

FILE

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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

2004 APR -1 AM 9:49

In the Matter of the Application of Time :  
Warner Cable Information Services : Case No. 03-2229-TP-ACE  
(Ohio), LLC to Offer Local and :  
Interexchange Voice Services. :

PUCO

**MEMORANDUM OF CINCINNATI BELL TELEPHONE COMPANY**  
**IN OPPOSITION TO TWCIS' MOTION TO STRIKE**  
**MARCH 12, 2004 APPLICATION FOR REHEARING**

On March 12, 2004, Cincinnati Bell Telephone Company ("CBT") filed an Application for Rehearing of the Commission's February 11, 2004 Entry on Rehearing. Specifically, CBT sought rehearing of the second paragraph of part (7) of the Entry of Rehearing as unreasonable and unlawful because it would allow TWCIS to operate as a telephone company without a certificate of public convenience and necessity and without waivers of the Commission's rules. In response to CBT's Application for Rehearing, TWCIS has filed a Motion to Strike as well as a Memorandum Contra. CBT hereby responds to TWCIS' Motion to Strike.

**I. CBT's March 12, 2004 Application For Rehearing Is Authorized By Statute.**

TWCIS would have the Commission invent a rule of law that does not currently exist – to prohibit an application for rehearing of an entry denying rehearing. TWCIS cites no authority for this proposed rule and there is none. Quite to the contrary, Ohio law expressly allows any party who has entered an appearance in a proceeding to file an application for rehearing of any order, regardless of whether the order is an "original" order, an order granting rehearing, or an order denying rehearing. An application for rehearing may be filed "in respect to any matters determined in the proceeding." R.C. § 4903.10.

TWCIS suggests that the February 11, 2004 did not "determine" anything, when it certainly did. The February 11 Entry on Rehearing represents a definite change from the

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Commission's December 17, 2003 Entry. In the earlier order, the Commission "authorize[d]" TWCIS to provide its planned VoIP services to the public "in the manner set forth in the company's application." In part (7) of the February 11, 2004 Entry on Rehearing, the Commission retreated from the December 17, 2003 ordering clause and clarified that its statement was not intended to be construed as granting operating authority of any kind. The Commission nevertheless announced a new position that it "would do nothing to allow or preclude TWCIS from operating in the manner set forth in [its] application." The Commission further stated that TWCIS would "retain" the right to operate and it would not preclude TWCIS from providing telephone service before it has a certificate.

It would be overly simplistic to create a rule against rehearing any entry denying rehearing. The mere title of an order does not reveal all of its substance. Any time the Commission makes new determinations in an order, those new determinations are subject to rehearing regardless of the title of the order. R.C. § 4903.10; O.A.C. § 4901-1-35(A). Ohio Supreme Court jurisprudence prohibits a party from raising an issue on appeal that has not been presented to the Commission in an application for rehearing. Forest Hills Util. Co. v. Pub. Util. Comm'n (1972), 31 Ohio St.2d 46, 285 N.E.2d 702; Cincinnati v. Pub. Util. Comm'n (1949), 151 Ohio St. 353, 86 N.E.2d 10; Travis v. Pub. Util. Comm'n (1931), 123 Ohio St. 355, 175 N.E. 586. The rule proposed by TWCIS would effectively insulate from judicial review any new matter contained in an entry denying rehearing. The Commission cannot so insulate matters from review simply by including them in an order that denies rehearing.

Even though the first ordering clause in the February 11, 2004 Entry on Rehearing characterized the order as "affirming" the December 17, 2003 Entry, the Commission did, in fact, change its decision. The ordering clause in the original Entry stated that "TWCIS is

authorized to operate in accordance with finding 5.” In the Entry on Rehearing, the Commission stated that “[i]t was never our intent for that entry to be construed as . . . granting operating authority of any kind from the Commission to TWCIS.” The Commission went from expressly “authorizing” TWCIS to operate to “not granting operating authority of any kind.” This represents a change in position by the Commission, despite being couched as an affirmance of the earlier order.

It is still unlawful to commence operations as a telephone company without a certificate. R.C. § 4905.24. And, the Commission’s Entry on Rehearing made clear that it has not granted TWCIS a certificate or any waivers. Entry on Rehearing, ¶ (2). Yet, the Commission’s current position is that it will do nothing to prevent TWCIS or others from operating without a certificate. This determination invites unlawful activity and must be subject to rehearing.

## **II. CBT’s January 16, 2004 Application for Rehearing Was Not Procedurally Defective.**

TWCIS wrongly contends that CBT’s January 16, 2004 Application for Rehearing was procedurally defective because it was not served on the Office of the Consumers’ Counsel. Again, TWCIS cites no authority for its assertion. Revised Code § 4903.10 provides that an applicant for rehearing “shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding *in the manner and form prescribed by the commission.*” (emphasis added). The Commission prescribed the manner of service in Rule 4901-1-05, including a special rule for intervenors:

For purposes of this rule, the term ‘party’ includes all persons who have filed motions to intervene which are pending at the time a pleading or paper is to be served, *provided that the person serving the pleading or other paper has been served with a copy of the motion to intervene.*

O.A.C. § 4901-1-05(D) (emphasis added.) When the OCC filed its still pending Motion to Intervene in this case, it served TWCIS and the Commission, but not CBT. Therefore, for

purposes of the Commission's service rules, OCC was not a party upon which CBT was required to serve its application for rehearing.<sup>1</sup> Therefore, TWCIS' argument regarding service is wrong and CBT's January 16, 2004 Application for Rehearing was procedurally proper.

Even if TWCIS was correct with respect to CBT's January 16, 2004 Application for Rehearing, any defect in that filing has no bearing on the propriety of CBT's March 12, 2004 Application for Rehearing. There is no issue with respect to service of the pending application. TWCIS speculates that CBT filed the current application for rehearing to "cure" alleged defects in the first one. That is not the case. The second application for rehearing stands on its own merit and only addresses new material in the February 11, 2004 Entry on Rehearing. CBT could have pursued the current application for rehearing even if it had never filed the earlier one. Pursuant to statute, every Commission order is subject to rehearing.

In any event, the validity of CBT's first Application for Rehearing is not germane here and will not be until and unless it becomes the subject of an appeal. There is no reason to speculate whether such an appeal, or any particular issues it might raise, would be proper. That is a question for only the Ohio Supreme Court to address, not this Commission.

**III. TWCIS Presents No Substantive Reasons Why CBT's Current Application For Rehearing Should Not Be Granted.**

TWCIS has failed to address the merits of CBT's Application for Rehearing – instead it relies upon procedural maneuvers to avoid a discussion of the merits. Notably, TWCIS has never denied that Ohio law prohibits the commencement of operation as a telephone company

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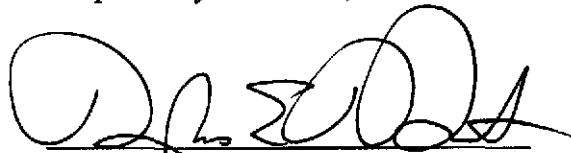
<sup>1</sup> It is noteworthy that the OCC, the only party affected by not receiving service from CBT, has not complained about not being served. It obviously had access to CBT's filings and commented on the same when it opposed other applications for rehearing, but the OCC chose not to oppose CBT's application. See Memorandum Contra of the Office of the Ohio Consumers' Counsel to the Applications for Rehearing filed by SBC Ohio, Inc. and the Ohio Telecom Association, filed January 26, 2004, at n.6.

without a certificate from the Commission. R.C. § 4905.24. In the face of CBT's clear demonstration that TWCIS will be a "telephone company" if it offers the services it proposes, TWCIS has declined to offer any reasons why that is not the case. Nor has TWCIS presented any justification for the Commission to knowingly allow TWCIS or any other entity to violate Ohio law and operate as a telephone company without a valid certificate. Therefore, the Commission should reject TWCIS' procedural challenges to CBT's Application for Rehearing as groundless and grant CBT's application for rehearing for lack of any substantive opposition.

**Conclusion**

The Commission should deny TWCIS' Motion to Strike, grant CBT's March 12, 2004 Application for Rehearing and vacate the second paragraph of part (7) of the February 11, 2004 Entry on Rehearing.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served upon the following persons by regular U.S. mail, postage prepaid, this 1<sup>st</sup> day of April, 2004.

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A handwritten signature in black ink, appearing to read "Terry L. Etter", is written over a horizontal line.

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