

IN THE SUPREME COURT OF OHIO

LORRI TURNER, ADMINISTRATRIX, etc., : Case Nos.: 2007-0035; 2007-0112
: :
Appellee, : On Appeal from the Cuyahoga County
: Court of Appeals, Eighth Appellate
-vs- : District
: :
OHIO BELL TELEPHONE COMPANY, et al., : Court of Appeals
: Case No. CA-05-087541
Appellants. :

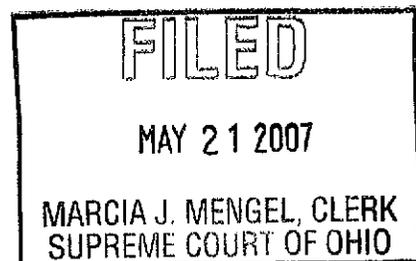
BRIEF OF AMICI CURIAE THE OHIO TELECOM ASSOCIATION, VERIZON NORTH INC., CINCINNATI BELL TELEPHONE COMPANY, LLC, UNITED TELEPHONE COMPANY OF OHIO, dba EMBARQ, WINDSTREAM OHIO, INC. AND WINDSTREAM WESTERN RESERVE, INC. IN SUPPORT OF APPELLANTS, URGING REVERSAL

Thomas E. Lodge (0015741)
Tom.Lodge@ThompsonHine.com
THOMPSON HINE LLP
One Columbus
10 West Broad Street
Columbus, OH 43215-3435
(614) 469-3200 – Telephone
(614) 469-3361 - Fax

Andrew H. Cox (0071459)
Andrew.Cox@ThompsonHine.com
William J. Hubbard (0077033)
Bill.Hubbard@ThompsonHine.com
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114-1216
(216) 566-5500 – Telephone
(216) 566-5800 – Fax
Attorneys for Amicus Curiae Verizon North Inc.

Douglas E. Hart (0005600)
dhart@douglasshart.com
441 Vine Street
Suite 1722
Cincinnati, OH 45202
(513) 621-6709
(513) 621-6981 fax
Attorney for Amicus Curiae Cincinnati Bell Telephone Company LLC

Joseph R. Stewart (0028763)
joseph.r.stewart@embarq.com
UNITED TELEPHONE COMPANY OF OHIO, DBA EMBARQ
50 W. Broad St., Suite 3600
Columbus, OH 43215
(614) 220-8625 – Telephone
(614) 224-3902 – Fax
Attorney for Amicus Curiae Embarq



William A. Adams (0029501)
William.Adams@baileycavalieri.com
BAILEY CAVALIERI LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215-3422
(614) 229-3278 – Telephone
(614) 221-0479 – Fax
*Attorneys for Amicus Curiae Windstream Ohio,
Inc. and Windstream Western Reserve, Inc.*

John J. Spellacy (0657000)
1540 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114
(216) 241-0520 - Telephone

Sean P. Allan (0043522)
sallan@agllp.com
ALLAN & GALLAGHER LLP
1300 The Rockefeller Building
614 W. Superior Avenue
Cleveland, Ohio 44113
(216) 377-0598 – Telephone
(216) 644-699 - Fax
Attorneys for Plaintiff-Appellee

Thomas E. Lodge (0015741)
Tom.Lodge@ThompsonHine.com
Carolyn Flahive (0072404)
Carolyn.Flahive@ThompsonHine.com
THOMPSON HINE LLP
One Columbus
10 West Broad Street
Columbus, OH 43215-3435
(614) 469-3200 – Telephone
(614) 469-3361 - Fax
*Attorneys for Amicus Curiae The Ohio
Telecom Association*

Anthony F. Stringer (0071691)
astringer@calfee.com
CALFEE HALTER & GRISWOLD LLP
800 Superior Avenue, Suite 1400
Cleveland, Ohio 44114-2688
(216) 622-8214 – Telephone
(216) 241-0816 - Fax
*Attorneys for Defendant-Appellant
Ohio Bell Telephone Company*

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STATEMENT OF INTEREST OF THE TELECOM AMICI CURIAE

The Telecom Amici Curiae consist of The Ohio Telecom Association (“OTA”), Verizon North Inc., Cincinnati Bell Telephone Company LLC (“Cincinnati Bell”), United Telephone Company of Ohio dba Embarq (“Embarq”), Windstream Ohio, Inc. and Windstream Western Reserve, Inc. (collectively, “Telecom Amici Curiae”). The OTA is a statewide trade association that promotes the common interests of telecommunications companies serving and employing Ohioans. The OTA currently represents 41 landline telecommunications providers,¹ and over 100 associate member companies that supply goods and services to the telecommunications industry. Its member companies provide local telephone service throughout Ohio and employ 16,000 Ohioans. The five OTA members joining in this amicus brief, Verizon North Inc., Cincinnati Bell, Embarq, Windstream Ohio, Inc. and Windstream Western Reserve, Inc., serve 44.8% of the landline telephones in Ohio. When combined with Appellant Ohio Bell Telephone Company, these five Amicus Curiae and Appellant Ohio Bell represent approximately 96.5% of the landline customers served by OTA members, and employ a like percentage of poles used in providing that service.

More pertinent to this case, OTA members serve approximately 5.2 million phone lines in Ohio, the majority of which are served through a network of wires strung from poles like the pole in this case. The Telecom Amici Curiae estimate that approximately 1.8 million poles are used to provide telephone service in Ohio, primarily within the public right of way along roads and highways. As a result, the outcome of this case is of critical significance to the Telecom Amici Curiae, other members of the OTA, and all rate paying consumers of telephone service.

¹ “Landline telephone service” is provided over traditional wired telephone networks, as contrasted with wireless service, which employs electromagnetic spectrum for delivery of telecommunications.

If the test adopted by the Eighth District Court of Appeals becomes Ohio law, OTA members will unquestionably incur significant additional costs associated with claims of motorists who strike their poles. As detailed elsewhere in this Brief, those costs will arise from insurance, from claims defense, from relocation, and potentially from acquisition of private rights-of-way (whether voluntarily or by eminent domain). Those costs will then, through simple economics, be passed along to all landline telephone customers throughout the State. The Telecom Amici Curiae, on behalf of themselves, other OTA members, and all Ohio rate paying customers, urge reversal.

STATEMENT OF FACTS

The Telecom Amici Curiae adopt the Statement of Facts presented by Appellant South Central Power Company.

SUMMARY OF ARGUMENT

For decades, telecommunications companies doing business in Ohio have exercised a statutory grant of authority from the Ohio General Assembly to construct millions of telephone poles within the public right of ways along roads and highways. The pole locations are plotted along the roadway, submitted for approval to the Ohio Department of Transportation ("ODOT") or applicable local authorities, and placed in accordance with and in reliance on permits they issue. For more than seventy years, Ohio statutory and case law clearly defined the service provider's duty with respect to the placement of telephone poles – a telephone utility could not be held liable for a vehicle striking a telephone pole or related facility located within the public right of way if the pole was located off the improved portion of the road intended for vehicular travel.

This consistency in the law permitted Ohio's telephone companies to provide service to Ohioans in a cost effective manner, by using the public right of way as expressly intended by the Ohio General Assembly, without the need to negotiate private land easements or to exercise

eminent domain powers to take private land from Ohio's citizens. This consistency was brought to an end by the Eighth District Court of Appeals' decision in this case – a decision which erroneously ignored extensive precedent and adopted a new multi-factor second-guessing exercise that turns every telephone pole in Ohio into a liability magnet, opening a flood gate of litigation and ensuring that the cost of telephone service in Ohio will increase as the increased cost of relocating and placing utility poles will be passed on to each user of telephone service in Ohio. If allowed to stand, the decision of the Eighth District Court of Appeals will dramatically and adversely impact the way telecommunications companies do business in Ohio. The Telecom Amici Curiae join Appellants in requesting that this Court reverse the Court of Appeals' decision and adopt the propositions of law urged by the Appellants.

LAW AND ARGUMENT

The Telecom Amici Curiae adopt the propositions of law as stated by Appellant South Central Power Company.

I. For Decades, the Telecom Amici Curiae, Their Predecessors and Other Telecommunication Service Providers Have Done Business in Ohio in Reliance on Ohio's Consistent Fabric of Statutory and Case Law Which Clearly Defined the Telephone Utility's Duty in Placing Poles Within Public Right of Ways Along Ohio Roadways.

The Telecom Amici Curiae serve approximately one-half of all consumers of landline telephone service throughout Ohio. The vast majority of this service is provided through a network of overhead lines supported by poles, which can be seen virtually anywhere alongside the highways and streets of Ohio. Verizon North Inc., providing service in 80 counties, owns 344,507 poles upon which its lines are strung exclusively and has joint use agreements for another 306,114 poles upon which numerous utilities are strung. Cincinnati Bell owns 98,625 many of which also accommodate electric power lines. In addition to Cincinnati Bell's own poles, it has placed its wires and cables on 81,158 poles owned by electric utilities. Embarq

owns 119,468 poles and has joint use agreements with other utilities for another 176,626 poles. Windstream Ohio, Inc. and Windstream Western Reserve, Inc. collectively own 55,122 poles and have joint use agreements with other utilities for another 154,566 poles. These five Amici Curiae serve 44.8 % of the telephone access lines in Ohio. Appellant Ohio Bell Telephone Company, which itself serves 51.7% of the telephone access lines served by OTA members,² owns or shares an additional 471,706 poles.³ As a result, it can be fairly estimated that approximately 1.8 million poles are used to provide telephone service in Ohio. This figure does not take into account the millions of other utility poles and facilities that are located along Ohio roads that are not used for telephone lines.

Before the decision of the Eighth District Court of Appeals, based on the previously consistent state of Ohio law, the business plan for physically providing telecommunication service to Ohio residents was straightforward – lines were laid out within public right of ways along roads leading to the service destinations, the lay-out was submitted for ODOT or local governmental approval, the reviewing agency evaluated the pole location relative to the design and conditions of the road, the plan was either approved or revised, and the poles were placed pursuant to a governmental permit. The duty of the telephone utility in placing the pole was consistently interpreted by Ohio courts and clearly defined – the telephone service provider could not be held liable if a vehicle struck its pole, provided the pole was located outside the portion of the road improved and intended for vehicular travel. This consistent state of the law facilitated business planning for the placement of telephone facilities in Ohio, which in turn allowed the Telecom Amici Curiae the opportunity to provide the most cost effective service to the residents of this state.

² Ohio Telecom Association, 2007 Membership Directory at 98, Exhibit A hereto.

³ Annual Report of the Ohio Bell Telephone Company to the Public Utilities Commission of Ohio, for the period ended December 31, 2006, filed April 30, 2007.

Using public right of ways for the placement of telephone poles has several advantages:

- First, using the public right of way permits telephone service providers to avoid the cost of obtaining private easements, which minimizes utility delivery costs, and ultimately minimizes consumer costs.
- Second, telecommunication companies have the statutory authority to use the public right of way on a broad basis, subject to ODOT or other governmental approval. By contrast, where private easements are necessary, the service providers must identify the interest holder and negotiate an easement on a pole-by-pole basis – a practice which, again, increases the cost to Ohio consumers of telephone services.
- Third, in the experience of the Telecom Amici Curiae, most landowners are reluctant to allow placement of a telephone pole on their private property (despite compensation) because they have no desire to have telephone poles and related facilities located on their private property.
- Fourth, where the private landowner is unwilling to convey an easement voluntarily, the telephone utility must initiate eminent domain proceedings. While the Telecom Amici Curiae can exercise the right of eminent domain as public utilities, they are in turn reluctant to do so because it places them in an adversarial relationship with their customer. Moreover, as this Court is well aware, popular resentment against eminent domain is strong and growing. Finally, eminent domain proceedings consume valuable time and resources, and can delay the commencement of necessary telephone service to business and residential users.

Moreover, it is the public policy of this state that telephone service providers be able to use the public right of way along roads and highways. The Ohio General Assembly long ago

made the public policy judgment that public utilities serve an important and unique public function, and should be afforded the opportunity to use public space to locate their facilities. See R.C. 4939.02(A)(2) (announcing that the public policy of Ohio concerning the use of public ways is to "[p]romote the availability of a wide range of utility, communication, and other services to residents of this state at reasonable costs").

This public policy was well served through seventy years of consistent Ohio case law holding that the placement of a utility pole in the right of way, but outside the improved portion of the road does not constitute a danger or obstruction to those properly using the road; thus, the utility provider cannot be held liable for a vehicle that leaves the improved portion of the road and strikes an off-road utility pole. See *Cincinnati Gas & Electric Co. v. Bayer* (Nov. 3, 1975), 1st Dist. Nos. C-74627 & C-74628, 1975 Ohio App. LEXIS 6305; *Ferguson v. Cincinnati Gas & Electric Co.* (1st Dist. 1990), 69 Ohio App.3d 460, 462, 590 N.E.2d 1332; *Neiderbrach v. Dayton Power & Light Co.* (2d Dist. 1994), 94 Ohio App.3d 334, 640 N.E.2d 891; *Short v. Ohio Bell Telephone Co.* (4th Dist. 1941), 35 Ohio L. Abs. 375, 37 N.E.2d 439, 1941 Ohio App. LEXIS 955 * 2-3; *Ohio Postal Telegraph-Cable Co. v. Yant* (5th Dist. 1940), 64 Ohio App. 189, 28 N.E.2d 646; *Curry v. Ohio Power Co.* (Feb. 14, 1980), 5th Dist. No. CA-2671, 1980 Ohio App. LEXIS 11996; *Mattucci v. Ohio Edison Co.* (9th Dist. 1946), 79 Ohio App. 367, 73 N.E.2d 809; *Crank v. Ohio Edison Co.* (Feb. 2, 1977), 9th Dist. No. 1446, 1977 Ohio App. LEXIS 9020; *Jocek v. GTE North, Inc.* (Sept. 27, 1995), 9th Dist. No. 17097, 1995 Ohio App. LEXIS 4343. The consistent rule of law created by these decisions has permitted the Telecom Amici Curiae to place poles within the public right of way, knowing that the duty of care to motorists was satisfied if the pole was placed off the improved portion of the road – a clearly defined rule of

law that has fostered the cost effective provision of telecommunication services in Ohio through the use of the public right of ways, as intended by the Ohio General Assembly.

II. The Decision of the Eighth District Court of Appeals to End Seventy Years of Consistent Case Law Has a Severe, Adverse Impact on the Telecom Amici Curiae's Ability to Do Business in Ohio and to Provide the Most Cost Effective Telecommunication Service to Ohio Consumers.

The Telecom Amici Curiae have been able to take advantage of the benefits of using the public right of way to the ultimate benefit of the consumer because the previously consistent body of case law in Ohio ensured that poles placed within the public right of way, but off the portion of the road improved for vehicular travel, would not later become sources of costly litigation. In contrast to the bright-line standard upheld by Ohio courts for seven decades, the Eighth District Court of Appeals fashioned eight factors to consider in determining whether a utility can be held liable in a pole collision case. These eight factors (which do not even amount to a test) give utility providers absolutely no guidance as to how to plan the construction of utility poles and related facilities in Ohio. The eight factors to be considered are: (1) proximity to the road, (2) the condition of the road, (3) the direction of the road, (4) the curvature of the road, (5) the width of the road, (6) the grade of the road, (7) the slope of the road, and (8) the position of side drains or ditches. *See Turner v. Ohio Bell Telephone Co.*, Cuyahoga App. No. CA-05-087541, 2006-Ohio-6168, at ¶¶ 9-12. Under this fact intensive standard, there is no place within the public right of way that a pole can be safely placed as a matter of law – every pole placement will be subject to second guessing by the fact finder. This type of legal standard creates uncertainty and inconsistency in the law and undermines the ability of telephone service providers to create consistent business plans for the placement of telephone facilities in Ohio, thereby increasing the cost of doing business in Ohio and ultimately the cost to consumers.

The eight factors are flawed for a number of reasons:

- First, unlike the bright-line test that is derived from the Ohio Revised Code, the eight factors have no legislative basis.
- Second, they ignore altogether the legal duty and personal responsibility of drivers to maintain their vehicles on the road. Simply put, a driver who commits a negligent or unlawful act in driving off the road is favored over a utility company that is providing a service by placing a telephone pole in the public right of way pursuant to a statutory grant of authority and pursuant to a permit issued by a government agency.
- Third, they improperly shift the burden to evaluate the location of telephone poles from the permitting agency to the telephone service providers, who have traditionally relied on ODOT or the local government to perform this function. Notably, and demonstrating how detached from reality the ruling of the Eighth District Court really is, a pole cannot be placed until the appropriate governmental permit is issued, making any previous eight-factor evaluation by a telephone service provider largely irrelevant.
- Fourth, they impose upon utilities a duty to engineer their facilities to take into account out-of-control motorists – an inherently impossible task, given that the path of the errant vehicle will, by definition, be completely unpredictable.
- Fifth, they offer telephone service providers no safe harbor to place facilities within the right of way. As a matter of simple geometry, in any accident, the motorist will be able to argue that the pole would not have been hit had it been in

a different location – an irrefutable fact, but a fact which the Telecom Amici Curiae submit is legally irrelevant.

In addition to undermining the basic business model that the Telecom Amici Curiae and their predecessors have used in Ohio for seventy years, the eight factors of the Eighth District Court of Appeals will expose the Telecom Amici Curiae to unplanned and unreserved liability on a mass scale. With every pole in Ohio now a liability magnet, telecommunication service providers will be confronted with two options – to relocate poles at tremendous expense in advance of an accident, or to leave them in place at tremendous exposure.

To relocate their poles, service providers would be required to inspect their entire system, and where necessary, reengineer their system to relocate poles to different locations within the right of way, or onto private property, with the impossible goal of predicting what a future jury may find acceptable under the nebulous eight factors. Such an effort would be extraordinarily expensive. In the experience of the Telecom Amici Curiae, moving a single pole costs approximately \$1,200. When additional utility providers have their service on a pole, or when the pole is located in areas more difficult to access, the cost to move a single pole can easily exceed \$3,000. Further, in most cases, a single pole alone cannot be moved. Each pole must remain aligned with the other poles adjacent to it so as to avoid straining the telephone cable and to avoid the need for excessive guy wires. As a result, if a single pole is moved, the other poles up and down the line must be moved to keep them aligned. Considering the approximately 1.8 million telephone poles used in providing telephone service in Ohio, the cost to relocate them all would be staggering. These are all costs that would be passed on to Ohio consumers of telephone service.

The Telecom Amici Curiae will not be the only ones affected by the movement of existing poles. Moving a single pole – or, as would be necessary, an entire line of poles – would require the issuance of new governmental permits. This would not only result in more costs to the service provider and consumers, but it would also cause state and local governments to incur additional expense in providing personnel to inspect the new pole locations and approve the permits.

In relocating poles and placing new poles, the Telecom Amici Curiae may be forced to abandon the public right of way altogether, and retrench to private property substantially farther from the improved roadway. The cost to identify and obtain necessary private easements through negotiation would be substantial and un-welcomed by Ohio private landowners, who traditionally do not desire to have telephone poles located on their private land. This cost would be multiplied if telecommunication service providers were forced to initiate eminent domain proceedings to take private land for the purpose of constructing telephone lines. But even beyond the political and economic costs of such an approach, a move to private land would present significant practical challenges. Utilities would be forced to manage and maintain their pole inventory amidst a patchwork of hundreds of thousands of individually negotiated easements, each potentially with its own terms – again, increasing costs that are passed on to the consumer.

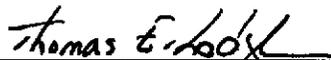
The other option for Ohio telecommunication service providers to respond to the mass potential liability created in a post *Turner* world would be to maintain the status quo, and attempt to respond to the flood of litigation that will result if every vehicular collision with an off-road utility could result in litigation. The cost of this newly created litigation would, again, be passed

on to Ohio consumers as part of the new cost of doing business in the State of Ohio. The weight of this new brand of litigation would also be felt on the dockets of Ohio's courts.

CONCLUSION

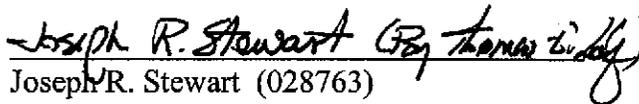
For the better part of a century, the Telecom Amici Curiae, their predecessors and other telecommunication service providers have placed millions of telephone poles within the public right of way along highways and roads in Ohio. These poles are placed pursuant to a statutory grant of authority and with the express approval of ODOT or local governments. Because Ohio law has been clear for seventy years, the Telecom Amici Curiae have been able to use the public right of way, as intended by the Ohio General Assembly and to the ultimate benefit of the consumer, without the risk of liability resulting from vehicular collisions with off road facilities. The decision of the Eighth District Court of Appeals ends seventy years of precedent, severely impacts the Telecom Amici Curiae's ability to do business in Ohio and to provide the most cost effective telecommunication service to Ohio consumers. For these reasons and those provided by Appellants, this Court should reverse the Eighth District Court of Appeals, and adopt the propositions of law urged by the Appellants.

Respectfully submitted,

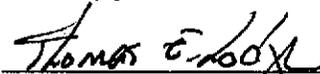


Thomas E. Lodge (0015741)
Tom.Lodge@ThompsonHine.com
THOMPSON HINE LLP
One Columbus
10 West Broad Street
Columbus, OH 43215-3435
(614) 469-3200 – Telephone
(614) 469-3361 - Fax

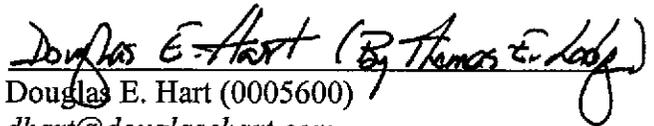
Andrew H. Cox (0071459)
Andrew.Cox@ThompsonHine.com
William J. Hubbard (0077033)
Bill.Hubbard@ThompsonHine.com
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114-1216
(216) 566-5500 – Telephone
(216) 566-5800 – Fax
Attorneys for Amicus Curiae Verizon North Inc.



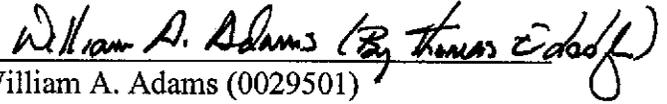
Joseph R. Stewart (028763)
joseph.r.stewart@embarq.com
United Telephone Company of Ohio, dba
Embarq
50 W. Broad St., Suite 3600
Columbus, OH 43215
(614) 220-8625 – Telephone
(614) 224-3902 – Fax
Attorney for Amicus Curiae Embarq



Thomas E. Lodge (0015741)
Tom.Lodge@ThompsonHine.com
Carolyn Flahive (0072404)
Carolyn.Flahive@ThompsonHine.com
THOMPSON HINE LLP
One Columbus
10 West Broad Street
Columbus, OH 43215-3435
(614) 469-3200 – Telephone
(614) 469-3361 - Fax
*Attorneys for Amicus Curiae The Ohio Telecom
Association*



Douglas E. Hart (0005600)
dhart@douglasshart.com
441 Vine Street
Suite 1722
Cincinnati, OH 45202
(513) 621-6709
(513) 621-6981 fax
*Attorney for Amicus Curiae Cincinnati Bell
Telephone Company LLC*



William A. Adams (0029501)
William.Adams@baileycavalieri.com
Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215-3422
(614) 229-3278 – Telephone
(614) 221-0479 – Fax
*Attorneys for Amicus Curiae Windstream
Ohio, Inc. and Windstream Western Reserve,
Inc.*

CERTIFICATE OF SERVICE

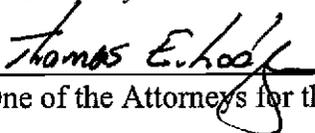
The undersigned certifies that a copy of the foregoing, *Brief Of Amici Curiae The Ohio Telecom Association, Verizon North, Inc., Cincinnati Bell Telephone Company LLC, United Telephone Company of Ohio dba Embarq, Windstream Ohio, Inc. and Windstream Western Reserve, Inc. In Support Of Appellants, Urging Reversal*, was served upon the following by regular U.S. mail, postage pre-paid, on May 21st, 2007:

John J. Spellacy, Esq.
1540 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114

Sean P. Allan, Esq.
Allan & Gallagher LLP
1300 The Rockefeller Building
614 W. Superior Avenue
Cleveland, Ohio 44113
Attorneys for Plaintiff-Appellee

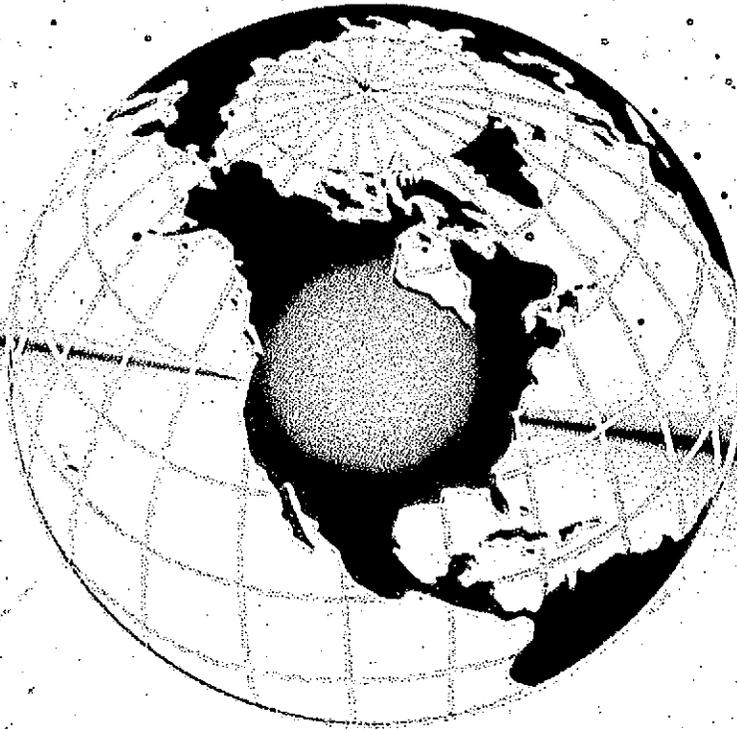
Anthony F. Stringer, Esq.
Calfee Halter & Griswold LLP
800 Superior Avenue, Suite 1400
Cleveland, Ohio 44114-2688
*Attorneys for Defendant-Appellant
Ohio Bell Telephone Company*

William R. Case, Esq.
Scott A. Campbell, Esq.
Jennifer E. Short, Esq.
Thompson Hine LLP
10 W. Broad Street, Suite 700
Columbus, Ohio 43215-3435
*Attorneys for Defendant-Appellant
South Central Power Company*



One of the Attorneys for the Telecom

Ohio Telecom Association 2007 Membership Directory



Statistics

OTA Members as of 12/31/05 by Number of Access Lines

Company	Number of Access Lines	Exchanges
AT&T Ohio	2,701,383	192
Verizon	831,845	244
Cincinnati Bell	673,349	12
Embarq	545,935	164
Windstream Western Reserve, Inc.	170,483	41
Windstream Ohio, Inc.	120,577	15
CenturyTel	76,529	6
Chillicothe	35,493	10
Champaign	10,644	2
Orwell	7,175	9
Conneaut	7,063	1
Germantown	3,988	1
Doylestown	3,802	1
Little Miami	3,352	2
Minford	3,195	1
Continental	2,385	3
Sycamore	2,058	3
Columbus Grove	1,936	1
Kalida	1,549	1
Ottoville Mutual	1,503	1
Nova	1,459	2
Sherwood Mutual	1,404	1
Arthur Mutual	1,334	1
New Knoxville	1,312	1
Oakwood	1,231	1
Benton Ridge	1,213	3
Glandorf	1,203	1
Wabash Mutual	1,201	1
Ayersville	1,179	1
Bascom Mutual	952	1
Fort Jennings	881	1
Buckland	817	1
Arcadia	800	1
Ridgeville	782	1
Vanlue	776	1
Middle Point Home	772	1
McClure	734	1
Frontier Communications	616	1
Farmers Mutual	478	1
Pattersonville	417	1
Vaughnsville	358	1
TOTAL	5,224,163	