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May 4, 2007

Via UPS Next Day Air and Facsimile

Ms. Reneé J. Jenkins
Director of Administration
Secretary of the Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

PUCO

2007 MAY -7 AM 10:22

RECEIVED-DOCKETING DIV

**Re: The Champaign Telephone Company v. The Ohio Bell Telephone Company
d/b/a AT&T Ohio and Level 3 Communications, LLC and ATL
Communications, Inc.; PUCO Case No. 07-369-TP-CSS**

Dear Ms. Jenkins:

Enclosed are an original and ten (10) copies of the Motion to Dismiss and Memorandum In Support of Motion to Dismiss of ATL Communications, Inc. to be filed in connection with the above-referenced matter on behalf of ATL Communications, Inc.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Davis Wright Tremaine LLP

Elleanor H. Chin

Enclosures

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

Champaign Telephone Company,

Complainant,

v.

Ohio Bell Telephone Company, d/b/a AT&T
Ohio, Level 3 Communications, LLC, and
ATL Communications, Inc.

Respondents.

Case No. 07-369-TP-CSS

**MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

**MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF MOTION TO
DISMISS**

Pursuant to Commission Rule 4901-1-12, and other applicable law and authority, ATL Communications, Inc. ("ATL") respectfully moves the Public Utilities Commission of Ohio (the "Commission") to dismiss the above-captioned complaint ("Complaint"), filed by Champaign Telephone Company ("Champaign"), as and to the extent that the Complaint claims that ATL has any liability to Champaign with respect to the matters addressed in the Complaint. The grounds for this motion are set forth below.

1. Introduction and Summary.

First, the Complaint does not allege that ATL is a "public utility" under Ohio law, nor does it allege facts that would support the conclusion that ATL is such an entity. As a result, the Commission lacks jurisdiction over ATL, and ATL is not a proper defendant in any proceeding before this Commission. See Commission Rule 4901-0-01(C)(2). The Commission can and

should dismiss the Complaint as to ATL on this basis without having even to consider the specifics of Champaign's allegations.

Second, even if the Commission had jurisdiction over ATL, the Complaint does not begin to state a cause of action against ATL. It vaguely states, in one throw-away sentence, that ATL acted "improperly;" but does not allege that any ATL action violates any statute, law, rule, regulation, or tariff provision. As a result, in statutory terms, the Complaint does not state "reasonable grounds for complaint" as required by Rev. Code § 4905.26. *See* Commission Rule 4901-9-01(C)(3). ATL should not be put to the time and expense of participating in this proceeding on the basis of such a flimsy "case" against it.

Finally, Champaign's basic claim is that it is entitled to be paid its tariffed access charges – by someone – with respect to certain traffic. Under Ohio law (and general principles of utility regulation), Champaign can only assess its tariffed charges in a manner consistent with the tariff itself. Here, nothing in Champaign's applicable tariff provisions suggests any theory on which ATL could be deemed to be Champaign's "customer." Therefore, there is no theory on which ATL could be liable to Champaign. In terms of the statutes and rules governing this proceeding, this, too, shows that Champaign has not stated "reasonable grounds for complaint" against ATL.

2. ATL Is Not Subject To The Commission's Jurisdiction.

First and foremost, the Commission should dismiss ATL from this case because the Commission lacks jurisdiction over ATL. Rev. Code § 4905.05 provides that the Commission's "jurisdiction, supervision, powers, and other duties of the public utilities commission extend to every public utility ... the plant or property of which lies wholly within this state." *See also* Rev. Code § 4905.04 (the Commission is "vested with the power and jurisdiction to supervise

and regulate public utilities [and] to require all public utilities to furnish their products and render all services exacted by the commission or by law”).

As relevant to the telephone business, a “public utility” is an entity “engaged in the business of transmitting telephonic messages to, from, through, or in this state and as such is a common carrier.” Rev. Code § 4905.03. The Complaint does not directly allege that ATL is a public utility. *See* Complaint, ¶ 4 (no allegation that ATL is a public utility); *compare id.* at ¶¶ 2, 3 (specifically alleging that other defendants are “public utilities”). Moreover, none of the specific factual allegations relating to ATL – which, as described below, are extremely sparse in any event – suggest that ATL is “engaged in the business of transmitting telephonic messages to, from, through, or in this state.”¹ Because ATL is not a public utility, the Commission has no jurisdiction over it.²

Nothing in the Commission’s statute gives it jurisdiction over third parties such as ATL, even if those third parties’ activities indirectly affect a telephone company’s activities. In this regard, Champaign does not appear to understand that ATL, as a Responsible Organization, makes use of the SMS/800 database under the terms of an FCC tariff. That tariff is filed by the several large telephone companies that actually operate that database. *See* www.sms800.com, “Becoming a RespOrg.”

¹ As described below, ATL is a “Responsible Organization” with respect to the administration of toll free numbers. As such, ATL is certified to make use of the national database of such numbers to input and update call routing instructions for the numbers that ATL administers on behalf of its own customers. ATL does not, in its capacity as a Responsible Organization, send, receive, originate, terminate, transmit or switch any traffic. All of those functions are performed by carriers – such as Champaign and AT&T.

² *See Steven Carp, Complainant, v. AT&T Ohio, Respondent*, Case No. 07-91-TP-CSS 2007 Ohio PUC LEXIS 262 (2007) (dismissing allegations of a complaint that related to Yellow Pages advertising, because Yellow Pages advertising is not a “telephone service”).

In other words, in ATL's toll free number administration role – that is, as a Responsible Organization – ATL *purchases* services from a tariff – the SMS/800 tariff. It does not *supply* services pursuant to a tariff, as it might if it were a public utility.

It is true that the routing instructions that ATL puts into the SMS/800 database, on behalf of its customer, will affect how calls to the customer's toll free number are provided. But that does not mean that ATL has any role in actually *providing* the telecommunications services that are involved. When ATL puts routing instructions into the SMS/800 database for its customer (an entity that subscribes to a toll free number), ATL is, in effect, setting the stage so that certain telecommunications services will be provided, directly or indirectly, to its customer. Those services, however, are provided by the carriers when an end user actually calls the toll free number in question. At that point, in accordance with the routing instructions in the database, the call was routed from the originating ILEC (in this case, Champaign), through (in this case) AT&T, and then on to (in this case) Level 3.

ATL takes no position on whether, in fact, the particular call routing just noted creates an obligation on the part of any of the carriers involved to make payments to any of the other carriers involved, either for access charges or for some other charges. Our point is simply that *ATL* does not provide any telecommunications services to anyone, at any stage of the process, either inside or outside of Ohio. As a result, ATL cannot be viewed as a "public utility" by virtue of performing its functions as a "Responsible Organization."

The Commission's rules reflect, albeit indirectly, the fact that ATL does not belong in this case. Commission Rule 4901-1-10 identifies the entities that are properly viewed as "parties" to Commission proceedings. While public utilities can be parties, *see* Rule 4901-1-

10(A)(2), and while persons complaining about the acts of public utilities can be parties, *see* Rule 4901-1-10-(A)(1), nothing in the Commission's rules suggests that a non-utility entity such as ATL can properly be a defendant in a matter before the Commission. In this regard, as noted above, the statute (Rev. Code § 4905.04) states that the Commission is "vested with the power and jurisdiction to supervise and regulate public utilities [and] to require all public utilities to furnish their products and render all services exacted by the commission or by law." The Commission is not given general jurisdiction over the actions of customers of public utilities, much less over third parties such as ATL.

Because ATL is not a "public utility," the Commission lacks jurisdiction over ATL, and the Complaint should be dismissed as against ATL.

3. The Complaint Does Not State A Claim Against ATL And, Therefore, There Are No "Reasonable Grounds" For The Complaint.

The Complaint does not identify any statute, law, rule, regulation or tariff provision that ATL supposedly violated. ATL certainly cannot be liable to Champaign if – as is evident from the Complaint – Champaign cannot point to anything that ATL supposedly did wrong. In these circumstances, "reasonable grounds for complaint" have not been stated, *see* Rev. Code. § 4905.26, and the Complaint should be dismissed as to ATL.

The Complaint mentions ATL in only four places. Paragraph 4 identifies ATL as a "Responsible Organization" ("RespOrg") and states that it has provided its services as a RespOrg in Ohio. (This latter assertion is false; but the Commission may assume it to be true for purposes of considering this motion.) ATL is, indeed, a RespOrg, but obviously there is nothing illegal or

inappropriate about that – whether in Ohio or elsewhere. Of course, nothing in the Complaint suggests that there is anything wrong with being a RespOrg.³

Paragraph 10 of the Complaint states that “in its capacity as a Resp Org, ATL populated the SMS/800 database” so that calls to the affected toll free number would route to a specific plain old telephone service (“POTS”) number assigned to Level 3. This is true; but Champaign seems unaware of the fact that establishing routing instructions for toll free numbers – in accordance with the instructions of the customers who subscribe to those numbers – is what RespOrgs *do*.⁴ There is nothing illegal or inappropriate about a RespOrg such as ATL establishing instructions so that a particular toll free number will route to a particular POTS number, and nothing in the Complaint suggests that there is.⁵

The Complaint does not mention ATL again until Paragraph 28. That paragraph states, in its entirety, as follows:

³ Generally speaking a RespOrg is an entity that has been certified as competent to manage customer’s orders for toll free numbers by means of interfacing with the national SMS/800 database. While carriers can be and often are RespOrgs, RespOrgs do not need to be carriers, and many are not. The RespOrg function does not entail providing any telecommunications services of any kind. Essentially, the Resp Org assists a user of a toll free number in ensuring that the user obtains the services that it needs from carriers – such as Champaign and AT&T in this case – in order to have calls dialed to the user’s toll free number routed as directed by the user. See *Toll Free Service Access Codes, et al.*, Fifth Report and Order in Docket No. 95-155, Order in NSD File no. L-99-87, Order in NSD File L-99-88, 15 FCC Rcd 11939 (2000) at ¶ 3.

⁴ In the words of the Federal Communications Commission (“FCC”), “RespOrgs are carrier and non-common carrier entities that are certified by DSMI to access and use information in the centralized SMS/800 database. RespOrgs search for and reserve toll free numbers for their customers, and create and maintain the associated call processing records that are stored in the centralized SMS/800 database. Under the terms of the SMS/800 Tariff, RespOrgs pay monthly charges for each number they reserve or manage.” *Toll Free Service Access Codes, et al.*, Fifth Report and Order in Docket No. 95-155, Order in NSD File no. L-99-87, Order in NSD File L-99-88, 15 FCC Rcd 11939 (2000) at ¶ 3.

⁵ As noted above, RespOrgs obtain access to, and make use of, the SMS/800 database under the terms of a federal tariff filed by the carriers that actually run the SMS/800 database. Champaign has not remotely suggested that ATL’s actions in this case were in any way contrary to the terms of the tariff under which it makes use of the SMS/800 database. But even if Champaign were to somehow concoct such a claim, this Commission would lack jurisdiction over it because the tariff in question is interstate in nature, on file with the FCC.

Champaign believes and submits that ATL improperly directed that calls to 877-398-0770 be routed to Level 3, which resulted in Champaign receiving no compensation for originating the calls in question. Accordingly, ATL is responsible for any and all damages incurred by Champaign as a result of ATL's conduct.

If Champaign really "believes" that ATL's actions in establishing call routing for a toll free number in accordance with the instructions of its own customer are "improper," that can only be a result of Champaign's lack of understanding as to how the SMS/800 system works. There is nothing illegal or inappropriate about a toll free number being routed to a Level 3 POTS number (or any other POTS number). Certainly nothing in the Complaint identifies any statute, any law, any regulation, any rule, or any tariff provision that was, could have been, or might have been violated by ATL "direct[ing] that calls to 877-398-0770 be routed to Level 3." Champaign's vague, unspecified, and unsupported assertion – that ATL's establishment of these call routing instructions was done "improperly" – does not state "reasonable grounds for complaint." Yet this vague and unsupported claim is all that Champaign asserts as a basis for saying that ATL is "responsible" for Champaign's "damages."⁶

The Complaint's final mention of ATL is in Paragraph 29(c), where Champaign asks the Commission to find "that AT&T of Ohio, Level 3, and/or ATL are liable to Champaign" for the access charges that Champaign believes apply to the traffic in question. Here again, however, nothing in the complaint indicates that ATL has done anything wrong. ATL is aware of no precedent – and the Complaint cites none – that would suggest that a RespOrg would ever be

⁶ In this regard, other than its apparent problems in collecting its access charges from AT&T, which are discussed below, nothing in the complaint suggests that Champaign has experienced any "damages" at all. Its sole gripe, so to speak, is that it did not receive the tariffed access charges it thought it would receive. There is no allegation that Champaign's property was damaged in any way, or that Champaign incurred any out-of-pocket costs (as opposed to uncollected access revenues) by virtue of its customers making calls to the affected toll free number. Note in this regard that the Commission does not have general jurisdiction over contract or tort "damages" claims.

responsible for access charges that may (or may not) be due in connection with calls to toll free numbers the routing instructions of which the Resp Org has established. In effect, the RespOrg, by managing call routing instructions on behalf of its customer (the user of the toll free service), establishes the physical path that calls are supposed to travel. But the question of whether calls traveling that physical path are, or are not, subject to access charges (or any other charges), is a matter between the carriers that actually handle the call.

In sum, although the Complaint *mentions* ATL, and baldly *claims* that ATL should be liable to Champaign, nothing in the Complaint identifies any legal duty that ATL supposedly breached, or any contractual or tariff provision that ATL supposedly assented to, that would *support* a finding of liability. The Complaint, therefore, has failed to state “reasonable grounds” for any claim against ATL, and should be dismissed.

4. There Are No Reasonable Grounds For The Complaint Against ATL Because Champaign’s Access Tariff Does Not Contemplate Imposing Charges On ATL.

It is settled law that a utility providing a service under a tariff is obliged to abide by the terms and conditions of its tariff. *See* Ohio Rev. Code Ann. § 4905.32 (“No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.”) *See also Suburban Power Co. v. Public Utilities Commission of Ohio*, 123 Ohio St. 275; 175 N.E. 202, 204 (1931). The Commission has authority and jurisdiction over Champaign’s access tariff, and the Commission may and should consider the terms of that tariff in evaluating this Motion.⁷

⁷ Champaign’s Tariff P.U.C.O. No. 1 is available via the Commission’s web site. That tariff incorporates by reference the National Exchange Carriers Association (“NECA”) tariff discussed below.

Champaign is seeking to receive its tariffed intrastate originating access charges for handling calls that its subscribers dialed to a particular toll free number. Champaign's access tariff, however, does not permit imposing access charges on ATL. Therefore, ATL cannot possibly be liable to Champaign, and should be dismissed from this case.

Champaign's P.U.C.O. No. 1 does not set forth its own separate "terms and conditions." Instead, at Section No. 1, Fifth Revised Sheet No. 1 (effective November 7, 2003), Champaign "adopts the Interstate Access Service Tariffs filed by the National Exchange Carrier Association [NECA] set forth below as they now exist and as they may be subsequently modified for intrastate access charge purposes." Champaign specifically adopts Section 2 of NECA's Tariff FCC No. 5, which sets out the general terms and conditions on which access service is provided. *See id.*; *see also* Complaint at ¶ 26 (noting that Champaign has adopted NECA Tariff FCC No. 5, and relying on that tariff to claim a right to a late payment penalty).

The NECA tariff defines who is a "customer" purchasing access services under the tariff in the following terms:

The term "Customer(s)" denotes any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity *which subscribes to the services offered under this tariff*, including both Interexchange Carriers (ICs) and End Users.

NECA Tariff FCC No. 5, Section 2.6, 3rd Revised Page 2-65.1 (Effective March 9, 2000)

(emphasis added). For ATL to be liable to Champaign for tariffed access charges, ATL must

Because the NECA tariff is incorporated by reference into Champaign's Tariff P.U.C.O. No. 1, the NECA tariff must be deemed to be a part of the tariff that Champaign has filed with the Commission and that the Commission has permitted to take effect. Therefore, it is appropriate – indeed, in fairness, required – that the Commission take official notice of the contents of the NECA tariff as well. It is available on-line at: www.neca.org/media/tariff5.pdf. For the convenience of the Commission, we are attaching those portions of the NECA tariff that we refer to in this Motion.

meet the tariff's definition of a "customer." Yet ATL plainly does not meet that definition. ATL does not "subscribe to the services offered under" Champaign's access tariff, and nothing in the Complaint alleges or suggests that it does.

There can be no doubt that the "customer" is the entity that subscribes to and receives access services from Champaign. Section 1.1 of the NECA tariff provides:

1. Application of Tariff: 1.1 This tariff contains regulations, rates and charges ***applicable to the provision of*** End User Access, Switched Access, Special Access, Digital Subscriber Line Access Service, Public Packet Data Network and other miscellaneous services hereinafter referred to collectively as service(s). ***These services are provided to customers*** by the Issuing Carriers of this tariff, hereinafter the Telephone Company. This tariff also contains Access Ordering regulations and charges that are applicable when these services are ordered or modified by the customer.

NECA Tariff FCC No. 5, 7th Revised Page 1-1 (Effective July 1, 2003) (emphasis added).

Indeed, the very section of this tariff on which Champaign relies in its claim for late payment penalties, Section 2.4.1 (*see* Complaint at ¶¶ 26, 29), makes clear that only "customers" are liable under the tariff:

2.4.1. (C) Payment Dates and Late Payment Penalties (1) ***All bills dated as set forth in (B)(2) preceding for service***, other than End User Service, Federal Universal Service Charge, ISDN Line Ports, DS1 Line Port, Digital (C) Subscriber Line Access Service and Presubscription Service ***provided to the customer by the Telephone Company*** are due 31 days (payment date) after the bill day or by the next bill date (i.e., same date in the following month as the bill date), whichever is the shortest interval, except as provided herein, and are payable in immediately available funds. If the customer does not receive a bill at least 20 days prior to the 31 day payment due date, then the bill shall be considered delayed. When the bill has been delayed, upon request of the customer the due date will be extended by the number of days the bill was delayed. Such request of the customer must be accompanied with proof of late bill receipt.

NECA Tariff FCC No. 5, 5th Revised page 2-29 (Effective August 25, 2004) (emphasis added).

Again, it is completely clear that the only entities liable to Champaign under this tariff are “customers” who have received “services” “provided by” Champaign.

Champaign has alleged no facts or legal theories – because there are none – under which ATL could remotely be construed to be a “customer” of Champaign. For this reason as well, Champaign has failed to state “reasonable grounds for complaint” against ATL. As a result, ATL must be dismissed from this case.

5. Conclusion

The gist of this case is that Champaign believes that it is entitled to receive originating access charges for certain calls that its customers dialed to a particular toll free number. ATL takes no position with respect to whether that traffic is subject to access charges at all; with respect to whether, if so, what access charges might apply; or with respect to which entity in the call path – carrier or end user – might conceivably be liable for them. ATL takes no position on these issues because ATL is not a public utility in Ohio; it is not involved in the origination, switching, transport or termination of any of the affected calls; and the Complaint does not

identify any legal duty that ATL supposedly breached that could support any liability on ATL's part. For these reasons, the Complaint should be dismissed as to ATL.

Respectfully submitted,
ATL Communications, Inc.

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Dated: May 4, 2007

EXHIBIT: CITED PAGES FROM NECA TARIFF F.C.C. NO. 5

ACCESS SERVICE

1. Application of Tariff

- 1.1 This tariff contains regulations, rates and charges applicable to the provision of End User Access, Switched Access, Special Access, Digital Subscriber Line Access Service, Public Packet Data Network and other miscellaneous services hereinafter referred to collectively as service(s). These services are provided to customers by the Issuing Carriers of this tariff, hereinafter the Telephone Company. This tariff also contains Access Ordering regulations and charges that are applicable when these services are ordered or modified by the customer. (C)
- 1.2 The provision of such services by the Telephone Company as set forth in this tariff does not constitute a joint undertaking with the customer for the furnishing of any service.
- 1.3 Pursuant to the Federal Communications Commission's June 29, 1987 Order in CC Docket No. 86-467 and Section 69.603 of the Commission's Rules, NECA "shall also prepare and file an access charge tariff containing terms and conditions for access service and form for the filing of rate schedules by telephone companies that choose to reference these terms and conditions while filing their own access rates." This tariff complies with this Order and Rule requirement and may be referenced by small companies that serve fewer than 50,000 subscriber lines and are described as subset 3 carriers (Section 61.39 of the Commission's Rules). This tariff referencing by small companies is solely for the purpose of reduced regulation of small companies as ordered by the FCC and does not constitute a joint undertaking with the Telephone Company for the furnishing of any service.

Transmittal No. 988

Issued: June 16, 2003

Effective: July 1, 2003

Director - Access Tariffs
80 So. Jefferson Road, Whippany, NJ 07981

ACCESS SERVICE

2. General Regulations(Cont'd)2.4 Payment Arrangements and Credit Allowances (Cont'd)2.4.1 Payment of Rates, Charges and Deposits (Cont'd)(C) Payment Dates and Late Payment Penalties

- (1) All bills dated as set forth in (B)(2) preceding for service, other than End User Service, Federal Universal Service Charge, ISDN Line Ports, DS1 Line Port, Digital Subscriber Line Access Service and Presubscription Service provided to the customer by the Telephone Company are due 31 days (payment date) after the bill day or by the next bill date (i.e., same date in the following month as the bill date), whichever is the shortest interval, except as provided herein, and are payable in immediately available funds. If the customer does not receive a bill at least 20 days prior to the 31 day payment due date, then the bill shall be considered delayed. When the bill has been delayed, upon request of the customer the due date will be extended by the number of days the bill was delayed. Such request of the customer must be accompanied with proof of late bill receipt. (C)

Transmittal No. 1035

Issued: August 10, 2004

Effective: August 25, 2004

Director - Access Tariffs
80 So. Jefferson Road, Whippany, NJ 07981

ACCESS SERVICE

2. General Regulations (Cont'd)2.6 Definitions (Cont'd)Communications System

The term "Communications System" denotes channels and other facilities which are capable of communications between terminal equipment provided by other than the Telephone Company.

Customer(s)

The term "Customer(s)" denotes any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) and End Users.

Customer Node

The term "Customer Node" denotes Telephone Company provided equipment located at a customer designated premises that terminates a high speed optical channel.

(x) Issued to reflect new corporate address.

Transmittal No. 855

Issued: February 23, 2000

Effective: March 9, 2000

Director - Access Tariffs
80 So. Jefferson Road, Whippany, NJ 07981

Certificate of Service

I hereby certify that on this 4th day of May, 2007, I caused a copy of the foregoing

"MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF MOTION TO

DISMISS" to be served by first-class mail on the parties to this proceeding, as indicated below.

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