

**FILE**

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**AT&T OHIO,**

**Complainant,**

**v.**

**UNITED TELEPHONE COMPANY OF  
OHIO D/B/A EMBARQ,**

**Respondent.**

**Case No. 07-755-TP-CSS**

**COMPLAINT**

Complainant AT&T Ohio<sup>1</sup>, by its undersigned attorneys, files this Complaint against Respondent United Telephone Company of Ohio d/b/a Embarq ("Embarq")<sup>2</sup> pursuant to R.C. §§ 4905.06, 4905.22, 4905.26, and 4905.31. In support thereof AT&T Ohio states as follows:

**THE PARTIES**

1. AT&T Ohio is an Ohio corporation with its principal place of business in Ohio. AT&T Ohio provides telephone exchange service, exchange access, and other telecommunications and information services within the State of Ohio. AT&T Ohio is a public utility as that term is defined in section 4905.02 of the Ohio Revised Code.

2. Embarq is an Ohio corporation with its principal place of business in Ohio. Embarq provides telephone exchange service, exchange access, and other telecommunications and information services within the State of Ohio. Embarq is a public utility as that term is defined in section 4905.02 of the Ohio Revised Code.

<sup>1</sup> The Ohio Bell Telephone Company uses the name AT&T Ohio.

<sup>2</sup> For ease of reference, the parties' current names are used throughout this Complaint. They used different names during the time period (and in the agreements) in question.

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## **JURISDICTION AND VENUE**

3. This Commission has jurisdiction over this Complaint pursuant to R.C. §§ 4905.06, 4905.22, 4905.26, and 4905.31.

## **GENERAL ALLEGATIONS**

4. This Complaint seeks a Commission order that Embarq's attempt to collect from AT&T Ohio amounts that Embarq claims AT&T Ohio owes for services provided to the State of Ohio are unreasonable, unlawful and otherwise in contravention of the law and Embarq's own agreements and tariffs.

5. On July 7, 1995 the State of Ohio Department of Administrative Services ("SODAS" or "State") issued a Request for Proposal, which was subsequently amended and clarified (collectively referred to as "the RFP") for the State of Ohio Multi-Agency Communications System ("SOMACS"). The RFP states that the contract between the State and participating carriers "shall consist of the RFP as modified by any addenda" as well as the successful carrier's proposal, a signed contract, and any purchase orders entered by the State. The RFP further states that "BY SUBMITTING A PROPOSAL, THE CONTRACTOR ACKNOWLEDGES THAT IT HAS READ THIS RFP, UNDERSTANDS IT AND AGREES TO BE BOUND BY ITS TERMS" and that the Contract with the State (defined to include the RFP) "IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE CONTRACT BETWEEN THE PARTIES."

6. With regard to the services to be obtained by the State, the RFP requires "Best Pricing." Section 3.33 of the RFP mandates that "[s]tate agencies charges shall be reduced to the lowest prices offered any customer of equal or smaller volumes . . . if those become lower than prices quoted in this Contract." Further, Section 3.6 of the RFP states that "[t]o the extent the Contractor has tariffs filed with the Public Utilities Commission of Ohio that regulate or pre-

empt particular provisions of the RFP or Contractor response, such tariffs shall supersede the affected provisions.”

7. Subsequently, AT&T Ohio and Embarq entered into a Teaming Agreement, under the terms of which the parties jointly prepared and submitted a Response to the RFP (the “Proposal”) dated October 31, 1995. The Teaming Agreement was necessary because SODAS required services to be provided, in many instances, outside the exchanges in which AT&T Ohio is authorized to provide service. Similar Teaming Agreements were entered into with other incumbent local exchange carriers (“ILECs”) in Ohio.

8. Some time later, AT&T Ohio was notified that the SOMACS bid was tentatively awarded by SODAS to the group of carriers that included AT&T Ohio, Embarq, and others. SODAS stated its desire that AT&T Ohio would serve as the prime contractor and single point of contact and that Embarq and the other ILECs serve as one of the subcontractors to AT&T Ohio for the SOMACS project.

9. To implement the State’s request and carry out the Contract with the State, on February 1, 1996 AT&T Ohio and Embarq entered into a Subcontractor Agreement with respect to the SOMACS project.

10. The Subcontractor Agreement specified that AT&T Ohio would, from time to time, and as telecommunications service manager for SODAS, order in SODAS’ name those services offered by Embarq in the Proposal. Section 2 of the Subcontractor Agreement describes the RFP and the Proposal as the “Governing Documents.” It then states that Embarq “acknowledges and agrees that it shall be fully bound by all of the applicable terms and conditions of the above-referenced documents with respect to the services provided by [Embarq] to SODAS.” Section 2 then provides that “[t]he rights and obligations of [Embarq] and [AT&T

Ohio] shall be those specified in the RFP and the Proposal, . . . which documents are attached hereto and incorporated herein by this reference,” except for additional or different issues addressed by the Subcontractor Agreement.

11. The Subcontractor Agreement also addressed ordering, billing, and other aspects of the parties’ relationship. In particular, section 5(a) of the Subcontractor Agreement makes clear that it “does not constitute the purchase and resale by [AT&T Ohio] of [Embarq’s] services.” Instead, AT&T Ohio is to order services “in SODAS’ name” as SODAS’ agent, and Embarq is to “provide those ordered services to SODAS.” Section 4(a) specifies that Embarq would “periodically issue an invoice” to AT&T Ohio “as telecommunications service manager for SODAS.”

12. Consistent with the fact that AT&T Ohio was not purchasing any services from Embarq, but simply acting as a clearinghouse for the State, Section 4(a) expressly states that AT&T Ohio “undertakes no collection obligation” and that AT&T Ohio “shall not be obligated to make a payment to [Embarq] *unless and until, or to the extent that, [AT&T Ohio] has been paid by SODAS* for [Embarq’s] services.” (Emphasis added.)

13. The Agreement includes an attachment with a list of prices that was apparently finalized on or about February 28, 1996. In paragraph 3(b) of the Agreement, it is specified that the prices “shall be firm for ten (10) years from the date of this Agreement.”

14. Thereafter, AT&T Ohio and Embarq began to operate under the RFP and the Subcontractor Agreement. As SODAS ordered services in Embarq’s territory, they were provisioned and installed by Embarq, as needed. Embarq’s bills to AT&T Ohio from the inception of the parties’ relationship reflected Embarq’s tariff rates, and not the rates appearing in the list attached to the Subcontractor Agreement.

15. AT&T Ohio paid Embarq's bills and received payment from the State for the amounts billed to the State. AT&T Ohio requested clarification of Embarq's bills but did not receive a satisfactory response.

16. On information and belief, Embarq never implemented the price list attached to the Subcontractor Agreement in its billing system (for example, Embarq did not create a contract-specific USOC for the rates listed).

17. For nearly eight years, Embarq continued to bill AT&T Ohio its tariffed rates, provided notices of tariff rate changes, and treated SODAS as a tariff customer in all respects.

18. On September 16, 2004, in response to a billing inquiry by AT&T Ohio, Embarq claimed that AT&T Ohio had "purchased services outside the contract from [Embarq's] tariffs," and asserted that Embarq should have instead billed AT&T Ohio at the rates listed in the attachment to the Subcontractor Agreement. Embarq then claimed that AT&T Ohio owed it an additional \$9,696,996 for services provided to the State for the relevant time period.

19. Following extensive negotiations, Embarq persists in its erroneous view that AT&T Ohio "underpaid" for the services rendered to the State from 1996 - 2004. It has, however, adjusted its claim downward to approximately \$5 million (the "disputed amounts").

20. AT&T Ohio and Embarq have engaged in a series of communications in the hopes of reaching agreement on the issue presented, but those attempts have been unsuccessful. Embarq persists in its demand that AT&T Ohio pay Embarq for services that Embarq provided to the State – services for which Embarq has already received payment up to eight years ago based on Embarq's own bills and Embarq's own tariffs. The Subcontractor Agreement states that "all disputes arising under this Agreement shall be resolved in the appropriate forum in the State of Ohio." AT&T Ohio accordingly seeks declaratory relief.

21. A "contract may be construed by a declaratory judgment or decree either before or after there has been a breach of contract." R. C. § 2721.04. The three elements necessary to obtain a declaratory judgment are: (1) that a real controversy between adverse parties exists; (2) which is justiciable in character; and (3) that speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost. *Herrick v. Kosydar*, 339 N.E.2d 626, 627 (Ohio, 1975).

22. These elements have been met. There is a real, justiciable controversy between AT&T Ohio and Embarq over the proper rates for the services rendered by Embarq. Moreover, speedy relief is necessary to the preservation of AT&T Ohio's rights.

#### **COUNT I**

23. AT&T Ohio repeats paragraphs 1-22 as though fully set forth herein.

24. The Subcontractor Agreement between AT&T Ohio and Embarq unambiguously states that AT&T Ohio is not purchasing services from Embarq, and that AT&T Ohio "shall not be obligated to make a payment to [Embarq] unless and until, or to the extent that, [AT&T Ohio] has been paid by SODAS for [Embarq's] services."

25. Under the plain language of the Subcontractor Agreement, AT&T Ohio cannot be obligated to make any further payments to Embarq, based on Embarq's attempt to change its bills long after Embarq's receipt and acceptance of payment, because AT&T Ohio has not been paid by SODAS for these Embarq-altered amounts.

26. AT&T Ohio is entitled to a declaration that it has no obligation to pay Embarq any part of the disputed amounts.

#### **COUNT II**

27. AT&T Ohio repeats paragraphs 1-26 as though fully set forth herein.

28. The RFP issued by the State, which was accepted by Embarq and incorporated into the Subcontractor Agreement, requires "Best Pricing." It mandates that the State's charges "shall be reduced to the lowest prices offered any customer of equal or smaller volumes . . . if those become lower than prices quoted in this Contract." It further provides that "[t]o the extent the Contractor has tariffs filed with the Public Utilities Commission of Ohio that regulate or preempt particular provisions of the RFP or Contractor response, such tariffs shall supersede the affected provisions."

29. The intent of the parties' agreements, as demonstrated by the RFP and confirmed by Embarq's course of performance, is that the State would not be required to pay any more than the tariffed rates for services rendered by Embarq.

30. Embarq has breached the agreements by attempting to increase its prices above the tariffed rates, after having billed and accepted payment at the tariffed rates for several years.

31. AT&T Ohio is entitled to a declaration that it has no obligation to pay Embarq for any part of the disputed amounts.

### **COUNT III**

32. AT&T Ohio repeats paragraphs 1-31 as though fully set forth herein.

33. Embarq established a practice of provisioning and billing the requested services under its tariff and at tariffed rates. AT&T Ohio reasonably relied on Embarq's bills as they were presented. Embarq received and accepted payment at tariffed rates for years.

34. Embarq has waived, and/or is estopped or otherwise barred from asserting, any claim that it is entitled to payment above the tariffed rates.

35. AT&T Ohio is entitled to a declaration that it has no obligation to pay Embarq any part of the disputed amounts.

#### COUNT IV

36. AT&T Ohio repeats paragraphs 1-35 as though fully set forth herein.

37. Embarq established a practice of provisioning and billing the requested services under its tariff and at tariffed rates. For Embarq to later insist on payment at different rates is an unreasonable practice under R. C. § 4905.26 and would result in unjust enrichment.

38. The Commission should declare that Embarq's practice of billing tariff rates and accepting payment accordingly for over eight years established a practice from which Embarq cannot now deviate.

39. R. C. § 4905.22 provides:

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

40. Embarq's claim that AT&T Ohio owes more than it has already paid (from the State) violates the requirement that every public utility provide service and facilities that are adequate and in all respects just and reasonable. Its claim also violates the requirement that all charges be just and reasonable.

41. Under R. C. § 4905.31, the Commission may change, alter, or modify any arrangement between two public utilities. To the extent the agreements are construed to support Embarq's claim, they should be modified by the Commission to reflect the manner in which Embarq implemented the Subcontractor Agreement over the first eight years of its existence and the course of dealing between the parties.



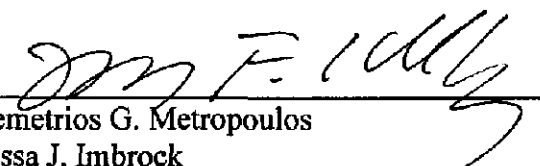
42. The Commission should grant any and all such further relief as the Commission deems appropriate.

Dated: June 27, 2007

Respectfully submitted,

AT&T Ohio

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on June 27, 2007  
by first class mail, postage prepaid, and by e-mail and hand delivery, as indicated, on the  
following parties:

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