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93-4000-TP-FAD

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GTE North, Inc., Plaintiff,	:	Case No. **5:97CV 0554**
v.	:	**JUDGE SAM H. BELL** (Magistrate Judge Thomas)
Craig A. Glazer, *et al.*, Defendants.	:	

DEFENDANT PUBLIC UTILITIES COMMISSION OF OHIO COMMISSIONERS' MOTION TO DISMISS

Betty D. Montgomery
Attorney General of Ohio
(Ohio Reg. No. 0007102)
Ann E. Henkener, Trial Counsel
(Ohio Reg. No. 0025248)
Steven T. Nourse
(Ohio Reg. No. 0046705)
Duane W. Luckey
(Ohio Reg. No. 0023557)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
(614) 466-4396
FAX: (614) 644-8764

Attorneys for Defendants-Public Utilities Commission of Ohio Commissioners

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Defendants.	:	

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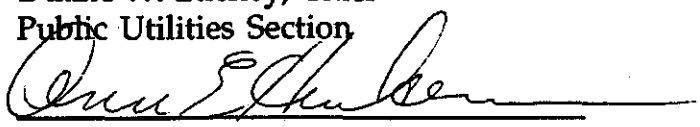
Defendants, individual Commissioners of the Public Utilities Commission of Ohio, move the Honorable Court to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b). Defendant Commissioners request that the Court set a time for oral argument on this motion. A memorandum in support is attached.

Respectfully submitted,

Betty D. Montgomery
Attorney General of Ohio

Duane W. Luckey, Chief
Public Utilities Section



Ann E. Henkener, Trial Counsel
Steven T. Nourse
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793

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	:	**JUDGE SAM H. BELL**
v.	:	**(Magistrate Judge Thomas)**
Craig A. Glazer, *et al.*, Defendants.	:	AFFIDAVIT OF **ANN E. HENKENER**

STATE OF OHIO)
) SS: AFFIDAVIT
COUNTY OF FRANKLIN)

I, Ann E. Henkener, having been duly sworn, depose and state as follows:

1. I am one of the attorneys representing Defendants-Public Utilities Commission of Ohio Commissioners in Case No. 5:97 CV 0554.

2. To the best of my knowledge, this case has not yet been assigned to any track by this court.

3. The Memorandum in Support of this Motion to Dismiss is within the applicable twenty (20) page limit.

FURTHER AFFIANT SAYETH NAUGHT.

Ann E Henkener

ANN E. HENKENER

SWORN TO, BEFORE ME, and subscribed in my presence, this 22nd day of May, 1997.

Steve Nave

NOTARY PUBLIC
My Commission Expires:

NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

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BRIEF STATEMENT OF ISSUES

1. Should the Court dismiss or order a mandatory transfer of the case for improper venue, pursuant to 28 U.S.C. § 1406, or use its discretion to order a permissive transfer of venue, pursuant to 28 U.S.C. § 1404?
2. Must an aggrieved party await the adoption of a final interconnection agreement by a State commission prior to filing an action under 47 U.S.C. § 252(e)(6)?
3. Is an action under 47 U.S.C. § 252(e)(6) premature and constitutionally unripe for adjudication where the plaintiff appeals an arbitration award and fails to await the adoption or ordering of an interconnection agreement, as required by both the federal statute and the procedural rules of the State commission that is adjudicating the arbitration?
4. Did Congress, by enacting 47 U.S.C. § 252(e)(6) and creating an action against a State commission in a federal district court, violate the Eleventh Amendment to the United States Constitution and, if so, is an injunction action for the same purpose also prohibited against all of the commissioners in their official capacities?

SUMMARY OF ARGUMENT

Defendants, individual commissioners of the Public Utilities Commission of Ohio (Defendants or Commissioners) request a dismissal or mandatory transfer for improper venue. The Commissioners submit that the Public Utilities Commission of Ohio (PUCO) is the only indispensable party to this appeal. As such, neither the individual commissioners nor Sprint Communications Company L.P. (Sprint) are necessary defendants. Without Sprint as a proper defendant, the proper venue for this action should be the Eastern Division of the Southern District of Ohio where the PUCO is located. If the Court maintains this case as an injunction action against

the individual Commissioners, instead of an appeal against the PUCO under 47 U.S.C. § 252 (e)(6), the Southern District is still the appropriate venue because all of the defendants reside in the Southern District. The Court should order a mandatory transfer of venue to the Southern District of Ohio pursuant to 28 U.S.C. § 1406(a). Even without deciding who the proper defendants should be in this action, this Court should order a discretionary transfer of venue under 28 U.S.C. § 1404(a) to advance the interests of justice.

Defendants also request dismissal of this action because this court currently lacks jurisdiction over the subject matter of the complaint and this matter is not ripe for judicial review. Further, the Eleventh Amendment to the United States Constitution prevents an action under 47 U.S.C. § 252(e)(6) against a State public utilities commission or the individual commissioners.

GTE North, Inc. (GTE North) brings this complaint under 47 U.S.C. § 252(e)(6), which states that any party aggrieved by a determination of a State public utilities commission concerning an agreement for interconnection with an incumbent telephone company may appeal to federal district court to determine whether the agreement meets the requirements of the federal law. Because no agreement had been entered into at the time the complaint was filed, this Court has no subject matter jurisdiction, and this case is not ripe for review. At least five similar cases filed in federal district courts in other states have recently been dismissed. In addition, one has been dismissed in the Northern District of Ohio.

This Court lacks subject matter jurisdiction over the Commissioners acting in their official capacity, and over the PUCO because both the PUCO Commissioners and the PUCO possess sovereign immunity. Congress has not lawfully abrogated that immunity through enactment of 47 U.S.C. 252(e)(6) because it did not act pursuant to a valid exercise of power. The PUCO is an indispensable party in an appeal

challenging its order, and this entire action must be dismissed even where Sprint was voluntarily named by GTE North as a defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF THE FACTS

On February 8, 1996, the Telecommunications Act of 1996 (1996 Act) became law. Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151, *et seq.* The 1996 Act provides "for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[1] The 1996 Act opens local telecommunications markets to competing providers by imposing new interconnection, unbundling, and resale obligations on existing providers. 47 U.S.C. § 251 (1997). New entrants can now connect their telephone systems with systems of the incumbents, buy individual service components from the incumbents, or purchase local service on a wholesale basis for resale. State public utilities commissions, such as the PUCO, must assure that reasonable agreements between incumbents and competitors are formed, either through negotiation or arbitration.

The 1996 Act insures that interconnection agreements between incumbent telephone companies and new entrants are entered into in a timely manner:

1. A new entrant may make a formal request for negotiation for interconnection or resale from an incumbent. 47 U.S.C. § 251 (1997).

2. From the 135th to the 160th day after the date the incumbent LEC receives a request for negotiation, a new entrant may petition the state commission to arbitrate any open issue. 47 U.S.C. § 252(b)(1) (1997).

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[1] S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) and H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess. 1 (1996).

3. State commissions must resolve issues raised in the petition within 9 months of the original request to negotiate. 47 U.S.C. 252(b)(4). PUCO guidelines name this resolution an "arbitration award." *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996* (Arbitration Guidelines), Case No. 96-463-TP-UNC, Guideline X.I. Motion Appendix at 8.

4. Parties to the arbitration must submit the entire (arbitrated and negotiated) agreement to the State commission for approval or rejection. 47 U.S.C. § 252(e)(2).

5. The parties and other interested persons may file written comments and responses concerning the proposed agreement. *Arbitration Guidelines,* Guideline X.K.1., Motion Appendix at 9.

6. The state commission has 30 days after the filing of the agreement in which to approve or reject the agreement, or the agreement is deemed to be approved after the 30 day period. 47 U.S.C. § 252(e)(4) (1997); *Arbitration Guidelines,* Guideline X.K.2., Motion Appendix at 9.

In the case below, Sprint requested interconnection from GTE North on April 18, 1996. GTE North Complaint at ¶ 46. This corresponds with Step 1 above. On September 25, 1996, Sprint filed a petition with the PUCO initiating arbitration of unresolved issues. This corresponds with Step 2. The PUCO conducted four days of evidentiary hearings. The latest action completed in the above sequence as of March 4, 1997, the date the instant case was filed, was the PUCO Arbitration Award issued on January 30, 1997. This arbitration award corresponds to Step 3 above.

On February 13, 1997, Sprint filed a motion with the PUCO requesting to exercise its right under 47 U.S.C. § 252(i) to elect the contract GTE North was to enter into with AT&T Communications of Ohio, Inc. On April 10, 1997, the PUCO granted Sprint's request. *In the Matter of the Petition of Sprint Communications Company L.P.* (Arbitration Case), Case No. 96-1021-TP-COI (Entry) (April 10, 1997), Sprint Motion to Dismiss, Ex. 1. The case below was then closed of record. GTE North and

Sprint will not be entering into an agreement based on the Arbitration Award of January 30, 1997.

ARGUMENT

Proposition of Law No. I:

The Southern District of Ohio is the most appropriate venue for this action.

A. The Court should dismiss the case for improper venue or order a mandatory transfer to the Southern District of Ohio. *See* 28 U.S.C. § 1406(a) (1997).

The PUCO is the only indispensable party to this appeal. Sprint may have an interest in joining as an intervenor. Sprint's presence in the case, if it remains, should not be an outcome-determinative factor for the venue of this action.

GTE North alleges that venue in this case is based on Sprint having property and doing business in the District. Complaint at ¶ 16. This is not, however, an *in rem* proceeding involving a judgment against property. The decision appealed from merely imposes rates for services that GTE North is required under federal law to provide. The venue provision in 28 U.S.C. § 1391(b)(2), referring to property within the district as a basis for venue, is not an appropriate basis for venue in this case. Venue in this district is appropriate only if Sprint is a proper defendant.

The PUCO is an indispensable party to an appeal under Section 252(e)(6), pursuant to Federal Rule of Civil Procedure (FRCP) 19(b). Subsection (e)(6) of 47 U.S.C. § 252, the provision relied upon by plaintiffs to file this case, is entitled "Review of State Commission Actions." Section 252 makes at least *forty-five* references to the "State Commission." *See* 47 U.S.C. §§ 252(b)(4), (e), (e)(6), (f)(2) (1997). By contrast, there are *no* references in Section 252 to individual state commissioners.

Two additional provisions within Section 252 confirm that the State commission was the only defendant contemplated by Congress. First, in addition to creating an action for judicial review of the State commission's arbitration decision,

Congress also provided that the normal judicial review of a Federal Communication Commission (FCC) decision would be available, if the FCC steps in to arbitrate an interconnection agreement where a State failed to act. *See* 47 U.S.C. §§ 252(e)(5), 252(e)(6) (1997). The fact that Congress, in two adjacent sentences within the same subsection, creates two similar actions in federal court to review arbitration decisions of State commissions and the FCC suggests that both types of appeals would be filed against the administrative agency rendering the challenged decision. Petitions for judicial review of FCC final orders must be filed against the FCC, and not against individual FCC Commissioners or against a party to the administrative proceeding. *See* 47 U.S.C. § 402 (1997); 28 U.S.C. § 2344 (1997).

The other provision closely related to the federal action created by Section 252(e)(6) is that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4) (1997). The grant of review power to the federal court and the stripping of review power from the State courts should be construed together. The decisions of utilities commissions are appealed to State court, where the State commission is the respondent. The administrative agency must directly defend its decision in court.[2] Other parties who have had an integral interest in the proceeding below (*i.e.*, including the prevailing party before the administrative agency) must request intervention in the appeal proceeding in order to participate.

A Commissioner cannot adjudicate a case alone. Rather, the PUCO can only act as a whole, under the authority of the State of Ohio. *See* Ohio Rev. Code Ann.

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[2] For example, in Ohio, final orders of the PUCO can be appealed directly to the Supreme Court, where the PUCO is the appellee. Ohio Rev. Code Ann. § 4903.13 (Baldwin 1997). Only by leave of Court can other interested parties intervene as an appellee. *Id.* The same would be true in seeking judicial review of an FCC arbitration order under Section 252(e)(6). *See* 47 U.S.C. § 402 (1997); 28 U.S.C. § 2344 (1997). Those situations are analogous to GTE's inclusion of AT&T as a defendant in this administrative appeal, even though GTE also included the PUCO Commissioners as defendants.

§§ 121.22, 4901.08 (Baldwin 1997). An example illustrating the true result sought in this case is that Commissioner Johnson, who did not participate in the arbitration decision below, is named as a defendant in this appeal. Further, the complaint does not mention Commissioner Jones who replaced former Commissioner Fanelly on April 11, 1997. Not only is the complaint faulty in these respects, it is clear that the injunction action is, in effect, against the PUCO.

In enacting the 1996 Act, Congress viewed the State commission as the only indispensable party to an appeal of its order. The naming of Sprint as a defendant can not dictate the venue of this action. Because the Northern District is an improper venue for the only necessary defendant, 28 U.S.C. § 1406(a) requires that the case be transferred to the Southern District.

B. The Court should order a permissive transfer of venue to the Southern District of Ohio to advance the interests of justice. 28 U.S.C. § 1404(a) (1997).

If the Court is not convinced that Sprint was improperly named as a party, the Court should order a discretionary transfer of venue under 28 U.S.C. § 1404(a). The statute for discretionary transfer of venue provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1997). Congress enacted 28 U.S.C. 1404(a) in 1948 to allow for the easy change of venue within a unified federal system. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1515 (10th Cir. 1991) (*citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 70 L.Ed.2d 419 (1981)).

Among the factors a district court should consider are: [1] the plaintiff's choice of forum; [2] the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; [3] the cost of making the necessary proof; [4] questions as to the enforceability of a judgment if one is obtained; [5] relative advantages and obstacles to a fair trial; [6] difficulties

that may arise from congested dockets; [7] the possibility of the existence of questions arising in the area of conflict of laws; [8] the advantage of having a local court determine questions of local law; and [9] all other considerations of a practical nature that make a trial easy, expeditious and economical. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509 (10th Cir. 1991) (*quoting Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 147 (10th Cir. 1967)).

The Northern District of Ohio has recognized, "[t]he Court is to afford little deference to the plaintiff's choice of forum when these factors strongly support transfer of venue." *Rothberg v. General Motors Corp.*, 1994 U.S. Dist. LEXIS 4005, unreported (January 13, 1994 Memorandum and Order) (Case No. 1:93CV2180). In this action, the factors weigh in favor of transfer of venue.

The case *sub judice* arose in the Eastern Division of the Southern District. There is no substantial relationship to the Eastern Division of the Northern District other than Sprint's residing and doing business in the district (of course, Sprint does business in every district in Ohio). All administrative proceedings were conducted in Columbus. All witnesses were presented at the hearing conducted in Columbus. The PUCO rendered its decision in Columbus. This action is an appeal from an administrative agency and the venue should be related to the location of the agency. Requiring the State of Ohio to defend this lawsuit in any federal court is improper. But requiring the State of Ohio to defend this case (and others like it) in the Northern District is inconvenient and inefficient.

There are numerous arbitration proceedings pending before the PUCO. Numerous additional cases may be filed and subjected to appeal under 47 U.S.C. § 252(e)(6) (1997). One has already been filed in the Eastern Division of the Southern District.[3] All of the companies requesting interconnection are incorporated in Ohio

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3 *AT&T Communications of Ohio v. Ohio Bell, et al.*, Case No. C2 97-443.

and may be subjected to suit in any district court in Ohio. Under GTE North's venue theory, various arbitration appeals could soon be pending in all seven of the District Courts in Ohio. 28 U.S.C. § 1391(c) (1997); *see also St. Joe Paper Co. v. Mullins Mfg. Corp.*, 311 F.Supp. 165 (1979).

If incumbent local exchange companies like GTE North are permitted both to name an interconnecting telephone company directly as a defendant in an action appealing the state administrative agency's decision, and to arbitrarily select the venue of arbitration appeals based solely on the presence of that party as a defendant, an unmanageable, inconvenient and inefficient result will be generated for both the PUCO and the federal court system. Transferring the case to the Southern District would foster a consistent, convenient and efficient venue for these cases.

Processing the cases in the district in which they arose is logical and fair. In addition, establishing a practice of transferring these cases to Columbus would enable the court to develop an expertise in the complex and technical issues presented in these cases. In short, the Court should consider not just the logistics of this case, but of all similar ones to come in the immediate future.

In addition to the obvious practical convenience, the potential for inconsistency in rulings and approach to these proceedings is also greatly expanded if this request for transfer of venue is not granted by this Court. The complex legal and technical issues surrounding this unique procedure outlined in Section 252 (e)(5) could require each of the district judges in all of those actions to "reinvent the wheel."

That situation does not bode well for either the federal court or the State of Ohio. The efficiencies and reduction of potential conflict are significant in furthering the interests of justice, if these appeals are filed in, or transferred to, the Eastern Division of the Southern District. A transfer order in this case is likely to influence other filers to initiate their action in Columbus or other District Court judges in

Ohio that may consider similar requests for transfer of venue in the near future. Because the Northern District is a *forum non conveniens* for the PUCO and individual Commissioners, the case should be transferred to the Southern District pursuant to 28 U.S.C. § 1404(a).

Proposition of Law No. II:

> **This Court currently lacks subject matter jurisdiction because the complaint was filed prematurely. *See* 47 U.S.C. § 252(e)(6) (1997).**

Civil Rule 12(b)(1) states "lack of jurisdiction over the subject matter" is a defense to an action in federal court. FRCP 12(b)(1). Civil Rule 12(h)(3) states "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FRCP 12(h)(3). Because GTE North is asserting jurisdiction, it bears the burden of proving that federal jurisdiction is proper. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). This Court must construe this grant of jurisdiction strictly and resolve any doubts against federal jurisdiction. *United States ex rel. Precision Co. v. Koch Indust., Inc.* 971 F. 2d 548, 551-2 (10th Cir. 1992).

GTE North brought the case at bar "under section 252(e)(6) of the Telecommunications Act of 1996 . . . to challenge an Arbitration Award" of the PUCO. Count 1, Complaint; *see also* Count 15. The parties do not dispute the facts relevant to this motion. Jurisdiction in this case depends on the interpretation of Section 252(e) as applied to those facts. Section 252(e)(6) states, in relevant part:

> In any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

GTE North apparently believes the PUCO's January 30, 1997 order is a "determination" under Section 252(e)(6), and that this Court has jurisdiction to review any "determination" made by a State commission.

GTE North requests that this Court relieve GTE North of the responsibility of filing an agreement as required by the 1996 Act. Complaint at 45. The 1996 Act did not contemplate this type of relief. Section 252(e)(6) only permits the Federal district court to "determine whether the agreement" meets certain requirements.[4] It is undisputed that at the time this case was filed, there was no "agreement."

GTE South, Inc. recently brought suit in the U.S. District Court for the Eastern District of Virginia challenging interlocutory determinations by the Virginia commission made under Section 252. It was dismissed because that court lacked subject matter jurisdiction. *GTE South, Inc. v Morrison*, No. 3:96 CV 1015, Mem. Op. (E.D. Va. Feb. 20, 1997) (1997 WL 82527). In *GTE South*, the Virginia commission issued an order resolving issues arbitrated between GTE South and Sprint. The Virginia commission, like the PUCO, directed the parties before it to file a complete interconnection agreement before a date set several weeks after the commission order. GTE South, like GTE North, challenged the State commission's arbitration decision rather than awaiting the State commission's decision on the agreement.

In *GTE South*, the Court analyzed Section 252(e)(6) to decide if it had jurisdiction over a "determination," such as the commission decision concerning the arbitration, as GTE South contended, or if it had jurisdiction only over the final "agreement" as the State commission contended. The Court recognized that the statute used both the words "determination" and "agreement," and found:

> The remainder of § 252(e)(6) clarifies that the Federal district court determines whether the agreement which was arguably dictated by the orders or determinations of the [Virginia commission], is within the boundaries of the Act. Hence, when reading the entire paragraph, the language clearly indicates that the Court will review the decisions of the [Virginia commission] based on whether the agreement entered into by the parties pursuant to the arbitration decisions is in compli-

[4] 47 U.S.C. § 252(e)(6) also refers to a "statement." This statement is to be filed only by a Bell Operating Company under 47 U.S.C. § 271(c)(1)(B). Because GTE North is not a Bell Operating Company, the "statement" has no applicability to this case.

> ance with the Act. Since the parties do not dispute, and the Complaint explains, that there was no agreement between Sprint and GTE when the Complaint was filed, the Court does not have subject matter jurisdiction under the Act.

Id. at 7-8. The Court recognized that the 1996 Act set forth several steps in developing an interconnection agreement. In Virginia, like Ohio, not all steps had been completed, so the Court determined not to disrupt the process before all steps were complete. *Id.* at 8.

On May 12, 1997, a similar appeal was dismissed in the U. S District Court for the Eastern Division of the Northern District of Ohio. *GTE North v. Glazer, et al.*, Case No. 5:97CV137 (N.D. Ohio May 12, 1997), unreported, Motion Appendix at 1. Again, GTE North appealed an arbitration award of the Ohio commission. The Court determined that:

> until an interconnection agreement between GTE and AT&T is approved by the PUCO, GTE's attempts to short-circuit the expedited agency process created by Congress would violate the plain terms of the Act.

Id. at 6. Several other district courts, when faced with similar suits, have reached the same conclusion. *GTE Southwest v. Wood,* No. M-97-003 (S.D. Texas March 13, 1997), unreported, Sprint Motion to Dismiss, Ex. 4; *GTE Northwest Incorporated v. Nelson,* No. C96-1991 WD (W.D. Wash. Mar. 31, 1997), unreported, Sprint Motion to Dismiss, Ex. 3; *GTE Northwest Incorporated v. Hamilton,* No. 97-6021-TC (D. Or. Mar. 28, 1997), unreported, Sprint Motion to Dismiss, Ex. 5.

Congress provided an avenue for review, and this Court should respect that choice. GTE North can more properly request review if, and when, the PUCO approves a final agreement setting forth the entirety of the terms and conditions of GTE North's interconnection, unbundled elements, and resale to Sprint. A judicial review of an arbitration award is not contemplated by the 1996 Act, and cannot sub-

stitute for a judicial review of the final agreement. Because that agreement does not yet exist, this Court has no jurisdiction over the PUCO proceedings to date.

Proposition of Law No. III:

> **This case is not ripe for judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).**

The U.S. Supreme Court has imposed a ripeness requirement as a prerequisite to federal court review of an administrative agency's decisions. The court is to determine whether the impact of an agency decision "is sufficiently direct and immediate" and has a "direct effect on . . . day-to-day business." *Id.* at 152. Agency action is not final if it is only "the ruling of a subordinate official," or "tentative." *Id.* at 151. "The core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797, 120 L. Ed. 2d 636, 648 (1992).

In the case below, the decisions of the PUCO have no "immediate" impact on GTE North, are "tentative," and, importantly, the agency has *not* completed its decision-making process. The decision GTE North is attempting to appeal is the arbitration award issued pursuant to 47 U.S.C. 252(b)(4). Under the 1996 Act, parties to the arbitration are to submit their joint agreement to the State commission for the Commission's approval or rejection. 47 U.S.C. § 252(e)(2) (1997). Under the PUCO guidelines, parties have 14 days to submit an agreement which conforms to the arbitration award. *Arbitration Guidelines*, Guideline X.J., Motion Appendix at 9.

Next, the parties and other interested persons may file comments supporting or opposing the proposed agreement within the next ten days, with responses to be submitted after 5 additional days. *Arbitration Guidelines*, Guideline X.K.1., Motion Appendix at 9. The PUCO has 30 days after the filing of the agreement to approve or reject the agreement, or the agreement will be deemed approved. 47 U.S.C. § 252(e)(4) (1997); *Arbitration Guidelines*, Guideline X.K.2., Motion Appendix at 9. If

the PUCO rejects the agreement, the parties may resubmit the agreement, or may file an application for rehearing. *Arbitration Guidelines*, Guideline XI, Motion Appendix at 10.

The terms of the arbitration decision (the subject of this appeal) are not the same as the terms of an agreement as contemplated by 47 U.S.C. 252(e). The agreement will contain both arbitrated terms and the terms the parties previously voluntarily agreed to in negotiations. The PUCO must review the final agreement under the standards in the 1996 Act. Section 252 provides that the State commission may reject any portion of an agreement, including both arbitrated provisions and negotiated provisions, based upon standards in that section. 47 U.S.C. § 252(e)(2) (1997). Because the PUCO has not had an opportunity to make this comprehensive review and rule upon the interconnection agreement in its entirety, this case is unripe. Events occurring subsequent to the filing of this action show the wisdom of not adjudicating a case which is unripe. Sprint has elected to dismissed its arbitration case below, and to take service on the same terms as AT&T.

Proposition of Law No. IV:

> **The Court should dismiss the entire case because: (i) the Eleventh Amendment to the United States Constitution prevents an action under 47 U.S.C. § 252(e)(6) against either the PUCO or the individual PUCO commissioners acting together as the PUCO, *Seminole Tribe of Florida v. Florida*, 517 U.S. —, 134 L.Ed.2d 252 (1996), and (ii) the PUCO is an indispensable party to this appeal under FRCP 19(b).**

The Court lacks subject matter jurisdiction over the defendant PUCO Commissioners acting together in their official capacity because the Commissioners possess sovereign immunity and Congress has not lawfully abrogated that immunity through enactment of 47 U.S.C. 252(e)(6). Two prerequisites must precede a Court concluding that Congress, through the enactment of a statute, has constitutionally required a State to defend itself in federal court: (1) the statute clearly expresses its

intent to abrogate the immunity, and (2) Congress acted "pursuant to a valid exercise of power." *Seminole Tribe of Florida v. Florida*, 517 U.S. —, 134 L.Ed.2d 252, 266 (1996) (citations omitted). Both inquiries must be satisfied before the Court can enforce a federal statute as permitting the State to be sued in federal court.

An executive agency of the State such as the PUCO, acts on behalf of the State and also possesses sovereign immunity under the Eleventh Amendment. *See, e.g. Welch v. Texas Highways Dept.*, 483 U.S. 468 (1987). Although Congress was sufficiently clear in manifesting its intention that State utility commissions defend appeals under Section 252(e)(6), Congress' attempt to abrogate States' sovereign immunity under the 1996 Act was not done "pursuant to a valid exercise of power." Therefore, the State of Ohio, the PUCO and the PUCO Commissioners acting together in their official capacities are immune from defending an appeal filed under Section 252(e)(6) seeking judicial review of a PUCO order.

GTE North will argue that the Court has jurisdiction to grant injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908). Under *Seminole* , however, a Court will not enforce the *Ex Parte Young* doctrine where a detailed remedial statute enlisting specific procedures and limited liability was enacted by Congress. *Seminole*, 134 L.Ed.2d at 278-279.

The PUCO is an indispensable party to any appeal under Section 252(e)(6) from one of its arbitration decisions, pursuant to FRCP 19(b). It is clear from the language in Section 252 that Congress intended that State utility commissions defend appeals under Section 252(e)(6). The PUCO is the only real party in interest in an appeal seeking judicial review of the PUCO's order. Because the Court lacks jurisdiction over the PUCO, the entire case must be dismissed.

A. Congress has clearly expressed its intent to abrogate the immunity of the States in enacting 47 U.S.C. § 252(e)(6).

Congress' intent to have State commissions defend their arbitration decisions in federal court was made abundantly clear in Section 252. Section 252 is replete with references to the "State" and the "State commission," and it is clear that the appeal under Section 252(e)(6) was intentionally designed to proceed against the State commission as part of the State. *See* Defendants' Motion to Dismiss at 3-5.

The Court has held that Congress' intent to abrogate the States' immunity from suit must be obvious from a clear legislative statement. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991). Defendants concede that Section 252(e)(6) satisfies that standard. As a result, the key inquiry in this case is whether Congress' attempted abrogation was done pursuant to a valid exercise of power. It was not.

B. Congress' attempt to abrogate the sovereign immunity of the States found in 47 U.S.C. § 252(e)(6) was not enacted "pursuant to a valid exercise of power." *Seminole Tribe of Florida v. Florida*, 517 U.S. —, 134 L.Ed.2d 252 (1996).

Prior to *Seminole Indian Tribe of Florida v. Florida*, 517 U.S. —, 134 L.Ed.2d 252 (1996), Congress attempted to abrogate State immunity under the Eleventh Amendment by enacting legislation pursuant to the Interstate Commerce Clause. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The 1996 Act was effective February 8, 1996, prior to the time that the Court released its decision in *Seminole* (*i.e.*, March 27, 1996). Congress is deemed to understand and act upon the state of existing law when it legislates. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979). Thus, at the time Congress enacted Section 252(e)(6), it believed that it could abrogate State immunity by enacting the 1996 Act.

The *Seminole* decision held directly that Congress does not possess the requisite constitutional authority to abrogate State immunity through Article I legislation, overruling its prior decision in *Union Gas*. *Seminole*, 134 L.Ed.2d at 269-273. This holding defeats any Congressional attempt to abrogate the sovereign immunity

of States that is based on the Interstate Commerce Clause. Congress' attempt to abrogate the sovereign immunity of States through the enactment of Section 252(e)(6) is unconstitutional. In enacting that provision, Congress operated under a mistaken legal theory that it could abrogate State immunity by enacting legislation under the Interstate Commerce Clause. As will be demonstrated, Section 252(e)(6) cannot be resurrected by an action under the doctrine of *Ex Parte Young*.

C. The detailed remedial scheme found in the 1996 Telecommunications Act prevents injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908), against the individual PUCO Commissioners acting together in their official capacities. *Seminole Tribe of Florida v. Florida*, 517 U.S. —, 134 L.Ed.2d 252, 278-279 (1996).

GTE North will urge the Court to apply the doctrine of *Ex Parte Young* and effectively ignore the plan for direct and limited judicial review of State commission arbitration decisions that Congress crafted in Section 252. That same argument was squarely rejected by the *Seminole* Court, due to the existence of a detailed remedial scheme created by Congress that included a provision for judicial review of State action by a federal district court. The Court held:

> [W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*.

Seminole, 134 L.Ed.2d 252, 278. The *Seminole* Court refused to replace the unconstitutional Congressional plan with a judicially-created remedy (*e.g.*, an injunction under *Ex Parte Young* doctrine), and dismissed the entire action. *Id.* The same result should occur in this case.

The *Seminole* Court observed that it would be difficult to see why an aggrieved party would "suffer through" the remedies designed by Congress "when more complete and immediate relief would be available under *Ex Parte Young*." *Id.* Allowing GTE North to file an *Ex Parte Young* action attacking arbitration decisions would emasculate Congress' intent and is inappropriate, even where that intent was

unconstitutional and cannot be carried out. *Seminole*, 134 L.Ed.2d at 279. Like the statute addressed in the *Seminole* decision, the action for judicial review found in Section 252(e)(6) does not "stand alone," but was created in the context of a "carefully crafted" remedial scheme. *Seminole*, 134 L.Ed.2d at 278.

Remedial provisions within Section 252 include the automatic approval provisions. If a State commission fails to approve a negotiated agreement within 90 days or an arbitrated agreement within 30 days, the agreement shall be deemed approved. 47 U.S.C. § 252(e)(4) (1997). If aggrieved parties are allowed to ignore these remedial provisions, they could quickly file an *Ex Parte Young* action against the individual State commissioners and seek an injunction forcing them to reject an agreement that does not conform to the substantive requirements of the 1996 Act. Instead, Congress intended that the agreement be deemed approved after the specified time periods and an aggrieved party could file an appeal against the State commission seeking judicial review of the interconnection agreement.

Section 252 also provides that a State commission can only fully review issues presented for arbitration and may not fully review issues negotiated between the parties. 47 U.S.C. § 252(e)(2) (1997). In particular, a State commission cannot reject a negotiated term of agreement unless it is discriminatory or against the public interest. Arbitrated terms and conditions are subject to broader requirements in Sections 251 and 252, as well as related FCC regulations. *Id.* The limited and specific remedial process defined by Congress did not contemplate general injunction actions to broadly enforce the requirements of the 1996 Act.

Section 252 imposes a strict timetable for the resolution of issues which restricts the way a State commission can process the cases. Consequently, these provisions impact the remedies available for judicial review. As evidenced by the premature action in this case, if plaintiff can simply file an injunction action to

enforce the requirements of the 1996 Act, without regard to the remedial process and strict timelines found within Section 252, Congress' remedial plan will be subverted.

The *Seminole* Court made another important observation that supports a rejection of *Ex Parte Young* in the instant case. The Court noted that, although the judicial review statute taken alone could be interpreted to encompass an *Ex Parte Young* cause of action, the remainder of the statute indicated that Congress clearly contemplated that the State would be the respondent and repeatedly referred to "the State." *Seminole*, 134 L.Ed.2d at 278 (note 17). *All* of the provisions in Sections 251 and 252 refer to the "State Commission" or "the State," and *none* of them refer to individual State Commissioners. There is no reasonable implication that Congress dramatically switched gears in Section 252(e)(6) to transform an inquiry of limited judicial review into a full-blown relitigation of all the legal issues involved, and subject individual State commissioners to the broad injunctive and contempt powers of the federal court. Surely, Congress would have expressly provided for such an imposing and significant remedy *if it had intended to do so.*

As demonstrated, the relief requested in this case is effectively against the State. The underpinning of the landmark case, *Ex Parte Young*, is not present. An individual state officer is not threatening to violate federal law on an ongoing basis. The PUCO can only act through a quorum of Commissioners. *See* Ohio Rev. Code Ann. §§ 4901.08, 121.22 (Baldwin 1997). Congress contemplated that the State, acting through the State commission, was the party responsible to arbitrate the interconnection agreements. Congress realized that individual Commissioners lack the power to arbitrate an interconnection agreement. The *Seminole* Court also recognized the importance of this distinction in declining to enjoin Florida's Governor from violation of federal law. The Court noted that its refusal to maintain an *Ex Parte Young* action against Governor Chiles was based, in part, on the fact that the

act sought to be enjoined was not of the sort likely to be performed by an individual state officer. *Seminole,* 134 L.Ed.2d at 279 (note 17).

Ex Parte Young cannot resurrect Congress' unlawful attempt to have State commissions defend their arbitration decisions in federal court.

D. The entire action must be dismissed because an action under 47 U.S.C. § 252(e)(6) is an appeal of the PUCO's decision. As such, the PUCO is the real party in interest and is an indispensable party in such an appeal, pursuant to FRCP 19(b). Without jurisdiction over the PUCO itself, the Court cannot provide complete relief or proceed with the action "in equity or good conscience." FRCP 19(b) (1997).

In addition to the plain text of Section 252, the PUCO is also considered an indispensable party to this proceeding under FRCP 19(b). If a necessary party cannot be made a party, the court must determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." FRCP 19(b). Factors to be considered by the court are:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FRCP 19(b). Normally, a balancing of the four factors should occur, but the presence of sovereign immunity substantially tilts the balance in favor of dismissal.

It has been widely concluded by federal courts that an action must be dismissed where an indispensable party cannot be joined to the lawsuit due to sovereign immunity. The Sixth Circuit has embraced this principle in *Keweenaw Bay Indian Community v. State of Michigan,* 11 F.3d 1341 (6th Cir. 1993). In that case, the Sixth Circuit affirmed a dismissal where an indispensable party, an Indian tribe, possessed sovereign immunity. *Keweenaw Bay,* 11 F.3d at 1349.

The Circuit courts faced with the issue have expressly held that the presence of sovereign immunity is not only significant, but is a "*compelling* factor" in weighing the factors contained in FRCP 19(b), which leaves "very little room for balancing of other factors." *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 548 (2nd Cir. 1991) (emphasis added). If there is any doubt that the PUCO is an indispensable party to an appeal of its order, that question should be resolved in favor of dismissal. Although Congress has expressly waived this defense for federal agencies, no comparable waiver has been given by the Ohio General Assembly. Congress waived this defense with respect to actions for federal judicial review of federal administrative agencies by amending the Administrative Procedures Act in 1976. *See* 5 U.S.C. §§ 702, 703 (1997). The legislative history for this amendment stated that its purpose was to "remove the defense of sovereign immunity as a bar to judicial review of federal administrative action otherwise subject to judicial review." H.R. Rep. No. 1656, 94th Cong., 2nd Session 1976, 1976 U.S.C.C.A.N. 6121, at 1. In particular, the legislation was explicitly intended to "simplify technical complexities concerning the naming of the party" so that an appeal for judicial review "shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." *Id.* at 1-2.

Beyond the context of sovereign immunity, considering a state agency to be an indispensable party in a federal action challenging the agency's order is consistent with federal case law. *Ricci v. State Bd. of Law Examiners*, 569 F.2d 782, 784 (3rd Cir. 1978) (Pennsylvania Supreme Court was indispensable party in proceeding to invalidate one of its rules); *Stevens v. Bartholomew*, 222 F.2d 804, 806 (D.C. Cir. 1955) (state agency building highway project has sovereign immunity precluding injunction action against federal funding authority); *Bomer-Blanks Lumber Co., Inc. v. Oryx Energy Corp.*, 837 F.Supp. 769, 770 (M.D.La 1993) (action interpreted as collateral attack on agency's order made agency an indispensable party). Although the United

States Supreme Court has not directly addressed this issue, it has implied that it would reach the same result. *See United Auto Workers v. Brock*, 477 U.S. 274, 291 (1986) (state agency enforcing federal law was not an indispensable party under FRCP 19 because federal law itself was being challenged and the case was "not an appeal from an adverse benefit determination" under federal law).

The request for injunctive and declaratory relief in the complaint at bar does not change the character of the action — it is still an appeal of a PUCO decision seeking a judicial reversal of the decision that is enforceable against the PUCO and the State of Ohio. Although Congress thought it was empowered to require States to defend their arbitration decisions in federal court, that premise was discredited by the *Seminole* case. Consequently, the Court must dismiss the entire action.

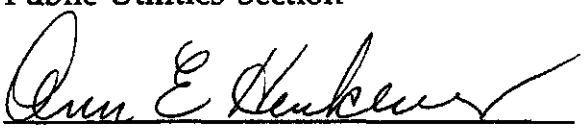
CONCLUSION

In accordance with the foregoing, this Court should grant this motion to dismiss or order a transfer of venue to the Southern District of Ohio.

Respectfully submitted,

Betty D. Montgomery
Attorney General of Ohio

Duane W. Luckey, Chief
Public Utilities Section



Ann E. Henkener, Trial Counsel
Steven T. Nourse
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793

Attorneys for Defendants-Public Utilities Commission of Ohio Commissioners

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Motion to Dismiss** was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following counsel of record, this 22nd day of May, 1997.

Ann E. Henkener

Ann E. Henkener
Assistant Attorney General

COUNSEL OF RECORD:

James B. Niehaus
James D. Robenalt
Thompson, Hine, & Flory, L.L.P.
3900 Key Center
127 Public Square
Cleveland, OH 44114

William P. Barr, Esq.
Ward W. Wueste, Jr., Esq.
M. Edward Whelan III, Esq.
GTE Service Corporation
1850 M Street, N.W.
Washington, D.C. 00036

Lewis F. Powell, III, Esq.
J. Burke McCormick, Esq.
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

Paul T. Cappuccio, Esq.
Eugene F. Assaf, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005

John A. Rogovin, Esq.
Paul G. McNamara, Esq.
O'Melveny & Myers, LLP
555 13th Street, N.W.
Washington, D.C. 20004

Thomas L. Jacobs
Sprint/North Central Operations
900 Springmill Street
Mansfield, OH 44906

David P. Murray
Bradford T. Hammock
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

GTE NORTH INCORPORATED,	)	**CASE NO. 5:97CV137**
	)	
PLAINTIFF	)	**JUDGE PETER C. ECONOMUS**
	)	
v.	)	
	)	
CRAIG A. GLAZER, CHAIRMAN, et al.,	)	**MEMORANDUM OPINION AND ORDER**
	)	
DEFENDANTS	)	

This matter is before the Court upon Motions to Dismiss by Defendants AT&T Communications of Ohio ("AT&T") (Dkt. #6) and the Commissioners of the Public Utilities Commission of Ohio ("PUCO")(Dkt. #20). GTE North Incorporated ("GTE") filed this declaratory judgment action to set aside arbitration determinations made by the PUCO pursuant to the Telecommunications Act of 1996 ("the Act"). Defendants allege that this action is a premature appeal by GTE from an interlocutory order of the PUCO in the interconnection proceeding between AT&T and GTE.

Defendants submit three major arguments to support their contention that the Complaint is premature and improper.

First, because Congress authorized federal district court review only of final State

commission orders approving or rejecting interconnection agreements, the Court lacks jurisdiction of the subject matter. *See* Fed.R.Civ.P. 12(h)(3). ("Whenever it appears...that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").

Second, GTE's challenge is not ripe for judicial review, because the State commission proceedings are not complete and their effects could not possible be "felt in a concrete way" by GTE until an interconnection agreement is approved or rejected by the PUCO. *See, e.g.*, Abbott Labs v. Gardner, 387 U.S. 136, 148-49 (1967).

And, finally, the declaratory relief that GTE seeks is wholly discretionary, and it is settled law that district courts should decline to exercise jurisdiction where, as here, a litigant's attempts to use declaratory relief "would result in piecemeal trials of the various controversies presented or in the trial of a particular issue without resolving the entire controversy." Yellow Cab Co. v. City of Chicago, 186 F.2d 946, 950-51 (6th Cir. 1951) (citations omitted); *see also* Nationwide Ins. v. Zavalis, 52 F.3d 689, 692 (7th Cir. 1995).

Although, the Commissioners also raise a series of procedural and immunity issues, the Court finds Defendants' first argument to be dispositive of the case, and shall not address Defendant's remaining arguments.

THE ACT

In the Act, Congress sought to shift local telephone monopoly markets to competition as quickly as possible by requiring Plaintiff and other incumbent local exchange carriers to enter into interconnection agreements allowing AT&T and other requesting telecommunications carriers to offer consumers local service choices. H.R. Rep. No. 104-

204 at 85 (1995). *See also* 47 U.S.C. §§ 251(c), 252(a).

The Act directs the incumbent telephone companies to negotiate purchase and interconnection agreements with the new entrants pursuant to § 252. The parties may arrive at an agreement as to the terms for providing interconnection services either by negotiation or arbitration. Id. at § 252(a)-(b). During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent receives a request for negotiation, the incumbent or any other party to the negotiation may petition the PUCO to arbitrate any open issues. Id. at § 252(b). The PUCO must resolve each issue set forth in the petition not later than nine months after the date of the initial request. Id. at § 252(b)(4)(C).

Once the parties arrive at either an arbitrated or negotiated agreement, the agreement is submitted to the PUCO for approval or rejection. The PUCO can approve the agreement either by express ratification or by inaction (the agreement is deemed to be approved if the PUCO fails to approve an arbitrated agreement within thirty days after submission or a negotiated agreement within ninety days). Id. at § 252(e)(1) and (5).

The Act then provides for Federal District Court review. Id. at § 252(e)(6).

SUBJECT MATTER JURISDICTION

Rule 12(b)(6) states in relevant part that "the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter." If jurisdiction is not found, then the court shall dismiss the action. *See* Fed.R.Civ.P. 12(h)(3).

In cases involving delayed judicial review of final agency actions, the Supreme Court

in Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994), held that Congress has allocated initial review to an administrative body where such intent is "fairly discernable in a statutory scheme." Id. at 776 (citations omitted). "Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether claims can be afforded meaningful review." Id.

§252 of the Act plainly states that Federal District Courts are to become involved only after the State Commission has reviewed the agreement to determine whether that agreement meets the requirements of §§251 and 252. "In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal District Court to determine whether *the agreement or statement* meets the requirements of section 251 of this title and this section." Id. at §252(e)(6)(emphasis added).

Two recent District Court decisions have interpreted the term "determination" to mean the final agreement, not the several decisions that precede it, as GTE argued in both cases. GTE v. Morrison, No. 3:96CV1015 Mem. Op. (E.D.Va. Feb. 20, 1997 WL 82527); GTE Southwest Inc. v. Wood, No. M-97-003 (S.D.Tex. March 13, 1997).

GTE again petitions for an expansive definition of the term "determination" contending that "determination" should include every decision made by the PUCO leading up to the final agreement. However, that construction contravenes both the language and the congressional intent of the statute. The Act states that if the parties cannot reach agreement within 135 days, then either party can petition *the PUCO* for binding arbitration on the

disputed issues. The PUCO then must resolve the dispute or disputes within nine months after the arbitration request is filed.

If, as GTE contends, they may sue over a disputed issue before the final agreement is reached, then this compressed timetable has no meaning. Given the burdened dockets of the district courts, final agreements could be delayed almost indefinitely while the piecemeal litigation is ongoing. Based on GTE's argument, any disagreement with any decision made by the PUCO would be grounds for litigation.

The compressed timetable set out in the Act does not support this interpretation of the statute. On the contrary, the Act requires such an expedited schedule that Congress' clear intent was to facilitate the opening of the local telephone service markets as quickly as possible. Congress could not have intended, or expected, that one party would be allowed to sue over one or more preliminary decisions, and that those suits be resolved, within the 135 days allotted by the Act.

GTE attempts here precisely the sort of piecemeal litigation that Congress intended to preclude. By providing judicial review only of final State Commission PUCO orders approving or rejecting interconnection agreements, Congress limited incumbents' opportunities to disrupt and delay the expedited agency proceedings.

CONCLUSION

The tightly restricted timetables prescribed by §252 remove any conceivable doubt that Congress intended that State commission administrative processes remain unimpeded until an interconnection agreement is completed and approved. In these circumstances,

exercising jurisdiction here unquestionably would "disrupt[] the review scheme Congress intended," Thunder Basin, 510 U.S. at 206.

Therefore, until an interconnection agreement between GTE and AT&T is approved by the PUCO, GTE's attempts to short-circuit the expedited agency process created by Congress would violate the plain terms of the Act. Accordingly, pursuant to Fed.R.Civ.P. 12(h)(3), Defendants' Motions to Dismiss (Dkt. ##6, 20) are hereby **GRANTED.**

IT IS SO ORDERED.

PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

GTE NORTH INCORPORATED,	)	**CASE NO. 5:97CV137**
	)	
PLAINTIFF	)	**JUDGE PETER C. ECONOMUS**
	)	
v.	)	
	)	
CRAIG A. GLAZER, CHAIRMAN, et al.,	)	**JUDGMENT**
	)	
DEFENDANTS	)	

This matter is before the Court upon Motions to Dismiss by Defendants AT&T Communications of Ohio ("AT&T") (Dkt. #6) and the Commissioners of the Public Utilities Commission of Ohio ("PUCO")(Dkt. #20).

For the reasons set forth in the attached Memorandum Opinion and Order, which is incorporated herein by reference, Defendants' Motions to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) (Dkt. ##6, 20) are hereby **GRANTED**. Therefore, Plaintiff's Complaint is **DISMISSED** without prejudice.

IT IS SO ORDERED.

PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE