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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
CenturyTel of Ohio, Inc. For Approval of) Case No. 04-62-TP-ALT
an Alternative Form of Regulation)
Pursuant to Chapter 4901:1-4, Ohio)
Administrative Code.)

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CENTURYTEL OF OHIO, INC.'S MEMORANDUM CONTRA
OCC'S MOTION TO INTERVENE

On January 30, 2004, the Ohio Consumers' Counsel ("OCC") filed a motion to intervene and requested an expedited ruling ("OCC Intervention Motion"). OCC first argues that it is entitled to intervention as of right under § 4901-1-11(A), O.A.C. In the alternative, OCC contends that it qualifies for permissive intervention under Division B of § 4901-1-11, O.A.C. For the following reasons, CenturyTel of Ohio, Inc. ("CenturyTel-Ohio") maintains that intervention by OCC is not appropriate.

I. OCC Cannot Intervene As Of Right.

OCC asserts that it has a right to intervene under Ohio Admin. Code 4901-1-11(A)(1), which provides that "[u]pon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that: A statute of this state or the United States confers a right to intervene." OCC contends that § 4911.14, Ohio Rev. Code, confers such a right upon the OCC. Section 4911.14, Ohio Rev. Code, states that "[t]he jurisdiction of the consumers' counsel extends to every case that he or another party brings before the public utilities commission involving the fixing of any rate. . . charged for commodities or services by any public utility"

" But § 4911.14, Ohio Rev. Code, confers no right to intervene in this instance because the

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Commission is not involved in “the fixing of any rate.” CenturyTel-Ohio’s application does not propose the increase (or decrease) of any rate, joint rate, fare, charge, *etc.* for any commodity or service provided by CenturyTel-Ohio. Not surprisingly, OCC fails to cite any part of CenturyTel-Ohio’s application that does so. Because CenturyTel-Ohio’s application does not involve the fixing of rates, OCC cannot justify its claim for intervention based on § 4911.14, Ohio Rev. Code.

Next, OCC argues that the Commission should grant intervention here because it granted OCC’s similar motion to intervene in the United Telephone Company of Ohio d/b/a Sprint elective alternative regulation (“alt. reg.”) proceeding, Case No. 02-2117-TP-ALT. However, the Commission did not conclude that OCC had a right to intervene in that case. *See* Case No. 02-2117-TP-ALT, Finding and Order, at ¶ 15 (Oct. 3, 2002). Rather, the Commission granted OCC intervention under Ohio Admin. Code 4901-1-11(A)(2), which allows intervention if the four criteria of Division 4901-1-11(B) are met. *Id.* at Finding 15. In Sprint’s elective alt. reg. case the OCC advanced the same intervention as of right arguments it rehashes here, and the Commission did not grant intervention on those grounds. For the same reasons, it should not do so here.

II. OCC Should Not Be Granted Permissive Intervention.

Ohio Rev. Code §4903.221(B) sets forth four criteria to consider when evaluating a request for permissive intervention. They are:

- (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 proceedings; and

- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

OCC restates these criteria at pages 4-5 of its Motion to Intervene, but then merely concludes, without any application of the relevant facts or analysis, that its request meets all of them. OCC's argument in support of intervention is that because the Commission permitted intervention in the Sprint case, OCC's motion to intervene should be granted here. *See* OCC Intervention Motion, at 5. But the two instances are distinguishable.

In the Sprint case, OCC was permitted into a first-of-its-kind proceeding under the new elective alt. reg. rules that the Commission adopted in Case No. 00-1532. The Commission summarily rejected OCC's attempts in the Sprint case to relitigate the Commission's determinations in Case No. 00-1532. The Commission allowed OCC's intervention in the Sprint elective alt. reg. case because it believed OCC should have an opportunity to demonstrate that it could play a constructive role. Instead, OCC demonstrated in the Sprint case that its only purpose was to raise arguments regarding competition, available alternatives, and the value of elective alt. reg. commitments; the same arguments that the Commission repeatedly rejected in the rulemaking proceeding. The Commission need not allow OCC to waste everyone's resources addressing these arguments yet again.

The following analysis of § 4903.221(B)'s four criteria illustrates that good cause does not exist in this case for permissive intervention.

A. **OCC's Interest In This Proceeding Is To Renew Its Objections To The Commission's Determinations In Case No. 00-1532.**

OCC concedes that "[t]he issues that [it] will be raising here are the same that were raised in Sprint's case: the failure of any party to show that all of CenturyTel's non-basic services are subject to competition or have reasonably available alternatives, and the failure of any party to

show that CenturyTel's alt. reg. plan is in the public interest." OCC Intervention Motion, at 3.

The Commission, however, disposed of OCC's arguments on both of these issues in its December 6, 2001 Opinion and Order, at 11-21; and its April 25, 2002 Entry on Rehearing, at 2-5, in Case No. 00-1532-TP-COI.

The Commission most recently rejected the same arguments by OCC in the Sprint case: "[T]he Commission's order in Case No. 00-1532 issued record-based findings and conclusions **that all non-basic services for all ILECs in Ohio are subject to competition or have reasonably available alternatives**, thereby justifying regulatory relief under Section 4927.03, Revised Code." Finding and Order, at ¶ 23 (October 3, 2002). (Emphasis added). The Commission stated further that "the Commission has previously concluded in Case No. 00-1532 that the elective alternative regulation plan **satisfies the public interest test of Section 4927.03**, Revised Code, and satisfies the state's policy goals outlined in Section 4927.02, Revised Code." *Id.* at ¶24 (Emphasis added). Consequently, both issues — (1) whether CenturyTel-Ohio's non-basic services are subject to competition or have reasonably available alternatives; and (2) whether CenturyTel-Ohio's alt. reg. plan, which complies with the Commission's rules, is in the public interest — were addressed by the Commission in the 00-1532 case.

In sum, "the nature and extent of [OCC's] interest" is in relitigating issues that the Commission already has addressed and determined, and the first criterion for permissive intervention does not support OCC's request.

B. The Commission Has Already Rejected The Legal Position Advanced By OCC As Being Not Relevant To The Merits Of An Application For Approval Of An Alt. Reg. Plan.

A review of OCC's Intervention Motion and its corresponding Motion to Dismiss or, in the alternative, Motion to Stay this proceeding reveals that OCC is making the same legal

arguments it made and that the Commission rejected in both the 00-1532 case and, more recently, in Sprint's application for approval of its alt. reg. plan (Case No. 02-2117). As noted above, OCC admits that it is recycling the same arguments it made in the Sprint case, which it also made in the 00-1532 case. In the Sprint Order, the Commission dismissed these arguments as follows:

The Commission is not surprised that the OCC's position is unchanged. **However, the Commission does recognize that OCC is making the very same arguments to challenge Sprint's application in this case as OCC made in challenging the rules approved in Case No. 00-1532. The Commission's orders in Case No. 00-1532 fully address the OCC's arguments raised in both proceedings and there is no reason for the Commission to repeat the same analyses and conclusions set forth in those orders. Likewise, there is no reason here to rediscuss and reevaluate the evidence submitted in the record in Case No. 00-1532 for the purpose of addressing OCC's same arguments.** Accordingly, the Commission hereby incorporates into the record in this case the entire record from Case No. 00-1532, including but not limited to all of the Commission's orders as well as the evidence submitted by parties in that case. The record from that case should be considered as part of the record in this case and that record supports the Commission's orders in Case No. 00-1532 and the resulting rules adopted in Chapter 4901:1-4, O.A.C.

Sprint Order at ¶23 (Emphasis added). The Commission determined that it was not appropriate in the context of an ILEC application for approval of an elective alt. reg. plan to reevaluate arguments it already considered fully and ruled upon in the 00-1532 Case. As a result, the legal position advanced by the OCC here has been determined by the Commission to be inappropriate in the pending case. Accordingly, the second criterion for permissive intervention does not support OCC's request.

C. OCC Seeks To Unduly Prolong and Delay This Proceeding.

A key element of the elective alt. reg. plan available under Rule 4901:1-4, O.A.C., is the speed with which automatic approval may be obtained. Divisions (B) and (E) of Rule 4901:1-4-

02 provide that an application shall be automatically approved on the 46th day after the filing absent either suspension by the Commission or a hearing that is held under a request supported by clear and convincing evidence that “extraordinary circumstances” exist causing grounds for a hearing. By specifically defining the requirements of an appropriate application in Ohio Admin. Code 4901:1-4 (including a plan as to how the applicant will meet all of the commitments required by Ohio Admin. Code § 4901:1-4-05), the Commission’s clear intent was to devise a process that would enable an ILEC to elect alt. reg. without the need for lengthy negotiations, protracted and expensive hearings, and potential results significantly different from the alternative regulation plan originally proposed by the ILEC. In sum, under these rules, if the Commission determines that the ILEC has filed an appropriate application, the ILEC may enter into alt. reg. 46 days after filing its application.

OCC’s purpose for intervening is to derail the adoption of “off the shelf” elective alt. reg. plans by incumbent LECs such as CenturyTel-Ohio. OCC is displeased with the result of the 00-1532 case and related rules, and the OCC will do whatever it can in an effort to impede CenturyTel-Ohio’s attempt to adopt an elective alt. reg. plan. The purpose of OCC’s intervention is to prolong and delay this proceeding until it has stopped CenturyTel-Ohio’s adoption of the elective alt. reg. plan. Consequently, OCC’s intervention is in direct conflict with the third permissive intervention criterion.

D. There Are No Factual Issues To Develop In This Case Other Than Whether Or Not CenturyTel-Ohio’s Application Complies with Ohio Admin. Code 4901:1-4.

Ohio Admin. Code 4901:1-4 specifically defines the requirements of an appropriate application for elective alt. reg. (including a plan as to how the applicant will meet all the commitments required by Ohio Admin. Code § 4901:1-4-05). If an applicant’s plan complies

with the rules, it may enter into its alt. reg. plan 46 days after filing its application.

Consequently, OCC will not significantly contribute to full development and equitable resolution of factual issues because none exist. The Commission made the important decisions for which the OCC seeks to challenge by intervening in this case. It made these decisions based on the comprehensive record of the industry-wide 00-1532 investigation. Moreover, the Commission adopted rules that purposely incorporated these factual decisions so that these issues would not need to be relitigated each time an ILEC sought approval of an elective alt. reg. plan. OCC, as a result, will not meet the fourth criterion for permissive intervention because it will not make any contribution to the factual record.

III. Conclusion.

It is important to keep in mind when considering OCC's Motion to Intervene that what OCC is trying to do is precisely what the Commission's 00-1532 orders and related rules sought to avoid. In fact, when undertaking its investigation 00-1532, the Commission noted (and expressed its concern) that only three ILECs had chosen to propose an alternative regulation plan since January 1993.¹ The Commission stated that the reason more companies had not proposed alternative regulation plans was the time and costs involved in pursuing such cases and the fact that company proposals had resulted in lengthy negotiations, with results significantly different from the plan originally proposed.² Therefore, the Commission undertook the investigation — an investigation that lasted nearly two years and involved hundreds of pages of comments in addition to seven local public hearings — that resulted in the elective alternative regulation rules contained in OAC Chapter 4901:1-4. By design, the new rules provide for an “off the shelf”

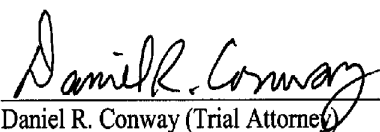
¹ Opinion and Order at 1, PUCO Case No. 00-1532-TP-COI (December 6, 2001).

² *Id.* at 1-2.

alternative regulation plan that could be opted into by an ILEC.³ OCC is trying to frustrate this process (as it did in the Sprint case) and should not be permitted to intervene in this case.

Dated: February 6, 2004

Respectfully submitted,

A handwritten signature in black ink, reading "Daniel R. Conway". The signature is written in a cursive style with a horizontal line underneath the name.

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³ *Id.* at 2.