No. 2017-0684

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 16-104211

CINDY SATTERFIELD, et al.,
Plaintiffs-Appellees,

v.

AMERITECH MOBILE COMMUNICATIONS, INC., et al.,
Defendants,

and

CINCINNATI SMSA LIMITED PARTNERSHIP,
Defendant-Appellant.

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I. INTRODUCTION

This appeal addresses two deeply flawed rulings below: 1) a misinterpretation of the plain language of a penalty statute on an issue of first impression, and 2) a gross abdication of the courts' duty to rigorously scrutinize damages models offered to support class certification.

A 1906 statute, now codified at R.C. 4905.61, provides that after the Public Utilities Commission of Ohio (PUCO) issues an order finding that a public utility has committed a regulatory violation, "the person" injured by "the violation" may seek treble damages in common pleas court. No decision of this Court offers guidance on who "the person" is. At issue here is a 2001 PUCO order finding that the failure of Appellant Cincinnati SMSA Limited Partnership (Ameritech) to maintain certain records during the mid-1990s justified an assumption that Ameritech effectively set its wholesale rate at $0, and that its failure to sell cellular service to a wholesaler, Cellnet, for $0 constituted illegal price discrimination. But neither "the person" filing this treble damages class action lawsuit (Appellee Intermessage Communications – now defunct), nor any other member of the certified class, is a wholesale cellular service provider to which PUCO found Ameritech should have sold service for $0.

Instead, the class consists of Ameritech *retail* cellular service customers between 1993 and 1995 who claim they were *indirectly* injured by the *wholesale* price discrimination found by PUCO regarding Cellnet, hypothesizing that the free wholesale cost would have been "passed on" to them. The courts below found Intermessage had standing to pursue this statutory claim as class representative even though:

- The 2001 PUCO order identified Cellnet, a wholesaler, as the party with the R.C. 4905.61 claim;
- Cellnet, suing as "the person" injured, and Ameritech agreed to a multi-million dollar settlement to extinguish Ameritech's liability for the regulatory violation;
- Retail customers do not (and cannot) purchase and use wholesale service, as Cellnet claimed it would have; and
- PUCO never found price discrimination in the retail market and expressly limited its order to the wholesale market for cellular services.

Worse still, this flawed interpretation of "the person" with standing to sue under R.C. 4905.61 will allow courts to award prohibited double penalties. Under the rule of law applied below, an indirect claimant may seek a second treble damages penalty from a public utility for the same regulatory violation and alleged harm already assessed and satisfied. It also violates public utilities' due process rights: since indirect injury claims stem from a violation of someone else's rights, and liability is not an issue in an R.C. 4905.61 action, a utility will be penalized without any opportunity to contest liability to the indirect claimant. And it impermissibly makes courts *de facto* rate-makers, as the identification of retail prices as a "common issue" supporting class certification shows. This Court should confirm that only those whose rights PUCO expressly finds to have been violated have standing to sue under R.C. 4905.61 as "the person" injured.

The courts below also failed to rigorously scrutinize whether Intermessage had developed an actual model that could demonstrate class-wide injury and damages. Intermessage's expert did not create such a model, claiming only that methods exist for

someone to do so. The Eighth District excused this failure to avoid delving "too deeply into the merits" at the class certification stage, thus reducing the critical class certification requirement that common issues of law or fact predominate to a nullity, in violation of *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). After *Comcast*, a party's assurance that it will eventually have a model satisfying this requirement is insufficient. The critical check on class certification that the predominance requirement supplies necessitates more than unsubstantiated promises about future damages models. *Comcast* applies principles this Court has already adopted, and this Court should declare that *Comcast* is the law in Ohio.

II. STATEMENT OF FACTS

A. PUCO Finds that Ameritech Committed Regulatory Violations at the Wholesale Level During the Mid-1990s.

Back in 1993, a reseller of cellular service (i.e., a wholesaler) named Westside Cellular, Inc. (Cellnet) filed a complaint with PUCO alleging that Ameritech and others had engaged in rate discrimination at the wholesale level. *See In Re Westside Cellular Inc. d/b/a Cellnet*, PUCO Case No. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 18, at *1-2, 133-37, 231-33 (Jan. 18, 2001) (*Cellnet* Order), Supp. 362-363, 393-395, 416-417. Cellnet had never purchased cellular service from Ameritech, but still claimed Ameritech discriminated against it by failing to offer capacity to Cellnet on a wholesale basis at the same rates Ameritech charged its own retail businesses. *Id.* at *230-33, Supp. 416-417. Cellnet also claimed Ameritech had failed to maintain separate operations and records for its wholesale and retail businesses. *Id.* at *96-100, 230, Supp. 385-386, 416. Ameritech disputed these allegations.

Roughly eight years later, PUCO's *Cellnet* Order found Ameritech lacked certain records showing the required separation of its wholesale and retail operations. *Cellnet* Order at *111, Supp. 388-389. PUCO then presumed that Ameritech's "internal wholesale rate is zero" and, on that basis, found Ameritech violated Ohio law in the mid-1990s by "charging" Cellnet a wholesale rate higher than zero and thus discriminating against it. *See id.* at *150-53, Supp. 397-398. Because the dispute over wholesale records and practices was "a case of first impression," PUCO found "the imposition of statutory penalties against Ameritech * * * not warranted in this case." *Id.* at *282, Supp. 429.

B. The *Cellnet* Order Limits its Findings to Wholesale Operations.

The regulatory context of the *Cellnet* Order is important here. In 1995 – two years after Cellnet filed its complaint with PUCO, and approximately six years before the *Cellnet* Order issued – the Federal Communications Commission (FCC) rejected PUCO's request for authority to regulate retail cellular service rates. *See generally In Re Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842 (1995); *In Re Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 12427 (1995) (denying petition for reconsideration). The FCC expressly told PUCO it could not "directly affect end-user rates." *See* 10 F.C.C.R. at 7853, ¶ 43.

After being rebuffed by the FCC, PUCO took pains to note that it made no findings affecting end-user rates:

- The *Cellnet* Order observed that "the regulatory construct for the cellular industry is unique inasmuch as the primary regulatory focus of the

Commission is related to the wholesale operations of the regulated entities, while the Commission is also cognizant of the fact that the cellular entities maintain retail operations as well." *Cellnet* Order at *93, Supp. 384.

- The *Cellnet* Order explained that any analysis of Ameritech's retail operations was "limited in context to the issue of whether or not [Ameritech had] properly separated [its] wholesale operations for the purpose of allowing the Commission to properly determine that [Ameritech had] afforded nonaffiliated resellers the treatment prescribed" by Ohio law. *Id.* at *94, Supp. 384.
- The *Cellnet* Order's findings of fact and conclusions of law were limited to services at the wholesale level. *Id.* at *280-82, Supp.428-429.

Ameritech appealed the wholesale violations found in the *Cellnet* Order and this Court affirmed, concluding the assumed internal wholesale rate of zero was "set by Ameritech" through its "accounting records (or lack thereof)." *Cincinnati SMSA LP v. Pub. Util. Comm.*, 98 Ohio St.3d 282, 2002-Ohio-7235, ¶ 5.

C. Cellnet's Counsel Brings Five Treble Damages Actions on Behalf of Wholesale Providers.

In the *Cellnet* Order, PUCO identified Cellnet as the party with a potential R.C. 4905.61 claim. *Cellnet* Order at *94, Supp. 385 (explaining that "a court of competent jurisdiction will address the issue of whether the violation results in an injury to Cellnet and the amount of damages involved"); *id.* at *276, Supp. 427 (declining to address "Cellnet's ability to obtain treble damages pursuant to Section 4905.61," but pointing out

that Cellnet would have to prove "the specific damages incurred as a result of the acts of discrimination"). So after this Court affirmed the *Cellnet* Order, Cellnet sued Ameritech, seeking treble damages under R.C. 4905.61 for the record-keeping violation and resulting finding of wholesale price discrimination. *See* Petition for Writ of Certiorari, *Cincinnati SMSA LP v. Pub. Util. Comm.*, 2003 WL 22428096, at *15 (No. 02-1711).

The trial court found Cellnet's recovery could "include damages for overcharges, lost profits, including lost customers * * * all of which will be trebled." *Id.* Following that holding, Cellnet used the assumed "internal wholesale rate" of zero as the basis for its "overcharge" calculations and sought over $1 billion in damages because Ameritech had failed to offer free capacity to Cellnet on a wholesale basis. *Id.* This massive potential liability forced Ameritech into a $22 million settlement before trial. *See* Pl.'s Compl. at ¶ 87, fn. 2, Supp. 17.

The quest of Cellnet's counsel to obtain additional recoveries, however, had just begun. Attorneys who represented Cellnet filed six more R.C. 4905.61 treble damages actions based on the regulatory violation found in the *Cellnet* Order. Five of those cases were filed by wholesale cellular service providers.[1] But because those actions were not timely filed, Ameritech's potential liability was extinguished once this Court confirmed that R.C. 4905.61 actions are subject to a one-year statute of limitations.

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[1] *See Discount Cellular v. Ameritech Mobile Communications, Inc., et al.*, Cuyahoga C.P. No. 03-CV-518042; *Jeff Rand Corp. d/b/a Wireless Outlet v. Ameritech Mobile Communications, Inc., et al.*, Cuyahoga C.P. No. 03-CV-578317; *Wireless Associates, LLC v. Ameritech Mobile Communications, Inc.*, Cuyahoga C.P. No. 03-CV-515881; *Accents Group, Inc. d/b/a Auto Accents v. Verizon Wireless a/k/a New Par, et al.*, Cuyahoga C.P. No. 03-CV-522546; *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless a/k/a New Par*, Cuyahoga C.P. No. 04-CV-522647.

See Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless, 113 Ohio St.3d 394, 2007-Ohio-2203.

D. Cellnet's Counsel Files this Case on Behalf of Retail Customers on the Theory that the Wholesale Violations Affect Retail Rates.

1. The class representative: an out-of-business company claiming to represent thousands of mid-1990s cell phone users.

The sixth treble damages action filed by Cellnet's former counsel is this one, filed on behalf of Intermessage, as class representative, nearly three years after the *Cellnet* Order issued and three years after Intermessage had gone out of business.[2] Intermessage had purchased no cellular phones from Ameritech, but instead entered into one, two, or three-year contracts for cellular numbers that it then programmed into transceivers installed in back-up alarm panels. Moore Dep. at 29-30, 36-37, 44-45, Supp. 328-332; Schimmelphennig Dep. at 77, Supp. 336. Once the panels were programmed and installed, Intermessage never switched cellular service providers, because "to reprogram the alarm boxes in the field was too daunting." Moore Dep. at 37, Supp. 330.

Like Intermessage, many other retail subscribers entered into multi-year contracts. Johnson Aff. at ¶¶ 4, 6 and Attachments 1-2, Supp. 338-348. As of October 18, 1993, Ameritech had approximately 90,000 customers, many under term contracts. *Id.* at Attachment 1, Supp. 341. By the end of the class period (September 8, 1995), Ameritech had approximately 180,000 customers. *Id.*, Supp. 345. During this time,

[2] Intermessage sold back-up panels for alarm systems before dissolving in March 2001. Moore Dep. at 17-18, Supp. 327.

roughly 27,000 customer accounts were disconnected and approximately 117,000 added, many of which also would have been under term contracts. *Id.*, Supp. 341-345. No "customer-specific information" is available for this period. *Id.* at ¶ 5, Supp. 339. The only way to acquire *some* of this information would be to examine between 10 and 15 million microfiche billing images in a Chicago warehouse and then convert those images, at significant cost, to a digital format. Pohl Aff. at ¶¶ 21-24, Supp. 357-358.

2. **<u>Ameritech repeatedly points out the fatal standing problem and obtains an order limiting the class period to 1993-1995.</u>**

One obvious difference between this case and the other treble damages actions filed by Cellnet's former counsel is that this one is on behalf of retail subscribers, not wholesale purchasers. Retail subscribers buy cell phone service directly from Ameritech, not through a wholesaler such as Cellnet. Pohl Aff. at ¶ 8, Supp. 352.

Ameritech explained to the trial court why this mattered, moving for judgment on the pleadings and pointing out that indirect retail claimants like Intermessage lack standing to sue based on regulatory violations at the wholesale level. *See* 5/30/06 Mot. for Judgment on the Pleadings, Supp. 36-51. The trial court denied this motion in a one-line entry. *See* 10/3/06 JE, Appx. 54. Ameritech had some success, however, in challenging the timeliness of Intermessage's claims. While the trial court found this R.C. 4905.61 action was not barred in its entirety by the statute of limitations, it limited the class to the 1993-1995 time period. *See* 9/29/08 JE; 10/28/08 JE.

Ameritech also joined a separate writ proceeding filed in this Court. *See generally State of Ohio ex rel. Verizon Wireless, et al. v. Jose A. Villanueva, Judge*, S.Ct. Case No. 2006-0407. The complaint for writ of prohibition pointed out that none of

PUCO's findings in the *Cellnet* Order "related to retail rates or retail customers" and argued that, without those PUCO findings, the trial court lacked jurisdiction to proceed. *See* Compl. for Writ of Prohibition at ¶¶ 23-24, Supp. 56-57.

Judge Villanueva and Intermessage (as intervenor) moved to dismiss the writ action. *See* Intermessage 3/22/06 Mot. to Dismiss, Supp. 100-105; Respondent's 3/22/06 Mot. to Dismiss, Supp. 78-99. They argued that the trial court had jurisdiction "to determine whether the predicate necessary to recover damages under R.C. 4905.61 can be established"[3] and, as a result, Ameritech had an adequate remedy by appeal.[4] This Court granted the motions and dismissed the action without an opinion, likely for that reason. *State ex rel. Verizon Wireless v. Villanueva*, 109 Ohio St.3d 1420, 2006-Ohio-1420; *see also Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶ 22 (lack of standing deprives court of jurisdiction over the case, not subject matter jurisdiction); *State ex rel. McGirr v. Winkler*, ___ Ohio St.3d ___, 2017-Ohio-8046, ¶ 13 (court with subject matter jurisdiction may determine its own jurisdiction and a party has adequate remedy by appeal to challenge that determination).

3. Intermessage promises someone at some future time can develop a damages model.

Intermessage produced two expert reports from John M. Gale (Gale) in 2006 and 2007. Neither report proposed a methodology to determine the harm, if any, experienced by the putative class of retail subscribers, or the amount of damages to

[3] *See* Mem. in Supp. of Resp. Mot. to Dismiss at 11, Supp. 90.

[4] *See* Intermessage Mot. to Dismiss at 2, Supp. 103 (asserting that "courts of general jurisdiction have authority to determine their own jurisdiction [and] that appeal is an adequate remedy").

which they would be entitled. *See* Report of John M. Gale at 6, Supp. 111; Reply Report of John M. Gale at 1-2, 19-20, Supp. 113-114, 131-132. Further discovery confirmed that Gale could offer no guidance on a specific model that could determine whether Ameritech's conduct had a class-wide impact at the retail level and measure the damages suffered by the class.

a. <u>An expert with no experience.</u>

One problem for Intermessage was that Gale had never done this before. At his deposition, Gale admitted he had never been qualified by a court as an expert and had never done what he characterized as an "allocation" methodology — *i.e.*, determine in what amount, if any, individual retail subscribers were damaged. Gale Dep. at 90, 188, 192, 260, Supp. 311, 315-316, 322. Gale became familiar with the *Cellnet* Order through his work in the *Cellnet* treble damages action. *Id.* at 14-15, Supp. 302. He was not an expert witness in the case, but worked "under the direction of Professors Woroch and McFadden" — the experts who developed the *Cellnet* wholesale damages model. *Id.* at 8-9, 15, Supp. 301-302. By the time Gale became involved, "most of the work" on the wholesale model "was close to done." *Id.* at 22, Supp. 303. Gale simply "participated in preparing the exhibits[.]" *Id.* at 36, Supp. 305.

b. <u>A model designed to do something else.</u>

Another problem was that the model Gale became familiar with addressed a different circumstance (alleged overcharge damages at the wholesale level). The *Cellnet* model sought to estimate "overcharge" damages to Cellnet using a "market simulation model" that "made predictions about prices and quantities in the but-for world." Gale Dep. at 22, 25, Supp. 303. The "overcharge" reflected "[t]he differences in

the wholesale prices that Cellnet actually paid and the prices that they would have paid if they'd had access to" the assumed Ameritech internal wholesale rate of zero. *Id.* at 33-34, 237-39, Supp. 304-305, 320-321.

Because the *Cellnet* wholesale damages model did not need to predict how *retail* subscribers would react to pricing changes, it made "several simplifying assumptions about consumer and firm behavior." Gale Dep. at 40, Supp. 306. These assumptions include:

- A single retail price derived from the monthly cost of subscribing to a provider in every market where Cellnet was active and every year during which a violation occurred. Gale Dep. at 40, Supp. 306.
- An average fee paid by retail subscribers in that year in that market. *Id.* at 41, Supp. 306.
- An average per-minute price charged by that provider in that year in that market. *Id.* at 42-43, Supp. 307.
- Average minutes of use billed by that provider in that year in that market. *Id.*, Supp. 307.

These "simplifying assumptions" would have to be modified to calculate damages allegedly suffered by individual retail subscribers, because (unlike wholesale subscribers) retail customers had many rate plan options and varying usage patterns. Marvel Report at ¶ 32, Supp. 261; Hausman Report at ¶¶ 16, 29, Supp. 145, 151-152. As Gale admitted:

- "[H]aving better prices available to you doesn't necessarily mean that you have been damaged." Gale Dep. at 132, Supp. 314.

- Some customers cannot (because of term contracts) or will not switch in response to price changes. Gale Dep. at 221-222, 224, Supp. 318-319.
- And "some customers may be better off without lower prices but with better service." Gale Dep. at 188, Supp. 315.

Gale thus conceded that, "[i]f [he] wanted to determine the damages to a particular individual, [he] would have to go and find out what they paid, [he] would have to go and find out how they would choose among alternatives, and then [he] would have to go and make a prediction based on the alternatives that were available to them in the but-for world, which one of those alternatives they would choose." Gale Dep. at 104, Supp. 313. But Gale had not done this. *Id.* Nor had the *Cellnet* experts. *Id.* And Intermessage has never explained how one could locate retail subscribers from 23-25 years ago, determine what they paid for cell service in the mid-1990s, and then divine what they would have done back then had they been offered a different price.

c. **A scope of work that did not include analyzing how the model would have to be modified.**

A third problem was that Gale had not been retained to actually develop a damages model, so he had not even thought about how to do it. According to Gale, his task was simply to determine whether a methodology existed somewhere that could be modified to assess class-wide impact and damages in the retail market:

- Gale Dep. at 79, Supp. 308 ("What I have been asked to do, and therefore, what I believe my job to be, is to determine whether there are well-accepted, broadly-used methodologies in economics that can be used to determine impact and measure damages for the class.");

- Gale Dep. at 81, Supp. 308 ("I have not rendered an opinion on what is the best way to measure that impact.");
- Gale Dep. at 86, Supp. 310 ("I'm not rendering an opinion on what is the best methodology.");
- Gale Dep. at 87, Supp. 310 ("I have not proposed a formula that should be used. It's my opinion that a formula can be determined that would apportion damages that uses common proof.");
- Gale Dep. at 195, Supp. 317 (conceding his reports are "not trying to describe the specific model that would be used").

In other words, Gale had not been retained to construct an actual retail damages model. Gale Dep. at 236, Supp. 320 ("I haven't been retained to determine liability or allocations."). He had not thought about how to modify the *Cellnet* wholesale damages model. *Id.* at 88, Supp. 310 ("I haven't done this so I need to think through what I would have to do at each step."); *see also id.* at 98, Supp. 312 ("I have not decided how it should be modified."). And he acknowledged each assumption underlying the *Cellnet* wholesale damages model would have to be reexamined. *Id.* at 99-100, Supp. 312.

In short, Gale did no modeling or calculations whatsoever for this case. Gale Dep. at 268, Supp. 323 ("I have not developed any simulation models for this case."); *id.* at 270, Supp. 324 ("Q. Okay. Other than looking for certain information, have you done any quantitative work of any kind in this case? A. Where I've actually done calculations and looked for specific – no.").

d. **The impossibility of showing class-wide injury and damages here.**

Intermessage's failure to retain someone to develop an actual model demonstrating class-wide injury and damages reflects the impossibility of this task. A class action expert with extensive experience in telecommunications cases explained that:

- *Individual service contracts are not available*. The millions of microfiche bills referred to above may not represent "all billing cycles for the entire class period," the conversion to a digital format would at most be 85% accurate, and those bills will not establish the retail subscriber's plan and contract dates. Pohl Aff. at ¶¶ 21, 23-24, Supp. 357-358.
- *Individual retail subscriber behavior cannot be modeled*. Retail subscribers selected cellular service plans for many different reasons. Pohl Aff. at ¶ 16, Supp. 355. One might choose a higher-priced plan based on phone selections or subsidies. *Id*. Another might do so due to concerns about service quality, and a third might do so because they wanted more features. *Id.* With all these choices, "it does not appear that an individual 'But For' Price can be calculated without each class member providing input[.]" Pohl Aff. at ¶ 17, Supp. 355.
- *Class-wide injury and damages are therefore incalculable*. Calculating damages "requires a 'But For' Price that is based on individual service contract terms, as well as individual decisions and behavior. Since the individual service contract data may not be available, and individual

decisions and behavior cannot be known without input from each class member, it is not possible to calculate the 'But For' Price at an individual class member level." Pohl Aff. at ¶ 31(b), Supp. 361.

4. **The flawed class certification order.**

In briefing finished in 2009, Intermessage moved to certify a class of retail subscribers based on Gale's flawed and insufficient assumptions. In 2016, almost seven years after the briefing concluded, the trial court certified a class of "all retail subscribers of [Ameritech] who purchased service with an Ohio area code within geographic areas in which the PUCO decision found wholesale price discrimination during the period October 18, 1993 through September 8, 1995." *See* 2/9/16 Order Granting Class Certification at 19, Appx. 52; 2/9/16 JE, Appx. 33.

5. **The Eighth District affirms without independent analysis.**

Ameritech appealed and the Eighth District, with scant independent analysis and by quoting most of the trial court's opinion as its own, affirmed. App. Op. at ¶ 26, Appx. 21-30. Ameritech's application for reconsideration was denied on April 7, 2017. 4/7/17 JE, Appx. 5.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

A claimant lacks standing to sue under R.C. 4905.61 for "treble the amount of damages sustained in consequence of the violation" absent a prior determination by the Public Utilities Commission that the claimant's rights under a specific public utilities statute or commission order were violated.

The plain meaning of a statute permitting "the person"[5] injured to recover "treble the amount of damages sustained in consequence of the violation" is that only those whose rights PUCO expressly finds to have been violated have standing to sue. Entirely absent from R.C. 4905.61 is any language that would authorize a class action lawsuit for indirect harms allegedly caused by a violation of someone else's rights. Moreover, allowing recovery for indirect harms wrongly penalizes a public utility a second time for the same conduct, strips utilities of their due process right to contest liability for the indirect claim, and encourages endless class actions against utilities for a singular violation (as the many suits filed against Ameritech under the *Cellnet* Order shows). In an area where threatened damages for a single claim can reach $1 billion, clarity on the persons who have standing to pursue this penalty is sorely needed. The Court should resolve this issue of first impression by enforcing the statute as written.

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[5] For ease of reference, "the person" is used throughout the brief to refer to a natural person or a corporation (such as Cellnet or Intermessage). *See* Moore Dep. at 17-18, Supp. 327 (Intermessage was a corporation before dissolving). In any Ohio statute, unless another definition is supplied, "person" includes a corporation. R.C. 1.59. The General Assembly expressly included a corporation within the scope of R.C. 4905.61 by using the phrase "the person, firm, or corporation[.]"

A. R.C. 4905.61 Limits Standing to Those Whose Rights PUCO Expressly Finds to Have Been Violated.

1. The statute's plain text bars treble damages for indirect injury.

The statutory text is the starting point. *Stewart v. Vivian*, __ Ohio St.3d __, 2017-Ohio-7526, ¶ 24. The statute says:

> If any public utility or railroad does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code, or declared to be unlawful, or omits to do any act or thing required by the provisions of those chapters, or by order of the public utilities commission, the public utility or railroad is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of the violation, failure, or omission.

R.C. 4905.61.

a. The first clause allows a lawsuit only after PUCO finds a regulatory violation.

This Court long ago held that PUCO must determine the lawfulness of a utility's conduct before suit is filed. *State ex rel. Northern Ohio Tel. Co. v. Winter*, 23 Ohio St.2d 6, paragraph one of the syllabus (1970); *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St.2d 191, 194 (1978). This holding rests on two legal principles:

- Ohio's "comprehensive scheme" for regulating public utilities expresses a legislative intent to vest the power to determine regulatory violations "solely in the Commission." *Winter*, 23 Ohio St.2d at 9.
- Because a regulatory violation is a condition precedent to a treble damages action, PUCO must find a violation before the action is filed. *Milligan*, 56 Ohio St.2d at 194.

And because only PUCO can find regulatory violations, a defendant cannot contest these violations in an R.C. 4905.61 penalty proceeding filed in the court of common pleas. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, ¶ 21 ("Given that the statute requires a prior finding of a violation, a plaintiff in a claim brought pursuant to R.C. 4905.61 need only show causation and damages flowing from the adjudicated violation.").

b. **<u>The second clause determines who may sue.</u>**

The plain text of the second clause limits standing to sue, specifying that "the public utility or railroad is liable to *the person, firm, or corporation injured thereby* in treble the amount of damages *sustained in consequence of the violation, failure or omission.*" R.C. 4905.61 (emphasis added). The clear text of this clause establishes that only persons whose rights were found to have been violated by a PUCO order may sue. And, as discussed below at pages 24-27, enforcing the statute as written is critical to avoid due process violations.

The first clause of the statute assumes only one violation ("act or thing") and only one order. By using a definite article ("the") and a singular party (person, firm or corporation) in the clause that follows, the General Assembly signaled its intent to confer standing only on *the* person harmed by *the* act found by *the* order to violate the law. This language plainly invokes a direct injury requirement, thus limiting standing to persons whose rights were found to have been violated by a PUCO order. If there were an intent to allow a recovery beyond this first step for a single act, the legislature would have employed a more comprehensive ("all persons") or flexible ("any person") term. It did not do so.

Any other interpretation of R.C. 4905.61 would violate not just the plain text of the statute, but also the canon of strict construction. A penalty statute is strictly construed. *State ex rel. 31, Inc. v. Indus. Comm. of Ohio*, __ Ohio St.3d __, 2017-Ohio-9112, ¶ 21; *Dean v. Seco Elec. Co.*, 35 Ohio St.3d 203, 205 (1988). And the treble damages remedy in R.C. 4905.61 is "intended to penalize public utilities[.]" *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, ¶ 19. Reasonable doubts over the meaning of this statute thus "must be resolved" by limiting the scope of this treble damages remedy to claimants whose rights PUCO expressly finds to have been violated. *State ex rel. 31, Inc.*, 2017-Ohio-9112, ¶ 21.

2. <u>This is the way it would have been understood when it was adopted.</u>

Examining the context in which this statute became law confirms this construction. R.C. 4905.61 must be construed "based on how one would have reasonably understood the text 'at the time' it was enacted." *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636, ¶ 9 (plurality opinion), citing *Volz v. Volz*, 167 Ohio St. 141, 146 (1957). And no one reasonably would have understood in 1906 that this language provided a treble damages remedy to persons whose rights had not been adjudicated in a PUCO proceeding and who instead allege (at best) indirect injury flowing from a violation of someone else's rights.

a. The General Assembly adopted then-existing Wisconsin law.

When the General Assembly in 1906 created the Railroad Commission (which eventually became the PUCO),[6] it adopted the language of the Wisconsin Railroad Commission statutes. *See* Rosenbaum, *Legislative History of the Public Utilities Commission of Ohio*, 3 U.Cin.L.Rev. 138, 155 (1929) ("This act was known as the Wurtz Law and, with the principal exception of omitting the power over joint rate fixing, was a replica of the then existing Wisconsin law."); H.B. No. 78, 98 Ohio Laws 342, 355-56 § 25, Appx. 69-70. The General Assembly had a template for writing a broader penalty provision, if it had wished to do so. At that time, the Valentine Act (Ohio's antitrust statute) allowed "*any* person who shall be injured in his business or property, by reason of *anything* forbidden or declared to be unlawful," to recover double damages. *See* S.B. No. 336, 93 Ohio Laws 143, 146, § 11, Appx. 105 (emphasis added). But instead of using these broader and more flexible terms, the General Assembly used the more precise phrasing of Wisconsin law.

b. Wisconsin law and prevailing norms at the time limited claims to direct harms.

Several years before Wisconsin passed the statute that served as the model for the Ohio law, the Wisconsin Supreme Court held that a water-works company had no liability under the common law for indirect harm a citizen suffered when the water-works company breached a duty to the city. *See Britton v. Green Bay & Ft. H. Waterworks Co.*, 51 N.W. 84 (1892). *Britton* reiterated the rule of law that "[r]emote damages are

[6] The Railroad Commission was later renamed the Public Service Commission and, finally, the Public Utilities Commission. Rosenbaum, 3 U.Cin.L.Rev. at 155-59; *see also* H.B. No. 325, 102 Ohio Laws 549, Appx. 74-100.

not recoverable," explaining that an indirect injury theory is "almost an entire stranger to our common-law jurisprudence[.]" *Id.* at 87. The Wisconsin Supreme Court later confirmed its treble damages statute did not change the common law rule, emphasizing the "absence of any direct provision in the law indicating any intention to change the rule" and "the tremendous liabilities which the law would impose" if claims for indirect harm were allowed. *Krom v. Antigo Gas Co.*, 143 N.W. 163, 164 (Wis. 1913).

The narrow Wisconsin law the General Assembly adopted reflects an awareness of prevailing legal norms of the time, which did not look kindly on claims for indirect harms. As Justice Holmes wrote in 1918, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." *S. Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (rejecting "pass on" defense to overcharge claim based on railroad rates found excessive by the Interstate Commerce Commission). And there is no clearer way to signal an intent not to go beyond this step than to write a law limiting recovery for a violation of an order to *the* person injured and only allowing claims for damages "sustained in consequence of *the* violation."

B. <u>This Interpretation Follows Analogous Precedent, Preserves a Defendant's Due Process Rights and Adheres to the Separation of Powers.</u>

1. <u>This interpretation follows analogous holdings and the policies supporting them.</u>

This Court's construction of analogous language in the current version of the Valentine Act also supports this interpretation. The Valentine Act now allows only "the person" injured to pursue a treble damages claim. *See* R.C. 1331.08 (providing that "the person injured in the person's business or property by another person by reason of anything forbidden or declared to be unlawful [in R.C. 1331.01 to 1331.04] may sue").

This Court found the Valentine Act does not allow claims for indirect harms in *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985. *Johnson* addressed whether an indirect purchaser of goods could file a claim for Ohio antitrust violations. This Court said "no," following federal precedent. *See id.* at syllabus, following *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

a. <u>**Indirect damages claims generate double recoveries and insoluble apportionment problems.**</u>

The federal precedent adopted by this Court in *Johnson* is based on the general tendency to limit damages to direct claimants (*Associated Gen. Contrs. of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983)), and two additional concerns regarding indirect damages claims:

- A rule of law permitting direct purchasers to collect full damages requires a corresponding rule barring claims for indirect harms, since a recovery by indirect purchasers would be duplicative. *See Illinois Brick*, 431 U.S. at 730-31 (otherwise, after "an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount"); and
- Tracing and apportioning damages through complex distribution chains is virtually impossible. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968) (antitrust defendant could not raise "passing-on defense" to distributor's antitrust claim because trying to trace damages under that theory "would require a convincing showing of * * * virtually

unascertainable figures" and "the task would normally prove insurmountable").

b. Those problems exist here.

Both concerns apply to a treble damages claim for indirect harm under R.C. 4905.61, as these proceedings show. As discussed, Cellnet obtained a multi-million dollar settlement from Ameritech based on an assumption that, but for the price discrimination found by PUCO, many retail customers, including Ameritech's own retail subscribers, would have purchased service from Cellnet instead. The settlement thus paid Cellnet, "the person" whose rights PUCO found to have been violated, millions of dollars for the same conduct the class now relies upon to seek indirect treble damages. *See* Pl.'s Compl. at ¶ 57, Supp. 11-12. Ameritech already settled and extinguished its liability for that conduct. Allowing a class of retail subscribers to pursue claims for this same liability would result in a double penalty. *Illinois Brick*, 431 U.S. at 730-31.

Claims by indirect claimants under R.C. 4905.61 also suffer from an inability to trace and apportion damages through complex distribution chains. Intermessage's expert admitted that "[i]f [he] wanted to determine the damages to a particular individual, [he] would have to go and find out what they paid, [he] would have to go and find out how they would choose among alternatives, and then [he] would have to go and make a prediction based on the alternatives that were available to them in the but-for world, which one of those alternatives they would choose." Gale Dep. at 104, Supp. 313. Evaluating the many plan alternatives for each retail subscriber and determining how that particular user would choose among them is a task that "would normally prove

insurmountable," *Hanover Shoe*, 392 U.S. at 493, which no doubt is why no one has created such a damages model here.[7]

The only reasonable way to construe R.C. 4905.61 is to hold that only persons whose rights were adjudicated in the PUCO proceeding may sue.

2. **<u>This interpretation is necessary to avoid constitutional violations.</u>**

Courts presume the General Assembly complied "with the constitutions of the state and of the United States[.]" R.C. 1.47(A). Here, two separate constitutional concerns require an interpretation that limits the treble damages penalty to claims for direct harm: (1) violations of a defendant's due process right to present every available defense; and (2) separation of powers violations created by a rule of law that, under the guise of an indirect injury claim, allows courts and juries, instead of the PUCO, to determine the lawfulness of a public utility's conduct.

a. **<u>A narrow construction preserves a defendant's due process right to present every available liability defense.</u>**

(i) **<u>A defendant must have the ability to contest liability for a penalty.</u>**

The rule of law adopted below violates public utilities' due process rights. A basic requirement of due process is "an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation omitted). Yet, as discussed, a public utility sued under R.C. 4905.61 may contest only causation and damages. *Cleveland Mobile Radio Sales*, 2007-Ohio-2203, ¶ 21. A rule of law that

[7] As discussed at pages 35-38, the lack of an actual damages model also is fatal to class certification.

allows suits for *indirect* harms thus creates a danger that a public utility will be forced to pay damages for perceived violations PUCO never found, which the utility had no opportunity to contest.

(ii) <u>PUCO found no violations at the retail level.</u>

Here, PUCO *assumed* an "internal wholesale rate of zero" and, on that basis, found Ameritech violated Ohio law by charging Cellnet a wholesale rate higher than zero and thus discriminating against it. *Cellnet* Order at *150-51, 237-40, Supp. 397-398, 418. This finding rested not on the *actual* rates charged to Cellnet (who, after all, was never a customer), but on a presumed wholesale rate of zero that PUCO adopted as a sanction for Ameritech's failure to keep certain records. *Id.* At the same time, PUCO:

- Said that competition at the retail level "is not the focus of the Commission's consideration in this matter," *id.* at *93, Supp. 384;
- Found only that "Ameritech Mobile acted in a discriminatory manner towards *Cellnet*," *id.* at *240, Supp. 418 (emphasis added); and
- Focused its discussion of potential remedies solely on *Cellnet*. *Id.* at *94, 276, Supp. 385, 427.

Consistent with these findings, PUCO expressly limited its conclusions of law to *wholesale* conduct, not retail conduct. *Cellnet* Order at *281, Supp. 429 ("For the specified timeframes, Ameritech Mobile and Air Touch Cellular are both in violation * * * for refusing to make their services * * * universally available on equal terms to nonaffiliated resellers."). And because the dispute over wholesale recordkeeping and

practices that generated these regulatory violations was "a case of first impression," PUCO declined to impose "statutory penalties against Ameritech." *Id.* at *282, Supp. 429.

Since its analysis and findings were limited to wholesale conduct, PUCO has never found that the rights of retail subscribers were violated. *See Cellnet* Order at *93-94, Supp. 384 ("[T]he Commission is focused on the supplier/customer relationship. Any analysis of the respondents' retail operations is limited in context to the issue of whether or not the respondents have properly separated their wholesale operations for the purpose of allowing the Commission to properly determine that respondents have afforded nonaffiliated resellers the treatment prescribed by the applicable statutory provisions and the applicable Commission orders."). Nor did PUCO ever say that a wholesale cost of $0 would be an appropriate assumption in the retail market.

(iii) <u>PUCO lacked authority to affect retail cellular prices.</u>

Indeed, PUCO could not have found such a violation or made any findings about end-user rates. As discussed, prior FCC rulings rejected PUCO's request for authority to regulate retail cellular service rates. *See In Re Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842, 7853, ¶ 43 (1995) (PUCO cannot "directly affect end-user rates"); *In Re Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 12427 (1995) (denying petition for reconsideration). PUCO thus lacked the power to make findings that would have authorized this lawsuit.

(iv) **<u>Ameritech cannot contest in court a finding PUCO did not and could not make.</u>**

Worse yet, since R.C. 4905.61 does not allow a defendant to contest liability, *Cleveland Mobile Radio Sales*, 2007-Ohio-2203, ¶ 21, Ameritech will never have an opportunity to defend itself against a (non-existent) finding that the rights of retail subscribers were violated between 1993 and 1995. This would be a clear due process violation, and one that is easily avoided if R.C. 4905.61 is properly construed as limiting recovery to those whose rights PUCO expressly found to have been violated.

3. **<u>A narrow construction preserves PUCO's prerogative to determine the lawfulness of a public utility's conduct.</u>**

There is a second constitutional concern with a rule of law that allows claims for indirect harm based on violations of someone else's rights. This rule of law forces courts and juries to evaluate the lawfulness of a public utility's conduct, which is beyond their power. As discussed, only PUCO may determine whether a regulatory violation occurred. *See Winter*, 23 Ohio St.2d 6, paragraph one of the syllabus. Any finding by a common pleas court on matters such as the lawfulness of the rates charged by a public utility, or the adequacy of its service, "is unauthorized by law and amounts to a usurpation of judicial power." *Id.* at 9; *see also Milligan*, 56 Ohio St.2d 191, paragraph one of the syllabus ("A Court of Common Pleas is without jurisdiction to hear a claim seeking treble damages pursuant to R.C. 4905.61 absent a prior determination by the Public Utilities Commission that there was in fact a violation of R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921 or 4925, or an order of the Commission.").

Here, the trial court found, and the court of appeals affirmed, that retail pricing is an issue subject to class adjudication. *See* App. Op. at ¶ 26, Appx. 25 (identifying the issues presented by Intermessage's claim as including "whether [Ameritech's] conduct affected the market and proximately caused retail cellular prices to be artificially inflated"). Again, PUCO neither considered nor found a violation based on Ameritech's retail pricing. *See Cellnet* Order at *93-94, 281, Supp. 384, 429. Since the lawfulness of a public utility's conduct is within the exclusive jurisdiction of PUCO, the common pleas court and the jury lack power to determine this "common issue." No reasoned interpretation of R.C. 4905.61 would permit this infringement upon the separation of powers between courts and administrative agencies. This Court should confirm that R.C. 4905.61 limits recovery to those whose rights PUCO expressly finds to have been violated.

C. Nothing Prevents this Court from Deciding this Issue.

Rather than defend the standing decision on the merits, Intermessage's memorandum opposing jurisdiction attempted to create procedural barriers that do not exist. Intermessage first insisted that whether its rights were adjudicated by a PUCO order "is a merits question, not a class certification question nor one subject to interlocutory review." Intermessage Mem. in Resp. at 6-7. Intermessage misread the law. Whether its rights were adjudicated by PUCO is a standing issue, and standing may be raised at any time. As such, it is an inherent prerequisite to class certification and reviewable in an interlocutory appeal.

1. **Intermessage can pursue this action only if R.C. 4905.61 gives it standing to do so.**

First, whether Intermessage is "the person" authorized to file a treble damages action under R.C. 4905.61 is a standing issue and the law regarding statutory standing is well-settled. When, as here, a claim is based on a statute, "the inquiry as to standing must begin with a determination of whether the statute in question authorizes review *at the behest of plaintiff*." *City of Middletown v. Ferguson*, 25 Ohio St.3d 71, 75-76 (1986) (emphasis added), quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). The issue here is at whose "behest" an R.C. 4905.61 action may be filed. This *has* to be a standing inquiry because this Court has already held that the merits of an R.C. 4905.61 claim include only two elements: causation and damages. *Cleveland Mobile Radio Sales*, 2007-Ohio-2203, ¶ 21.

As standing is a "jurisdictional requirement," it may be raised at any time. *Federal Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 22, citing *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218 (1987). And, given that standing "is an inherent prerequisite to the class certification inquiry,"[8] it follows that "standing may — indeed must — be addressed" in an interlocutory appeal from a class certification order. *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir.2002).

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[8] Absent standing, the plaintiff cannot "seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), cited with approval in *Woods v. Oak Hill Community Med. Ctr.*, 134 Ohio App.3d 261, 269 (4th Dist.1999); *see also* 5 Moore's Federal Practice 23-306, Section 23.63[1][b] (3d ed.2017) ("[i]f the named plaintiff does not have standing to bring a particular claim, the named plaintiff may not represent the class with respect to that claim and certification is, therefore, improper[.]").

2. <u>A summary dismissal of a prior writ action did not rule on standing.</u>

Equally flawed was Intermessage's claim that the "law of the case" doctrine bars review here. Intermessage Mem. in Resp. at 4. This assertion relies entirely on the dismissal of a separate writ action without an opinion. *See* pp. 8-9, *supra*. Nothing about that dismissal prevents this Court from reaching the merits here.

A summary dismissal of a writ generally does not bar consideration of merits issues in a future appeal. *See Key v. Wise*, 629 F.2d 1049, 1054-55 (5th Cir. 1980) (refusing to apply law of the case to the denial of a writ where the denial "could also have been predicated on grounds not inconsistent with" the panel's determination on the merits); *see also Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998) ("Our summary denial of Chrysler's petition for a writ of mandamus cannot be considered an adjudication of these issues on the merits."); *United States v. Shirley*, 884 F.2d 1130, 1135 (9th Cir. 1989) (holding that law of the case does not apply when the prior panel denied the petition for writ of mandamus without opinion); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 693 (1st Cir. 1992) (explaining that "the general rule is that the denial of a petition for mandamus is not ordinarily entitled to any preclusive effect when the unsuccessful petitioner later prosecutes his direct appeal").

This rule applies here, as the most likely explanation for the dismissal of the writ is Ameritech's adequate remedy by this appeal. *See* pp. 8-9, *supra*; *State ex rel. Verizon Wireless v. Villanueva*, 109 Ohio St.3d 1420, 2006-Ohio-1420; *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶ 22; *State ex rel. McGirr v. Winkler*, ___ Ohio St.3d ___, 2017-Ohio-8046, ¶ 13.

Proposition of Law No. 3

> **Where a plaintiff relies upon a damages model to establish that common issues would predominate, the model must demonstrate that injury-in-fact and damages can be proven on a class-wide basis.**

This appeal demonstrates the problem with a rule of law that does not require the plaintiff to "provide [a] working damages model," because doing so would "delve too deeply into the merits of plaintiff's claim at the class certification stage." App. Op. at ¶ 26, Appx. 27. Under the lower courts' ruling, a plaintiff can obtain class certification based on a mere assurance that some expert will eventually develop a workable damages model. Such a rule impermissibly throws a bedrock requirement for class certification under Civ.R. 23(B)(3) — that common issues of law or fact predominate — "out the window." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014). Indeed, the whole point of this Court's refinements to the "rigorous analysis" required to certify a class is to make sure common issues predominate and the class is cohesive enough to warrant representative adjudication. To provide much needed guidance to trial courts, this Court should recognize *Comcast* as an outgrowth of principles it has already adopted and declare that the hard look at statistical damages models demanded by *Comcast* is the law in Ohio.

A. Class Actions Are the Exception, Not the Rule.

Class action suits "are the exception to the usual rule that litigation is conducted by and on behalf of only the individually named parties." *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, ¶ 33 (emphasis added), citing *Comcast*, 569 U.S. at 33. To fit within this exception, this Court has stressed, "the party bringing the class

action must affirmatively demonstrate compliance with the procedural rules governing class actions." *Id.*

B. <u>Federal Law Provides Appropriate Guidance on the Scope of this Exception.</u>

Federal law is "an appropriate aid" to interpreting Civ.R. 23. *Stammco LLC v. United Tel. Co. of* Ohio, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 18, quoting *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201 (1987). Looking to *Comcast* is particularly appropriate, because clarification of the required analysis of damages models "turn[s] on the straightforward application of class-certification principles" (569 U.S. at 34) that this Court has already adopted.

C. <u>A Plaintiff Must Prove a Class Can Be Certified; Mere Promises Are Not Adequate.</u>

The first principle derived from *Comcast* is that Civ.R. 23 requires proof, not promises. *See Comcast*, 569 U.S. at 33 ("The Rule 'does not set forth a mere pleading standard.'") (internal citation omitted). This Court's precedents echo that principle. *E.g., Stammco*, 2013-Ohio-3019, ¶ 30 (Civ.R. 23 "does not set forth a mere pleading standard."), quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A plaintiff thus "must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* To meet this burden, the plaintiff has to show "by a preponderance of the evidence that the proposed class meets each of the requirements set forth in the rule." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, ¶ 15.

D. <u>The Trial Court May Examine the Merits of the Underlying Claim in Its Rigorous Analysis.</u>

The second principle of *Comcast* is that a trial court's rigorous analysis may overlap with the merits of the plaintiff's underlying claim. *Comcast*, 569 U.S. at 33-34. Here, too, this Court has already followed suit. *Cullen* holds that a trial court "must conduct a rigorous analysis when determining whether to certify a class pursuant to Civ.R. 23 and may grant certification only after finding that all of the requirements of the rule are satisfied[.]" 2013-Ohio-4733, at paragraph one of the syllabus. The necessary rigor includes "resolv[ing] factual disputes relative to each element and [] find[ing], based upon those determinations, other facts, and the applicable legal standard, that the requirement is met." *Id.* This Court has recognized that this analysis "overlap[s] with the merits of the plaintiff's underlying claim" because class certification "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Stammco*, 2013-Ohio-3019, ¶ 30, quoting *Dukes,* 564 U.S. at 351.

E. <u>Part of this Analysis Is Whether Common Evidence Will Show Each Class Member Was Injured.</u>

And while *Comcast* took as a given that a showing of predominance under Fed.R.Civ.P. 23(b)(3) requires proof that individual injury could be established through common evidence, 569 U.S. at 30, this Court has held that plaintiffs must "adduce common evidence that shows all class members suffered *some* injury." *Felix*, 2015-Ohio-3430, ¶ 33 (emphasis added), citing *In Re Rail Freight Fuel Surcharge Antitrust Litigation—MDL No. 1869*, 725 F.3d 244, 252 (D.C.Cir. 2013). A "key purpose" of the predominance requirement is "to test whether the proposed class is sufficiently cohesive

to warrant adjudication by representation." *Felix*, 2015-Ohio-3430, ¶ 35. And common proof of class-wide injury is necessary to establish this cohesion. After all, a showing of injury is "the most basic requirement to bringing a lawsuit." *Id.* at ¶ 36.

F. ***Comcast* Follows These Principles and Provides Necessary Clarification on How to Establish Predominance With a Damages Model.**

Comcast implemented these principles in a case in which the plaintiff sought to establish predominance by showing that actual injury and the resulting damages were measurable "on a class-wide basis." 569 U.S. at 30. Establishing predominance in this way requires an actual model at the class certification stage showing "damages are capable of measurement on a classwide basis." *Id.* at 34. In *Comcast*, the plaintiff sought to satisfy this requirement with a model that was intended to calculate damages for the class by analyzing what cable prices would have been "but for" the alleged antitrust violations. *Id.* at 32. The problem with the model, however, was that the district court accepted only one of four theories of antitrust impact (an "overbuilder" theory) and "the model did not isolate damages resulting from any one theory of antitrust impact." *Id.* Because the model did not "even attempt to" measure the damages stemming from the only liability theory the district court had found viable, the Court held that the model "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at 35.

G. ***Comcast* Requires a Plaintiff to Produce an Actual Model Using a Reasonable Methodology.**

An essential point in *Comcast* is that the model itself is subject to scrutiny at the class certification stage to ensure that the methodology is not speculative. *Id.* at 35-36. This scrutiny is necessary, the Court explained, to avoid reducing the "predominance

requirement to a nullity." *Id.* Thus, Rule 23 "not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." *In Re Rail Freight Fuel Surcharge Antitrust Litigation—MDL No. 1869*, 725 F.3d at 255.

In the wake of *Comcast*, federal courts now routinely reject claims of predominance based on flawed models designed to show class-wide injury and damages. *See In re Domestic Drywall Antitrust Litig.*, E.D. Pa. MDL No. 2437, 13-MD-2437, 2017 WL 3700999, at *14 (Aug. 24, 2017) (a damages model in an indirect purchaser action that is "riddled with assumptions that divorce the model from the facts and the theory of liability" is "not permitted" under *Comcast*); *In re NJOY, Inc. Consumer Class Action Litig.*, C.D. Cal. No. CV-14-428-JFW, 2016 WL 787415, at *5-9 (Feb. 2, 2016) (denying motion to certify class where plaintiffs' flawed and shifting damages models were not "capable of calculating damages on a classwide basis"); *Cannon v. BP Prods. N. Am., Inc.*, S.D. Tex. No. 3:10-CV-00622, 2013 WL 5514284, at *5, 15-16 (Sept. 30, 2013) (denying certification under Rule 23(b)(3) where plaintiffs submitted no alternatives to a flawed model offered to prove causation and damages, and explaining that under *Comcast* assurances that such a model can be fixed at the merits stage are insufficient).

H. The "Possible Future Model" Allowed by the Court Below Is Insufficient Under *Comcast*.

The Eighth District's decision cannot survive the scrutiny required by *Comcast*. As discussed, an expert seeking to show class-wide injury and damages here would have to create an actual model that reliably:

- Determines what each Ameritech retail cellular customer actually paid between 1993 and 1995;
- Determines which customer(s) could have switched cellular service plans during this period;
- Determines how those customers who could have switched plans would have chosen among then-available options;
- Predicts, based on the hypothetical wholesale price to Cellnet of $0, which plan each customer would have chosen in this "but for" scenario; and
- Calculates the damages that each retail customer would have suffered, assuming the highly implausible scenario that Ameritech could have stayed in business selling its wholesale service for $0.

Gale had not even thought about how to accomplish any of these steps, let alone all of them. Gale Dep. at 88, 98-100, 236, 268, 270, Supp. 310, 312, 320, 323-324. As the court below acknowledged, Gale "does not propose [a] definite method [for] allocating damages," he "has never used the [*Cellnet* wholesale damages] model to determine class-wide impact and damages," and this "model would have to be adapted to show class-wide impact across the retail market." App. Op. at ¶ 26, Appx. 26. Common sense alone dictates that a plaintiff cannot show its methodology is "just and reasonable" if it avoids proffering one altogether. *Comcast*, 569 U.S. at 35-36. The Eighth District's decision thus does exactly what *Comcast* says courts may not do: permit the predominance requirement to become a "nullity." *Id.* at 36.

1. Without a reliable damages model, Intermessage cannot show its damages theory is consistent with its liability theory.

It is no solution to argue that Intermessage's "proposed theory of damages is consistent with its theory of liability." App. Op. at ¶ 26, Appx. 26. Here, there was no theory of damages; Gale did no modeling or calculations — period. Gale Dep. at 268, 270, Supp. 323-324. He had not even been retained to construct an actual damages model. *Id.* at 79, 81, 86-87, 195, 236, Supp. 308, 310, 317, 320. The core holding of *Comcast* is that trial courts must scrutinize damages models, 569 U.S. at 35-36, and there is no better example of a deficient model than one that does not exist.

Even district courts within the Ninth Circuit, argued by some to be a haven for class actions, recognize that no model means no class certification. *See, e.g., Ward v. Apple Inc.*, N.D. Cal. No. 12-CV-05404-YGR, 2018 WL 934544, at *3 (Feb. 6, 2018) (denying motion to certify where expert's declaration merely asserted that "there exists a common methodology * * * to reliably assess the existence and amount of damages" left the trial court "unable to fulfill" its obligation under *Comcast* to scrutinize the damages model).

2. The ability to file dispositive motions or seek decertification later is no substitute for the required rigorous analysis.

Nor is it sufficient to point to the ability of a defendant to seek summary judgment or decertification. App. Op. at ¶ 29, Appx. 31-32. After *Comcast*, "[a] party's assurance to the court that it intends or plans to meet the [class certification] requirements is insufficient." *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015).

Such a rule of law would, as the Seventh Circuit convincingly explained, throw the predominance requirement out the window:

> [The trial court] thought it enough at this stage that the plaintiffs *intend* to rely on common evidence and a single methodology to prove both injury and damages, and that whether the evidence and the methodology are sound and convincing is a question going to the strength of the plaintiffs' case and should be postponed to summary judgment proceedings or trial. *But if intentions (hopes, in other words) were enough, predominance, as a check on casting lawsuits in the class action mold, would be out the window. Nothing is simpler than to make an unsubstantiated allegation*.

Parko v. Shell Oil Co., 739 F.3d 1083, 1086 (7th Cir. 2014) (emphasis added).

Fidelity to this core holding of *Comcast* is crucial because the trial court's "ruling on the certification issue is often the most significant decision rendered in these class-action proceedings." *Deposit Guaranty Natl. Bank v. Roper*, 445 U.S. 326, 339 (1980). Without careful scrutiny of a damages model proffered to show predominance, "defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 350 (2011). Courts "have noted the risk of 'in terrorem' settlement that class actions entail," *id.* and this risk is greatly enhanced when courts adopt a certify-first-and-ask-questions-later approach. *See* Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum.L.Rev. 1872, 1875 (2006) ("Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis * * * result in settlements."). The flawed analysis conducted below should be firmly rejected by this Court.

IV. <u>CONCLUSION</u>

If allowed to stand, the two deeply flawed rules of law adopted by the Eighth District Court of Appeals will encourage a never-ending stream of class action, treble damages lawsuits against public utilities. This Court should limit public utilities' downstream liability by holding that claimants who allege only indirect injuries lack standing to sue for treble damages under R.C. 4905.61. And this Court should bar class certification based on speculative damages theories and adopt the *Comcast* template for analyzing class damages models. Adopting these rules of law requires decertification of the class and dismissal of the action.

Respectfully submitted,

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APPENDIX

Supreme Court of Ohio Clerk of Court - Filed May 22, 2017 - Case No. 2017-0684

No.

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 16-104211

CINDY SATTERFIELD, et al.,
Plaintiffs-Appellees,

v.

AMERITECH MOBILE COMMUNICATIONS, INC., et al.,
Defendants,

and

CINCINNATI SMSA LIMITED PARTNERSHIP,
Defendant-Appellant.

NOTICE OF APPEAL OF APPELLANT CINCINNATI SMSA LIMITED PARTNERSHIP

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NOTICE OF APPEAL OF APPELLANT

Appellant Cincinnati SMSA Limited Partnership hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Court of Appeals Case No. CA-16-104211 on March 16, 2017. An application for reconsideration was timely filed on March 27, 2017. The application for reconsideration was denied on April 7, 2017. This case is one of public and great general interest.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

CINDY SATTERFIELD, ET AL.

Appellee

COA NO. 104211

LOWER COURT NO. CV-03-517318

COMMON PLEAS COURT

-vs-

AMERITECH MOBILE COMMUNICATIONS, INC., ET AL.

Appellee

MOTION NO. 505778

Date 04/07/17

Journal Entry

Motion by appellant for reconsideration is denied.

RECEIVED FOR FILING

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CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By ________ Deputy

Adm. Judge, KATHLEEN ANN KEOUGH, Concurs

Judge ANITA LASTER MAYS, Concurs

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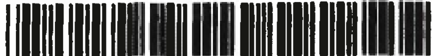
CA16104211 98405447



Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104211

CINDY SATTERFIELD, ET AL.

PLAINTIFFS-APPELLEES

vs.

AMERITECH MOBILE COMMUNICATIONS, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-03-517318

BEFORE: Kilbane, J., Keough, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 16, 2017

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Cincinnati SMSA Limited Partnership (operating under the trade name Ameritech Mobile ("Ameritech")), appeals from the trial court's order certifying a class action complaint brought by plaintiffs-appellees, Cindy Satterfield ("Satterfield"), Cindy Satterfield, Inc., n.k.a. Highland Speech Services, Inc. ("Highland"), and Intermessage Communications ("Intermessage") (collectively referred to as "plaintiffs"). For the reasons set forth below, we affirm.

{¶2} In December 2003, Satterfield, Highland, and Intermessage filed a class action complaint against Ameritech, Ameritech Mobile Communications, Inc., Verizon Wireless a.k.a. New Par, Verizon Wireless ("VAW"), L.L.C., and Airtouch Cellular Eastern Region, L.L.C. (the last three of which are collectively referred to as ("Verizon")). Ameritech and Verizon are providers of wholesale and retail cellular telecommunications services and equipment.

{¶3} Satterfield and Highland purchased cellular service from Verizon. Intermessage was a retail customer of Ameritech owned primarily by Kevin Moore ("Moore") and Robert Schimmelphennig ("Schimmelphennig"). Intermessage operated a two-way radio business and sold backup panels for alarm systems. Intermessage purchased cellular service from Ameritech and placed it into a product that was used to back up the alarm systems it sold.

Intermessage paid Ameritech directly for the cost of the cellular service and then passed those costs to its customers. Intermessage dissolved in 2001 and Moore and Schimmelphennig created a new business, Wireless Associates, Ltd. ("Wireless Associates"). Moore sold his interest in Wireless Associates to Schimmelphennig in 2005.

{¶4} The complaint is based upon a prior ruling of the Public Utilities Commission of Ohio ("PUCO"), finding that Ameritech and Verizon discriminated against Cellnet, an independent reseller of cellular services, with respect to their offering of wholesale services to Cellnet. *See In the Matter of Complaint of Westside Cellular, Inc. d.b.a. Cellnet v. New Par Cos. d.b.a. AirTouch Cellular & Cincinnati SMSA Ltd. Partnership*, PUCO Case No. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 18 (Jan. 18, 2001) (*"Cellnet Order"*). Cellnet alleged that Ameritech and Verizon had discriminated against it by unlawfully providing cellular service, equipment, and features to their own retail operations at rates, terms, and conditions more favorable than those that they made available to Cellnet. The PUCO found that Ameritech and Verizon committed numerous acts prohibited by R.C. Chapter 4905 (titled Public Utilities Commission — General Powers), commencing October 18, 1993.[1]

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[1]Under R.C. Chapter 4905, the PUCO requires all Ohio cellular phone companies to sell cellular service at nondiscriminatory wholesale rates. By increasing the number of competitors that could offer cellular service, the public would benefit from the lower prices that such competition would naturally cause.

Specifically, Ameritech and Verizon provided retail cellular service to end users at rates and upon terms and conditions more favorable than those that they made available to Cellnet.

{¶5} In their complaint, Satterfield, Highland, and Intermessage defined the members of its class as all subscribers to the Verizon defendants' service from 1991-1997 and all subscribers to Ameritech service from 1993-1998. Plaintiffs asserted the following three causes of action: (1) recovery for treble damages under R.C. 4905.61; (2) unjust enrichment; and (3) tortious acquisition of a benefit. They essentially claimed that

> [Ameritech] cheated Ohio cellular telephone consumers out of millions of dollars by excluding competitors that charged lower rates and by locking-in customers before other competitors could enter the market. By manipulating the market for cellular telephone service in Ohio — practices for which the PUCO has already found [Ameritech] liable — [Ameritech] caused each Class Member, including [Intermessage], to pay more for cellular telephone service than the market otherwise would have charged.

{¶6} In January 2006, the trial court dismissed plaintiffs' causes of action for unjust enrichment and tortious acquisition, finding that R.C. 4905.61 is the exclusive remedy for the plaintiffs. Under R.C. 4905.61, a plaintiff may recover against a public utility when the PUCO finds that a public utility engaged in conduct prohibited by statute or a PUCO order and the plaintiff suffered damages as a result of that conduct.

{¶7} In September 2008, the court granted Verizon's motion for judgment on the pleadings against Satterfield and Highland on statute of limitations grounds. In October 2008, the parties agreed to dismiss all claims against Ameritech Mobile Communications, Inc. Therefore, the remaining cause of action before the trial court was Intermessage's claim against Ameritech under R.C. 4905.61, which was limited by the trial court to the period of October 18, 1993 through September 8, 1995.

{¶8} Also in September 2008, the trial court concluded that Intermessage's claim for 1995-1998 was barred by the statute of limitations. The court found that the statute of limitations for the 1995-1998 claim expired on January 18, 2002, which was one year after the PUCO issued the *Cellnet Order*. The court found, however, that Intermessage could maintain its claim for the 1993-1995 period because such claim is controlled by the Ohio Supreme Court's decision that reviewed the *Cellnet Order* — *Westside Cellular, Inc. v. Pub. Utils. Comm.*, 98 Ohio St.3d 165, 2002-Ohio-7119, 781 N.E.2d 199. In *Westside Cellular*, the Ohio Supreme Court reversed that part of the *Cellnet Order*, finding that Cellnet could not have suffered economic injury prior to 1995 because it had not earlier made a formal request to Ameritech for wholesale service. Instead, the court held that the applicable time frame commenced on October 18, 1993, which was the date of Cellnet's complaint to the PUCO. *Id.* at ¶ 10.

{¶9} Then in December 2008, Intermessage filed a motion for class certification. Intermessage sought certification on behalf of "all retail subscribers of [Ameritech] who purchased service with an Ohio area code during the period October 18, 1993 through September 8, 1995." In June 2015, the trial court conducted a pretrial conference to discuss the pending motion and required the parties to submit proposed orders.

{¶10} On February 9, 2016, the trial court entered an opinion and order granting Intermessage's motion for class certification. In a 19-page order, the trial court certified a class under Civ.R. 23(A) and (B)(3) consisting of "all retail subscribers of [Ameritech] who purchased service with an Ohio area code within geographic areas in which the PUCO decision found wholesale price discrimination during the period October 18, 1993 through September 8, 1995." In a thorough 19-page opinion, the trial court certified this class "on all the remaining claims, issues, and defenses presented in this action."

{¶11} It is from this order that Ameritech appeals, raising the following assignment of error for review.

Assignment of Error

> The trial court erred in granting the motion for class certification filed by [Intermessage].

{¶12} In the sole assignment of error, Ameritech claims the court erred in granting class certification to Intermessage because it lacks standing to pursue its purported claim against Ameritech. Ameritech further argues that even if Intermessage had standing to bring the class action, the class was erroneously certified because: (1) it necessarily includes persons who were not injured; (2) individualized issues predominate over common questions of fact or law; (3) its claims are not typical of the purported class; and (4) a class action is not superior to other methods of adjudication.

Standing

{¶13} Ameritech first argues that the class certification fails because Intermessage lacks standing as an adequate class representative for the following three reasons: (1) Intermessage no longer owns its claim against Ameritech, but assigned it to others after it dissolved; (2) after dissolving, Intermessage failed to pursue its claim against Ameritech as speedily as practicable under R.C. 1701.88(D); and (3) the violations at issue found by the PUCO concerned duties Ameritech owed to an independent reseller regarding the provision of wholesale services, while Intermessage and the purported class it seeks to represent consist of indirect, retail purchasers. We disagree.

{¶14} R.C. 1701.88, which establishes the powers of a corporation after dissolution, provides that "[a]ny claim existing or action or proceeding pending by or against the corporation may be prosecuted to judgment, with right of

appeal as in other cases." *Id.* at (C). Therefore, "the dissolution of a corporation does not abate '[a]ny claim existing or action or proceeding pending by or against the corporation or which would have accrued against it * * *.'" *State ex rel. Falke v. Montgomery Cty. Residential Dev.*, 40 Ohio St.3d 71, 74, 531 N.E.2d 688 (1988), quoting R.C. 1701.88(B).

{¶15} Ameritech argues that Intermessage lacks standing because Intermessage transferred its claim to either Wireless Associates, Ltd., or Schimmelphenning and Moore, after dissolving. In support of its contention, Ameritech relies on certain deposition testimony of Moore and Schimmelphennig. However, when asked about Intermessage's assets Schimmelphennig stated that "I can't tell you specifically * * * [b]ecause I don't recall." Additionally, Moore was never asked whether Intermessage had transferred its claim against Ameritech. In his affidavit attached to Intermessage's motion for class certification, he stated that "[t]he claims brought in this suit on behalf of [Intermessage] existed in favor of [Intermessage] at the time of its dissolution, and are being pursued in this litigation pursuant to [R.C. 1701.88.]" Thus, Intermessage's claim against Ameritech remained an asset of Intermessage after dissolution.

{¶16} Ameritech also contends that Intermessage lacks standing to pursue its claim against it because Intermessage did not commence this action "as speedily as is practicable" when winding up its affairs. R.C. 1701.88(D)

provides that the directors of a dissolved corporation "shall proceed as speedily as is practicable to a complete winding up of the affairs of the corporation." "A corporation continues to exist after dissolution, for the purpose of winding up its affairs[.]" *Diversified Prop. Corp. v. Winters Natl. Bank & Trust Co.*, 13 Ohio App.2d 190, 193, 234 N.E.2d 608 (2d Dist.1967), paragraph one of syllabus.

{¶17} Ameritech claims that Intermessage waited 33 months to bring this suit. Ameritech acknowledges that Intermessage filed within the statute of limitations, but argues that it was not "speedily enough." The damages Intermessage seeks against Ameritech occurred from October 18, 1993, through September 8, 1995. However, recovery of those damages can be only be obtained through a lawsuit brought under R.C. 4905.61, which cannot be initiated without a prior finding that the utility had violated a PUCO statute or order. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 21, citing R.C. 4905.61; *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St.2d 191, 383 N.E.2d 575 (1978), paragraph one of the syllabus. In the instant case, the liability finding was not made until 2001 by the *Cellnet Order*, which was not rendered final until 2002 by *Cincinnati SMSA L.P. v. Pub. Util. Comm. of Ohio*, 98 Ohio St.3d 282, 2002-Ohio-7235, 781 N.E.2d 1012. That finding expressly excluded the period of time now at issue in this lawsuit — October 18, 1993 through September 8, 1995. *Cellnet Order*, 2001 Ohio PUC LEXIS 18 at 269-271. The first finding of liability involving the

relevant 1993-1995 time period was not made until December 26, 2002, by the Supreme Court in *Westside Cellular*. Intermessage's complaint was filed within a year later on December 16, 2003. R.C. 1701.88(A) provides that a corporation may do such acts as are required to wind up its affairs and for this purpose the dissolved corporation "shall continue as a corporation for period of five years from the dissolution[.]" Intermessage filed this lawsuit within three years of its dissolution. Therefore, Intermessage commenced its complaint as speedily as practicable in accordance with R.C. 1701.88.

{¶18} Ameritech further argues that Intermessage lacks standing because the *Cellnet Order* did not establish liability as to Intermessage or any other retail customer. In the *Cellnet Order*, the PUCO held that Ameritech had violated Ohio statutes and PUCO orders, which provided that cellular telephone companies were required to maintain separate wholesale and retail operations; and the terms, conditions, and rates that the Ameritech's wholesale operations made available to Ameritech's affiliated retail operations were to be made available to any unaffiliated wholesale customer of Ameritech.

{¶19} In the *Cellnet Order*, the PUCO found that Ameritech was providing its own affiliated reseller with service and equipment for free, while charging, or attempting to charge, the unaffiliated reseller Cellnet for the same service. This resulted in Ameritech being able to charge its own customers for service when it had minimized the competition. Intermessage's economic expert

believes that the price Ohio consumers would have paid without Ameritech's conduct is about two-thirds of what they did pay. R.C. 4905.61 does not require anything more than a finding of unlawful conduct on the part of a public utility in order to permit an injured party to institute an action for damages in common pleas court.

{¶20} Thus, based on the foregoing, we find that Intermessage has standing to recover damages against Ameritech for the injury caused by the PUCO violations.

{¶21} Having found that Intermessage has standing to bring the class action against Ameritech, we now address Ameritech's arguments regarding the trial court's certification of the class action.

Class Action — Standard of Review

{¶22} A trial court has broad discretion in determining whether to certify a class action, and an appellate court should not disturb that determination absent an abuse of discretion. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). In *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 694 N.E.2d 442 (1998), the Ohio Supreme Court noted

that "the appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded * * * in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket." *Id.* at 70, citing *Marks*; *In re NLO, Inc.*, 5 F.3d 154 (6th Cir.1993). "A finding of abuse of discretion * * * should be made cautiously." *Marks* at 201.

{¶23} The *Hamilton* court further noted that the trial court's discretion in deciding whether to certify a class must be exercised within the framework of Civ.R. 23. *Id.* The trial court is required to "carefully apply the class action requirements" and to conduct a "rigorous analysis" into whether the prerequisites for class certification under Civ.R. 23 have been satisfied. *Id.* *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, paragraph one of the syllabus.

Requirements for Class Action Certification

{¶24} In determining whether a class action is properly certified, the first step is to ascertain whether the threshold requirements of Civ.R. 23(A) have been met. Once those requirements are established, the trial court must turn to Civ.R. 23(B) to discern whether the purported class comports with the factors specified therein. Accordingly, before a class may be properly certified as a class action, the following seven prerequisites must be met: (1) an identifiable class must exist, and the definition of the class must be unambiguous; (2) the named

plaintiff representatives must be members of the class; (3) the class must be so numerous that joinder of all the members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representatives must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three requirements under Civ.R. 23(B) must be met. *Hamilton*, 82 Ohio St.3d at 71, 694 N.E.2d 442, citing Civ.R. 23(A) and (B); *Warner v. Waste Mgt. Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988). Of the Civ. R. 23(B) requirements, subsection (3) is applicable to the instant case. This section provides that a class action may be allowed if "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that class action is superior to other available methods for fairly and efficiently adjudicating the controversy." We note that the burden of establishing that a cause of action merits treatment as a class action rests on the party bringing the lawsuit. *State ex rel. Ogan v. Teater*, 54 Ohio St.2d 235, 247, 375 N.E.2d 1233 (1978), citing *Tolbert v. Western Elec. Co.*, 56 F.R.D. 108 (N.D.Ga. 1972); *McFarland v. Upjohn Co.*, 76 F.R.D. 29 (E.D.Pa. 1977).

{¶25} Here, Ameritech raises arguments similar to those it raised before the trial court. It argues that the class certification must be reversed because the class necessarily includes persons who were not injured; individualized issues predominate; Intermessage failed to establish harm and damages on a

class-wide basis; Intermessage cannot prove typicality; and a class action is not superior to other methods of adjudication. The trial court addressed these arguments and found in favor of Intermessage. We agree with the trial court.

{¶26} In its thoughtful and detailed opinion granting class action certification, the court wrote:

> Typicality: This case satisfies Civ.R. 23(A)(3), requiring that the claims or defenses of the representative parties are typical of the claims or defenses of the class. To satisfy this requirement, the claims of the named plaintiff "need not be identical" to those of other class members. [*PlannedParenthood Assn. v. Project Jericho*, 52 Ohio St.3d 56, 64, 556 N.E.2d 157].
>
> [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.
>
> *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 485, 2000-Ohio-397, 727 N.E.2d 1265 (2000), quoting Newberg on Class Actions (3 Ed.1992) Sec. 3.13 (internal quotation omitted). The purpose of typicality is to protect absent class members and promote economy of class action by ensuring the named plaintiffs' interests are substantially aligned with the class. Typicality is met where there is no express conflict between the class representatives and the class. *Hamilton*, [82 Ohio St.3d at 77, 694 N.E.2d 442].
>
> [Ameritech] argues [Intermessage] is uniquely atypical because it passed on the entire cost of cellular service it purchased to its customers. [Intermessage] was manufacturer and seller of backup panels for alarm systems. [Intermessage] purchased cellular service for the backup panels from [Ameritech], and then sold the panels to its customers. Thus, [Intermessage] did not suffer the overcharge

damages claimed by other class members.

However, this argument constitutes "passing-on" defense, rebutted by the well-established rule that an offense is complete at the time of injury, regardless of the victim's later acts in mitigation. [*Hanover Shoe, Inc., v. United Shoe Machine Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968)]. [Intermessage] purports that the class is comprised of retail purchasers of cellular service, rather than retail users. Additionally, merely because [Intermessage] passed on the overcharge to its customers does not establish conflict between [Intermessage] and the other class members.

The evidence of record shows [Intermessage's] claim against [Ameritech] arises from the same events, practices, and conduct that give rise to the claims of every other class member, and the claims of each class member are based on the same legal theory. [Intermessage] alleges the same unlawful conduct was directed at or affected the named [Intermessage] and every other member of the class. More importantly, there is no conflict, express or otherwise, between the named [Intermessage] and the class. The typicality criterion for class certification is satisfied in this action.

Adequacy: This case also satisfies Civ.R. 23(A)(4), requiring that the representative parties fairly and adequately protect the interests of the class. This requirement "is divided into consideration of the adequacy of the representatives and the adequacy of counsel." [*Warner*, 36 Ohio St.3d at 98, 521 N.E.2d 1091 (1988)]. [Ameritech] does not contest the adequacy of [Intermessage's] counsel to represent the class, but [Ameritech] does contend [Intermessage] is an inadequate class representative.

A named plaintiff is deemed adequate so long as his or her interest is not antagonistic to the interest of other class members. *Hamilton*, [82 Ohio St.3d at 77-78, 694 N.E.2d 442]; *Warner* [at 98]; *Marks*, [31 Ohio St.3d at 203, 509 N.E.2d 1249]. The evidence of record shows the interests of [Intermessage] are not antagonistic to the interests of any other member of the class. [Intermessage] was a retail subscriber and purchased service with an Ohio area code during the relevant time period. [Intermessage's] interest is compatible with the interest of other class members who were also retail subscribers.

[Ameritech] argues [Intermessage] is an inadequate class representative because [Intermessage] may be distracted by an arguable defense peculiar to it. Specifically, [Intermessage] is a dissolved corporation that failed to bring this matter as speedily as practicable to complete the winding up of its affairs as required by [R.C. 1701.88(D)]. [Intermessage] was voluntarily dissolved in March 2001 and brought the present action in December 2003. However, there is no strict rule requiring dissolved corporation to complete the winding up of its affairs by set date. Pursuant to [R.C. 1701.88(A)], a corporation may do such acts as are required to wind up its affairs and for this purpose the dissolved corporation shall continue as corporation for period of five years from the dissolution. [Intermessage] filed this lawsuit within three years of its dissolution. [Ameritech]'s argument has no merit.

Also, [Ameritech] now asserts [Intermessage] is an inadequate class representative because [Intermessage's] status as a dissolved corporation means it lacks standing to bring this claim. Standing involves the question of whether party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 17, 2012-Ohio-5017, 979 N.E.2d 1214. The standing argument is similar to [Ameritech's] argument that [Intermessage] failed to bring this matter as speedily as practicable to complete the winding up of its affairs as required by R.C. 1701.88(D). Both arguments invoke the Ohio statute dictating how a voluntarily dissolved corporation may bring lawsuit.

Under Ohio law, a dissolved corporation may bring lawsuit if it is brought as part of the company's winding up of its affairs. Under R.C. 1701.88(A), "when a corporation is dissolved voluntarily . . . the corporation shall cease to carry on business and shall do only such acts as are required to wind up its affairs * * * and for such purposes it shall continue as corporation for period of five years from the dissolution, expiration, or cancellation." Pursuant to [R.C. 1701.88(B)], the voluntary dissolution of corporation shall not eliminate any remedy available to the corporation prior to its dissolution if the corporation brings an action within the time limits otherwise permitted by law.

In this case, [Intermessage] was dissolved in March 2001 and filed

this lawsuit in December 2003. [Intermessage] seeks remedy arising from conduct which occurred between October 18, 1993 and September 8, 1995. The PUCO decision finding that [Ameritech] had engaged in price discrimination was released on January 18, 2001. Both [Ameritech's] alleged conduct and the PUCO decision occurred prior to the corporation's dissolution. There is no dispute the case was brought within the applicable statute of limitations. Accordingly, [Intermessage] is an adequate class representative and will not be distracted by an arguable defense peculiar to it.

* * *

[Intermessage] has satisfied the adequacy criterion for class certification.

Predominance: Questions of law and fact common to the members of the class must predominate over any questions affecting individual members. Predominance is met when there exists generalized evidence which proves or disproves an element on simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position. [*Baughman v. State Farm Mut. Auto Ins. Co.*, 88 Ohio St.3d 480, 489, 727 N.E.2d 1265 (2000).]

In determining whether common questions predominate, "the focus of the inquiry is directed toward the issue of liability." *Cicero v. U.S. Four, Inc.*, 10th Dist. Franklin No. 07AP-310, 2007-Ohio-6600, ¶ 38. The predominance requirement is satisfied where the questions of law or fact common to the class represent a significant aspect of the case and are able to be resolved for all members of the class in single adjudication. *Schmidt v. AVCO Corp.* 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984).

The central issue of this case is to what extent [Ameritech] is liable to [Intermessage] for [Ameritech's] wholesale price discrimination. In [the *Cellnet Order*,] the PUCO found [Ameritech] had engaged in unlawful discriminatory pricing practices. Under [R.C. 4905.61], a public utility which engages in price discrimination is liable to any person, firm, or corporation injured by such violation.

The issues presented by [Intermessage's R.C. 4905.61] claims are common to the proposed class — *e.g.*, whether [Ameritech's] conduct affected the market and proximately caused retail cellular prices to be artificially inflated; whether [Ameritech's] conduct prevented resellers from increasing their market share by lowering their prices; whether [Ameritech's] conduct prevented other resellers from entering the Ohio market; and whether and to what extent [Ameritech's] conduct proximately caused injury to the members of the class. These issues "represent significant aspect of the case" and are "able to be resolved for all members of the class in a single adjudication." *Schmidt*, [15 Ohio St.3d at 313, 473 N.E.2d 822]. All of the issues bearing upon [Ameritech's] liability are common to the class as whole. These issues can be adjudicated in single, class-wide trial and predominate over any individual issues that might remain.

[Intermessage's] expert Dr. Gale opined that without discriminatory pricing, resellers would have been more competitive, whether as group because there are more of them, or because particular reseller became more competitive, causing prices to decline. The price decline would have impacted all consumers. Gale Dep. at 67.

Dr. Gale further stated: "It is my opinion that the alleged acts by [Ameritech] had class-wide impact, and that there are feasible and widely-used methodologies for showing the impact through common proof." Report of John M. Gale ("Gale Report"), at p. 2. Dr. Gale identified one possible model for measuring damages the "McFadden/Woroch model" developed for the damages litigation arising from the PUCO determination[.] During this litigation, Dr. Gale assisted Professors McFadden and Woroch with "preparing an expert report which included damage estimate for Cellnet [aka Westside Cellular, the plaintiff in the PUCO case] based on standard model of competition and consumer demand well documented in the economics literature." Gale Report at p. 4.

Dr. Gale described the McFadden/Woroch model as follows: "[t]he damages model employed by Professors McFadden and Woroch estimated, for each year in each of seven Ohio SMSAs [Standard Metropolitan Statistical Areas], retail prices and sales for each of the two facilities-based cellular providers and Cellnet but for the

price discrimination. The model relied upon data for costs, revenues, subscribers, and prices provided by defendants and Cellnet. In addition, the model used estimates of consumer demand for wireless services published in the economics literature. The methodology did not vary across SMSAs and years. During the [Cellnet] litigation, variations of the damages model were introduced by one defendant's expert that included entry of multiple resellers at the non-discriminatory wholesale prices." Gale Report at p. 4. As explained by Dr. Gale, "[t]hese models, relied upon by both Cellnet's and defendant's experts demonstrate not only that model which shows class-wide impact is available, but that such model has already been developed and used." [*Id.*]

[Ameritech] argues the court must deny class certification because Dr. Gale does not propose definite method allocating damages among the proposed class. [Ameritech] challenges Dr. Gale's Report because, as Dr. Gale admits, he has never used the McFadden/Woroch model to determine class-wide impact and damages in this case. In fact, the model would have to be adapted to show class-wide impact across the retail market. Gale Dep. p. 69.

[Ameritech] relies principally on the United States Supreme Court's decision in [*Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013)]. [Ameritech] argues that *Comcast* stands for the proposition that [Intermessage] must provide damages model susceptible to measurement across the entire class in order to satisfy the predominance requirement. This reading of the *Comcast* holding is unduly broad.

* * *

Comcast was unusual because the plaintiff's damages model was disconnected from the plaintiff's theory of liability. Comcast is distinguished because in this case [Intermessage's] proposed theory of damages is consistent with its theory of liability. [Intermessage's] expert may not have an exact measure of damages, but as the *Comcast* court acknowledges, at this stage of class certification an exact measure is not required. *Id.*

The court need only probe the underlying merits of plaintiff's claim for the purposes of determining whether plaintiff has satisfied the prerequisites of class certification. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 242, 2013-Ohio-3019, 994 N.E.2d 408. [Intermessage] is pursuing this claim pursuant to [R.C. 4905.61], which allows person, firm or corporation injured by public utility's price discrimination to seek damages. The PUCO already determined that [Ameritech] engaged in price discrimination. [Intermessage] must prove injury in order to establish liability. Whether [Intermessage] can provide working damages model goes directly to the merits of [Intermessage's] claim. While class brought pursuant to [R.C. 2905.61] must prove damages to prevail on the merits, such proof is not prerequisite to class certification. Predominance "requires showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." [*Amgen Inc. v. Connecticut Retirement Plans Trust Funds*, 133 S.Ct. 1184, 1191, 185 L.Ed.2d 308 (2013).]

Moreover, [Intermessage] need not prove that each element of claim can be established by class-wide proof. The rule requires "that common questions *predominate* over any question affecting only individual class members." *Glazer v. Whirlpool Corp.* (*In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*), 722 F.3d 838, 860-61 (6th Cir.2013), quoting *Amgen* [at 1196] (internal quotation omitted) (emphasis in original). *Comcast* does not abrogate existing case law dictating that the court should not delve too deeply into the merits of plaintiff's claim at the class certification stage of the litigation. *Stammco*, 136 Ohio St.3d at 242. Moreover, "[w]hether mathematical formula could be used to calculate individual damages is irrelevant because the need to calculate damages individually, by itself, is not reason to deny class certification." *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, ¶ 21, (8th Dist.), jurisdictional motion overruled, 99 Ohio St.3d 1437 (8th Dist.2003).

* * *

[Intermessage's] claims in this case are common to the class. [Intermessage's] theory of liability consists of whether [Ameritech's] anti-competitive conduct affected the market and proximately

caused retail cellular prices to be artificially inflated. The damages theory is the difference between what retail customers actually paid for cellular service and what retail customers should have paid but-for [Ameritech's] anti-competitive conduct. Dr. Gale's report proposes a model that could be adapted to measure class-wide damages resulting from [Intermessage'] only theory of liability.

Although Dr. Gale does not provide an exact model for measuring damages, the court will have an opportunity through the factual development of the case to consider whether the damages formula can be established and utilized. Also, [Intermessage] will be subject to summary judgment if it is not able to establish damages model. Finally, the court may alter or amend its certification of the class at any time prior to final order. Civ. R. 23(C)(1)(c).

[Ameritech] additionally argues that determination of injury in fact would require an individual by individual review of each class member claim and that this fails the predominance requirement of class certification. In fact, Dr. Gale testified at his deposition "[i]f wanted to determine the damages to particular individual, would have to go and find out what they paid, would have to go and find out how they would choose among alternatives, and then would have to go and make prediction based on the alternatives that were available to them in the but-for world, which one of those alternatives they would choose. Then I could make an estimation of the damages for that individual." Gale Dep. at 104:2-10.

However, individualized damages are not fatal to class certification because predominance focuses on liability, rather than damages. *Ojalvo v. Board of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 232[, 466 N.E.2d 875] (1984). It is not necessary for a plaintiff to prove "that each element of claim can be established by classwide proof: What the rule does require is that common questions *predominate* over any questions affecting only individual class members." [*Glazer*, 722 F.3d at 858, quoting [*Amgen*, 133 S.Ct. at 1196], (internal quotation omitted) (emphasis in original).

To clarify, if common liability issues predominate over issues of individual liability or damages, then the predominance requirement is satisfied even though the actual damages may be individualized. Here, the issue of whether [Ameritech's] anti-competitive conduct

affected the market and proximately caused retail cellular prices to be artificially inflated is common to the class.

[Intermessage] has demonstrated that the common liability issues predominate over individual claims of class members and has satisfied the predominance requirement for class certification.

Superiority: Finally, this case satisfies the superiority requirement for class certification. The superiority criterion is satisfied where "the efficiency and economy of common adjudication outweigh the difficulties and complexity of individual treatment of class members claims." [*Warner*, 36 Ohio St.3d at 96, 521 N.E.2d 1091]. "[I]n determining whether class action is superior method of adjudication, the court must make comparative evaluation of the other processes available to determine whether class action is sufficiently effective to justify the expenditure of judicial time and energy involved therein." *Westgate Ford Truck Sales, Inc. v. FordMotor Co.*, 8th Dist. Cuyahoga No. 86596, 2007-Ohio-4013, ¶ 78, quoting [*Schmidt*, 15 Ohio St.3d at 313, 473 N.E.2d 822.] (internal quotations omitted). Class certification should be granted where "[r]epetitious adjudication of liability, utilizing the same evidence over and over, could be avoided." [*Marks*, 31 Ohio St.3d at 204, 509 N.E.2d 1249].

In the instant case, class certification will permit class-wide adjudication of all issues bearing upon [Ameritech's] liability. Without class certification, adjudication of class members claims would require tens of thousands of individual suits with concomitant duplications of costs, attorneys' fees, and demands upon court resources. *Ojalvo, supra*, 12 Ohio St.3d at 235 (a class action is "the ideal means of adjudicating in single proceeding what might otherwise become three thousand to six thousand separate administrative actions"). Similar benefits will accrue to [Ameritech] through avoidance of multiple suits and multiple jury determinations.

Moreover, if class members were required to pursue their claims individually, the potential for recovery likely would be outweighed by the cost of investigation, discovery, and expert testimony. Class certification overcomes the lack of incentive individuals would face in attempting to recover small amounts with individual actions. [*Hamilton*, 82 Ohio St.3d 67 at 80, 694 N.E.2d 442]. The

> aggregation of class members claims in class action will ensure there is "a forum for the vindication of rights" that is economical enough to pursue. *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 431, 1998-Ohio-405, 696 N.E.2d 1001, quoting *Hamilton* [at 80] (1998) (internal quotations omitted).
>
> Based on the whole of the parties' submissions and the evidence presented, class action is the most efficient means of adjudicating [Ameritech's] alleged liability and the damages allegedly caused to the proposed class members. A class action will avoid the repetitious adjudication of liability and is sufficiently effective as to justify the judicial time and energy involved. [Intermessage] has satisfied the superiority requirement for class certification.

{¶27} We agree with the detailed findings of the trial court. Intermessage has satisfied the predominance, typicality, superiority, and adequacy requirements for class certification. Intermessage's claim against Ameritech arises from the same events, practices, and conduct that give rise to the claims of every other class member, and the claims of each class member are based on the same legal theory. Furthermore, the PUCO has already determined that Ameritech engaged in price discrimination. In the instant case, Intermessage is pursuing its claim under R.C. 4905.61, which allows a corporation injured by public utility's price discrimination to seek damages. In support of its predominance contention, Ameritech's relies on *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.2d 1224 and *Ford Motor Credit v. Agrawal*, 8th Dist. Cuyahoga No. 103667, 2016-Ohio-5928, and argues that Intermessage did not suffer any injuries because it passed the costs on to its

customers.[2] The court found, and we agree, that the issue of whether Ameritech's anticompetitive conduct affected the market and proximately caused retail cellular prices to be artificially inflated is common to the class. If common liability issues predominate over issues of individual liability or damages, then the predominance requirement is satisfied even though the actual damages may be individualized.

{¶28} We are mindful that

> due deference must be given to the trial court's decision. A trial court that routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions. * * * A finding of abuse of discretion * * * should be made cautiously.

Marks, 31 Ohio St.3d at 201, 509 N.E.2d 1249.

{¶29} Here, the trial court presided over the instant case for over 13 years and concluded that Intermessage established the requirements to maintain a class action under Civ.R. 23. In doing so, the trial court conducted a 19-page analysis into whether the prerequisites for class certification under Civ.R. 23 have been satisfied. Cognizant of the fact that a class-action certification does not go to the merits of the action, the trial court acknowledged that it will have

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[2]*Felix* and *Ford Motor Credit* stand for the proposition that all class members must be in fact injured by defendant's actions. *Felix* was an Ohio Sales Consumer Practices Act ("OSCPA") case that carried an extra burden of proof for the plaintiff. In *Ford Motor Credit*, this court found that individualized inquiry is necessary to determine injury. *Id.* at ¶ 30. These cases are factually distinguishable as the instant case does not involve the OSCPA and the record demonstrates an injury to all class members.

an opportunity to consider whether damages can be established, summary judgment is possible if Intermessage is not able to establish damages, and the court's ability to alter or amend its certification of the class at any time prior to final order.

{¶30} Therefore, based on the foregoing, we find that the trial court did not abuse its discretion in certifying the class in the instant case.

{¶31} The sole assignment of error is overruled.

{¶32} Accordingly, judgment is affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FILED AND JOURNALIZED
PER APP.R. 22(C)

MARY EILEEN KILBANE, JUDGE

MAR 1 6 2017

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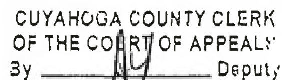
By  Deputy

KATHLEEN ANN KEOUGH, A.J., and
ANITA LASTER MAYS, J., CONCUR

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CINDY SATTERFIELD, ET AL
Plaintiff

AMERITECH MOBILE COMMUNICATIONS, INC., ET AL
Defendant

Case No: CV-03-517318

Judge: JOSE` A VILLANUEVA

JOURNAL ENTRY

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IS GRANTED.

O.S.J.

2/9/2016

Judge Signature Date

02/09/2016

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Cindy Satterfield, etc., Dismissed Plaintiff, and INTERMESSAGE COMMUNICATIONS, Remaining Plaintiff, on behalf of Itself and All Other Persons Similarly Situated vs. Ameritech Mobile Communications, Dismissed Defendant, *et al.*, and CINCINNATI SMSA LIMITED PARTNERSHIP, Remaining Defendant.	))))))))))))))))	CASE NO. CV-03-517318 JUDGE JOSE A. VILLANUEVA **ORDER GRANTING CLASS CERTIFICATION**

José A. Villanueva, J.:

This case comes before the court on plaintiff Intermessage Communications' Motion for Class Certification against Cincinnati SMSA Limited Partnership. Plaintiff seeks to certify this action as a class under Civ. R. 23 on behalf of "all retail subscribers of Cincinnati SMSA Limited Partnership who purchased service with an Ohio area code during the period October 18, 1993 through September 8, 1995."[1]

The parties have briefed the issues and the court has considered all arguments. For the following reasons, the court grants plaintiff's Motion for Class Certification.

[1] Ohio Civil Rule 23 was amended effective July 1, 2015. The prior iteration of Civ. R. 23 is substantively identical such that the case law interpreting and applying the earlier provisions of those sections and the parties' prior submissions on class certification can be considered pursuant to the amended Civ. R. 23.

RELEVANT FACTS

Plaintiff claims it was damaged by defendant's unlawful price discrimination and violations of the Public Utilities Commission of Ohio (hereinafter "PUCO"). Plaintiff brings this suit pursuant to R.C. § 4905.61.

This case originates from a 2001 PUCO decision, *Westside Cellular, Inc. d/b/a/ Cellnet v. GTE Mobilnet et al.,* PUCO Case No. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 18. The PUCO case was initiated by Cellnet against several wholesale cellular providers in Ohio, including defendant. The 2001 PUCO decision found that defendant, dba Ameritech Mobile, committed numerous acts prohibited by R.C. § 4905 and the wrongdoing commenced October 18, 1993.

Specifically, PUCO found defendant in violation of the PUCO's order regarding the separation of defendant's wholesale and retail operations. Defendant's practice of establishing wholesale rates for nonaffiliated carriers by first consulting with its retail employees relative to the potential impact on its retail business violated PUCO's order requiring nondiscriminatory treatment of nonaffiliated wholesale customers.

Plaintiff's theory of liability is that Ohio retail cellular customers paid higher prices due to defendant's wholesale price discrimination. Under R.C. § 4905.61, if a public utility violates any act prohibited by R.C. § 4905, such public utility is liable to the person injured thereby in treble damages. Plaintiff now seeks class certification. Plaintiff defines the class as "all retail subscribers of Cincinnati SMSA Limited Partnership who purchased service with an Ohio area code during the period October 18, 1993 through September 8, 1995."

CLASS ACTION STANDARD OF REVIEW AND ANALYSIS

In considering a motion to certify a class, a trial court must assume the truth of the allegations in the complaint. Any doubts a trial court may have as to whether the elements of the class certification have been met should be resolved in favor of upholding the class. *Nagel v. Huntington Nat'l Bank*, 179 Ohio App. 3d 126, 131, 2008-Ohio-5741, ¶ 10, 900 N.E.2d 1060 (8th Dist.), quoting *Rimedio v. Summacare*, 172 Ohio App.3d 639, 644, 2007-Ohio-3244, 876 N.E.2d 986 (9th Dist.); *Baughman v. State Farm Mut. Ins. Co.*, 88 Ohio St.3d 480, 487, 2000-Ohio-397, 727 N.E.2d 1265.

Compliance with Civ. R. 23 cannot be presumed from allegations in a complaint. *Cullen v. State Farm Mut. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 34. Rather, "the analysis requires the court to resolve factual disputes relative to each requirement and to find, based upon those determinations, other relevant facts, and the applicable legal standard, that the requirement is met." *Id.* at ¶ 16. However, "[t]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1191, 185 L.Ed.2d 308 (2013).

"Pursuant to Civ. R. 23, plaintiffs must establish seven prerequisites in order to certify a class action: (1) an identifiable and unambiguous class must exist, (2) the named representatives of the class must be class members, (3) the class must be so numerous that joinder of all members of the class is impractical, (4) there must be questions of law or fact that are common to the class, (5) the claims or defenses of the representative parties must be typical of the claims and defenses of the members of the class, (6) the representative parties must fairly and adequately protect the interests of the class, and (7) one of the three requirements of Civ. R.

23(B) must be satisfied." *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 19, citing *Warner v. Waste Mgmt., Inc.*, 36 Ohio St.3d 91, 94-96, 521 N.E.2d 1091 (1988).

Of the Civ. R. 23(B) requirements, only subsection (3) is applicable to the case at hand. This provision states that a class action may be allowed if the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[2]

"The burden of establishing that a cause of action merits treatment as a class action rests squarely on the party bringing suit." *State, ex rel. Ogan v. Teater*, 54 Ohio St.2d 235, 247, 375 N.E.2d 1233 (1978). That burden is satisfied by a preponderance of the evidence. *E.g.*, *Warner, supra,* 36 Ohio St.3d at 94; *accord, Cullen v. State Farm Mut. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 15.

It is the court's duty to conduct a rigorous analysis when determining whether to certify a class pursuant to Civ. R. 23. *Cullen*, 137 Ohio St.3d at 379. This rigorous analysis requires the court to resolve factual disputes relative to each requirement and to find, based upon those determinations, other relevant facts, and the applicable legal standard, that the requirement is met. *Id.* Although the court should not conduct a trial on the merits as part of a class action certification analysis, deciding whether a claimant meets the burden for class certification requires the court to consider what will have to be proved at trial and whether those matters can be presented by common proof. *Id.*

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[2] For this analysis the court should consider (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action.

Defendant does not challenge plaintiff's ability to prove the first four criteria of class certification: identifiability, membership, numerosity, and commonality. Defendant argues plaintiff cannot satisfy its burden for class certification with respect to the typicality, adequacy, predominance, and superiority requirements of Civ. R. 23. In conducting its rigorous analysis, the court considers all criteria for class certification.

Identifiability: This case satisfies Civ. R. 23(A)(1), requiring that an identifiable and unambiguous class exist. The identifiability criterion for class certification simply means that the definition of the class must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 71-72, 1998-Ohio-365, 694 N.E.2d 442 (1998). It is required that the class definition be precise enough "to permit identification within a reasonable effort." *Id.* at 72. "Civ[il] R[ule] 23 does not require a class certification to identify the specific individuals who are members so long as the certification provides a means to identify such persons." *Planned Parenthood Ass'n v. Project Jericho*, 52 Ohio St.3d 56, 63, 556 N.E.2d 157 (1990). "The fact that members may be added or dropped during the course of the action is not controlling. The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class." *Id.*

Plaintiff's motion seeks certification of a class defined as "all retail subscribers of Cincinnati SMSA Limited Partnership who purchased service with an Ohio area code during the period October 18, 1993 through September 8, 1995." The evidence of record shows whether an individual is, or is not, a member of the class can be objectively determined either from defendant's own records or from the documents and information supplied by the putative class member. The definition of the class is sufficiently precise that the court can readily determine

"whether a particular individual is a member of the class." *Hamilton, supra*, 82 Ohio St.3d at 73. The identifiability criterion for class certification is satisfied in this action.

Membership: This case satisfies Civ. R. 23(A)(1), requiring that the named plaintiff be a member of the class as defined. The evidence of record shows plaintiff was a retail subscriber of defendant Cincinnati SMSA Limited Partnership (doing business under its trade name of Ameritech Mobile), which purchased service with an Ohio area code during the period October 18, 1993 through September 8, 1995, and, therefore, during the class period. Thus, the named plaintiff and proposed class representative is a member of the class as defined and, therefore, the membership criterion for class certification is satisfied in this action.

Numerosity: This case satisfies Civ. R. 23(A)(1), requiring that the class be so numerous that joinder of all members is impracticable. "The rule itself does not specify the minimum class size which will render joinder impracticable." *Vinci v. Am. Can Co.*, 9 Ohio St.3d 98, 99, 459 N.E.2d 507 (1984). However, "subclasses have been certified with as few as twenty-three members." *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 202, 509 N.E.2d 1249 (1987). Generally, "[i]f the class has more than forty people in it, numerosity is satisfied." *Warner v. Waste Mgmt., Inc.*, 36 Ohio St.3d 91, 97, 521 N.E.2d 1091 (1988).

In this case, the class would encompass all retail subscribers of Cincinnati SMSA who purchased service with an Ohio area code during a two-year period.

Commonality: This case satisfies Civ. R. 23(A)(2), requiring that there be questions of law or fact common to the class. Commonality does not "demand that all the questions of law or fact raised in the dispute be common to all the parties." *Marks, supra*, 31 Ohio St.3d at 202. So long as there is a common issue of law or of fact, the commonality criterion is satisfied. *Warner, supra,* 36 Ohio St.3d at 97. Civil Rule 23(A)(2) "clearly does not require commonality with

respect to damages but merely that the basis for liability is a common factor for all class members." *Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 235, 466 N.E.2d 875 (1984). In the instant case, virtually all the issues presented by the named plaintiff are common to the class.

Typicality: This case satisfies Civ. R. 23(A)(3), requiring that the claims or defenses of the representative parties are typical of the claims or defenses of the class. To satisfy this requirement, the claims of the named plaintiff "need not be identical" to those of other class members. *Planned Parenthood, supra*, 52 Ohio St.3d at 64.

> [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.

Baughman v. State Farm Mut. Auto. Ins. Co., 88 Ohio St.3d 480, 485, 2000-Ohio-397, 727 N.E.2d 1265 (2000), quoting 1 Newberg on Class Actions (3 Ed.1992) Sec. 3.13 (internal quotation omitted). The purpose of typicality is to protect absent class members and promote economy of class action by ensuring the named plaintiffs' interests are substantially aligned with the class. Typicality is met where there is no express conflict between the class representatives and the class. *Hamilton, supra*, 82 Ohio St.3d at 77.

Defendant argues plaintiff is uniquely atypical because it passed on the entire cost of cellular service it purchased to its customers. Plaintiff was a manufacturer and seller of backup panels for alarm systems. Plaintiff purchased cellular service for the backup panels from defendant, and then sold the panels to its customers. Thus, plaintiff did not suffer the overcharge damages claimed by other class members.

However, this argument constitutes a "passing-on" defense, rebutted by the well-established rule that an offense is complete at the time of injury, regardless of the victim's later acts in mitigation. *Hanover Shoe, Inc., v. Onited Shoe Machine Corp.*, 392 U.S. 481 (1968). Plaintiff purports that the class is comprised of retail *purchasers* of cellular service, rather than retail *users*. Additionally, merely because plaintiff passed on the overcharge to its customers does not establish a conflict between plaintiff and the other class members.

The evidence of record shows plaintiff's claim against defendant arises from the same events, practices, and conduct that give rise to the claims of every other class member, and the claims of each class member are based on the same legal theory. Plaintiff alleges the same unlawful conduct was directed at or affected the named plaintiff and every other member of the class. More importantly, there is no conflict, express or otherwise, between the named plaintiff and the class. The typicality criterion for class certification is satisfied in this action.

Adequacy: This case also satisfies Civ. R. 23(A)(4), requiring that the representative parties fairly and adequately protect the interests of the class. This requirement "is divided into a consideration of the adequacy of the representatives and the adequacy of counsel." *Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 98, 521 N.E.2d 1091 (1988). Defendant does not contest the adequacy of plaintiff's counsel to represent the class, but defendant does contend plaintiff is an inadequate class representative.

A named plaintiff is deemed adequate so long as his or her interest is not antagonistic to the interest of other class members. *Hamilton, supra*, 82 Ohio St.3d at 77–78; *Warner, supra*, 36 Ohio St.3d at 98; *Marks, supra*, 31 Ohio St.3d at 203. The evidence of record shows the interests of plaintiff are not antagonistic to the interests of any other member of the class. Plaintiff was a retail subscriber and purchased service with an Ohio area code during the relevant

time period. Plaintiff's interest is compatible with the interest of other class members who were also retail subscribers.

Defendant argues plaintiff is an inadequate class representative because plaintiff may be distracted by an arguable defense peculiar to it. Specifically, plaintiff is a dissolved corporation that failed to bring this matter as speedily as practicable to complete the winding up of its affairs as required by R.C. § 1701.88(D). Plaintiff was voluntarily dissolved in March 2001 and brought the present action in December 2003. However, there is no strict rule requiring a dissolved corporation to complete the winding up of its affairs by a set date. Pursuant to R.C. § 1701.88(A), a corporation may do such acts as are required to wind up its affairs and for this purpose the dissolved corporation shall continue as a corporation for a period of five years from the dissolution. Plaintiff filed this lawsuit within three years of its dissolution. The defendant's argument has no merit.

Also, defendant now asserts plaintiff is an inadequate class representative because plaintiff's status as a dissolved corporation means it lacks standing to bring this claim. Standing involves the question of whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 17, 2012-Ohio-5017, 979 N.E.2d 1214. The standing argument is similar to defendant's argument that plaintiff failed to bring this matter as speedily as practicable to complete the winding up of its affairs as required by R.C. § 1701.88(D). Both arguments invoke the Ohio statute dictating how a voluntarily dissolved corporation may bring a lawsuit.

Under Ohio law, a dissolved corporation may bring a lawsuit if it is brought as part of the company's winding up of its affairs. Under R.C. § 1701.88(A), "when a corporation is dissolved

voluntarily . . . the corporation shall cease to carry on business and shall do only such acts as are required to wind up its affairs . . . and for such purposes it shall continue as a corporation for a period of five years from the dissolution, expiration, or cancellation." Pursuant to R.C. § 1701.88(B), the voluntary dissolution of a corporation shall not eliminate any remedy available to the corporation prior to its dissolution if the corporation brings an action within the time limits otherwise permitted by law.

In this case, plaintiff was dissolved in March 2001 and filed this lawsuit in December 2003. Plaintiff seeks a remedy arising from conduct which occurred between October 18, 1993 and September 8, 1995. The PUCO decision finding that defendant had engaged in price discrimination was released on January 18, 2001. Both the defendant's alleged conduct and the PUCO decision occurred prior to the corporation's dissolution. There is no dispute the case was brought within the applicable statute of limitations. Accordingly, plaintiff is an adequate class representative and will not be distracted by an arguable defense peculiar to it.

The named-plaintiff portion of the adequacy criterion for class certification has become of lesser importance than the attorney portion of the criterion. *Unifund CCR Partners v. Young*, 7th Dist. Mahoning No. 11-MA-113, 2013-Ohio-4322, ¶ 51; *accord, Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86596, 2007-Ohio-4013, ¶ 69. The evidence presented, including the affidavits of plaintiff's proposed co-lead counsel Thomas Theado, Randy Hart, and Mark Griffin, demonstrates that these attorneys have the expertise to adequately represent the interests of the class. Plaintiff has satisfied the adequacy criterion for class certification.

Predominance: Questions of law and fact common to the members of the class must predominate over any questions affecting individual members. Predominance is met when there

exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position. *Baughman v. State Farm Mus. Automobile Ins. Co.*, 88 Ohio St. 3d 480, 489 (2000).

In determining whether common questions predominate, "the focus of the inquiry is directed toward the issue of liability." *Cicero v. U.S. Four, Inc.*, 10th Dist. Franklin No. 07AP-310, 2007-Ohio-6600, ¶ 38. The predominance requirement is satisfied where the questions of law or fact common to the class represent a significant aspect of the case and are able to be resolved for all members of the class in a single adjudication. *Schmidt v. AVCO Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984).

The central issue of this case is to what extent defendant is liable to plaintiff for defendant's wholesale price discrimination. In *Westside Cellular, Inc. v. GTE Mobilnet, et al.*, Case No. 93-1758-RC-CSS,[3] the PUCO found defendant had engaged in unlawful discriminatory pricing practices. Under R.C. § 4905.61, a public utility which engages in price discrimination is liable to any person, firm, or corporation injured by such violation.

The issues presented by plaintiff's R.C. § 4905.61 claims are common to the proposed class – *e.g.*, whether defendant's conduct affected the market and proximately caused retail cellular prices to be artificially inflated; whether defendant's conduct prevented resellers from increasing their market share by lowering their prices; whether defendant's conduct prevented other resellers from entering the Ohio market; and whether and to what extent defendant's conduct proximately caused injury to the members of the class. These issues "represent a significant aspect of the case" and are "able to be resolved for all members of the class in a single

[3] Affirmed by the Ohio Supreme Court in *Westside Cellular Inc. v. Pub. Util. Comm.*, 98 Ohio St.3d 165, 2002-Ohio-7119, 781 N.E.2d 199, and in *Cincinnati SMSA L.P. v. Pub. Util. Comm.*, 98 Ohio St.3d 282, 2002-Ohio-7235, 781 N.E.2d 1012.

adjudication." *Schmidt, supra*, 15 Ohio St.3d at 313. All of the issues bearing upon defendant's liability are common to the class as a whole. These issues can be adjudicated in a single, class-wide trial and predominate over any individual issues that might remain.

Plaintiff's expert Dr. Gale opined that without discriminatory pricing, resellers would have been more competitive, whether as a group because there are more of them, or because a particular reseller became more competitive, causing prices to decline. The price decline would have impacted all consumers. Gale Dep. at 67.

Dr. Gale further stated: "It is my opinion that the alleged acts by defendants had a class-wide impact, and that there are feasible and widely-used methodologies for showing the impact through common proof." Report of John M. Gale ("Gale Report"), at p. 2. Dr. Gale identified one possible model for measuring damages – the "McFadden/Woroch model" developed for the damages litigation arising from the PUCO determination.[4] During this litigation, Dr. Gale assisted Professors McFadden and Woroch with "preparing an expert report which included a damage estimate for Cellnet [aka Westside Cellular, the plaintiff in the PUCO case] based on a standard model of competition and consumer demand well documented in the economics literature." Gale Report at p. 4.

Dr. Gale described the McFadden/Woroch model as follows: "[t]he damages model employed by Professors McFadden and Woroch estimated, for each year in each of seven Ohio SMSAs [Standard Metropolitan Statistical Areas], retail prices and sales for each of the two facilities-based cellular providers and Cellnet but for the price discrimination. The model relied upon data for costs, revenues, subscribers, and prices provided by defendants and Cellnet. In addition, the model used estimates of consumer demand for wireless services published in the

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[4] *Westside Cellular, Inc. d/b/a/ Cellnet v. GTE Mobilnet et al.*, PUCO Case No. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 18.

economics literature. The methodology did not vary across SMSAs and years. During the [Cellnet] litigation, variations of the damages model were introduced by one defendant's expert that included entry of multiple resellers at the non-discriminatory wholesale prices." Gale Report at p. 4. As explained by Dr. Gale, "[t]hese models, relied upon by both Cellnet's and defendants' experts demonstrate not only that a model which shows class-wide impact is available, but that such a model has already been developed and used." *Id*

Defendant argues the court must deny class certification because Dr. Gale does not propose a definite method allocating damages among the proposed class. Defendant challenges Dr. Gale's Report because, as Dr. Gale admits, he has never used the McFadden/Woroch model to determine class-wide impact and damages in this case. In fact, the model would have to be adapted to show class-wide impact across the retail market. Gale Dep. p. 69.

Defendant relies principally on the United States Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013). Defendant argues that *Comcast* stands for the proposition that a plaintiff must provide a damages model susceptible to measurement across the entire class in order to satisfy the predominance requirement. This reading of the *Comcast* holding is unduly broad.

In *Comcast*, the plaintiffs filed a class action lawsuit alleging Comcast had engaged in a "clustering" scheme through unlawful swap agreements to monopolize cable services in the Philadelphia cluster, and that this conduct injured Comcast's subscribers by eliminating competition and holding prices for cable services above competitive levels. The District Court found only one of the plaintiffs' four theories of injuries was susceptible to class-wide proof and certified the class on that basis. However, the plaintiffs' expert model was not created to measure damages resulting from the only theory of injury remaining. The Supreme Court reversed class

certification because although "calculations of damages need not be exact" at the class certification stage, any model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. *Comcast Corp.*, *supra*, 133 S.Ct. at 1433.

Comcast was unusual because the plaintiff's damages model was disconnected from the plaintiff's theory of liability. *Comcast* is distinguished because in this case plaintiff's proposed theory of damages is consistent with its theory of liability. Plaintiff's expert may not have an exact measure of damages, but as the *Comcast* court acknowledges, at this stage of class certification an exact measure is not required. *Id.*

The court need only probe the underlying merits of plaintiff's claim for the purposes of determining whether plaintiff has satisfied the prerequisites of class certification. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St. 3d 231, 242, 2013-Ohio-3019, 994 N.E.2d 408. Plaintiff is pursuing this claim pursuant to R.C. § 4905.61, which allows a person, firm or corporation injured by a public utility's price discrimination to seek damages. The PUCO already determined that defendant engaged in price discrimination. Plaintiff must prove injury in order to establish liability. Whether plaintiff can provide a working damages model goes directly to the merits of plaintiff's claim. While a class brought pursuant to R.C. § 2905.61 must prove damages to prevail on the merits, such proof is not a prerequisite to class certification. Predominance "requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

Moreover, a plaintiff need not prove that each element of a claim can be established by class-wide proof. The rule requires "that common questions *predominate* over any question

affecting only individual class members." *Glazer v. Whirlpool Corp.* (*In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*), 722 F.3d 838, 860–61 (6th Cir. 2013), quoting *Amgen, supra*, 133 S. Ct. at 1196 (internal quotation omitted) (emphasis in original). *Comcast* does not abrogate existing case law dictating that the court should not delve too deeply into the merits of plaintiff's claim at the class certification stage of the litigation. *Stammco,* 136 Ohio St. 3d at 242. Moreover, "[w]hether a mathematical formula could be used to calculate individual damages is irrelevant because the need to calculate damages individually, by itself, is not a reason to deny class certification." *Hoang v. E*Trade Group, Inc.,* 151 Ohio App. 3d 363, 2003-Ohio-301, ¶ 21, (8th Dist. 2003), *jurisdictional motion overruled*, 99 Ohio St. 3d 1437 (8th Dist. 2003).

The court disagrees with defendant's assertion that *Comcast* stands for the proposition that a plaintiff is required to demonstrate an exact measure of damages at the time of class certification in order to meet the predominance requirement. In fact, several District Courts have limited the scope of *Comcast*. In *Glazer v. Whirlpool Corp.*, the Sixth Circuit concluded that *Comcast* was "premised on existing class-action jurisprudence" and that "it remained the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members." *Glazer, supra,* 722 F.3d at 860–61. In *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015), the Second Circuit found that "*Comcast*, then, did not hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis . . . the Court did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance." Finally, *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th

Cir. 2013), held upon remand in light of *Comcast*, that "the fact that damages are not identical across all class members should not preclude class certification."

Plaintiff's claims in this case are common to the class. Plaintiff's theory of liability consists of whether defendant's anti-competitive conduct affected the market and proximately caused retail cellular prices to be artificially inflated. The damages theory is the difference between what retail customers actually paid for cellular service and what retail customers should have paid but-for defendant's anti-competitive conduct. Dr. Gale's report proposes a model that could be adapted to measure class-wide damages resulting from plaintiff's only theory of liability.

Although Dr. Gale does not provide an exact model for measuring damages, the court will have an opportunity through the factual development of the case to consider whether the damages formula can be established and utilized. Also, plaintiff will be subject to summary judgment if it is not able to establish a damages model. Finally, the court may alter or amend its certification of the class at any time prior to a final order. Civ. R. 23(C)(1)(c).

Defendant additionally argues that a determination of injury in fact would require an individual by individual review of each class member's claim and that this fails the predominance requirement of class certification. In fact, Dr. Gale testified at his deposition "[i]f I wanted to determine the damages to a particular individual, I would have to go and find out what they paid, I would have to go and find out how they would choose among alternatives, and then I would have to go and make a prediction based on the alternatives that were available to them in the but-for world, which one of those alternatives they would choose. Then I could make an estimation of the damages for that individual." Gale Dep. at 104:2-10.

However, individualized damages are not fatal to class certification because predominance focuses on liability, rather than damages. *Ojalvo v. Board of Trustees of Ohio State University*, 12 Ohio St. 3d 230, 232 & n.1 (1984). It is not necessary for a plaintiff to prove "that each element of a claim can be established by classwide proof: What the rule does require is that common questions *predominate* over any questions affecting only individual class members." *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 858 (6th Cir. 2013), quoting *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (internal quotation omitted) (emphasis in original).

To clarify, if common liability issues predominate over issues of individual liability or damages, then the predominance requirement is satisfied even though the actual damages may be individualized. Here, the issue of whether defendant's anti-competitive conduct affected the market and proximately caused retail cellular prices to be artificially inflated is common to the class.

Plaintiff has demonstrated that the common liability issues predominate over individual claims of class members and has satisfied the predominance requirement for class certification.

Superiority: Finally, this case satisfies the superiority requirement for class certification. The superiority criterion is satisfied where "the efficiency and economy of common adjudication outweigh the difficulties and complexity of individual treatment of class members' claims." *Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988). "[I]n determining whether a class action is a superior method of adjudication, the court must make a comparative evaluation of the other processes available to determine whether a class action is sufficiently effective to justify the expenditure of judicial time and energy involved therein." *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86596, 2007-Ohio-

4013, ¶ 78, quoting *Schmidt v. AVCO Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984) (internal quotations omitted). Class certification should be granted where "[r]epetitious adjudication of liability, utilizing the same evidence over and over, could be avoided." *Marks v. C.P. Chemical Co.*, 31 Ohio St.3d 200, 204, 509 N.E.2d 1249 (1987).

In the instant case, class certification will permit class-wide adjudication of all issues bearing upon defendant's liability. Without class certification, adjudication of class members' claims would require tens of thousands of individual suits with concomitant duplications of costs, attorneys' fees, and demands upon court resources. *Ojalvo*, *supra*, 12 Ohio St.3d at 235 (a class action is "the ideal means of adjudicating in a single proceeding what might otherwise become three thousand to six thousand separate administrative actions"). Similar benefits will accrue to defendant through avoidance of multiple suits and multiple jury determinations.

Moreover, if class members were required to pursue their claims individually, the potential for recovery likely would be outweighed by the cost of investigation, discovery, and expert testimony. Class certification overcomes the lack of incentive individuals would face in attempting to recover small amounts with individual actions. *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 80, 694 N.E.2d 442 (1998). The aggregation of class members' claims in a class action will ensure there is "a forum for the vindication of rights" that is economical enough to pursue. *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 431, 1998-Ohio-405, 696 N.E.2d 1001, quoting *Hamilton*, *supra*, 82 Ohio St.3d at 80 (1998) (internal quotations omitted).

Based on the whole of the parties' submissions and the evidence presented, a class action is the most efficient means of adjudicating the defendant's alleged liability and the damages allegedly caused to the proposed class members. A class action will avoid the repetitious

adjudication of liability and is sufficiently effective as to justify the judicial time and energy involved. Plaintiff has satisfied the superiority requirement for class certification.

CONCLUSION

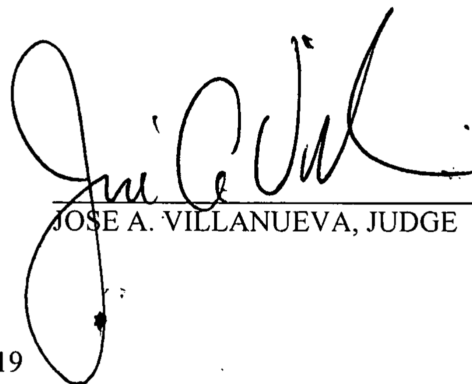
The court grants plaintiff's Motion for Class Certification and certifies this case as a class action pursuant to Civ. R. 23(A) and (B)(3) on behalf of "all retail subscribers of Cincinnati SMSA Limited Partnership who purchased service with an Ohio area code within geographic areas in which the PUCO decision found wholesale price discrimination during the period October 18, 1993 through September 8, 1995," on all the remaining claims, issues, and defenses presented in this action.

The court approves the named plaintiff, Intermessage Communications, as class representative.

The court finds Hahn Loeser & Parks LLP by Dennis Rose, Randy J. Hart LLP by Randy J. Hart, the Law Offices of Mark Griffin by Mark D. Griffin, and Gary, Naegele & Theado LLC by Thomas R. Theado, are adequate to serve as co-lead class counsel as required under Civ. R. 23(F)(1) and (4) as required by Civ. R. 23(F)(2).

The court will withhold issuing further orders in this matter consequent to class certification pending appeal pursuant to R.C. § 2505.02(B)(5).

IT IS SO ORDERED.



JOSE A. VILLANUEVA, JUDGE

DATE: February 9, 2016

CERTIFICATE OF SERVICE

A copy of the court's **Opinion and Order Granting Plaintiff's Motion for Class Certification** has been sent this 9th Day of February, 2016 to the following:

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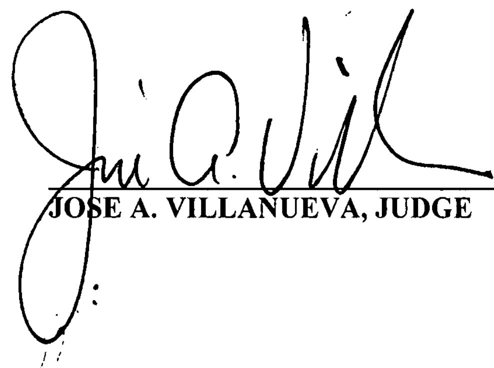

JOSE A. VILLANUEVA, JUDGE

41456950

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CINDY SATTERFIELD, ET AL
Plaintiff

AMERITECH MOBILE COMMUNICATIONS, INC., ET AL
Defendant

Case No: CV-03-517318

Judge: JOSE` A VILLANUEVA

JOURNAL ENTRY

DEFENDANTS AMERITECH MOBILE COMMUNICATIONS, LLC AND CINCINNATI SMSA LIMITED PARTNERSHIP'S 05/30/2006 MOTION FOR JUDGMENT ON THE PLEADINGS IS DENIED.

Judge Signature   Date 9-29-06

RECEIVED FOR FILING
OCT 03 2006
GERALD E. FUERST, CLERK
BY ______ DEP.

PROCESSED
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GERALD E. FUERST, CLERK
IMAGING DEPARTMENT

09/21/2006   VOL 3683 PG 0872

Baldwin's Ohio Revised Code Annotated
Title XLIX. Public Utilities
Chapter 4905. Public Utilities Commission--General Powers (Refs & Annos)
Forfeitures and General Provisions

R.C. § 4905.61

4905.61 Treble damages

Effective: September 13, 2010
Currentness

If any public utility or railroad does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code, or declared to be unlawful, or omits to do any act or thing required by the provisions of those chapters, or by order of the public utilities commission, the public utility or railroad is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of the violation, failure, or omission. Any recovery under this section does not affect a recovery by the state for any penalty provided for in the chapters.

CREDIT(S)

(2010 S 162, eff. 9-13-10; 1953 H 1, eff. 10-1-53; GC 614-68)

Notes of Decisions (33)

R.C. § 4905.61, OH ST § 4905.61
Current through File 51 of the 132nd General Assembly (2017-2018) and 2017 State Issue 1.

End of Document

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sive of Sundays and the day said bill was presented, and was filed in the office of the secretary of state, April 16, 1906.

LEWIS B. HOUCK,
Secretary to the Governor.
175G

[House Bill No. 78.]

AN ACT

To regulate railroads and other common carriers in this state, create a board of railroad commissioners, prevent the imposition of unreasonable rates, prevent unjust discriminations and insure an adequate railway service.

Be it enacted by the General Assembly of the State of Ohio:

Railroad commission; appointment, number and term of members.

SECTION 1. A railroad commission is hereby created to be composed of three commissioners. Within sixty days after the passage of this act the governor shall, by and with the advice and consent of the senate, appoint such commissioners, but no commissioner so appointed shall be qualified to act until so confirmed, unless appointed during the adjournment of said senate. The term of one such appointee shall terminate on the first Monday in February, 1909; the term of the second such appointee shall terminate on the first Monday in February, 1911; and the term of the third such appointee shall terminate on the first Monday in February, 1913. In January, 1909, and biennially thereafter, there shall be appointed and confirmed, in the same manner, one commissioner for the term of six years from the first Monday in February of such year. Each commissioner so appointed shall hold his office until his successor is appointed and qualified.

Vacancies.

Any vacancy shall be filled by appointment by the governor for the unexpired term, subject to confirmation of the senate, but any such appointment shall be in full force until acted upon by the senate.

Qualifications of commissioners.

a. The said commissioners shall have the following qualifications: One shall have a general knowledge of railroad law; each of the others shall have a general understanding of matters relating to railroad transportation, but at no time shall there be more than two of said commissioners members of the same political party.

Removals.

b. The governor may at any time remove any commissioner for any inefficiency, neglect of duty, or malfeasance in office. Before such removal he shall give such commissioner a copy of the charges against him and shall fix a time when he can be heard in his own defense, which shall be not less than ten days thereafter and said hearing shall be open to the public. If he shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner and his findings thereon with the record of the proceedings.

c. No person so appointed shall be pecuniarily interested in any railroad in this state or elsewhere, and if any such commissioner shall voluntarily become so interested, his office shall ipso facto become vacant; and if he shall become so interested otherwise than voluntarily he shall within a reasonable time divest himself of such interest; failing so to do, his office shall become vacant, and the governor shall proceed as provided for in section 1*b* of this act.

Additional qualification; effect of disqualification.

d. No commissioner, nor the secretary, shall hold any other office or position of profit, or pursue any other business or vocation, or serve on or under any committee of any political party, but shall devote his entire time to the duties of his office.

Commissioners shall devote entire time to duties of office.

e. Before entering upon the duties of his office, each of said commissioners shall take and subscribe the constitutional oath of office, and shall in addition thereto swear (or affirm) that he is not pecuniarily interested in any railroad in this state or elsewhere, and that he holds no other office of profit, nor any position under any political committee or party; which oath or affirmation shall be filed in the office of the secretary of state.

Oath of office.

f. Each of said commissioners shall receive an annual salary of five thousand dollars, payable in the same manner as salaries of other state officers are paid.

Salary.

g. The commissioners appointed under this act shall within twenty days after their appointment and qualification meet at the state capitol and organize by electing one of their number chairman, who shall serve until the second Monday of February, 1907. On the second Monday of February in each odd numbered year the commissioners shall meet at the office of the commission and elect a chairman, who shall serve for two years and until his successor is elected. A majority of said commissioners shall constitute a quorum to transact business, and any vacancy shall not impair the right of the remaining commissioners to exercise all the powers of the commission, so long as a majority remains.

Organization.

h. Said commission may appoint a secretary at a salary of not more than twenty-five hundred dollars per annum, and may appoint not more than three clerks, two of whom shall receive an annual salary not exceeding one thousand dollars each, and one of whom shall be an expert stenographer and receive an annual salary not exceeding twelve hundred dollars, and may employ such other experts as may be necessary to perform any service it may require of them, and shall fix their compensation. They may appoint inspectors who shall have the right to inspect freight in the cars or warehouses of transportation companies. Such inspectors shall also have the right to inspect all waybills, bills of lading and shipping receipts of such transportation companies so that they may determine whether the classification and rating of such freight is in conformity with the published tariffs and classifications of such transportation companies. Said inspectors shall be employed at fixed compensation.

Secretary and clerks; appointment and salaries.

Inspectors.

Duties of secretary.

i. The secretary shall take and subscribe to an oath similar to that of the commissioners, and shall keep full and correct records of all transactions and proceedings of the commission, and shall perform such other duties as may be required by the commission. Any person ineligible to the office of commissioner shall be ineligible to the office of secretary.

Name of commission; seal.

j. The commissioners shall be known collectively as "Railroad Commission of Ohio," and in that name may sue and be sued. It shall have a seal with the words "Railroad Commission of Ohio," and such other design as the commission may prescribe engraved thereon by which it shall authenticate its proceedings and of which the courts shall take judicial notice.

Office; furniture and supplies; expenses.

k. The commission shall keep its office at the capitol, and shall be provided by the adjutant general with suitable room or rooms, necessary office furniture, supplies, stationery, books, periodicals, maps, and all necessary expenses shall be audited and paid as other state expenses are audited and paid. The commission may hold sessions at any place other than the capitol when the convenience of the parties so requires. The commissioners, secretary, and clerks, and such experts as may be employed, shall be entitled to receive from the state their actual necessary expenses while traveling on the business of the commission. Such expenditures to be sworn to by the person who incurred the expense and approved by the chairman of the commission.

Rules and regulations.

l. The commission shall have power to adopt and publish rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of railroads and other parties before it, and all hearings shall be open to the public.

May confer with railroad commissioners of other states.

m. The commission may confer by correspondence, or by attending conventions, or otherwise, with the railroad commissioners of other states, and with the interstate commerce commission, on any matters relating to railroads.

Term "railroad" defined.

SECTION 2. The term "railroad" as used herein shall mean and embrace all corporations, companies, individuals, associations of individuals, their lessees, trustees or receivers (appointed by any court whatsoever) that now, or may hereafter, own, operate, manage or control any railroad or part of a railroad as a common carrier in this state, or cars, or other equipment used thereon, or bridges, terminals, or side tracks, or any docks or wharves or storage elevators used in connection therewith, whether owned by such railroad or otherwise, but the provisions of this act shall not apply to companies engaged exclusively in the sleeping car business. The term "railroad" whenever used herein shall also mean and embrace express companies, and all duties required of and penalties imposed upon any railroad or any officer or agent thereof shall, in so far as the same are applicable, be required of and imposed upon express companies and their officers and agents, and the commission shall have the power of supervision and control of express companies to the same extent as railroads.

a. The provisions of this act shall apply to the transportation of passengers and property between points within this state, and to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing charges and mileage charges, and shall apply to all railroad corporations, express companies, car companies, freight and freight line companies, and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers, upon or over any line of railroad within this state, and to any common carrier engaged in the transportation of passengers and property wholly by rail or partly by rail and partly by water.

To what the provisions of this act shall apply.

b. This act shall not apply to street and electric railroads engaged solely in the transportation of passengers within the limits of cities, nor other private railroads not doing business as common carriers.

To what this act shall not apply.

SECTION 3. Every railroad is hereby required to furnish reasonably adequate service and facilities, and the charges made for any service rendered or to be rendered in the transportation of passengers or property or for any service in connection therewith or for the receiving, switching, delivering, storing or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Duties of railroads.

SECTION 4. Every railroad shall print in plain type and file with the commission within a time fixed by the commission, schedules which shall be open to public inspection, showing all rates, fares and charges for the transportation of passengers and property, and any service in connection therewith, which it has established and which are in force at the time between all points in this state upon its line, or any line controlled or operated by it, and the rates, fares and charges shown on such schedules as are in effect at the date this act takes effect. The schedules printed as aforesaid shall plainly state the places upon its line or any line controlled or operated by it in this state between which passengers and property will be carried, and there shall be filed therewith the classification of freight in force. Every railroad shall publish with and as a part of such schedules all rules and regulations that in any manner affect the rates charged or to be charged for the transportation of passengers or property, also its charges for delay in loading or unloading cars, for track and car service, or rental and for demurrage, switching, terminal or transfer service, or for rendering any other service in connection with the transportation of persons or property. Two copies of said schedules for the use of the public shall be filed and kept on file in every depot, station and office of such railroad where passengers or freight are received for transportation in such form and place as to be accessible to the public and where they can be conveniently inspected. When passengers or property are transported over connecting lines in this state operated by more than one railroad, and the several railroads operating such lines establish joint

Same; schedules of rates, etc.

rates, fares and charges, a schedule of joint rates shall also in like manner be printed and filed with the commission and in every depot, station and office of such railroads where such passengers or property are received for transportation.

Changes in schedules.

a. No change shall thereafter be made in any schedule, including schedule of joint rates, or in any classification, except upon ten days' notice to the commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect; provided, that the commission, upon application of any railroad, may prescribe a less time within which a reduction may be made. Copies of all new schedules shall be filed as hereinbefore provided in every depot, station and office of such railroad, ten days prior to the time the same are to take effect unless the commission shall prescribe a less time.

Changes in schedules; notices to be posted.

b. Whenever a change is made in any existing schedule, including schedule of joint rates, a notice shall be posted by the railroad in a conspicuous place in every depot, station and office, stating that changes have been made in the schedules on file, specifying the class or commodity affected and the date when the same will take effect.

Unlawful for railroads to charge, demand, collect or receive greater or less compensation than that specified in schedules.

c. It shall be unlawful for any railroad to charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property or for any service in connection therewith than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, and the rates, fares and charges named therein shall be the lawful rates, fares and charges until the same are changed as herein provided.

Form of schedules.

d. The commission may prescribe such changes in the form in which the schedules are issued by the railroad as may be found expedient, and such schedule shall, as far as practicable, conform to the forms prescribed by the interstate commerce commission.

Rates shall be just and reasonable.

SECTION 5. Whenever passengers or property are transported over two or more connecting lines of railroad between points in this state, and the railroad companies have made joint rates for the transportation of the same, such rates and all charges in connection therewith shall be just and reasonable, and every unjust and unreasonable charge is prohibited and declared to be unlawful; provided, that a less charge by each of said railroads for its proportion of such joint rates than is made locally between the same points on their respective lines shall not for that reason be construed as a violation of the provisions of this act, nor render such railroads liable to any of the penalties hereof.

Special contract rates.

SECTION 6. Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions, and shall be subject to the provisions of this act as

to the printing and filing of the same: Provided, all such rates shall be under the supervision and regulation of the commission.

Classifications of freight shall be uniform.

SECTION 7. The classification of freight in the state shall be uniform on all railroads.

Free transportation or transportation at reduced rates, when lawful.

SECTION 8. Nothing herein shall prevent the carriage, storage or handling of freight free or at reduced rates for the United States, the state, or any political subdivision thereof, or any municipality thereof, or for charitable purposes, or to and from fairs and expositions for exhibition thereat, or household goods the property of railway employes; or the issuance of mileage, commutation or excursion passengers' tickets, provided that the same shall be obtainable by any person applying therefor without discrimination, or of party tickets, provided, that the same shall be obtainable by all persons applying therefor under like circumstances and conditions. This act shall not be construed as preventing railroads from giving free transportation or reduced rates therefor to any minister of the gospel, officer or agents of incorporated colleges, regular agents of charitable societies, when traveling upon the business of the society only, destitute and homeless persons, railroad officer, attorney, director, employe or members of their families; or to prevent the exchange of passes with officers, attorneys or employes of other railroads and members of their families.

Live stock attendants; may furnish free transportation for.

a. Upon any shipment of live stock or other property of such nature as to require the care of an attendant, the railroad may furnish to the shipper or some person or persons designated by him, free transportation for such attendant, including return passage to the point at which the shipment originated; provided, there shall be no discrimination in reference thereto between such shippers, and the commission shall have power to prescribe regulations in relation thereto.

Duty of railroads with respect to depots, buildings, side tracks, switches, etc.

SECTION 9. It shall be the duty of every railroad to provide and maintain adequate depots and depot buildings at its regular stations for the accommodation of passengers, and said depot buildings shall be kept clean, well lighted and warmed, for the comfort and accommodation of the traveling public. All railroads shall keep and maintain adequate and suitable freight depots, buildings, switches and side tracks for the receiving, handling and delivering of freight transported or to be transported by such railroads; provided, that this shall not be construed as repealing any existing law on the subject.

Duty of railroads with respect to furnishing cars.

SECTION 10. Every railroad shall, when within its power so to do, and upon reasonable notice, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight in car load lots. In case of insufficiency of cars at any time to meet all requirements, such cars as are available shall be distributed among the several applicants therefor in proportion to their respective immediate requirements without discrimination

between shippers or competitive or non-competitive places; provided, preference may be given to shipments of live stock and perishable property.

Power of commission as to enforcement of reasonable regulation for furnishing cars, etc.

a. The commission shall have power to enforce reasonable regulations for furnishing cars to shippers and switching the same, and for the loading and unloading thereof, and the weighing of the cars and freight offered for shipment over any line of railroad.

Interchange of traffic between railroads.

SECTION 11. All steam railroad companies as between themselves and all interurban and electric railroads as between themselves, shall afford all reasonable and proper facilities for the interchange of traffic between their respective lines, for forwarding and delivering passengers and property, and shall transfer and deliver without unreasonable delay or discrimination any freight or cars, loaded or empty, or any passengers destined to any point on its own or any connecting lines; provided, that precedence over other freight may be given to live stock and perishable freight.

Control of commission over private tracks.

a. The commission shall have control over private tracks in so far as the same are used by common carriers, in connection with any railroad for the transportation of freight, in all respects the same as though such tracks were a part of the track of said railroad.

Investigation of charges that rates, fares, etc., or regulations, etc., are unreasonable or unjustly discriminatory or that service is inadequate.

SECTION 12. Upon complaint of any person, firm, corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission may notify the railroad complained of that complaint has been made, and ten days after such notice has been given the commission may proceed to investigate the same as hereinafter provided. Before proceeding to make such investigation the commission shall give the railroad and the complainants ten days' notice of the time and place when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. If upon such investigation the rate or rates, or any regulation, practice or service complained of shall be found to be unreasonable or unjustly discriminatory, or the service shall be found to be inadequate, the commission shall have power to fix and order substituted therefor such rate or rates, fares, charges or classification as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future, and shall also have power to make such orders respecting such regulation, practice or service as it shall have determined to be reasonable and which shall be observed and followed in the future.

a. The commission may, when complaint is made of more than one rate or charge, order separate hearings thereon, and may consider and determine the several matters complained of separately, and at such times as it may prescribe. No complaint shall of necessity at any time be dismissed because of the absence of direct damage to the complainant.

Separate hearings.

b. Whenever the commission shall believe that any rate or rates or charge or charges may be unreasonable or unjustly discriminatory, and that an investigation relating thereto should be made, it may, upon its own motion, investigate the same. Before making such investigation it shall present to the railroad a statement in writing setting forth the rate or charge to be investigated. Thereafter, on ten days' notice to the railroad of the time and place of such investigation, the commission may proceed to investigate such rate or charge in the same manner and make like orders in respect thereto as if such investigation had been made upon complaint.

Power of commission to make investigation upon its own motion.

c. This section shall be construed to permit any railroad to make complaint with like effect as though made by any person, firm, corporation or association, mercantile, agricultural or manufacturing society, body politic or municipal organization.

Railroad may make complaint.

SECTION 13. Each of the commissioners, for the purposes mentioned in this act, shall have power to administer oaths, certify to official acts, issue subpœnas, compel the attendance of witnesses, and the production of papers, waybills, books, accounts, documents and testimony. In case of disobedience on the part of any person or persons to comply with any order of the commission or any commissioner or any subpœna, or on the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, it shall be the duty of the court of common pleas of any county, or a judge thereof, on application of a commissioner, to compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpœna issued from such court, or a refusal to testify therein, and in addition said commission shall have the powers vested in justices of the peace, or notaries public to compel witnesses to testify and to produce books and papers.

Power of commissioners to administer oaths, issue subpœnas, compel the attendance of witnesses, etc.

a. Each witness who shall appear before the commission by its order shall receive for his attendance the fees and mileage now provided for witnesses in civil cases in courts of record, which shall be audited and paid by the state in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers sworn to by such witnesses and approved by the chairman of the commission; provided, that no witness subpœnaed at the instance of parties other than the commission shall be entitled to compensation from the state for attendance or travel unless the commission shall certify that his testimony was material to the matter investigated.

Witnesses' fees and mileage.

b. The commission or any party may in any investigation cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by

Depositions.

law for like depositions in civil actions in courts of common pleas.

Record of investigations.

c. A full and complete record shall be kept of all proceedings had before the commission on any investigation had under section 12 of this act, and all testimony shall be taken down by the stenographer appointed by the commission. Whenever any complaint is served upon the commission under the provisions of section 16 of this act the commission shall, before said action is reached for trial, cause a certified transcript of all proceedings had and testimony taken upon such investigation to be filed with the clerk of the court of common pleas of the county where the action is pending.

Value of certified copy of proceedings.

A transcribed copy of the evidence and proceedings, or any specific part thereof, on any investigation, taken by the stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript in longhand of all the testimony on the investigation, or of a particular witness, or of other specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and transcribed shall be received in evidence with the same effect as if such reporter were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand, free of cost, to any party to such investigation, and all other persons, a copy on payment of a reasonable amount therefor.

Action of commission when charges of unreasonableness or inadequacy of service are found to be true.

SECTION 14. Whenever, upon an investigation made under the provisions of this act, the commission shall find any existing rate or rates, fares, charges or classifications, or any joint rate or rates, or any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are unreasonable or unjustly discriminatory, or any service is inadequate, it shall determine and by order fix a reasonable rate, fare, charge, classification or joint rate to be imposed, observed and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory, and it shall determine and by order fix a reasonable regulation, practice or service to be imposed, observed and followed in the future, in lieu of that found to be unreasonable or unjustly discriminatory, or inadequate, as the case may be, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the railroad affected thereby, which order shall of its own force take effect and become operative thirty days after the service thereof. All railroads to which the order applies shall make such changes in their schedule on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares, or charges, or in any joint rate or rates, without the approval of the commission. Certified copies of all other orders of the commission shall be delivered to the railroads affected thereby in like manner, and the same shall take effect within such times thereafter as the commission shall prescribe.

a. The commission may at any time upon application of any person or any railroad and upon notice to the parties in interest, and after opportunity to be heard as provided in section 12, rescind, alter or amend any order fixing any rate or rates, fares, charges or classification, or any other order made by the commission, and certified copies of the same shall be served and take effect as herein provided for original orders.

Power of commission to rescind, alter or amend its orders.

SECTION 15. All rates, fares, charges, classifications and joint rates fixed by the commission shall be in force and shall be prima facie lawful, for a period of one year from the date the same takes effect, unless or until changed or modified, by the commission, or in pursuance of section 16 of this act. All regulations, practices and service prescribed by the commission shall be in force and shall be prima facie reasonable, unless suspended or found otherwise in an action brought for that purpose pursuant to the provisions of section 16 of this act, or until changed or modified by the commission as provided for in paragraph *a*, section 14, of this act.

Rates, fares, classifications, etc., fixed by commission are prima facie lawful.

Regulations, practices and services prescribed by commission are prima facie reasonable.

SECTION 16. Any railroad or other party in interest being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may, within sixty days, commence an action in the court of common pleas against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order, is unlawful or unreasonable, or that any such regulation, practice or service, fixed in such order, is unreasonable, in which action the adverse parties shall be served with the summons. The commission shall file its answer, and on leave of court, any interested party may file an answer to said complaint within ten days after the service thereof, whereupon said action shall be at issue and stand ready for trial upon ten days' notice by either party. All actions brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the court of common pleas shall always be deemed open for the trial thereof and the same shall be tried and determined as other civil actions; any party to such action may introduce original evidence in addition to the transcript of the evidence offered to said commission.

Proceedings in common pleas court to vacate or set aside orders of commission fixing rates, fares, classifications, etc., or orders fixing regulations, practices or services.

a. No injunction shall issue suspending or staying any order of the commission except upon application to the court of common pleas or judge thereof, notice to the commission having been given and hearing having been had thereon.

Injunctions.

b. If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such

Proceeding when evidence introduced by plaintiff is found to be different from that offered upon hearing before commission.

transmission. Upon the receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classification, joint rate or rates, regulation, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

Judgment of common pleas court.

c. If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

Appeals.

d. Either party to said action, within sixty days after service of a copy of the order or judgment of the court may appeal or take the case up on error as in other civil actions. Where an appeal is taken the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar.

Burden of proof.

e. In all actions under this section the burden of proof shall be upon the plaintiff to show by clear and satisfactory evidence that the order of the commission complained of is unlawful, or unreasonable, as the case may be.

Judicial proceedings under this act shall be the same as in civil actions.

SECTION 17. In all actions and proceedings in court arising under this act all processes shall be served, and the practice and rules of evidence shall be the same as in civil actions, except as otherwise herein provided. Every sheriff or other officer empowered to execute civil processes shall execute any process issued under the provisions of this act, and shall receive such compensation therefor as may be prescribed by law for similar services.

Witness shall not be excused on ground that evidence may tend to incriminate.

a. No person shall be excused from testifying or from producing books and papers in any proceedings based upon or growing out of any violation of the provisions of this act on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he may have testified or produced any documentary evidence; provided, that no person so testifying shall be exempted from prosecution or punishment for perjury in so testifying.

Certified copies of orders of commission shall be prima facie evidence in judicial proceedings.

b. Upon application of any person the commission shall furnish certified copies, under the seal of the commission, of any order, made by it, which shall be prima facie evidence in any court or proceeding of the facts stated therein.

SECTION 18. The commission shall have authority to inquire into the management of the business of all railroads, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from any railroad all necessary information to enable the commission to perform the duties and carry out the objects for which it was created.

Authority of commission to inquire into management of business of railroads.

a. The commission shall cause to be prepared suitable blanks for the purposes designated in this act, which shall conform as nearly as practicable to the forms prescribed by the interstate commerce commission, and shall, when necessary, furnish such blanks to each railroad. Any railroad receiving from the commission any such blanks, shall cause the same to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question it shall give a good and sufficient reason for such failure; and said answer shall be verified under oath by the proper officer of said railroad and returned to the commission at its offices within the time fixed by the commission, the making of a false affidavit or filing of the same shall be deemed perjury and punishable as such under the statutes of Ohio defining perjury.

Blanks to be filled out by railroads; commission to prepare and furnish.

Perjury.

b. The commission or any commissioner, or any person or persons employed by the commission for that purpose, shall, upon demand, have the right to inspect the books and papers of any railroad and to examine under oath any officer, agent or employe of such railroad in relation to any matter which is the subject of complaint and investigation; provided, that any person other than the one of said commissioners who shall make such demand shall produce his authority to make such inspection under the hand of the commissioner, or of the secretary, and under the seal of said commission.

Right of commission to inspect books, etc.

c. The commission may require, by order or subpœna, to be served on any railroad, in the same manner that a summons is served in a civil action in the court of common pleas, the production within this state, at such time and place as it may designate, of any books, papers or accounts relating to any matter which is the subject of complaint or investigation kept by said railroad in any office or place without the state of Ohio, or verified copies in lieu thereof, if the commission shall so order, in order that an examination thereof may be made by the commission or under its direction, and such subpœna may issue to any sheriff in any county of the state. Any railroad failing or refusing to comply with any such order or subpœna within a reasonable time, shall, for each day it shall so fail or refuse, forfeit and pay into the state treasury a sum of not less than one hundred dollars nor more than one thousand dollars, to be recovered in a civil action brought in the name of the railroad commission of Ohio.

Commission may require production of books, papers, accounts, etc.

Penalty for refusal to comply with order or subpœna.

SECTION 19. Every railroad whenever required by the commission shall, within a time to be fixed by the commission, deliver to the commission for its use copies of all contracts which relate to the transportation of persons or property, or any service in connection therewith, made or en-

Railroads to furnish commission with copies of contracts relating to transportation of persons or property.

tered into by it with any other railroad company, terminal company, depot company, car company, equipment company, express or other transportation company, bridge company, or any shipper or shippers, producers or consumers or other person or persons doing business with it.

Filing of verified list of tickets, passes and mileage books issued free.

a. Every railroad shall, on the first Monday in February in each year, and oftener if required by the commission, file with the commission a verified list of all railroad tickets, passes and mileage books issued free or for other than actual bona fide money consideration at full established rates during the preceding year, together with the names of the recipients thereof, the amount received therefor and the reason for issuing the same. This provision shall not apply to the sale of tickets at reduced rates open to the public, nor to tickets, passes, or mileage books issued to persons not residents of this state, nor to tickets, passes or mileage books issued prior to the passage of this act, or issued pursuant to section 8 of this act.

Railroads shall file with commission full and true statement of affairs of corporation.

SECTION 20. Every railroad company incorporated or doing business in this state, or which shall hereafter become incorporated or do business in this state shall, on or before the 15th day of September, 1906, and on or before the same day in each year thereafter, make and transmit to the commission at its office in Columbus, a full and true statement under oath of the proper officer of such corporation, of the affairs of such corporation relative to the state of Ohio for the year ending on the 30th day of June preceding, which statement for the state of Ohio shall be similar in character and detail to the annual report required to be made by railroad companies to the interstate commerce commission.

Power and duty of commission to investigate freight rates on interstate traffic.

SECTION 21. The commission shall have power, and on complaint of any person it is hereby made its duty, to investigate all or any freight rates on interstate traffic on railroads in this state, and when the same are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission shall present the facts to the railroad, with a request to make such changes as the commission may advise, and if such changes are not made within a reasonable time, the commission shall apply by petition to the interstate commerce commission for relief. All freight tariffs issued by any such railroad relating to interstate traffic in this state shall be filed in the office of the commission within thirty days after the passage of this act, and all such tariffs thereafter issued shall be filed with the commission when issued.

Application to interstate commerce commission for relief.

"Unjust discrimination" defined; penalty.

SECTION 22. If any railroad, or any agent or officer thereof, shall directly or indirectly, by any special rate, rebate, drawback, or by means of false billing, false classification, false weighing, or by any other device whatsoever, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service

rendered or to be rendered by it for the transportation of persons or property or for any service in connection therewith, than that prescribed in the published tariffs then in force, or established as provided herein, or than it charges, demands, collects or receives from any other person, firm, or corporation for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful, and upon conviction therefor shall forfeit and pay into the state treasury not less than one hundred dollars nor more than five thousand dollars for each offense; and any agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars for each offense.

Charging or collecting less compensation for services in consideration of the furnishing of part of the facilities therefor, unlawful.

a. It shall be unlawful for any railroad to demand, charge, collect or receive from any person, firm or corporation a less compensation for the transportation of property or for any service rendered or to be rendered by said railroad in consideration of said person, firm or corporation furnishing any part of the facilities incident thereto; provided, nothing herein shall be construed as prohibiting any railroad from procuring any facilities or service incident to transportation and paying a reasonable compensation therefor.

Unlawful to make or give undue or unreasonable preference or advantage or to subject to undue or unreasonable prejudice or disadvantage.

SECTION 23. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Unlawful to accept or receive rebate, concession, etc., by which property shall be transported at less than published rate.

SECTION 24. It shall be unlawful for any person, firm or corporation knowingly to accept or receive any rebate, concession or discrimination in respect to transportation of any property wholly within this state, or for any service in connection therewith, whereby any such property shall by false billing, false classification, false weighing, or any other device whatsoever, be transported at a less rate than that named in the published tariffs in force as provided herein, or whereby any service or advantage is received other than is therein specified.

Penalty.

Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars for each offense.

Punitive damages.

SECTION 25. If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this act, prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such railroad shall be liable to the person, firm or corporation injured there-

by in treble the amount of damages sustained in consequence of such violation; provided, that any recovery as in this section provided shall in no manner affect a recovery by the state of the penalty prescribed for such violation.

Penalty against officers, agents and employes.

SECTION 26. Any officer, agent or employe of any railroad who shall wilfully fail or refuse to fill out and return any blanks as required by this act, or shall wilfully fail or refuse to answer any questions therein propounded, or shall knowingly or wilfully give a false answer to any such question, or shall evade the answer to any such question, where the fact inquired of is within his knowledge, or who shall, upon proper demand wilfully fail or refuse to exhibit to any commissioner or any commissioners, or any person authorized to examine the same, any book, paper or account of such railroad, which is in his possession or under his control, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each such offense; and a penalty of not less than five hundred dollars nor more than one thousand dollars shall be recovered from the railroad for each such offense when such officer, agent or employe acted in obedience to the direction, instruction or request of such railroad or any general officer thereof.

Penalty against railroad for violation of this act, etc.

SECTION 27. If any railroad shall violate any provision of this act, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it, or upon failure of any railroads to place in operation any joint rate, or do any other act herein prohibited, for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement or order made by any court upon its application, for every such violation, failure or refusal, such railroad or railroads shall forfeit and pay into the state treasury a sum of not less than one hundred dollars nor more than ten thousand dollars for each offense. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any railroad, acting within the scope of his employment, shall in every case be deemed to be the act, omission or failure of such railroad.

Power of commission to regulate in cases not specifically designated.

SECTION 28. Whenever, after hearing and investigation as provided by this act, the commission shall find that any charge, regulation or practice affecting the transportation of passengers or property, or any service in connection therewith, not hereinbefore specifically designated, is unreasonable or unjustly discriminatory, it shall have the power to regulate the same as provided in sections 12 and 14 of this act.

Railroad accidents; duty of commission as to investigation.

SECTION 29. Every railroad shall, whenever an accident attended with loss of human life occurs within this state, upon its line of road or on its depot grounds or yards, give immediate notice thereof to the commission. In the event of any such accident, the commission, if it deem the public interest requires it, shall cause an investigation to be made

forthwith, which investigation shall be held in the locality of the accident, unless, for greater convenience of those concerned, it shall order such investigation to be held at some other place, and said investigation may be adjourned from place to place as may be found necessary and convenient. The commission shall seasonably notify an officer or station agent of the company of the time and place of the investigation. The cost of such investigation shall be certified by the chairman of the commission, and the same shall be audited and paid by the state in the same manner as other expenses are audited and paid and a record or file of said proceedings and evidence shall be kept by said commission.

Commission to inquire into neglect or violation of laws of state.

SECTION 30. The commission shall inquire into any neglect or violation of the laws of this state by any such railroad corporation hereinbefore defined doing business therein, or by the officers, agents or employes thereof, or by any person operating a railroad, and shall have the power, and it shall be its duty, to enforce the provisions of this act as well as all other laws relating to railroads and report all violations thereof to the attorney-general; upon request of the commission it shall be the duty of the attorney-general or the prosecuting attorney of the proper county to aid in any investigation, prosecution, hearing or trial had under the provisions of this act, and to institute and prosecute all necessary actions or proceedings for the enforcement of this act and of all other laws of this state relating to railroads and for the punishment of all violations thereof. Any forfeiture or penalty herein provided shall be recovered and suit thereon shall be brought in the name of the state of Ohio in the court of common pleas for Franklin county, or of any county having jurisdiction of the defendant. The attorney-general of Ohio shall be the counsel in any proceeding, investigation, hearing or trial prosecuted or defended by the commission, or any prosecuting attorney selected by said commission in any county where such action is pending.

Upon request of commission attorney-general or prosecuting attorney shall prosecute.

Commission may investigate claims against railroads not acted upon within ninety days after filing thereof; special report.

SECTION 31. All claims against any railroad for loss of or damage to property from any cause, or for overcharge upon any shipments, or for any other service, if not acted upon within ninety days from the date of the filing of such claim with the railroad, may be investigated by the commission, in its discretion and the result of such investigation shall be embodied in a special report which shall be open to public inspection and may be included in the next annual report of the commission.

Substantial compliance with act sufficient to give effect to rules, etc., of commission.

SECTION 32. A substantial compliance with the requirements if this act shall be sufficient to give effect to all rules, orders, acts and regulations of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.

Act shall not affect right of action for right, penalty or forfeiture; penalties and forfeitures under this act shall be cumulative.

SECTION 33. This act shall not have the effect to release or waive any right of action by the state or by any person for any right, penalty or forfeiture which may have arisen or which may hereafter arise under any law of this state; and all penalties and forfeitures accruing under this act shall be cumulative and a suit for, and recovery of one, shall not be a bar to the recovery of any other penalty.

Commission can enforce this act by mandamus, injunction, etc.

SECTION 34. In addition to all the other remedies provided by this act for the prevention and punishment of any and all violations as to the provisions hereof and all orders of the commission, the commission can compel compliance with the provisions of this act and of the orders of the commission by proceedings in mandamus, injunction or by other appropriate civil remedies.

Filing by railroads of copies of schedules of rates in force when act takes effect.

SECTION 35. Every railroad in this state shall, within thirty days after the passage of this act, file in the office of the commission copies of all schedules of rates, including joint rates in force on its line or lines, between points within this state, on the date this act takes effect.

Powers, duties, etc., of present commissioner of railroads and telegraphs conferred upon commission herein created.

SECTION 36. All powers, duties and privileges imposed and conferred upon the commissioner of railroads and telegraphs of this state under existing laws are hereby imposed and conferred upon the commission created under the provisions of this act; provided, that the power and duties conferred and imposed upon the railroad commissioner by laws in force at the passage of this act shall continue to be exercised by him until the commission provided for in section 1 of this act has been appointed and qualified, whereupon the office of commissioner of railroads and telegraphs is hereby abolished.

Office of commissioner of railroads and telegraphs abolished.

Invalidity of any section or part thereof of this act shall not affect other sections or parts thereof.

SECTION 37. Each section of this act and every part of each section are hereby declared to be independent sections and parts of sections and the holding of any section or part thereof to be void or ineffective for any cause shall not be deemed to affect any other section or any part thereof.

Repeals, etc.

SECTION 38. Sections 245, 246 and section 249 of the Revised Statutes of Ohio are hereby repealed; provided, however, no rates fixed by the commission shall exceed the maximum rates prescribed by any statute of the state of Ohio in force at the time the commission fixes such rates, nor shall this act in any wise affect, modify or repeal section 3374 of the Revised Statutes of Ohio, as amended February 8, 1906.

C. A. THOMPSON,
Speaker of the House of Representatives.

JAMES M. WILLIAMS,
President pro tem. of the Senate.

Passed April 2, 1906.

This bill was presented to the governor, April 3, 1906, and was not signed or returned to the house wherein it originated within ten days after being so presented, exclu-

sive of Sundays and the day said bill was presented, and was filed in the office of the secretary of state, April 16, 1906.

LEWIS B. HOUCK,
Secretary to the Governor.
176G

[House Bill No. 233.]

AN ACT

To amend sections 395 and 396 of the Revised Statutes of Ohio, to provide for the appointment of a state inspector of oils and deputy inspectors of oils, and to define and prescribe the duties, and fix the compensation, of such state inspector of oils and of such deputy inspectors of oils.

Be it enacted by the General Assembly of the State of Ohio:

State inspector of oils:

SECTION 1. That sections 395 and 396 of the Revised Statutes of Ohio, be amended to read as follows:

Appointment and term of inspector of oils.

Sec. 395. The governor, by and with [the] advice and consent of the senate, shall appoint a skilled and suitable person, who is not interested in manufacturing, dealing or vending any illuminating oils manufactured from petroleum, as state inspector of oils, whose term of office shall be for two years from the fifteenth day of May of each even numbered year and until his successor is appointed and qualified; provided, however, that the first appointment of a state inspector of oils under this act shall be for the term of two years commencing May 15, 1906, and continuing until his successor is appointed and qualified, and that the present inspector of oils for the first district of Ohio and the present inspector of oils for the second district of Ohio shall without salary or other compensation from the state jointly perform the duties of the state inspector of oils under this act, until May 15, 1906, and no longer and provide further, that in case of a vacancy occurring by death, resignation or otherwise in the office of state inspector of oils the governor shall fill the same as provided in section twelve of the Revised Statutes of Ohio.

Empowered to appoint deputies.

The state inspector of oils, when so appointed and qualified, is empowered to appoint a suitable number of deputy inspectors of oils not exceeding eighteen in number, who are not interested in manufacturing, dealing or vending any illuminating oils manufactured from petroleum, who are empowered to perform the duties of inspection, and liable to the same penalties as the state inspector of oils; and the state inspector of oils may remove any one or more of such deputy inspectors of oils for a reasonable cause and appoint others in their places; provided, that all deputy inspectors of oils now in office shall remain in office and perform the duties of deputy inspector of oils under this act, until May 15, 1906, and no longer. The inspectors and their deputies

[House Bill No. 325.]

AN ACT

Changing the name of the Railroad Commission of Ohio, to that of the Public Service Commission of Ohio, defining the powers and duties of the latter commission with respect to public utilities, and to amend sections 501, 502 and 606 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 501, 502 and 606 of the General Code be amended to read as follows:

"Railroad" defined.

Sec. 501. The term "railroad" as used in this chapter shall include all corporations, companies, individuals, associations of individuals, their lessees, trustees, or receivers appointed by a court, which owns, operates, manages or controls a railroad or part thereof as a common carrier in this state, or which owns, operates, manages or controls any cars or other equipment used thereon, or which owns, operates, manages or controls any bridges, terminals, union depots, side tracks, docks, wharves, or storage elevators used in connection therewith, whether owned by such railroad or otherwise. Such term "railroad" shall mean and embrace express companies, water transportation companies and interurban railroad companies, and all duties required of and penalties imposed upon a railroad or an officer or agent thereof insofar as they are applicable, shall be required of and imposed upon express companies, water transportation companies and interurban railroad companies, their officers and agents. The commission shall have the power of supervision and control of express companies, water transportation companies and interurban railroad companies to the same extent as railroads.

Other companies.

Application of act.

Sec. 502. This chapter shall apply to the transportation of passengers and property between points within this state, to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing charges and mileage charges, to all railroad companies, sleeping car companies, equipment companies, express companies, car companies, freight and freight line companies, to all associations of persons, whether incorporated or otherwise, which do business as common carriers, upon or over a line of railroad within this state, and to a common carrier engaged in the transportation of passengers or property wholly by rail or partly by rail and partly by water or wholly by water. In addition thereto the provisions of this act shall apply to the regulation of any and all other duties, services, practices and charges, of the railroad company, incident to the shipping and receiving of freight, which are proper subjects of regulation, excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes.

Assessment for maintaining commission, and how apportioned.

Sec. 606. For the purpose of maintaining the department of the public service commission of Ohio, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding seventy-five thousand dollars each year shall be apportioned among and assessed upon the railroads and public utilities within the state, by the commission, in proportion to the intra state gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made.

Certificate of assessment to auditor of state.

Collection.

On or before the first day of August next following, the commission shall certify to the auditor of state the amount of such assessment apportioned by it to each railroad and public utility and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such public service commission.

Section 614-1.

Name.

SECTION 2. The railroad commission of Ohio shall hereafter be known as the public service commission of Ohio. In addition to the powers, duties, and jurisdiction conferred and imposed upon said commission by chapter one, division two, title three, part first, of the General Code, and the acts mandatory or supplementary thereto, the public service commission of Ohio shall have and exercise the powers, duties, and jurisdiction provided for in this act.

Additional powers, duties and jurisdiction imposed and conferred.

Section 614-2.

SECTION 3. The following words and phrases used in this act, unless the same be inconsistent with the text shall be construed as follows:

Definitions.

The term "commission" when used in this act, or in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto means "The Public Service Commission of Ohio."

The term "commissioner" means one of the members of such commission.

Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

When engaged in the business of transmitting to, from, through or in this state, telegraphic messages, is a telegraph company;

When engaged in the business of transmitting to, from, through, or in this state, telephonic messages, is a telephone company and as such is declared to be a common carrier;

When engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state, is an electric light company;

When engaged in the business of supplying artificial gas for lighting, power or heating purposes to consumers within this state, is a gas company;

When engaged in the business of supplying natural gas for lighting, heating, or power purposes to consumers within this state, is a natural gas company;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partly within this state, is a pipe line company;

When engaged in the business of supplying water through pipes or tubing, or in a similar manner to consumers within this state, is a water works company;

When engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes, is a heating or cooling company;

When engaged in the business of supplying messengers for any purpose, is a messenger company;

When engaged in the business of signalling or calling by an electrical apparatus, or in a similar manner, for any purpose, is a signalling company;

When engaged in the business of operating, as a common carrier, a railroad, wholly or partly within this state, with one or more tracks upon, along, above or below any public road, street, alley, way or ground, within any municipal corporation, operated by any motive power other than steam, and not a part of an interurban railroad, whether such railroad be termed street, inclined plane, elevated, or underground railroad, is a street railroad company;

When engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad is a suburban railroad company;

When engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights-of-way, outside of municipalities, using electricity or other motive power than animal or steam power for the transportation of passengers, packages, express matter, United States mail, baggage and freight, is an interurban railroad company, and included in the term "railroad" as used in section 501 of the General Code. The term "railroad," when used in this act, includes all railroads, interurban railroad companies, express companies, freight line companies, sleeping car companies, equipment companies, car companies, water transportation companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state.

"Public utility" defined.

SECTION 4. The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be

owned or operated by any municipality, and except such utilities as are defined as "railroads" in sections 501 and 502 of the General Code and these terms shall apply in defining "public utilities" and "railroads" wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto or in this act.

Section 614-3.
Jurisdiction to regulate "public utilities" and "railroads."

SECTION 5. The public service commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate "public utilities" and "railroads" as herein defined and provided and to require all public utilities to furnish their products and render all services required by the commission, or by law.

Section 614-4.

SECTION 6. The jurisdiction, supervision, powers and duties of the public service commission shall extend to every public utility and railroad, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state, and to the persons or companies owning, leasing or operating the same, and to the records and accounts of the business thereof done within this state.

Section 614-5.
Rules governing proceedings.

SECTION 7. The commission shall have power to adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations and hearings which shall be open to the public.

Section 614-6.
Examination of witnesses and production of records.

SECTION 8. The commission shall have power, either through its members or by inspectors or employes duly authorized by it, to examine under oath, at any time and for assisting the commission in the performance of any powers or duties of the commission, any officer, agent or employe of any public utility or railroad or any other person, in relation to the business and affairs of such utility and to compel the attendance of such witness for the purpose of such examination. In case of disobedience on the part of any person or persons to comply with any order relating to the production or examination of books, contracts, records, documents and papers or in case of the refusal of any person to testify to any matter regarding which he may be lawfully interrogated by any such member, employe or inspector of the commission at any time or place, it shall be the duty of the common pleas court of any county or any judge thereof, on application of any member of the commission, to compel obedience by contempt proceedings as in the case of the disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein.

Section 614-7.
Examination of records.

SECTION 9. The commission shall have power, either through its members or by inspectors or employes duly authorized by it, to examine all books, contracts, records, documents and papers of any public utility, and by subpoena duces tecum to compel the production thereof, or of duly verified copies of the same or any of them, and to

compel the attendance of such witnesses as the commission may require to give evidence at such examination.

Section 614-8. SECTION 10. The commission shall have general supervision over all public utilities within its jurisdiction as hereinbefore defined, and shall have the power to examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and also with respect to the safety and security of the public and their employes, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements. The commission, either through its members or inspectors or employes, duly authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device and lines of any public utility.

General supervision.

Section 614-9. SECTION 11. Every public utility shall file with the commission, when and as required by it, a copy of any contract, agreement or arrangement, in writing, with any other public utility relating in any way to the construction, maintenance or use of its plant or property, or any service, rate or charge.

May require copy of contract.

Section 614-10. SECTION 12. The commission may establish a system of accounts to be kept by public utilities, or classify utilities and prescribe a system of accounts for each class and prescribe the manner in which such accounts shall be kept. Such system shall when practicable conform to the system prescribed by the tax commission of Ohio. It may also, in its discretion, prescribe the form of records to be kept by public utilities, and the commission may require that no other records be kept except as may be required by the laws of the United States or as may hereafter be required by the laws of this state. The commission shall, at all times, have access to all accounts kept by public utilities, and may designate any of its officers or employes to inspect and examine any and all such accounts.

System of accounts.

Form of records.

The commission, may, if it shall determine that any expenditures or receipts have been improperly charged or credited, order the necessary changes in such accounts.

Changes in accounts.

Section 614-11. SECTION 13. Except in his report to the commission or when called on to testify in any court or proceeding, any such employe or agent who shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employe or agent shall be fined not less than fifty dollars, and not more than one hundred dollars, and shall thereafter be disqualified from acting as agent, or in any other capacity under the appointment or employment of the commission.

Penalty for divulging information.

Section 614-12. SECTION 14. Every public utility shall furnish necessary and adequate service and facilities which shall be reasonable and just, and every unjust or unreasonable

Unreasonable charge prohibited.

charge for such service is prohibited and declared to be unlawful.

Section 614-13.

SECTION 15. Every public utility shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just and reasonable, and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for any service, or in connection therewith, or in excess of that allowed by law or by order of the commission, is prohibited and declared to be unlawful.

Section 614-14.

Rebates, special rates, free service, etc., prohibited.

SECTION 16. 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 less compensation for any services rendered, or to be rendered, except as provided in this act, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under the same, or substantially the same circumstances and conditions. Nor shall free service or service for less than actual cost be furnished for the purpose of destroying competition, and such free service and every such charge is prohibited and declared unlawful.

Section 614-15.

Undue advantage.

SECTION 17. No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 614-16.

Printed schedules of rates must be filed.

SECTION 18. Every public utility shall print and file with the commission, within ninety days after this act takes effect, schedules, showing all rates, joint rates, rentals, tolls, classifications and charges for service of each and every kind by it rendered or furnished, which were in effect at the time this act takes effect and the length of time the same has been in force, and all rules and regulations in any manner affecting the same. Such schedules shall be plainly printed and kept open to public inspection. The commission shall have power to prescribe the form of every such schedule, and may, from time to time, prescribe, by order, changes in the form thereof. The commission may establish rules and regulations for keeping such schedule open to public inspection, and may, from time to time, modify the same. A copy of such schedules or so much thereof as the commission shall deem necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission may order.

Section 614-17.

Reasonable arrangements allowed.

SECTION 19. Nothing in this act shall be taken to prohibit a public utility from entering into any reasonable arrangement with its customers, consumers or employes for the division or distribution of its surplus profits or providing for a sliding scale of charges or providing for a

minimum charge for service to be rendered, unless such minimum charge is made or prohibited by the terms of the franchise, grant or ordinance under which such public utility is operated, a classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration, or providing any other financial device that may be practicable or advantageous to the parties interested. No such arrangement, sliding scale, minimum charge, classification or device shall be lawful unless the same shall be filed with and approved by the commission. Every such public utility is required to conform its schedules of rates, tolls and charges to such arrangement, sliding scale, classification or other device. Every such arrangement, sliding scale, minimum charge, classification or device shall be under the supervision and regulation of the commission, and subject to change, alteration or modification by the commission.

Approval.

Section 614-18. SECTION 20. No public utility shall charge, demand, exact, receive or collect a different rate, rental, toll or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any public utility refund or remit directly or indirectly, any rate, rental, toll or charge so specified, or any part thereof, nor extend to any person, firm or corporation, any rule, regulation, privilege or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms and corporations under like circumstances for the like, or substantially similar, service.

Schedule rate collected.

Refunder or remitter not allowed.

Section 614-19. SECTION 21. The furnishing by any public utility of any product or service, at the rates, and upon the terms and conditions provided for in any existing contract, executed prior to the passage of this act, shall not be construed as constituting a discrimination, or undue or unreasonable preference, or advantage within the meaning specified.

Prior contract.

Provided, however, that when any such contract or contracts are or become terminable by notice, the commission shall have power, in its discretion, to direct by order, that such contract or contracts shall be terminated as and when directed by such order.

Section 614-20. SECTION 22. Unless otherwise ordered by the commission, no change shall be made in any rate, joint rate, toll, classification, charge or rental, in force at the time this act takes effect, or as shown upon the schedules which shall have been filed by a public utility in compliance with the requirements of this act, or by order of the commission, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the change, rate, charge, toll, classification or rental shall go into effect; and all proposed changes shall be plainly indicated upon existing schedules, or by filing new schedules thirty days

Change of rates. 30 days' notice.

prior to the time they are to take effect, but the commission may prescribe a less time when they may take effect.

Section 614-21. Complaint.

SECTION 23. Upon complaint in writing, against any public utility, by any person, firm or corporation, or upon the initiative or complaint of the commission that any rate, fare, charge, toll, rental, schedule, classification or service, or any joint rate, fare, charge, toll, rental, schedule, classification or service rendered, charged, demanded, exacted or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, or unjustly preferential or in violation of law, or that any regulation, measurement or practice affecting or relating to any service furnished by said public utility, or in connection therewith, is, or will be, in any respect unreasonable, unjust, insufficient or unjustly discriminatory or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, the commission shall notify the public utility complained of that complaint has been made, and of the time and place when the same will be considered and determined, which notice shall be served upon the public utility not less than fifteen days before such hearing, and shall plainly state the matters or things complained of. The commission shall, if it appear that there are reasonable grounds for the complaint, at such time and place proceed to consider such complaint and may adjourn the hearing thereof from time to time. The parties thereto shall be entitled to be heard, represented by counsel and to have process to enforce the attendance of witnesses. A public utility may make complaint as to any matter affecting its own product or service with like effect as though made by a person, firm or corporation, in which event the commission shall publish notice thereof for ten days prior to such hearing in a newspaper of general circulation at the situs of such public utility.

Notice of complaint and time and place of hearing.

Rights of parties.

Publication, when.

Section 614-22. Separate hearings.

SECTION 24. When complaint is made of more than one rate, charge, or service, the commission may order separate hearings thereon and may consider and determine the matters complained of separately and at such times and places as it may prescribe. No complaint shall necessarily be dismissed because of the absence of direct damage to the complainant.

Section 614-23.

SECTION 25. Whenever the commission shall be of the opinion, after hearing, that any rate, fare, charge, toll, rental, schedule, classification or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory or unjustly preferential or in violation of law, or the service inadequate, or that the maximum rates, charges, tolls or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall, with due regard among other things, to the value of all of

the property of the public utility actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount, (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservation out of the income for surplus, depreciation and contingencies, and all such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, fare, charge, toll, rental or service to be thereafter rendered, charged, demanded, exacted or collected for the performance or rendition of the service, and order the same substituted therefor; and thereafter, no change in the rate, fare, toll, charge, rental, schedule, classification or service, shall be made, rendered, charged, demanded, exacted or changed by such public utility without the order of the commission and any other rate, fare, toll, charge, rental, classification or service shall be deemed and held to be unjust and unreasonable, prohibited and unlawful. Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in this act for other hearings, has been given, the commission may rescind, alter or amend an order fixing any rate or rates, fare, toll, charge, rental, classification or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

May fix reasonable rate.

Rescind, alter or amend.

Section 614-24. SECTION 26. The commission shall have the right to investigate and determine the value of all the property, including the value of its physical property, of every public utility within its jurisdiction actually used and useful for the service and convenience of the public, whenever it deems the ascertainment of such value necessary in order to properly carry into effect any of the provisions of this act.

Valuation of property.

Section 614-25. SECTION 27. Before final determination of the value of the property of any public utility the commission shall, after due notice to such public utility, hold a public hearing as to such valuation and the provisions of section 23 of this act shall insofar as practicable, apply to such hearing.

Public hearing.

Section 614-26. SECTION 28. The commission may at any time upon its own motion make a revaluation of such property.

Section 614-27. SECTION 29. Whenever the commission shall be of the opinion, after hearing had upon complaint, as in this act provided, or upon its own initiative or complaint, served as in this act provided, that the rules, regulations, measurements or practices of any public utility with respect to its public service are unjust or unreasonable, or that the equipment or service thereof is inadequate, inefficient, improper or insufficient, or cannot be obtained, it shall determine the

Power to change rules and prescribe equipment.

regulations, practices and service thereafter to be installed, observed, used and rendered, and fix and prescribe the same by order to be served upon the public utility. It shall thereafter be the duty of such public utility and all of its officers, agents and official employes to obey the same and do everything necessary or proper to carry the same into effect and operation; provided, that nothing herein contained shall be so construed as to give to the commission power to make any order requiring the performance of any act or the doing of anything which is unjust or unreasonable or in violation of any law of the state or the United States.

Section 614-28.

May order repairs, improvements, etc.

SECTION 30. Whenever the commission shall be of the opinion, after hearing had, as in this act provided, or upon its own initiative or complaint, as in this act provided, that repairs or improvements to the plant or equipment of any public utility, should reasonably be made, or that any additions thereto should reasonably be made, in order to promote the convenience or welfare of the public, or of employes, or in order to secure adequate service or facilities, the commission may make and serve an appropriate order with respect thereto, directing that such repairs, improvements, changes or additions be made within a reasonable time, and in a manner to be specified therein. Every such public utility, its officers agents and official employes shall obey such order and make such repairs, improvements, changes and additions required of such public utility by such order.

Section 614-29.

Use of equipment over street, etc., by other public utility.

SECTION 31. Every public utility having any equipment on, over or under any street, or highway, shall, subject to the provisions of section 9103 of the General Code, for a reasonable compensation, permit the use of the same by any other public utility whenever the commission shall determine as provided in section 32 hereof that public convenience, welfare and necessity require such use, or joint use, and such use or joint use will not result in irreparable injury to the owner or other users of such equipment, nor in any substantial detriment to the service to be rendered by such owners or other users.

Section 614-30.

Application on failure to agree.

SECTION 32. In case of failure to agree upon such use or joint use or the conditions or compensation for such use or joint use, any public utility may apply to the commission, and if after investigation the commission shall ascertain that the public convenience, welfare and necessity require such use or joint use and that it would not result in irreparable injury to the owner or other users of such property or equipment, nor in any substantial detriment to the service to be rendered by such owner or other users of such property or equipment, said commission shall by order direct that such use or joint use be permitted and prescribe reasonable conditions and compensation for such joint use.

Section 614-31.

SECTION 33. Such use or joint use so ordered shall be permitted and such conditions and compensation so pre-

scribed shall be the lawful conditions and compensation to be observed, followed and paid, subject to recourse to the courts by any interested party as provided in this act. Any such order made by the commission may be revoked or from time to time revised by the commission.

Conditions and compensation.

Section 614-32. SECTION 34. The commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the public or any public utility of this state in case of any emergency to be judged by the commission, to temporarily alter, amend, or with the consent of the public utility concerned suspend any existing rates, schedules or order relating to or affecting any public utility or part of any public utility in this state. Such rates so made by the commission shall apply to one or more of the public utilities in this state or to any portion thereof as may be directed by the commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the commission.

Power to amend, alter or suspend schedule of rates.

Section 614-33. SECTION 35. The commission shall keep informed of all new construction, extensions and additions to the property of such public utilities and may prescribe the necessary forms, regulations and instructions to the officers and employes of such public utilities for the keeping of construction accounts, which shall clearly distinguish all operating expenses and new construction.

Construction accounts.

Section 614-34. SECTION 36. The commission shall ascertain and prescribe suitable and convenient standard commercial units of the product or service of any public utility, when the character of its product or service is such that it can be determined, and such units shall be the lawful units for the purposes of this act.

Standard units.

Section 614-35. SECTION 37. Each such utility shall furnish to the commission in such form and at such times as the commission may require such accounts, reports and information as shall show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public.

Report, etc.

Section 614-36. SECTION 38. The commission may ascertain and fix adequate and serviceable standards for the measurement of quality, pressure, initial voltage or other condition pertaining to the supply or quality or the product or service rendered by any public utility and prescribe reasonable regulations for examination and testing of such product or service and for the measurements thereof. It may establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurements, and every public utility is required to carry into effect all orders issued by the commission relative thereto.

Standards of measurement.

Section 614-37. SECTION 39. The commission may provide for the examination and testing of any and all appliances used for the measurement of any product or service of a public utility. Any consumer or user may have any such appliance tested upon payment of the fees fixed by the commis-

Examination and test.

sion. The commission may declare and establish reasonable fees to be paid for testing such appliances on the request of the consumers or users, the fees to be paid by the consumer or user at the time the request is made, but to be paid by the public utility and repaid to the consumer or user if the appliance be found commercially defective or incorrect to the disadvantage of the consumer or user.

Section 614-38. Facts shall be public and records open.

SECTION 40. All facts and information in the possession of the commission shall be public, and all reports, records, files, books, accounts, papers and memoranda of every nature whatsoever in their possession shall be open to inspection by the public at all reasonable times, except when the commission shall determine it to be necessary to withhold for a reasonable time from the public any facts or information in its possession.

Section 614-39. Incrimination no excuse.

SECTION 41. No person shall be excused from testifying or from producing accounts, books and papers, in any hearing before the commission, or any member thereof, or any person appointed by it to investigate any matter or thing under its jurisdiction, on the ground or for the reason that the testimony or evidence might tend to incriminate him, or subject him to a penalty or forfeiture, but no such person shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he may have testified or produced any documentary evidence; provided, that no person so testifying shall be exempted from prosecution or punishment for perjury in so testifying.

Section 614-40.

SECTION 42. Whenever any rate, toll, charge or service, ordered substituted by the commission, shall be a joint rate, toll, charge or service, and the public utilities parties thereto, fail to agree upon the apportionment thereof within twenty days after the service of such order, the commission may, after hearing, make and issue a supplemental order fixing the apportionment of such joint rate, toll, charge or service between such public utilities, and the same shall take effect of its own force as a part of the original order.

Supplemental order.

Section 614-41. All orders take effect, when.

SECTION 43. All orders made by the commission shall, of their own force, take effect and become effective operative thirty days after service thereof, unless a different time be provided in the order.

Section 614-42. Railroad track connection.

SECTION 44. When the tracks of a steam railroad, the tracks of an interurban or suburban railroad cross, connect or intersect and such tracks are of the same gauge, the companies owning such roads may connect the tracks of the roads so connecting, crossing or intersecting, so as to admit the passage of cars from one road to the other with facility. If any such road or roads fail, neglect or refuse to make such connection, upon complaint of any party authorized by the provisions of this chapter to file complaint, the commission shall proceed to hear and determine the same in a manner provided for making investigations, upon complaint. If upon such hearing the commission shall find it is

Complaint on failure.

Hearing—order.

practicable and reasonably necessary to accommodate the public to connect such tracks and that when so connected, it will be practicable to transport over such road, cars without endangering the equipment, tracks or appliances of either company, then the commission shall make an order requiring such railroads to make connection, describing the terms and conditions, and apportion the cost thereof between the railroads. When such connection is made, the railroads parties thereto, according to their respective powers, shall afford all reasonable and proper facilities for the interchange of traffic between their respective lines for forwarding and delivering passengers and property, and without unreasonable delay or discrimination shall transfer, switch and deliver cars, freight or passenger, destined to a point on its own or connecting lines; but precedence may be given to live stock and perishable freight over other freight. Whenever a derailing device is required at the intersection of any railroads herein mentioned the same shall be installed, maintained and operated as required by such commission, which shall have full power and authority to prescribe the necessary rules and regulations for the operation of the same, and designate the company or companies that shall be responsible for the operation thereof.

Interchange of traffic.

Section 614-43.

SECTION 45. Upon the application of any person, public utility or railroad aggrieved thereby, the commission may, upon written petition therefor, filed within thirty days after any order made by the commission shall have been entered upon its records, grant a rehearing of the matter upon which such order was based. Notice of such rehearing shall be given as required with respect to original hearings, of the time and place for the rehearing thereon. Upon such rehearing any party may offer additional evidence which could not, with reasonable diligence, have been offered on the former hearing. Upon such rehearing, the commission may change, modify, vacate or affirm its former order and make and enter such new order as may be deemed necessary.

Rehearing.

Section 614-44.

SECTION 46. Any municipal corporation in which any public utility is established, may, by ordinance, at any time within one year before the expiration of any contract entered into under the provisions of sections 3644, 3982 and 3983 of the General Code between the municipality and such public utility with respect to the rate, price, charge, toll, or rental to be made, charge, demanded, collected or exacted, for any commodity, utility or service, by such public utility, or at any other time authorized by law proceed to fix the price, rate, charge, toll, or rental that such public utility may charge, demand, exact or collect therefor for an ensuing period, as provided in sections 3644, 3982 and 3983 of the General Code. Thereupon, the commission, upon complaint in writing, of such public utility, or upon complaint of one per centum of the electors of such municipal corporation, which complaints shall be filed within

Power of municipality to fix rate, etc.

Complaint—hearing.

sixty days after the passage of such ordinance, shall give thirty days' notice of the filing and pendency of such complaint to the public utlity and the mayor of such municipality, of the time and place of the hearing thereof, and which shall plainly state the matters and things complained of.

Accepted rate becomes operative, when.

If any public utility shall have accepted any rate, price, charge, toll, or rental fixed by ordinance of such municipality, the same shall become operative, unless within sixty days after such acceptance there shall have been filed with the commission, a complaint, signed by not less than three per centum of the qualified electors of such municipality. Upon such filing, the commission shall forthwith give notice of the filing and pendency of such complaint to the mayor of such municipality and fix a time and place for the hearing thereof. The commission shall, at such time and place, proceed to hear such complaint, and may adjourn the hearing thereof from day to day.

The filing of a complaint by a public utility, as herein provided, shall be taken and held to be the consent of such public utility to continue to furnish its product or service, and devote its property engaged therein to such public use during the term so fixed by ordinance or by the provisions of this act. Parties thereto shall be entitled to be heard, represented by counsel, and to have process to force the attendance of witnesses.

Section 614-45.

Rate will not be suspended or vacated, etc., without bond.

SECTION 47. No such complaint or appeal to the commission shall suspend, vacate, or set aside the rate, price, charge, toll or rental fixed by ordinance unless such public utility shall elect to charge the rate, price, charge, toll or rental in force and effect immediately prior to the taking effect of the regulation complained of and appealed from, and shall give an undertaking in such amount as the commission shall determine. The undertaking shall be filed with the commission and shall be payable to the state of Ohio for the use and benefit of the consumers affected by the regulation in question. The condition of the undertaking shall be that such public utility shall refund to each of its consumers, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect from such consumers. The commission shall make all necessary orders in respect to the form of such undertaking and the manner of making such refunders.

Section 614-46.

Finding as to rate.

SECTION 48. If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental, so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (ex-

clusive of any tax or annual charge) actually paid to any political subdivision of the state or county as a consideration or the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservations from the income for surplus, depreciation and contingencies, and such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance, which shall not be less than two years, and order the same substituted for the rate, price, charge, toll or rental so fixed by ordinance or the commission may find and declare that the rate, price, charge, toll or rental, so fixed by ordinance, is just and reasonable, and ratify and confirm the same.

When effective.

No such rate, price, charge, toll or rental so determined by the commission shall become effective or valid until after the commission shall have ascertained and determined the valuation upon which such price, charge, toll or rental is based as provided in this act. And such valuation so determined shall be, at all times, open to public inspection. Thereupon the commission shall make inquiry and investigation with respect to the ability of such public utility to furnish its product during such period, if it be found that it is able so to do, the commission shall order the public utility in question to continue to furnish the same for the period and at the rate, price, charge, toll or rental so fixed and determined, and such public utility shall continue to furnish its product as provided in such order.

Section 614-47. When act not applicable.

SECTION 49. This act shall not apply to any rate, fare or regulation now or hereafter prescribed by any municipal corporation granting a right, permission, authority or franchise, to use its streets, alleys, avenues or public places, for street railway or street railroad purposes, or to any prices so fixed under sections 3644, 3982 and 3983 of the General Code, except as provided in sections 46, 47 and 48 of this act.

Section 614-48. Annual report.

SECTION 50. Every public utility shall file with the commission, at such times and in such form as it may prescribe, an annual report, duly verified, covering the yearly period fixed by the commission. The commission shall prescribe the character of the information to be embodied in such annual report, and shall furnish to each public utility a blank form therefor. If any such report is defective or erroneous, the commission may order the same to be amended within a prescribed time. Such annual reports shall be preserved in the office of the commission. The commission may, at any time, require specific answers to questions upon which it may desire information.

Section 614-49. Depreciation account.

SECTION 51. Every public utility shall carry a proper and adequate depreciation or deferred maintenance account, whenever the commission after investigation shall

determine that a depreciation account can be reasonably required. The commission shall ascertain, determine and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The charge for depreciation shall be such as will provide the amount required over and above the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progress of the art or industry. The commission may prescribe such changes in such charges for depreciation from time to time as it may find necessary.

Section 614-50. Depreciation fund.

SECTION 52. The moneys for depreciation charges thus provided for shall be set aside out of the earnings and carried as a depreciation fund. The moneys in such fund may be expended in new construction, extensions or additions to the property of the public utility, or invested, and if invested, the income from the investment shall also be carried in the depreciation fund. Such fund and the proceeds thereof, may be used for the purpose of renewing, restoring, replacing or substituting depreciated property in order to keep the plant in a state of efficiency. Such fund and the proceeds or income therefrom shall be used for no purpose other than as provided in this section, except upon the approval of the commission.

Section 614-51. Power to require additions and extensions.

SECTION 53. The council of any municipality shall have the power upon filing of an application therefor by any person, firm or corporation, to require of any public utility, by ordinance or otherwise, such additions or extensions to its distributing plant within such municipality as shall be deemed reasonable and necessary in the interest of the public, and, subject to the provisions of section 9105 of the General Code, to designate the location and nature of all such additions and extensions, the time within which they must be completed, and all conditions under which they must be constructed and operated. Such requirements and orders of the council shall be subject to review by the commission, as provided in sections 46 and 48 hereof. The council and commission in determining the practicability of such additions and extensions, shall take into consideration the supply of the product furnished by such public utility available, and the returns upon the cost and expense of constructing said extension and the amount of revenue to be derived therefrom, as well as the earning power of the public utility as a whole.

Section 614-52. Company not permitted to exercise right of franchise where another is giving adequate service.

SECTION 54. No telephone company shall exercise any permit, right, license or franchise that may have been heretofore granted but not actually exercised or that may hereafter be granted to own or operate a plant for the furnishing of any telephone service, thereunder in any municipality or locality, where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the commission a certificate after public hearing of all parties interested that the exer-

cising of such license, permit, right or franchise is proper and necessary for the public convenience.

Section 614-53. SECTION 56. A public utility or a railroad, as defined in this act, may, when authorized by order of the commission, and not otherwise, issue stocks, bonds, notes and other evidences of indebtedness, payable at periods of more than twelve months after date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities or for the improvement or maintenance of its service, or for the reorganization or readjustment of its indebtedness and capitalization, or for the discharge or lawful refunding of its obligations, or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility or railroad not secured or obtained from the issue of stocks, bonds, notes or other evidences of indebtedness of such public utility or railroad within five years next prior to the filing of an application therefor as herein provided, or for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditures in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which said expenditure was made.

Power to issue stocks, bonds, etc.

Commission may authorize issue.

The commission may, by order duly made, authorize the issue of bonds, notes, or other evidence of indebtedness, for the reimbursement of money heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements prior to five years next preceding the filing of an application therefor, if such application for such consent be made prior to January 1, 1913.

Provided, however, that it shall be the duty of the commission to authorize, on the best terms obtainable, such issues of stocks, bonds and other evidence of indebtedness as shall be necessary to enable any public utility to comply with the provisions of any contract heretofore made between such public utility and any municipality.

Section 614-54. SECTION 57. The proceedings for obtaining the consent and authority of the commission for such issue as provided in the next preceding section of this act, shall be as follows:

Proceedings to obtain authority.

(a) In case the stocks, bonds, notes, or other evidence of indebtedness are to be issued for money only, the public utility or railroad shall file with the commission a statement, signed and verified by the president and secretary thereof, setting forth:

(1) The amount and character of the stocks, bonds or other evidence of indebtedness.

(2) The purposes for which they are to be issued.

(3) The terms upon which they are to be issued.

(4) The total assets and liabilities of the public utility or railroad in such detail as the commission may require.

(5) If the issue is desired for the purpose of the reimbursement of money expended from income, as herein provided, the amount expended, when and for what purposes expended.

(6) Such other facts and information pertinent to the inquiry as the commission may require.

(b) If the stocks, bonds, notes or other evidence of indebtedness are to be issued, partly or wholly for property or services or other consideration than money the public utility or railroad shall file with the commission a statement, signed and verified by its president and secretary, setting forth:

(1) The amount and character of the stocks, bonds or other evidence of indebtedness proposed to be issued.

(2) The purposes for which they are to be issued.

(3) The description and estimated value of the property or services for which they are to be issued.

(4) The terms on which they are to be issued or exchanged.

(5) The amount of money, if any, to be received from the same in addition to the property, service or other consideration.

(6) The total assets and liabilities of the public utility or railroad in such detail as the commission may require.

(7) Such other facts and information pertinent to the inquiry as the commission may require. Provided however, that this section or the preceding section shall not apply to union depot companies heretofore organized, and under contract until the same are completed.

Section 614-55.

Hearings.

Order.

Application of proceeds.

SECTION 58. For the purpose of enabling the commission to determine whether it should issue such order, it shall hold such hearings, make such inquiries or investigation, examine such witnesses, books, papers, documents and contracts as it may deem proper. The order of the commission shall fix the amount, character and terms of any such issue, and the purposes to which the issue or any proceeds thereof shall be applied, and recite that the money, property, consideration or labor procured or to be procured or paid for by such issue, has been, or is reasonably required for the purposes specified in the order, and the value of any property, consideration or service as the case may be, as found by the commission for which in whole or in part, such issue is proposed to be made. No such public utility or railroad shall, without the consent of the commission, apply any such issue or its proceeds to any purpose not specified in the order. Such public utilities or railroads may issue notes for proper corporate purposes, and not in violation of any provision of this act, payable at periods of not more than twelve months without the consent of the commission, but no such notes shall, in whole or in part, directly or indirectly, be refunded by any issue

of stocks or bonds, or by any evidence of indebtedness, running for more than twelve months without the consent of the commission. All stocks, bonds, notes or other evidence of indebtedness, issued by any public utility or railroad without the consent or permission of the commission, as herein provided, shall be void and of no effect. No interstate railroad or public utility shall be required, however, to apply to the commission for authority to issue stock, bonds, notes or other evidence of indebtedness for the acquisition of property, the construction, completion, extension or improvement of its facilities or the improvement or maintenance of its service outside the state, or for the discharge or refunding of obligations issued or incurred for such purposes or for reimbursement of moneys actually expended for such purposes outside of the state.

Issue without authority, void.

Section 614-56. SECTION 59. Where a public utility or railroad is, at the time this act takes effect, in the possession of one or more receivers or its property is under foreclosure, and a reorganization thereof is pending, any new company or companies that may hereafter be organized to acquire such property or any part thereof, shall be exempt from all the provisions of this act with respect to the issue of bonds, stocks and evidences of debt, provided that the total debts, obligations and securities of such new or reorganized company or companies exclusive of bonds, obligations, stocks and other securities that may be issued or authorized for additional capital shall not exceed the debts, obligations, stocks and other securities of the existing company or companies, and provided further that from and after its organization and the issue of such bonds, obligations, stocks and other securities as hereby permitted, all the provisions of this act shall apply to such new or reorganized company or companies.

Public utility in hands of receiver, etc., exempt from this act.

Section 614-57. SECTION 60. Any director, president, secretary, manager, officer or other official of any public utility or railroad who shall knowingly make any false statement to secure the issue of any stock, bond, note or other evidence of indebtedness, or who shall, by such false statement, procure the order of the commission for the issue of any stock, bond, note or other evidence of indebtedness, or issue with knowledge of such fraud, negotiate, or cause to be negotiated any such stock, bond, or other evidences of indebtedness in violation of this act, shall upon conviction thereof, be fined not less than five hundred dollars, or be imprisoned in the penitentiary for not less than one year or more than ten years.

Penalty for false statement.

Section 614-58. SECTION 61. No public utility or railroad shall declare any stock, bond or scrip dividend or divide the proceeds of the sale of any stock, bond, or scrip among its stockholders, unless authorized by the commission so to do.

Dividend must be authorized.

Section 614-59. SECTION 62. The commission shall not have power to authorize the capitalization of any franchise or right to own, operate or enjoy any franchise whatsoever in excess

Capitalization.

of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as the consideration for the grant of such franchise or right, nor shall the capital stock of a corporation formed by the merger or consolidation of two or more corporations exceed the sum of the capital stock of the corporation or corporations so consolidated or merged, at the par value thereof, and such sum or any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any such corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger; nor shall the aggregate amount of the debt of such consolidated companies by reason of such consolidation be increased.

Section 614-60.
Consent and approval of commission.

SECTION 63. With the consent and approval of the commission, but not otherwise:

(a) Any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state, may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other.

(b) Any public utility may purchase, or lease the property, plant or business of any other such public utility.

(c) Any such public utility may sell or lease its property or business to any other such public utility.

(d) Any such public utility may purchase the stock of any other such public utility.

The proceedings for obtaining the consent and approval of the commission for such authority, shall be as follows:

Petition.

There shall be filed with the commission a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, clearly setting forth the object and purposes desired, stating whether or not it is for the purchase, sale, lease or making of contracts or for any other purpose in this section provided and also the terms and conditions of the same. The commission shall, upon the filing of such petition, if it deem the same necessary, fix a time and place for the hearing thereof. If, after such hearing or in case no hearing is required, the commission is satisfied that the prayer of such petition should be granted and the public will thereby be furnished adequate service for a reasonable and just rate, rental, toll, or charge therefor, it shall make such order in the premises as it may deem proper and the circumstances require, and thereupon it shall be lawful to do the things provided for in such order.

Hearing.

Section 614-61.

SECTION 64. With the consent and approval of the commission, but not otherwise, any two or more telephone companies, defined in this act, and doing business in this

state or partly within and partly without this state, may consolidate with each other, when such telephone companies shall have complied with the orders and requirements of the commission and the provisions of this act.

Merger.

Such telephone companies shall file with the commission a joint petition for such consolidation, signed and verified by the president and secretary of the respective companies, in which shall be set forth in detail, all of the terms, conditions and proceedings pertaining to such consolidation and in such form as the commission may require, and thereupon the commission shall fix a time and place for the hearing of such petition.

Petition.

If, after such hearing, the commission is satisfied that such consolidation will promote public convenience, and will furnish the public adequate service for a reasonable rate, rental, toll or charge therefor, it shall make an order authorizing such consolidation, which order before taking effect shall be filed with the secretary of state. Other proceedings relating to such consolidation shall be in the manner and with the effect, not inconsistent with the provisions of this act, as is provided for in the consolidation of railroad companies under the laws of this state.

Order.

No consolidation, purchase, lease or contract by which two or more telephone companies merge or operate their lines or plants jointly or in connection with each other, shall become valid or effective until after the commission shall have ascertained and determined the valuation as provided in this act upon which the rates, tolls, charges and rentals are based and also shall have fixed and determined such rates, tolls, charges and rentals so to be charged.

Valuation, rates, etc.

All valuations so ascertained and determined shall be at all times open to public inspection.

Section 614-62. SECTION 65. All such contracts, leases, purchases, sales or consolidations not made pursuant to the provisions of this act or contrary hereto shall be void and of no effect.

Void contracts.

Section 614-63. SECTION 66. The commission shall have the power upon complaint, in writing, by any person, or on its own initiative, by order, to require any two or more telephone companies whose lines or wires form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points, between different localities which cannot be communicated with or reached by the lines of either company alone, where such service is not already established or provided for, unless public necessity requires additional service, to establish and maintain through lines within the state between two or more such localities. The joint rate or charges for such service shall be just and reasonable and the commission shall have power to establish the same, and declare the portion thereof to which each company affected thereby shall be entitled and the manner in which the same shall be secured and paid. All necessary con-

Power to form continuous line.

Charges, rates, etc.

struction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such division of expense and labor as shall or may be required by the commission.

Section 614-64. SECTION 67. Every public utility or railroad and every officer thereof, shall obey, observe, and comply with every order, direction and requirement of the commission, made under authority of this act, so long as the same shall be and remain in force. Any public utility or railroad herein defined which violates any provision of this act, or which after due notice fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission officially promulgated shall forfeit and pay to the state not to exceed one thousand dollars for each such failure, omission or neglect and each day's continuance thereof shall be deemed and held to be a separate offense.

Penalty on failure to comply with orders.

Section 614-65. SECTION 68. Whoever being an officer, agent or employe in an official capacity, of a public utility or railroad defined in this act, knowingly violates any provisions of this act, or wilfully fails, omits or neglects to obey, observe or comply with any lawful order or direction of the commission made with respect to any public utility or railroad shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned not more than two years, or both, and each day's continuance of such failure, omission or neglect shall constitute a separate offense.

Penalty.

Section 614-66. Title of action. SECTION 69. Actions to recover penalties and forfeitures provided for in this act, shall be prosecuted in the name of the state and may be brought in the court of common pleas of any county in which the public utility or railroad may be located. Such action shall be commenced and prosecuted by the attorney general, when directed so to do by the commission. Moneys recovered by such action shall be deposited in the state treasury to the credit of the general revenue fund.

Section 614-67. SECTION 70. Whenever the commission shall be of the opinion that any public utility or railroad has failed, omitted or neglected to obey any order made with respect thereto, or is about to fail or neglect so to do, or is permitting anything, or about to permit anything contrary to, or in violation of law, or an order of the commission, duly authorized under the provisions of this act, the attorney general, upon the request of the commission, shall commence and prosecute such action, actions, or proceedings in mandamus or by injunction in the name of the state, as may be directed by the commission, against such public utility or railroad, alleging the violation complained of and praying for proper relief, and in such case the court may make such order as may be proper in the premises.

Mandamus—injunction.

Section 614-68. SECTION 71. If any public utility or railroad does, or

causes to be done, any act, matter, or thing prohibited by this act, or declared to be unlawful, or shall omit to do any act, matter or thing required by this act, or by order of the commission, such public utility or railroad shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, failure or omission; provided, that any recovery under this section shall in no manner affect a recovery by the state for any penalty provided for in this act.

Treble damages on violations.

Section 614-69.

SECTION 72. A public utility or railroad or other party in interest, dissatisfied with an order of the commission fixing or substituting or confirming any fare, toll, price, rate, charge, rental, schedule or classification, or any order fixing or substituting or confirming any regulation, practice, act or service, or any other order, finding, determination, direction or requirement of the commission, may commence an action in the court of common pleas of Franklin county or of the county in which is located the principal office of the public utility or railroad within sixty days after such order is made, against the commission as defendant, to vacate and set aside such order on the ground that the fare, toll, price, rate, charge, rental, schedule or classification fixed in such order, is unlawful or unreasonable, or that the regulation, practice, act or service, fixed in such order is unlawful or unreasonable; or that the order, finding, determination, direction or requirement of the commission is unlawful or unreasonable; in which action summons may be issued to any county or counties in this state and there served upon the adverse parties. Such action shall proceed as provided in sections 544, 545, 546, 547, 548, 549, 550, 551, 552 of the General Code, which sections shall apply to public utilities with the same force and effect as to railroads.

Action to vacate order, etc.

Section 614-70.

SECTION 73. Upon the commencement of any such action, the operation of the order, finding, determination, direction or requirement complained of shall not be suspended until the determination of said action, unless the court or a judge thereof, after notice of and hearing, shall otherwise order and the court or judge thereof may, after hearing, fix the terms and conditions for the suspension of said order, finding, determination, direction or requirement or any part thereof.

Suspension of order, when.

Provided, however, that the commencement of such action to vacate and set aside any order of the commission with respect to any fare, toll, price, rate, charge, or rental, shall vacate and suspend the order of the commission sought to be vacated, if such public utility or railroad shall elect to charge the fare, toll, price, rate, charge, or rental in force and effect immediately prior to the entering of such order of the commission, and shall give an undertaking in such amount as the court shall determine. The undertaking shall be filed with the court and shall be pay-

Bond.

able to the state of Ohio for the use and benefit of the users affected by the order of the commission. The condition of the undertaking shall be that the public utility or railroad shall refund to each of such users, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect from such users. The court shall make all necessary orders in respect to the form of such undertaking and the manner of making such refunders.

Section 614-71. Service of order.

SECTION 74. Every order provided for in this act, shall be served upon every person or corporation to be affected thereby, either by personal delivery or a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby, or in the case of a corporation, to any officer or agent thereof, upon whom a summons may be served. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person or corporation upon whom it is served must if so required in the order notify the commission in like manner whether the terms of the order are accepted and will be obeyed.

Section 614-72. Free service or reduced rates valid, when.

SECTION 75. Nothing in this act contained shall prevent any public utility or railroad from granting the whole or any part of its property for any public purpose, or granting reduced rate or free service of any kind to the United States government, the state government or any political division or subdivision thereof, or for charitable purposes or for fairs or expositions or to any officer or employe of such public utility or railroad or his family and all contracts and agreements made or entered into by such public utility or railroad for such use, reduced rates, or free service shall be valid and enforcible at law.

Section 614-73. Limitation.

SECTION 76. No franchise, permit, license or right to own, operate, manage or control any public utility, herein defined as an electric light company, gas company, water works company or heating and cooling company, shall be hereafter granted or transferred to any corporation not duly incorporated under the laws of Ohio.

Section 614-74.

SECTION 77. Companies formed to acquire property or to transact business which would be subjected to the provisions of this act, and companies owning or possessing franchises for any of the purposes contemplated in this act, shall be deemed and held to be subject to the provisions of this act, although no property may have been acquired, business transacted or franchises exercised.

Section 614-75.

SECTION 78. The act, omission or failure of any officer, agent or other person, acting for or employed by a public utility or railroad, while acting within the scope

of his employment, shall be deemed and held to be the act or failure of the public utility or railroad.

Section 31-2. SECTION 79. The commission shall have an official seal which shall be one inch and three-quarters in diameter, with such design as the commission may prescribe engraved thereon, and surrounded by the words "The Public Service Commission of Ohio," with which its proceedings shall be authenticated and of which the courts shall take judicial notice. Seal.

Section 614-76. SECTION 80. The commission shall charge and collect for furnishing any copy of any paper, record, testimony or writing made, taken or filed under the provisions of this act, except such transcripts and other papers as are required to be filed in any court proceedings herein authorized, whether under seal and certified to or otherwise, the same fees now charged by the secretary of state, and such fees itemized shall be paid into the state treasury on the first day of each month. Upon application of any person, and payment of the proper fee therefor, the commission shall furnish certified copies under the seal of the commission, of any order made by it, which shall be prima facie evidence in any court of the facts stated therein. The copies of schedules and classifications and tariffs of rates, tolls, prices, rentals, regulations, practices, services, fares and charges, and of all contracts, agreements and arrangements between public utilities and railroads, or either, filed with the commission as herein provided, and the statistics, tables and figures contained in the annual or other reports of such companies made to the commission as required under the provisions of this act, shall be preserved as public records in the custody of the commission and shall be received as prima facie evidence of what they purport to be, for the purpose of investigations and prosecutions by the commission and in all judicial proceedings; and copies of and extracts from any of such schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the commission under the seal of such commission, shall be received in evidence with like effect as the originals. Also copies of any order made by such commission certified under the seal of such commission, shall be furnished to any person upon application. Fees.

Section 614-77. SECTION 81. The commission shall, whenever called upon by any officer, board or commission now existing or hereafter created in the state or any political subdivision thereof, furnish any data or information to such officer, board or commission and shall aid or assist any such officer, board or commission in performing the duties of his or its office, and all officers, boards or commissions now existing or hereafter created in the state or any political subdivision thereof, shall furnish to the commission, upon request, any data or information which will assist such com- Information furnished by commission.

mission in the discharge of the duties imposed upon it by this act.

Section 614-78. SECTION 82. If the commission after investigating shall find that any rate, joint rate, fare, charge, toll, rental, schedule or classification of service is unjust, unreasonable and insufficient or unjustly discriminatory or unjustly preferential or in violation of law or otherwise in violation of any provisions of this act or that any service is inadequate or cannot be obtained the public utility found to be at fault shall pay the expenses incurred by the commission upon such investigation.

Costs and expenses.

All fees, expenses and costs of or in connection with any hearing or investigation may be imposed by the commission upon any party to the record, or may be divided between any or all parties to the record in such proportion as the commission may determine.

Section 614-79. SECTION 83. Whoever, being a member of the commission, shall wilfully overvalue the property of a public utility for the purpose of enabling such public utility to exact a higher rate for service than could lawfully be exacted, or, shall wilfully undervalue such property for the purpose of preventing such public utility from charging a lawful rate for such service shall be fined not to exceed one thousand dollars or be imprisoned not more than two years or both.

Penalty for wilful over or under valuation.

Section 614-80. SECTION 84. The commission shall annually as early as the fifteenth day of December, make and deliver to the governor, a full report of the operation and execution of all laws which it is herein required to administer, for the year ending November 15th, twenty-five hundred copies, which shall be printed in book form for the use of the general assembly and the public. In addition thereto, it shall make such recommendations to the general assembly as it may from time to time deem proper.

Report to governor.

Section 614-81. SECTION 85. The commission may appoint a secretary, and such number of assistants, clerks, experts, accountants, examiners, inspectors and stenographers as, in its opinion may be necessary, and fix their compensation, which shall be paid out of the state treasury upon the warrant of the auditor upon presentation of vouchers signed by the chairman and secretary of the commission. But all appointments, salaries and compensations shall be first approved by the governor. The commissioners and their assistants, shall receive from the state their actual and necessary expenses while traveling on the business of the commission. An itemized statement of such expenses must be sworn to by the person who incurred them, and such statement shall be filed with the commission and approved by it before payment is made.

Assistants, appointment and approval.

Salaries and expenses.

Section 614-82. SECTION 86. Each section of this act, and every part thereof, is hereby declared to be independent sections and parts of sections and the holding of any section or part

thereof to be void or ineffective for any cause, shall not be deemed to affect any other section or part thereof.

Section 62250-2. SECTION 87. Each of the members of the commission shall receive an annual salary of six thousand dollars, payable in the same manner as the salaries of other state officers are paid. Salary.

Section 614-83. SECTION 88. The total annual expenditures of the commission shall not exceed the sum of seventy-five thousand dollars, in addition to such sum or sums as may be derived under section 606 of the General Code.

The sectional numbers on the margin hereof are designated as provided by law. TIMOTHY S. HOGAN, *Attorney General.*

SECTION 89. That said original sections 501 and 502 and section 606 of the General Code be and the same are hereby repealed.

SECTION 90. This act shall take effect and be in force from and after June 30th, 1911.

S. J. VINING,
Speaker of the House of Representatives.
HUGH L. NICHOLS,
Passed May 31st, 1911. *President of the Senate.*

This bill was presented to the Governor on June 2, 1911, and was not signed or returned to the house wherein it originated within ten days after being so presented, exclusive of Sundays and the day said bill was presented, and was filed in the office of the Secretary of State June 21, 1911.

JOHN W. DEVANNEY,
Veto Clerk.
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[House Bill No. 489.]

AN ACT

To provide for the construction of joint county ditches.

Be it enacted by the General Assembly of the State of Ohio:

Section 6563-1. SECTION 1. When it is proposed to construct or improve a ditch or to improve or straighten a natural water course which will require location in two or more counties, or which will cut off any of the water which flows into one county from one or more counties, such improvement may be made according to the following provisions: A petition for such improvement shall be filed by fifty or more persons interested therein with the auditor of one of said several counties. Petition.

Section 6563-2. SECTION 2. Any ditch constructed under the provisions of this act may be so constructed that it will take the water out of its natural course and cause the same to flow through said ditch in a different direction and find its outlet at a different place than it would naturally. Change of water course.

Section 6563-3. SECTION 3. Said petition shall set forth the general character of the proposed improvement together with the Contents of petition.

R.C. § 1331.08

1331.08 Liability for damages

Currentness

In addition to the civil and criminal penalties provided in sections 1331.01 to 1331.14 of the Revised Code, the person injured in the person's business or property by another person by reason of anything forbidden or declared to be unlawful in those sections, may sue therefor in any court having jurisdiction and venue thereof, without respect to the amount in controversy, and recover treble the damages sustained by the person and the person's costs of suit. When it appears to the court, before which a proceeding under those sections is pending, that the ends of justice require other parties to be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside in the county where the action is pending.

CREDIT(S)

(2001 H 126, eff. 2-20-02; 1976 H 1358, eff. 10-1-76; 1953 H 1; GC 6397)

Notes of Decisions (36)

R.C. § 1331.08, OH ST § 1331.08
Current through File 51 of the 132nd General Assembly (2017-2018) and 2017 State Issue 1.

End of Document

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SECTION 7. This act shall take effect and be in force from and after its passage.

HARRY C. MASON,
Speaker of the House of Representatives.
ASAHEL W. JONES,
President of the Senate.

Passed April 19, 1898. 119G

[Senate Bill No. 336.]

AN ACT

To define trust and to provide for criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in the state.

Trust defined.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That a trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce.

2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.

3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests

that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void.

Suit against offending corporation or association for forfeiture of charter; duty of attorney-general and prosecuting attorney.

SECTION 2. For a violation of any of the provisions of this act by any corporation or association mentioned herein, it shall be the duty of the attorney-general, or the prosecuting attorney of the proper county, to institute proper suits or quo warranto proceedings in the court of competent jurisdiction in any of the county seats in the state where such corporation or association exists or does business, or may have a domicile. And when such suit is instituted by the attorney-general in quo warranto, he may also begin any such suit in the supreme court of the state, or the circuit court of Franklin county, for the forfeiture of its charter rights, franchises or privileges and powers exercised by such corporation or association, and for the dissolution of the same under the general statutes of the state.

Prohibition against offending foreign corporation; duty of attorney-general.

SECTION 3. Every foreign corporation, as well as any foreign association, exercising any of the powers, franchises or functions of a corporation in this state, violating any of the provisions of this act, is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the attorney-general to enforce this provision by bringing proper proceedings in quo warranto in the supreme court, or the circuit court of the county in which defendant resides or does business, or other proper proceedings by injunction or otherwise. The secretary of state shall be authorized to revoke the certificate of any such corporation or association heretofore authorized by him to do business in this state.

Secretary of state to revoke certificate.

Conspiracy against trade; penalty against person engaged therein.

SECTION 4. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than fifty ($50) dollars nor more than five thousand ($5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense.

What indictment to contain.

SECTION 5. In any indictment for any offense named in this act, it is sufficient to state the purpose or effects of the trust or combination. And that the accused is a member of, acted with or in pursuance of it, or aided or assisted

in carrying out its purposes, without giving its name or description, or how, when and where it was created.

Evidence.

SECTION 6. In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

Penalty.

SECTION 7. Each and every firm, person, partnership, corporation or association of persons, who shall in any manner violate any of the provisions of this act, shall for each and every day that such violations shall be committed or continued, after due notice given by the attorney-general or any prosecuting attorney, forfeit and pay the sum of fifty ($50) dollars, which may be recovered in the name of the state, in any county where the offense is committed, or where either of the offenders reside; and it shall be the duty of the attorney-general, or the prosecuting attorney of any county on the order of the attorney-general, to prosecute for the recovery of same. When the action is prosecuted by the attorney-general against a corporation or association of persons, he may begin the action in the circuit court of the county in which defendant resides or does business.

Duty of attorney-general and prosecuting attorney.

Where attorney-general may bring action.

Illegal contract.

SECTION 8. That any contract or agreement in violation of the provisions of this act, shall be absolutely void and not enforceable either in law or equity.

Provisions cumulative.

SECTION 9. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state.

Unlawful to own trust certificates or enter into combination.

SECTION 10. It shall not be lawful for any person, partnership, association or corporation, or any agent thereof, to issue or to own trust certificates, or for any person, partnership, association or corporation, agent, officer or employe, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article, and any person, partnership, association or corporation that shall enter into any such combination, contract or agreement for the purpose aforesaid shall

Penalty.

be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not less than fifty dollars, nor more than one thousand dollars.

Injury to business or property of another; suit for damages.

SECTION 11. In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover two-fold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not.

Who may be made parties defendant.

Definition of terms.

SECTION 12. The word "person" or "persons," whenever used in this act, shall be deemed to include corporations, partnerships and associations existing under or authorized by the state of Ohio, or any other state, or any foreign country.

When act takes effect.

SECTION 13. This act shall take effect and be in force from and after the first day of July, 1898.

HARRY C. MASON,
Speaker of the House of Representatives.
ASAHEL W. JONES,
President of the Senate.

Passed April 19, 1898. 120G

[Senate Bill No. 227.]

AN ACT

To amend sections 582, 583 and 584 of the Revised Statutes of Ohio.

Justices of the peace:

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That sections 582, 583 and 584 of the Revised Statutes of Ohio be amended so as to read as follows:

Jurisdiction in general limited to townships.

Sec. 582. The jurisdiction of justices of the peace, in civil cases, unless otherwise directed by law, is limited to the township wherein they have been elected, and wherein they reside; but no justice of the peace shall hold court outside of the limits of the township for which he was elected.

Jurisdiction of justices in particular cases.

Sec. 583. Justices of the peace within and co-extensive with their respective counties shall have jurisdiction and authority:

Baldwin's Ohio Revised Code Annotated
Rules of Civil Procedure (Refs & Annos)
Title IV. Parties

Civ. R. Rule 23

Civ R 23 Class actions

Currentness

(A) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(B) Types of Class Actions. A class action may be maintained if Civ.R. 23(A) is satisfied, and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(a) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(a) the class members' interests in individually controlling the prosecution or defense of separate actions;

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(b) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(d) the likely difficulties in managing a class action.

(C) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification order

(a) Time to issue. At an early practicable time after a person sues or is sued as a class representative, the court shall determine by order whether to certify the action as a class action.

(b) Defining the class; appointing class counsel. An order that certifies a class action shall define the class and the class claims, issues, or defenses, and shall appoint class counsel under Civ.R. 23(F).

(c) Altering or amending the order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(a) For (B)(1) or (B)(2) Classes. For any class certified under Civ.R. 23(B)(1) or (B)(2), the court may direct appropriate notice to the class.

(b) For (B)(3) Classes. For any class certified under Civ.R. 23(B)(3), the court shall direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

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(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Civ.R. 23(C)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action shall:

(a) for any class certified under Civ.R. 23(B)(1) or (B)(2), include and describe those whom the court finds to be class members: and

(b) for any class certified under Civ.R. 23(B)(3), include and specify or describe those to whom the Civ.R. 23(C)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(D) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(a) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(b) require to protect class members and fairly conduct the action giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(c) impose conditions on the representative parties or on intervenors;

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(d) require that the pleadings be amended to eliminate allegations about representation of absent persons, and that the action proceed accordingly; or

(e) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Civ.R. 23(D)(1) may be altered or amended from time to time and may be combined with an order under Civ.R. 16.

(E) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court shall direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval shall file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Civ.R. 23(B)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this division (E); the objection may be withdrawn only with the court's approval.

(F) Class Counsel.

(1) Appointing class counsel. A court that certifies a class shall appoint class counsel. In appointing class counsel, the court:

(a) shall consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(b) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(c) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(d) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Civ.R. 23(G); and

(e) may make further orders in connection with the appointment.

(2) Standard for appointing class counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Civ.R. 23(F)(1) and (4). If more than one adequate applicant seeks appointment, the court shall appoint the applicant best able to represent the interests of the class.

(3) Interim counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of class counsel. Class counsel shall fairly and adequately represent the interests of the class.

(G) Attorney Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award shall be made by motion. Notice of the motion shall be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and shall state in writing the findings of fact found separately from the conclusions of law.

(4) The court may refer issues related to the amount of the award to a magistrate as provided in Civ.R. 53.

(H) Aggregation of Claims. The claims of the class shall be aggregated in determining the jurisdiction of the court.

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CREDIT(S)
(Adopted eff. 7-1-70; amended eff. 7-1-15)

STAFF NOTES
2015:

The rule is amended to conform its provisions to the changes made to Federal Rule 23 since the 1970 adoption of the Ohio Rule. While Civ.R. 23 has remained unchanged since its adoption, the Federal rule, upon which the Ohio rule was originally modeled, has undergone significant changes to guide courts and parties in the conduct of class actions, most notably the substantive amendments made to the Federal rule in 1998 and the stylistic changes made in 2007. The changes to the Ohio rule include defining the class and appointing class counsel in the certification order; additional detail for the initial notice to Civ.R. 23(B)(3) class members and for the notice of a proposed settlement, voluntary dismissal, or compromise; and new provisions addressing the appointment of class counsel and the awarding of attorney fees and nontaxable costs.

1970:

Rule 23, with the exception of subdivision (F), is the unchanged language of Federal Rule 23.

The present Ohio statute on class actions, § 2307.21, R.C., provides that:

When the question is one of a common or general interest of many persons, or the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Rule 23 represents a significant broadening of the scope of class actions in this state. § 2307.21, R.C., has been construed so as to limit class actions to cases in which there is a "community of interest" between the alleged representative members and the remainder of the class. Currently plaintiffs seeking to use the class action device under the Ohio statute must comply with the restrictive provision of § 2307.18, R.C. (joinder of plaintiffs having an interest) and § 2307.20, R.C. (parties united in interest must be joined). The result has been to restrict the use of class suits to those cases in which the members of the class are united by a common bond of property or identity of relief sought. In *Knotts v. City of Gallipolis*, 100 Ohio App. 491 (1956), a class action was permitted on behalf of all residents of a municipality to restrain certain acts by officers of the municipality. The class, taxpayers and property owners, was construed as having "a common or general interest." On the other hand, in *Colbert et al. v. Coney Island*, 97 Ohio App. 311 (1954), a class action by three plaintiffs on behalf of all members of their race who had been denied admission to an amusement park, the action was dismissed on the theory that the interests of the class were too diverse to have "a common or general interest."

The present version of Federal Rule 23, upon which Rule 23 is based, became effective on July 1, 1966. This version departs from its class suit predecessor in a number of significant ways. It eliminates the categorization of class suits--the "true," "hybrid" and "spurious" groupings identified with previous Rule 23--and seeks to identify various kinds of class actions in terms of recurring factual patterns.

The trial judge is to determine whether the action is a class action as soon after commencement as practicable. To do this he must first determine that the four prerequisites of subdivision (A) are met. He must then decide whether the action fits into one of the fact patterns described by subdivisions (B)(1)(a), (B)(1)(b), (B)(2) or (B)(3). The Federal Rules Advisory Committee notes to the present version of Rule 23 suggest the various kinds of cases which would probably fall within one of these four subdivisions. For example, a case like *Knotts v. City of Gallipolis, supra*, would fit within (B)(1)(a).

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An action by policy holders against a fraternal benefit association attacking a financial reorganization of the society would fall within (B)(1)(b), as would a case where claims are made by numerous persons against a fund and the fund is insufficient to meet all claims.

Subdivision (B)(2) would be the subdivision into which an action like *Colbert et al. v. Coney Island, supra*, would fit if other criteria of Rule 23 were met.

Subdivision (B)(3) deals with fact patterns in which the class action is not so clearly called for, such as a mass accident involving injuries to numerous persons or a case where a fraud has been perpetrated on a large number of persons. Before the judge can determine that the action is a proper class action under (B)(3), he must first determine that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to any other available method of adjudication.

In the case of a class action under (B)(3) all members of the class must be given notice by the court, as detailed in subdivision (C)(2). Any such member may "opt out" of the class by requesting exclusion from the judgment.

Once an action is determined to be a class action all members are to be included in the final judgment whether or not it is favorable to the class, except a member of the class described by (B)(3) who has requested exclusion.

The basic effect of Rule 23 is to provide the trial judge with considerable flexibility and discretion in handling purported class actions. The rule provides him with detailed guidelines to assist him in this task.

Rule 23(F), not to be found in Federal Rule 23, provides that members of the class may cumulate claims in order to meet the $500 minimum jurisdiction of the court of common pleas.

Notes of Decisions (1268)

Rules Civ. Proc., Rule 23, OH ST RCP Rule 23
Current with amendments received through January 1, 2018.

End of Document

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