



**TESTIMONY OF JONATHON MCGEE
EXECUTIVE DIRECTOR
OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

BEFORE THE

**HOUSE PUBLIC UTILITIES COMMITTEE
OHIO HOUSE OF REPRESENTATIVES**

IN OPPOSITION TO

HOUSE BILL 276

DECEMBER 1, 2009

Introduction

Mr. Chairman and members of the Committee, my name is Jonathon McGee. I am the Executive Director of the Ohio Cable Telecommunications Association, a trade association representing cable television operators, programmers and suppliers. Through our member companies, we serve the vast majority of the almost 3 million cable television viewing households in the state. On behalf of the more than 7,000 full-time cable employees in Ohio, I am here today to oppose House Bill 276. I'm sure you have heard that passage of this bill will foster competition in the telephone marketplace. Our concerns are that HB 276, as introduced, could threaten the emerging competitive telecommunications market in Ohio by modifying the applicability of the current carrier-to-carrier and wholesale pricing rules governing the market; and further, for a bill that is touted to modernize telecom regulation, it focuses only on the incumbent providers and fails to address significant issues facing new entrants in the market. Any "modernization" should take into account issues facing both the incumbents and the competitive market entrants. Thus, while the cable industry opposes HB 276, that does not mean the cable industry would not support more global legislation that addresses market barriers encountered by new entrants.

The Cable Industry and Competition

It is important at the outset to note that competition in the telephone marketplace does now exist and, hopefully, will continue to exist and grow. In fact, a large and growing number of competitors operate in today's telephone marketplace. Traditional

cable operators now offer, in addition to video service, both telephone and high-speed broadband products. Nevertheless, while competition does now exist, the incumbent telephone providers still retain the dominant market position.

Traditional cable operators' video product is also in an extremely competitive market today. Direct Broadcast Satellite (DBS) service, which is available all over the state, has 25% of the Ohio multi-channel video market, and other wireline providers such as WOW (formerly owned by Ameritech), Horizon and others have been directly competing with the incumbent cable companies for years. More recently, most incumbent telephone companies, including AT&T, Verizon, Cincinnati Bell and Embarq/CenturyLink, have entered the mix, either partnering with a satellite company to provide "bundled" services including video or delivering a video product over their current wirelines, or both. The multi-channel video market in Ohio is as competitive, if not more so, as the telephony market, with incumbent cable market share at 50.3%, down from 68% in 2003. This does not even take into account a new, emerging video competitor. Online video is growing at an exponential rate with more than 167 million Americans watching online an average of 10.8 hours during October 2009, viewing 28 billion videos. Sites such as YouTube, Hulu, and Microsoft continue to alter today's video delivery, with 84% of web users viewing video over the Internet. Not only is the video market competitive, it is changing rapidly.

Perspectives on Investment: Cable v. Phone

In advancing this legislation, the telephone industry has touted the billions of dollars it intends to invest in Ohio if only this legislation passes and its regulatory burden

is decreased. We heard similar statements from the telephone industry in support of previous legislation, including SB 235 (2001), HB 218 (2005) and most recently during the debates over SB 117 (2007). But the cable industry has already made a significant private investment to upgrade our infrastructure: more than \$145 billion has been spent nationwide since Congress passed the 1996 Telecommunications Act. In Ohio alone, the industry has invested well over \$2.25 billion in imbedded infrastructure, and is bringing jobs and new technology to its customers. This is all despite being heavily regulated on the video side - so heavily regulated that the telephone industry said it could not compete if it was subject to similar regulation and sought relief by changing the video laws in Ohio through SB 117.

Cable continues to invest in Ohio today. For example, Time Warner Cable recently opened a state-of-the-art call center in Zanesville with over 400 employees and recently opened its new Midwest regional office in Columbus on a former brownfield. In Belmont, Jefferson, and Columbiana counties, Comcast has rolled out its new DOCSIS 3.0 broadband service with world class speeds of 50 mbps – this in the heart of Appalachia. Try to get that speed from a DSL line! Cox Communications in Parma and the western Cleveland suburbs last year expanded its technical support center, adding high-tech jobs, and is now servicing customers from other Cox divisions around the country. One of the first cable operators in the nation to transition to an all-digital format was Massillon Cable TV. And all of this was done without the cable industry seeking legislation before investing in Ohio.

Along with this investment in infrastructure, the cable industry has invested heavily in the communities it serves. In 2008, OCTA members' cash and in-kind

contributions in Ohio totaled over \$30 million. Last month, Time Warner Cable announced its \$100 million *Connect a Million Minds* initiative which provides grants and in-kind services to promote STEM education projects - \$11 million of that money is earmarked for Ohio. This new initiative will connect youth to learning opportunities in science, math, technology and engineering and will inspire a lifelong exploration of science and technology that will make a meaningful, measurable difference in Ohio communities. And in October, Cox Communications Cleveland announced the success of its inaugural employee campaign to fund Cox Charities. Cox Charities will award grants to area non-profit organizations, with funding decisions made by an Advisory Committee of Cox employees as well as local community leaders. Funds will be generally targeted to programs that help meet the community's most pressing needs. Across Ohio, other OCTA members support their communities through cash donations, employee volunteer commitments, PSAs and other initiatives.

Misconceptions Concerning Deregulation

Before I get into detail regarding the OCTA's opposition to HB 276, I wanted to shed some light on a few misconceptions and inaccurate statements that have been made by the telephone industry in recent testimony on this issue.

- *Cable telephony is not subject to customer service standards.*

The reality is that cable telephony is subject to customer service standards. Most cable operators follow the PUCO's Minimum Telephone Service Standards (MTSS); and the many OCTA members that hold CLEC certificates must comply. Further, unlike the incumbent telephone companies, cable operators that are not operating under a CLEC

certificate are subject to the Attorney General enforced Consumer Sales Practice Act (CSPA) which includes treble damages and attorneys' fees as remedies.

- *Cable telephony is unregulated and does not pay any taxes, fees or other charges imposed on incumbent local telephone companies.*

The reality in Ohio is that when cable operators provide circuit-switched phone service to customers they are regulated in a substantially similar manner as the incumbent telephone companies providing circuit-switched phone service. The regulations placed on telephone providers are determined by the manner in which the service is provided, NOT by who is providing the service.

Further, cable telephony providers and their CLEC partners collect/pay the following taxes and fees:

- PUCO Annual Assessment;
- OCC Annual Assessment;
- State and local sales taxes;
- State and federal Telephone Relay Service (TRS) fees;
- FCC regulatory fee; and
- Federal Universal Service Fund (USF).

It is interesting to note that even though cable operators pay into the USF, the primary beneficiaries of these subsidies are the incumbent telephone companies.

- *The Incumbents' market share has been substantially reduced.*

The reality is that incumbent telephone companies are still the dominant landline providers of telephone service in Ohio and nationally. While incumbent telephone providers have suffered access line losses, those losses have NOT resulted in a proportionate corresponding loss of their landline telephone service market share. Each landline customer that an incumbent telephone company loses does not mean that a landline competitor has added that customer. In fact many times, the landline customer that the incumbent telephone provider loses is actually gained by a wireless provider *owned by the incumbent telephone company*. One can only imagine the skepticism that would greet cable's claims of competition from satellite in the video marketplace if we actually owned the satellite companies. Simply looking at landline losses without reviewing market share does not paint an accurate picture of the dominant market share that the incumbent telephone companies still enjoy in the landline phone market. Mr. Joe Gillan, a consulting economist, will go into this issue in more detail in his comments.

- *HB 276 only deals with "Retail" issues and not "Wholesale" issues.*

The reality is that HB 276 makes changes to what are in fact "wholesale" issues contained in the both the PUCO's "carrier-to-carrier" rules and in Chapter 4905. First, I want to point out that nowhere in current law or in the legislation are the terms "retail" and "wholesale" defined. However, practically speaking, the bill as drafted does make changes to several provisions that impact what would be considered "wholesale" issues, that is, issues between telecom providers. As I will elaborate on later, one of the cable industry's major concerns with the legislation is that due to the ambiguous nature of its drafting, the bill inadvertently impacts the PUCO's "carrier-to-carrier" rules, some of

which involve wholesale pricing, but in general regulate the relationship between the incumbents and the new market entrants. Other provisions that touch on the governance of the relationship between providers include sections addressing rates to terminate 911 calls to PSAPs, carrier access rate reform, the creation of a mechanism to address high cost recovery, and the elimination of reporting requirements used by cable operators and other pole attachees needed to calculate pole attachment rates. Moreover, if this is only a retail telephone bill, why is “video” included in the new definition of “IP-enabled services?”

Concerns with the “As-introduced” Version

I want to again stress that we are not opposed to revisions to the laws and rules governing the retail side of the market, so long as those changes do not interfere with the current regulatory structure governing the relationships of incumbent providers (ILECs) and new market entrants. However, one needs to look no further than the LSC comment to the legislation to understand that this bill probably creates more problems than it solves. The comment states that the bill is “**unclear** as to the scope of PUCO authority and the types of companies and services it can regulate;” “the wording of the bill ... **may raise question[s]**” regarding PUCO jurisdiction; and the “bill **lacks clarity** regarding how the authority granted to the PUCO.... Relates to the PUCO’s authority elsewhere under Title 49;” “certain sections [are] **ambiguous**” as to their application. I’ve read more than my share of LSC analyses over the years and I cannot recall an LSC comment as critical as this one.

Federal and Ohio policy has been established to foster competition in the telecommunications marketplace. In Ohio, the market has been fostered in part by the PUCO through its general authority to regulate telephone companies and its “carrier-to-carrier” rules which regulate the relationship between ILECs and new entrants. But due to the ambiguities raised through the bill’s complicated statutory scheme and unclear definitions of important terms which are used in the “carrier-to-carrier” rules, these rules that have fairly governed the relationship of ILECs and new entrants may no longer apply. Without these rules remaining viable and enforceable, the emerging competitive marketplace in Ohio may be irreparably damaged.

Preserving the existing regulation of “carrier-to-carrier” services is essential because ILECs hold a virtual monopoly on the services regulated - services that competitors cannot function without, such as terminating local calls to ILEC customers and moving telephone traffic across the existing networks. HB 276 should be amended to clarify that it only addresses retail regulations and not the carrier-to-carrier regulations.

I would like to thank Chairman DeGeeter and Representative Sayre for working with us to address the bill’s ambiguities. They have listened to our concerns and are working to ensure that the bill truly does what it is purported to do. The amendment offered here in the House Committee today is a necessary first step to alleviating our concerns with the bill’s drafting problems. Benita Kahn from Vorys, Sater, Seymour and Pease, LLP, will testify today in more detail regarding our concerns with the legislation as currently pending and today’s amendment.

A More Global Approach

In addition to our concerns resulting from the bill's lack of clarity, this legislation does not address key issues that would ensure the continued growth of Ohio's competitive marketplace. This bill is being called a "Telecom Regulation Modernization Act." But to truly accomplish this goal, thought must be given to issues impacting competitors in the market.

POLE ATTACHMENT RATES

To deliver services such as cable television, telephone and broadband, communications companies must attach their wires to utility poles owned by other entities, such as investor-owned utilities, municipal electric systems, and rural electric cooperatives. This is known as *pole attachments*. Recognizing the monopolistic nature of pole ownership, both Congress and the FCC mandated in the 1970s that pole attachment fees be cost-based using a federal formula to determine the rate. This law allows the individual states to elect to enforce the federal standard, which Ohio has done for investor-owned utilities (e.g., AEP, Duke, AT&T, CBT) through the PUCO. However, in Ohio, unlike investor-owned utilities, Ohio municipal electrics and rural electric cooperatives are not regulated by the Federal Pole Attachment Act. In Ohio, municipal electrics and rural electric coops can set the rate at their whim and the cable operator has the choice of either paying, or getting off of the poles. These rates are essentially non-negotiable due to the inherently unequal bargaining power of these utilities.

Further, those that must attach to the poles have no venue to resolve pole negotiation issues with the municipal electrics and rural electric coops as they do with investor-owned

utilities. Recently, cable operators and others who attach to municipally or cooperatively owned utility poles have struggled to obtain fair, reasonable, and non-discriminatory rates, practices, and procedures for the use of those facilities. Cost-based rates are the standard for investor-owned utilities and, based on the monopoly position held by municipal electrics and rural electric cooperatives in Ohio, should be applied to them as well. Exorbitant pole rates inhibit the deployment of digital cable television, telephone and broadband services – especially in rural areas.

The cable industry values the relationship that it has with the majority of municipal electric companies and electric cooperatives and appreciates the reasonable approach that many take with regard to pole attachment rates, terms and conditions. Unfortunately, some of those utilities have been charging unreasonable rates, which is why the OCTA supports efforts to establish a cost-based pole attachment formula, such as the federal formula, that will ensure fair and reasonable pole attachment fees for all attachees. The OCTA also supports creating a forum to review and resolve disputes for new agreements or renewals upon request from either party for the purpose of resolving pole attachment agreement issues.

RIGHT TO APPEAL RIGHT-OF-WAY FEES

The OCTA supports extending the right to appeal right-of-way fees to cable operators as it is available to its utility competitors. The Ohio Right-of-Way law (ORC 4939.06) allows utilities, but not cable operators, to appeal excessive right-of-way fees to

the PUCO. This has become an issue to the cable industry as we move from local franchises to the state-issued franchise created last General Assembly under SB 117. In the past, right-of-way issues were handled at the local level when cable operators had to obtain local franchise agreements. Now that these local agreements are being phased out, cable operators need a forum to appeal excessive fees.

“ECONOMIC HARDSHIP” STATUS SHOULD NOT BE USED TO BLOCK COMPETITION

Under federal law, rural telephone companies are not required to provide competitors with PUCO approved wholesale rates for interconnection if the PUCO determines that the rural company would be faced with “economic hardship.” Under HB 276, rural companies that claim “hardship” can continue to charge competitors above-wholesale rates and still be deregulated. This effectively allows the rural ILEC to keep competitors out of that rural market and at the same time be deregulated. The legislation should be amended to prohibit companies from being deregulated until they allow competition in their market through the application of wholesale interconnection rates.

PARITY IS THE KEY TO TRUE COMPETITION

The regulatory framework in Ohio for telecommunications products and services - voice, video and data - is broken, and House Bill 276 does not go far enough to fix it. While it is true that incumbent telephone companies are not regulated in an identical

manner as the new telephone market entrants, traditional telephone companies that enter the video market, as the new market entrant, are regulated with a lighter touch. For instance, incumbent cable operators have unique Public, Educational and Government Access (PEG) channel obligations, legacy institutional network commitments and build-out requirements to which new entrants are not subject. In some instances cable must comply with local, state, and federal customer service requirements whereas the new entrants do not. The Direct Broadcast Satellite (DBS) industry, with which AT&T, Cincinnati Bell and other telephone companies have marketing and resale agreements, has little to none of the above-mentioned requirements or customer service standards.

Because companies are currently regulated differently based on their status as an incumbent or new entrant, the types of products they deliver, and the mode of delivery, there is somewhat of a balance between the regulatory burden and associated costs. Passing legislation that addresses the regulatory burden of just one segment of the telecommunications industry (i.e. telephone) upsets the balance that currently exists.

The OCTA encourages this committee to take a more global view of how all telecommunications products and services are regulated and work to address all of the regulatory disparity that exists today between telephone companies, cable companies, satellite companies, and wireless companies instead of just addressing one segment of the telecommunications regulatory structure. It is my understanding that this is the approach other states, such as Indiana, have taken. Doing it right once may take time but in the end will create the jobs, investment, innovations and consumer choice touted by proponents of this legislation. The cable industry stands ready to assist you and to work with the other segments of the telecommunications industry to make this happen.

We hope this helps you understand our concerns with this legislation as it is currently drafted and hope to work with you to address these issues. Thank you.