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INTRODUCTION

The Public Utilities Commission of Ohio (Commission) has taken necessary action to preserve the continued availability of payphones in many areas of the State of Ohio. Many Ohioans still depend on payphones, particularly in emergency situations. Payphones, however, are rapidly being removed from service. An important factor behind this trend, as determined by the Commission, is the rate structure for lines connecting payphones to the telephone network. The Commission therefore ordered a rate adjustment as an interim step toward a new rate structure that more accurately reflects costs.

Appellant Cincinnati Bell Telephone Company, LLC (Cincinnati Bell) has asked the Court to stay the Commission's order pending resolution of its appeal. The Court should decline to grant this extraordinary relief. As will be shown *infra*, Cincinnati Bell has not met its burden to demonstrate that a stay is warranted. The motion for stay should be denied and the Commission's order allowed to stand while the Court reviews the merits of the appeal.

STATEMENT OF THE FACTS AND CASE

This case involves the latest phase in a Commission proceeding involving the payphone industry. In a previous phase, the Commission had applied a cost-based News Services Test (NST) to AT&T's payphone line rates in accordance with a Federal Communications Commission (FCC) decision. This Court

affirmed the Commission orders in that phase. *Payphone Ass'n of Ohio v. Pub. Util. Comm'n*, 109 Ohio St.3d 453, 849 N.E.2d 4 (2006).

The current phase began on July 18, 2007, when the Payphone Association of Ohio (PAO) filed a motion asking the Commission to apply the NST to certain non-RBOCs (Regional Bell Operating Companies). The PAO alleged that the rates charged by the non-RBOC incumbent local exchange carriers (ILECs) were contributing to the elimination of public payphones. On October 3, 2007, the Commission issued an entry providing all parties an opportunity to comment on the PAO's request. Comments were filed by several PAO member companies, the Ohio Consumers' Counsel, and the ILECs.

After reviewing the initial and reply comments, the Commission issued its decision on March 19, 2008. *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services ("In re Pay Telephone Services")*, Case No. 96-1310-TP-COI (Entry) (March 19, 2008). The Commission found that there was a threat to the continued availability of payphones in Ohio. In order to stem the rapid loss of payphones, the Commission ordered the non-RBOC ILECs to adopt, on an interim basis, a safe harbor rate equal to AT&T's highest rural rate band with an additional ten percent markup to reflect any cost advantages of AT&T over the other ILECs. The ILEC were also given the option of proposing new rates supported by an NST-compliant cost study. If an ILEC does so within

six months of the date of the entry, there will be a true-up to collect the difference between the new rates and the safe harbor rates.

On April 18, 2008, Cincinnati Bell and the other ILECs filed applications for rehearing. The Commission denied the applications for rehearing in their entirety. *In re Pay Telephone Services* (Entry on Rehearing) (May 14, 2008). Cincinnati Bell filed a Notice of Appeal and motion for stay on June 10, 2008.

ARGUMENT

Proposition of Law No. I:

Cincinnati Bell has failed to comply with the statutory requirements for obtaining a stay under R.C. 4903.16.

Cincinnati Bell has failed to commit to the financial undertaking that is required by R.C. 4903.16. Ohio Rev. Code Ann. § 4903.16 (Anderson 2008), App. at 1. By this omission, Cincinnati Bell has failed to satisfy the statutory procedural requirements necessary for issuance of a stay.

This Court has determined “that there is no automatic stay of any [PUCO] order, but that it is necessary for any person aggrieved thereby to take affirmative action, and if he does so he is required to post bond.” *City of Columbus v. Pub. Util. Comm’n*, 170 Ohio St. 105, 109-110, 163 N.E.2d 167, 171 (1959); *Keco Industries, Inc., v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 258, 141 N.E.2d 465, 468 (1957). Unless otherwise specified, an order of the Commission is effective immediately upon journalization. Ohio Rev. Code Ann. §

4903.15 (Anderson 2008), App. at 1. To obtain a stay of a Commission order, a party must follow the procedure described in R.C. 4903.16:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the *appellant shall execute an undertaking, payable to the state* in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Ohio Rev. Code Ann. § 4903.16 (Anderson 2008) (emphasis added), App. at 1.

The statute provides without exception that an appellant seeking to stay the execution of a Commission order must execute an undertaking for the potential payment of damages if the Commission order is upheld. Ohio Rev. Code Ann. § 4903.16 (Anderson 2008), App. at 1. The Court has strictly applied this requirement. In rejecting a stay application, the Court concluded that the appellant “did not follow the statutory procedure of asking the Supreme Court to stay an order of the Commission, *including posting a bond.*” *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, 162 (1991). Similarly, the Court has also imposed the bond requirement on a municipal appellant. *City of Columbus v. Pub. Util. Comm’n*, 170 Ohio St. 105, 109, 163 N.E. 2d 167, 191 (1959) (finding that the statutory procedures control the process

for appealing final Commission orders and “any stay of an order of the Commission is dependent on the execution of an undertaking by the appellant.”)

Cincinnati Bell urges the Court to permit the company to establish a trust account in lieu of posting a bond. Cincinnati Bell cites a case from 1984 as precedent for this alternative procedure. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm’n*, 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984). It is important to view that case in context. That decision was issued during an era in which the Court took a significantly more expansive view of the stay procedure. The Court has in recent years taken a more restrictive approach to its review of stay applications. Indeed, notwithstanding frequent requests, this Court has rarely seen fit to grant a stay over a Commission order pending appeal. *See Ohio Consumers’ Counsel v. Pub. Comm’n*, 109 Ohio St. 3d 1492, 848 N.E.2d 856 (2006) (stay denied); *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 107 Ohio St. 3d 1679, 839 N.E.2d 401 (2005) (stay denied); *Reading v. Pub. Util. Comm’n*, 105 Ohio St. 3d 1496, 825 N.E.2d 621 (2005) (stay denied); *Ameritech Ohio v. Pub. Util. Comm’n*, 79 Ohio St. 3d 1473, 682 N.E.2d 1002 (1997) (stay denied). On the contrary, the Court’s standard for granting a stay (discussed further in Proposition of Law No. II, *infra*) is a difficult standard for appellants to satisfy.

Cincinnati Bell has failed to fulfill a statutory prerequisite for the granting of a stay of a Commission order. On that basis alone, the stay request should be denied.

Proposition of Law No. II:

An order of the Public Utilities Commission of Ohio should not be stayed by the Court absent a strong showing that the party seeking the stay will likely prevail on the merits; that without a stay irreparable harm would be suffered; that if a stay is issued substantial harm to other parties would not result; and, most importantly, that such a stay is in the public interest. *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 31 Ohio St. 3d 604, 605, 510 NE.2d 806, 807 (1987) (Douglas, J. dissenting).

On June 10, 2008, Cincinnati Bell filed an application requesting that this Court issue a stay of execution pursuant to R.C. 4903.16. That statute does not contemplate granting a stay as a routine matter. Indeed, a stay of an agency order is considered an extraordinary remedy. *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

In 1987, then Justice Andrew Douglas, in dissent, offered the following standards to guide the Court's analysis of any application seeking a stay:

Orders of the Public Utilities Commission have effect on everyone in this state – individuals, business and industry. When the commission issues an order, after the thorough review generally given by the commission and its experts, a stay of that order should only be given after substantial thought and consideration – if at all, and then only where certain standards are met. These standards should include consideration of [1] whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; [2] whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; [3] whether or not, if the stay is issued, substantial harm to other parties would result; and, above all in these types of cases, [4] where lies the interests of the public.

MCI Telecommunications Corp. v. Pub. Util. Comm'n, 31 Ohio St. 3d at 606, 510 N.E.2d at 807 (1987). The standards articulated in the Douglas dissent in *MCI* are

well reasoned and comport with the standards applied by federal courts in similar cases. *See, e.g. Cuomo v. Nuclear Reg. Comm'n*, 772 F.2d 972, 974 (D.C. 1985). As applied to the case at bar, Cincinnati Bell has failed to establish that its request comports with these reasonable standards. The company has further failed to make even a colorable showing that a stay is warranted in this case.

A. Cincinnati Bell has failed to show that it has a likelihood of prevailing on the merits.

Cincinnati Bell has not made the required strong showing that it is likely to prevail on the merits of its appeal. Indeed, Cincinnati Bell avoided any discussion of the merits in its motion, choosing instead to focus on the lower rates it would collect under the Commission order, as if that were sufficient to warrant a stay. The issuance of a stay should not be viewed as a ministerial act. Rather, imposing a stay is an extraordinary action, one that delays the implementation of a decision by the agency with expertise in the subject matter. Such a step should not be taken without a clear indication that the agency has acted unreasonably or unlawfully.

Here, the Commission has determined that the continued availability of payphones is in the public interest and it has taken an action it found necessary to preserve that availability. The Commission determined that “payphones provide an essential, alternative communications option for emergencies and for those who cannot afford wireline or wireless services.” *In re Pay Telephone Services* (Entry) (March 19, 2008) at 13. The Commission’s order comports with the statement of telecommunications policy found in R.C. 4927.02. That statute charges the

Commission with the responsibility to “[p]romote diversity and options in the supply of public telecommunications services and equipment throughout the state.” Ohio Rev. Code Ann. § 4927.02 (A) (4) (Anderson 2008), App. at 2.

The Commission observed that the payphone industry in Ohio is in a state of rapid decline. *In re Pay Telephone Services* (Entry) (March 19, 2008) at 13-14. In order to stem the rapid removal of payphones, the Commission determined that it was necessary to examine the level of payphone access line rates. After reviewing the data before it, the Commission determined that urgent intervention was necessary. The Commission offered the non-RBOC ILECs a choice between complying with the NST and retaining a safe harbor rate established by the Commission. The safe harbor rate is equal to AT&T’s highest rural rate band plus a ten percent markup to recognize the different costs of the other ILECs. *Id.* at 15. The safe harbor rate is subject to a true-up if an ILEC filed a cost study supporting a higher rate within six months of the Commission entry. *Id.* The Commission’s response to the imminent threat to the public interest was reasonable and consistent with Ohio law.

B. Cincinnati Bell has not shown that, without a stay, it will suffer irreparable harm.

It is Cincinnati Bell that seeks to change the status quo by obtaining extraordinary relief and, therefore, Cincinnati Bell bears the burden of proof. Cincinnati Bell has not shown irreparable harm from the Commission order. Without such a showing, this Court should not grant extraordinary relief.

Some Commission decisions, once implemented, cannot practically be undone. Where the Commission has approved a merger and the merger has been completed, it may be difficult to separate the assets later. Similarly, where the Commission has approved a bond issuance and the bonds have been sold, the bonds cannot simply be recalled. This case does not involve such a situation. This case is simply about rates. To grant the stay in this case would establish a precedent that a stay is available whenever a party appeals an order changing a utility's rates. Such a rule would convert an extraordinary, discretionary remedy into a ministerial act.

In this case, there can be no irreparable harm from the Commission order because the order itself establishes a mechanism for correcting any temporary harm. The order requires the ILECs to use the safe harbor rate as an *interim* measure. Thereafter, an ILEC may file a cost study showing that a higher rate is appropriate. *In re Pay Telephone Services* (Entry) (March 19, 2008) at 15. If an ILEC does so within six months from the date of the entry and the Commission finds the higher rate to be justified, there will be a true-up. *Id.* The ILEC will then recover the difference between the safe harbor rate and the new cost-based rate.

Because Cincinnati Bell has the opportunity to show that a higher rate is justified on the basis of its costs, and because it has the opportunity to recover any shortfall, it cannot suffer irreparable harm from the Commission order. Cincinnati Bell has shown no irreparable harm, can show no irreparable harm, and has an

administrative means to avoid any harm. The stay request should therefore be denied.

C. Cincinnati Bell has failed to show that, if the stay is granted, other parties would not suffer substantial harm.

The Commission found that payphones are being rapidly removed in this state, a fact that no party to the case below disputed. The Commission further found that the rates payphone providers were paying, coupled with a reduced demand, made many payphones not economically viable. Consequently, the Commission saw a “need for urgent intervention” to slow the rapid disappearance of payphones. *In re Pay Telephone Services* (Entry) (March 19, 2008) at 14.

If the Court grants the stay, one can expect to see providers continue to remove payphones from Cincinnati Bell’s territory. Not only would this harm the payphone operators, but it would also harm those consumers who rely on payphones for essential communications. Moreover, many of the payphones that are removed would likely never be replaced. This harm cannot be corrected by a refund. Granting a stay, then, would cause substantial harm to the payphone providers and their customers.

D. The public interest requires that the stay be denied.

The Commission has concluded that the continued availability of payphones is in the public interest. As the Commission observed, “payphones provide an essential, alternative communications option for emergencies and for

those who cannot afford wireline or wireless services.” *In re Pay Telephone Services* (Entry) (March 19, 2008) at 13. The Commission has acted to preserve the continued availability of payphones. Granting the stay could jeopardize that availability and would not be in the public interest.

CONCLUSION

Cincinnati Bell has failed to justify its request for a stay. Furthermore, it has failed to offer the statutorily required bond. Therefore, the motion for a stay should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Memorandum Contra** submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 16th day of June 2008.


Thomas G. Lindgren

Parties of Record:

Douglas E. Hart
441 Vine Street, Suite 4192
Cincinnati, Ohio 45202

APPENDIX

4903.15 Orders effective immediately - notice.

Unless 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. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

Effective Date: 10-25-1961

4903.16 Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Effective Date: 10-01-1953

4927.02 State policy.

(A) It is the policy of this state to:

- (1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;
- (2) Rely on market forces, where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market, to maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications service;
- (3) Encourage innovation in the telecommunications industry;
- (4) Promote diversity and options in the supply of public telecommunications services and equipment throughout the state;
- (5) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of public telecommunications services where appropriate;
- (6) Consider the regulatory treatment of competing and functionally equivalent services in determining the scope of regulation of services that are subject to the jurisdiction of the public utilities commission;
- (7) Not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services; and
- (8) Protect the affordability of telephone service for low-income subscribers through the continuation of lifeline assistance programs.

(B) The public utilities commission shall consider the policy set forth in this section in carrying out sections 4927.03 and 4927.04 of the Revised Code and in reducing or eliminating the regulation of telephone companies under those sections as to any public telecommunications service.

Effective Date: 03-17-1989; 11-04-2005