

Testimony by the Public Utilities Commission of Ohio

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**Before the House Public Utilities
and Energy Committee**

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PUCO MISSION:

**To ensure all residential and business consumers access
to adequate, safe, and reliable utility services at fair
prices, while facilitating an environment that provides
competitive choices.**



Chairman Hagan and members of the House Public Utilities Committee, thank you for the opportunity to testify on HB 218. My name is Ronnie Fergus and I am a Commissioner for the Public Utilities Commission of Ohio (PUCO). I have worked on telecommunications issues for the last 25 years at the Commission, and I have been working on the implementation of the alternative regulation law that you are proposing to expand in HB 218, since it was first adopted in 1988. Today, I am here to provide you with an overview of alternative regulation from the PUCO's perspective.

The PUCO was one of the first regulatory commissions in the country to recognize that traditional regulation no longer made sense for some parts of the telecommunications industry that were beginning to see competition. Just over twenty years ago, I wrote the PUCO order that gave providers of competitive telecommunications services, for the first time, the flexibility to move their rates up and down within a band of rates without prior commission approval, and the ability to introduce new services under much shorter timeframes than traditional regulation.

Not long after the PUCO issued that order, we took another look at the telecommunications market and concluded that the market had already outgrown the limited authority we believed we had under then-current law. To address that reality, both the PUCO and the industry urged the General Assembly to update our law to allow the PUCO to consider alternative forms of regulation. The 117th General Assembly adopted Ohio's first alternative regulation law with the enactment of Amended Substitute HB 563 in 1988. HB 563 was updated again, in 2001, at the urging of the PUCO, to define further basic local telephone service and to narrow the number of telecommunications services that were subject to the more restrictive level of alternative regulation. The HB 563 framework has served everyone very well for the last 16 years.

Over the course of those 16 years, the PUCO has regularly reviewed the telecommunications market, and each time, adopted more progressive alternative regulation for telephone companies subject to competition. Three years ago, we came up with what we call our "off-the-shelf alt reg plan." The idea was to devise a plan that any

of our local telephone companies could literally take off the shelf and opt into through a simple, 45-day automatic process. All of our large local telephone companies in Ohio, except one, have opted into this plan.

Under this plan, a local telephone company can price its service offerings, except for stand-alone basic local telephone service and basic caller ID, at whatever rates the company thinks the market will bear,¹ and the company can also change those rates on 0-day notice with no approval from the Commission. Stand-alone basic local telephone service and basic caller ID are capped at the rates that were in effect when the company opted into the plan.

If the local telephone company packages stand-alone basic service with any other service, it may price that local service package at whatever price the market will bear. For example, if the telephone company packages basic local telephone service with calling features, long distance service, or voicemail, the company can offer that package at whatever rate is competitive with all the other packages being offered in the market, regardless of the capped rate for stand-alone basic service.

The “off the shelf alt reg plan” gives the incumbent local telephone companies the exact same pricing flexibility as all the other telephone companies that we regulate and that they compete against (with the limited exceptions mentioned above). In other words, but for the pricing of stand-alone basic local telephone service and a few other limited services, local telephone companies under this plan are virtually free of economic regulation.

Before I talk about the bill itself, I wanted first to address some of the questions that came up last week, concerning PUCO jurisdiction and HB 218’s impact on voice over the internet protocol (VoIP) service, broadband over the power line (BPL), and carrier interconnection disputes. First, the PUCO does not currently regulate VoIP providers in Ohio. The PUCO’s jurisdiction over VoIP providers is an open question

¹ A few services like second lines, call waiting, call trace, and non-published number service are subject to more limited pricing flexibility up to a cap of twice the rate that was in effect when the plan was adopted.

before the Federal Communications Commission (FCC) and in Federal court. We are actively participating in those matters, and our own docket on this issue is on hold, awaiting the FCC's and Federal court's decisions. HB 218 would not allow us to assert any jurisdiction over VoIP inconsistent with or prohibited by federal law. It goes without saying that the PUCO cannot violate federal law, and it is certainly our objective to take action in a manner that is consistent with federal law.

The PUCO does not currently regulate BPL either, although we have worked with our regulated electric companies to insure that monopoly distribution services are not subsidizing unregulated BPL. This bill would not impact the current status of BPL.

The same is true of our authority to enforce and arbitrate carrier interconnection obligations. The Telecommunications Act of 1996 (Telecom Act) establishes an obligation on incumbent local telephone companies to provide to other carriers the facilities and equipment necessary to interconnect with the local telephone company's network. The Telecom Act also requires incumbent local telephone companies to negotiate in good faith interconnection terms, and provides that state commissions mediate and arbitrate interconnection agreements in the event of a dispute between carriers. The PUCO has, in place, detailed rules that govern carrier relationships and the mediation and arbitration of disputes between carriers. HB 218 does not change any of this.

Now that I have touched on what HB 218 does not do, let me tell you what it does do. HB 218 gives the PUCO additional authority to consider whether regulation of basic local telephone service should be loosened further, where there is competition. Given that HB 218 still keeps in place the decision framework that we have been operating under for the last 16 years, the PUCO is comfortable with the bill as introduced. We do have a few concerns, however, with the bill, as currently drafted, that we wanted to share with you.

First, the PUCO is concerned with trying to define the terms "advanced services" and "internet protocol-enabled services." These terms have yet to be defined at the

federal level, and because our jurisdiction over these services would be tied to the federal law, the PUCO wants to insure that there is not a mismatch between definitions in state law and federal law. We would ask that you consider an amendment to the bill deleting the definitions.

Our next concern is with a change made on line 157 of the bill. Currently, if the PUCO grants an exemption from regulation or adopts alternative regulation for any service, we can modify our order at a later date if we find that the basis on which we originally concluded that the exemption or alternative regulation was in the public interest is no longer valid. Under the law today, we cannot take back the exemption or the alternative regulation once eight years has passed from the date the PUCO ordered the exemption or alternative regulation, unless the affected telephone company or companies consent.

HB 218 changes this eight-year provision to a three-year provision. In other words, if the PUCO decided today to establish a new form of alternative regulation for any telecommunications service, and if after three years something changed in the telecommunications market that demanded we reconsider that alternative regulation, the PUCO would be prohibited by this bill from modifying the regulation to protect consumers, simply by virtue of the passage of time. The only changes we would be permitted to consider, once three years had passed, would be changes agreeable to the telephone companies. That makes no sense to us.

The telecommunications market is changing so quickly, it is hard to keep up with how the changes will impact consumers. If the law is changed to a three-year requirement, the PUCO would constantly be reevaluating alternative regulation to consider modifications, if necessary, just to make sure that the basis for our original decision was still valid. Rather than providing more certainty for the industry after a period of time, this change in the law would instead result in more uncertainty for utilities, consumers, and the financial markets.

Let me give you an example. It does not seem possible, but it has already been three years since we established our “off-the-shelf alt reg plan.” In three short years, the telecommunications market has changed drastically, and no one knows for sure whether it is for the better or not. We have new players in VoIP and BPL. There are technical issues with both services and no one knows for sure whether these will take off as some predict. The industry is consolidating, with SBC and Verizon merging with their two largest competitors for local telephone service, AT&T and MCI. Will this be good for the market, or will it stifle competition? There is no way of knowing this yet. If our law had a three-year provision as now proposed, instead of the current eight-year provision, I can tell you that the PUCO would not be so willing to sit back and wait to see if changes were necessary. We would have to be more proactive to insure that we did not lose our ability to address the changing market to protect the public interest.

There is no downside to leaving the eight-year provision in place. If your concern is that the PUCO will not keep pace with the changing market if we leave it eight years, the eight-year provision does not keep the PUCO from reviewing the market regularly to insure that regulation continues to evolve and keep pace with the changing environment. The PUCO has a good track record of doing just that for the last 16 years, and we will continue to do that. In fact, we are required by Joint Committee on Agency Rule Review (JCARR) to review all of our rules at least once every five years. The PUCO asks that you consider an amendment to change the three years back to eight years, as the current law provides.

Our third concern with HB 218 is that it gives us only 90 days to adopt rules initially implementing this bill. I know that must sound like more than enough time, particularly when you consider that the 90-day clock would not start until after the 90-day period it takes for the law to become effective. Mr. Shooshan, who testified last week, even joked with me that he believed I could write the rules in 90 minutes! But, the fact of the matter is a rulemaking does not work that way.

As a public agency whose rules are subject to both appeal to the Supreme Court of Ohio and review by JCARR, we must follow a public process. Attached to my

testimony is a timeline I prepared to give you an idea of what is involved in a PUCO rulemaking. For purposes of the timeline, we would begin work immediately upon signing of the bill to work informally with all the stakeholders in developing a proposal for consideration. I have assumed that we would be completely ready to issue a proposal for formal comment on day one that the bill takes effect.

The rest of the timeline assumes a perfect world, which, of course, we do not live in. For instance, this timeline assumes that no one requests any additional time for comments, that no public hearings are necessary, that the comments are manageable and do not require PUCO staff to re-write completely the proposal, that the commissioners do not have major problems with the PUCO staff recommendation that would require redrafting, and that everyone is happy with our rules after only one round of rehearing on the final rules (JCARR requests that we not send our rules to them for review until all rounds of rehearing have been completed at the PUCO).

As you can see from the attachment, even in a perfect world, we need a minimum of 180 days. If the PUCO were to end up with only 90 days to adopt rules implementing HB 218, the rules will necessarily be bare bones, probably more procedural than substantive in nature.

Allowing the PUCO only 90 days for a rulemaking implementing a utility law would be unprecedented. I have been involved with almost every major piece of legislation affecting utilities in the last twenty years, and I cannot recall any law which gave us only 90 days. The two most recent laws dealing with competition in the gas and electric industries either did not establish any time limits on the PUCO rulemaking or gave us 180 days. The PUCO asks that you consider an amendment to the bill which would give the PUCO 180 days to adopt rules implementing HB 218.

Finally, the PUCO is concerned with talk at last week's hearing of the possibility of adding language to the bill stating the legislative intent to eliminate and reduce regulation. HB 218 already contains language specifying the policies of the state which the PUCO must consider in, and I quote from line 75 of the bill, "reducing or eliminating

the regulation of telephone companies” under Chapter 4927. This bill updates those policies that you want us to consider, in effect, indicating what you believe is important in the PUCO’s consideration of eliminating and reducing regulation. Even with those policies spelled out, the PUCO has the difficult task of striking the right balance between maintaining a sound telecommunications industry, developing a competitive market, and protecting the interests of Ohio consumers.

If legislative intent language is added focusing only on the goal of reducing or eliminating regulation of the telephone industry, that policy (which is already clear in the bill) will be elevated above the other important policies that the PUCO must consider in balancing the various interests. We heard SBC opine last week that they would like to see that kind of language added because they would find it useful in making arguments before the Supreme Court of Ohio and before JCARR in support of their position, which we know will be deregulation. By this bill, you are giving the PUCO the discretion to decide what is best for Ohio, taking into account all the policies of the state and all of the different interests we must balance. We are afraid that, even with the best of legislative intentions, other stakeholders will use such language to push their agendas, which may or may not be consistent with the policies of the state already identified in the bill.

I thank you for this opportunity to share with you the PUCO’s perspective on HB 218. The PUCO, while comfortable with the framework of HB 218, urges you to consider amendments deleting the definitions for advanced services and internet protocol-enabled services, adding the eight-year provision back into the law, and increasing the rulemaking time to a minimum of 180 days.

I would be happy to answer any questions you may have.