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PUCO

April 1, 2003

Kerry Bruce, Esq.
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Re: In the Matter of the Complainant of WorldCom, Inc., *et al.* v. City of Toledo The Public Utilities Commission of Ohio
Case No. 02-3207-AU-PWC
Case No. 02-3210-EL-PWC

Dear Mr. Bruce:

Enclosed please find a copy of Intervenor XO Ohio, Inc.'s Reply Brief, which we have filed today with the PUCO in connection with the above-referenced matter.

Please do not hesitate to contact me should you have any questions regarding the enclosed.

Very truly yours,

Michael D. Dortch

Michael D. Dortch

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of WorldCom, Inc., ATT Corp. KMC telecom III, LLC, and LDMI Telecommunications, Inc. Complainants, v. City of Toledo, Respondent.	)	CASE NO.: 02-3207 AU-PWC
In the Matter of the Complaint of the Toledo Edison Company and American Transmission Systems, Inc. Complainants, v. City of Toledo Respondent.	)	CASE NO.: 02-3210-EL-PWC

INTERVENOR XO OHIO, INC.'S REPLY BRIEF

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I. INTRODUCTION

The briefs submitted by the parties reflect the fact that this is a case of "first impression." Those briefs reveal that the disagreements between Toledo and the complainants concerning Am. Sub. Senate Bill 255 (SB 255) are not limited to the issue of whether Toledo's Ordinance is unjust, unreasonable, and unlawful under the standards imposed by SB 255. Instead, the briefs demonstrate that the parties disagree as to what standards SB 255 imposes, how the Commission is to apply those standards, and even which party bears the burden of proof in these proceedings.

In this Reply Brief, XO Ohio, Inc. offers an analysis of these fundamental issues, and will not address again the deficiencies in the evidence introduced by Toledo.

II. THE FUNDAMENTAL STANDARDS THAT THIS COMMISSION SHOULD APPLY TO "PUBLIC WAY COMPLAINTS"

A. The Burden Of Proof Is Placed Upon The Municipality By Statute

1. The Procedure To Be Employed By This Commission Was Created By The Language Of SB 255 Itself.

There can be no doubt that the *procedure* applicable to the complaint process created by SB 255 was largely adopted from R.C. §4905.26 and this Commission's process regarding complaints as to utility service. R.C. §4939.06(A) expressly states as much. Accordingly, a case must be initiated by a "written complaint." The Commission must review the written complaint to determine whether "reasonable grounds" for the complaint are stated therein. If the Commission finds reasonable grounds for the complaint, the Commission must then fix a time and date for hearing, and notify the parties thereof. The parties are entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses at the hearing. Through R.C. §4939.06(A), each of these procedures is "borrowed" from R.C. §4905.26.

However, SB 255 did not simply expand this Commission's complaint jurisdiction. It

creates an entirely new jurisdiction, and designs a new proceeding that includes procedures and standards different from and in addition to those borrowed from §4905.26. For example, a municipality is directed to file notice with this Commission whenever it is considering an ordinance that would impose a fee for occupancy of the public right-of-way, R.C. §4939.05(E); and this Commission is directed to suspend the operation of the right-of-way fee provisions of a duly enacted municipal ordinance pending a hearing on the merits if it concludes that "reasonable grounds" are stated in the complaint. R.C.§4939.06(B). Most importantly, this Commission is authorized to declare the fees a municipality would impose for occupancy of the public right-of-way to be just and reasonable, or unjust, unreasonable, and unlawful, R.C. §4939.06(C), and to allocate recovery of the public way fee by the utility in different manners depending upon the Commission's own determination of a just and reasonable fee for use of the public way owned or operated by the particular municipality. Thus, the procedures applicable to "public way complaints" are those defined by the statute itself.

2. **Similarly, SB 255 Imposes The Burden Of Proof Upon Municipalities That Seek To Enforce Fees For The Use Of The Public Way**

Toledo assumes, simply because SB 255 refers to procedures in part created by R.C. §4905.26, that the burden of proof among the parties to complaint proceedings filed pursuant to SB 255 are to be allocated in the same way as in proceedings pursuant to R.C. §4905.26. *See* Initial Post-Hearing Brief Of The City Of Toledo ("Toledo's Brief"), p. 7. Toledo has ignored the express provisions of SB 255:

> ***Public way fees levied by a municipal corporation shall be based only on costs that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way.*** The costs shall be reasonably and competitively neutrally allocated among all persons occupying or using public ways owned or controlled by the municipal corporation . . . . No public way fee shall include a return on or exceed the amount of costs reasonably

> allocated by the municipal corporation to such occupant or user or pursuant to any reasonable classification of occupants or users.

R.C. §4939.05(C) (emphasis supplied.) Thus, SB 255 expressly mandates that ***the municipality "clearly demonstrate"***[1] that "costs" are properly "allocated and assigned" to the occupancy and use of the right-of-way. These "allocated costs" may include ***only*** costs "actually incurred" by the municipality. These "actually incurred costs" must be allocated to those using the right-of-way in a manner that is not only "reasonable" but also "***competitively neutral.***" The fee that the municipality seeks to impose upon an occupant of the public way ***must not exceed the amount of the costs allocated to that occupant.***

R.C. §4939.05(C) expressly places the burden of proof upon the municipality to demonstrate and justify (1) the costs it actually incurs to manage the public right-of-way, (2) the allocability of those costs to occupants within the public right-of-way (3) the municipality's particular allocation of costs to occupants within the public right-of-way and (3) the resulting fee it proposes to impose upon those using the public way.

B. Toledo Confuses Constitutional Standards And The Standards Imposed By SB 255

Toledo also suggests that this Commission's SB 255 inquiry is at an end so long as the municipality has stated *some* rational basis for the fees it would impose. Toledo Brief p. 17-20. Toledo is attempting to engraft an equal protection/constitutional analysis upon this statutory proceeding. Toledo again ignores the language of SB 255, and authority that it cites to itself:

> It is well established that "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws*...Section 3 of Article XVIII, or the Home-Rule Amendment, gives

[1] Moreover, by demanding that the municipality "clearly demonstrate" its costs and the reasonable, nondiscriminatory allocation of those costs, the General Assembly imposed a standard of proof akin to "clear and convincing evidence" upon the municipalities. *Cf. Schulz v. Sullivan* (1993), 92 Ohio App. Ed 205 ("clear and convincing" construed); and *State v. Ingram* (1992) 82 Ohio App.3d 341 ("clear and positive" construed).

municipalities the authority to impose exactions, *provided that the municipality is not statutorily forbidden from doing so...*

Home Builders Assoc. of Dayton v. Beavercreek (2000), 89 Ohio St. 3d 121, 124 (emphasis supplied.) Simply put, if a municipality's methodology is in conflict with the standards of Chapter 4939 it must be declared unlawful, unreasonable, and unjust. As discussed *infra*, the statute imposes more than mere rationality upon municipalities.

C. Proper Fees For Use Of The Public Right-Of-Way Are Based Upon Only Those Costs Imposed Upon The Municipality By The Utility's Occupancy Or Use Of The Public Way

1. The Costs Referred To Within The Statute Are Historic Costs, Actually Incurred; Not Forward Looking Costs, Yet To Be Incurred.

Toledo argues at length that the testimony of Dr. Aron should be rejected and that the term "actual cost" should be given an ordinary commonly understood meaning.[2] Toledo Brief pp. 10-13. Toledo then posits a definition of "cost" as nothing more than "an out of pocket expense" and argues, based upon this definition and upon case law interpreting the term "cost" in various contexts, that "costs" may include both historic costs and forward looking costs. From this Toledo argues that SB 255's use of the term "actual cost" is not intended to restrict municipalities to the recovery of past costs. Toledo's Brief, p. 14-16.

Toledo's argument fails to acknowledge words within SB 255 that expressly modify the term "actual costs" – the words *"has actually incurred."* While the term "costs" may well encompass both historic and forward looking costs, the language of SB 255 forecloses the recovery of forward looking costs. The language of SB 255 mandates that public way fees are to be based "only on costs that the municipal corporation . . .*has actually incurred*. . ." Such costs

[2] Strangely, Toledo then quotes at length from a Nebraska Attorney General Opinion in which the term "actual costs" is found to have no common law or well understood trade or technical meaning. In fact, according to the Attorney General of Nebraska, the term is unconstitutionally vague, because the term actual costs could be a reference to "an embedded economic cost, embedded accounting cost, incremental accounting cost, incremental economic cost, marginal economic cost, and so on." Toledo Brief, p. 13 (citing Nebraska Op. Atty Gen. No. 86050.)

are necessarily past costs.

2. **The Statute Incorporates The Principle of Cost Causation – It Does Not Permit Costs To Be Allocated And Assigned To Occupants Of The Public Way On The Basis Of Other Rationales.**

a. The Statute Is Based Upon Cost Causation.

Toledo itself claims to recognize that a nexus must exist between the cost it incurs and the presence of a utility which causes it to incur that cost. For example, Toledo relies upon the case of *City of Richmond Heights v. LoConti* (1969), 19 Ohio App. 2d 100, 110 for the analogy that the term ". . . expense, when applied to licensing statutes, 'must be related to the expenses which are caused to the community by the licensed occupation(s).'" Toledo Brief, p. 14. Nonetheless, Toledo attempts to allocate and assign to utilities a portion of what Toledo calls "indirect costs" – snow removal, house numbering, street lighting, alley cleaning, surveying, etc. Toledo concedes that it does so not on the basis that the utilities caused or even that they contribute to the costs of these activities, but that the utilities benefit from these activities – a hypothesis that is itself debatable. This allocation is simply improper.

Dr. Aron testified at length regarding the economic principles underlying the statute. Simply put:

> If the cost in question would be incurred with or without the presence of the utilities in the rights of way, then the cost may be very real, but it would not be caused by the utilities occupancy or use of the rights of way and therefore [is] not recoverable in a rights-of-way fee.

Direct Testimony of Dr. Aron, p. 8 (TE Exhibit 39), lines 9-12.

Dr. Aron is correct in her analysis. The language of R.C. §4939.05(C) clearly indicates that a municipality must demonstrate a nexus between the costs the municipality allocates to an occupant within the public way (or at least to a particular class of occupants) and the expense incurred by the municipality as a result of that occupancy.

b. Cost Causation Precludes Cross-Subsidies

Moreover, the language indicates that a properly designed public way fee based upon costs does not result in the subsidization of one occupant of the public way by another:

> Public way fees levied by a municipal corporation shall be based only on costs that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way. ***The costs shall be reasonably and competitively neutrally allocated among all persons occupying or using public ways owned or controlled by the municipal corporation, including, but not limited to, persons for which payments are waived as authorized by division (B) of this section or for which compensation is otherwise obtained.*** No public way fee shall include a return on or exceed the amount of costs reasonably allocated by the municipal corporation to such occupant or user or pursuant to any reasonable classification of occupants or users.

R.C. §4939.05(C)(emphasis supplied.) As the highlighted language suggests, the relationship between the municipality's "allocation" and the principle of cost causation is so strong that the municipality must allocate the appropriate proportion of "costs" among *all* occupying the public way, including even those from whom the municipality might choose to forego collection of its fees. By this means, it is certain that those paying public way fees are not required to subsidize the use and occupancy of those for whom the municipality has waived its fees.

By mandating that public right-of-way fees be "cost-based" and "appropriately allocated," SB 255 allows a municipality to recover from a utility those costs actually imposed upon it as a result of the utility's occupation and use of the public way – but it is also precludes the municipality from demanding more from that utility than the costs the utility imposes upon the municipality. To paraphrase the *City of Richmond* decision upon which Toledo itself relies: "[costs], when applied to the [public way ordinance] must be related to the [costs] which are caused to the community by the licensed [utility]."

D. **Costs Properly Recovered Through A Right-Of-Way Fee Are Those Incurred To Manage The Public Right-Of-Way, Not Those Incurred Due To Other Municipal Activities**

SB 255 permits the recovery of costs incurred in management of the public way. It does not permit costs that the municipality incurs when engaging in other activities to be allocated to occupants of the public way. In this case, Toledo fails completely to distinguish between its responsibilities as the manager of the public way and its responsibilities as the owner of utilities that happen to occupy the public way. Furthermore, Toledo's inclusion of increased "utility construction" costs simply forces utilities to subsidize its water and sewer utilities through public way fees in violation of the anti-subsidy principle of SB 255. Costs incurred to operate city water, sanitary sewer or storm sewer facilities are not "public way" costs merely because those city owned facilities also happen to be located within the public way.

E. **Mileage Bands May Or May Not Prove A Rational Method Of Allocating Shared Costs Among Similar Utilities. They Are Not Appropriately Used To Allocate Shared Costs Among Dissimilar Utilities.**

1. **Fees Based Upon Mileage Of Occupancy Are Not Necessarily Rational, As Toledo Assumes.**

Toledo asserts that "mileage of occupancy" is ***alone*** a rational basis upon which to allocate fees among the various occupants of the public way. Toledo failed to make any showing that this is true, however. The record may be examined in vain for any evidence that suggests that a link exists between the miles a utility occupies and the resultant costs imposed upon the municipality. For example, it may rationally be posited that the mileage of existing facilities within a public way has nothing to do with the expense incurred by a municipality. The expense incurred by a municipality may prove to have virtually no correlation to mileage at all, but instead a strong correlation to such factors as the type of utility, the type of facilities, the physical location of the utility, the geographic locations of the facilities, the amount of annual

maintenance activities, or the annual amount of new construction within the public way.

2. Toledo's Mileage Based Fee Is Demonstrably Irrational

Even assuming that a municipality introduces evidence tending to establish a correlative link between mileage in the public way and the expense incurred by the city, however, there would be no reason to then accept that any such correlation would be uniform amongst utilities of different types. In fact, as the evidence introduced in this case demonstrates, there may often be *no* correlation between certain costs and certain utilities. Toledo, for example, would impose the cost of "wire down" events upon all utilities.[3] Toledo made no effort to distinguish between those utilities whose facilities consist of wires and other utilities whose facilities do not include wires. Toledo also made no attempt to distinguish between facilities on poles and facilities that are placed underground.

Under Toledo's scheme, therefore, an entity owning no wires whatsoever but which has more than 100 miles of pipeline facilities in the public way, an entity with 100 miles of wires in the public way, all of which are in underground conduit, and an entity with 100 miles of wires on poles within the public right-of-way are all allocated the same proportion of Toledo's "wire down" costs – even though two of the three could not possibly contribute to the events that create the cost.

Similarly, Toledo asserts that "tree removal costs" are an actual cost associated with its management of the right-of-way that is appropriately allocated to utilities. Toledo's evidence, however, failed to suggest that even one tree was removed due to the presence of either an electric or telecommunication utility. Instead, Toledo conceded that its evidence regarding tree removal activity relates solely to the presence of water, sewer and gas utilities. Toledo also

[3] XO Ohio, Inc. continues to maintain that "wire down" charges cannot simply be assigned to the utility owning the wires. As should be obvious, wire down events will include incidences in which the utility caused the cost and incidences in which the utility did not cause the cost.

conceded that the majority of the tree removal expense was related to the two of these three utilities which are owned by the city itself.

3. Mileage Based Fees Are Absolutely Prohibited When They Have Anti-Competitive Impacts

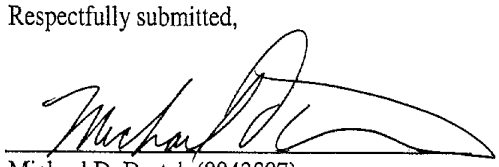
Nor does the Commission's inquiry end with a determination that a fee structure based upon mileage is "reasonable." SB 255 requires more. SB 255 requires that fee structures be non-discriminatory in impact. As XO Ohio, Inc. maintained in its Initial Brief, a fee structure such as Toledo's, which threatens to impose a fee as much as twenty times greater per mile on one user of the public way than that imposed upon its competitor, is invalid on its face.

III. CONCLUSION

The standards of SB 255 are those imposed by the Statute itself. These standards place the burden of proof upon the municipality to "clearly demonstrate" that its fees comply with the statutory requirements. The statutory requirements are that the fees be (1) based solely upon costs the municipal corporation "has actually incurred." The fee must be (2) allocated reasonably among those occupying the public way on the basis of the costs of managing the public way that the municipality incurs as a result of their presence within the public way. Finally, the fee must be (3) competitively neutral in impact.

Dated: April 1, 2003

Respectfully submitted,



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Certification of Service

I hereby certify that the attached Intervenor XO Ohio, Inc.'s Reply Brief was served this 1st day of April, 2003 by U.S. Mail, postage prepaid, upon each of the following:

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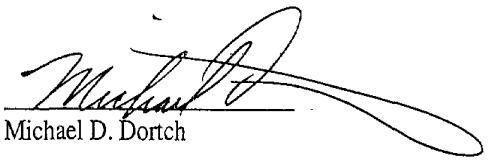

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