BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM CONTRA MOTIONS FOR PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), submits this memorandum contra[1] the motions for protective order filed in this docket on March 17 and 18, 2011.[2] The motions were filed by a number of parties who seek to keep secret certain information required to be filed by the Entry of the Public Utilities Commission of Ohio ("Commission" or "PUCO") dated February 23, 2011. The movants make a claim for secrecy on the ground that the information is competitively sensitive.

But many carriers – including truly competitive carriers – have publicly filed information which these motions seek to shield from public view on the ground that it is competitively sensitive. It must be recalled that this case involves a proposal to have the customers of some companies pay to make up revenues lost by **other** companies. Thus if there is any competitive concern here – and there is not, as discussed below – that

[1] Ohio Adm. Code 4901:1-12(B).

[2] The motion of CenturyTel of Ohio, Inc. ("CenturyTel"), United Telephone Company of Ohio ("United Telephone"), CenturyTel Long Distance and Embarq Communications Inc. (collectively, "CenturyLink") was the only one filed on March 17, 2011.

concern is outweighed by the public need to review the information on which this support is to be based. Especially under these circumstances, the Commission must decide "this case through a fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission's decision."[3] This case has the potential to lead to increased rates for many Ohio telephone customers, and the dollars at issue in this case should be reviewed in the public light.

The February 23, 2011 Entry required "contributing carriers" – as defined in the PUCO staff proposal contained in the November 3, 2010 Entry initiating this docket[4] –to file data on their intrastate retail telecommunications service revenues, their uncollectible intrastate telecommunications revenue, and their total access lines as of December 31, 2010.[5] "Eligible carriers" – as also defined by the November 3 Entry[6] – were also required to file information on their access charge rates, the intrastate billed demand for each rate element, and the resulting revenue by rate element.[7] Incumbent local exchange carriers ("ILECs") were also required to file information regarding their basic local exchange service rates, associated charges, and access lines.[8] The motions for protective

[3] *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio,* Case No. 99-890-TP-ACE, *Entry* at 2-3 (October l, 1999); *see also In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets,* Case No. 89-365-RC-ATR at 7 (October 18, 1990) (holding that "any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public's interest in disclosure.")

[4] November 3, 2010 Entry, Appendix A at 1.

[5] See February 23, 2011 Entry at 4. From the first datum and the second, the "intrastate retail telecommunications services revenues less uncollectibles" were also required to be reported.

[6] November 3 Entry, Appendix A at 1. See also February 23, 2011 Entry at 1, n.1.

[7] See February 23 Entry at 3-4.

[8] Id. at 4 and Attachment.

order were filed by both eligible carriers and by contributing carriers,[9] even though the February 23, Entry referred only to such requests from eligible carriers.[10]

OCC opposes the motions for protective order because none of the motions has adequately demonstrated that the information in question is deserving of protection under Ohio Adm. Code 4901-1-24(D) or R.C. 1331.61(D). In particular, the movants have not demonstrated how this information could be utilized by their competitors to the movants' detriment.

Further, much of the data asserted by movants to be so competitively sensitive is data that has, until very recently, been filed publicly here in Ohio. And a number of competitive carriers have in fact publicly filed this very data in this docket without any claim for protection.

[9] Of the CenturyLink companies, CenturyTel is an eligible carrier; the others are contributing carriers. The following other carriers filed motions for protective order: the AT&T Entities ("AT&T") (contributing carriers); Cincinnati Bell Telephone Company LLC, Cincinnati Bell Extended Territories LLC, Cincinnati Bell Wireless, LLC and Cincinnati Bell Any Distance Inc. (collectively, "Cincinnati Bell") (contributing carriers); Comcast Phone of Ohio, LLC ("Comcast") (contributing carrier); Frontier North Inc.. and Frontier Communications of Michigan Inc. (collectively, "Frontier") (eligible carrier) (a redacted version of its data response does not appear on DIS); First Communications LLC ("First Communications") (contributing carrier); Globalcom Inc. dba First Communications ("Globalcom") (contributing carrier); McLeodUSA Telecommunications Services, LLC, et al. (collectively, "PAETEC") (contributing carriers); Nexus Communications Inc. ("Nexus") (contributing carrier); the Small Local Exchange Carriers ("SLECs") (the SLECs, all eligible carriers, are identified at page 1 of their motion for protective order, and filed individual data responses); Sprint Communications Company L.P., et al. (collectively "Sprint Nextel") (all contributing carriers); Time Warner Cable Information Services (Ohio) ("TWCIS") (contributing carrier); T-Mobile Central LLC and VoiceStream Pittsburgh, L.P. ("T-Mobile") (contributing carriers); Verizon (contributing carriers); Windstream Ohio, Inc. and Windstream Western Reserve, Inc. (collectively, "Windstream" (eligible carriers). DeltaCom, Inc. ("DeltaCom") and Business Telecom, Inc. ("BTI") filed Motions and their allegedly confidential responses on March 28, 2011. It also appears that Armstrong Telecommunications, Inc. ("Armstrong") (contributing carrier) filed its data under seal without a motion for protective order as required by Ohio Adm. Code 4901-1-2(E); see Ohio Adm. Code 4901-1-24(D). On the other hand, it appears that Qwest Communications Company, LLC ("QCC") (contributing carrier) originally filed data under seal, then filed a motion for protective order, but subsequently made a public filing.

[10] See February 23 Entry at 4.

In an Entry dated March 23, 2011, the Attorney Examiner stated that "[a]n entry addressing these requests [for confidential treatment] will be issued at a later date."[11] OCC urges the Commission to deny the requests for protective order, and make this important data public, as it should be.

II. THE CARRIERS HAVE NOT SHOWN THAT THE DATA IN QUESTION IS COMPETITIVELY SENSITIVE, ESPECIALLY CONSIDERING THAT SOME CARRIERS HAVE PUBLICLY FILED THE SAME TYPE OF INFORMATION AND NOT CLAIMED THE INFORMATION IS CONFIDENTIAL.

Admittedly here we are dealing with numerous motions for protective orders filed by entities or groups of entities. But the motions are startlingly similar, especially with regard to their conclusory language and their failure to meet the burden of showing that protection is warranted.

For example, AT&T states, "If this information is released to the public it would cause harm to the AT&T Entities by providing their competitors information which is deemed to be competitive."[12] Similar sentiments are expressed by others: CBT states, "The need to protect the designated information from public disclosure is clear…"[13] And First Communications states that its filing "contains confidential information and the disclosure of which would be detrimental to [its] commercial interests."[14] Windstream states, "Public disclosure of this information would impair Windstream's ability to

[11] March 23 Entry at 1. OCC has filed an interlocutory appeal from another aspect of that Entry.

[12] AT&T Motion at 2; see also Comcast Motion at 2, 4; Frontier Motion at 2; Nexus Motion at 2; PAETEC Motion at 3, 5; T-Mobile Motion at 2, 4; SLEC Motion at 3; Sprint Motion at 3, 5; TWCIS Motion at 2, 4; Verizon Motion at 1, 2

[13] CBT Motion at 3; see also CenturyLink Motion at [2}.

[14] First Communications Motion at 1.

respond to competitive opportunities in the marketplace, and would provide competitors with an unfair competitive advantage."[15] But what is noticeably lacking is any discussion of how Windstream would be impaired, or, for any of the carriers, how their competitors would be able to take advantage of this information.

Ohio Adm. Code 4901-1-27(B)(7)(e) requires that "[t]he party requesting such protection shall have the burden of establishing that such protection is required." The reason for this burden upon movants is that the PUCO's rules support "the inherent, fundamental policy of R.C. 149.43 … to promote open government, not restrict it."[16]

Moreover, the Commission has found on occasion that business information asserted to be sensitive may not be protected from disclosure. For instance, and directly related to the issue here, the Commission has declined to define as a trade secret the calling data that reveals business information such as traffic volume and revenues from interLATA calls between exchanges.[17] Interconnection demand letters and timelines for interconnection have been determined not to amount to trade secrets.[18] The Commission has also ruled that the fair market value and net book value of assets sought to be transferred need not be protected from disclosure.[19]

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[15] Windstream Motion at 2.

[16] *Besser v. Ohio State University*, 89 Ohio St. 3d 396, 396 (2000).

[17] *In the Matter of the Petition of Alvahn L. Mondell, et al. v. The Ohio Bell Telephone Company Relative to a Request for Two-Way, Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company*, Case No. 89-221-TP-PEX, Entry (May 16, 1989).

[18] *See In the Matter of the Application of CTC Communications Corp. for a Certificate of Public Convenience and Necessity to Provide Local and Telecommunication services in Ohio*, Case No. 00-2247-TP-ACE, Entry at 3-4 (February 8, 2001).

[19] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 3-8 (October 18, 1990).

These holdings convey a conservative approach to defining trade secrets – an approach that recognizes that the trade secret provisions of R.C. 1333.64 as effectuated in R.C. 149.43 create a very limited and narrow exception to Ohio's public records law.[20]

R.C. 149.43 is Ohio's public records law that has been addressed in numerous proceedings before the Commission. R.C. 4901.12 requires that "all proceedings of the public utilities commission and all documents and records in its possession are public records," except as provided in the exceptions under R.C. 149.43. The Commission has noted that R.C. 4901.12 and R.C. 4905.07 "provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome."[21]

Ohio Admin. Code 4901-1-24(D) requires that "[a]ny order issued under this paragraph shall minimize the amount of information protected from public disclosure." The Commission stated in a 2004 case:

> The Commission has emphasized, in *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry issued November 23, 2003, that:
>
> > [a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (Section 149.43, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to 'ensure that governmental records be open and made available to the public … subject to only a few very limited exceptions.' *State ex. rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].[22]

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[20] See *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 7 (November 25, 2003) (citations omitted).

[21] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5 (October 18, 1990).

[22] *In re MxEnergy, Inc*., Case No. 02-1773-GA-CRS *et al*., Entry at 3 (September 7, 2004) (notations in original).

The Commission has used a balancing approach in its review of motions for protective orders. For instance, the PUCO has noted

> it is necessary to strike a balance between competing interests. On the one hand, there is the applicant's interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission's own interest in deciding this case through a fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission's decision.[23]

The Ohio Supreme Court has addressed the test for protection from disclosure under R.C. 149.43 as the "state or federal law" exemption.

> We have also adopted the following factors in analyzing a trade secret claim:
>
> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e*., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.'[24]

The analysis of these factors regarding the documents in question is missing from all of the motions for protective order at issue here, except for broad, summary statements, as noted above.

The Commission has made it clear that a movant who seeks to protect information *from the public* in a case must raise "specific arguments as to how *public disclosure* of

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[23] *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, *Entry* at 2-3 (October l, 1999); *see also In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR at 7 (October 18, 1990) (holding that "any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public's interest in disclosure.")

[24] *Besser* at 399-400.

the specific items could cause them harm, or how disclosure of the information would permit the companies' *competitors* to use the information to their advantage."[25] Such a standard is in accord with the specific provisions of Ohio's trade secret exemption from public records, R.C. 1331.61(D). Under R.C. 1331.61(D), a trade secret must qualify under Section (D) as one of the forms of information listed and must then satisfy both criterion one and two: the information must have "independent economic value" and must have been kept under circumstances that maintain its secrecy.

The PUCO has held, in analyzing whether *others* (i.e. competitors) can obtain "economic value" from the disclosure, that economic value is not derived simply by the fact that the information is not generally known by other persons.[26] But this is exactly what the movants plead when they allege that the information is a trade secret because it pertains to confidential information that competitors could use.[27]

The Commission has also held that financial data, including basic financial arrangements, do not contain proprietary information worthy of trade secret protection.[28] Additionally, financial statements of an interexchange carrier have likewise been found not to be a trade secret.[29] Even detailed financial information such as balance sheets,

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[25] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain* Assets, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990) (emphasis added)

[26] *In the Matter of the Application of the Ohio Telephone Company for Approval of an Alternative Form of Regulation*, Case No.93-487-TP-ALT, Entry at 10 (November 25, 2003) (the Commission found that data compiled by SBC Ohio that listed locations where broadband service had been deployed was not a trade secret).

[27] See footnotes 11-14, above.

[28] *In the Matter of the Applications of Vectren Retail, LLC et al. for Renewal of Certification as a Competitive Retail Natural Gas Supplier and for Approval to Transfer that Certification*, Case No. 02-1668-GA-CRS, Entry at 5 (August 11, 2004).

[29] *In the Matter of the Application of Rapid Transmit Technology, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Entry at 2-3 (October 1, 1999).

plant, accumulated depreciation, and amortization has been found to fail to meet the trade secret definition.[30]

Further, the legal arguments raised in the motions are general in nature, and do not discuss why this specific information is deserving of protection.[31] In particular, the fact that a company treats information as a trade secret does not make it so.[32]

The SLECs cite the fact that in 00-127, the Commission granted protected status to their information.[33] In the first place, it does not appear that any party challenged that designation. Equally importantly, the focus in that case was not on the SLECs; it was on the larger ILECs, and nothing was done about the SLECs' access charges in that case. In this case, by contrast, the focus is on the SLECs; and in this case (again in contrast to 00-127), customers of other ILECs are proposed to be required to support (pay for) any revenue losses seen by the SLECs. The SLECs themselves have insisted on this.[34] Thus if there is any competitive concern here – and there is not, as discussed below – that concern is outweighed by the public need to review the information on which this support is to be based.

The varying responses to the Commission's information filing requirements also undercut any individual carrier's (or group of carriers') assertion that the data must be kept confidential. The data falls into three groups:

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[30] *In the Matter of the Filing of Annual Reports by Regulated Public Utilities*, Case No. 89-360-AU-ORD, Entry at 7-11 (August 1, 1989).

[31] See AT&T Motion at 2-5; CBT Motion at 3-4; CenturyLink Motion at [2-4]; Comcast Motion at 2-5; Nexus Motion at 2-4; PAETEC Motion at 4-6; T-Mobile Motion at 3-5; Sprint Motion at 3-5; TWCIS Motion at 2-5; Verizon Motion at 2-3; Windstream Motion at 2-5..

[32] See CenturyLink Motion at [5]; Frontier Motion at 2; Windstream Motion at 5.

[33] SLEC Motion at 3, n.3, citing *In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Opinion and Order (January 11, 2001) at 2, n.3.

[34] See SLEC Comments (December 20, 2010) ("SLEC Comments") at 17.

November 3 Entry, Appendix C

Appendix C to the November 3, 2010 Entry – as supplemented by the February 23 Entry – required eligible carriers to file with the PUCO the following information:

> 1. The total intrastate switched access revenues from all recurring switched access rate elements billed, including switched dedicated elements that are priced on a flat rate basis;
>
> 2. The rate elements that contributed to the calculation of item 1;
>
> 3. The intrastate and interstate rate associated with each rate element identified in 2;
>
> 4. The intrastate billed demand for each rate element identified in 2;
>
> 5. The interstate and intrastate tariffs supporting the rates identified in 3; and
>
> 6. The number of access lines as of December 31, 2009.

CenturyTel publicly filed a response to item 1 from Appendix C for 2009.[35] The SLECs did not file this data publicly, for 2009 or 2010. Neither did Windstream. And despite the fact that Frontier's description of its confidential information did not include total access revenues,[36] this information was not publicly filed.

CenturyTel and the SLECs both publicly filed the access rate elements (item 2) and the rates (item 2). Windstream filed neither.[37]

None of the contributing carriers filed publicly the billed demand for the rate elements (item 3).

[35] The February 23 Entry required this data to be filed for 2010 as well.

[36] See Frontier Motion at [2].

[37] As noted, Frontier made no public filing.

CenturyTel and the SLECs both publicly filed lists of the tariffs for the access rate elements (item 5). For some reason, Windstream appears to believe that even its tariffs are proprietary.

And finally, CenturyTel and the SLECs both publicly filed their 2009 and 2010 access line counts (item 6). Windstream and Frontier, again, did not publicly file their line counts.[38]

Clearly, the variety of these responses argues against the position that this information is competitively sensitive, and shows that a protective order for this information has not been justified. The only issue as to which there is unanimity among the eligible carriers is billed demand for the access rate elements.

Of course, that information is the key piece of information for this proceeding. Billed demand times the intrastate rate – minus the interstate rate times that demand – yields the revenues that the eligible carriers will be giving up if the Access Reform Plan ("ARP") is adopted. And the net revenues are those that will have to be replaced – from some set of customers – under the revenue neutrality requirement of R.C. 4927.15(B). Thus this bottom line, for each eligible carrier and for the eligible carriers in general, is the crucial datum for the Commission's decision here, and for the parties' arguments.[39] Any reasonable balancing test[40] would recognize the importance of this information.

And any such balancing test would also recognize that the eligible carriers have also failed to support their claims that the number of access minutes they bill for each rate

[38] See Windstream Motion at 2. Again, Frontier's description of its confidential information did not include total company access line counts. See also Section III., below.

[39] OCC has requested information from the eligible carriers as to the source of those revenues (i.e., from which carriers they come), and from certain of the other carriers as to how much intrastate access charges they pay. So far those discovery requests have not produced results.

[40] See page 6, above.

element is competitively sensitive information. The fact that carrier X billed Y terminating minutes in 2010 would appear to provide only marginal value, if any, to X's competitors. Clearly, none of the eligible carriers has met its burden of proof as to why this information should be kept secret.

November 3 Entry, Appendix D

Appendix D requires all contributing carriers to file with the PUCO the following information:

> 1. The contributing carrier's 2010 total intrastate retail telecommunications services revenues, including prepaid and revenues from providing telecommunication services to interconnected voice over internet protocol services providers;
>
> 2. The contributing carrier's 2010 uncollectible intrastate retail telecommunications revenues;
>
> 3. The contributing carrier's 2010 total intrastate retail telecommunications revenues minus uncollectibles;
>
> 4. And the contributing carrier's total Ohio access lines as of December 31, 2010.

Here again, the diversity of the responses on these data requirements shows clearly that the data is not competitively sensitive. And those carriers that claim the data is proprietary have failed to show that it must be protected.

In the first place, Windstream, which strongly protected its responses on Appendix C, publicly filed all of the information required by Appendix D. And each of the SLECs publicly filed this information. Clearly, these carriers face competition to some extent.[41]

[41] SLEC Comments at 3-4.

And even more importantly, the many competitive local exchange carriers ("CLECs") and the other carriers that did not file motions for protective orders do not consider this information to be competitively sensitive, so they publicly filed the information. This represents at this point almost thirty **competitive** carriers.[42] If any entities should be concerned about disclosing genuinely competitively sensitive information, it should be these companies.

This makes the assertions by other companies that all of the Appendix D information deserves protection all the less credible. Those claiming this status include AT&T Mobility, all four of the Cincinnati Bell companies, Comcast, First Communications, the Frontier companies, Globalcom, the PAETEC companies, Nexus, Sprint, T-Mobile, TWCIS, and the Verizon companies.

On the other hand, some carriers are selective with this information. AT&T Communications of Ohio, Inc.; TCG Ohio; SNET America, Inc.; SBC Long Distance; AT&T Advanced Solutions; and AT&T Ohio are willing to report their total intrastate retail telecommunications revenue, but not their uncollectibles or their number of access lines. CenturyTel and United Telephone report their access lines, but none of the rest of the Appendix D data.[43]

The carriers claiming protected status for this information have not shown that it deserves protection. The motions for protective order should be denied.

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[42] Obviously, the Commission should be concerned that the responses to the February 23 Entry grossly understate the number of "contributing carriers" as defined in the ARP. Clearly, many carriers are unaware of – or have deliberately disregarded – the February 23 Entry.

[43] It appears that CenturyTel and United Telephone have switched their access line counts, because CenturyTel is shown with more than 300,000 access lines and United Telephone with 47,000 access lines.

February 23 Entry

The February 23 Entry requires all ILECs to file with the PUCO the following information:

> 1. The tariffed basic local exchange service ("BLES") rate as BLES is defined in Section 4927.01 (A)(l), Revised Code;
>
> 2. The tariffed touchtone rate if not included in BLES rate;
>
> 3. The average mileage charges, if any, required to receive BLES;
>
> 4. The applicable Subscriber Line Charge (SLC);
>
> 5. The intrastate access recovery fees (applicable only to Frontier North and United Telephone Company of Ohio dba Century Link);
>
> 6. If the BLES rates vary by exchange access area/zones/bands, the ILEC shall provide the total number of access lines covered by each rate;
>
> 7. Any other Commission-ordered surcharges; and
>
> 8. The total number of access lines as of December 31, 2009, and December 31, 2010.

It appears that the only items of dispute for this filing are 6 and 8, having to do with access lines.

AT&T Ohio publicly filed its 2009 total access line counts, but asserted that its 2010 counts are confidential. Likewise, CBT publicly filed its 2009 total access line counts, but asserted that 2010 counts – including total and per-rate-band counts – are proprietary. Windstream publicly filed both the 2009 and 2010 total access line counts, but asserted that the totals by access area/zones/bands are confidential. And despite its assertion that its "confidential information consists of … total number of access lines by exchange access band rate…" Frontier made no public filing.

On the other hand, CenturyTel provided both 2009 and 2010 access line counts, and United Telephone publicly provided not only the total 2009 and 2010 counts but the

counts broken down by residential and business rate band, along with the number of lines in each distance zone. And the SLECs publicly filed all the information requested in the February 23 Entry.

As stated above, the disparate treatment of this information by these companies supports the notion that none of this information should be deemed to be proprietary. If access line counts – either total or broken down by rate band – are not competitively sensitive for one company, or multiple companies, they should not be competitively sensitive for any of the ILECs.

III. SOME OF THE DATA HAS PREVIOUSLY BEEN PUBLICLY FILED.

Finally, with regard to access line counts and total intrastate revenues, this information should not be considered proprietary because, up until this year, all telephone companies – especially the ILECs – were required to include this information in their publicly-filed PUCO annual reports.[44] The revenue numbers were included on Schedule 33 of the annual reports.[45] And the access line counts – **including counts by exchange** – were listed on Schedule 27.

The companies provide no reason why information that was publicly filed for many years suddenly took on competitive significance in 2010. This information is not deserving of such protection.

[44] Various wireless companies asserted that their revenue numbers were proprietary, but it does not appear that the Commission ever issued a protective order for this information.

[45] See also accounts 5082-084 on the Income Statement Report.

AT&T states, as to its "access line information, it is information that is no longer required to be filed in its Annual Report."[46] But this occurred not because of any desire or need to have this information kept confidential, but because the General Assembly decided to limit the data in telephone companies' Annual Reports to that needed to calculate the PUCO and OCC assessments.[47]

IV. PROTECTIVE AGREEMENTS MAY BE AN ALTERNATIVE TO, BUT DO NOT RESOLVE THE ISSUES IN, THE MOTIONS FOR PROTECTIVE ORDER.

OCC has been working – principally with the eligible carriers – to enter into protective agreements in order to gain access to the information that these carriers have filed under a claim of confidentiality. OCC will continue to work on entering into these protective agreements. Although for OCC gaining access through a protective agreement is a practical alternative, this still does not address the question of whether the carriers have met their burden of justifying such protection under the law and the Commission's rules. In any event, the Commission, in ruling on the pending motions, should assure that its order does not interfere with provisions in OCC's protective agreements that, among other things, provide processes for obtaining PUCO resolution of issues of confidentiality regarding specific information.

[46] AT&T Motion at 5.

[47] R.C. 4905.14(A)(2)(a). Information regarding pole attachment and conduit costs is also required to be filed. R.C. 4904.14(A)(2)(b).

V. CONCLUSION

None of the movants for protective order has met its burden to show that the information for which they seek protected status is deserving of such status. The fact that some carriers – ILECs, CLECs and IXCs – publicly filed this information shows clearly that this information is not deserving of protection. And some of the information was previously publicly filed. The motions for protective order should all be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served electronically to the persons listed below, on this 1st day of April, 2011.

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Summary: Memorandum Memorandum Contra Motions for Protective Order by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of BERGMANN, DAVID C.