BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Investigation into Intrastate Carrier Access Reform Pursuant to S.B. 162.	)))	Case No. 10-2387-TP-COI

MOTION TO INTERVENE
AND
MOTION FOR HEARING AND OTHER PROCEDURAL ORDERS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene in this case where the Public Utilities Commission of Ohio ("PUCO" or "Commission") is investigating the intrastate access charges that carriers pay to Ohio local exchange carriers ("LECs") for intrastate long distance traffic, purportedly pursuant to recently-adopted R.C. 4927.15(B) and (C).[1] These access charges add to the revenues of LECs, and add to the costs of long-distance carriers. The Commission has asked for comment on a proposal by PUCO staff that will a) reduce incumbent LECs' ("ILECs'") intrastate access charges to equal their interstate access charges; and b) allow the ILECs to recoup the revenues lost from these access charge reductions through an intrastate Access Recovery Fund ("ARF").[2] The staff proposal, for the first time, would allow Ohio ILECs to recover lost revenues from other Ohio carriers and, presumably, from the other carriers' customers.

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[1] Entry (November 3, 2010) ("Entry").

[2] The plan is set forth in Entry, Appendix A; the questions posed for response are set forth in Entry, Appendix B.

OCC moves to intervene on behalf of the residential customers of all of the Ohio carriers – both the customers of the LECs that will have their access charges reduced and those customers who may be required to replace the LEC's lost revenues, in addition to the customers of the interexchange carriers ("IXCs") that will have their access charge payments reduced.[3] No other party represents these customers' interests.

The Entry provides that comments are to be filed on December 20, 2010. OCC submits that in this case – where not only are reductions to intrastate access charge being contemplated,[4] but the recovery of lost revenues is specifically proposed – mere comments are insufficient. Therefore, OCC moves the Commission to hold a hearing prior to ordering any such changes, especially any change involving increases in the rates that customers pay.

Further, OCC moves the Commission to require the data that PUCO staff proposes to be filed once the plan is approved[5] to be filed before the comments are to be filed, so that it can serve as a factual basis for those comments and the Commission's decision on a plan. This would involve a postponement of the comment date. In part dependent on that timing, OCC also moves the Commission to provide for a shortened discovery response period.[6]

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[3] See R.C. Chapter 4911; R.C. 4903.221; Ohio Adm. Code 4901-1-11.

[4] As in *In the Matter of the Commission's Investigation Into the Modification of Access Charges,* Case No. 00-127-TP-COI ("00-127") and *In the Matter of the Complaint of Verizon North, Inc., MCIMetro Access Transmission Services LLC d/b/a Verizon Communications Services, Inc. d/b/a Verizon Business Services, Teleconnect Long Distance Services & Systems Co. d/b/a Telecom USA, TTI National, Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions and Verizon Select Services, Inc. d/b/a GTE Long Distance, v. Century Tel of Ohio, Inc., Windstream Ohio, Inc. and Windstream Western Reserve, Inc.*, Case No. 07-1100-TP-CSS ("07-1100").

[5] See Entry, Appendices C and D.

[6] Ohio Adm. Code §§ 4901-19(A), -20(C) and -22(B).

There is good cause for the granting OCC's motion to intervene and procedural motions, as further explained in the following Memorandum in Support.

Respectfully submitted,

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I. INTRODUCTION

The Commission has been addressing various access charge issues since access charges first appeared on the scene following the break-up of the AT&T monolith in the early 1980s.[7] Despite a lack of specific statutory authority,[8] the Commission has acted, by and large, to reduce the level of intrastate access charges.[9]

On September 13, 2010, Substitute S.B. 162 ("Sub. S.B. 162") became effective. That legislation contained new R.C. 4927.15(B) and (C), which state,

> (B) The public utilities commission **may** order changes in a telephone company's rates for carrier access in this state subject to this division. In the event that the public utilities commission reduces a telephone company's rates for carrier access that are in effect on the effective date of this section, that reduction **shall be on a revenue-neutral basis under terms and conditions established by the public utilities commission**, and any resulting rate changes necessary to comply with division (B) or (C) of this section shall be in addition to any upward rate alteration made under section 4927.12 of the Revised Code.

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[7] See *In the Matter of the Commission Investigation Relative to Establishment of Intrastate Access Charges*, Case No. 83-464-TP-COI ("83-464"), Opinion and Order (May 21, 1984).

[8] See, e.g., *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 32 Ohio St.3d 306 (1987).

[9] The most recent such action was in 00-127, Opinion and Order (January 11, 2001).

> (C) The public utilities commission has authority to address carrier access policy and **to create and administer mechanisms for carrier access reform, including, but not limited to, high cost support**.

(Emphasis added.) The first thing that is obvious about the new law – contrary to the implication of the Entry – is that the Commission is not **required** to order changes in access rates, or to address carrier access policy. The second thing that is obvious is that if and only if the Commission orders reductions in telephone company access rates, the reductions must be "revenue-neutral" – a term that is undefined.[10]

As shown herein, OCC meets the criteria for intervention in this proceeding and the Commission should grant OCC's motion to intervene. Also as shown in this Memorandum in Support, the Commission should proceed cautiously here, as it has in the past, especially because, for the first time in Ohio utility regulation, the PUCO staff has proposed assessing other telephone companies – and presumably their customers – to accomplish the revenue neutrality contemplated by new R.C. 4927.15(B) for the telephone companies that are required to reduce their intrastate access charges. This caution should include holding a hearing, especially before "revenue neutrality" is implemented. It should also include requiring the data requested by PUCO staff to be submitted **before** – not after – the comments are filed.

II. MOTION TO INTERVENE

R.C. 4903.221 provides, in part, that any person "who may be adversely affected" by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests

[10] The revenue neutrality requirement is not mentioned in the Entry itself. Further, new R.C. 4927.15(B) refers to "telephone companies," not just to ILECs. Thus the revenue neutrality requirement extends to competitive local exchange carriers ("CLECs") whose access charges are reduced. The PUCO staff plan does not appear to recognize this; CLECS are not mentioned other than as a source of payments **into** the fund.

of Ohio's residential consumers may be "adversely affected" by this case, especially if the consumers were unrepresented in a proceeding that would require them to make up the revenues formerly paid by carriers. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions to intervene:

> (1) The nature and extent of the prospective intervenor's interest;
>
> (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
>
> (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
>
> (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest is representing Ohio's residential consumers in order to ensure that the proceeding does not result in unreasonable or inequitable rate increases that would harm residential customers. This interest is different from that of any other party and especially different from that of the LECs that would see the access revenues they receive reduced, and different from the carriers that would see the access charges they pay reduced, and different from the carriers that will be paying into the fund, who will likely seek to pass through their payment to their customers. The advocacy of such carriers includes the financial interest of their stockholders.

Second, OCC's advocacy for consumers will include advancing the position that residential consumers' rates should be "just and reasonable," pursuant to R.C. 4905.22, among other statutes. OCC's position is therefore directly related to the merits of this

case before the PUCO, the authority with regulatory control of public utilities' rates in Ohio.

Third, OCC's intervention will not "unduly" prolong or delay the proceedings. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest.

Fourth, OCC will significantly contribute to the full development and equitable resolution of the factual issues. OCC will obtain and develop information that the PUCO should consider for equitably and lawfully deciding the case in the public interest.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate, OCC has a very real and substantial interest in this case where the rates some carriers pay will be reduced and the rates other customers pay will be increased.

In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies. Further, Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the "extent to which the person's interest is represented by existing parties." While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion in that OCC uniquely has been designated as the state representative of the interests of Ohio's residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.[11]

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. In addition, OCC has been a participant throughout the Commission's access charge proceedings, including 00-127 and the more recent complaint by Verizon (now Frontier) and its affiliates against other incumbent local exchange carriers ("ILECs").[12] On behalf of Ohio residential consumers, the Commission should grant OCC's Motion to Intervene in this proceeding.

III. THE NEED FOR A HEARING

The Commission clearly has the authority to order a hearing in Commission investigations such as this. Indeed, a hearing was held in the granddaddy of this case, the original investigation into intrastate access charges.[13] Hearings have also been held in various other Commission investigations relating to telephone service.[14] If the

[11] *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶ 13-20 (2006).

[12] See 07-1100, Entry (November 29, 2007) (*inter alia*, granting OCC intervention).

[13] See *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St.3d 266, 269 (1988).

[14] E.g., *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Opinion and Order (July 20, 2000) at 3.

Commission were to proceed with the access charge complaint, 07-1100, there would have to be a hearing.[15]

As previously noted, the last time this issue was addressed by the Commission, it ordered access charges to be reduced, but did not specifically indicate that lost access charge revenues were to be replaced.[16] Here, in the context of new R.C. 4927.15(B), PUCO staff has proposed a revenue replacement mechanism that will apply to all the ILECs that have their access charges reduced.[17] In addition, PUCO staff's proposal requires all other ILECs, CLECs, interexchange carriers and wireless carriers to contribute to the revenue replacement mechanism.

In this case, the issues that should be reviewed at a hearing include, but are not limited to:

1. Whether the intrastate access charges of the LECs whose current access charges are in excess of the interstate level should be reduced, and to what level?[18]

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[15] R.C. 4905.26; new R.C. 4927.21.

[16] 00-127 Opinion and Order at 14.

[17] This apparently will include all the ILECs other than AT&T (formerly known as Ameritech) and CBT, whose access rates were reduced to interstate levels prior to 00-127; and the former Embarq (now part of CenturyLink) and the former Verizon (now part of Frontier), whose access rates were reduced as the result of settlements in 00-127. Those settlements were not "revenue neutral," as the ILECs accepted far less than the amount of their claimed revenue losses in recoupment. (Due to the Commission's subsequent action – or, rather, inaction – the revenue recovery mechanisms have been allowed to continue unchanged, despite the "precipitous decline" in access minutes.) It should also be noted that those settlements also included substantial consumer benefits, in the guise of expanded local calling areas; no such offsetting consumer benefits appear to be contemplated in the PUCO staff proposal.

[18] The Entry and PUCO staff's plan appear to be based on only two "facts." First, the receipt by the Commission of formal and informal complaints from long distance carriers about excessive access charges. Entry at 1. Notably, the one formal complaint cited (id., n.1) has lain fallow for three years. And second, the precipitous decline in access minutes of use. Id. at 1. Notably, this would argue **against** the need to address access charge rates, because of the "precipitous decline" in the payments that long distance carriers have to make.

2. How should "revenue neutrality" be defined?[19]

3. If reductions in access charges occur, how should the LECs recoup the revenue loss from those reductions in access charges in order to ensure revenue neutrality?[20]

4. Should revenue neutrality be achieved entirely through recoupment from other carriers and their customers (as proposed by PUCO staff), or should some amount of the recoupment come from the carrier whose access charges are reduced?[21]

5. Crucially, what will the financial impact of access charge reductions be on the LECs whose access charges are reduced, and what will the impact of recoupment be on the carriers that are required to contribute to the fund? The ILECs' assertions as to the latter must be subject to review at a hearing, including cross-examination, especially given the inter-company support mechanism that is now being proposed.[22]

Given the unique circumstances of this proceeding, it bears repeating that requiring a witness to submit to cross-examination is the "greatest legal engine ever invented for the discovery of truth."[23] The truth about intrastate access charges, intrastate access charge

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[19] The statute does not define the term.

[20] See footnote 10, supra.

[21] Especially given the low basic service rates of some of the smaller ILECs. New R.C. 4927.15(B) states that the recoupment shall be **in addition to** the basic service rate increases permitted by new R.C. 4927.12. Of course, all other rates of the ILECs are deregulated, pursuant to new R.C. 4927.03(D), and the Commission has broad discretion under new R.C. 4927.15(C) to devise mechanisms for carrier access reform.

[22] See Section IV, infra.

[23] See *California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970) (quoting 5 J. Wigmore, Evidence § 1367, at 32 (J. Chadbourn rev. 1974)).

revenues, whether they should be reduced, and how any reductions should be replaced should be obtained at a hearing.

IV. THE NEED FOR DATA BEFORE DECIDING ON A PLAN

In an April 27, 2000 Entry in 00-127, the Commission required the filing of access charge revenue data and requested the filing of comments to occur on the same day.[24] OCC then filed a Motion for Extension of Time, seeking to have the revenue data filed followed by comments one month later.[25] OCC stated,

> [T]he time allowed in the Entry for filing comments should be extended, in order to allow adequate time for the preparation of comments on these important issues. The Commission will be better served by receiving the more thorough analyses that an extension of time will allow. Moreover, in order to better organize comments, OCC requests that the informational filings precede the filing of initial comments by one month. This would provide all stakeholders with a reasonable opportunity to review and digest the information and then include that analysis as part of initial comments.[26]

The Attorney Examiner agreed, and granted an extension, stating, "[R]eceipt of the revenue impact information in advance may assist parties in their preparation of comments."[27]

In the present case, by contrast, the Commission has included with the Entry "data requests that staff proposes be issued with the proposed plan **should the plan be adopted**

[24] See 00-127 Opinion and Order at 1.

[25] 00-127, OCC Motion for Extension of Time (May 4, 2000).

[26] Id. at 2-3.

[27] Id., Entry (May 18, 2000) at 2. OCC did in fact utilize this information in its comments. See id., Comments of the Ohio Consumers' Counsel (June 20, 2000), Attachments A and B.

by the Commission…."[28] There is one data request for the "eligible ILECs"[29] and another for the "contributing carriers."[30] And responses to both data requests are to be "submitted," not filed. Thus the contributing carriers will not have the information (other than their own, if they are an ILEC) regarding the magnitude of the ARF, for their comments or reply comments, and the eligible ILECs will not have the information for their comments or reply comments.[31] OCC and other non-carrier parties will apparently never have access to this information absent a belated public records request. And, importantly, the Commission will not have this information until after it decides whether to adopt the plan, a modified version of the plan, or no plan at all. To put it bluntly, this makes no sense.[32]

Thus the Commission should require the **filing** of the information in Appendices C and D of the Entry within thirty days of the Commission Entry ruling on OCC's Motions,[33] and then allow the filing of comments on the plan – based on that information – thirty days thereafter. Any concern about delay should be mitigated by the fact that R.C. 4927.15(B) does not indeed **require** the Commission to take action on access charges.[34] When combined with the "precipitous decline" in access minutes, this and the

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[28] Entry at 2 (emphasis added).

[29] Entry, Appendix C. "Eligible ILEC" is defined at page 1 of Appendix A.

[30] Id., Appendix D. "Contributing carrier" is also defined at page 1 of Appendix A.

[31] In this respect, the original schedule in 00-127 was superior because parties would at least have had the filed information to use in their reply comments.

[32] For the Commission to make the decision with this information not being part of the public record would be unlawful. *Tongren v. Pub. Util. Comm'n*, 85 Ohio St.3d 87 (1999).

[33] OCC understands that carriers may consider part of this information to be proprietary, and commits to working with the carriers to enter into protective agreements to ensure timely access to this information.

[34] Unlike the rulemaking just completed by the Commission *In the Matter of the Adoption of Rules to Implement Substitute Senate Bill 162*, Case No. 10-1010-TP-ORD.

unprecedented recovery mechanism provide all the more reason for the Commission to take a deliberative approach here.

V. THE NEED FOR EXPEDITED DISCOVERY

R.C. 4903.082 directs that "[a]ll parties and intervenors **shall** be granted ample rights of discovery." (Emphasis added.) That should be especially true in a proceeding such as this, where some rates are being reduced but the lost revenues are proposed to be recouped from other carriers.[35]

Ohio Adm. Code §§ 4901-19(A), -20(C) and -22(B) allow the Commission to shorten the response times for various forms of discovery. In part dependent on the Commission's rulings on OCC's other motions made herein, there will be a need for expedited discovery. For example, if the Commission denies OCC's motion for a hearing and/or denies OCC's motion to require filing of the carrier data, expedited discovery – with a response period of ten days rather than the twenty days in Ohio Adm. Code[36] and electronic service of discovery responses – will be needed in order for OCC's comments to be based upon data. On the other hand, if the Commission grants the motion for hearing but schedules the hearing soon after the comment date, expedited discovery will also be necessary. Likewise, if the Commission grants the motion for data filing but then schedules the comment filing date soon after the data filing date, expedited discovery to follow up on the data filing will also be necessary. This does not purport to be an exhaustive list of the circumstances in which expedited discovery will be necessary; for

[35] It should be presumed that these other carriers will attempt to pass those charges on to their own customers.

[36] E.g., Ohio Adm. Code 4901-1-19(A).

efficiency's sake the Commission should grant expedited discovery but permit individual carriers to seek motions for relief if that proves unduly burdensome.[37]

VI. CONCLUSION

OCC has met the statutory and administrative tests for intervention in this proceeding. The Commission should grant OCC's Motion to Intervene.

The Commission should also grant OCC's Motion for a Hearing in this proceeding where PUCO staff's proposal establishes an unprecedented revenue recovery mechanism. Further, the Commission should require the carriers to file the data requested by PUCO staff ***before***, rather than after, comments are filed or a hearing is held. Finally, the Commission should provide for expedited discovery in this proceeding.

Respectfully submitted,

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[37] Expedited discovery has been ordered where appropriate in other proceedings. E.g., *In the Matter of the Application of Dayton Power & Light Company for Approval of a Unique Arrangement with Caterpillar Inc.*, Case No. 10-734-EL-AEC, Entry (July 30, 2010).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Intervene and Motion for Hearing and Other Procedural Rulings by the Office of the Ohio Consumers' Counsel was served by electronic mail to the persons listed below, on this 9th day of November 2010.

/s/ David C. Bergmann
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Summary: Motion Motion to Intervene and Motion for Hearing and Other Procedural Orders by the Office of the Ohio Consumers' Counsel electronically filed by Mrs. Mary V. Edwards on behalf of BERGMANN, DAVID C. and Office of the Ohio Consumers' Counsel