

FILE

BEFORE

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THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Complaint of)
WorldCom, Inc.; AT&T Corp.; KMC)
Telecom III, LLC; ICG Telecom Group,)
Inc.; and LDMI Telecommunications, Inc.,)

Complainants,)

Case No. 02-3207-AU-PWC

v.)

City of Toledo)

Respondent.)

**MEMORANDUM CONTRA OF THE CITY OF TOLEDO
TO THE MOTIONS TO INTERVENE OF XO OHIO, INC.
AND TIME WARNER TELECOM OF OHIO, L.P.**

Now comes the City of Toledo and hereby files this memorandum contra to the motions to intervene filed by XO Ohio, Inc. ("XO"), and Time Warner Telecom of Ohio, L.P. ("Time Warner"), on December 16, 2002 and December 12, 2002, respectively.

Toledo has completed its investigation and has determined, upon information and belief, that neither XO nor Time Warner has any facilities in Toledo's right of way. Although both parties have been sent interrogatories requesting a listing of any facilities in Toledo's right of way, Toledo feels certain enough of its conclusion to justify the filing of this memorandum rather than waiting for the intervenors' response. Since Toledo's challenge to the intervention is based primarily on the issue of the inapplicability of its right of way ordinance to said

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intervenor, it was unable to file this memorandum in accordance with the time period dictated by the Commission's rules pending knowledge regarding the intervenors' presence in the right of way. This motion should be considered timely since it is being filed promptly upon Toledo's determination that its right of way ordinance is not yet applicable to either intervenor. Should either intervenor disclose that it owns, operates or is ready to immediately construct facilities in Toledo's right of way, Toledo will withdraw its opposition to the intervention motion of that party.

Pursuant to OAC §4901-1-11, prospective intervenors must be able to demonstrate that they have a "real and substantial interest in the proceeding, and that the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties." Neither XO nor Time Warner meets this test. Therefore, the Commission should deny their motions for intervention.

As noted, neither party has any facilities in Toledo's right of way. Without such facilities, these parties are not subject to the fees or regulations in Toledo's ordinance and they do not have a real or substantial interest in the proceeding. Although the parties may profess a desire to someday locate facilities in Toledo's right of way, that is an insufficient interest to justify intervention. Under such circumstances, their general interest is already adequately represented by the existing parties to this case.

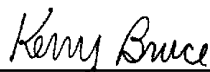
Both XO and Time Warner are Competitive Local Exchange Carriers. If they owned or operated facilities in Toledo's right of way, they would not be situated any differently than WorldCom or KMC Telecom. Such future or potential interest is insufficient to pass the intervention test:

"The Commission has consistently denied intervention requests when the person's interest is that legal precedent may be established which may affect that person's interest in a subsequent case. [footnote citation omitted] To grant intervention on this basis would render the Commission's rule on intervention meaningless and allow almost any person intervention in any case based on the proposition that the precedent established may affect them in some future case."

In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues, Case No 99-1212-EL-ETP et al., (March 23, 2000).

XO and Time Warner do not have a real and substantial interest in this proceeding, and any potential interest they may have is already adequately represented. Accordingly, the City of Toledo respectfully requests that the Commission deny XO's and Time Warner's motions to intervene.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing City of Toledo's Memorandum Contra was placed in the U.S.

Mail this 29th day of January, 2003 addressed to the following parties.

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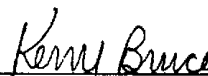
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