FILE

Douglas E. Hart
Attorney at Law

RECEIVED-DOCKETING DIV
2007 FEB 23 AM 11:21
PUCO

February 22, 2007

**VIA FEDERAL EXPRESS**

Ms. Renee Jenkins
Chief, Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

**Re: In the Matter of the Establishment of Carrier-to-Carrier Rules, Case No. 06-1344-TP-ORD**

Dear Ms. Jenkins:

Enclosed please find an original and 11 copies of the Reply Comments of Cincinnati Bell Telephone Company LLC. Please file the original and 10 copies in the above referenced proceeding and please date stamp and return the additional copy to me in the enclosed self-addressed stamped envelope.

Very truly yours,

Douglas E. Hart

DEH
Enclosures



441 Vine Street Suite 3108 Cincinnati, Ohio 45202
Ph: (513) 621-6709 Fax: (513) 621-6981
dhart@douglasehart.com

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|---|
| In the Matter of the Establishment of Carrier-to-Carrier Rules. | ) ) | Case No. 06-1344-TP-ORD |
| In the Matter of the Commission Ordered Investigation of the Existing Local Exchange Competition Guidelines. | ) ) ) | Case No. 99-998-TP-COI |
| In the Matter of the Commission Review of the Regulatory Framework for Competitive Telecommunications Services Under Chapter 4927, Revised Code. | ) ) ) ) | Case No. 99-563-TP-COI |

**REPLY COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY LLC**

In accordance with the Commission's Entry in this matter of November 21, 2006, and the Attorney Examiner's January 18 and February 5, 2007 Entries extending the time in which to file reply comments, Cincinnati Bell Telephone Company LLC ("CBT") hereby submits its Reply Comments concerning the Staff's proposed revisions to the carrier-to-carrier rules (the "Staff Proposal").

CBT offers these reply comments in addition to its initial comments filed in this proceeding and in addition to the reply comments filed by OTA, in which CBT generally concurs. CBT does not attempt to address all issues in these reply comments, and a lack of reply does not imply agreement with the comments of the other parties. Rather, CBT re-affirms its initial comments and offers these reply comments as a supplement.

**4901:1-7-02 Adoption of Federal Rules**

CBT agrees with AT&T, Verizon, Embarq and OTA that the Commission should not adopt federal interconnection and unbundling rules as independent state rules, particularly not such rules as they existed on a specific date in the past. As CBT stated in its Initial Comments, there is no need for such state rules as the federal rules apply automatically and the Commission is already required to follow the federal rules. The independent adoption as state law of the same substantive requirement of the federal rules would almost certainly result in the creation of inconsistencies as the federal rules change over time. In most instances, the federal supremacy clause would cause the federal rule to supersede state rules, so the state rules would largely be a nullity. In case there is a situation where federal preemption would not apply, Ohio law still prohibits state rules that are inconsistent with federal law and regulations and affirmatively requires the Commission to follow the federal law and regulations. Ohio Revised Code § 4905.041. Therefore, creating independent state rules serves no purpose.

**4901:1-7-07 <u>BFR Fees</u>**

XO Communications Services, Inc. and One Communications object to proposed rule 7(E), which authorizes a "BFR fee" to allow LECs to recover costs related to unique requests for interconnection, special arrangements and technical and economic feasibility assessments. CBT suggests that the term BFR is being used in two different contexts: one, with respect to requests for interconnection generally and, the other, with respect to unusual arrangements that are not typically provided. It is appropriate for the Commission to authorize BFR fees for special arrangements. CBT's interconnection agreements have included such provisions since 1997 and they should continue to be authorized. Regardless of whether the Commission calls general interconnection requests "BFRs" or something else, it should continue to permit LECs to recover their costs to investigate special requests. The rule clearly states that recoverable BFR costs relate to the "evaluation of the unique request for interconnection, examination of facilities for special arrangements, and technical and economic feasibility assessments." These costs are recoverable whether the request relates to an initial interconnection agreement, a subsequent interconnection agreement, or a request within the course of performance of an existing agreement. The rule should not be deleted. In the alternative, Time Warner offers amended language to clarify that the BFR fee would only apply to special circumstances. While CBT does not believe the amendment is necessary, doing so would be preferable to eliminating the rule altogether.

**4901:1-7-07(A)(7)** **<u>Adoption of Existing Interconnection Agreements</u>**

Pac-West asserts the right to adopt an existing interconnection agreement pursuant to § 252(i) and then subsequently to adopt any other interconnection agreement, even if the previously adopted agreement is not yet expired. Such a rule would undermine the sanctity of contracts and leave ILECs, but not CLECs, bound to contracts. Once a CLEC has adopted an existing interconnection agreement, it should be bound by that agreement for its term just like any other private contract. The CLEC cannot abandon an agreement other than in accordance with its internal provisions for termination or amendment. Thus, the Commission should not endorse a wholesale right of CLECs to jump from agreement to agreement at will, but should remind CLECs that adoption of an agreement has binding legal consequences.

**4901:1-7-12(D)(2)(d)** **<u>Reciprocal Compensation</u>**

The OCTA and Pac-West take issue with Rule 12(D)(2)(d)(ii), which limits reciprocal compensation to end office rates when carriers interconnect using direct end office trunks. OCTA and Pac-West ask the Commission to allow CLECs to charge tandem switching rates for all traffic terminating on their networks, even if such traffic was exchanged over direct trunks to an ILEC end office.[1]

OCTA and Pac-West focus only on the federal tandem *eligibility* rule, 47 C.F.R. § 51.711(a)(3). A CLEC switch is eligible to receive reciprocal compensation at tandem rates if it serves a comparable area as the ILEC's tandem switch. But they completely ignore 47 C.F.R. § 51.711(a), which requires that rates for the transport and termination of local telecommunications traffic must be symmetrical. The FCC defined "symmetrical" as "rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic *equal to those that the incumbent LEC assesses upon the other carrier for the same services*." 47 C.F.R. § 51.711(a)(1) (emphasis added).

When carriers exchange local traffic over direct end office trunks, they are providing each other with the same services and should receive the same compensation. The only mutual and reciprocal rate for traffic exchanged over that facility is the end office rate.

Paragraph 1090 of the FCC's August 8, 1996 First Report and Order allowed that states may set different rates for traffic depending upon whether it is routed through a tandem switch or directly to an end office. The fact that the FCC gave states this choice makes it clear that not all traffic to CLECs is subject to tandem rates. States have the flexibility to establish rates that reflect the circumstances of how traffic is exchanged. To

[1] In light of the FCC's *Order on Remand and Report and Order* in CC Docket Nos. 96-98, 99-68, FCC 01-131, released April 27, 2001, which addressed compensation for Local Traffic and ISP traffic after June 13, 2001, this issue is essentially moot. Nearly all of CBT's interconnection agreements use the $.0007 reciprocal compensation rate for all Local Traffic and ISP Traffic, which is lower than either the tandem or end office transport and termination rate.

maintain symmetrical rates, the same rates must apply to traffic going in both directions on the same set of trunks.

The end office rule is not new – the Commission has followed it for a decade. The Commission developed the rule in arbitration proceedings that were extensively argued and briefed. See, *e.g.*, Arbitration Awards in Case Nos. 97-152-TP-ARB (Aug. 14, 1997), 99-1153-TP-ARB (Feb. 24, 2000), and 00-1532-TP-ARB (Feb. 28, 2001). For example, in Case No. 99-1153-TP-ARB, even though the Commission concluded that the CLEC was eligible to receive tandem compensation due to the geographic coverage of its switch, the Commission specifically stated that the decision applied only when the CLEC interconnected at the tandem. In the event the CLEC interconnected at an end office, the end office rate would apply.

The result sought by OCTA and Pac-West is not *symmetrical* reciprocal compensation, but *asymmetrical* compensation. CLECs would receive tandem switching compensation in all cases, but would only pay ILECs tandem compensation when traffic was actually routed through the tandem switch. This is a clear example of regulatory arbitrage, where CLECs attempt to profit from what should be a completely neutral activity.

OCTA and Pac-West's position, if allowed, would guarantee any CLEC a built-in profit simply by exchanging identical volumes of traffic with an ILEC. All the CLEC would have to do would be to establish direct end office trunks to the ILEC. It would then pay end office rates, but collect tandem rates on all traffic. It is clear that the FCC did not intend for this to happen, as its First Report and Order reflects the expectation that where traffic is in balance, there would be no net exchange of funds between carriers.

*First Report and Order*, FCC 96-325, ¶ *1086* ("For example, in the case where traffic is balanced, net termination charges are zero . . . ."). OCTA and Pac-West's request to change the rule should be denied.

**4901:1-7-13 Transit Traffic**

Much has been said in this proceeding about transit traffic and whether non-ILECs have any duty to negotiate compensation arrangements when they do not directly interconnect. One issue that has not been addressed with respect to transit traffic is whether it is appropriate for an ILEC to charge transit rates to deliver traffic to its own CLEC affiliate within the ILEC service territory. Prior to the most recent iteration of the proposed competitive retail service rules, the Commission had prohibited ILECs from having a CLEC affiliate operating in its traditional service area. Now that in-territory affiliates are permitted, the rules raise the question of what traffic arrangements apply to traffic that is delivered to the ILEC's tandem for termination on the network of its CLEC affiliate. CBT submits that the Commission can and should appropriately require an ILEC to treat such calls as its own traffic and not to permit the ILEC to charge transit rates for delivery of traffic to its own affiliate within its own ILEC service territory. By making an affiliate part of its corporate family, the ILEC should be required to terminate local traffic destined to the affiliate at reciprocal compensation rates.

**4901:1-7-22(A) Customer Migration**

CBT agrees with AT&T that more detail is needed with respect to the rules governing the migration of customers that have decided to change carriers. ILECs have long been subject to detailed requirements in interconnection agreements regarding pre-ordering and ordering activities to ensure timely migration of customers to CLECs.

Unfortunately, CLECs have not reciprocated when customers decide to migrate back to ILECs or to other CLECs. CBT has experienced numerous situations where a customer's number is not timely ported back, many times resulting in the customer being out of service or having to change telephone numbers in order to receive timely service. It is time that the migration procedures work the same in both directions and in the same frames. The public interest and customer convenience demand that.

**4901:1-7-23 Pole Attachments**

CBT disagrees with OCTA's request to place pole attachment and conduit rates in Tier 1. Subjecting pole and conduit rates to Tier 1 treatment would place them under a form of rate regulation that is inapposite to the applicable regulatory treatment. Pole and conduit rates are established using the FCC pole attachment and conduit occupancy formulas and rate changes should be permitted as justified under those formulas. These services bear no relationship to the type of retail services that are grouped under Tier 1 and which are subject to entirely different retail pricing restrictions.

**4901:1-7-26 Competition Safeguards**

CBT agrees with AT&T, OTA and Verizon that the Commission should not establish additional state CPNI rules or rules governing other types of proprietary information. The FCC has carefully crafted CPNI rules based upon § 222 of the Telecommunications Act. These rules have been shaped and restricted by federal court litigation as well. There is no need for supplementation of those rules at the state level, which is likely unlawful, just as the FCC's initial attempt to regulate the use of CPNI was declared unlawful by the U.S. Court of Appeals for the Tenth Circuit. The Commission should not attempt to regulate non-CPNI proprietary information, or the sharing of information among affiliates. The proposed rules go too far in attempting to require the sharing of sensitive information with competitors and in prohibiting the sharing of information between retail and wholesale divisions. Existing law on this subject is adequate and there has been no demonstration that there is a problem in this regard that needs to be fixed.

**The OCC's Comments Are Largely Irrelevant to This Docket**

The OCC complains about matters that have no bearing on the proposed carrier-to-carrier rules at issue in this proceeding, such as the outcome of CBT and AT&T's recent BLES alternative regulation proceedings. The proposed carrier-to-carrier rules have no bearing on the terms and conditions of an individual LEC's retail services, so the OCC's comments have no place in this proceeding.

The OCC also argues for imposition of various enforcement rules, as had been proposed in Case No. 99-998/99-563 several years ago. CBT would submit that the Commission appropriately abandoned that approach and should not revive it here. As CBT argued in its Application for Rehearing in that proceeding, the proposed forfeiture rules went well beyond the Commission's statutory authority and were otherwise ill-advised. OCC relates a recent service quality investigation involving Embarq as justification for such enforcement rules. But the Embarq matter had nothing to do with carrier-to-carrier issues and presents no basis for imposing such enforcement rules here. The OCC further advocates public participation in enforcement proceedings which, again, has no place in these carrier-to-carrier rules. Disputes between carriers are generally wholesale matters between carriers, not retail issues. There is no reason for end users or the OCC to have any involvement in resolving such carrier disputes.

PIC Changes

With respect to its comments on specific proposed rules, the OCC advocates a longer window in which customers can make an initial selection of a toll provider. The OCC's position should be rejected because it ignores the fact that LECs incur costs every time a customer requests a PIC change, regardless of when it is made. When a PIC selection is made with an initial order for service, the cost is recovered as part of the normal installation charge. However, when a subsequent call is made to make a PIC selection, the LEC incurs additional costs without a corresponding means of recovering them. LECs should be allowed to recover those costs, if they choose to do so. The simplest way to accomplish that is to limit the "free" PIC selection to the initial order.

Lifeline Discounts

CBT agrees with OCC's comment on Rule 21(D) that, if an ILEC will not be able to receive federal funding for services sold to a non-ETC, the ILEC should not be forced to give that carrier a Lifeline discount. ILECs should not bear the financial burden that is attributable to the other carrier being ineligible. However, CBT reads the proposed rule as only requiring the provision of a Lifeline discount to an ETC *if* the ILEC would be able to obtain reimbursement from federal and/or state funding mechanisms. Thus, if CBT's interpretation of the rule is correct, then OCC's proposed change is unnecessary. If no reimbursement is available, the non-ETC reseller receives the resale discount, but not the Lifeline discount. If, however, the Commission intended to require Lifeline discounts in all cases, the rule should be changed.

Carrier Defaults

Finally, the OCC requests to be included in the process for termination of service when a carrier defaults under an interconnection agreement. CBT does not believe it is necessary to involve the OCC in that process, as the Commission has capably overseen such situations in the past. In the event the Commission does choose to involve the OCC, CBT submits that any responsibility to notify OCC should rest only on the defaulting carrier who has the relationship with retail customers, not the underlying ILEC who would not necessarily know the identity of the retail customers involved.

**Conclusion**

CBT urges the Commission to revise its proposed Carrier to Carrier Rules in accordance with CBT's Initial Comments and these Reply Comments.

Respectfully submitted,

Douglas E. Hart (0005600)
441 Vine Street
Suite 3108
Cincinnati, OH 45202
(513) 621-6709
(513) 621-6981 fax
dhart@douglasehart.com

Attorney for Cincinnati Bell
Telephone Company LLC

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Comments was served upon each of the following persons by U.S. Mail, postage prepaid, this 23rd day of February 2007.

Douglas E. Hart

Jon F. Kelly
Mary Ryan Fenlon
AT&T
150 East Gay Street
Room 4-A
Columbus, OH 43215

Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

David C. Bergmann
Terry L. Etter
Office of the Ohio Consumers' Counsel
10 West Broad Street
Suite 1800
Columbus, OH 43215-3485

Thomas E. Lodge
Carolyn S. Flahive
Thompson Hine LLP
One Columbus
10 West Broad Street, Suite 700
Columbus, OH 43215-3435

David A. Turano
Shoemaker, Howarth & Taylor LLP
471 East Broad Street
Suite 2001
Columbus, OH 43215

Sally W. Bloomfield
Thomas O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Joseph R. Stewart
Embarq
50 West Broad Street
Suite 3600
Columbus, OH 43215-5918

Todd M. Rogers
Chester, Willcox & Saxbe, LLP
17 South High Street, Suite 900
Columbus, OH 43215-3413

R. Edward Price
One Communications Corp.
100 Chestnut Street, Suite 600
Rochester, NY 14604

Joel Lodge
Kemp, Schaeffer, Rowe & Lardier Co.
88 West Mound Street
Columbus, OH 43215-5018

Michael W. Fleming
Williams Mullen
8270 Greensboro Drive
McLean, VA 22102