemptive effect of the FCC's most recent Notice of Proposed Rulemaking. Nor, in the SLECs' opinion, is one likely, if the FCC does ultimately act. It is not necessary for the Commission to remain idle if it chooses intrastate action. As the SLEC Group has previously urged: "We have the opportunity here to do what is beneficial for all Ohioans. The ARP should be implemented."[5]

In summary, there is no basis whatsoever to conclude that the Commission's February 23, 2011 Entry is unreasonable or unlawful. Simply stated, the OCC's motion jumps the gun, rather than await this Commission's deliberation on this and the other issues raised in the original Entry.

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[4] See for example, the Comments of Cincinnati Bell at 15, Frontier at 2-3, the Ohio Cable and Telecommunications Association at 7, T-Mobile at 11-12, Verizon at 15, and Windstream at 1.
[5] SLEC Reply Comments at 14.

**B. Hearings**

In its November 19, 2010, Motion to Intervene and Motion for Hearing and Other Procedural Orders, the OCC asserted that "mere comments are insufficient" and "litigation is necessary."[6] The OCC's position on this issue is not new and is merely resurrected without any additional basis or support. The Motion points to no specific instances where the comments or replies raised contested factual issues. There was, for example, no dispute raised by the OCC to the basic proposition that access lines and minutes are declining. Indeed, the OCC acknowledges this to be the case and adopts the Commission's figures, rather than disputing them.[7] The claim for hearings is simply another OCC abstraction.

The SLECs continue to maintain that none of the contentions raised by OCC to date mandates a hearing. However, it should be noted that the Commission has never *denied* the OCC's request for a hearing. The Commission has simply deferred the prospect of conducting a hearing until more information was gathered and it was better able to determine whether there was a need for a hearing to resolve *disputed issues of fact.* The Commission clearly articulated the following framework for proceeding on the subject of intrastate access restructuring in its December 8, 2010 Entry as follows:

> 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. Regarding the requests that the ILEC data be filed prior to the filing of comments or that discovery occur prior to the filing of initial and reply comments, these requests are denied at this time. However, in order to clear up confusion over the process, we will discuss below how the Commission intends to proceed in the matter. At this time, the Commission determines that data and discovery are not necessary in order to comment. Rather, we 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

[6] OCC Motion to Intervene at 2.
[7] OCC Comments at 30.

> 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. *In any event, interested entities will have a full opportunity to present their positions to the Commission before the Commission ultimately rules on the access recovery mechanism.*[8]

This investigation was initiated by the Commission pursuant to S.B. 162, which provides the Commission authority to restructure intrastate access rates on a revenue neutral basis.[9] If any rates other than intrastate access rates change, they will not change pursuant to the provision of the Revised Code that requires a hearing.[10] The ability to conduct a paper investigation is particularly within the Commission's discretion. The OCC's complaint that a hearing must be immediately scheduled was, and still remains, premature.

As the SLEC Group has previously contended, this Commission has used both on the record hearings and paper proceedings in its access restructuring history. Following the Commission's initial intrastate access rate hearing in 1988,[11] the Commission conducted a series of paper proceedings and eventually held a second investigation in 2001 that was *not* the subject of hearings. Rather, it was subject to the same administrative structure involving comments, replies, and data requests as currently contemplated by the Commission.[12] There are legitimate issues that are best resolved by legal argument and policy interpretation presented through comments and replies, and not the presentation and cross-examination of witness' testimony. If, however, the Commission deems a hearing necessary, it has reserved the right to schedule one.

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[8] December 8, 2010 Entry at 4, ¶ 12 (emphasis added).
[9] R.C. § 4927.15.
[10] See e.g. Section 4903.083 of the Revised Code, which requires hearings for rate increases pursuant to R.C. § 4909.18.
[11] *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St.3d 266, 269 (1988).
[12] Indeed, the Commission formally initiated Case No. 00-127-TP-COI "to consider whether and how intrastate access rates should be modified[,] invited comment on a number of issues and required the submission of certain revenue and access rate information [subject to the filing of ] revenue information and initial [and reply] comments" in much the same way the Commission has structured the instant investigation. *See* January 11, 2001 00-127 Entry, at 1.

As this Commission has previously recognized, "access reform is an important policy decision[.]"[13] As contrasted with contested issues of fact, policy and legal determinations do not per se require the conduct of adversarial hearings. There is no basis whatsoever to conclude that the Commission's February 23, 2011 Entry is unreasonable or unlawful on this ground.

**C. Discovery**

In its November 19, 2010 Motion, the OCC asked the Commission to modify its rules of discovery to provide a shortened discovery response and to require the SLECs to respond to the Commission data requests contained in Appendix C prior to any interested party having to file comments or replies to the Entry. In response, as identified above, the Commission provided for the right to discovery on the submitted data and further provided that additional motions for discovery would be entertained once the Commission had proceeded through the framework of the investigation as it is currently laid out.[14] Moreover, the Commission subsequently, in the very Entry to which OCC applies for rehearing, provided that the initial discovery on the submitted data would be expedited and that parties would have the opportunity to submit supplemental comments *following* their review and discovery of the submitted data, precisely as OCC requested.[15]

Having provided discovery on the information currently relevant to the PUCO's proposal, having reserved the right to address discovery further, and having provided the opportunity to file supplemental comments following the review of submitted data, the OCC has been afforded adequate rights to discovery and comment. There is no basis whatsoever to conclude that the Commission's February 23, 2011 Entry is unreasonable or unlawful on this ground.

[13] 00-127 Opinion and Order at 13.
[14] December 8, 2010 Entry at 4.
[15] February 23, 2011 Entry at 4.

### D. Adequacy of Comment Period

The OCC also contends that the Commission has afforded too limited a time period to provide both comments and replies. In particular, the OCC complains that "[g]iven the amount of data that will be submitted, the reply comments will need to focus on the analyses of data included in the initial comments."[16] The OCC clearly has had the ability to review the data submitted by the SLEC Group, only a small portion of which was declared confidential, since March 18. It is only under the projection of the OCC's more burdensome hearing process, involving the discovery of information not relevant to the pending PUCO Staff access restructuring proposal, that the SLEC Group would envision the need for more time to file comments and replies. Nonetheless, as OCC already recognized, in the event the period provided by the Commission for the provision of replies is insufficient, the OCC or any other party could request a continuance[17] or an extension for replies could be considered. There is no basis whatsoever to conclude that the Commission's February 23, 2011 Entry is unreasonable or unlawful on this ground.

### E. OCC Intervention

Finally, the OCC continues to claim the Commission erred by failing to grant OCC's Motion to Intervene. However, while citing error, the OCC has failed to aver how its rights have been impaired merely by the title attached, or not attached, to its participation in this investigation. The OCC's right to participate as an interested party or a stakeholder has never been challenged by any party, nor has the OCC been denied any opportunity in any respect to participate in this investigation because it is not an "intervenor."

[16] OCC Application at 12-13.
[17] OCC Application at 13.

OCC cites to *Ohio Consumers Counsel v. Pub. Util. Comm.*[18] to support its contention that the OCC has a right to intervene in PUCO proceedings. No one has denied the OCC's right to participate or disputed its interest in the proceeding. Notably, in the case cited, while the Supreme Court found the PUCO should have granted OCC's intervention, it specifically acknowledged that while "the statute governing intervention in PUCO proceedings - 'clearly contemplates intervention in quasi-judicial proceedings, characterized by notice, hearing, and the making of an evidentiary record,'" when, as in this investigation (and as was the case on appeal), no hearing is held before the PUCO, "there is no right to intervene."[19] More importantly, having found no impairment of the OCC's rights despite its lack of intervenor status, the Supreme Court refused to reverse the PUCO Order notwithstanding the error:

> Even so, the two causes need not be remanded to the PUCO so that the Consumers' Counsel can intervene, because, according to the PUCO's orders in both cases, *the PUCO took the Consumers' Counsel's filings into consideration when it made its decision. Because the PUCO concluded in both cases that no hearing was needed on the electric companies' requests for accounting changes, and because the PUCO considered all the documents presented to it by the parties and all prospective intervenors, the Consumers' Counsel's status as a nonparty had no discernable adverse effect on her efforts to advocate for a particular outcome in the two proceedings.*
>
> *The denial of the motions to intervene, in other words, did not prejudice the Consumers' Counsel's efforts to be heard before the PUCO.* This court has explained in past cases that we "will not reverse an order of the Public Utilities Commission unless the party seeking reversal demonstrates the prejudicial effect of the order."[20]

OCC's claim then, as it is now, was full of sound and fury, but in the end signified nothing. Because the Commission has welcomed the input of essentially any entity wishing to comment on the subject and presumably is most certainly willing to consider all comments and replies filed with it, the OCC's assertion of a statutory or any other interest in the proceeding is

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[18] *Ohio Consumers' Counsel v. Pub. Util. Comm.,*, 111 Ohio St. 3d 384, 856 N.E. 2d 940 (2006).
[19] *Id.*, 856 N.E. 2d at 945.
[20] *Id.* 856 N.E. 2d at 946 (emphasis added; citations omitted).

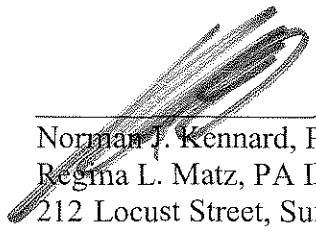
irrelevant and the Commission's ruling on the Motion to Intervene was and remains unnecessary at this time. There is no basis whatsoever to conclude that the Commission's February 23, 2011 Entry is unreasonable or unlawful on this ground.

## III. CONCLUSION

For the reasons stated herein, the Ohio Small Local Exchange Carriers submit that the process established by the Commission in its February 23, 2011 Entry is in full compliance with the statutory requirements of S.B. 162 and the Ohio Public Utility Code, and that the Ohio Consumers' Counsel Application for Rehearing should be denied.

Respectfully submitted,

THOMAS, LONG, NIESEN & KENNARD



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Attorneys for the
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Dated: April 4, 2011

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra to the Office of Consumers Counsel Application for Rehearing was served by electronic mail this 4th day of April 2011.

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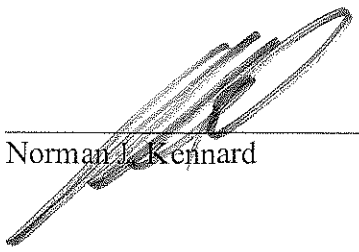

Norman J. Kennard

Summary: Memorandum Small Local Exchange Carriers' Memorandum Contra The Office of the Ohio Consumers' Counsel Application for Rehearing electronically filed by Ms. Teresa L Thomas on behalf of Small Local Exchange Carriers Group