

In the Matter of the Commission's )  
Oversight Concerning the Ohio Small ) Case No. 97-414-TP-UNC  
Local Exchange Carrier Association. )

The Office of the Ohio Consumers' Counsel ("OCC") files Comments in this proceeding involving more than \$500,000 derived from a Hardship Fund that was to be used to the mutual benefit of small local exchange carriers ("SLECs") and their customers.<sup>1</sup> According to a petition filed jointly by the Ohio Small Local Exchange Carriers Association ("OSLECA") and the Northwest Ohio Independent Telecommunications Association, Inc. ("NWOITA") (collectively, "Petitioners"), the money at the heart of this proceeding consists mostly of interest earned on the Hardship Fund monies.<sup>2</sup> OCC is the representative of residential utility customers in Ohio.<sup>3</sup>

Petitioners seek approval by the Public Utilities Commission of Ohio (“PUCO”) for their plan to dissolve OSLECA and to turn the money remaining in the Hardship Fund’s General Operating Account over to NWOITA. Petitioners state that they believe the remaining dollars in the OSLECA account should be “invested in maintaining a

<sup>1</sup> See *In the Matter of the Commission Investigation Relative to the Establishment of Intrastate Access Charges*, Case No. 83-464-TP-COI, Finding and Order (February 12, 1997) (“1997 Hardship Fund Order”) at 5.

<sup>2</sup> Petition of the Ohio Small Local Exchange Carriers Association to Discontinue Its Operations by Merger into the Northwest Ohio Independent Telecommunications Association, Inc. (May 3, 2013) at 4.

<sup>3</sup> Ohio Adm. Code 4901-1-11.

strong RLEC community organization focused upon their common interests and concerns.”<sup>4</sup> To that end, they intend to distribute the remaining dollars in the account “for one or more exempt purposes within the meaning of Section 501(c)(6) of the Internal Revenue Code.”<sup>5</sup>

The money comes from interest on funds that were to be used for the mutual benefit of the SLECs and their customers.<sup>6</sup> Under the Internal Revenue Code cited by Petitioners, Section 501(c)(6) organizations may conduct unlimited lobbying and general advocacy activities related to the exempt purpose of the organization.<sup>7</sup> Such activities would tend to be for the benefit of the organizations and their members, and could be to consumers’ detriment. The PUCO has never recognized that a utility’s lobbying activities benefit customers.<sup>8</sup>

If the PUCO approves the Petition, it should do so only if it requires NWOITA to place the money at issue in an escrow account that can only be used for purposes that are mutually beneficial to the SLECs and their customers. The PUCO-approved uses of the Hardship Fund should be designated as a guide for NWOITA’s use of the remaining OSLECA account money.

As background, in 1987 the PUCO adopted rules governing the final transition to an ongoing intrastate access charge and toll compensation plan for local exchange

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<sup>4</sup> Petition at 5. “RLEC” means “rural local exchange carriers.” *Id.* at 1.

<sup>5</sup> *Id.*

<sup>6</sup> See 1997 Hardship Fund Order at 5.

<sup>7</sup> See IRS Publication 4221-NC, *Compliance Guide for Tax-Exempt Organizations (Other than 501(c)(3) Public Charities and Private Foundations)* at 5 (available at <http://www.irs.gov/pub/irs-pdf/p4221nc.pdf>).

<sup>8</sup> See *Cincinnati Bell Rate Case*, Case No. 84-1272-TP-AIR, et al., Opinion and Order (October 29, 1985), 1985 Ohio PUC LEXIS 15 at [\*54].

companies operating in Ohio.<sup>9</sup> In the rulemaking proceeding, the PUCO directed that the Hardship Fund be established temporarily through the transfer of \$5 million from the LEC Reserve Fund.<sup>10</sup> The fund was available to any local exchange company with 10,000 or fewer access lines that identified a hardship reflecting special cost considerations and that submitted justification for the amount of the relief sought.<sup>11</sup> In 1989, the PUCO, in acting on a motion by the Ohio Telephone Association, ordered that the fund be continued indefinitely.<sup>12</sup>

In October 1996, the Ohio Telephone Association, on behalf of the SLECs, asked the PUCO to review and approve a proposed constitution and bylaws for the yet-to-be-established OSLECA. The proposed OSLECA constitution and bylaws stated: “The Board of Trustees shall receive applications from member companies, or a group of member companies in accordance with the purposes for which the Association is formed, seeking to utilize the hardship funds for the mutual benefit of such companies and the subscribers of such companies.”<sup>13</sup>

In the 1997 Hardship Fund Order, the PUCO approved OSLECA as overseer of the Hardship Fund. Everything about use of Hardship Fund money was directed toward the mutual benefit of SLECs and their customers. The PUCO directed its Staff “to monitor the performance of the organization, which may include an independent audit, to ensure that it is operating in the best interest of its member companies **and in the best**

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<sup>9</sup> *In the Matter of the Commission Investigation Relative to Establishment of Intrastate Access Charges*, Case No. 83-464-TP-COI.

<sup>10</sup> *Id.*, Opinion and Order (March 12, 1987), 1987 Ohio PUC LEXIS 100, [\*25].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, Entry (January 10, 1989), 1989 Ohio PUC LEXIS 40, [\*15-\*16].

<sup>13</sup> *Id.*, Constitution and By-Laws of the Ohio Small Local Exchange Carriers Association (October 11, 1996) at 4.

**interest of its member companies' subscribers."**<sup>14</sup> The PUCO also stated its vision regarding use of Hardship Fund money:

Concerning the OSLECA members' use of the Hardship Fund monies, the Commission envisions that the Hardship Fund be used to prepare and assist small non-primary carrier LECs in dealing with the transition to a new competitive telecommunications marketplace and the requirements of the Telecommunications Act of 1996 (1996 Act). For example, the monies could be used to develop a small LEC generic cost study that could be utilized by member companies to assist a company in meeting the requirements of Sections 251(b) and (c) of the 1996 Act; or to assist a company **and its customers** in transitioning to higher rates necessitated by access charge reform.<sup>15</sup>

And the PUCO stated that it "on its own initiative, after consulting with the Board of Trustees, may authorize disbursements of Hardship Funds for any other purpose for the benefit of the Association members **and its subscribers**."<sup>16</sup>

Through the years, the PUCO preapproved certain types of projects that met the funding criteria of OSLECA's bylaws. In December 2005, the PUCO stated that the following projects, to meet state and federal mandates, would be preapproved for using Hardship Fund money: studies to identify "phantom traffic"; projects to implement state and federal mandates for Local Number Portability, the Communications Assistance for Law Enforcement Act, and E-9-1-1 wireless and Voice over Internet Protocol updates; and interconnection and traffic exchange negotiations.<sup>17</sup> In November 2007, the PUCO expanded the list of preapproved projects to include projects that further the deployment and promotion of broadband Internet access consistent with state and federal initiatives in this area; expenses associated with the enhanced lifeline commitment under elective

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<sup>14</sup> 1997 Hardship Fund Order at 4 (emphasis added).

<sup>15</sup> Id. at 4-5 (emphasis added).

<sup>16</sup> Id. at 5 (emphasis added).

<sup>17</sup> Case No. 97-414, Entry (December 21, 2005) at 3.

alternative regulation; and projects to implement federal mandates associated with Customer Proprietary Network Information.<sup>18</sup> And in October 2008, the PUCO allowed the Hardship Fund to be used for compliance with federal requirements for protecting consumers' from identity theft.<sup>19</sup>

Although not all of these purposes directly benefit customers, most of the purposes have at least some consumer benefit, and none run counter to customers' interests. The Petition, however, would allow the SLECs to use the money remaining in the OSLECA account in ways that may be detrimental to customers.

Counsel for NWOITA has provided OCC with a copy of that organization's bylaws, which include the purposes of the organization. Article II, Section 1 of NWOITA's bylaws states that the purpose of the organization "is to promote the business of telecommunications (including broadband deployment) in the State of Ohio and assist its members to more effectively compete in the provision of telecommunications and broadband services to their customers; to provide their customers with adequate, up-to-date and reliable service at affordable prices and to promote the common business interests of its members."

The section also lists specific objectives and purposes of NWOITA to promote the business of telecommunications and broadband deployment. These include:

- A. Seeking the promotion of best practices among its member companies and the encouragement of uniformity and cooperation by telecommunication industry companies for the provision of telecommunications and broadband services.
- B. Educating the public in the use of telecommunication and broadband services.

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<sup>18</sup> Id., Entry (November 28, 2007) at 3.

<sup>19</sup> Id., Entry (October 29, 2008) at 3.

- C. Assisting the establishment of mutual aid and emergency preparedness for equipment and labor to assist its members in meeting communications needs in times of natural or other disasters.
- D. Establishment of a system for sharing of industry safety information, skills and knowledge amongst members including the training of its members and the receipt of grants for developing and conducting training of the employees of the members in safety and technical matters.

These purposes would appear to fit into the PUCO's directive in the 1997 Hardship Fund Order that the money be used for the mutual benefit of the SLECs and their customers.

Two other provisions of NWOITA's bylaws, however, might not fit that directive. Its bylaws also allow NWOITA to engage in "any other activity not prohibited by the Ohio Revised Code for non-profit entities." And the next section states that "the Association shall not carry out any other activities not permitted to be carried out by an organization exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code or any corresponding section of any future tax code." The sentence contains a double-negative that, if removed, would allow NWOITA to carry out any other activities permitted to be carried out by 501(c)(6) organizations. This is similar to the Petitioners' intent to use the remaining dollars in the account "for one or more exempt purposes within the meaning of Section 501(c)(6) of the Internal Revenue Code."<sup>20</sup>

Under the Internal Revenue Code, 501(c)(6) organizations can work for the enactment of laws to advance the common business interests of the organization's members.<sup>21</sup> Ohio law contains no prohibitions on the lobbying activities of 501(c)(6) organizations.

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<sup>20</sup> Petition at 5.

<sup>21</sup> See [www.irs.gov/publications/p557/ch04.html#en\\_US\\_2011\\_publink1000200321](http://www.irs.gov/publications/p557/ch04.html#en_US_2011_publink1000200321).

Thus, the Petition, as filed, would allow NWOITA to use the money remaining in the OSLECA account for lobbying activities. But the lobbying interests of the SLECs are likely to conflict with the interests of their customers.<sup>22</sup> And spending money derived from the Hardship Fund on lobbying and the like would not be for the benefit of customers. Neither the PUCO nor the Supreme Court of Ohio has ruled that lobbying by public utilities benefits their customers.

The Supreme Court, however, has examined a similar issue in an appeal of a rate case. In *City of Cleveland*, the Court considered whether the PUCO should have disallowed certain types of advertising from the rate base of the Cleveland Electric Illuminating Company (“CEI”). The Court noted that

The record indicates that the primary objective of CEI’s advertising plan was to sway public opinion in its favor. Over two-thirds of its mass media budget was allocated for ads designed to bolster consumer appreciation of the company’s services and develop acceptance of its rates. Other advertising objectives were: to promote nuclear power, to present CEI as a responsible corporate citizen, to present its point of view regarding environmental regulation, and to preserve its right to pass on its advertising costs.<sup>23</sup>

The Court noted that such institutional or promotional advertising is of “questionable benefit” to customers because it is “designed to benefit the owners of the company by projecting a favorable image of its operations.”<sup>24</sup>

Similarly, utilities’ lobbying efforts also are of questionable benefit to customers, and in fact could be detrimental to them. The money remaining in the OSLECA account

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<sup>22</sup> Except possibly for the customer-owned mutual telephone companies.

<sup>23</sup> *City of Cleveland v. Public Util. Comm’n.* (1980), 63 Ohio St. 2d 62, 73; 406 N.E.2d 1370; 1980 Ohio LEXIS 773, [\*\*\*23-\*\*\*24].

<sup>24</sup> *Id.*, 63 Ohio St. 2d at 72; 1980 Ohio LEXIS 773, [\*\*\*20-\*\*\*22], quoting *Re Iowa Pub. Serv. Co.* (Iowa 1972), 96 P.U.R. 3d 1, 20.

is derived from funds that were meant to be used to the mutual interests of the SLECs and their customers. It should not be used by NWOITA for lobbying purposes.

In order to protect consumers, the PUCO should prevent use of the money remaining in the OSLECA account for lobbying purposes. The PUCO should condition any approval of the Petition on NWOITA placing the OSLECA account money into an escrow fund that can be used only for the purposes listed in Article II, Section 1, items A. through D. of NWOITA's bylaws, discussed above, or for any purpose the PUCO preapproved for use of Hardship Fund money.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of these Comments was served on the persons stated below via regular mail and electronic service this 10<sup>th</sup> day of May 2013.

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Summary: Comments Comments on the Petition to Dissolve OSLECA (Including Disposition of the Hardship Fund) by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Etter, Terry L Mr.