

# **Released From Confidential Status**

**Case Numbers: 96-1310-TP-COI**

**Date: 04/20/2009**

**Confidential Document originally filed  
March 18, 2004 in this proceeding  
released to the public.**

This is to certify that the images appearing are an  
accurate and complete reproduction of a case file  
document delivered in the regular course of business  
Technician       J       Date Processed   4-20-09

2004 MAR 18 PM 5:05

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO PUCO**

In the Matter of the Commission's Investi- )  
gation into the Implementation of Section )  
276 of the Telecommunications Act of 1996 ) Case No. 96-1310-TP-COI  
Regarding Pay Telephone Services. )

**REPLY BRIEF OF THE PAYPHONE ASSOCIATION OF OHIO**  
**(CONFIDENTIAL VERSION)**

Philip F. Downey  
Stephen M. Howard  
VORYS, SATER, SEYMOUR AND PEASE LLP  
52 East Gay Street  
Columbus, OH 43215  
(614) 464-5401

Attorneys for the Payphone Association of Ohio

Date: March 18, 2004

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND BACKGROUND .....	1
II. ARGUMENT.....	3
A. This Commission, Not SBC Ohio, Has Authority To Establish Permanent Payphone Rates and Must Do So By Determining Which of the Most Appropriate Rate Options Will Best Comport With Section 276 and the State Telecommunications Policy.....	3
B. The <u>Wisconsin Payphone Decision</u> Did Not Modify or Clarify The New Services Test .....	4
C. This Commission Has Already Determined In Case No. 02-1280 That it is Premature to Establish Permanent Rates on the Basis of the August 4, 2003 Cost Study.....	5
D. PAO Witness Starkey's Recommended UNE Methodology for Allocating Overheads Is Superior to SBC's Physical Collocation Tariff Order Methodology and Should Be Adopted.....	7
E. Usage Fees Should Be Recovered From a Per-Minute Rate Structure and Should Be Based Upon The 1.96 Minutes as the Average Duration of a Local Telephone Call Made From a Payphone in the SBC Ohio Service Territory .....	10
III. CONCLUSION.....	12
CERTIFICATE OF SERVICE .....	13
ATTACHMENT A (December 19, 1996 Entry)	
ATTACHMENT B (SBC Ohio Tariff Filings in Case Nos. 96-643 and 96-844)	
ATTACHMENT C (June 23, 1997 Letter)	

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Investi- )	
gation into the Implementation of Section )	
276 of the Telecommunications Act of 1996 )	Case No. 96-1310-TP-COI
Regarding Pay Telephone Services. )	

**REPLY BRIEF OF THE PAYPHONE ASSOCIATION OF OHIO**

**(CONFIDENTIAL VERSION)**

**I. INTRODUCTION AND BACKGROUND**

Significant omissions and mischaracterizations abound in SBC Ohio's recitation of the procedural history of this proceeding.

SBC Ohio failed to mention that the Commission, in its December 19, 1996 Entry (Attachment A) in initiating this case, ordered all incumbent LECs operating within the State of Ohio to file with the Commission by January 15, 1997 tariffs proposing to provide two types of pay phone access lines. These tariffs were to be cost-based, consistent with the requirements of Section 276 of the 1996 Act, and nondiscriminatory. The Commission also required all large incumbent LECs to file cost support with their applications. These directives still have not been met by SBC Ohio. SBC Ohio cites no special exemption or waiver from the requirements of that Entry which was issued over seven years ago.

At p. 2 of its Brief, SBC Ohio refers to a May 22, 1997 Entry requiring ILECs to provide COCOT Line Service and COCOT Coin Line Service to payphone providers. SBC Ohio goes on to indicate that it implemented such tariffs which became effective without contest on August 5 and September 19, 1996. Those tariff filings, made on July 3, 1996 in Case No. 96-643 and on August 19, 1996 in Case No. 96-844 are attached as Attachment B.

The Commission must not be misled and conclude that SBC Ohio complied with the December 19, 1996 Entry by virtue of these tariff filings. Case No. 96-643 was filed merely to "provide information about the features related to a Customer-Owned, Coin Operated Telephone (COCOT) in a single section of the tariff". See Attachment B, pages 1 and 24 of the July 3, 1996 filing in Case No. 96-643. In Case No. 96-844, SBC Ohio sought to introduce a new service called COCOT-Coin Line. While SBC Ohio did offer COCOT and COCOT-Coin Line Service as a result of these filings, neither filing demonstrates that the proposed rates complied with the New Services Test nor did such filings relieve SBC from complying with the December 19, 1996 Entry which required cost based rates.

SBC Ohio again refers to the May 22, 1997 Entry that also directed each ILEC to review its respective payphone tariffs to insure that it is consistent with the requirements of Section 276 of the Act, the FCC's CC 96-128 decision and this investigation. Proposed tariff amendments were to be filed with the Commission by June 22, 1997. SBC Ohio, at p. 2 of its Initial Brief, refers to a letter dated June 23, 1997 that it alleges was filed for the proposition of indicating that its existing tariff was in compliance, as demonstrated by the cost study submitted to the Staff on May 16, 1997. The June 23, 1997 letter, attached as Attachment C, says nothing of the sort. That letter is limited to re-tariffing directory services and eliminating certain semi-public and public telephone services that would not be offered after October 7, 1997. Further, the cost study submitted to the Staff purportedly on May 16, 1997, was never filed (as required by the December 19, 1996 Entry) in this case and neither the PAO nor any other party had an opportunity to review it or cross-examine its author on its contents.

SBC Ohio's perceived need to rewrite history and its selective memory lapses appear to suggest that it is either intentionally misleading the Commission or simply failing to fully understand the issues in this case.

## II. ARGUMENT

### A. This Commission, Not SBC Ohio, Has Authority To Establish Permanent Payphone Rates and Must Do So By Determining Which of the Most Appropriate Rate Options Will Best Comport With Section 276 and the State Telecommunications Policy.

Throughout its direct case and its Initial Brief, SBC Ohio maintains that it, not the Commission, should determine rates. See SBC Ohio Initial Brief, pp. 9 and 18; Currie Direct at 13. The FCC issued the Wisconsin Payphone Decision<sup>1</sup> "to assist states in determining whether BOCS' intrastate payphone line rates comply with Section 276 and its payphone orders." See Wisconsin Payphone Decision at paragraph 68. If this Commission were to adopt the SBC Ohio approach in this case, it would be abdicating its regulatory responsibilities. This Commission, not SBC Ohio nor Dr. Currie, should be deciding the permanent rates in this matter based upon which rate option best complies with Section 276 of the Telecommunications Act of 1996 and the state telecommunications policy. SBC Ohio is not the final arbiter of rates.

Like SBC Ohio's opening statement and its entire direct case, there is nothing in SBC Ohio's Initial Brief which demonstrates why its proposed rates better comply with Section 276 and the state telecommunications policy than does the PAO position. The absence of such policy arguments is not surprising. SBC Ohio's entire approach throughout this proceeding has been targeted at gouging independent payphone service providers. The Commission must apply the pro-competition policy of Section 276 and the anti-discrimination policy of Section 4927.02,

---

<sup>1</sup> In the Matter of Wisconsin Public Service Commission Order Directing Filings, Bureau/CPD No. 00-01, Memorandum Opinion and Order, January 29, 2002.

Revised Code in determining that PAO rates proposed by PAO witness Starkey should be adopted as permanent rates.

**B.     The Wisconsin Payphone Decision Did Not Modify or Clarify The New Services Test.**

At page 9 of its Initial Brief, SBC Ohio alleges that the Wisconsin Payphone Decision "modified and clarified" the New Services Test. This is simply untrue.

As PAO witness Starkey testified on cross-examination, there is a long history at the FCC that resulted in the Wisconsin Payphone Decision. There were actually three or four orders out of the FCC that establishes the New Services Test as the new mechanism to set rates. The New Services Test is culminated in the Wisconsin Payphone Decision but really is a summary of other orders that gives one a broad understanding of the New Services Test. It is only one of among other orders that requires the New Services Test for payphone service rates. Tr. II, 165-166. Not only does the New Services Test, as discussed in the Wisconsin Payphone Decision, establish a price for as the direct cost, but it was intended to insure that the amount of overhead was not unreasonably high. Tr. II, 167. Thus, the New Services Test was not modified or clarified by the Wisconsin Payphone Decision but rather was only summarized by the FCC and has actually been around for some time.

**C. This Commission Has Already Determined In Case No. 02-1280 That it is Premature to Establish Permanent Rates on the Basis of the August 4, 2003 Cost Study.**

SBC Ohio has argued throughout its brief that its direct costs, based on an August 4, 2003 LRSIC cost study, were newer and should be adopted over PAO witness Starkey's direct costs which were based upon a June, 2000 filed LRSIC cost study. SBC Ohio argues that newer is better; the PAO's position is that the August 4, 2003 cost study has not been subjected to the level of scrutiny that would produce accurate and reliable results in setting permanent rates.

The Commission recently addressed this issue. The "Loop Cat" model which was used in generating direct costs in the August 4, 2003 cost study (Tr. II, 80) is now at issue in Case No. 02-1280. In Case No. 02-1280, SBC Ohio had asked the Commission to make its proposed TELRIC rates which are based on similar cost studies go into effect on an interim basis. On December 17, 2003, the Commission denied such a request. SBC Ohio filed an application for rehearing. On March 11, 2004, the Commission denied SBC Ohio's application for rehearing as moot because it addressed a companion issue in Case No. 02-1280.

That companion issue was the March 5, 2004 SBC Ohio motion for approval of an interim rate for two-wire analog unbundled loops and a request for an expedited ruling on the motion. SBC Ohio had abandoned its proposal to make all of its proposed rates in Case No. 02-1280 go into effect on an interim basis. The Commission found it appropriate to increase<sup>2</sup> only a single rate, the two-wire analog UNE loop rate in access areas B, C, and D on an interim basis, subject to true-up pending a thorough examination of the proposed TELRIC components in phase one. See In Re Review of SBC Ohio's TELRIC Costs for Unbundled Network Elements, Case No. 02-1280-TP-UNC, Finding and Order, March 11, 2004, Findings 14 and 15.

---

<sup>2</sup> The Commission only granted a part of the increase requested which was \$3.00, \$2.50, and \$2.00 for access areas B, C, and D, respectively.



The significance of the Commission's March 11 Finding and Order in Case No. 02-1280 for purposes of this case is clear. Only one rate was partially increased on an interim basis, was subject to true-up, and subject to the condition that competition in the residential marketplace would not substantially be reduced. The Commission recognized that the cost study supporting the SBC Ohio proposed increased TELRIC rates had yet to be subjected to a thorough examination.

The Commission's action in Case No. 02-1280 embraces the very point the PAO has made throughout this case. The August 4, 2003 SBC Ohio cost study, which employs the same Loop Cat model contained in the cost studies in Case No. 02-1280, has not yet been subjected to a thorough examination. Unlike Case No. 02-1280, however, the Commission in Case No. 96-1310 is not trying to set interim rates, but rather permanent rates. The Commission has decided in Case No. 02-1280 that it would be premature to rely upon the recent SBC Ohio cost studies in order to establish interim rates for all but one of the rates proposed. If the Commission is reluctant to establish interim rates based on such untested cost studies, then it should not use them to establish permanent rates.

The only direct cost study that we have in this record which stands up to the level of scrutiny that the Commission has recently demanded is PAO witness Starkey's rates which came from the SBC Ohio cost study filed in June, 2000. That study meets the level of scrutiny the Commission has demanded. The Commission has no choice but to find that the August, 2004 cost study, using the same Loop Cat model that is employed in the cost studies in Case No. 02-1280, must be rejected as it has not been subject to scrutiny by the Commission Staff or industry representatives. PAO witness Starkey's recommended direct costs should be adopted.

**D. PAO Witness Starkey's Recommended UNE Methodology for Allocating Overheads Is Superior to SBC's Physical Collocation Tariff Order Methodology and Should Be Adopted.**

The key issue in this case is the appropriate methodology in allocating overheads. The PAO respectfully recommends that the Commission adopt the UNE methodology which it has already approved and established and adopt a uniform and consistent allocation factor of \*\*confidential information begins\*\* 33.64% \*\*confidential information ends. On the other hand, SBC claims that because the FCC mentioned the Physical Collocation Tariff Order methodology and because SBC chose it, this Commission has no choice but to adopt SBC Ohio's proposed factors ranging anywhere from \*\*confidential begins\*\* 5.48% \*\*confidential information ends\*\* to \*\* confidential information begins\*\* 1,653.94% \*\*confidential information ends\*\*. A thoughtful analysis and comparison of the two approaches leads to the conclusion that the Physical Collocation Tariff Order methodology, as applied by SBC Ohio, is susceptible to subjective manipulation and contains numerous defects and inconsistencies. SBC Ohio used this approach because it can easily be manipulated to justify its higher, proposed rates. Thus, it should be rejected.

At page 18 of its initial brief, SBC Ohio claims that because it selected and performed the Physical Collocation Tariff Order methodology, the results of the other two methods are not relevant. Again, this statement is erroneous. The FCC did not give SBC Ohio carte blanche to decide the appropriate methodology; the FCC, in fact, told state commissions that they could continue to apply the UNE methodology as was recommended by the Bureau order in the Wisconsin Payphone Decision.

It must be remembered that SBC did not use the Physical Collocation Tariff Order methodology to set rates; it merely used this methodology only to develop very high ceilings

which would justify its pre-ordained proposed rates. Remember that it was Mr. Caldwell, the product manager, not Dr. Currie alone, who determined the proposed rates. Tr. II, 81.

SBC Ohio claims that Dr. Currie consistently performed a Physical Collocation Tariff Order methodology to determine the permissible overhead loading factors for all pay phone services. This, of course, is not true. With respect to restricted coin access, SBC Ohio witness Currie applied a default overhead loading factor developed from the SBC pay phone business which would have generated a ceiling monthly rate of **\*\*confidential information begins\*\*** \$0.95 **\*\*confidential information ends\*\***. See SBC Ohio Brief, at 29. But instead of proposing the ceiling monthly rate, SBC Ohio wants to keep the current rate of \$10.75 per month. Its justification is that the rate is reasonable because "demand is insignificant". Is it any wonder why demand would be insignificant when the current rate has an allocation of overhead costs of **\*\*confidential information begins\*\*** 1,653.94% **\*\*confidential information ends\*\***? It is truly amazing that SBC Ohio would call a mark-up of **\*\*confidential information begins\*\*** 1,653.94% **\*\*confidential information ends\*\*** a "trivial cost exception."

When he analyzed comparable services, Dr. Currie often came down to a single service by which to compare and develop a comparable overhead loading factor. The fact that he only arrived at a single service in many cases places an unreasonable, unlawful, and unacceptable level of subjectivity upon his analysis. Dr. Currie should have known after arriving at such few comparable and competitive services that the Physical Collocation Tariff Order methodology was not appropriate and should have been discarded. Unlike the proposed overhead allocation percentage under Mr. Starkey's UNE methodology, this Commission has not approved this methodology.

In brief, SBC Ohio claims that Dr. Currie rejected considering win-backs, contracts, packages, and bundled rates because they are not "stand alone" services. SBC Ohio Brief, at 21. Yet win-backs, contracts, packages, and bundled rates are the very type of competitive response that provides lower competitive rates. Dr. Currie was wrong to disregard these other options.

Dr. Currie also utilized intraLATA toll as a "comparable and competitive" service for local usage. IntraLATA toll simply does not have any factual similarity to the local usage service that pay phone providers provide. It is not a direct replacement for local usage. It is neither a complement or substitute for local usage. Independent pay phone providers are not selling intraLATA toll as a replacement for local services. Such a comparison should have been rejected out of hand.

Finally, as mentioned in our initial brief, SBC Ohio has utterly failed to demonstrate why the use of the Physical Collocation Tariff Order methodology is in any way consistent with Section 276 of the Act or the telecommunications policy of this state as found in Section 4927.02, Revised Code. In reality, it contradicts Section 276 and the state telecommunication policy because it leads to monopoly rates.

PAO witness Starkey used the UNE overhead allocation methodology which has already been approved by this Commission. It produces a uniform, objective, and well scrutinized factor of \*\* confidential information begins\*\* 33.64% \*\*confidential information ends\*\*.

Mr. Starkey's UNE methodology is objective, tested, and not subject to manipulation. Using the UNE methodology, we do not have to get into the question of what is comparable and what is not. We do not have to find ourselves coming up with a single comparable service and relying solely on that service in arriving at an appropriate ceiling for an overhead factor. Finally, the use of the UNE methodology will produce consistent, objective and reasonable rates which will

comport with the pro-competition policy of Section 276 and the anti-discrimination policy of Section 4927.02, Revised Code. Simply put, PAO witness Starkey's methodology is objective, tested, consistent, reasonable and should be adopted.<sup>3</sup>

**E. Usage Fees Should Be Recovered From a Per-Minute Rate Structure and Should Be Based Upon The 1.96 Minutes as the Average Duration of a Local Telephone Call Made From a Payphone in the SBC Ohio Service Territory.**

In its initial Brief at pages 30-32, SBC Ohio argues that the Commission should not change the existing billing structure from a per message to a per minutes of use basis because it would require expensive changes to the billing system. No evidence was offered in support of this statement. On the other hand, the record provides that SBC Ohio incurs usage costs based upon the total number of usage minutes required of it in any given time frame. PAO Ex. 1, p. 39. SBC Ohio's usage costs are driven far more directly by usage minutes rather than usage messages. PAO Ex. 1, p. 40. The FCC, in the Wisconsin Payphone Decision, held that any rate for local usage billed to a payphone line, as well as the monthly payphone rate, must be cost-based and priced in accordance with the New Services Test. This requirement applies regardless of whether current payphone line service tariffs specify a particular rate for payphone line usage, or whether they currently incorporate by reference the applicable rate from a business service tariff. See Wisconsin Payphone Decision, at paragraph 64. A non-cost-based usage rate would also constitute an impermissible "end run" around the requirements of Section 276. Wisconsin Payphone Decision, at paragraph 65. The Commission should order SBC Ohio's billing structure to be based on a rate per minute as opposed to a rate per message.

---

<sup>3</sup> Even if the Commission were to adopt the Physical Collocation Tariff Order methodology, it should use the \*\*\* confidential information begins \*\*\* 56.16% \*\*\* confidential information ends \*\*\* factor from the SBC payphone business uniform overhead factor, at the most, for all rates. See SBC Ex. 2B, Currie Direct Confidential Attachment 3, p. 1 of 9. This factor applied uniformly would be more consistent with Section 276 and the State's telecommunication policy than SBC Ohio's proposed rates.

SBC Ohio also takes issue with the PAO recommendation of using an average holding time of 1.96 minutes per message. Specifically, SBC criticizes the random sample upon which Mr. Starkey based his 1.96 minute per message average holding time as not consisting of twelve months of total data, not having the same number of payphone lines each month, having only approximately a third of total independent payphone provider lines as of May, 2003 and 5% of total payphone line service in the SBC Ohio service territory. These criticisms are not persuasive because SBC Ohio failed to provide ANY evidence of an average length of a local payphone call made from its service territory.

Dr. Currie's average duration of a local call of **\*\*confidential information begins\*\*** 3.53 minutes per call **\*\*confidential information ends\*\*** is not limited to local calls from payphones.<sup>4</sup> Tr. II, 75-76. Dr. Currie did not testify that there were any exclusions for calls from customers using the telephone for dial up Internet access. As the Commission knows, such calls could last from a few minutes to several days and this would seriously skew the average duration of a local call.

The Commission is establishing rates for payphone services. The ONLY evidence we have in the record for purposes of establishing a cost-based local usage rate for payphones is the 1.96 minutes average holding time for local calls made from payphones in the SBC Ohio area as advocated by Mr. Starkey. The Commission should use 1.96 minutes average duration of a local call in an establishing a per minute rate structure. Even if the Commission should decide not to change the usage structure, it should use the 1.96 minutes per message average duration of a local call made from a payphone in the SBC Ohio area.

---

<sup>4</sup> The fact that SBC Ohio did not even try to study its own 28,770 payphone lines in Ohio and did not produce an average holding time for a local call made from an SBC payphone should speak volumes to the Commission. The PAO's average holding time should be adopted.

### III. CONCLUSION

The Commission cannot and should not accept SBC Ohio's ultimatum that only its methodology is relevant in setting permanent rates. Rather, the Commission should focus on the policy objectives of Section 276 of the Act and the state telecommunications policy in exercising its judgment and discretion in determining which rate best comports with the applicable policy. SBC Ohio's cost study, its use of the Physical Collocation Tariff Order methodology and its average holding time are untested, subjective, and not consistent with policy objectives. The PAO urges the Commission to adopt Mr. Starkey's recommendations as set forth in Attachments B and C to the initial brief, adjusting for the use of an overhead factor of **\*\*confidential information begins\*\* 33.64% \*\*confidential information ends\*\*** instead of the **\*\*confidential information begins\*\* 32.00% \*\*confidential information ends\*\*** that he employed.

Respectfully submitted,

Stephen M. Howard

Philip F. Downey

Stephen M. Howard

VORYS, SATER, SEYMOUR AND PEASE LLP

52 East Gay Street

Columbus, OH 43215

(614) 464-5401

Attorneys for the Payphone Association of Ohio


**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply Brief of the Payphone Association of Ohio was served upon the following persons by hand-delivery this 18<sup>th</sup> day of March, 2004.

William A. Adams  
Dane Stinson  
Arter & Hadden LLP  
One Columbus  
10 West Broad St., 21<sup>st</sup> Floor  
Columbus, OH 43215-3422

Matt Satterwhite  
Jodi Bair  
Assistant Attorney General  
Public Utilities Section, 9<sup>th</sup> Floor  
180 East Broad Street  
Columbus, OH 43215

David C. Bergmann  
Dirk Winkler  
Ohio Consumers Counsel  
10 West Broad St., Suite 1800  
Columbus, OH 43215

  
\_\_\_\_\_  
Stephen M. Howard