

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Frontier)
North, Inc. for a Commission Determination) Case No. 13-1528-TP-BLS
Pursuant to Ohio Revised Code Section)
4927.12(C)(3).)

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

On June 28, 2013, Frontier North, Inc. filed an application seeking the authority under R.C. 4927.12(C)(3) to raise the rates that customers pay for basic local exchange service (“basic service”) in 223 exchanges.¹ On July 22, 2013, the Office of the Ohio Consumers’ Counsel (“OCC”) filed a Motion to Intervene in this case and a Motion to Deny the Application for 12 exchanges. In the Motion to Deny, OCC argued Frontier had not shown that two or more alternative providers offer competing service to Frontier’s basic service in the 12 exchanges.² OCC asked the Public Utilities Commission of Ohio (“PUCO”) to find that the Application has not met the statutory requirements for granting Frontier the authority to increase the basic service rates residential customers pay in the 12 exchanges.³

An application for authority to raise basic service rates shall be deemed to have met the requirements of R.C. 4927.12(C)(3)(a) “unless the commission, within thirty days after the filing of the application, issues an order finding that the requirements have

¹ See Application (June 28, 2013), Exhibit 1.

² See Motion at 7-12.

³ See id. at 6-7.

not been met.”⁴ By July 29, 2013, thirty days after the Application was filed,⁵ the PUCO did not issue an order finding that the Application did not meet the statutory requirements, and thus the Application was deemed granted by operation of law. As a result, Frontier’s residential customers pay \$1.25 more per month for basic service as of August 1, 2013.⁶

OCC seeks rehearing in this proceeding.⁷ The PUCO’s failure to issue a ruling was unjust, unreasonable and unlawful in the following respects:

1. The PUCO did not comply with R.C. 4903.09, which requires it to file findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact, in the record of all contested cases.
2. The PUCO allowed Frontier to have the authority to raise the rate customers pay for basic service in the 12 exchanges even though Frontier did not show that at least two alternative providers are offering competing service to its basic service in those exchanges, as required by R.C. 4927.12(C)(3)(a).

The PUCO should abrogate Frontier’s authority to raise the rate customers pay for basic service in the 12 exchanges.

The grounds for this Application for Rehearing are set forth in the accompanying Memorandum in Support.

⁴ R.C. 4927.12(C)(3)(b).

⁵ The 30th day was actually July 28, 2013, which was on a Sunday. Ohio Adm. Code 4901-1-07(A) provides “[i]n computing any period of time prescribed or allowed by the commission, the date of the event from which the period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it falls on a Saturday, Sunday, or legal holiday, in which case the period of time shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday.” See also R.C. 1.14. Thus, the 30th day by law was July 29, 2013.

⁶ On August 1, 2013, Frontier filed its revised tariff increasing the basic service rate by \$1.25, effective immediately.

⁷ OCC files this Application for Rehearing pursuant to Ohio Adm. Code 4901-1-35.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

R.C. 4927.12(C)(3)(a), enacted in 2010 as part of Substitute Senate Bill 162 (“Sub. S.B. 162”) provides:

If the commission has not made a prior determination that the exchange area qualified for alternative regulation of basic local exchange service under Chapter 4901:1-4 of the Ohio Administrative Code as that chapter existed on the effective date of this section, an incumbent local exchange carrier may not alter its rates for basic local exchange service upward for that exchange area unless the carrier first applies to the commission and the commission determines that the application demonstrates that two or more alternative providers offer, in the exchange area, competing service to the basic local exchange service offered by an incumbent local exchange carrier in the exchange area, regardless of the technology and facilities used by the alternative provider, the alternative provider's location, and the extent of the alternative provider's service area within the exchange area. An alternative provider includes a telephone company, including a wireless service provider, a telecommunications carrier, and a provider of internet protocol-enabled services, including voice over internet protocol.

In 2009, the PUCO granted Verizon North, Inc. the authority to raise the rates it charged residential customers for basic service in 21 exchanges.⁸ In 2010, the PUCO

⁸ *In the Matter of the Application of Verizon North, Inc. for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 08-989-TP-BLS, Order (March 18, 2009).

approved a Stipulation allowing Frontier to acquire the Verizon service territory in Ohio.⁹ Among other things, the Stipulation prohibited Frontier from pursuing the right to raise its residential basic service rates until it met the Stipulation's broadband commitment. On May 6, 2013, Frontier filed a letter in the 09-454 docket signifying that it had met the broadband commitment. On June 28, 2013, the Friday before the Independence Day holiday, Frontier filed its Application seeking authority to raise the rates its residential customers pay for basic service in the 223 exchanges not affected by the 2009 Order.¹⁰

OCC diligently examined the 800-plus pages of documentation Frontier submitted with the Application to support its contention that at least two alternative providers offer service that competes with Frontier's basic service in the exchanges named in the Application. OCC's examination revealed that Frontier had not made the showing required by R.C. 4927.12(C)(3)(a) for 12 exchanges.¹¹ On July 23, 2013, OCC filed a Motion to Intervene in this case and a Motion to Deny the Application for the 12 exchanges. OCC's Motion to Deny explained in detail why Frontier's documentation for the 12 exchanges was inadequate to meet the statutory requirements.¹²

Under R.C. 4927.12(C)(3)(b), an application for authority to raise basic service rates shall be deemed to have met the requirements of R.C. 4927.12(C)(3)(a) "unless the commission, within thirty days after the filing of the application, issues an order finding that the requirements have not been met." By July 29, 2013, thirty days after the

⁹ *In the Matter of the Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc. and Verizon Communications Inc. for Consent and Approval of a Change in Control*, Case No. 09-454-TP-ACO, Finding and Order (February 11, 2010).

¹⁰ Frontier received authority to raise its small business basic service rates in Case No. 12-3127-TP-BLS.

¹¹ Amesville, Amsterdam, Baltic, Bergholz, Bowerston, Cooperdale, Dillonvale-Mt. Pleasant, Jewett, LeTart Falls, Scio, Sinking Springs and Summerfield.

¹² Motion at 7-12.

Application was filed, the PUCO did not issue such an order. Thus, the Application was deemed granted by operation of law. Hence Frontier's residential basic service customers now pay \$1.25 more per month than they did before.

Because OCC filed a Motion to Deny the Application, this is a contested case. R.C. 4903.09 provides that "[i]n all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The PUCO, however, did not comply with R.C. 4903.09. In addition, it was unreasonable for the PUCO to allow the Application to be approved for the 12 exchanges, given the inadequate showing Frontier made in support of the Application for those exchanges.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene and a motion to deny the Application in this proceeding.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.” As shown herein, the statutory standard to modify or abrogate Frontier’s authority to raise the rate customers pay for basic service in the 12 exchanges is met here.

III. ARGUMENT

A. The PUCO did not comply with R.C. 4903.09, which requires it to file findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact, in the record of all contested cases.

This case involves the operation of two statutes. First, is R.C. 4927.12(C)(3)(b), which states that the PUCO “shall be deemed to have found” that an application for authority to raise basic service rates “meets the requirements” of R.C. 4927.12(C)(3)(a) if the PUCO does not deny the application within 30 days after it is filed. Second, is R.C. 4903.09, which requires the PUCO “in all contested cases” to file “findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” The Supreme Court of Ohio has stated that “[t]he purpose of ... [this section] is to provide this court with sufficient details to enable us to determine, upon appeal, how the commission reached its decision.”¹³

¹³ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1983), 4 Ohio St. 3d 107, 110, citing *General Tel. Co. v. Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271, 59 O.O.2d 338.

When faced with related and co-existing statutes, the PUCO must “harmonize and accord full application to each of these statutes unless they are irreconcilable and in hopeless conflict.”¹⁴ An examination of the two statutes at issue here shows that they may be harmonized, and thus both should be given effect.

R.C. 4927.12(C)(3)(b) can be given full effect in cases where no objections are filed to an application for authority to raise basic service rates. Where no objections are filed, the PUCO need not issue an order approving the application, so long as the applicant has made the showing required by R.C. 4927.12(C)(3)(a).

But where objections to the application have been filed, the proceeding becomes a contested case and, under R.C. 4903.09, the PUCO is obligated to explain why the application should be approved, based on the record of the proceeding. Although Sub. S.B. 162 made several provisions of former Title 49 inapplicable to revised Chapter 4927,¹⁵ Sub. S.B. 162 did not exempt the PUCO from the complying with R.C. 4903.09 regarding applications in cases brought under R.C. 4927.12(C). Thus, in contested cases involving authority to raise customers’ basic service rates, the PUCO must issue a written opinion setting forth its findings and explaining its findings based on facts in the record.

This is consistent with previous PUCO processes regarding applications that were subject to automatic approval. For example, in 1991 the PUCO established an automatic approval process for alternative regulation of small local exchange carriers as provided by statute at the time. There, the PUCO recognized that cases in which objections are filed are contested cases, requiring a written order: “The Commission will issue, no later

¹⁴ *State ex rel. Gains v. Rossi* (1999), 86 Ohio St. 3d 620, 622, 716 N.E.2d 204, 207; *State v. Patterson* (1998), 81 Ohio St. 3d 524, 526, 692 N.E.2d 593, 595.

¹⁵ See, e.g., R.C. 4927.03(C).

than the automatic approval date, an order specifically approving the application, **if the case is a contested one, that is, one in which objections are filed.**”¹⁶

In Frontier’s previous basic service pricing case, the PUCO rejected OCC’s arguments on this issue. There, OCC filed Comments on Frontier’s application suggesting, among other things, that the application should be denied for 13 exchanges in which Frontier’s supporting documentation was inadequate.¹⁷ The PUCO allowed the application to be approved by operation of law, and OCC filed an Application for Rehearing. In its Entry on Rehearing, the PUCO ruled that OCC’s filings did not make the proceeding a contested case:

Under OCC’s theory, however, merely filing a motion to intervene and comments converts the statutory automatic case process into a “contested case” complete with hearings, a transcript of testimony, and exhibits in which the Commission must file findings of fact and written opinions setting forth the basis for our decision. Adopting OCC’s position would circumvent the Commission’s responsibility to determine, under the time lines set forth in the statute, whether an application satisfies the requirements of Section 4927.12, Revised Code.¹⁸

Objections to an application may be expressed in many forms, including comments regarding the application. In this proceeding, OCC filed a Motion to Deny, which specifically objected to approval of the Application in 12 exchanges.¹⁹ Thus, this case is a contested case.

¹⁶ *In the Matter of the Commission Investigation Into the Implementation of Sections 4927.01 to 4927.05, Revised Code, as They Relate to Regulation of Small Local Exchange Telephone Companies*, Case No. 89-564-TP-COI, Supplemental Finding and Order (August 15, 1991), Revised Appendix A at 8 (emphasis added).

¹⁷ See 12-3127-TP-BLS, OCC Motion to Intervene and Comments (December 21, 2012) at 7-13.

¹⁸ Id., Entry on Rehearing (March 6, 2013) at 4-5.

¹⁹ In addition, this case involves residential basic service rates while the 12-3127 case addressed basic service rates for small businesses.

As to the PUCO's concerns about the timelines in R.C. 4927.12(C)(3)(b), the statute does not preclude the PUCO from issuing an order allowing itself more time to consider an application – especially a lengthy application such as the one in this proceeding – that is being contested. The PUCO has used this mechanism to give itself more time to consider applications for rehearing. R.C. 4903.10 provides that “[i]f the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.” Nevertheless, the PUCO frequently “grants” rehearing for the sole purpose of allowing itself more time to consider the issues raised on rehearing.²⁰ The PUCO could have done the same thing in this case involving an 800-plus page application seeking the authority to increase the basic service rates of residential customers in 223 of Frontier's 244 exchanges.

The PUCO's approval of Frontier's Application in this contested case without filing “findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact” as required by R.C. 4903.09 is unlawful. The PUCO should abrogate the automatic approval of the Application for the 12 exchanges discussed in OCC's Motion to Deny.

²⁰ See, e.g., *FirstEnergy Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 to 2015*, Case No. 12-2190-EL-POR, Entry on Rehearing (May 15, 2013); *Ohio Power Company Corporate Separation*, Case No. 12-1126-EL-UNC, Entry on Rehearing (December 12, 2012); *FirstEnergy Phase-In Costs and Financing Costs*, Case No. 12-1465-EL-ATS, Entry on Rehearing (November 28, 2012); *Ohio Power Phase-In Recovery Rider*, Case No. 11-4921-EL-RDR, Entry on Rehearing (September 26, 2012). The Ohio Supreme Court has approved this practice. *State Ex Rel. Consumers' Counsel v. Public Util. Comm.*, 102 Ohio St. 3d 301, 304; 2004 Ohio 2894; 809 N.E.2d 1146 (2004) (“The commission acted within 30 days of the filing of the applications when it granted the applications on February 11 for the limited purpose of allowing additional time to consider them. Nothing in R.C. 4903.10 or precedent specifically prohibited the commission from so proceeding.”)

B. The PUCO allowed Frontier to have the authority to raise the rate customers pay for basic service in the 12 exchanges even though Frontier did not show that at least two alternative providers are offering competing service to its basic service in those exchanges, as required by R.C. 4927.12(C)(3)(a).

Under R.C. 4927.12(C)(3)(a), the PUCO must determine whether the Application shows that two or more alternative providers offer competing service to Frontier's basic service in each of the exchanges named in the Application. The statute uses the phrase "for that exchange" and thus the showing must be exchange-specific. In the Motion to Deny, OCC objected to the Application because Frontier did not show that the carriers listed for each of the 12 exchanges offer service competing with its basic service in those exchanges. Automatic approval of the Application for these 12 exchanges has harmed residential consumers because the rate they must pay for Frontier's basic service has increased \$1.25 per month without a showing that at least two alternative providers offer a service competing with Frontier's basic service in the exchanges.

Frontier's supporting documentation did not show that some providers offer service in several of the exchanges included in the Application. For two providers – American Broadband & Telecommunications ("AB&T") and Clear Rate Communications ("Clear Rate") – Frontier submitted only pages from the providers' tariffs that contained a general statement that the providers offer service in Frontier's territory. But there was no showing that the providers actually offer service in the specific exchanges where Frontier claims they compete with its basic service – Amesville and Bergholz for AB&T; Amsterdam, Baltic and Bowerston for Clear Rate. Further, as OCC noted in its Motion to Deny, the AB&T tariff page Frontier used in the Bergholz

exchange was from the Steubenville exchange, which is not even part of Frontier's service territory.²¹

Competitive providers are not required to offer service in every exchange where they are authorized to provide service. Frontier, which has the burden of proof in this proceeding, should have provided documentation showing that AB&T and Clear Rate actually offer service in the specified exchanges, but it did not. It was unreasonable for the PUCO to determine that Frontier carried its burden of proof regarding AB&T and Clear Rate in the Amesville, Amsterdam, Baltic, Bergholz and Bowerston exchanges.

OCC also objected to two Voice over Internet Protocol providers that Frontier claims offer service competing with its basic service – SunISP and Skype. Not only was Frontier's documentation inadequate to make the showing required by law for the exchanges in which Frontier claimed SunISP and Skype to be alternative providers,²² but these companies' services also lack an essential element of basic service – 911 capability.²³ Thus, SunISP and Skype customers in the 12 exchanges must have an alternative means – which would most likely be Frontier's own service – for contacting emergency personnel.

Hence the services offered by SunISP and Skype can best be viewed as a substitute for long distance service, not a competitor to Frontier's basic service. It was thus unreasonable for the PUCO to not reject SunISP and Skype in the exchanges for which Frontier claims them as alternative providers.²⁴

²¹ Motion to Deny at 12.

²² Id. at 7-8.

²³ Id. at 8-10.

²⁴ SunISP was named in all 12 exchanges while Skype was named only in the Amsterdam exchange.

The documentation Frontier submitted to support its Application does not show that the services of AB&T, Clear Rate, SunISP and Skype compete with Frontier's basic service for residential customers in the 12 exchanges. The PUCO should have rejected these carriers as alternative providers in those exchanges. Without these carriers, Frontier did not show that there are at least two alternative providers offering service that competes with its basic service in each of the 12 exchanges. The PUCO should have found that Frontier failed to meet the requirements of 4927.12(C)(3)(a), but it did not.

The PUCO allowed Frontier's Application to be automatically approved under R.C. 4927.12(C)(3)(a), and thus the PUCO deemed Frontier's documentation to be adequate to meet the statutory requirements. But based on the record in this proceeding, it was unreasonable for the PUCO to regard Frontier's inadequate showing as meeting the requirements of R.C. 4927.12(C)(3)(a). The PUCO acted unlawfully in allowing Frontier to have pricing authority under R.C. 4927.12(C) for the 12 exchanges, and the PUCO should abrogate the automatic approval of the Application for the 12 exchanges.

IV. CONCLUSION

The PUCO has recognized that cases involving automatic approval of applications become contested when objections are filed. OCC's Motion to Deny objected to the Application, thus making this proceeding a contested case. The PUCO therefore was required by R.C. 4903.09 to set forth, in writing, findings and conclusions based on the record of this proceeding. The PUCO did not do so, and thus violated R.C. 4903.09.

Further, the PUCO unreasonably and unlawfully allowed the Application to be approved by operation of law. Frontier did not show that the services of at least two other providers in the 12 exchanges compete with its basic service, as required by R.C.

4927.12(C)(3)(a). Without a showing that alternative providers offer service that competes with Frontier's basic service, residential customers in the 12 exchanges have been harmed by the increase in the rates they pay for Frontier's basic service.

Each of these errors by the PUCO is sufficient to abrogate the automatic approval of the Application for the 12 exchanges. To protect residential consumers in the 12 exchanges, the PUCO should do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel was served by electronic mail to the persons listed below, on this 28th day of August 2013.

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Summary: Application Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Etter, Terry L Mr.