No. 19-

IN THE

Supreme Court of the United States

INTERMESSAGE COMMUNICATIONS, INC.,

Petitioner,

v.

AMERITECH MOBILE COMMUNICATIONS, INC.
AND CINCINNATI SMSA LIMITED PARTNERSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio Supreme Court has violated Petitioners' due process rights by interpreting Ohio law in a way that prevents individuals who have been harmed by conduct found by that Court to be wrongful/illegal, from having any avenue to pursue any remedy for damages caused by that wrongful conduct.

PARTIES TO THE PROCEEDINGS

The Petitioner is Intermessage Communications, Inc. The Respondents are Ameritech Mobile Communications, Inc. and Cincinnati SMSA Limited Partnership.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6 Petitioner Intermessage Communications, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock. Intermessage Communications, Inc. likewise has no subsidiaries and is not the parent of any other corporation or entity.

RELATED CASES

1. *Satterfield v. Ameritech Mobile Comm., Inc.* Cuyahoga County Court of Common Pleas, Docket Case No. 03-CV-517318, Judgment Entry, February 19, 2016.

2. *Satterfield v. Ameritech Mobile Comm. Inc.,* Ohio Eighth District Court of Appeals, Docket Case No. 16-CA-104211, Opinion and Order, March 16, 2017.

3. *Satterfield v. Ameritech Mobile Comm., Inc.*, the Ohio Supreme Court, Docket Case No. 20017-0684, Opinion and Order, December 18, 2018.

4. *Satterfield v. Ameritech Mobile Comm., Inc.*, the Ohio Supreme Court, Docket Case No. 20017-0684, Denial of Motion for Reconsideration, February 20, 2019.

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The original opinion of the Ohio Supreme Court (App. A) was issued on December 18, 2018 in Ohio Supreme Court Case No. 20017-0684 and is captioned as *Satterfield v. Ameritech Mobile Comm., Inc.*, 155 Ohio St.3d 463, 121 N.E.2d 144 (2018). The opinion of the Ohio Supreme Court on reconsideration (App. C) was issued on February 20, 2019 in that same case and bearing that same caption and Ohio Supreme Court case number. *Satterfield v. Ameritech Mobile Comm., Inc.*, 154 Ohio St.3d 1512, 116 N.E.3d 1290 (Table).

The opinion of the Ohio Eighth District Court of Appeals (App. C) was issued on March 16, 2017 in Court of Appeals Case No. 16-CA-104211 and is captioned as *Satterfield v. Ameritech Mobile Comm. Inc.*, 2017-Ohio-928, 86 N.E.3d 830 (Cuyahoga 2017).

The decision of the Cuyahoga County Court of Common Pleas (App. B) was issued on February 19, 2016 in the case captioned as *Satterfield v. Ameritech Mobile Comm., Inc.*, Cuyahoga County Court of Common Pleas, Case No. 03-CV-517318 and is not reported.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on December 18, 2018. A Motion for Reconsideration was denied on February 20, 2019. App. C. On May 16, 2019 Justice Sotomayor extended the time within which to file a petition for writ of certiorari to and including July 22, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Constit., Amend. V.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Constit., Amend. XIV, Section 1.

The pertinent provisions of Ohio law involved are Ohio Rev. Code §§ 4905.26, 4905.61 and Ohio Supreme Court precedent establishing the authority of the Public Utilities Commission of Ohio ("PUCO").

In Ohio, the PUCO "has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except this court) any jurisdiction over such matters." *State ex rel. Cleveland Elec. Illuminating. Co. v. Cuyahoga Cty. Court of Common Pleas*, 88 Ohio St.3d 447, 450, 727 N.E.2d 900 (2000).

Once a finding of wrongdoing is made by the PUCO an action under Ohio Rev. Code § 4905.26 may be commenced

to recover damages. The State of Ohio had mandated that this is the exclusive means to seek damages from a PUCO finding of violation. See, *Ohio Edison Company v. PUCO*, 56 Ohio St.2d 419, 421, 384 N.E.2d 283, 284 (1978) ("general finding of [the utility's] unlawful practice would enable any of the customers billed at the higher rate to bring an action for damages in the appropriate Court of Common Pleas. . . . [which] "lays the groundwork for recovery of treble damages under [Ohio Rev. Code §] 4905.61.").

The State of Ohio had also mandated previously that the PUCO has no ability to determine whether or whose "rights were violated." *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30, 132 N.E.162 (1921).

The relevant statutes provide:

> Ohio Rev. Code § 4905.26. Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities 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, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable,

> unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained . . . .
>
> * * *
>
> The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Ohio Rev. Code § 4905.26

> Ohio Rev. Code § 4905.61 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 4925 of the Revised Code, or declared to be unlawful, or omits to do any act or thing required by such chapters, or by order of the public utilities commission, such public utility is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, failure, or omission.

Ohio Rev. Code § 4905.61 (emphasis added.)

STATEMENT

In 1993, an Ohio company known as Westside Cellular, Inc. dba Cellnet ("Cellnet") sought to enter the cellular telephone marketplace as a reseller. To achieve that objective, Cellnet sought service from Ameritech pursuant to regulations implemented by the PUCO. Ameritech refused to provide service on that basis. Cellnet then

brought a complaint at the PUCO pursuant to Ohio Rev. Code § 4905.26 where it alleged, *inter alia*, that (1) Ameritech had failed to separate its wholesale operations from its retail operations; (2) Ameritech had failed to maintain separate accounting for its wholesale operations and retail operations; (3) Ameritech had failed to comply with the requirement that its wholesale and retail operations have "no involvement whatsoever" in each other's business; and (4) that Ameritech was providing such service to its own affiliated retail operations for free, which the Ohio Supreme Court characterized as a "zero rate". *Cincinnati SMSA Limited Partnership aka Ameritech v. Public Util. Comm. of Ohio*, 98 Ohio St.3d 282, 283, 781 N.E.2d 1021 (2002). Of import here, these allegations relate solely to Ameritech's conduct in the market generally.

After a three-week trial, the PUCO issued an opinion in which it found that Ameritech had violated Ohio law.

The PUCO, after hearing evidence, ruled that between 1993[1] and 1998:

- "Ameritech Mobile has failed to maintain its records in a manner which would satisfy the objectives and intent of the regulatory framework established in both the Commission's 84-944 and 89-563 Orders." *Cellnet* Order at 37. Pl.App. at 143.

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1. The Commission's ruling in the *Cellnet* case stated that Ameritech's wrongful conduct began in 1995. On appeal, the Ohio Supreme Court reversed the PUCO and held that the wrongdoing started in 1993. *Westside Cellular, Inc. v. Pub. Util. Comm.*, 98 Ohio St.3d 165, 781 N.E.2d 199 (2002).

- "Ameritech Mobile is in violation of the Commission's order regarding the separation of its wholesale and retail operations." *Id.* at 38. Pl.App. at 144.

- Based on the testimony of Ameritech executive Alan Ferber, "the Commission conclude[d] that Ameritech Mobile was not separating its wholesale and retail in its normal course of business." *Id.* at 38. Pl.App. at 144.

- "Ameritech Mobile's practice of establishing wholesale rates for nonaffiliated carriers by first consulting with Ameritech Mobile's retail employees relative to the potential impact on Ameritech Mobile's retail business violated the Commission's 84-944 and 89-563 Orders." *Id.* at 39. Pl.App. at 145.

- "Due to Ameritech Mobile's failure to develop rates for transactions between its wholesale and retail affiliates, as well as the failure to properly maintain its records as directed by the Commission, Ameritech Mobile has harmed its own defense by not even allowing the Commission to be aware of the actual rate charged to its retail affiliate. Ameritech Mobile wishes the Commission to blindly accept the reasonableness of its internal rate without first establishing that a specific rate existed or establishing that the rate is greater than zero. In the absence of any information to the contrary, the Commission must assume that Ameritech Mobile's internal wholesale rate is zero. This conclusion is supported by Ameritech

> Mobile's own inability to identify any rate, as well as the fact that Ameritech Mobile's own annual report filings fail to demonstrate any revenue for its affiliate retail arm's [sic] purchase of service." *Id.* at 50. Pl.App. at 156.

- "[T]here was no charge between Ameritech Mobile's retail and Ameritech Mobile's wholesale." *Id.* at 51. Pl.App. at 157.

The Ohio Supreme Court, in a series of opinions, unanimously affirmed the judgment of the PUCO. *Cincinnati SMSA Limited Partnership aka Ameritech v. Public Util. Comm. of Ohio*, 98 Ohio St.3d 282, 283, 781 N.E.2d 1021 (2002); *See Westside Cellular,* Inc. *v. PUCO*, 98 Ohio St.3d 165, 168, 781 N.E.2d 199 (2002); *New Par v. PUCO*, 98 Ohio St.3d 277, 279-80, 781 N.E.2d 1008 (2002). Among the Ohio Court's holdings was a finding that Ameritech failed to charge its affiliated retail operations anything for service. The Ohio Supreme Court stated:

> However, Ameritech's argument is based on a fallacy; to the extent that Ameritech's internal wholesale rate was set at zero, it was so set by Ameritech, not by the commission. The commission merely determined that the internal wholesale rate was zero based on examinations of Ameritech's accounting records (or lack thereof) and consideration of testimony of Ameritech witnesses.

98 Ohio St.3d at 283.

Likewise, the Ohio Supreme Court upheld the PUCO's determination that Ameritech did not separate its wholesale operations from its retail business, as it was required to do. *Id.* at 282 – 83. Based on its illegal conduct, Ameritech avoided competitive retail price pressures thus thwarting the entire policy objectives articulated in Ohio statutes. Those policy objectives include "[r]ely[ing] primarily on market forces, where they exist, to maintain reasonable service levels for telecommunications services at reasonable rates." Ohio Rev. Code § 4927.02.

Normal avenues for Ohio citizens to file civil complaints are not available to customers of "public utilities" such as Ameritech. Ohio citizens cannot bring common law civil actions to determine wrongdoing of public utilities and harm caused thereby. "The commission has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except this court) any jurisdiction over such matters." *State ex rel. Cleveland Elec. Illuminating. Co. v. Cuyahoga Cty. Court of Common Pleas*, 88 Ohio St.3d 447, 450, 727 N.E.2d 900 (2000).

The complaint provisions under Ohio Rev. Code §§ 4905.26 and 4905.61 were important since utility users who are harmed by the wrongful conduct of public utilities have no other recourse. In addition to not being able to bring common law claims, Ohio's Consumer Sales Practices Act (Ohio Rev. Code § 1345 *et seq.*) excludes "transactions between persons, defined in sections 4905.03" and thus cannot be used against a cellular telephone company such as Ameritech since Ohio Rev. Code § 4905.03 defines the Respondents as "public utilities".

Likewise, the Ohio Supreme Court has held that utility users cannot institute an action against a public utility utilizing the anti-competitive provisions of Ohio's Antitrust act. *State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 88 Ohio St.3d 447, 727 N.E.2d 900 (2000).

With the foregoing facts as preface, named Petitioner – a subscriber of Ameritech that purchased service with an Ohio area code during the period October 18, 1993, through September 8, 1995 – brought suit against Ameritech on behalf of itself and similarly-situated service subscribers. Their claim is based on the exact violations which the PUCO found Ameritech committed. Each member of the Class is "the person . . . injured thereby" and has "damages sustained in consequence of such violations," for which such damages are recoverable under Ohio Rev. Code § 4905.61.

Despite the fact that wrongdoing was found as to the Respondent, the Ohio Supreme Court has now held that Petitioner may not seek damages because the PUCO has not made a determination that Petitioner has had its rights violated. *Satterfield v. Ameritech Mobile Comm., Inc.*, 155 Ohio St.3d 463, 122 N.E.3d 144 (2018). But, this is the precise finding that the same Court had said was outside the scope of PUCO review. *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30, 132 N.E.162 (1921).

REASONS FOR GRANTING THE PETITION

The PUCO and the Ohio Supreme Court have held that Respondents have violated the law. Ohio has mandated that in a case involving a public utility, the only avenue

available to seek redress for such violations is through an action for damages in state court pursuant to Ohio Rev. Code § 4905.61. Prior to the decision being appealed here, this scheme was consistent with the United States Constitution which provides, *inter alia*, that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amendment V. It was also consistent with the 14th amendment's provision that "nor shall any state deprive any person of life, liberty or property without due process of law. As explained below, the decision of the Ohio Supreme Court at issue here has provided that only those Ohioans whose "rights have been found [by the Ohio Public Utilities Commission] to have been violated" may seek to recover their damages for such violations of Ohio law.

While at first blush this may sound "reasonable", at the same time the Ohio Supreme Court has let stand its precedent that the PUCO can only determine whether wrongful conduct has occurred, but the PUCO is expressly prohibited from deciding whether a litigant's "rights have been violated." Thus after this decision, it is impossible for Ohioans to exercise their due process rights, because such customers must obtain a finding from the PUCO that their rights have been violated, while at the same time, the PUCO is prevented from making that finding. *Satterfield,* 155 Ohio St.3d 463, 122 N.E.3d 144 (2018); *New Bremen,* 103 Ohio St. 23 (1921).

1. The Underlying Decision Denies Due Process to Millions of Ohioans.

There are over 11 million individual citizens in the State of Ohio pursuant to the 2010 census. Likewise, there

are hundreds of thousands, if not millions, of corporate citizens. Each one of these citizens is also a consumer of public utility service in the state. Up until the decision at issue here, these citizens had redress at the PUCO (as to wrongdoing) and in a trial court (to determine rights violated). As a result of the Ohio Supreme Court's decision, none of those citizens may ever bring an action in the State of Ohio to seek damages (or a determination of their rights that were violated) for injuries where the PUCO has made a finding of wrongdoing. Thus, the decision of the Ohio Supreme Court deprives every Ohioan of his/her rights to due process and are therefore violative of the Fifth and Fourteenth Amendments of the U.S. Constitution.

The combination of the decision against Petitioner and the Court's previous ruling in *New Bremen* means that it is now law in the state of Ohio that (1) before a person can seek damages for injury caused by a public utility, the person injured must first obtain a ruling from the PUCO that its rights were violated and (2) the PUCO has no ability to make such a finding. This leaves Petitioner with no remedy in Ohio for conduct that has been found to be wrongful; a result squarely at odds with the constitutional guarantees outlined herein.

2. Ohioans Have No Remedy Even When Wrongdoing is Found.

The statute at issue is Ohio Rev. Code § 4905.61 which provides, in full:

> **If any public utility** or railroad **does, or causes to be done, any act or thing prohibited by Chapter**s 4901, 4903, **4905**, 4907, 4909,

> 4921, 4923, and 4925 **of the Revised Code, or declared to be unlawful**, or omits to do any act or thing required by such chapters, or **by order of the public utilities commission, such public utility is liable to the person, firm, or corporation injured thereby** in treble the amount of damages sustained in consequence of such violation, failure, or omission."

Ohio Rev. Code § 4905.61 (emphasis added.)

Under this statute, a plaintiff may recover against a public utility by showing **only** (1) a finding by the PUCO that a public utility engaged in conduct prohibited by statute and/or a PUCO order and (2) that the person seeking the damage was injured as a result of that conduct.

Here, there has been the requisite finding of wrongdoing. In its *Cellnet* Order, the PUCO held that Ameritech had violated the Ohio statutes and PUCO regulations which were designed to benefit the members of the class, "Ohio citizens". See, Ohio Rev. Code § 4927.02. Specifically, the PUCO found, and the Ohio Supreme Court affirmed, that in violation of Ohio law (1) Ameritech did not separate its wholesale and retail operations; (2) Ameritech did not maintain separate wholesale and retail accounting; (3) Ameritech's wholesale operations and retail operations did not operate in compliance with the directive that they have "no involvement whatsoever" in each other's business and (4) Ameritech gave its retail affiliate free service and failed to provide that to Cellnet. *Cellnet* Order at 38 – 39.

In enacting the damage provisions of Ohio Rev. Code § 4905.61, the Ohio legislature did not focus on who the

parties were in a particular PUCO case, but rather on who was injured by the violations found in a PUCO case. The entire statute relates to damages to "the person … injured thereby." It is those entities which have explicit standing under the statute. There is no requirement in Ohio Rev. Code § 4905.61 that the PUCO also find harm. That is the entire point of Ohio Rev. Code § 4905.61, to allow a competent court to determine whether there was harm. This made sense because the PUCO did not have authority to determine harm. *New Bremen*, 103 Ohio St. 23, 30, (1921).

The efficacy of this scheme has been recognized by the Ohio Supreme Court. In *Kazmeier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 152, 573 N.E.2d 658 (1991) the Court with respect to Ohio Rev. Code § 4905.61, stated that:

> The General Assembly has provided a specific remedy for **persons,** firms or corporations who have sustained damages due to an unlawful act of a public utility, or where such damages arise from the utility's omission to do any act or thing required by law or by the order of the commission. [Ohio Rev. Code §] 4905.61 provides that in such instances the utility is liable for treble damages. (Footnote omitted.)
>
> However, this court has held that bringing a suit for treble damages under [Ohio Rev. Code §] 4905.61 is dependent upon a finding by the commission that there was in fact a violation of a specific statute, or noncompliance with a commission order.

Id. at 152 (emphasis added.) Thus, not only did the Ohio Supreme Court in *Kazmaier* explain the interconnected nature of the statutory scheme, but it recognized that "persons . . . who have sustained damages" have been "provided a specific remedy" in Ohio Rev. Code § 4905.61 by the General Assembly. The same Court has now eliminated that remedy.

3. Elimination of Any Remedy for Wrongful Conduct is Unconstitutional.

The United States Supreme Court in *Lujan v. G&G Firesprinklers, Inc.*, 532 U.S. 189, 121 S.Ct. 1446 (2001) stated that the relevant inquiry in looking at a due process question is whether "the State has deprived the Claimant of a protected property interest." In *Barrett v. Holmes*, 102 U.S. 651, 26 L.Ed. 291 (1880) the Supreme Court in looking at a similar situation where the State of Iowa had instituted a scheme that prevented action without a prerequisite finding that was impossible to obtain, stated that "a right without a remedy is unknown to the law." *Id.* at 652. The Court went on to state that "the legislature could not have intended to prevent an action after the expiration of five years, in cases in which it was impossible that any measures could be taken in this form of action for the recovery within that time."

The Ohio Supreme Court has recognized the "due course of law" aspect of Ohio's Section 16, Article I as the equivalent of the due process clause of the United States Constitution. *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 880 N.E.2d 420 (2007), ¶48.

The Ohio Supreme Court in analyzing whether there is a constitutional due process right in having a "remedy" has recognized that the due process and remedies clauses, of the Ohio Constitution (Section 16, Article I), provide that "every person, for an injury done * * *, shall have remedy by due course of law." *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 201, 883 N.E.2d 377, ¶51. In *Groch*, the Court stated that "[t]he rights encompassed by the remedy aspect of Section 16, Article I are well settled. 'When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner.'" *Id.* at ¶52, quoting *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 880 N.E.2d 420 (2007), ¶44. The Ohio Court has previously identified a practical and essential element of the Constitution's right-to-remedy clause: "When the Constitution speaks of remedy and injury to person, property or reputation, it requires an opportunity granted **at a meaningful time and in a meaningful manner**." *Gaines v. Preterm–Cleveland, Inc.*, 33 Ohio St.3d 54, 60, 514 N.E.2d 709, 716 (1987) (emphasis added), quoting *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 47, 512 N.E.2d 626, 628 (1987) overruled on other grounds, *Ruther v. Kaiser,* 134 Ohio St.3d 408, 2012 – Ohio – 4686.

Without the ability to seek redress in court pursuant to Ohio Rev. Code § 4905.61, Petitioners, and indeed all Ohioans, have no recourse **anywhere** to seek redress for violations of law that were designed specifically to protect them. For example, where other consumers could utilize Ohio's Consumer Sales Practices Act, Ohio Rev. Code § 1345.01 ("CSPA"), cellular telephone customers could not utilize that law because that statute specifically

states that is not applicable to transactions involving any company that is defined in Ohio Rev. Code § 4905.03 as a public utility. Likewise, where Ohio's antitrust statutes, Ohio Rev. Code § 1331 *et seq.* would generally allow a consumer to bring an action for unfair and anticompetitive practices, the Ohio Supreme Court has held that such avenue is closed for customers of public utilities. *State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Court of Common Pleas*, 88 Ohio St.3d 447, 727 N.E.2d 900 (2000). Without recourse, the entire policy of ensuring protection for Ohio's consumers against unreasonable and unlawful rates and unlawful discrimination as articulated by both the Commission and the Ohio General Assembly would be impossible to implement.

4. The PUCO Can Never Implement the Supreme Court's Decision.

The PUCO can never fulfill the Ohio Supreme Court's requirement that the PUCO identify persons injured by the violation because determinations of injury are explicitly outside of the PUCO's jurisdiction. The Ohio Supreme Court failed to recognize that the PUCO itself was asked in the Cellnet case to determine whether anyone was injured. In that case, they were asked by Cellnet for a finding that in fact **it** was injured. The PUCO refused to make a finding that even Cellnet was injured, because, it held, such matters to be outside its jurisdiction. The PUCO stated in this regard:

> Although Count X of Cellnet's Third Amended Complaint appears to be directly centered on the issue of the real and substantial economic injury incurred by Cellnet due to the alleged

> conduct of the respondents, Cellnet's briefs are restricted in focus to AirTouch Cellular's alleged violations of Section 4905.22, Revised Code, (Cellnet Initial Br. 143-145). Such arguments are misplaced in the context of remedy sought through this count of the complaint. The Commission finds that its rulings with respect to the discrimination claims speak for themselves. As to the issue of any economic harm related to these determinations, the Commission finds that its jurisdiction relative to this case is limited to determining whether a public utility has violated any specific statute or order of the Commission. *State ex. Rel. Northern Ohio Tel. Co. v, Winter*, 23 Ohio St. 2d 6 (1970). **Any determination relative to resulting economic harm or damages should be addressed by a court of competent jurisdiction.** (Emphasis added.)

Cellnet Opinion and Order at 93.

In short, the PUCO correctly stated that it only declares the existence of a violation – but that it does not have the power to determine whose rights had been violated or who suffered any injury. The Ohio Supreme Court has now held that "the ambit of 'the person, firm, or corporation' that can bring a treble-damages action after legal rights have been violated depends on the terms of the PUCO's finding or order declaring a violation." *Satterfield v. Ameritech Mobile Comm., Inc.*, 155 Ohio St.3d 463, 122 N.E.3d 144 (2018). But in the very PUCO Opinion in Cellnet that is the focus of the Ohio Supreme Court here, the PUCO itself, relying on the Court's precedent

in *Winter*, held that it could not address whether any particular entity was economically harmed and that "its jurisdiction relative to this case is limited to determining whether a public utility has violated any specific statute or order of the Commission." Cellnet Opinion and Order at 93. This principle has been the law of Ohio since 1921. *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30, 132 N.E. 162. (1921) (where the Court first held that "[the] Public Utilities Commission is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities . . . .") *Id.*

CONCLUSION

It is inconsistent, and violative of the Constitutional rights of every Ohioan to say that "only those who the PUCO finds to be injured have standing" and at the same time recognizing an explicit statement from the PUCO and the Ohio Supreme Court that in fact it cannot address who was injured. Since the PUCO itself in the Cellnet order said that it could not even find that Cellnet suffered harm, under the current reasoning, even Cellnet could not have brought a case for damages under Ohio Rev. Code § 4905.61.

The Ohio Supreme Court's current reasoning assumes that in any given case, the PUCO can rule whether any particular person or entity is injured – or determine the nature of the injuries. The PUCO in the very order at issue here has said that it cannot make such a ruling. The PUCO's view of the law is affirmed by the Court's holding in *New Bremen.*

For the foregoing reasons, Petitioner asks this Court to grant the petition for *Writ of Certiorari* and hear this appeal to protect the Due Process rights of all Ohioans.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF OHIO, DATED DECEMBER 18, 2018

SUPREME COURT OF OHIO

Slip Opinion No. 2018-Ohio-5023

SATTERFIELD ET AL.; INTERMESSAGE COMMUNICATIONS,

Appellee,

v.

AMERITECH MOBILE COMMUNICATIONS, INC., ET AL.; CINCINNATI SMSA LIMITED PARTNERSHIP,

Appellant.

(No. 2017-0684—Submitted July 18, 2018—Decided December 18, 2018)
Appeal from the Court of Appeals for Cuyahoga County, No. 104211, 2017-Ohio-928

KENNEDY, J.

In this discretionary appeal from a judgment of the Eighth District Court of Appeals, we consider the parameters established by R.C. 4905.61 regarding the parties that have standing to bring a treble-damages action pursuant to that statute. Here, appellee, Intermessage Communications ("Intermessage"), and members of

a proposed class of retail cellular-telephone-service subscribers seek to recover treble damages under R.C. 4905.61 for regulatory violations committed in the mid-1990s when those regulatory violations—as determined by the Public Utilities Commission of Ohio ("PUCO")—related to the wholesale cellular-service market.

Because the language of R.C. 4905.61 limits recovery of treble damages to the "person, firm, or corporation" directly injured as a result of the "violation, failure, or omission" found by the PUCO, we hold that Intermessage and the proposed class of retail cellular-service subscribers lack standing to bring an action pursuant to R.C. 4905.61. Moreover, because the resolution of the first proposition of law asserted by appellant, Cincinnati SMSA Limited Partnership (operating under the trade name Ameritech Mobile) ("Ameritech"), resolves this case, we decline to address Ameritech's other proposition of law. We therefore reverse the judgment of the Eighth District and order the matter dismissed.

FACTS AND PROCEDURAL HISTORY

The origins of the current action arose in October 1993, when Westside Cellular, Inc., d.b.a. Cellnet ("Cellnet"), filed a multicount complaint with the PUCO against Ameritech and other wholesale cellular-service providers. *See In re Complaint of Westside Cellular, Inc. v. New Par Cos.*, Pub. Util. Comm. No. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 18, *1-2, 96-100, 133-137, 230-233 (Jan. 18, 2001) ("the *Cellnet* order"). We will focus on only the allegations against Ameritech and the resolution of

those allegations in the *Cellnet* order because Ameritech is the only wholesale cellular-service provider involved in the current dispute.

Cellnet, a cellular-telephone-service reseller, had purchased cellular service on a wholesale basis from Ameritech, rebranded the service, and marketed it on a retail basis. *Westside Cellular, Inc. v. PUC*, 98 Ohio St. 3d 165, 2002-Ohio-7119, 781 N.E.2d 199, ¶ 1. Cellnet alleged that Ameritech had engaged in rate discrimination against it. More specifically, Cellnet claimed that Ameritech had failed to offer cellular service, equipment, and features to Cellnet on a wholesale basis at the same rate Ameritech had charged its own retail businesses. *Id.; see also* the *Cellnet* order, 2001 Ohio PUC LEXIS 18 at *230-233. Cellnet also claimed that Ameritech had failed to maintain separate operations and records for its wholesale and retail businesses. *Id.* at *96-100.

In 2001, the PUCO issued the *Cellnet* order, finding that Ameritech had engaged in numerous practices that were prohibited by R.C. Chapter 4905. The PUCO found that Ameritech had failed to maintain its records in a manner that satisfied the PUCO's overriding purpose to ensure that wholesale cellular-service providers were providing access on a nondiscriminatory basis. *Id.* at *108-112. The PUCO further found that Ameritech had violated R.C. 4905.33 by charging Cellnet a higher rate than Ameritech's retail affiliate paid for the same service under substantially the same circumstances and conditions. *Id.* at *151.

Appendix A

Ameritech appealed the findings of the PUCO in the *Cellnet* order as of right to this court. We affirmed. *Cincinnati SMSA L.P. v. PUC of Ohio*, 98 Ohio St. 3d 282, 2002-Ohio-7235, 781 N.E.2d 1012, ¶ 8.

Based upon the PUCO's ruling regarding Ameritech's activities in the wholesale cellular-service market, Intermessage and two other named plaintiffs who are no longer involved in this litigation—Cindy Satterfield and Cindy Satterfield, Inc., a.k.a. Highland Speech Services, Inc.—filed the instant class-action complaint against Ameritech and other parties in December 2003. Because only the claims of Intermessage and the proposed class against Ameritech are at issue in this case as it comes to us, we will limit our discussion of the facts to those parties.

Intermessage was a retail purchaser of cellular-telephone service from Ameritech. It entered into contracts with Ameritech for cellular-telephone numbers and used the accompanying service to back up alarm systems that Intermessage sold to its customers. Intermessage paid Ameritech for the retail cellular service and then passed those costs on to its customers.

Intermessage initially sought to define the class as "all subscribers to Ameritech Mobile service from 1993-1998" and sought recovery under several different theories of relief, including under R.C. 4905.61. Intermessage claimed that the practices Ameritech had engaged in—practices for which the PUCO had already found Ameritech liable—included preventing cellular-service resellers from entering the Ohio market and from increasing the

resellers' market shares. Intermessage further alleged that these practices caused each member of the proposed class to pay more for cellular-telephone service than the retail market otherwise would have charged.

The trial court in 2006 and 2008 made several rulings that limited Intermessage's class action against Ameritech to recovery only under R.C. 4905.61 and only for the period October 18, 1993, through September 8, 1995.

The trial court eventually granted Intermessage's motion for class certification, certifying 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" upon its finding that the statutory prerequisites for class certification had been satisfied.

The Eighth District Court of Appeals affirmed, concluding that the trial court had not abused its discretion in certifying the class. 2017-Ohio-928, 86 N.E.3d 830, ¶ 30.

We accepted the following two propositions of law:

> 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.

> 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.

151 Ohio St. 3d 1501, 2018-Ohio-365, 90 N.E.3d 945.

ARGUMENTS OF THE PARTIES

Ameritech contends that Intermessage's class action cannot survive because the plain meaning of R.C. 4905.61 provides standing to sue only to those persons or entities whose rights the PUCO has expressly found were violated. In other words, Ameritech maintains that the statutory language unequivocally limits standing to persons or entities directly injured by the violations found by the PUCO. Ameritech asserts that there is no language in R.C. 4905.61 that authorizes a class-action lawsuit for indirect harms allegedly caused by a violation of the rights of some other person or entity. Intermessage counters that this court should not adopt Ameritech's interpretation, because Ameritech seeks to have the court ignore the actual language of the statute—which gives standing to "the person * * * injured" by a violation—and Ameritech also seeks to have us insert the phrase "whose rights the PUCO expressly finds to have been violated" into the statute.

Appendix A

ANALYSIS

As set forth above, Ameritech's first proposition of law asserts that a claimant lacks standing to bring an action under R.C. 4905.61 when the PUCO has never made a determination that that claimant's rights under a specific statute or PUCO order were violated. Because the language of R.C. 4905.61 is controlling, we begin in a familiar place—the principles of statutory construction.

The interpretation of a statute is a question of law that we review de novo. *State v. Pariag*, 137 Ohio St. 3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 9. A court's main objective is to determine and give effect to the legislative intent. *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St.3d 62, 65, 1995-Ohio 172, 647 N.E.2d 486 (1995).

The intent of the General Assembly must be determined primarily from the language of the statute itself. *Stewart v. Trumbull Cty. Bd. of Elections*, 34 Ohio St.2d 129, 130, 296 N.E.2d 676 (1973). "When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we must rely on what the General Assembly has said." *Jones v. Action Coupling & Equip.*, 98 Ohio St. 3d 330, 2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12, citing *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553, 2000-Ohio 470, 721 N.E.2d 1057 (2000) .

"Where a statute defines terms used therein, such definition controls in the application of the statute * * *." *Good Samaritan Hosp. of Dayton v. Porterfield*, 29 Ohio

St.2d 25, 30, 278 N.E.2d 26 (1972), citing *Terteling Bros., Inc. v. Glander*, 151 Ohio St. 236, 241, 85 N.E.2d 379 (1949), and *Woman's Internatl. Bowling Congress, Inc. v. Porterfield*, 25 Ohio St.2d 271, 275, 267 N.E.2d 781 (1971). Terms that are undefined in a statute are accorded their common, everyday meaning. R.C. 1.42.

The public-utility treble-damages statute, R.C. 4905.61, provides:

> If any public utility * * * does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 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 * * * 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 of the state for any penalty provided for in the chapters.

We have construed this provision to require that before a suit may be brought for treble damages, there must have been a prior declaration by the PUCO that the public utility violated one of the statutes enumerated within R.C. 4905.61 or an order of the PUCO. *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St.2d 191, 194, 383 N.E.2d 575 (1978). With this understanding in mind, we turn to the question of the statute's construction.

Ameritech's argument focuses on the legislature's use of the word "the"—instead of a word such as "a" or "any"—in the phrase "the person, firm, or corporation." It contends that the General Assembly's choice to use "the" to precede "person" demonstrates the legislative intent to confer standing only on those persons or entities whose rights the PUCO has expressly found were violated. However, this is not where our focus lies. Instead, resolution of this matter centers upon the phrases "injured thereby" and "in consequence of the violation, failure, or omission." The General Assembly did not define "injure," "thereby," or "consequence" for purposes of R.C. 4905.61. Therefore, we first consider the dictionary definitions of these terms.

"Injure" is defined as "[t]o violate the legal right of another or inflict an actionable wrong." *Black's Law Dictionary* 785 (6th Ed.1990). "Thereby" is defined as "by that," "by that means," "in consequence of that," "connected with that," or "with reference to that." *Webster's Third New International Dictionary* 2372 (2002). "Consequence" is defined as "something that is produced by a cause or follows from a form of necessary connection or from a set of conditions" or "a natural or necessary result." *Id.* at 482.

Applying these definitions, R.C. 4905.61 is susceptible of only one interpretation. "Thereby" and "in consequence of" express that the phrase "the person, firm, or corporation injured" specifically relates to the violation, failure, or omission declared by the PUCO. This reflects the General Assembly's intention to limit the recovery of

treble damages to only "the person, firm, or corporation" that was injured as a consequence of the violation declared by the PUCO. In other words, the ambit of "the person, firm, or corporation" that can bring a treble-damages action after legal rights have been violated depends on the terms of the PUCO's finding or order declaring a violation. Therefore, to determine the persons or entities that have standing to bring a treble-damages action under the statute, the relevant order or finding of the PUCO must be examined.

In this matter, the violations found in the *Cellnet* order were related to Ameritech's failure to maintain separate wholesale and retail operations and the corresponding discriminatory impact on nonaffiliated resellers. The PUCO stated in the *Cellnet* order that the duty to maintain separate operations was not solely owed to the PUCO but was necessary to protect unaffiliated resellers from discriminatory and anticompetitive conduct:

> "[I]t is necessary that Cellular licensees provide access to * * * cellular service pursuant to terms, conditions, and prices that are universally available on a nondiscriminatory basis to all customers, affiliated and non-affiliated alike" in order to prevent frustration of the public policy respecting *resale*.

(Emphasis added.) 2001 Ohio PUC LEXIS 18 at *112-113, quoting *In re Commission's Investigation into Implementation of Sections 4927.01 through 4927.05, Revised Code, as They Relate to Competitive*

Telecommunications Servs., Pub. Util. Comm. No. 89-563-TP-COI, 1993 Ohio PUC LEXIS 1161, *50 (Oct. 22, 1993). Moreover, the PUCO recognized the specific impact to Cellnet that resulted from Ameritech's discriminatory practices:

> [T]he record clearly demonstrates that Cellnet was treated less favorably, at least in some cases, than Ameritech Mobile's retail arm and, in some cases, retail customers. * * * [T]he Commission points to the comparisons provided relative to the terms, and conditions offered to Cellnet and those extended by Ameritech Mobile retail * * *. In addition, the Commission considers the comparison between the rates offered to Cellnet to the rates, terms, and conditions reflected in [certain] Cellnet Exhibits. * * * These differences exist despite the fact that [two of] the Commission's * * * [past] orders [have] required that cellular licensees provide access pursuant to terms, conditions, and prices that are universally available on a nondiscriminatory basis.

Id. at *145-146.

The *Cellnet* order reveals that pursuant to R.C. 4905.61, the parties injured by the violations—Ameritech's discriminatory behavior—were nonaffiliated cellular-telephone-service resellers in the wholesale market, i.e., direct purchasers of *wholesale* cellular service from Ameritech. Intermessage was not a cellular-telephone-service reseller in the wholesale market. Intermessage

was a purchaser of cellular service. It was a retail customer of Ameritech that purchased cellular service to back up its alarm systems, and any injuries it suffered were qualitatively different from those found in the *Cellnet* order, meaning that Intermessage's injuries were indirect and remote. The fact that Intermessage simply passed those costs on to its customers does not make Intermessage a reseller in the wholesale market. Intermessage's customers were not purchasing cellular service from Intermessage. Intermessage's customers were purchasing an alarm system with backup features that relied on Ameritech's cellular service. Therefore, Intermessage and the other retail customers of Ameritech in the proposed class that were similarly indirectly injured are unable to bring an action for treble damages pursuant to R.C. 4905.61 based upon the violations found in the *Cellnet* order.

CONCLUSION

Because the language of R.C. 4905.61 limits recovery of treble damages to the "person, firm, or corporation" directly injured as a result of the "violation, failure, or omission" found by the PUCO, we hold that Intermessage and members of the proposed class of retail cellular-service subscribers lack standing to bring an action pursuant to R.C. 4905.61. We therefore reverse the judgment of the court of appeals and order the trial court to dismiss this matter.

Judgment reversed.

O'Connor, C.J., and O'Donnell, French, Fischer, Dewine, and Degenaro, JJ., concur.

APPENDIX B— JUDGMENTS AND JOURNAL ENTRIES OF THE COURT OF APPEALS OF OHIO, EIGHTH DISTRICT AND THE COURT OF COMMON PLEAS, CUYAHOGA COUNTY, OHIO

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

COA NO. 104211
LOWER COURT NO. CV-03-517318

COMMON PLEAS COURT

MOTION NO. 505778

CINDY SATTERFIELD, *et al.*,

Appellee,

-vs-

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

Appellee.

Dated: April 7, 2017

JOURNAL ENTRY

Motion by appellant for reconsideration is denied.

Appendix B

Adm. Judge, KATHLEEN ANN KEOUGH,
Concurs

Judge ANITA LASTER MAYS,
Concurs

/s/_____
MARY EILEEN KILBANE
Judge

Appendix B

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

Appendix B

MARY EILEEN KILBANE, J.:

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.

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.

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.

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] 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.

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.

Appendix B

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.

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.

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.

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.

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.

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."

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].

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 no typical of the purported class; and (4) a class action is not superior to other methods of adjudication.

Standing

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.

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).

Appendix B

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.

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.

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.

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.

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.

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

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

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.

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

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).

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.

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].

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[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).

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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.

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.

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

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.

> 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.

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 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.

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

The sole assignment of error is overruled.

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.

/s/_____
MARY EILEEN KILBANE, JUDGE

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

Appendix B

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No.: CV-03-517318

CINDY SATTERFIELD, *et al.*,

Plaintiff,

v.

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

Defendant.

Judge: JOSE A. VILLANUEVA

JOURNAL ENTRY

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IS GRANTED.

/s/_____
Judge Signature

2/9/2016_____
Date

Appendix B

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CASE NO. CV-03-517318

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.

JUDGE JOSE A. VILLANUEVA

Appendix B

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.

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

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.

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, f 10, 900N.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, U 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, If 15.

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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.

Appendix B

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.*

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.*

Plaintiffs 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.

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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, 2007-0hio-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.

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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, 2007-0hio-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.

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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.

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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 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 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*

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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.

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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).

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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 "[repetitious 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).

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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.

/s/_____
JOSE A. VILLANUEVA, JUDGE

DATE: February 9, 2016

Appendix B

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No: CV-03-517318

CINDY SATTERFIELD, *et al.*,

Plaintiff,

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

Defendant.

Judge: JOSE A VILLANUEVA

JOURNAL ENTRY

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

/s/_____
Judge Signature

9/29/06_____
Date

APPENDIX C — OPINION OF THE SUPREME COURT OF OHIO, DATED FEBRUARY 20, 2019

SUPREME COURT OF OHIO

2017-0684

SATTERFIELD

v.

AMERITECH MOBILE COMMUNICATIONS, INC.

February 20, 2019

Cuyahoga App. No. 104211, 2017-Ohio-928

CASE ANNOUNCEMENTS

RECONSIDERATION OF PRIOR DECISIONS

Reported at ——— Ohio St.3d ——— , 2018-Ohio-5023, ——— N.E.3d ———. On motion for reconsideration. Motion denied.

APPENDIX D — R.C. § 4905.61 TREBLE DAMAGES

R.C. § 4905.61

4905.61 Treble damages

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.

APPENDIX E — R.C. § 4905.26 WRITTEN COMPLAINTS

SUPREME COURT OF OHIO

R.C. § 4905.26

4905.26 Written complaints; hearing

Effective: March 23, 2015

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities 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, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

Appendix E

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

This section does not apply to matters governed by Chapter 4913. of the Revised Code.

APPENDIX F — FED CIV. PROC. R. 23

CIV. R. RULE 23

(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;

(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;

(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.

Appendix F

(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;

(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.

Appendix F

(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.