

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the Matter of )  
 )  
Petition of the State of Ohio for )  
Authority to Continue to ) PR Docket No. 94-109  
Regulate Commercial Mobile )  
Radio Service )

**ORDER ON RECONSIDERATION**

**Adopted: August 3, 1995; Released: August 8, 1995**

By the Commission:

**I. INTRODUCTION**

1. On August 9, 1994, the Public Utilities Commission of Ohio (hereinafter "Ohio" or "PUCO"), on behalf of that state, petitioned us to retain state regulatory authority over the rates for intrastate commercial mobile radio services ("CMRS").<sup>1</sup> In an order released on May 19, 1995, we denied Ohio's petition because the state had failed to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.<sup>2</sup> On June 19, 1995, Ohio filed its petition for reconsideration of the *Ohio Order*.<sup>3</sup> On July 5, 1995, five parties filed oppositions to the Ohio Reconsideration Petition.<sup>4</sup>

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<sup>1</sup> Ohio, Statement of the Public Utilities Commission of Ohio's Intention To Preserve its Right for Future Rate and Market Entry Regulation of Commercial Mobile Services, at 1 (Aug. 9, 1994) (hereinafter "Ohio Petition").

<sup>2</sup> Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service, PR Docket No. 94-109, Report and Order, FCC 95-193 (Released May 19, 1995) (*Ohio Order*).

<sup>3</sup> Petition for Reconsideration of the Public Utilities Commission of Ohio, PR Docket No. 94-109 (filed June 19, 1995) (Ohio Reconsideration Petition).

<sup>4</sup> Oppositions to the *Ohio Petition* were filed on July 5, 1995 by Cellular Telecommunications Industry Association (CTIA); GTE Mobilnet (GTE Mobilenet); New Par; Sprint Cellular Company (Sprint); and McCaw Cellular Communications, Inc. (McCaw). No reply comments were filed.

For the reasons stated below, we deny the petition for reconsideration filed by Ohio.

## II. BACKGROUND

### A. The Budget Act.

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.<sup>5</sup> Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;<sup>6</sup> (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;<sup>7</sup> and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.<sup>8</sup>

3. Intrastate rate regulation. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of CMRS.<sup>9</sup> As an exception to this general rule, Congress also provided that, if a state had "any regulation" concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within

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<sup>5</sup> See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

<sup>6</sup> See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (paras. 11-13) (1994) (*CMRS Second Report and Order*), *reconsideration pending*.

<sup>7</sup> National Telecommunications and Information Administration Organization Act, § 113(b)(1).

<sup>8</sup> The competitive bidding methodology is intended to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays ...." 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of auctions under the statute, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

<sup>9</sup> See 47 U.S.C. § 332(c)(3)(A).

such State.”<sup>10</sup> The Commission was given twelve months to complete its action on any state petition, “including any reconsideration.”<sup>11</sup>

4. Other terms and conditions. Prior to OBRA, Section 332 prohibited the states from imposing “rate ... regulation” upon certain wireless telecommunications carriers.<sup>12</sup> This prohibition was construed broadly to preclude almost all state regulatory activity.<sup>13</sup> As revised by OBRA, Section 332(c)(3)(A) now prohibits states from regulating “the rates charged” for CMRS, but it expressly reserves to them the authority to regulate the “other terms and conditions of commercial mobile services.”<sup>14</sup>

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<sup>10</sup> See 47 U.S.C. § 332(c)(3)(B).

<sup>11</sup> *Id.*

<sup>12</sup> The statute provided in relevant part that “[n]o state or local government shall have any authority to impose any rate or entry regulation upon any *private* land mobile service . . . .” 47 U.S.C. § 332(c)(3) (emphasis added) (prior to revisions enacted by OBRA).

<sup>13</sup> See, e.g., *Telocator Network of America v. FCC (Millicom)*, 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission’s interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). See also, e.g., *American Teltronix (Station WNHM552)*, 3 FCC Rcd 5347 (1988) (“Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier.”), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990) (note omitted) (“state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute . . . . [A]ccompanying legislative history reveals that Congress recognized the Commission’s broad discretion to dictate which land mobile systems are to be regulated as private.”). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission’s Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 n.19 (1990):

If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

<sup>14</sup> 47 U.S.C. § 332(c)(3)(A).

## **B. The *Ohio Order*.**

### **1. Ohio Petition.**

5. In its initial petition, Ohio sought “to preserve its right for future rate and market entry regulation of commercial mobile services.” Ohio stated that it does not presently set rates or limit market entry of commercial mobile radio service (CMRS) providers, but that it currently “exercises jurisdiction over cellular service providers and radio common carriers.” The state explained that this jurisdiction extends to: (1) using its complaint authority to ensure that the rates of a cellular wholesaler are not unduly discriminatory, preferential to affiliates, or anticompetitively set below cost; and (2) reviewing contractual arrangements between regulated utilities, including interconnection and roaming agreements of CMRS providers, to ensure the availability of competitive alternatives. Ohio averred that regulation of this nature did not constitute rate and entry regulation preempted by Section 332(c). Ohio further explained that it monitors and identifies market entrants and the economic dynamics of the industry in order to obtain the information necessary to regulate telecommunications matters other than rates and entry, such as infrastructure deployment.<sup>15</sup>

### **2. Preemption Decision.**

6. Preemption of intrastate rate regulation. In the *Ohio Order*, we denied Ohio’s petition to regulate the rates and entry of CMRS providers. First, Ohio’s Petition did not demonstrate, as required under Section 332(c)(3)(A) of the Communications Act, that it was regulating “the rates charged” by any CMRS provider in that state as of June 1, 1993.<sup>16</sup> In addition, the *Ohio Order* found that the state had failed to meet its statutory burden of showing that market conditions for the service(s) at issue fail to protect subscribers adequately from unjust and unreasonable rates, or unjustly and unreasonably discriminatory rates. This decision was based in part on the fact that the PUCO itself has not concluded that market conditions fail to protect consumers. We found Ohio’s statement that it was not certain whether the evolving CMRS industry structure imposes sufficient market discipline to avoid any need for regulation to be insufficient because the statute requires a *demonstration* that market conditions “fail” to protect subscribers. The *Ohio Order* found that PUCO had not provided that demonstration for any commercial mobile radio service. Indeed, the *Ohio Order* observed, in an order adopted in October 1993, Ohio itself found “a reasonable probability that [the PUCO’s relaxation of cellular regulation] will not adversely affect consumers,”<sup>17</sup> and that no information had been filed in the record to cause this Commission

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<sup>15</sup> *Ohio Order*, at para. 28.

<sup>16</sup> See 47 U.S.C. § 332(c)(3)(A).

<sup>17</sup> Finding and Order, Competitive Telecommunications Services, Case No. 89-563-TP-COI, 1993 WL 500056, slip op. at \*16 (Ohio P.U.C. Oct. 22, 1993).

to question the PUCO's own judgment in this regard.<sup>18</sup>

7. Four additional bases the decision were identified. First, the PUCO Petition failed to address the direct and fundamental changes to the duopoly cellular market structure that are being realized by personal communications services (PCS) and other services, such as wide area specialized mobile radio (SMR). Second, the PUCO presented no evidence of systematically collusive or other anticompetitive practices concerning the provision of any CMRS. Third, the PUCO failed to present evidence showing widespread consumer dissatisfaction with CMRS providers in that state, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fourth, the PUCO did not present any analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers). Finally, in regard to Ohio's implication that the state may in future request authority to regulate entry into the CMRS marketplace, the *Ohio Order* noted that Section 332(c)(3)(A) of the Act wholly displaces state regulation of CMRS entry.<sup>19</sup>

8. State jurisdiction over other terms and conditions. The *Ohio Order* found that establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions would require a more fully developed record than that presented by the Ohio Petition and related comments. The *Ohio Order* further found that although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language.<sup>20</sup> Although the legislative history largely speaks for itself, we found it possible to extrapolate certain findings. We therefore chose to comment in a preliminary manner on what regulatory activities the PUCO is entitled to continue, despite denial of

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<sup>18</sup> *Ohio Order*, at para 38.

<sup>19</sup> *Ohio Order*, at paras. 31, 39; see 47 U.S.C. § 332(c)(3)(A).

<sup>20</sup> The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:

By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261. See *Ohio Order*, at paras. 40-42.

Ohio's Petition, in the interest of minimizing future proceedings directed at this issue.<sup>21</sup>

9. In its petition, Ohio had stated that it presently exercises jurisdiction over cellular service providers and radio common carriers to ensure that wholesale cellular rates are not below cost through its complaint authority, to monitor the industry, and to review contractual interconnection and roaming arrangements. The *Ohio Order* found that although Ohio may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS rates, it did not follow that its complaint authority under State law is entirely circumscribed, because complaint proceedings may concern carrier practices, separate and apart from their rates.<sup>22</sup> The *Ohio Order* stated that statutory "other terms and conditions" language is sufficiently flexible to permit Ohio to continue to conduct proceedings on complaints concerning matters, such as those discussed in the Committee Report, to the extent that State law provides for such proceedings. Further, the Committee's list of "other terms and conditions" explicitly contemplates review by states of contractual arrangements relating to "transfers of control." The *Ohio Order* concluded, therefore, that Ohio's review of contractual agreements between two or more CMRS providers also falls within the "other terms and conditions" language of section 332(c)(3) to the extent that such review does not directly affect end-user rates.<sup>23</sup>

10. The *Ohio Order* also found that several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation. Broadly, the *Ohio Order* determined that Ohio retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state. The *Ohio Order* stated that to the extent any interested party seeks reconsideration on this issue, it must specify with particularity the provisions of the Ohio regulatory practice at issue. Finally, the Commission observed that the statutory language is not broad enough to accommodate Ohio's apparent interest in asserting authority to regulate marketplace entry by CMRS providers because Section 332(c)(3) completely preempts state entry regulation of CMRS.<sup>24</sup>

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<sup>21</sup> *Ohio Order*, at para. 42.

<sup>22</sup> *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person "complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a)(emphasis added).

<sup>23</sup> *Ohio Order*, at para. 43.

<sup>24</sup> *Ohio Order*, at para. 45; citing 47 C.F.R. § 332(c)(3)(A) ("no state or local government shall have any authority to regulate the entry of . . . any commercial mobile radio service").

### III. PLEADINGS; DISCUSSION

#### A. Ohio Petition for Reconsideration.

11. Ohio appears to interpret paragraph 42 of the *Ohio Order* as requesting parties to provide a "more fully developed record" which would permit the Commission to establish a definitive demarcation between preempted rate regulation and retained state authority over terms and conditions. Consequently, Ohio requests that it be permitted to supplement its petition for reconsideration at a later date with the results of an on-going complaint proceeding involving a retail cellular reseller and several wholesale cellular providers in Ohio. Ohio requests that the Commission "indicate its willingness to accept such information in ruling upon the demarcation between preempted rate regulation and retained state authority over terms and conditions."<sup>25</sup>

12. In support of its request, Ohio explains that it has statutory responsibility to hear complaints concerning discriminatory practices and the setting of rates at below cost for the purpose of destroying competition.<sup>26</sup> On October 22, 1993, the PUCO had determined in an order that it would continue to investigate, on an ongoing basis, the development of resale competition within the cellular industry. At the same time, PUCO suspended its rate regulation of wholesale cellular providers.<sup>27</sup> Several days prior to the release of that order,

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<sup>25</sup> Ohio Reconsideration Petition at 3-4.

<sup>26</sup> Ohio Petition at 2, *citing* Ohio Revised Code 4905.33 and 4905.35. Specifically, the Ohio Revised Code 4905.33 provides:

No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm or corporation a greater or lesser compensation for any services rendered, or to be rendered, . . . than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions. No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition.

Ohio Revised Code 4905.35 provides:

No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

<sup>27</sup> Ohio Reconsideration Petition at 2, *citing In the Matter of the Commission Investigation Into Implementation of Section 4937.01 through 4927.05, Revised Code, as they Relate to Competitive Telecommunications Services*, Case No. 89-563-TP-COI. Relevant portions of this Finding and Order are attached as Exhibit A to Ohio's Reconsideration Petition.

Westside Cellular, Inc., dba Cellnet (Cellnet), a retail cellular provider, filed a complaint with PUCO requesting that the PUCO find that certain wholesale cellular providers, specifically, GTE Mobilnet, the New Par Companies, Ameritech Mobile Communications, Inc., and Youngstown Cellular Telephone Co., were in violation of various Ohio statutory provisions and several PUCO orders implementing these statutes.<sup>28</sup>

13. Ohio states that the PUCO has not yet concluded its adjudication of the complaint, although it has been attempting to move the case to hearing and determination in an expedited manner. Ohio claims that the final adjudication of the complaint may provide the more fully developed record this Commission has indicated it requires to make its determination regarding the demarcation between retained and lost state regulatory jurisdiction under Section 332.<sup>29</sup> Ohio argues that it would be poor public policy for the Commission to cut off efforts by the states to adjudicate cellular complaints which address claims of discrimination and which can provide the full, developed record which the Commission requires to make its determinations in the instant case.<sup>30</sup>

## **B. Oppositions**

14. Procedural defects. Several opponents argue that PUCO's reconsideration petition should be dismissed or denied because of procedural infirmities.<sup>31</sup> McCaw and GTE Mobilnet argue that PUCO's petition fails the most basic requirements of any petition for reconsideration. GTE Mobilnet notes that Section 1.106(d)(1) of the Commission's rules requires a petitioner (1) to "state with particularity the respects in which petitioner believes the action taken by the Commission . . . should be changed" and (2) to "state specifically the form of relief sought. . . ." McCaw and GTE Mobilnet maintain that the PUCO neither explicitly challenges the Commission's conclusions in the *Ohio Order*, nor provides any specifics whatsoever.<sup>32</sup> GTE Mobilnet argues that these deficiencies force the reader to speculate that the PUCO disagrees with the *Ohio Order's* limitation on its authority to pursue certain complaints, but that this is not stated in the Ohio Petition. GTE Mobilnet notes that

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<sup>28</sup> Ohio Reconsideration Petition at 2-3. Specifically, Cellnet requested that the PUCO find that the respondents did not maintain separate accounting records for their wholesale and retail operations in violation of PUCO orders, that the respondents had been unlawfully cross-subsidizing their retail operations with profits generated through their wholesale operations, and that the respondents provided service to their retail operations at rates lower than those which they offered to Cellnet. *In the Matter of the Complaint of West Side Cellular, Inc., dba Cellnet of Ohio, Inc.*, Case No. 93-1758-TP-CSS. *Id.* at 3.

<sup>29</sup> Ohio Reconsideration Petition at 3.

<sup>30</sup> Ohio Reconsideration Petition at 3.

<sup>31</sup> See e.g., McCaw Opposition at 2; GTE Mobilnet Opposition at 3-6; Sprint Opposition at 3.

<sup>32</sup> GTE Mobilnet Opposition at 3-4, citing 47 C.F.R. § 1.106(d)(1); McCaw Opposition at 2.

the need for clarity on the part of petitioners is particularly pressing given the extremely abbreviated time frame afforded the Commission under OBRA to act on this Petition.<sup>33</sup> Sprint argues that the Commission's denial of Ohio's petition for CMRS rate and entry regulation authority was clear-cut and that PUCO's reconsideration petition provides nothing either to justify reconsideration of that determination or to form a basis for expanding the terms and conditions outlined in the *Ohio Order* over which Ohio has clear continued jurisdiction.<sup>34</sup>

15. Attempt to extend statutory deadline. Opponents assert that the PUCO is attempting to use the petition for reconsideration process to indefinitely hold open the opportunity to submit data in support of its attempt to continue rate regulation.<sup>35</sup> McCaw argues that rather than attempting to articulate a fuller distinction between rate regulation and "other terms and conditions" than the Commission has already provided, the Ohio reconsideration petition merely seeks authority to keep alive the Cellnet Proceeding in the hopes that the record of that case eventually will shed some additional light on what is meant by "terms and conditions." McCaw argues there is no factual or legal basis for granting Ohio's request.<sup>36</sup> GTE Mobilnet states that this request cannot be granted because, under section 332(c)(3)(B), the time for the PUCO to submit evidence or to "develop the record" with respect to rate regulation was August 9, 1994. As of that date -- prescribed by OBRA itself -- the PUCO had a year to marshal whatever evidence it intended to present. Instead, asserts GTE Mobilnet, PUCO chose not to submit any evidence at all. GTE Mobilnet argues that it would subvert the statutory scheme entirely if the PUCO were allowed to await the outcome its Petition and only then submit evidence.<sup>37</sup> Under the statute, the Commission's action on this Petition must be completed by August 9, 1995. Opponents argue that to permit PUCO's proposed supplementation would mean holding the record open in this proceeding indefinitely, in direct conflict with the statutory mandate.<sup>38</sup> New Par states that it is not possible for the Commission to grant PUCO's request and still meet the statutory deadline.<sup>39</sup> GTE Mobilnet suggests that the PUCO's recourse under the statutory scheme is not to delay

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<sup>33</sup> GTE Mobilnet Opposition at 4, *citing* 47 U.S.C. § 332(c)(3)(B).

<sup>34</sup> Sprint Opposition at 3.

<sup>35</sup> *See, e.g.*, CTIA Opposition at 2 (Ohio's reconsideration petition, which requests authority to continue its investigation of a reseller complaint, represents a thinly-veiled attempt to regulate cellular rates); *accord* New Par Opposition at 2.

<sup>36</sup> McCaw Opposition at 2.

<sup>37</sup> GTE Mobilnet Opposition at 5, *citing* Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir. 1941) ("We cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence").

<sup>38</sup> GTE Mobilnet Opposition at 5; Sprint Opposition at 3; New Par Opposition at 3.

<sup>39</sup> New Par Opposition at 3.

implementation of the original rate preemption, but rather to petition the Commission for renewed rate authority at a later date if market conditions at that time so warrant.<sup>40</sup>

16. Scope of the preemption. CTIA contends that the Commission should reject PUCO's reconsideration petition on the ground that it represents an improper attempt to regain authority over CMRS rates. CTIA maintains that the Commission lacks the authority to permit PUCO to continue its investigation over CMRS rates because PUCO was unable to demonstrate the requisite conditions necessary to retain CMRS rate authority.<sup>41</sup> McCaw contends that any other conclusion would effectively leave the PUCO with significant authority over rates, even though it was unable to meet the statutory test for the grant of such authority.<sup>42</sup> New Par adds that congressional preemption of the state's authority to regulate the rates charged by cellular providers clearly preempts the authority to regulate rates through complaint proceedings as well as the authority to fix rates through traditional rate setting proceedings.<sup>43</sup>

17. GTE Mobilnet observes that the lack of specificity of the Ohio

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<sup>40</sup> GTE Mobilnet Opposition at 5, *citing* 47 U.S.C. § 332(c)(3)(A). *See also* Sprint Opposition at 3-4 (if and when the resolution of the Cellnet complaint produces evidence the PUCO deems relevant to a refinement of the "other terms and conditions" definition, PUCO should at that time submit it to the Commission).

<sup>41</sup> CTIA Opposition at 4-5.

<sup>42</sup> McCaw Opposition at 3 n.8, *citing* G. & T. Terminal Packaging Co. v. Consolidated Rail Corporation, 646 F. Supp. 511 (D.N.J. 1986), *aff'd* 830 F.2d 1230 (3rd Cir. 1987), *cert. denied*, 108 S. Ct. 1291 (1988) (barring collateral complaint against alleged rate discrimination where ICC had exempted transportation of certain goods from rate regulation). McCaw states that in G. & T., as here, the shipper argued that the absence of a complaint procedure left it without any remedy for price discrimination. The court disagreed:

This argument ignores that the [Interstate Commerce] Commission, in granting the exemption [from rate regulation], has determined that regulation is 'not needed to protect shippers from abuse of market power.' [Citation omitted] . . . Congress and the Commission has determined that the market is adequate protection; it is not the place of this court to disagree with that determination.

830 F.2d at 1235-36. *Id.*

<sup>43</sup> New Par Opposition at 8-9, *citing* Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578-79 (1981) (where Congress has given a federal agency exclusive authority over "rate regulation," a state is barred from adjusting rates in the form of an award of damages in a state law cause of action); Storer Cable Co. v. City of Montgomery Ala., 806 F. Supp. 1518 (M.D. Ala. 1992) (municipal ordinance which prohibited discriminatory and anticompetitive rates for the provision of cable television services was preempted rate regulation).

Reconsideration Petition poses substantive dangers, as well. GTE Mobilnet states that the PUCO has described a number of regulatory actions which it intends to pursue. While some of these actions may fall within the range of monitoring activities which the Commission has deemed permissible at paragraph 44 of the *Ohio Order*, others, according to GTE Mobilnet, are in direct contravention of both that Order and OBRA itself. GTE Mobilnet states that, as PUCO itself noted, its authority to determine rate-related complaint cases is presently before the U. S. District Court in Ohio.<sup>44</sup> GTE Mobilnet is concerned that if the Commission merely dismisses the PUCO Petition without condemning the regulatory activities expressly contemplated by the PUCO, the District Court could interpret the Commission's silence as implicit endorsement of the PUCO's extremely broad interpretation of the statute. Accordingly, GTE Mobilnet argues that re-affirmation in clear terms of the statutory prohibition against state rate regulation "of any kind" will provide invaluable guidance to the Court and the industry in resolving this and future disputes.<sup>45</sup>

18. Similarly, New Par states that the precise question before the U.S. District Court in the Cellnet case is whether PUCO's attempt to exercise jurisdiction over the Cellnet complaint constitutes rate regulation preempted by Section 332(c)(3)(A). New Par opines that the pending action in District Court is the proper forum in which to definitively resolve the question of the PUCO's jurisdiction to proceed in the pending Cellnet complaint case. Nevertheless, New Par suggests that the Commission use this proceeding under Section 332(c)(3)(A) specifically to instruct PUCO of its lack of jurisdiction, pursuant to that statute, over complaint cases alleging that the rates charged by a facilities-based cellular provider are discriminatory or set below cost. Because, New Par argues, the PUCO clearly lacks this jurisdiction, as recognized in the May 19, 1995 *Ohio Order*, the Commission can give this guidance without further delay.<sup>46</sup>

#### **D. Discussion**

19. Upon review of the record in this proceeding, the Ohio reconsideration petition, and the responsive pleadings, we conclude that Ohio has failed to make a sufficient showing that reconsideration of the Commission's findings and conclusions in the *Ohio Order* is warranted. In addition, the relief requested by the petitioner is inconsistent with the express terms of the Section 332(c)(3)(B), which require that we complete action on the Ohio Petition, "including any reconsideration," by August 10, 1995, and is therefore beyond the Commission's authority to grant. Accordingly, we deny Ohio's petition for reconsideration.

20. As a threshold matter, we agree with the opponents' argument that Ohio's

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<sup>44</sup> GTE Mobilnet Opposition at 6, *citing GTE Mobilnet of Ohio, et al. v. David W. Johnson, Commissioner, et al.*, No. C2-95-401 (S.D. Ohio filed May 2, 1995).

<sup>45</sup> GTE Mobilnet Opposition at 6-8.

<sup>46</sup> New Par Opposition at 5-8.

petition is insufficient under the requirements of Section 1.106(d) of the Commission's rules.<sup>47</sup> Under Section 1.106(d)(1), petitioners must "state with particularity the respects in which petitioner believes the action taken by the Commission . . . should be changed." Section 1.106(d)(2) also requires petitions for reconsideration to cite, where appropriate, "the findings of fact and/or conclusions of law which petitioner believes to be erroneous, and shall state with particularity the respects in which he believes such findings and conclusions should be changed."<sup>48</sup> Ohio's reconsideration petition lacks such particulars. Ohio does not request that the Commission make any changes in the action denying Ohio's petition for authority to continue to regulate CMRS rates, nor does it cite findings of fact or conclusions of law which it believes to be erroneous.

21. Ohio's reconsideration petition simply requests that this proceeding be held open until such time as the PUCO is able to conclude its adjudication of a 1993 complaint proceeding, so that the PUCO may supplement its reconsideration petition with the results of the adjudication, "*should* the PUCO's decision in that complaint provide information which would be relevant to the FCC's determination in the instant case and that the FCC indicate its willingness to accept such information in ruling upon the demarcation between preempted rate regulation and retained state authority over terms and conditions."<sup>49</sup> It is therefore impossible to tell exactly what error in the *Ohio Order*, if any, is complained of. Ohio's reconsideration petition does not explicitly request reconsideration of either the explicit determination we made in the *Ohio Order* that the record was insufficient to make more particular pronouncements on this issue, or the implicit determination that explication of a more particularized demarcation would have to await further proceeding, should the need arise. Nor does Ohio challenge the generalized demarcation we outlined in paragraphs 43-44 of the *Ohio Order*. It merely requests that it be permitted, at some unspecified time in the future, to offer additional evidence on this matter to support the instant petition.

22. We agree with the opponents that Ohio's request cannot be granted by this Commission under the express terms of Section 332(c)(3)(B) of the Act.<sup>50</sup> Under that provision, we became obligated to conclude our action in this proceeding within twelve months of the filing of Ohio's petition, "including any reconsideration." Thus, even if Ohio's reconsideration petition were not procedurally defective, we interpret the statutory deadlines included in Section 332(c)(3)(B) as precluding us from providing the relief Ohio requests.

23. Although States are free to supplement our knowledge on the issue of

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<sup>47</sup> 47 C.F.R. § 1.106(d).

<sup>48</sup> *Id.*

<sup>49</sup> Ohio Reconsideration Petition at 3-4 (emphasis added).

<sup>50</sup> 47 U.S.C. § 332(c)(3)(B).

where the precise line between preempted vs. retained state regulatory authority over commercial mobile radio services falls, we cannot withhold or defer disposition of Ohio's reconsideration petition past the statutory deadline awaiting such information. Should the PUCO gather additional evidence on this issue in the course of its investigation of the Cellnet complaint, or any other proceeding, which it believes to be probative on the demarcation between preempted rate regulation and retained state authority over terms and conditions, and should the PUCO at that time desire a definitive ruling from this Commission, the PUCO may institute a separate proceeding devoted to that matter. The PUCO may, for example, request file a petition requesting a declaratory ruling, supported by its findings. Similarly, the PUCO may file a petition for renewed rate authority under Section 332 if, in the course of its traditional authority to monitor commercial activities within its borders, the PUCO believes it has evidence to demonstrate that market conditions so warrant.

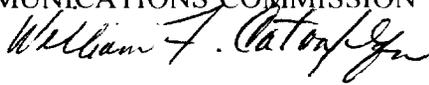
24. Finally, as we concluded in the *Ohio Order*, the legislative history of Section 332 is the best available description of the boundaries of the PUCO's authority to regulate the "other terms and conditions" of CMRS,<sup>51</sup> and provides the best guidance at this time for Ohio itself to determine which portions of its proposed actions with respect to investigating the development of resale competition within the cellular industry have been preempted and which may go forward. The record of this proceeding is not sufficiently detailed to permit us to comment meaningfully on the regulatory activities contemplated by the PUCO in the Cellnet proceeding.

#### IV. CONCLUSION

25. We conclude that Ohio has failed to make a sufficient showing that reconsideration of the Commission's findings and conclusions in the *Ohio Order* is warranted. In addition, the relief requested by the petitioner is inconsistent with the express terms of the Section 332(c)(3)(B), and is therefore beyond the Commission's authority to grant. We therefore deny Ohio's petition for reconsideration.

#### V. ORDERING CLAUSES

26. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, IT IS ORDERED that the Petition for Reconsideration of the Public Utilities Commission of Ohio IS DENIED for the reasons set forth above.

FEDERAL COMMUNICATIONS COMMISSION  
William F. Caton   
Acting Secretary

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<sup>51</sup> See *Ohio Order*, at paras. 40-45.