

Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Establishing Just and Reasonable Rates : WC Docket No. 07-135  
for Local Exchange Carriers :

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COMMENTS OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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BACKGROUND AND INTRODUCTION

On October 2nd, 2007, the Federal Communication Commission released a Notice of Proposed Rulemaking "...to consider whether the current rules governing the tariffing of traffic-sensitive switched access rates by local exchange carriers (LECs) are ensuring that rates remain just and reasonable...". 72 Fed. Reg. 64179-64185.

The Notice pays particular attention to allegations that some carriers have "endogenously" increased their terminating access traffic significantly beyond the levels contemplated in the calculations used to set their tariffed rates for terminating access. To summarize and generalize the allegations, certain small telephone companies have been accused of gaining a windfall under current rules. In essence, a carrier exits the NECA pool and replaces their NECA pool access tariffs with tariffs calculated as a Section 61.39 carrier, based on historical demand for terminating access. The carrier then

subsequently “endogenously” incites incoming access traffic, by entering into contracts with conference calling hosts, chat lines, and similar operations, or operating such a

service themselves. Often, these accusations also involve the telco paying the contracting customer an inappropriate “rebate” on the incoming traffic. Before reaching the point where a Section 61.39 carrier would be required to update their tariffs (which would reflect the increased traffic, thus reducing per minute terminating access rates), the carrier rejoins the NECA pool, files a new tariff based on the NECA pool calculations (in which the effect of the increased traffic on the telcos access rates is largely “lost” in the pooling).

The Notice also recognizes the difficulty created in responding to these allegations resulting from the “deemed lawful” provisions of Section 204(a)(3) of the Communications Act of 1934 as amended (the Act). In response to these petitions and the difficulty in responding, the Commission issued the Notice of Proposed Rulemaking in this proceeding. The Public Utilities Commission of Ohio (PUCO or Ohio Commission) hereby submits its comments in this matter.

## **DISCUSSION**

### **A. General Discussion**

The Commission requests in this Notice answers to a number of very detailed questions regarding the variables involved in calculating appropriate access tariff rates, and the nature of services that may be involved in “stimulating activities”. As the Ohio Commission does not have access to this

kind of information in sufficient detail to be of use, the Ohio Commission will not be responding to these questions. Rather, we will attempt to provide a view on the situation in Ohio and the proposed rules.

In addition, the Ohio Commission focuses its comments on rate-of-return ILECs as they are the group of carriers most likely to benefit from traffic stimulation practice and therefore, most likely to engage in that practice. More specifically, these comments focus on carriers making the election to file tariffs under Section 61.39. The Ohio Commission believes that a NECA carrier remaining in the pool has little incentive to engage in an inappropriate traffic stimulation practice, as it would be less likely to see any significant benefit from the practice, as it shares revenues with other NECA carriers. Section 61.38 carriers, being required under existing rules to project costs and demand also have far less incentive, due to the requirements to project with reasonable accuracy.

The Ohio Commission has a direct interest in how the FCC resolves the questions presented in this NOPR, as the Ohio Commission requires almost all incumbent LEC's intrastate access tariffs to mirror their interstate access tariffs. In addition, the Ohio Commission requires CLECs to cap their intrastate access rates at the competing ILEC's intrastate access rate. Thus, changes in the rules regarding interstate access tariffs and the resulting rates have a significant "ripple effect" in Ohio, as they would in some other

states<sup>1</sup>.

In resolving the specific issue that gave rise to the NOPR, some useful criteria for the resulting rules can be extracted from the concerns expressed by the Commission. The resulting rules should be generally applicable, not unduly complex, and possibly most important, readily enforced. Since the existing rules do, for the most part, meet these criteria, the Ohio Commission urges caution in the current proceeding. Additional layers of complexity, in general, tend to decrease ease of enforcement, and do not necessarily decrease the opportunity to “game” the system. If the concern is inappropriate behavior on the part of carriers, it is only necessary to identify critical elements of the behavior and either remove the opportunity to use those elements, or remove the incentive to use them. If the concern is maintaining appropriate rates for access traffic, the existing rules meet that concern reasonably well. It would be possible to more tightly regulate access charges than the existing rules do and thus assure that the rates are appropriate to the current situation at any point in time. However, the effort required in implementation and enforcement, as well as the effect on legitimate competition may not be desirable.

## **B. “Rebates”**

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<sup>1</sup> A brief review of decisions rendered in other states indicates that some degree of interstate access tariff mirroring appears to have been implemented or approved in Alabama, Alaska, Florida, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Pennsylvania, Washington, and Wisconsin, among others.

As a general statement, the Ohio Commission agrees with the Commission's tentative conclusion (Paragraph 19) that a rate-of-return carrier that shares revenue or provides compensation to an end user customer, or directly provides the stimulating activity, and bundles those costs with access charges is presumably engaging in an unreasonable practice that violates section 201(b) and the prudent expenditure standard. The Ohio Commission believes that such compensation or revenue sharing is unrelated to the provision of exchange access services, absent some evidence to the contrary<sup>2</sup>. That being said, there is some concern that perfectly reasonable (and even beneficial in the public-policy sense) transactions could run afoul of a rule that is not carefully crafted.<sup>3</sup>

In addition, the Ohio Commission is concerned that an overbroad definition of what constitutes an "unlawful rebate", or a strict prohibition against undertaking services that may stimulate incoming message traffic would tend to unreasonably foreclose companies from the legitimate pursuit of new lines of business.<sup>4</sup> Often, exploring new lines of business entails some

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<sup>2</sup> Given the rate and nature of the changes in the telecommunications industry, a categorical statement that these costs *always are* and *will always be* unrelated is difficult to make.

<sup>3</sup> Given the need for job stimulation in many of these rural communities, one could easily imagine a small telephone company providing a unique arrangement or promotion to help entice a company to locate a business facility (for example, a customer support call center) that employs a number of people, and has a large amount of incoming toll traffic, in their service territory. While this would fit aspects of the "pattern of concern", and would tend to stimulate terminating traffic, the Ohio Commission is not certain that such a scenario should, in all cases, be considered inappropriate.

<sup>4</sup> This is not to suggest that the existing regulations implementing Section 201(b) of the Act, whether at the Federal or State level, should in any way be relaxed. Indeed, it is because of

risk for both the telephone company and the customer. Offering an incentive to the customer is one way of mitigating that risk for the customer, allowing the telephone company to explore possibilities that would otherwise be impossible to test in the real world. Also to the extent that companies are expected to compete for business, and some of that business is incoming traffic, it is not unreasonable to expect them to try to generate incoming traffic.

Because of these concerns, the Ohio Commission believes that if the carrier doesn't seek to recover the costs of indirect or direct traffic simulation through access charges (i.e. such costs are not included in the revenue requirement calculation); the carrier should not be prohibited from entering into contracts that include offering some otherwise legal form of discount, credit or offset to the customer, or be prohibited from offering services themselves that may generate increases in traffic, subject to other recommendations outlined in these comments.

### **C. Appropriate rates**

The Ohio Commission agrees with the Commission's tentative conclusion (Paragraph 21) that average per minute switching costs do not increase proportionately to average per minute revenues as access demand

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the equity and effectiveness of those existing rules that the Ohio Commission is concerned about the possibly detrimental effect of additional constraints.

increases, and that, as a result, rates that may be just and reasonable given a specific level of access demand may not be just and reasonable at a higher level of access demand. The Ohio Commission also agrees that the Commission should have the opportunity to review the relationship between rates and average costs through the filing of a revised tariff when a section 61.38 or 61.39 carrier experiences significant increases in traffic to ensure that just and reasonable rates are maintained.

The Ohio Commission believes that the need for sensitivity to change must be balanced against the need for some degree of stability. Therefore, the Ohio Commission recommends the use of the Commission's proposed language in the carrier's traffic-sensitive tariffs, but would advocate using a relatively low threshold (as discussed in Paragraph 22) for the increase in local switching demand (such as 25-30%) that would trigger a review or refiling of tariffs. However, since such a low threshold could easily be triggered by normal variations throughout the year, the basis of comparison should be the same month of the preceding year, as the Commission indicates.

In addition, the increase in demand should be observed for three consecutive months before triggering a requirement for a carrier to file an access tariff revision. This would serve to exclude possible short-term spikes

in demand<sup>5</sup> that would not necessarily indicate either an inappropriate traffic stimulation practice or normal “non-endogenous” growth in demand for traffic termination.

The Ohio Commission does not believe that additional reporting as discussed in Paragraphs 21 and 29, in which a carrier would be expected to submit additional reports to the Commission if it files its own tariffs, is either necessary or desirable. Carriers filing tariffs under 61.39 should instead simply be required to keep record of their monthly demand. These records could be subject to review or audit and could be discoverable in a complaint proceeding.

The Ohio Commission believes that once the triggers outlined above are met, that the response should be prompt. Section 61.39 carriers should be required to file revised tariffs within one month of crossing the threshold outlined above (greater than 30% increase in applicable traffic, as compared to the same month in the previous year, for three consecutive months). In these tariff revision filings, carriers should be required to provide some type of data and studies used for typical filing, but reflecting the higher demand levels. If this requirement is embodied in the rules, the tariff language discussed in Paragraph 21 may not be necessary.

Finally, the studies should clearly demonstrate that the carrier is not

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<sup>5</sup> Or short term *decreases* in demand occurring in the previous year.

including any customer compensation, rebate, revenue sharing or costs related to activities or services that stimulate access traffic in the revenue requirement calculation for access charges.

In Paragraphs 27 and 28, the Commission discusses whether carriers should either be required to self-certify that they are not engaging in traffic stimulation, or should be subject to an automatic self-certification by virtue of filing tariffs. As discussed earlier, the Ohio Commission is concerned that small telephone companies not be unduly restricted in their efforts to explore lines of business or new business models. As a result, the Ohio Commission does not believe that it is either necessary or desirable to require a carrier to certify that it was not currently stimulating traffic and would not do so during the tariff period. Likewise, it appears inappropriate to make the filing of tariffs subject to an implied guarantee by the carrier. In the Ohio Commission's opinion, the requirements outlined by the Commission in the Notice, if modified as the Ohio Commission recommends, constitute a reasonable and fair protection against charging unjust and unreasonable rates, regardless of the nature of the events making the existing rates unreasonable.

**D. 61.39 Election**

As discussed earlier, the Ohio Commission believes that the most effective way to deal with inappropriate behavior on the part of carriers is to

determine what elements in the environment make the behavior advantageous (or even possible) and to either reduce the incentive (reduce the advantage), or remove the elements (remove the possibility). While their primary purpose is to ensure just and reasonable access rates, the proposed revisions in the Commission's Notice, as modified in this document, would serve to greatly reduce the advantage of the carrier behavior outlined in the petitions. As an additional preventative measure for this specific behavior, the Commission should simply make the option to exit the NECA pool and file tariffs as a section 61.39 carrier one-way.

A carrier making such an election obviously has sufficient data and the capability to develop their own costs outside the NECA pool. Absent some loss in this capability, or some reason why it should no longer be practical, there does not appear to be any reason for a carrier to rejoin the NECA pool, having left it.

In the alternative, the Commission could either make re-entry into the NECA pool subject to approval of a petition showing good cause why the carrier is no longer capable of reasonably calculating their own rates, or simply require that a carrier exiting the NECA pool remain out of the NECA pool for at least two full tariff cycles (a total of four years) even if it files for tariff revision to reduce its rates within that time, under the trigger process we recommend in these comments.

**E. Forbearance**

In Paragraphs 29 and 30, the Notice discusses the possibility of the Commission using the flexibility granted it in section 10 of the Act to forbear from the “deemed lawful” provisions of section 204(a)(3). Without commenting on whether such a use of section 10 is lawful, it does not appear to the Ohio Commission to be either necessary or desirable. The proposals made in the Notice, as amended by our recommendations, seem to have sufficient protection against the volatility the Commission expresses concern about.

If that does not appear to be sufficient, Section 204(b) of the Act gives the Commission the ability to “...allow all or part of a charge to go into effect on a *temporary basis* pending further order of the Commission...” [Emphasis added]. If a “mid course” tariff filing is required under the triggers, one of two situations will obtain. If the carrier files the required tariff, the Commission can approve it on a temporary basis under section 204(b). If the carrier fails to file the revision as required under the rules, then arguably the existing tariff is no longer “deemed lawful” since, under the proposed rules, it should have been replaced.

Finally, forbearance from the “deemed lawful” provision of section 204(a)(3) would result in a great deal of uncertainty for the carrier in question, and for those carriers interacting with it. Forbearance from the

“deemed lawful” provision, as proposed by the Commission, could leave a small carrier without the ability to charge and receive payment for a legitimately tariffed rate.

### **CONCLUSION**

As stated earlier, the Ohio Commission believes that the existing rules do, in the majority of cases, provide reasonable assurance of just and reasonable rates, consistent with the changing competitive environment. The Ohio Commission recommends caution in adding complex layers of regulation to a system that currently works. The few changes proposed by the Commission in its Notice, that are discussed and modified in this document, are sufficient to continue to provide that assurance of just and reasonable rates and inhibit inappropriate behavior, while still maintaining a reasonable degree of competitive flexibility and business options for small telephone companies.

Respectfully submitted,

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