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MEMORANDUM

TO: Daisy Crockron, Chief
Docketing Division

FROM: Dan Shields DFS
Telecommunications Division

SUBJECT: Comments to be filed in the Telecommunications Federal Activities Docket No. 93-4000-TP-FAD

DATE: July 8, 1996

Attached are two copies of a document to be filed in Case No. 93-4000-TP-FAD. The daily activities report description of the filing should read verbatim as follows:

The Public Utilities Commission of Ohio's Supplemental Comments filed with the Federal Communications Commission (FCC) in CC Docket No. 96-98 (In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996). The Supplemental Comments filed in this proceeding respond to the FCC's June 20, 1996, Public Notice calling for comments on a proposed Industry Demand and Supply Simulation Model.

Attorney General
Betty D. Montgomery

July 5, 1996

Via Overnight Mail

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

Re: *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98

Dear Mr. Caton:

Enclosed please find the original and five copies of the **Supplmental Comments of the Public Utilities Commission of Ohio** in the above-referenced matter. Please return a time-stamped copy to me in the enclosed stamped, self-addressed envelope.

Thank you for your assistance in this matter.

Respectfully submitted,

STEVEN T. NOURSE
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43266-0573
(614) 466-4397

STN/kja

Enclosure

cc: Wanda Harris, Competitive Pricing Division, Common Carrier Bureau
Chief, Industry Analysis Division, Common Carrier Bureau
Chief, Competition Division, Office of the General Counsel

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

SUPPLEMENTAL COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

The Federal Communications Commission (FCC) issued a Notice of Supplemental Comment in this docket on June 20, 1996. The Notice released for comment a complex economic Industry Demand and Supply Simulation Model relative to local exchange competition. The Notice gave no indication of how the Model was to be used or whether the FCC intends to use the Model to support a particular position or conclusion in this docket. The Model allows for the calculation of a variety of outputs from nearly 200 specifications. Comments had to be submitted by July 1, 1996, some seven (7) business days after the Notice was issued. A few days before the due date, the FCC extended the comment deadline to July 8, 1996. There are to be no reply comments. The Public Utilities Commission of Ohio (PUCO) hereby submits supplemental comments on this matter.

DISCUSSION

The complexity of the Industry Supply & Demand Model (Model) is enormous, and performing a proper analysis of the Model and its implications is a Herculean task. As such, it was simply unrealistic and unfair for the FCC to call upon parties in this docket to send out formal comments a mere six (6) business days after the Model is publicly released. The fact that the initial deadline of July 1

was later extended one week provides little relief, given that technical review of the model was simply not undertaken by the time the continuance was ordered due to the lack of adequate time. To make matters worse, the Notice of Supplemental Comment fails to provide any hint, much less a direct statement, as to how the model will fit into the issues being decided in this docket. The amorphous nature of the issue presented for comment greatly concerns the PUCO.

Given the FCC's untimely release of this complicated Model, the likelihood of receiving meaningful comments is low. In order for a proper analysis of the Model to be done, each variable would need to be considered and data collected for testing. Then, the statistical characteristics of the data-fitted model would need to be analyzed as a whole. Considering the complexity of nearly 200 input specifications incorporated into the Model, a meaningful analysis producing substantive comments could easily take months. The FCC cannot reasonably expect commentors to perform this task in a matter of days. The FCC's own regulations require that a "reasonable time" be given for comment on such matters. 47 C.F.R. § 1.415.

Separate and apart from the unrealistic time frame for comment on the Model, any reliance on the Model by the FCC in deciding this docket would be unfair because the invitation for comment is based on an undisclosed purpose. The unspecified purpose for which the Model could be used exacerbates the complexity of offering supplemental comments, and creates a "fear of the unknown" atmosphere in which comments are to be made. The procedure employed by the FCC in this docket raises serious questions of due process and fairness. The general purpose of a federal agency notice and comment procedure is to allow the agency to benefit from the experience and input of parties who file comments and to see to it that the agency maintains a flexible and open-minded attitude toward its rule. *Chocolate Manufacturers v. Block*, 755 F.2d 1098 (4th Cir. 1985). Federal Courts have

also held that the FCC is required to fully and fairly disclose the purpose and intended action associated with a rulemaking. *Reeder v. Federal Communications Commission*, 865 F.2d 1298 (D.C. Cir. 1989). In light of the Model's complexity, it is obvious that the time given for comment on the Model and the ambiguous manner in which it was released was not reasonable.

Although it is not clear how the FCC intends to utilize the Model (if at all), it is clear that the FCC could *not* use such a Model for certain purposes under the Telecommunications Act of 1996 (1996 Act). For example, Section 252 requires the rates for unbundled network elements to be based on cost and wholesale rates to be based on the retail rates less avoided cost. Consequently, a generic industry model should not be used as the primary basis of setting rates for network elements or wholesale services.[1] It cannot be reasonably disputed that the 1996 Act suggests that cost-based rates for these services are to be developed by using company-specific costs. Any generic or national model that ignores company-specific costs would, by definition, fail to satisfy that basic criterion.

Equally fundamental is the fact that states, not the FCC, are supposed to set the actual rates for unbundled and wholesale services, notwithstanding that the FCC's initial NPRM in this docket entertained tentative conclusions to the contrary. NPRM at ¶ 117. In particular, the FCC tentatively concluded that it has authority under Section 251(d) to adopt pricing rules to ensure that rates for interconnection, unbundled network elements, and collocation are just, reasonable, and nondiscriminatory. NPRM at ¶ 117. It may be that the FCC is now considering use

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1 Unlike Universal Service contributions and support payments for which the 1996 Act conveys a relatively "blank slate" to the FCC (and the Joint Board of Universal Service) to set appropriate methods for supporting express subsidies, Section 252 expressly limits the FCC and states to setting rates for network elements and wholesale services that are based on cost. In other words, although proxy methodologies could be economically efficient and otherwise legally permissible for Universal Service, using a proxy approach in directly setting wholesale and unbundling rates or in establishing pricing principles is arguably inappropriate. Moreover, Section 252's requirement that rates be based on "cost (determined without reference to a rate-of-return or other rate-based proceeding)" clearly contemplates company specific costs.

of the Model in acting on the NPRM's tentative conclusion regarding ratemaking authority. Given the lack of specificity in the Notice of Supplemental Comment, the initial NPRM contains the only substantive statements to draw upon in this regard. Ultimately, neither the released Model nor any other economic model could justify the FCC dictating a national pricing policy - because the FCC does not have legal authority to impose any national pricing scheme for intrastate services.

The NPRM failed to cite any specific language from the 1996 Act which expressly authorizes the FCC to establish national pricing standards. The Act does not give the FCC authority to establish pricing standards nor does the Act give the FCC authority to define wholesale rates or reciprocal compensation arrangements. There simply is no such language in the 1996 Act to this effect. Section 251(d)(1) specifically provides that "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996, the FCC shall complete all actions necessary to establish regulations to implement the requirements of this Section." This Section, the FCC claims, provides the authority for the FCC to establish pricing standards and define pricing terms, however, there is no express language that provides such statutory authority. NPRM at ¶¶ 117 - 118.

Within the same paragraph (Section 251(d)) of the 1996 Act from which the FCC derives its authority to establish national pricing standards, another sentence, Section 251(d)(3), explicitly provides that the FCC shall not preclude the states from enforcing or implementing the requirements of Section 251 as long as the state's policy is consistent with Section 251. This provision allows the states to enforce the requirements of this Section. If the FCC establishes a set of pricing standards that are not consistent with state law, states might be unable to enforce the FCC's principles. In order for states to enforce or implement any FCC-established pricing rules or regulations, the rules need to be consistent with state law.

The NPRM states that the pricing requirements of Section 251, as elaborated in Section 252, require the FCC to establish pricing principles interpreting and explaining the provisions of Section 252(d) for states to apply. NPRM at ¶ 118. To the extent that states are preempted by the establishment of such pricing prohibition policies, the FCC's interpretation conflicts with the Congressional prohibition against implied preemption under the 1996 Act. *See* Section 601(d). More directly, Congress, through the enactment of Sections 251(d)(3)and 252(d)(1), provided that the states should have a substantial role in determining a just and reasonable rate for interconnection and other network element charges. Section 252(d)(1) expressly allows state commissions to determine if interconnection rates are just and reasonable. Section 252(d) clearly provides that the states, not the FCC, will determine if the rates are reasonable.

The 1996 Act establishes how states are to determine whether the rates are reasonable. If Congress intended for states to determine reasonableness according to the FCC's requirements, this language would have been included in Section 252(d), entitled "Pricing Standards." Instead, Congress provided that rates are to be set by the states and that rates shall be "(i) based on the cost . . . of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and may include a reasonable profit." Section 252(d)(1). Within the Pricing Standards provision itself, Congress made no reference to national pricing principles to be established by the FCC. Congress went so far as to directly provide specific criteria for the *states* to use in making its determination, but did not refer to any FCC pricing principles. Accordingly, the NPRM's conclusion that the FCC has jurisdiction to establish national uniform pricing standards is in error. NPRM at ¶ 117, 118, and 120.

In this regard, it appears that the FCC may be considering utilizing the Model to support some undefined national pricing policy. An economic model, no matter

how useful or effective, cannot support the FCC taking action beyond its jurisdiction. Moreover, as a practical matter, a national model could not incorporate and account for the technical, demographic, and geographic differences in and among states. That weakness is substantial and is inherent in any uniform national pricing Model. As further evidence that Congress did not contemplate national pricing, the Congress, in enacting the 1996 Act, chose not to amend 47 U.S.C. § 152(b) which expressly limits the FCC's jurisdiction over intrastate telecommunication services.

Each negotiation, arbitration, and agreement will be unique and to apply national standards to each set of circumstances would undercut the 1996 Act's goal of promoting competition and eliminate the variances inherent in such negotiations, as envisioned by Congress. If the pricing principles adopted by the FCC conflict with state law, the states will be unable to implement the national principles. On the other hand, the states, if given the flexibility, could establish pricing principles that comply with state law *and* a broader set of guidelines under the 1996 Act. By complying with the 1996 Act, there would be sufficient consistency and predictability maintained throughout the nation. Therefore, a more detailed set of national regulations created by the FCC is not necessary for predictability, as the 1996 Act itself provides national rules and regulations. In this context, an economic model could be a useful tool for either the FCC or the States, but a particular model should not be forced on States by the FCC.

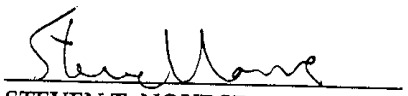
CONCLUSION

The Model released for comment may be a useful tool, but that complex determination cannot reasonably or fairly be tested at this late date in the context of this docket. It is not clear how the FCC intends to use the Model (if at all), but the FCC should avoid any approach that would bind states into using the Model for any purpose, particularly for rate-setting functions. Any national pricing model would be intrinsically ill-equipped to provide a basis to set company-specific cost-based rates. Similarly, any national Model would necessarily ignore geographic, technical and demographic differences that exist among and within the states. Accordingly, the FCC should strictly limit use of its Model by offering the Model as a voluntary resource for states to draw upon. The FCC might also decide to utilize the Model in the event that it is required to act where a state fails to act, under Section 252.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

DUANE W. LUCKEY
Section Chief



STEVEN T. NOURSE
JODI JENKINS BAIR
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
(614) 466-4396
FAX: (614) 644-8764