

Testimony by the Public Utilities Commission of Ohio

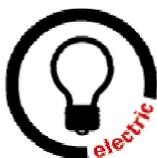
Ronda Hartman Fergus, Commissioner

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

June 7, 2005

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.**



Senator Schuler and members of the Senate Energy and Public Utilities Committee, thank you for the opportunity to testify as an interested party on SB 134. 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 SB 134, 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.

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 I talk about the bill itself, I wanted first to address some of the questions that came up in the House on the companion bill, concerning PUCO jurisdiction and the effect of this bill.

First, the PUCO does not currently regulate voice over the internet protocol (VoIP) providers in Ohio. The PUCO's jurisdiction over VoIP providers is an open question 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. SB 134 would not allow us to assert any jurisdiction over VoIP that is 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 also does not currently regulate broadband over the power line (BPL), 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. SB 134 does not change any of this.

Now that I have touched on what SB 134 does not do, let me tell you what it does do. SB 134 gives the PUCO additional authority to consider whether regulation of basic

local telephone service should be loosened further, where there is competition. Given that SB 134 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. By that, I mean that SB 134, consistent with our current law, does not force the PUCO to reach a specific result with respect to our expanded authority for basic local telephone service. Rather, the bill leaves to the PUCO the discretion to establish alternative regulations that strike the right balance between carrying out the policies of this state, maintaining a sound telecommunications industry, developing a competitive market, and protecting the interests of Ohio consumers.

That being said, we do have a few concerns with the bill, as currently drafted, that we wanted to share with you. Our first concern is with a change that SB 134 makes to the current law. Currently, if the PUCO grants an exemption from regulation or adopts alternative regulation for any service, we can modify our order up to eight years later 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. Once eight years has passed from the date the PUCO ordered the exemption or alternative regulation, we cannot take back the exemption or the alternative regulation for any reason, unless the affected telephone company or companies consent.

SB 134 changes this eight-year provision to a five-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 five years something changed in the telecommunications market that demanded we reconsider 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 five years has passed, would be changes agreeable to the telephone companies. That makes no sense to us.

If something changes in the telecommunications market that could negatively impact consumers, the PUCO believes that we should not be precluded from acting to

protect the public interest, no matter how long the alternative regulation has been in effect, and regardless of whether the telephone company agrees with us or not. However, 16 years ago, when HB 563 was passed, the industry argued that the PUCO should not be able to take back alternative regulation once established, so they would have some certainty. The PUCO, on the other hand, did not want to lose its ability to change the regulation if the basis upon which we granted alternative regulation was no longer valid. The compromise was the eight-year restriction in our current law.

Lowering the eight-year restriction to five years, as SB 134 does, only benefits the telephone companies, potentially to the detriment of consumers. Let me give you an example. As you know, the industry is consolidating, with both SBC and Verizon merging with our two largest telephone competitors in the state, AT&T and MCI. It has already been three years since we granted the regulatory freedoms I described to you in the beginning of my testimony. It will probably take another two years for these mergers to unfold. But, after two more years (which will be five years since we granted the alternative regulation), the PUCO would be prohibited by SB 134 from taking any action to change alternative regulation, even if we found ourselves in the worst case scenario of no competition in the state of Ohio. The only way we could make changes to that regulation would be if SBC, Verizon, and other telephone companies agreed to them.

Ironically, this change in the law from eight years to five years would not bring more certainty to regulation for utilities, consumers or the financial markets. To the contrary, it would result in the very uncertainty that the provision was originally intended to guard against. The PUCO will be a lot less willing to sit back and wait to see if the regulatory freedoms we have granted should be pulled back, for fear that we will lose our ability to protect the public interest if we do not act.

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 the 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 five years back to eight years, as the current law provides.

Our second concern with SB 134 is that it gives us only 120 days to adopt rules initially implementing this bill. I know that must sound like more than enough time, particularly when you consider that the 120-day clock would not start until after the 90-day period it takes for the law to become effective. In reality, rulemakings take time.

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.

Allowing the PUCO only 120 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 120 days. Indeed, most laws have not placed any limits on the time to implement rules. A recent gas bill gave the PUCO 180 days to establish certification rules. The PUCO asks that you consider an amendment to the bill which would give the PUCO 180 days to adopt rules implementing SB 134.

I thank you for this opportunity to share with you the PUCO's perspective on SB 134. The PUCO, while comfortable with the framework of SB 134, urges you to consider amendments 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.