

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues.	)	Case No. 95-845-TP-COI
In the Matter of MCI Metro Access Transmission Services, Inc. to Add a New Rate.	)	Case No. 96-808-TP-ATA
In the Matter of the Following Applications for Authority to Provide Local Telecommunication Services in Ohio:)	
Time Warner Communications of Ohio, L.P.	)	Case No. 94-1695-TP-ACE
MCI Metro Access Transmission Services, Inc.	)	Case No. 94-2012-TP-ACE
MFS Intelenet of Ohio, Inc.	)	Case No. 94-2019-TP-ACE
ICG Access Services, Inc.	)	Case No. 95-814-TP-ACE
Cablevision Lightpath	)	Case No. 95-1131-TP-ACE
AT&T Communications of Ohio, Inc.	)	Case No. 96-190-TP-ACE
LCI International Telecom Corp.	)	Case No. 96-263-TP-ACE
Scherers Communications Group Inc.	)	Case No. 96-298-TP-ACE
Brooks Fiber Communications of Ohio, Inc.	)	Case No. 96-349-TP-ACE
TCG Cleveland	)	Case No. 96-382-TP-ACE
Preferred Carrier Services Inc.	)	Case No. 96-428-TP-ACE
Communications Buying Group, Inc.	)	Case No. 96-431-TP-ACE
Ameritech Communications of Ohio, Inc.	)	Case No. 96-658-TP-ACE
Sprint Communications Company L.P.	)	Case No. 96-879-TP-ACE
Blue Ribbon Rentals II, Inc. dba Talk One America	)	Case No. 96-926-TP-ACE
NEXTLINK	)	Case No. 96-1036-TP-ACE
Cable & Wireless	)	Case No. 96-1038-TP-ACE
MIDCOM Communications Inc.	)	Case No. 96-1123-TP-ACE
WinStar Wireless of Ohio, Inc.	)	Case No. 96-1206-TP-ACE
LCI International Telecom Corp.	)	Case No. 96-1288-TP-ACE
A.R.C. Networks, Inc.	)	Case No. 96-1370-TP-ACE
In the Matter of the Following Applications to Amend Authority:)	
MFS Intelenet of Ohio, Inc.	)	Case No. 96-1240-TP-AAC
ICG Telecom Group, Inc.	)	Case No. 96-1336-TP-AAC

ENTRY ON REHEARING

The Commission finds:

- (1) In a Supplemental Finding and Order issued on January 16, 1997, the Commission addressed a variety of outstanding procedural issues concerning pending applications filed by entities seeking to provide basic local exchange services in competition with the incumbent local exchange carriers pursuant to the local service guidelines established in Case No. 95-845-TP-COI (845).
- (2) On February 14, 1997, the Ohio Consumers' Counsel (OCC), the Appalachian People's Action Coalition (APAC), and Edgemont Neighborhood Coalition Inc. (Edgemont)¹ sought rehearing and clarification on one aspect of the January 16, 1997 Supplemental Finding and Order. In addition, on February 18, 1997, Cincinnati Bell Telephone Company (CBT) sought rehearing of the Commission's January 16, 1997 Supplemental Finding and Order.
- (3) Memoranda contra CBT's application for rehearing was timely filed by NextLink Ohio, Inc.; Communications Buying Group, Inc.; Time Warner Communications of Ohio, L.P.; MIDCOM Communications Inc.; ICG Telecom Group, Inc.; and Winstar Wireless of Ohio, Inc. In addition, on March 4, 1997, MFS Intelenet of Ohio, Inc. (MFS) filed a memorandum contra CBT's application for rehearing as well as a motion for leave to file late-filed comments. In support of its motion for leave to file late-filed comments, MFS maintains that its counsel was disadvantaged with regard to reading, analyzing, and preparing a response to CBT's application as neither MFS nor its counsel was served with a copy of CBT's application for rehearing. MFS' motion for leave to file late-filed comments is well made and is, therefore, granted.
- (4) OCC, APAC, and Edgemont maintain that the Commission erred by failing to grant the prospective intervenor's motions to intervene in Blue Ribbon Rentals II Inc., dba Talk One America (Blue Ribbon Rentals), Case No. 96-926-TP-ACE (926),

¹ OCC, APAC, and Edgemont will be collectively referred to as prospective intervenors throughout this rehearing entry.

and that the Commission further erred by failing to clarify the due process rights² of prospective intervenors when an application for certification (ACE) proceeding has been suspended as in the case of Blue Ribbon Rentals.

- (5) CBT asserts five grounds for rehearing raised by the January 16, 1997 Supplemental Finding and Order, namely: (1) that the Commission failed to require each applicant to prove satisfaction of the requirements of Section 4905.24, Revised Code; (2) that the Commission limited its inquiry to each applicant's technical, financial, and managerial capabilities; (3) that the certification procedure applied by the Commission in these proceedings shifts the burden of proof from applicants to intervenors; (4) that the Commission applied the certification provisions of its local service guidelines in these proceedings when the Commission contends on appeal that the guidelines are not final; and (5) that the Commission denied CBT's motions to intervene and requests for hearing in each of the cases listed in Appendix A of the January 16, 1997 Supplemental Finding and Order.
- (6) Section 4903.10, Revised Code, provides that any party who has entered an appearance in a proceeding may apply for a rehearing with respect to any matter determined in the proceeding by filing an application within 30 days of the order in the Commission's journal. The Commission may grant and hold a rehearing on the matters specified in the application if, in its judgment, sufficient reason appears.
- (7) The applications for rehearing of OCC, APAC, Edgemont, and CBT have been filed timely as required by Section 4903.10, Revised Code.
- (8) Upon consideration of the February 14, 1997 application for rehearing filed by OCC, APAC, and Edgemont, we find that clarification of the Blue Ribbon Rentals 926 ACE proceeding is warranted. As correctly portrayed by OCC, APAC, and Edgemont, the Commission has not yet ruled on the out

² Prospective intervenors couch their rehearing in terms of due process rights; however, throughout the rehearing application the prospective intervenors seek clarification of their discovery rights inasmuch as the Commission has not, to date, ruled on the outstanding motions to intervene in Blue Ribbon Rentals 926 proceeding. The Commission will henceforth only be addressing the prospective intervenors' right to engage in discovery through this rehearing entry.

standing motions to intervene in the 926 ACE proceeding. The Commission did, however, address this matter in the January 16, 1997 Supplemental Finding and Order by stating, in relevant part, that:

[T]he application of Blue Ribbon Rentals ... was suspended by attorney examiner entry issued October 30, 1996. In suspending this application as currently filed, staff expressed concern regarding the technical, managerial, and financial capabilities of the applicant. At this time, we [the Commission] determine that this matter, 926, should remain under suspension and that a future entry will be issued setting forth the procedure under which this application will go forward.

The Commission now clarifies that all matters related to Blue Ribbon Rentals 926 ACE proceeding will be addressed in an entry to be issued in that proceeding. This will include rulings on the motions to intervene (which will also clarify the prospective intervenors' right to pursue discovery) which have been docketed by the prospective intervenors in the 926 case. The Commission anticipates that the prospective intervenors will have ample opportunities to raise their respective positions regarding Blue Ribbon Rentals' fitness to hold a local exchange operating certificate in the 926 ACE proceeding.

- (9) Next, we want to turn to the assignments of error raised by CBT. First, we will address the allegation that the Commission has unreasonably and unlawfully shifted the burden of proof from the applicant, under Section 4905.24, Revised Code, to intervenors. In support of this contention, CBT points to language contained at page four of the January 16, 1997 Supplemental Finding and Order which states that the Commission will not hold a hearing unless an interested party "can set forth identifiable concerns regarding the technical, managerial, or financial capabilities of an applicant."

Initially, the Commission notes that CBT has mischaracterized our local service guidelines on the issue of certification by focusing on one phrase explaining the circumstances under which a public evidentiary hearing is warranted and claiming

that this somehow unlawfully shifts the burden of proof required by Section 4905.24, Revised Code. Notwithstanding the above, we determine that it is appropriate to alleviate any confusion our local competition guidelines may have caused on the issue of Section 4905.24, Revised Code.

An applicant seeking a certificate of public convenience and necessity in order to provide local exchange services has the burden of establishing that it has the requisite technical, managerial, and financial abilities in order to establish that the applicant's exercise of such "license, permit, right, or franchise is proper and necessary for the public convenience", as contemplated by Section 4905.24, Revised Code. The Commission has not shifted this burden of proof. What the Commission has attempted to address in its local service guidelines, however, are the circumstances under which a public evidentiary hearing is necessitated and when the public convenience is adequately addressed pursuant to a paper proceeding. Through both proceedings, the Commission thoughtfully considers all objections raised concerning an applicant's certification application. Rehearing is denied on this matter.

- (10) CBT's assignment of error that it is unreasonable for the Commission to apply the certification provisions of the local service guidelines while contending on appeal that the guidelines are not ripe for appeal is also without merit and is consequently denied. In its assignment of error, CBT confuses the concepts involving the immediate effectiveness of a Commission order versus when a Commission order is ripe for appeal.

Section 4903.15, Revised Code, states that "[U]nless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission." The Commission's Finding and Order was issued in this matter on June 12, 1996. The Finding and Order specified that the effective date of the guidelines was August 15, 1996.³ Thus, the Commission's local service guidelines were effective and could be applied after August 15, 1996.

³ In an entry on rehearing issued August 1, 1996, the Commission confirmed that the June 12, 1996 Finding and Order remained in full force and effect pending rehearing.

In accordance with Section 4903.11, Revised Code, an order of the Commission becomes ripe for review in the Ohio Supreme Court within 60 days following "denial of the application for rehearing by operation of law, or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing." In previously considering when this 60-day window in which to seek review of a Commission order begins to run in a multiparty proceeding, the Ohio Supreme Court, in *Senior Citizens Coalition v. Pub. Util. Comm.* (1988), 40 Ohio St. 3d 329, found that the review period begins to run from the disposition of the last application for rehearing. Applications for rehearing of the local service guidelines were still pending on January 28, 1997, the date on which the Commission's Motion to Dismiss Appeal was filed in *Cincinnati Bell Telephone Company v. PUCO*, Ohio Supreme Court Case No. 97-26.⁴

Based upon all of the foregoing, the Commission believes that it is entirely reasonable and lawful to apply the local service guidelines and aver at the same time that an appeal before the Ohio Supreme Court is not ripe for resolution.

- (11) The remaining three issues have been previously addressed by the Commission.⁵ Because CBT has failed to raise any new arguments which the Commission has not already considered, rehearing on these remaining issues is denied.

It is, therefore,

ORDERED, That the motion for leave to file late-filed comments made by MFS Intelenet of Ohio, Inc. is granted in accordance with Finding (3). It is, further,

ORDERED, That the January 16, 1997 Supplemental Finding and Order is clarified to the limited extent outlined in Findings (8) and (9). It is, further,

ORDERED, That, in all other respects, the applications for rehearing filed by OCC, APAC, Edgemont, and CBT are denied in their entirety. It is, further,

⁴ The Ohio Supreme Court granted the Commission's Motion to Dismiss Appeal on February 26, 1997, without written opinion.

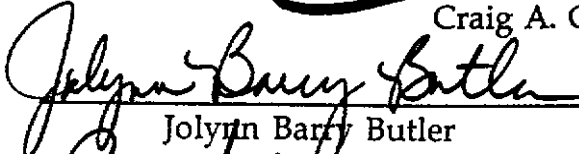
⁵ The Commission addressed certification issues under Section 4905.24, Revised Code, including the arguments raised by CBT in its February 18, 1997 application for rehearing, in the June 12, 1996 Finding and Order (pages 28-29), the November 7, 1996 Entry on Rehearing (pages 12-13), and the January 16, 1997 Supplemental Finding and Order (pages 2-4).

ORDERED, That a copy of this entry be served upon OCC, APAC, Edgemont, and CBT; their respective counsel; and upon all interested persons of record in this docket.

THE PUBLIC UTILITIES COMMISSION OF OHIO



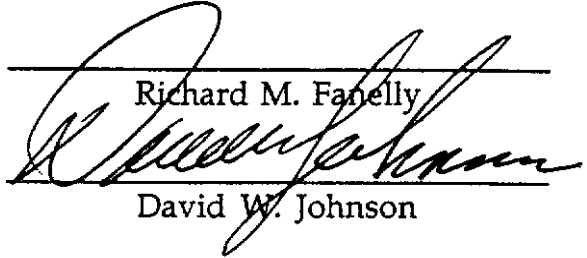
Craig A. Glazer, Chairman



Jolynn Barry Butler



Ronda Hartman Ferguson




Richard M. Fanelly

David W. Johnson

JRJ;geb

Entered in the Journal
MAR 6 1997

A True Copy

Gary S. Vigorito
Secretary

CASE NUMBER 96-1123-TP-ACE
CASE DESCRIPTION MIDCOM COMMUNICATIONS INC.
DOCUMENT SIGNED ON March 6, 1997
DATE OF SERVICE 3-6-97 (2) Entries

PERSONS SERVED

PARTIES OF RECORD

ATTORNEYS

APPLICANT

MIDCOM COMMUNICATIONS, INC.
BRADLEY D. TONEY
1111 THIRD AVE. SUITE 1600
SEATTLE, WA 98101

CHARLES C. HUNTER
HUNTER & MOW, P.C.
1620 I STREET, N.W.
SUITE 701
WASHINGTON, DC 20006

INTERVENOR

CINCINNATI BELL TELEPHONE COMPANY
201 EAST FOURTH STREET
P.O. BOX 2301
CINCINNATI, OH 45201

CHRISTOPHER J. WILSON
FROST & JACOBS
2500 CENTRAL TRUST CENTER
P.O. BOX 5715, 201 E. FIFTH ST.
CINCINNATI, OH 45202-4182

JACK B. HARRISON
FROST & JACOBS
2500 PNC CENTER
201 EAST FIFTH STREET
CINCINNATI, OH 45202