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83-464-TP-COI

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DOCKETING DIVISION
PUBLIC UTILITIES COMMISSION OF OHIO

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION INVESTIGATION RELATIVE TO ESTABLISHMENT OF INTRASTATE ACCESS CHARGES	))))	Case No. 83-464-TP-COI

CERTIFICATE OF SERVICE

I hereby certify that copies of the following, that is,

1) Request for Admission to Practice and Memorandum in Support of Request for Admission to Practice;

2) Motion of Midwest Mobilephone Corporation to Intervene for the Limited Purpose of filing a Memorandum of Law and Memorandum in Support of Motion to Intervene for the Limited Purpose of filing a Memorandum of Law; and

3) Memorandum of Law of Midwest Mobilephone Corporation

filed on behalf of Midwest Mobilephone Corporation have been served upon counsel of record as shown on the attached Appendix by regular mail, this 28th day of November, 1983.

Sally W. Bloomfield
Sally W. Bloomfield

CASE NO. 83-464-TP-COI
APPENDIX

PUBLIC UTILITIES COMMISSION
OF OHIO
Marsha Rockey Schermer
Mary R. Brandt
Assistant Attorney General
Chief, Public Utilities
375 South High Street
Columbus, Ohio 43215

OFFICE OF CONSUMERS' COUNSEL
Lenworth Smith, Jr.
Associate Consumers' Counsel
Office of Consumers' Counsel
137 East State Street
Columbus, Ohio 43215

CITY OF CLEVELAND
Craig A. Glazer
Assistant Director of Law
Room 106 - City Hall
Cleveland, Ohio 44114

OHIO BELL TELEPHONE COMPANY
OFFICE OF CORPORATE COUNSEL
D. W. Morrison Attorney
100 Erieview Plaza
Room 1300
Cleveland, Ohio 44114

CINCINNATI BELL TELEPHONE
COMPANY
Mark H. Longenecker
Frost and Jacobs
2500 Central Trust Tower
201 East Fifth Street
Cincinnati, Ohio 45202

GENERAL TELEPHONE COMPANY
OF OHIO
Joseph R. Stewart
100 Executive Drive
Suite 124
Marion, Ohio 43302

UNITED TELEPHONE COMPANY
John A. Rozic
655 Lexington Avenue
PO Box 3555
Mansfield, Ohio 44907
and
Alan P. Buchmann
Squire, Sanders and Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

ELYRIA TELEPHONE COMPANY, et al.
William R. Case
Thompson, Hine and Flory
100 East Broad Street
Columbus, Ohio 43215

CENTEL-OHIO
Donald B. Gardner
Murphey, Young and Smith
250 East Broad Street
Suite 1700
Columbus, Ohio 43215

ARCADIA TELEPHONE, et al.
William H. Schneider
Schneider, Prohaska and Sams
906 East Broad Street
Columbus, Ohio 43025

CASE NO. 83-464-TP-COI
APPENDIX

ORWELL TELEPHONE COMPANY
Donald Porkorny
70 South Maple Street
Orwell, Ohio 44076

AT&T COMMUNICATIONS OF
OHIO INC.
William S. Newcomb Jr.
Vory, Sater, Seymour and Pease
52 East Gay Street
Columbus, Ohio 43215
and
O. Carey Epps
Larry S. Salustro
10 South Canal Street,
First Floor
Chicago, Illinois 60606

MCI COMMUNICATIONS, INC.
Stanley Doten
Morrison and Foerster
1920 N. Street, N.W.
Washington, D.C. 20036

GTE SPRINT COMMUNICATIONS
CORPORATION
Paul F. Hanzlik
Sarah Read
Isham Lincoln and Beale
Three First National Plaza
Chicago, Illinois 60602

LEXITEL CORPORATION
John W. Bentine
Bell and Randazzo Co., L.P.A.
21 East State Street
Columbus, Ohio 43215

ALARM INTERVENORS
Daniel R. Loftus
18th Floor
First American Center
Nashville, Tennessee 37238

OHIO ASSOCIATION OF RADIO
COMMON CARRIERS
Sally W. Bloomfield
Bricker and Eckler
100 East Broad Street
Columbus, Ohio 43215

DEPARTMENT OF ADMINISTRATIVE
SERVICES STATE OF OHIO
Dennis J. Murphy
Carlile, Patchen, Murphy & Allison
100 East Broad Street
Columbus, Ohio 43215

COMBINED NETWORKS, INC.
Stephen H. Nemerovski
100 South Wacker
7th Floor
Chicago, Illinois 60606

0525m

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION INVESTIGATION RELATIVE TO ESTABLISHMENT OF INTRASTATE ACCESS CHARGES	)))	CASE NO. 83-464-TP-COI

REQUEST FOR ADMISSION TO PRACTICE
AND MEMORANDUM IN SUPPORT OF
REQUEST FOR ADMISSION TO PRACTICE

The undersigned, pursuant to Section 4901-1-08(B) O.A.C., hereby moves the Public Utilities Commission (Commission) for permission to admit Jeffrey S. Rasley, to practice before the Commission in the above captioned matter as counsel on behalf of Midwest Mobilephone Corporation.

The movant states that Jeffrey S. Rasley was admitted to the Bar in the State of Indiana in 1979 and is presently in good standing and is authorized to practice law in the State of Indiana and he is, therefore, qualified to practice before the Commission in the above captioned proceeding.

Memorandum In Support Of Request
For Admission To Practice

The O.A.C., Section 4901-1-08(B) states that a person authorized to practice law in another jurisdiction may be admitted to appear before the Commission in a particular proceeding, upon motion of an attorney of this state. The motion accompanying this Memorandum has been submitted by Sally W. Bloomfield, an attorney authorized to practice law in the State of Ohio, and, therefore,

the requirement of O.A.C. Section 4901-01-08(B) with respect to admission before the Commission has been satisfied.

WHEREFORE, the undersigned respectfully requests that Jeffrey S. Rasley be permitted to appear before the Commission in this proceeding.

RESPECTFULLY SUBMITTED,

Sally W Bloomfield

SALLY W. BLOOMFIELD

BRICKER & ECKLER
100 East Broad Street
Columbus, Ohio 43215
(614) 227-2368

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION INVESTIGATION RELATIVE TO ESTABLISHMENT OF INTRASTATE ACCESS CHARGES	)))	CASE NO. 83-464-TP-COI

MOTION OF MIDWEST MOBILEPHONE CORPORATION TO INTERVENE FOR THE LIMITED PURPOSE OF FILING A MEMORANDUM OF LAW

Midwest Mobilephone Corporation ("MMC") respectfully moves the Public Utilities Commission of Ohio ("Commission") for leave to intervene for the limited purpose of filing a Memorandum Of Law in the above captioned proceeding, pursuant to O.A.C. Section 4901-1-11.

Memorandum In Support Of Motion To Intervene For The Limited Purpose Of Filing A Memorandum Of Law

In support of its Motion To Intervene, MMC states as follows:

MMC is an Indiana corporation with its principal place of business at Suite 710, Guaranty Building, 20 North Meridian Street, Indianapolis, Indiana 46204.

MMC, its wholly owned subsidiaries and partners, are applicants for Domestic Public Cellular Telecommunications Station licenses with the Federal Communications Commission.

MMC, its subsidiaries and partners, currently have such license applications on file for service areas in Ohio, including

the following Standard Metropolitan Statistical Areas:

Company	SMSA
Midwest Mobilephone Corporation	Cincinnati, OH-IN-KY
Midwest Mobilephone of Columbus, Inc.	Columbus, OH
Midwest Mobilephone of Dayton, Inc.	Dayton, OH
M-C Partners of Toledo	Toledo, OH-MI
M-C Partners of Youngstown	Youngstown-Warren, OH
M-C Partners of Canton	Canton, OH

Upon issuance of a construction permit by the Federal Communications Commission to any of the above applicants to build a cellular telecommunications system in Ohio, MMC or its affiliate will apply to the Commission for a Certificate of Public Convenience and Necessity to provide Domestic Public Cellular Radio Telecommunications Service in the designated Ohio SMSA. MMC or its affiliate would then be an applicant to the Commission for intrastate private line and switched telecommunications services.

MMC currently is a one-third partner in the Indianapolis Telephone Company, which provides Domestic Public Cellular Radio Telecommunications Service to the Indianapolis, Indiana SMSA.

MMC will be dependent upon local exchange telephone companies, such as the Ohio Bell Telephone Company, for such facilities as are necessary to interconnect with the landline telephone network.

Access charges may be a significant portion of the operating expenses incurred by MMC and its affiliates in providing cellular telecommunications services. The methodology by which these charges are calculated will also affect the ability of MMC and its affiliates to effectively compete with affiliates of wireline telephone companies, such as Cincinnati SMSA Limited Partnership (a subsidiary of Ameritech Mobile Communications, Inc., an affiliate of the Ohio Bell Telephone Company), which will hold cellular telecommunications licenses. MMC has, therefore, substantial interest in the rate structure and local access rates to be charged by the local exchange companies after January 1, 1984.

MMC's intervention in the above captioned proceeding at this time will not prejudice the rights of any other parties or delay the proceedings. Such intervention will enhance the Commission's decision making by providing additional information to the Commission, specifically about the concerns of cellular radio telecommunications carriers. No other cellular radio telecommunications carriers have intervened or participated in the above captioned proceeding to the knowledge of MMC. It is particularly important that the interests of cellular radio telecommunications carriers be represented before the Commission, because the industry is in a nascent stage and precedents should, therefore, be carefully considered, which may substantially affect the viability of this new industry in Ohio.

MMC has a real and substantial interest in the above captioned proceeding and is so situated that the disposition of the proceeding may, as a practical matter, impair or impede its ability to protect that interest, along with the interests of other nonwireline cellular radio telecommunications carriers, and that interest is not adequately represented by existing parties to the proceedings.

Intervention is sought only for the limited purpose of providing the Commission with a Memorandum Of Law regarding the application of Ohio Bell's proposed intrastate access tariff to cellular radio telecommunications carriers. The said Memorandum Of Law is attached hereto and filed herewith.

MMC was not served with any pleadings in the above captioned proceedings and became aware of the status of the proceedings only recently through public knowledge.

The name and address of the person designated for service of pleadings, documents, or communications concerning this proceeding is: Jeffrey S. Rasley, Dutton, Kappes & Overman, Suite 710, Guaranty Building, 20 North Meridian Street, Indianapolis, Indiana 46204.

WHEREFORE, MMC requests leave to intervene in the above captioned proceeding for the limited purpose of submitting a

Memorandum Of Law to the Commission.

RESPECTFULLY SUBMITTED,

Sally W Bloomfield

SALLY W. BLOOMFIELD

BRICKER & ECKLER
100 East Broad Street
Columbus, Ohio 43215
(614) 227-2368

Douglas B. McFadden by JSR

DOUGLAS B. McFADDEN

Jeffrey S. Rasley

JEFFREY S. RASLEY

DUTTON, KAPPES & OVERMAN
710 Guaranty Building
20 North Meridian Street
Indianapolis, Indiana 46204
(317) 635-5395
Attorneys for Midwest
Mobilephone Corporation

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION INVESTIGATION RELATIVE TO ESTABLISHMENT OF INTRASTATE ACCESS CHARGES	)))	CASE NO. 83-464-TP-COI

MEMORANDUM OF LAW OF MIDWEST MOBILEPHONE CORPORATION

This Memorandum of Law is submitted by Midwest Mobilephone Corporation ("MMC") along with MMC's Motion To Intervene in the above captioned proceeding.

INTRODUCTION

In its April 6, 1983 Entry, the Public Utilities Commission of Ohio opened Docket 83-464-TP-COI "in order to address the setting of charges for intrastate access by telephone companies engaged in providing local exchange service in the State of Ohio." Id. at Paragraph 3. The said docket was opened to allow comment on the Ohio Bell Telephone Company's ("Ohio Bell") proposed intrastate access charges in Case No. 83-300-TP-AIR, and to some extent the proceeding was initiated in response to two legal proceedings at the Federal level:

Federal Communications Commission's In the Matter of MTS and WATS Market Structure, 90 FCC2d 135, Common Carrier Docket No. 78-72, Phase I (July 27, 1983) (hereafter referred to as "Access Charge Proceeding");

United States v. American Telephone and Telegraph Company, Civ. A. Nos. 74-1698 & 82-0192 (D.D.C. 1982) (hereafter referred to as "AT&T Action"), which led to the August 24, 1982, entry of the "Modification of Final Judgment," hereafter referred to as "MFJ."

With respect to MMC's intervention in this Cause, there are two issues, the first of which is whether or not MMC may lawfully be subjected to the carrier access charge provisions of Ohio Bell's proposed tariff. The second issue, which will arise only if it is decided that Ohio Bell's Tariff may lawfully be applied to a cellular radio telecommunications carrier, concerns the validity of specific provisions of that Tariff, as well as whether or not the rates under the Tariff are reasonable, just, and non-discriminatory.

TARIFF APPLICATION UNLAWFUL

The FCC has created a competitive market structure for the provision of Cellular Service, a structure in which the existence of at least two effective competitors is mandatory. Accordingly, the FCC will authorize the construction of two cellular systems in each standard metropolitan statistical area in Ohio.

Cellular telephone companies provide a communications service for their customers, who speak and listen through cellular telephones which are either mounted in motor vehicles or are completely portable. Cellular telephones contain low-power radio transmitters and receivers, which provide a communications path to the cellular telephone company's nearest cell site. At each cell site, low-power radio transmitters and receivers complete the communications path from the cellular telephones in the vicinity. All cell sites are linked together and are controlled by central switching equipment and, as a result, all cellular telephones within a cellular telephone company's authorized

service area can communicate with all other cellular telephones in the same area.

A cellular telephone customer cannot communicate with a wireline telephone customer unless the cellular system is connected to the wireline telephone system. This connection is sometimes labeled "interconnection" and is sometimes viewed as the means by which a cellular system obtains "access" to the wireline system but the terms "interconnection" and "access" refer to the same thing: a functioning electrical connection between a cellular telephone system and a wireline telephone system. Putting aside terminology, it is beyond dispute that the FCC has directed that cellular telephone systems and wireline telephone systems be connected.[1/]

MMC's position is that it is unlawful, inappropriate, and unworkable for the connection of a cellular radio telecommunications system to Ohio Bell's wireline exchange network to be governed by a Tariff. In MMC's view, the law requires that the connection and all related matters be governed by a written contract, containing those mutually acceptable terms upon which a cellular radio telecommunications carrier and Ohio Bell agree as a result of good faith negotiations. Accordingly, this Commission should order that Ohio Bell's proposed intrastate access tariff may not lawfully be applied to cellular radio telecommunications carriers and direct Ohio Bell to negotiate in good faith with cellular radio telecommunications carriers about connecting their cellular systems with Ohio Bell's wireline telephone system.

Prior FCC Determinations

By the time the FCC issued the First Cellular Order, although it had already decided that cellular systems should be fully interconnected,[2] the FCC had not previously examined the particular terms and conditions for interconnection.[3] Several commentators urged the FCC to adopt specific requirements about the type of interconnection arrangements required to be offered by the local wireline carrier. The FCC declined the urgings because it believed that requiring any specific arrangement might create a straight-jacket that could retard innovative and diverse service proposals. "The particular point of interconnection of a given cellular system will be dependent upon the design of the system and other factors which may vary from case to case. . . ."[4] At the same time, the FCC left no doubt that engineering and cost considerations were important in each interconnection arrangement. The FCC stated:

> [a] cellular system operator is a common carrier and not merely a customer; interconnection arrangements should therefore be reasonably designed so as to minimize unnecessary duplication of switching facilities and the associated costs to the ultimate consumer. The particular arrangements involved in interconnection of a given cellular system should be negotiated among the carriers involved and be made the subject of an intercarrier agreement.[5]

After the First Cellular Order was issued, the FCC continued to receive comments. People who believed the First Cellular Order left wireline carriers with too much discretion about the terms of interconnection continued to urge the adoption of specific requirements. On the other hand, AT&T commented that the First Order's interconnection provisions were appropriate because they preserved needed flexibility in light of the uncertainty as to how different kinds of cellular systems might affect the desirability of a particular interconnection arrangement in a given situation. Once again, the FCC declined to make specific orders because of its conviction that depriving cellular system operators and wireline carriers of the opportunity to design interconnections that would accommodate their specific needs would be wrong. In addition, the FCC re-emphasized the importance of the competitive market structure that it had designed for cellular telephone services.

> Interconnection issues must be viewed within the context of the competitive environment we are attempting to foster for cellular services. . . . In order to provide mobile services it is necessary to obtain interconnection to the local exchange facilities. In addition, effectuation of the public interest benefits flowing from competitive cellular systems requires that competing carriers be afforded equivalent access to the local exchange. It is imperative, therefore, that we establish parameters for reasonable cellular interconnection of cellular carriers. This is not to say, however, that it is necessary that we prescribe a particular form of interconnection. The reason for this is simply that in a dynamic technological environment such a prescription might impose arbitrary limits on cellular system design.

> Accordingly, our interconnection requirements, set forth below, are intended to provide competing carriers with equal access to the local exchange network while permitting the carriers involved to negotiate specific interconnection arrangements to accommodate differences in cellular system design.[6]

In addition, in a remark appropo to the situation in which Ohio Bell and cellular radio telecommunications carriers will find themselves, the FCC stated that "[w]here the local landline company doesn't apply for cellular service, we expect the landline company to provide non-wireline licensees with reasonable and appropriate interconnection, as negotiated between the parties."[7]

It should be clear that connection of cellular systems to Ohio Bell's wireline exchange according to Ohio Bell's proposed intrastate access tariff is not what the FCC had in mind. Ohio Bell's Tariff was not "negotiated by the parties," takes no account of "the actual design of any cellular systems," does impose "arbitrary limits," takes no account of the "competitive environment in which cellular radio telecommunications carriers must operate," and is not the subject of an "intercarrier agreement." Moreover, the proposed tariff represents the antithesis of an arrangement "reasonably designed so as to minimize unnecessary duplication of switching facilities and the associated costs to the ultimate consumer." The FCC was subjected to considerable pressures, all of which it resisted in order to preserve flexibility for the parties to take account of individual, local circumstances. Ohio Bell destroyed that

flexibility, however, and filed a unilaterally prepared tariff that would preempt all the options that the FCC so carefully preserved for cellular radio telecommunications carriers.

Modified Final Judgment

While Ohio Bell may take the position that its proposed intrastate access tariff is the product of the MFJ or orders in the Access Charge Proceeding, it should be plainly understood that such is not the case. There is not so much as a single word in the MFJ or in the Access Charge Proceeding that requires Ohio Bell to connect its wireline telephone system to cellular radio telecommunications carriers pursuant to a tariff. On the contrary, the effort to subject cellular systems' connection to a tariff is a purely internal decision, a decision made either by Ohio Bell or made and imposed by American Information Technologies Corporation, the corporation that will own 100 per cent of Ohio Bell as of January 1, 1984.

A brief review of the MFJ will make it abundantly clear that the MFJ has nothing to do with the way in which cellular systems are connected to Ohio Bell's wireline telephone system. Moreover, the AT&T Action and the MFJ provide affirmative support for the conclusion that applying a tariff to connection of cellular systems would be harmful and unreasonable.

Implementation of the MFJ[8/] will totally restructure the telephone industry. In summary and as here material, the MFJ and subsequent orders implementing it will accomplish the following.

First, American Telephone and Telegraph Company ("AT&T") will be removed from supplying local telephone service and, on January 1, 1984, must divest itself of the portions of its twenty two majority owned Bell operating companies ("BOCs") which perform that function. The geographic area for which these divested BOCs will provide local telephone service is a new unit, called Local Access and Transport Area ("LATA"), which, in most cases, will not include more than one standard metropolitan statistical area or territory in more than one state. After divestiture, the BOCs will provide telephone service from one point in a LATA to other points in the same LATA and will originate and terminate calls from one LATA to another. Carrying the inter-LATA portion of calls, however, will be forbidden to the BOCs and will be handled only by interexchange carriers, such as AT&T, MCI Communications Corporation, and GTE Sprint Communications Corporation.[9/] The MFJ included the following provisions:

> II
>
> BOC Requirements
>
> A. Subject to Appendix B, each BOC shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates.
>
> B. No BOC shall discriminate between AT&T and its affiliates and their products and services and other persons and their products and services in the:
>
> 1. Procurement of products and services;
>
> 2. Establishment and dissemination of technical information and procurement and interconnection standards;

3. Interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and

4. Provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

C. Within six months after the reorganization specified in paragraph I(A)(4), each BOC shall submit to the Department of Justice procedures for ensuring compliance with the requirements of paragraph B.

D. After completion of the reorganization specified in Section I, no BOC shall, directly or through any affiliated enterprise:

1. Provide interexchange telecommunications services or information services;

2. Manufacture or provide telecommunications products or customer premises equipment (except for provision of customer premises equipment for emergency services); or

3. Provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.[10]

According to Section IV(F) of the MFJ, "'Exchange access' means the provision of exchange services for the purposes of originating or termination interexchange communications" and, according to Section IV(K), "'Interexchange telecommunications' means telecommunications between a point or points located in one [LATA] and a point or points located in one or more other [LATAs] or a point outside [a LATA]."

Important provisions of the MFJ in light of the reasons it was begun[11] are those barring the BOCs from providing long distance service and directing the BOCs to provide all long distance carriers with equal access to the local exchange.

> Access to the local exchange is essential for all interexchange carriers and, as the evidence in the AT&T action has suggested, there are many ways in which the company controlling the local exchange monopoly could discriminate against competitors in the interexchange market. . . . After divestiture, the incentive of those who control the local networks to engage in such activity will remain unchanged: they would stand to gain business if other carriers were disadvantaged by poor access arrangements and high tariffs.
>
> To permit the Operating Companies to compete in this market would be to undermine the very purpose of the proposed decree - to create a truly competitive environment in the telecommunications industry. The key to interexchange competition is the full implementation of the decree's equal exchange access provisions. . . . If the Operating Companies were free to provide interexchange service in competition with the other carriers, they would have substantial incentives to subvert these equal access requirements. The complexity of the telecommunications network would make it possible for them to establish and maintain an access plan that would provide to their own interexchange service more favorable treatment than that granted to the other carriers. Such a result would perpetuate the very inequalities that the proposed decree is designed to eliminate. Finally, the Operating Companies would also have the ability to subsidize their interexchange prices with profits earned from their monopoly services.[12/]

It should be apparent that the scope of the AT&T Action and the MFJ is limited to inter-LATA or interexchange matters. Appendix B of the MFJ, for example, provides that, "as part of its obligation to provide non-discriminatory access to interexchange carriers, no later than September 1, 1984, each BOC shall begin to offer all interexchange carriers exchange access

on an unbundled, tariffed basis, that is equal in type and quality to that provided for the interexchange telecommunications services of AT&T and its affiliates" (emphasis added). The underlying purpose for all the legal proceedings which culminated in the MFJ was to provide a competitive market for long distance service - interexchange business - and the MFJ, without exception, uses the term "interexchange" to fashion remedies. By contrast, the situation faced by cellular radio telecommunications carriers and Ohio Bell is not a situation that the court even considered. Cellular radio telecommunications carriers are not inter-LATA or interexchange carriers and the MFJ, therefore, has nothing to do with how Ohio Bell should treat cellular radio telecommunications carriers. A cellular radio telecommunications carrier will be authorized to provide service only within an SMSA, and will, therefore, be an intra-LATA carrier, not an inter-LATA carrier. The AT&T action and the MFJ speak only to inter-LATA matters.

Access Charge Proceeding

It is equally clear that the Access Charge Proceeding does not mandate or pertain in any way to the connection of cellular systems to Ohio Bell's wireline telephone system. The results of the Access Charge Proceeding are contained in Part 69, which was added to Chapter I of Title 47 of the Code of Federal Regulations by the Access Charge Proceeding. Under these rules, tariffs for access service are to be filed and these tariffs must assess end user charges and carrier's carrier charges.[13/] End user

charges are to be assessed upon "end users"[14] and carrier's carrier charges are to be assessed upon "all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunication services . . . ." As explained above, cellular radio telecommunications carriers are not interexchange carriers.[15] As a result, it is beyond dispute that nothing in the Access Charge Proceeding applies to cellular radio telecommunications carriers dealings with Ohio Bell.

Tariff Inherently Inappropriate and Unreasonable

Ohio Bell's effort to extend the MFJ's access provisions beyond interexchange carriers is not the first. An effort to extend these provisions, which include the requirement that access be on a tariffed basis, was expressly rejected by Judge Greene. Several radio common carriers argued that the modification to the 1956 consent decree, as proposed by the parties and submitted to the Court, should also apply to their interconnections with the BOCs instead of only to interconnection by the interexchange carriers. The court rejected this argument and agreed with

> the parties' decision not to address these specialized demands.
>
> The access services required by these carriers are likely to differ from those needed by interexchange carriers and to differ also from carrier to carrier. . . . The decree could not establish all the various standards for interconnection for the large number of systems which seek access to the local networks of the divested Operating Companies.[16]

The parallels between this argument by radio common carriers and Ohio Bell's contention are obvious. Just as Judge Greene rejected this attempt to extend application of the MFJ beyond interexchange carriers, so should this Comission reject any argument that the MFJ as written has any application to an intra-LATA carrier such as a cellular radio telecommunications carrier.

The fundamental shortcoming with Ohio Bell's would-be treatment of cellular radio telecommunications carriers under a tariff is that Ohio Bell fails to recognize cellular radio telecommunications carriers for what are. They are fundamentally just like Ohio Bell. That is, they are telephone operating companies that will be engaged in providing local exchange telephone service. Numerous provisions in the FCC's First Cellular Order and Second Cellular Order, as discussed earlier in this Memorandum, eliminate any question about the FCC's characterization of cellular radio telecommunications carriers as local exchange carriers, a characterization the FCC re-affirmed less than two months ago.[17/]

The MFJ court reached the same conclusion. On November 1, 1983, Judge Greene entered a further Order and Memorandum in the AT&T Action in response to a petition by the BOCs for a ruling that they be permitted to offer mobile radio services across LATA boundaries in particular areas. The operating companies claimed that, without the relief requested in their petition, they would be significantly hindered in their efforts to provide important

new services, particularly cellular services, by the MFJ's prohibition on the offering by the BOCs of any inter-LATA telecommunications service. The court granted the petition, conditionally, and stated that mobile radio services, which would include cellular services, "are 'exchange telecommunication services' within the meaning of [the MFJ], and on this basis their provision by the Operating Companies within LATA boundaries does not, under the [MFJ] require special Court approval."[18/] Accordingly, it is clear that cellular radio telecommunications carriers, as local telephone companies are not among the class of persons to whom the MFJ has application.

It is fundamental that a tariff is inappropriate for governing and managing the connection of two companies' telephone systems. If the connection furnishes the means by which cellular systems are afforded "access" to Ohio Bell's system and to its customers, then that same connection provides the means by which Ohio Bell's system gains "access" to cellular systems and to cellular radio telecommunications carriers' customers. "Access" involving two local telephone companies is inevitably a two-way street. Moreover, if Ohio Bell has the power lawfully to subject cellular radio telecommunications carriers to a tariff for access, cellular radio telecommunications carriers necessarily have the same power to subject Ohio Bell to their tariff for access. Suppose those tariffs conflict. Who is to decide which provision prevails? The only answer is that this Commission would be forced to resolve such conflicts. Such a situation would make no sense but serves to illustrate how inappropriate a

tariff is for governing this situation. If tariffs were allowed to govern, the effect of the conflicting tariffs which might result would be to move from carrier-made rates and tariffs to Commission-made rates and tariffs. This would be a radical departure from the long established policy of this Commission in following carrier-made rates.

Many, if not most, of the subjects involved in this connection require mutual decisions. Unilateral determinations by either party are inappropriate. The Commission should, therefore, order that Ohio Bell's proposed access tariff may not be applied to cellular radio telecommunications carriers.

ALTERNATIVE RELIEF

Even if this Commission should rule that Ohio Bell's tariff could apply to cellular radio telecommunications carriers in principle, the Commission should also rule, at a minimum, that certain provisions are not enforceable or are not enforceable without modification. Such rulings are necessary because it would be impossible for cellular radio telecommunications carriers to operate their Cellular Systems in the manner contemplated by the FCC if Ohio Bell's proposed tariff were applicable in its present form.

Feature Group E

First, this Commission should declare unenforceable that part of the Tariff, which describes so-called Feature Group E, one of the types of "switched access service" offered by Ohio Bell. Evidently, the characteristics associated with this Feature Group

E represent the one and only one method according to which Ohio Bell is willing to have the two telephone systems be connected.

The basis for MMC's objection to a connection like the one described in Feature Group E is that by connecting a cellular system to the "line side" of an Ohio Bell central office, Ohio Bell treats the Cellular System as if it were no more than a PBX or switchboard. The capabilities of the Cellular System are vastly greater and the Cellular System as a whole has all the capabilities, including the ability to perform switching functions, of the Ohio Bell office, a "class 5" or "end office," to which it supposedly would be connected. By connecting a Cellular System to the line side of the Ohio Bell central office, all calls to and from the Cellular System would also pass through Ohio Bell's switching equipment and be switched by it. Not only is this totally unnecessary, it represents a substantial duplication of facilities.

As mentioned earlier in this Memorandum in connection with explaining the FCC's determination that the connection of cellular systems to the local wireline exchange should be negotiated and governed by written agreements rather than by tariffs unilaterally decreed, several people urged the FCC to specify particular interconnection arrangements. One consulting engineer urged the FCC to require that cellular systems be connected as class 5 offices, on the same basis as an independent telephone company, rather than in the manner of a customer telephone or PBX. The reason for this suggestion was that

treatment as a class 5 office would eliminate the need for duplication of central office switching functions and would allow non-wireline cellular carriers to perform exchange level switching functions for their own customers through a connection to the network on the same basis as any other exchange-level switch, such as a class 5 office.[19] The FCC agreed with this commentator but, to avoid denying flexibility to those cellular and wireline carriers who might want it, declined to impose specific, rigid interconnection requirements. Nevertheless, the FCC stated as follows:

> [i]n some cases, interconnection of a cellular system as a class 5 office, rather than at a lower hierarchical level, may well be the most appropriate policy. In this regard, we note that no reason has been advanced why the interconnection of a cellular system with the network as a class 5 office is technologically or economically inadvisable in general. To the extent that a cellular system will perform the functions of a class 5 office we believe it should be eligible to occupy the hierarchical position of one, and should not be arbitrarily placed below that level. This type of interconnection may not necessarily be the best engineering or cost effective approach in every case, however, as Telocator notes in its reply comments. For this reason we would be hesitant to mandate interconnection of cellular systems to the network as class 5 offices in all cases. The particular point of interconnection of a given cellular system will be dependent upon the design of the system and other factors which may vary from case to case, however.[20]

Accordingly, the FCC declined at the time to require any single type of interconnection for all cellular systems.

Ohio Bell, through the line side aspect of its Feature Group

E arrangement, would impose a duplication of central office switching functions, deny cellular radio telecommunications carriers the ability to perform their own exchange-level switching functions, and increase the costs to the ultimate consumer. Since Cellular Systems will perform all the functions of a class 5 office, in the words of the FCC quoted above, they "should be eligible to occupy the hierarchical position of [a class 5 office], and should not be arbitrarily placed below that level." This Commission should order, therefore, that Ohio Bell not be permitted to impose its Feature Group E method of connection upon cellular radio telecommunications carriers.

SUMMARY

For the reasons explained above, this Commission should order that Ohio Bell's proposed access tariff shall not apply to cellular radio telecommunications carriers and the connection of Cellular Systems to Ohio Bell's wireline telephone system. The FCC has clearly found that the terms of interconnecting cellular systems should be negotiated by the parties and embodied in a carrier-to-carrier agreement. Moreover, numerous provisions of Ohio Bell's Tariff are unjust and would result in unnecessary burdens and costs for cellular radio telecommunications carriers and their customers. Such provisions include the ones establishing line side connection of Cellular Systems and those that manifest Ohio Bell's refusal to recognize cellular radio telecommunications carriers as local exchange telephone companies and treat their systems as a class 5 central office. MMC,

accordingly, prays that this Commission enter orders accordingly.

RESPECTFULLY SUBMITTED,

BRICKLER & ECKLER

Sally W Bloomfield
SALLY W. BLOOMFIELD

BRICKER & ECKLER
100 East Broad Street
Columbus, Ohio 43215
(614) 227-2368

DUTTON, KAPPES & OVERMAN

Douglas B. McFadden by JSR
DOUGLAS B. McFADDEN

Jeffrey S. Rasley
JEFFREY S. RASLEY

DUTTON, KAPPES & OVERMAN
710 Guaranty Building
20 North Meridian Street
Indianapolis, Indiana 46204
(317) 635-5395
Attorneys for Midwest
Moblephone Corporation

1/ Report and Order, Common Carrier Docket No. 79-318, 86 FCC 2d 469 (1981) (hereafter "First Cellular Order"); Memorandum Opinion and Order on Reconsideration, Common Carrier Docket No. 79-318, 89 FCC 2d 58 (1982) (hereafter "Second Cellular Order").

2/ FCC Docket No. 18262, 51 FCC2d 945, 954-55 (1975).

3/ First Cellular Order at paragraph 53.

4/ Id. at paragraph 55.

5/ Id. at paragraph 56 (emphasis added).

6/ Second Cellular Order at paragraph 49.

7/ Id. at paragraph 50, n. 41.

8/ Since 1956, major portions of the telecommunications industry have operated under a consent decree entered that year in a proceeding in the federal district court in New Jersey, Civil Action No. 17-49, which remained a pending action through 1982. The Justice Department's antitrust case, begun in 1974, was filed in the District Court for the District of Columbia as Civil Action No. 74-1698. Thereafter, the parties to the New Jersey proceeding filed a motion to transfer it to the District of Columbia court. The New Jersey court granted that motion, the New Jersey action was docketed in the District of Columbia court under Civil Action No. 82-0192 and, on January 21, 1982, it was consolidated with the antitrust proceeding commenced in 1974.

The principal opinions and orders issued by District Judge Harold H. Greene in the consolidated proceeding in the District of Columbia court concerned an agreement reached by the parties to modify the 1956 consent decree and settle the 1974 antitrust suit through the court's entry of a new decree. On August 11, 1982, Judge Greene issued an opinion requiring certain changes to the parties' proposed consent decree and, on August 24, 1982, after the parties had agreed to the court's changes, the court entered the Modification of Final Judgment, a copy of which is attached as Exhibit "A". As the MFJ states, the 1956 consent decree was vacated in its entirety and superseded by the MFJ.

9/ August 11, 1982, opinion in Civil Action No. 82-0192, approving the United States and AT&T's agreed-upon proposed modification of the 1956 consent decree, but requiring certain changes prior to the entry of judgment, at 186-195; United States v. American Telephone and Telegraph Company, 552 F.Supp. 131, 186-195 (D.D.C. 1982).

10/ MFJ, Section II, entered August 24, 1982.

11/ In fact, there were two reasons for the complaint filed in 1974, but one, the Justice Department's judgment that the 1956 consent decree was not adequate in ways relating to the equipment market, is not material here. The other reason was that the Justice Department believed that the 1956 decree did not adequately protect against antitrust violations "in the intercity telecommunications field." United States v. American Telephone and Telegraph Company, 552 F.Supp. 131, 139 n. 18 (D.D.C. 1982).

12/ AT&T Action, 552 F.Supp. 131, 188 (emphasis added).

13/ 47 C.F.R. §§ 69.3, 69.4. (Hereafter, references to 47 C.F.R., Chapter I, Part 69, are made as "Section ___".)

14/ Section 69.5(a). See Note 4, supra. End user access charges are not material here.

15/ "Interexchange" means "services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as 'access service' for purposes of this Part." Section 63.2(r).

16/ AT&T Action, 552 F.Supp. 131, 196 n. 269 (D.D.C. 1982) (August 11, 1982, Opinion).

17/ "This Commission has characterized cellular service as 'an extension of local exchange service.'" Notice of Proposed Rulemaking, Common Carrier Docket No. 83-1086 at paragraph 17 (October 6, 1983) (citations omitted). This Notice proposes implementation of a lottery to select cellular licensees from among competing applicants for markets other than the thirty largest.

18/ AT&T Action, Memorandum at 4-5 (November 1, 1983).

19/ First Cellular Order at paragraph 54, paragraph 55 n. 63.

20/ Id. at paragraph 55 (footnotes omitted).