FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Doylestown Telephone Company for a Waiver of Edge-Out Access Rate Reduction Requirements.	)))	Case No. 08-117-TP-WVR

REPLY OF THE VERIZON COMPANIES TO MEMORANDUM CONTRA MOTION TO INTERVENE

In its application, Doylestown Telephone Company ("Doylestown") seeks a permanent waiver of the Rule 4901:1-7-14(D), OAC, requirement that it reduce its intrastate switched access charges to those of the host ILEC in the two exchanges of United Telephone Company of Ohio d/b/a Embarq ("Embarq") in which it provides edge-out service. The Verizon Companies[1] filed a motion to intervene on March 26, 2008. In the memorandum accompanying their motion, the Verizon Companies demonstrated that they meet the standards for intervention in Commission proceedings, stated the basis for their opposition to the application, and joined in Embarq's earlier motion that this matter be set for hearing. On April 9, 2008, Doylestown filed a memorandum contra the Verizon Companies' motion to intervene. The Verizon Companies hereby file their reply pursuant to Rule 4901-1-12(B)(2), OAC.

Doylestown first claims that the Verizon Companies should not be allowed to intervene because this matter relates to the carrier-to-carrier rulemaking and a motion to intervene would be inconsistent with *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 70 Ohio St.3d 311 (1994), which holds that the right to intervene under Section 4903.221, Revised Code, extends only to quasi-judicial proceedings, and its waiver could have been filed in the rulemaking.

[1] For purposes of this proceeding, the Verizon Companies consist of Verizon North Inc., MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, MCI Communications Services, Inc. d/b/a Verizon Business Services, Teleconnect Long Distance Services & Systems Co. d/b/a Telecom USA, and TTI National, Inc.

Doylestown Memorandum Contra, 1. The flaw in this argument is that, in fact, Doylestown did not file its waiver in that rulemaking. It filed it in this separate docket. Several of the Verizon Companies participated in that rulemaking, and if Doylestown had filed its waiver in that proceeding the Verizon Companies would not have needed to intervene.

Contrary to Doylestown's declaration, this is a quasi-judicial proceeding allowing intervention under *Ohio Domestic Violence Network.* By definition, the Commission must act in a quasi-judicial capacity to decide whether Doylestown can meet the Commission-imposed burden of demonstrating, in detail, that it is economically and or technically feasible to comply with the rule and how this rule is inconsistent with its current edge-out authority. *In the Matter of the Establishment of Carrier-to-Carrier Rules,* Case No. 06-1344-TP-ORD (Entry on Rehearing dated October 17, 2007), 18-19. There is no question the Verizon Companies "may be adversely affected" by the proceeding within the meaning of Section 4903.221, Revised Code. Thus, they are entitled to intervene to protect their interests. The Verizon Companies should not be prohibited from being heard simply because of Doylestown's procedural tactic.

Doylestown next cites the Ohio Supreme Court's decision in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384 (2006), for the proposition that intervention should be denied where would-be intervenors have an alternative avenue to seek recourse, and suggests that if its application is granted, the Verizon Companies can simply file a complaint. Doylestown Memorandum Contra, 1-2. This argument fails on three separate counts.

First, to grant Doylestown's waiver request, the Commission must find that Doylestown has satisfied the specific waiver criteria established by the Commission in its October 17, 2007 entry on rehearing in its recently-concluded carrier-to-carrier rulemaking proceeding, Case No.

06-1344-TP-ORD.[2] Once such a determination is made in this case, Doylestown would be the first to argue that a subsequent complaint by Embarq, the AT&T Entities, or the Verizon Companies is barred by collateral estoppel. Thus, there would be no "alternative avenue" by which these adversely affected parties could seek recourse.[3] Indeed, such a possible outcome demonstrates that the Verizon Companies are "so situated that the disposition of the proceeding may, as a practical matter, impair or impede [their] ability to protect [their] interest" – the showing required to support intervention under Rule 4901-1-11(A)(2), OAC. Clearly, denying the Verizon Companies' motion to intervene would deny them the opportunity to be heard on this important issue, a result totally at odds with the court's decision in the *Ohio Consumers' Counsel* case.

Second, even if the Commission were to entertain a subsequent complaint regarding the waiver of the access charge cap, the burden of proof in such a proceeding would be completely reversed. The Commission's October 17, 2007 entry on rehearing in Case No. 06-1344-TP-ORD imposes the burden of demonstrating that relief from the cap is warranted on the ILEC seeking the waiver. However, in a subsequent complaint case, the complainant would be required to prove affirmatively that relief from the cap was not warranted. This is yet another reason why the Verizon Companies' ability to protect their interests would be impaired or impeded if they are not granted intervention in this proceeding.

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[2] After rejecting the argument that the Rule 4901:1-7-14(D), OAC, access charge cap should not apply to ILECs providing edge-out service, the Commission noted that small ILECs could seek relief from this requirement, but that such waiver requests would be granted only "upon a detailed demonstration that it is economically and or technically infeasible to comply with this rule; and by further demonstrating how this rule is inconsistent with its current 'edge-out' authority." *In the Matter of the Establishment of Carrier-to-Carrier Rules,* Case No. 06-1344-TP-ORD (Entry on Rehearing dated October 17, 2007), at 15, 18-19.

[3] Doylestown does not dispute that carriers subject to its access charges in the edge-out areas "may be adversely affected" by this proceeding, a fact which satisfies the statutory standard governing intervention in Commission cases. *See* Section 4903.221, Revised Code.

Finally, Doylestown's suggestion that the Verizon Companies' complaint in Case No. 07-1100-TP-CSS somehow shows that an alternative avenue to seek recourse is available in this case is also wrong. *See* Doylestown Memorandum Contra, 2. The issue raised by the complaint in *Verizon North Inc., et al., v. CenturyTel of Ohio, Inc., et al.*, is whether the charges for intrastate switched access imposed by CenturyTel and Windstream violate Section 4905.22, Revised Code. The fact that both the Verizon Companies complaint and their opposition to Doylestown's rate cap waiver request raise the same policy considerations – including the Commission's oft-stated intention to rationalize access charges – does not mean that the Verizon Companies will not be prejudiced and efficiency of process compromised if the Commission rules on Doylestown's waiver request without input from the Verizon Companies and they later attempt to attack that ruling by filing a complaint. And while the appropriate access rate level is at issue in the complaint against CenturyTel and Windstream, the Commission has already determined the access rate small ILECs should charge in edge-out areas – that is, the same rate as the host ILEC. *See In the Matter of the Establishment of Carrier-to-Carrier Rules,* Case No. 06-1344-TP-ORD (Opinion and Order dated August 22, 2007), at 56-57, (small ILECs choosing to operate outside their service territories should not be allowed to unduly benefit from higher access rates that other carriers competing in the edge-out areas).

Thus, the question in this case is not whether permitting Doylestown to continue to charge its current access rates in the edge-out areas is consistent with establishing a rational access charge regime. The Commission has already decided that point. Rather, the question here is whether Doylestown can demonstrate any reason for the Commission to disregard these important policy considerations in this case. As discussed above, the Commission has determined that the small ILEC seeking the waiver has the burden of demonstrating that such

circumstances exist. Doylestown's attempt to shift that burden to carriers adversely affected by its existing access charges in the edge-out areas should be rejected out of hand.

Doylestown also argues that under Rule 4901:1-11(B)(5), OAC, the Verizon Companies should not be allowed to intervene because their interests are "not distinguishable" from those of Embarq and the AT&T Entities. However, the rule does not prevent intervention simply because parties have similar interests. The rule allows the Commission to consider "the extent to which the person's interest is represented by existing parties." None of the other carriers seeking intervention here represent the Verizon Companies, nor do they represent the Verizon Companies' interests. The right to intervene does not turn on which would-be intervenor files first.[4] As the Ohio Supreme Court stated: "interventions ought to be liberally allowed so that the positions of all persons . . . can be considered by the PUCO". *Ohio Consumers' Counsel,* 20. Doylestown does not dispute that the Verizon Companies have real and substantial interests in this proceeding, and, thus, they have the same right to intervene in this case as Embarq and the AT&T Entities.

Doylestown concludes its memorandum contra by totally miscasting the Verizon Companies' argument in support of Embarq's request for a hearing, claiming that "the Verizon Companies assert that a hearing is appropriate under Ohio Revised Code § 4909.18." Doylestown Memorandum Contra, 3. The Verizon Companies said no such thing. Rather, they merely pointed out that, if this application were before the Commission as an ATA under Section 4909.18, Revised Code, a hearing would be required because, under that statute, the Commission

[4] The purpose of Rule 4901:1-11(B)(5), OAC, is to permit the Commission to limit intervention where the interest of the movant is already represented by an existing intervenor. A typical example would be an individual industrial customer seeking to intervene that is also a member of a coalition of industrial customers that has previously been granted leave to intervene. Intervention would be denied to the individual customer under these circumstances. However, the Commission has never denied intervention to one industrial customer on the grounds that another industrial customer has already been granted intervention, which is the result Doylestown seeks here.

must set a "not-for-an-increase" application for hearing if it contains proposals that "may be unjust or unreasonable." *See* Verizon Companies Memorandum in Support, 7.

Having set up this straw man, Doylestown then topples it with the statement that Section 4909.18, Revised Code, does not apply to its waiver application. Doylestown Memorandum Contra, 3. Again, the Verizon Companies never asserted that this application is governed by Section 4909.18, Revised Code.[5] The Verizon Companies referred to this statute simply to show that, in another context, the Commission is required to a hold a hearing on an application where, as here, the proposals contained in the application may be unjust or unreasonable.[6] Although the Verizon Companies suggested that it would be logical to apply a similar standard in determining whether to set this matter for hearing, the principal thrust of the Verizon Companies' argument is that a hearing is required to determine if the specific waiver standard enunciated by the Commission in its recently-concluded carrier-to-carrier rulemaking has been met. *See In the Matter of the Establishment of Carrier-to-Carrier Rules,* Case No. 06-1344-TP-ORD (Entry on Rehearing dated October 17, 2007), at 15, 18-19. Rather than taking on this argument, Doylestown simply asserts that its waiver application "also demonstrates the economic infeasibility" of complying with the rule. Doylestown Memorandum Contra, 3.

As the Verizon Companies pointed out in supporting Embarq's request for a hearing in this matter, Doylestown has not demonstrated anything. All that is before the Commission at this point are Doylestown's untested allegations. The waiver standard – "a detailed demonstration that it is economically and or technically infeasible to comply with this rule; and

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[5] Although the Verizon Companies acknowledge that this case is not before the Commission under Section 4909.18, Revised Code, Doylestown's comment that this statute does not apply because Doylestown seeks to continue to charge the access rates previously approved by the Commission is perplexing. *See* Doylestown Memorandum Contra, 3. As the Commission well knows, Section 4909.18, Revised Code, is the vehicle for applications to approve tariff changes that do not involve increases in rates as well as for rate increase applications.

[6] In view of the arguments raised by Embarq, the AT&T entities, and the Verizon Companies in their earlier filings in this docket, there can be no question that Doylestown's proposal may be unjust or unreasonable.

by further demonstrating how this rule is inconsistent with its current 'edge-out' authority" – contemplates more than rhetoric, particularly where, as here, the allegations are disputed by adversely affected parties. Allegations are not evidence. The Commission cannot determine if Doylestown has satisfied its burden until Doylestown's allegations are scrutinized in an evidentiary hearing in which all adversely affected parties are permitted to participate. Otherwise, the waiver standard would be meaningless.

For those reasons set forth above, and for those reasons stated in the Verizon Companies' earlier memorandum, the Verizon Companies' motion to intervene should be granted and this matter should be set for hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that that a copy of the foregoing has been served upon the parties listed below by first-class U.S. mail, postage prepaid, this 16th day of April 2008.

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