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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. 07-755-TP-CSS**
	)	
UNITED TELEPHONE COMPANY OF OHIO D/B/A EMBARQ,	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF EMBARQ'S MOTION TO DISMISS AT&T'S COMPLAINT

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Dated: September 19, 2007

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Respondent United Telephone Company of Ohio, d/b/a Embarq ("Embarq"), respectfully submits this Memorandum in Support of Embarq's Motion to Dismiss AT&T's Complaint.

INTRODUCTION

It is black-letter law that this Commission lacks jurisdiction to adjudicate parties' rights and responsibilities under contracts, even when those contracts involve public utilities. Yet that is exactly what AT&T's Complaint asks this Commission to do -- issue a declaratory judgment in AT&T's favor in a dispute regarding a February 1, 1996 contract (the "Subcontractor Agreement") between Embarq and AT&T.

Under the Subcontractor Agreement, AT&T and Embarq worked together to provide services to the State of Ohio, for a project known as the State of Ohio Multi-Agency Communications System (the "SOMACS" project). AT&T was the prime contractor with the State for the SOMACS project, and the Subcontractor Agreement set forth the terms and conditions for Embarq's work as subcontractor.

As prime contractor, AT&T was required to bill the State of Ohio for Embarq's services. AT&T was then required to remit to Embarq sums it received from the State of Ohio for those services based on the rates in the Subcontractor Agreement. However, based in part on an admission from an AT&T employee, Embarq believes that AT&T engaged in an improper arbitrage scheme, under which AT&T systematically billed the State of Ohio more for Embarq's services than AT&T remitted to Embarq for those services. As a result, AT&T retained approximately $5 million in payments from the State of Ohio that Embarq believes AT&T should have remitted to Embarq under the Subcontractor Agreement. AT&T, by contrast, claims that the Subcontractor Agreement did not require it to remit the approximately $5 million in dispute to Embarq. (Complaint, ¶¶ 19, 25.)

AT&T's Complaint seeks a declaratory judgment from this Commission that AT&T has no obligation to pay Embarq the $5 million in dispute. Counts I-III of AT&T's Complaint clearly state that AT&T seeks a declaratory judgment regarding the parties' rights ***under the Subcontractor Agreement***. These Counts assert that AT&T is entitled to a declaratory judgment based on AT&T's allegations regarding "the plain language of the Subcontractor Agreement" (Count I, ¶ 25), AT&T's allegations that "Embarq has breached" the Subcontractor Agreement (Count II, ¶ 30), and AT&T's allegations that Embarq "has waived, and/or is estopped" from asserting claims against AT&T under the Subcontractor Agreement (Count III, ¶ 34). None of those Counts even ***mentions*** this Commission's authority to enforce Chapter 4905, Ohio Revised Code, much less asserts that AT&T is properly invoking this Commission's jurisdiction to enforce the requirements of Chapter 4905. The Commission must dismiss these Counts because they allege state common-law contract claims not within the Commission's jurisdiction.

Count IV of AT&T's Complaint ***purports*** to allege that Embarq's attempt to enforce the Subcontractor Agreement violates the requirement of Ohio Rev. Code Section 4905.22 that public utilities provide services on "just and reasonable" terms. However, it is well-settled that the Commission must look to the ***substance*** of a claim, rather than its form, to determine whether the Commission has jurisdiction. Here, the substance of AT&T's Count IV plainly is based on the parties' disagreement regarding the interpretation of Subcontractor Agreement. AT&T cannot transform this garden-variety contract dispute into a claim under Section 4905.22 merely by alleging that Embarq's attempt to enforce the Subcontractor Agreement constitutes an "unjust or unreasonable" practice. Count IV of AT&T's Complaint should be dismissed as well.

Finally, the Subcontractor Agreement was a contract under which Embarq was to provide services to the State of Ohio at reduced prices. Section 4905.34 makes clear that such contracts

are not subject to the requirements of Chapter 4905, and the Ohio Supreme Court has held that the Commission has no jurisdiction to adjudicate disputes regarding such contracts. Thus, the Commission has no jurisdiction to adjudicate the parties' dispute regarding the Subcontractor Agreement, and it should dismiss AT&T's Complaint on that basis as well.

BACKGROUND

In July 1995, the State of Ohio Department of Administrative Services ("SODAS") issued a Request for Proposals ("RFP) seeking bids for the SOMACS project, which was designed to develop telecommunications services for various agencies of the State of Ohio. (Complaint, ¶ 5.) Embarq and AT&T, together with other telecommunications companies throughout Ohio, entered into "Teaming Agreements" to develop a joint bid for the SOMACS project. (*Id.*, ¶ 7.) Their joint bid was accepted by SODAS. (*Id.*, ¶ 8.)

Following the acceptance of the parties' joint bid, Embarq and AT&T entered into the Subcontractor Agreement on February 1, 1996. (*Id.*, ¶ 9.) The purpose of the Subcontractor Agreement was to set forth terms and conditions under which Embarq and AT&T would provide services to SODAS for the SOMACS project. For example, the "WHEREAS" clauses recited the history of the parties' bid for the SOMACS project, then stated that the agreement's purpose was "to set forth [Embarq's and AT&T's] respective rights and obligations with respect to the SOMACS Project." (Exhibit (hereinafter "Ex.")1, at 1.)

Among other things, the Subcontractor Agreement established the parties' rights and responsibilities with respect to ordering, billing, and pricing for the services Embarq was to provide to SODAS. (Complaint, ¶ 11.) With respect to ordering, the Subcontractor Agreement provided that AT&T would "from time to time . . . as telecommunications service manager for SODAS, order in SODAS' name those services offered by [Embarq] . . . ." (Ex. 1, ¶ 3(a).) The

Subcontractor Agreement further provided that AT&T would be exercising "agency authority" for SODAS when it ordered services from Embarq. (*Id.*)

With respect to pricing for Embarq's services, Embarq "reaffirm[ed]" in the Subcontractor Agreement that its prices "shall be firm for ten (10) years from the date" of the Subcontractor Agreement. (*Id.*, ¶ 3(b).) In order for Embarq to obtain payment for its services, the Subcontractor Agreement provided that Embarq was to issue an invoice "in the name of [AT&T], as telecommunications service manager for SODAS, for those services provided to SODAS by [Embarq]." (*Id.*, ¶ 4(a).) AT&T would then consolidate Embarq's bills with bills from other telecommunications carriers, and submit the consolidated bill to SODAS. (*Id.*) AT&T was then to "remit to [Embarq] its share of the payment" received from SODAS. (*Id.*)

The Subcontractor Agreement provided that AT&T would not undertake any "collection obligation with respect to services performed by [Embarq] for SODAS[.]" (*Id.*) AT&T also was not obligated to remit payment to Embarq for its services, ***unless*** AT&T first received payment from SODAS for those services. (*Id.*) However, once AT&T received payment from SODAS for Embarq's services, the Subcontractor Agreement required AT&T to remit those payments to Embarq "to the extent that, [AT&T] has been paid by SODAS for [Embarq's] services." (*Id.*)

At the time the Subcontractor Agreement was signed, the rates quoted by Embarq were, in the aggregate, lower than Embarq's tariffed rates for the same services. (Exhibit, (hereinafter "Ex.") 2, ¶ 5.) At the time the Subcontractor Agreement was signed in 1996, it was generally understood within the telecommunications industry that rates for these types of services could increase over time. (*Id.*, ¶ 6.) Thus, by agreeing to maintain the prices in the Subcontractor Agreement for 10 years, Embarq not only agreed to provide services to SODAS at rates below

the then-current tariffed rates for the same services, it also gave SODAS protection against future price increases for those services. (*Id.*)

However, over time, Embarq's tariffed rates declined, and ultimately became lower in the aggregate than the rates in the Subcontractor Agreement. (*See id.*, ¶ 8.) Because of the manner in which AT&T ordered services from Embarq and the nature of Embarq's billing system, Embarq invoiced AT&T for services provided to SODAS based on the rates in Embarq's tariffs, rather than the rates set forth in the Subcontractor Agreement. (*Id.*, ¶ 7.) AT&T, in turn, remitted payment to Embarq from SODAS based on the lower, tariffed rates. (*Id.*, ¶ 8.) The difference between the rates Embarq was to receive for its services under the Subcontractor Agreement, and the lower tariffed rates, is approximately $5 million. (*Id.*; Complaint, ¶ 19.)

AT&T's Complaint alleges that AT&T does not owe Embarq the approximately $5 million in dispute, in part because AT&T "has not been paid by SODAS for these Embarq-altered amounts." (Complaint, ¶ 25.) However, in a telephonic meeting with Embarq employees regarding this dispute, at least one AT&T employee has ***admitted*** that AT&T did not reduce its bills to SODAS for Embarq's services once Embarq's tariffed rates decreased. (Ex. 2, ¶ 8.) In other words, AT&T continued charging SODAS for Embarq's services based on the contract rates, and continued receiving payments from SODAS for Embarq's services at those rates, even after AT&T began remitting payment to Embarq at the lower, tariffed rates. Embarq believes that this conduct constitutes a breach by AT&T of the Subcontractor Agreement.

AT&T filed its Complaint at the Commission on June 27, 2007. AT&T's Complaint purports to seek a declaratory judgment under Section 271.04, Ohio Rev. Code. (Complaint, ¶ 21.) That statute provides that a "'contract may be construed by a declaratory judgment or decree either before or after there has been a breach of the contract.'" (*Id.*) Counts I-II of

AT&T's Complaint seek a declaration that Embarq's attempts to recover amounts owed by AT&T under the Subcontractor Agreement are contrary to the "plain language" of Subcontractor Agreement, as well as the "intent of the parties" under Subcontractor Agreement. (*Id.*, ¶¶ 25, 29.) Count III claims that Embarq "has waived and/or is estopped or otherwise barred" from attempting to collect the higher rate from AT&T under the Subcontractor Agreement. (*Id.*, ¶ 34.) Count IV alleges that Embarq's attempt to enforce the provisions of the Subcontractor Agreement constitutes an unjust and unreasonable charge under O.R.C. § 4905.22. (*Id.*, ¶ 40.)

ARGUMENT

A motion to dismiss for lack of jurisdiction must be granted if the complainant has raised a cause of action that cannot be decided in the forum in which the complaint has been brought. *Brown v. FirstEnergy Corp.*, 825 N.E.2d 206, 210 (Ohio Ct. App. 2005); *see also Avco Fin. Servs. Loan, Inc. v. Hale*, 520 N.E.2d 1378, 1380 (Ohio Ct. App. 1987). When ruling on a motion to dismiss based on lack of jurisdiction, the Commission "is not confined to the allegations of the complaint and it may consider material pertinent to [the motion] without converting the motion into one for summary judgment." *Shockey v. Fouty*, 666 N.E.2d 304, 306 (Ohio Ct. App. 1995); *see also Dargart v. Ohio Dept. of Transp.*, 871 N.E.2d 608, 611 (Ohio Ct. App. 2006) (same).

Under this standard, the Commission should dismiss AT&T's Complaint for lack of jurisdiction for two reasons. *First*, the Commission lacks jurisdiction to adjudicate the parties' rights under the Subcontractor Agreement, as AT&T's Complaint asks the Commission to do. *Second*, the Subcontractor Agreement was an agreement to provide services to the State of Ohio at reduced rates. As the Ohio Supreme Court has held, the Commission does not have jurisdiction to resolve disputes pertaining to such agreements.

I. THE COMMISSION LACKS JURISDICTION TO ADJUDICATE THE PARTIES' RIGHTS UNDER THE SUBCONTRACTOR AGREEMENT.

It is well-settled that this Commission "is not a court of general jurisdiction, and therefore has no power to determine legal rights and liabilities with regard to contract rights or property rights, even though a public utility is involved." *Mkt. Research Servs. v. PUCO,* 517 N.E.2d 540, 544 (Ohio 1987). As the Ohio Supreme Court has stated, this Commission "has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights." *State ex rel. Ohio Power Co. v. Harnishfeger,* 412 N.E.2d 395, 396 (Ohio 1980).

Application of this black-letter law requires dismissal of AT&T's Complaint for two reasons. *First*, Counts I-III of AT&T's Complaint, on their face, plainly ask the Commission to adjudicate the parties' dispute regarding their rights under the Subcontract Agreement. *Second*, although Count IV of AT&T's Complaint purports to seek relief under Chapter 4905 of the Ohio Revised Code, in substance it seeks exactly the same thing as Counts I-III -- a determination regarding the meaning of, and the parties' rights under, the Subcontractor Agreement.

A. On Their Face, Counts I-III of AT&T's Complaint Ask the Commission to Adjudicate the Parties' Rights Under the Subcontractor Agreement, Which the Commission Lacks Jurisdiction to Do.

A straightforward review of Counts I-III of AT&T's Complaint makes clear that these Counts ask the Commission to adjudicate the parties' rights under the Subcontractor Agreement, and thus are not within this Commission's jurisdiction.

Count I of AT&T's Complaint alleges that the Subcontractor Agreement "unambiguously states" that AT&T is only obligated to remit payments to Embarq "to the extent that, [AT&T Ohio] has been paid by SODAS for [Embarq's] services." (Complaint, ¶ 24) (quoting Ex. 1, ¶ 3(b)). Based on these allegations, AT&T claims that, under "the plain language of the

Subcontractor Agreement," AT&T "cannot be obligated to make any further payments to Embarq" because AT&T "has not been paid by SODAS" for the amount Embarq claims AT&T failed to remit. (*Id.*, ¶ 25.) Count I claims that AT&T therefore "is entitled to a declaration that it has no obligation to pay Embarq any part of the disputed amounts." (*Id.*, ¶ 26.)

To be sure, Embarq disputes AT&T's allegations on the merits. Indeed, AT&T's assertion that it was not paid the $5 million in dispute by SODAS is directly contradicted by admissions of its own employee. (Ex. 2, ¶ 8.) But resolution of Count I, on its face, turns on the proper interpretation of the "plain language" of the Subcontractor Agreement. (Complaint, ¶ 25.) This is a contractual issue not subject to this Commission's jurisdiction. Rather, that issue should be determined by an appropriate court of general jurisdiction within the State of Ohio. *Mkt. Research Servs.*, 517 N.E.2d at 544; (Ex. 1, ¶ 18(c)).

Count II similarly seeks a determination of the parties' rights under the Subcontractor Agreement. AT&T alleges that Embarq's claim is contrary to "[t]he intent of the parties' agreements" and that Embarq "has breached the agreements" by attempting to recover the $5 million in dispute from AT&T. (Complaint, ¶¶ 29, 30.) Based on these allegations, AT&T again claims that it "is entitled to a declaration that it has no obligation to pay Embarq for any part of the disputed amounts." (*Id.*, ¶ 31.)

As with Count I, Embarq disputes the allegations of Count II on the merits. It is AT&T, not Embarq, that has "breached the agreements" between the parties. However, as with Count I, resolution of those issues requires interpretation of the parties' intentions under the Subcontractor Agreement, as well as a determination of whether AT&T's conduct was consistent with the Subcontractor Agreement. This determination is outside the Commission's jurisdiction.

The same analysis applies to Count III, which alleges that AT&T "is entitled to a declaration that it has no obligation to pay Embarq any part of the disputed amounts," because Embarq "has waived, and/or is estopped or otherwise barred from asserting, any claim that it is entitled to payment" of the disputed $5 million. (*Id.*, ¶¶ 34, 35.) Although Embarq certainly disputes AT&T's allegations on the merits, whether the common-law doctrines of waiver and/or estoppel bar Embarq from recovering the $5 million in dispute under the Subcontractor Agreement, present purely common-law claims that are not within this Commission's jurisdiction. Rather, these issues should be decided by a court of competent jurisdiction. Counts I-III of AT&T's Complaint should be dismissed for lack of jurisdiction.

B. Count IV of AT&T's Complaint Also Asks the Commission to Adjudicate the Parties' Rights Under the Subcontractor Agreement.

Unlike Counts I-III of the Complaint, Count IV at least makes reference to a provision of the Ohio Statutes that this Commission has jurisdiction to enforce -- namely Ohio Rev. Code § 4905.22, which requires that public utilities provide services on terms that are "in all respects just and reasonable." (Complaint, ¶ 39.) Count IV purports to allege that Embarq's attempt to recover the $5 million in disputed funds under the Subcontractor Agreement violates Ohio Rev. Code § 4905.22. (*Id.*, ¶ 40.)

However, the Ohio Supreme Court has made clear that the mere fact that Count IV ***purports*** to allege a violation of O.R.C. § 4905.22, does not confer jurisdiction on the Commission. Rather, the Supreme Court has held that, even when a complaint alleges a violation of Ohio Rev. Code § 4905.22, the Commission should look beyond the plaintiff's characterization of its claim and dismiss a complaint where the substance of the claim is purely contractual. *See Mkt. Research Servs., Inc.*, 517 N.E.2d at 541, 544; *see also In the Matter of the Complaint of Anne Eishen v. Columbia Gas,* Case No. 01-885-GA-CSS, 2001 Ohio PUC LEXIS

841, ¶ 7 (Nov. 20, 2001) (dismissing complaint that purported to state a violation of Chapter 4905 because the complaint was "in essence" seeking adjudication of a common law matter).

In *Marketing Research Services,* the complainant filed a complaint with the Commission alleging that the respondents had violated Ohio Rev. Code § 4905.22 by failing to comply with a contract to provide foreign exchange lines. 517 N.E.2d at 540-41. After reviewing the complaint and the respondents' motions to dismiss, this Commission dismissed the complaint for lack of jurisdiction, finding that "the matters raised were purely contract issues." *Id.* at 541. The Supreme Court agreed that this Commission had "no jurisdiction to adjudicate" the contractual issues raised in the complaint, and held that the Commission's "dismissal of [complainant's] complaint was correct." *Id.* at 544.

The analysis from *Marketing Research Services* applies here. AT&T's attempt to characterize a contractual dispute as violation of § 4905.22 cannot save Count IV from dismissal. As with Counts I-III, the central issue in determining whether AT&T owes Embarq the $5 million in dispute turns on the interpretation of the Subcontractor Agreement. If the Subcontractor Agreement required AT&T to pay Embarq based on the contract rates, AT&T cannot escape its freely-negotiated contractual commitment simply by mischaracterizing Embarq's attempt to enforce the Subcontractor Agreement as an "unreasonable practice" under Ohio Rev. Code § 4905.22. Indeed, the contractual nature of Count IV is underscored by the fact that AT&T expressly incorporated all of the allegations of the Complaint, including the allegations in Counts I-III discussed above, as part of Count IV. (Complaint, ¶ 36.)

If any doubt remained regarding the contractual nature of Count IV, it is dispelled by AT&T's request in Count IV that, in the event the Subcontractor Agreement is "construed to support Embarq's claim," it "should be modified by the Commission" based on AT&T's

allegations regarding the parties' course of performance. (*Id.*, ¶ 41.) This underscores the fact that, in substance, Count IV of AT&T's Complaint is based on the parties' dispute regarding the meaning of the Subcontractor Agreement. That dispute is not within this Commission's jurisdiction to adjudicate.[1] Count IV of the Complaint should be dismissed.

II. THE COMMISSION ALSO LACKS JURISDICTION BECAUSE THE SUBCONTRACTOR AGREEMENT WAS A CONTRACT TO PROVIDE SERVICES TO THE STATE OF OHIO AT REDUCED RATES.

Even if the Commission found that AT&T's Complaint did not seek adjudication of the parties' rights and responsibilities under the Subcontractor Agreement, the Commission still would lack jurisdiction over AT&T's Complaint. The Subcontractor Agreement was a contract to provide services to the State of Ohio at reduced rates. Under Ohio law, the Commission lacks jurisdiction to adjudicate disputes regarding such contracts.

Section 4905.34 of the O.R.C. provides that:

> Except as provided in sections 4905.33 and 4905.35 and Chapter 4928. of the Revised Code, Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code do not prevent any public utility or railroad from granting any of its property for any public purpose, or granting reduced rates or free service of any kind to the United States, to the state or any political subdivision of the state, for charitable purposes, for fairs or expositions, to a law enforcement officer residing in free housing provided pursuant to section 3735.43 of the Revised Code, or to any officer or employee of such public utility or railroad or the officer's or employee's family. All contracts and agreements made or entered into by such public utility or railroad for such use, reduced rates, or free service are valid and enforceable at law.

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[1] To the extent the Commission finds it necessary to consider AT&T's allegation that the Subcontractor Agreement should be "modified" under O.R.C. § 4905.31, it should reject AT&T's contention for two reasons. *First,* in order for O.R.C. § 4905.31 to apply, the Subcontractor Agreement must have been filed with the Commission. O.R.C. § 4905.31(E) ("No such arrangement, sliding scale, minimum charge, classification, variable rate, or device is lawful unless it is filed with and approved by the commission."). The Subcontractor Agreement was not filed with the Commission. *Second,* as discussed in Section II *infra*, the Subcontractor Agreement was a contract to provide the State with services at reduced rates. As explained below, § 4905.31 does not apply to such contracts.

The Ohio Supreme Court has held that, by enacting Section 4905.34, the "General Assembly has expressly given public utilities the authority to enter into reduced-rate contracts with political subdivisions without limitation." *Ohio Edison Co. v. Pub. Utilities Comm'n*, 678 N.E.2d 922, 927 (Ohio 1997). Thus, contracts to provide services to the State of Ohio at reduced rates under Section 4905.34 "are exempt" from the requirements of Chapter 4905, "including commission review under R.C. 4905.26." *Id.* at 926.

As the Supreme Court held in *Ohio Edison*, when the Commission is presented with a complaint involving a contract subject to Section 4905.34, the Commission has only "limited authority to determine the extent of its jurisdiction and whether a complaint pending before it actually involves an R.C. 4905.34 contract." *Id.* As the Supreme Court further held, "[o]nce the commission determines that the complaint pending before it involves an R.C. 4905.34 contract, the commission's jurisdiction is at an end and the case must be dismissed." *Id.*

The Subcontractor Agreement was a contract to provide the State of Ohio with services at reduced rates. On its face, the Subcontractor Agreement states that the contract's purpose was to set forth the "respective rights and obligations" of Embarq and AT&T "with respect to the SOMACS Project." (Ex. 1, at 1.) The Subcontractor Agreement became effective only "if and when" AT&T and SODAS "enter into a binding agreement . . . for the SOMACS [p]roject[.]" (*Id.*, ¶ 1.) In the event AT&T and SODAS were not able to enter into an agreement for the SOMACS project, the Subcontractor Agreement became "null and void *ab initio*." (*Id.*) There can be no serious dispute that the Subcontractor Agreement was a contract to provide services to the State of Ohio.

It also is clear that the Subcontractor Agreement provided the State of Ohio with "reduced rates" under § 4905.34. Embarq quoted specific prices for its services in the

Subcontractor Agreement, and Embarq "reaffirm[ed] that the prices it quoted. . . shall be firm for ten (10) years from the date" of the Subcontractor Agreement. (*Id.*, ¶ 3(b).) When the Subcontractor Agreement was signed, the rates in the Subcontractor Agreement were, in the aggregate, lower than Embarq's tariffed rates for the same services. (Ex. 2, ¶ 5.) Additionally, the firm pricing in the Subcontractor Agreement protected SODAS from anticipated increases in pricing for telecommunications services provided by Embarq. (*Id.*, ¶ 6.) Thus, the Subcontractor Agreement was a contract to provide services to the State of Ohio at reduced rates. Under § 4905.34 and the Supreme Court's decision in *Ohio Edison*, sections 4905.22 and 4905.26 do not apply to such contracts, and this Commission lacks jurisdiction to adjudicate AT&T's claims. AT&T's Complaint therefore should be dismissed.[2]

[2] Although Embarq's tariffed rates subsequently decreased, this does not change the fact that the Subcontractor Agreement was a contract to provide services to the State at reduced prices. It is black-letter law that, when ascertaining a party's intention under a contract, the relevant inquiry is what the party's intentions were at the time the contract was signed, not at some subsequent date. *See, e.g., Pool v. Insignia Residential Group,* 736 N.E.2d 507, 509 (Ohio Ct. App. 1999). Moreover, it is important to note that resolution of Embarq's claim in its favor would not expose the State of Ohio to any financial liability.

CONCLUSION

For the reasons set forth above, Embarq respectfully requests that the Commission dismiss AT&T's Complaint in its entirety.

Dated: September 19, 2007

Respectfully submitted,

UNITED TELEPHONE COMPANY OF OHIO
D/B/A EMBARQ

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CERTIFICATE OF SERVICE

I, Joseph R. Stewart, hereby certify that I caused a true and correct copy of Embarq's Memorandum in Support of its Motion to Dismiss AT&T's Complaint to be served this 19th day of September, 2007 via U.S. mail, prepaid postage, delivery on:

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EXHIBIT 1

SUBCONTRACTOR AGREEMENT

THIS AGREEMENT is entered into this 1st day of February, 1996, between AMERITECH CUSTOM BUSINESS SERVICES, a division of Ameritech Services, Inc., a Delaware corporation with offices at 225 West Randolph Street, Floor 23, Chicago, Illinois 60606, as agent and representative of The Ohio Bell Telephone Company and Ameritech Information Systems, Inc. (collectively referred to as "Ameritech"), and UNITED TELEPHONE COMPANY OF OHIO, an Ohio corporation with offices at 665 Lexington Avenue, Mansfield, Ohio 44907 ("Company").

WITNESSETH:

WHEREAS, the State of Ohio Department of Administrative Services ("SODAS") issued on July 7, 1995, 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"); and

WHEREAS, Company and Ameritech entered into a Teaming Agreement dated August 1, 1995 (the "Teaming Agreement"), under the terms of which the parties jointly prepared and submitted a Response dated October 31, 1995 (the "Proposal") to SODAS' RFP; and

WHEREAS, Ameritech has been notified that the SOMACS bid has been tentatively awarded to the group of carriers which includes Ameritech and Company, and that SODAS desires Ameritech to serve as prime contractor and Company to serve as a subcontractor to Ameritech for the SOMACS Project; and

WHEREAS, Ameritech and Company are entering into this Subcontractor Agreement ("Agreement") to set forth their respective rights and obligations with respect to the SOMACS Project;

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, the parties hereto agree as follows:

1. Effective Date. This Agreement shall become effective and binding upon Ameritech and Company if and when Ameritech and SODAS enter into a binding agreement (the "Prime Contract") for the SOMACS Project, and shall continue in full force and effect for that period of time specified in the Prime

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Contract. If Ameritech and SODAS are unable to negotiate a binding agreement for the SOMACS Project, then this Agreement shall be null and void *ab initio*.

2. Governing Documents. The rights and obligations of Company and Ameritech shall be those specified in the RFP and the Proposal, as the same may be amended and clarified in the Prime Contract, which documents are attached hereto and incorporated herein by this reference, except to the extent any additional and/or different rights and obligations shall be created in this Agreement. Company 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 Company to SODAS.

3. Ordering Services. (a) Ameritech shall from time to time during the term of this Agreement, as telecommunications service manager for SODAS, order in SODAS' name those services offered by Company in the Proposal, and Company agrees that it shall provide within its geographic serving area those ordered services to SODAS in accordance with this Agreement. Ameritech's agency authority for SODAS shall be expressley set forth in writing, and a copy of such document shall be provided to Company.

(b) Company reaffirms that the prices it quoted in the Proposal, which prices are attached hereto and incorporated in this Agreement by this reference, shall be firm for ten (10) years from the date of this Agreement.

4. Billing. (a) Company shall periodically issue an invoice in the name of Ameritech, as telecommunications service manager for SODAS, for those services provided to SODAS by Company. Company shall submit that bill to Ameritech, at such address as Ameritech shall specify in writing to Company, so that Ameritech may (i) consolidate Company's bill with those of Ameritech and all other Local Exchange Carriers ("LECs") involved in the SOMACS Project, (ii) present the consolidated bill to SODAS at one time, (iii) receive one payment from SODAS for all of the LECs' services on the SOMACS Project, and (iv) when payment is received from SODAS, remit to Company its share of the payment, less a credit equal to the amount of gross receipt tax that Company included in its bill to Ameritech. Ameritech undertakes no collection obligation with respect to services performed by Company for SODAS, and Ameritech shall not be obligated to make a payment to Company unless and until, or to the extent that, Ameritech has been paid by SODAS for Company's services.

(b) Ameritech shall be solely responsible for assessing, collecting and remitting to the appropriate taxing authority any gross receipts taxes which shall be due as a result of the services performed by Ameritech and Company for SODAS. Company shall be solely responsible for assessing, collecting and remitting any

other taxes due as a result of services performed by Company for SODAS. Company and Ameritech shall indemnify, defend and hold harmless each other against any claim for a party's failure to properly assess, collect and remit any taxes which that party is obligated to collect hereunder.

5. Regulatory Approval. (a) Company and Ameritech acknowledge and agree that this Agreement does not and shall not constitute the purchase and resale by Ameritech of Company's local exchange services.

(b) In the event of any conflict, inconsistency or incongruity between this Agreement and Company's tariff(s), this Agreement shall govern and control. If it is necessary for Company to file new or amend existing tariff to be able to perform those services specified in the Proposal, then Company shall promptly file or amend the applicable tariffs.

(c) Ameritech shall file this Agreement with the Public Utilities Commission of Ohio.

6. Relationship of the Parties. (a) This Agreement is not intended by the parties to constitute or create a joint venture, partnership or formal business organization of any kind, other than a subcontract arrangement as described herein, and the rights and obligations of the parties shall only be those expressly set forth in this writing. Neither party shall have authority to bind the other except to the extent authorized herein. Each party shall furnish to the other such cooperation and assistance as may be reasonably required hereunder; *provided that*, the parties, as between themselves, shall be deemed to be independent contractors, and the employees of one shall not be deemed to be the employees of the other.

(b) Nothing herein shall be construed as (i) providing for the sharing of profits or losses arising out of the efforts of either or both of the parties, or (ii) making a party responsible or liable for the obligations and undertakings of the other party, including responsibility or liability for the provision of service to SODAS.

7. Publicity. Neither party shall issue any news release, public announcement, advertisement or publicity concerning this Agreement or the services to be performed for SODAS which refers to the other party without the prior written consent of the other party, except that this Agreement and the terms thereof may be made known to SODAS or any other Ohio governmental entity involved with the SOMACS Project, if necessary or required by any laws or regulations. Any announcement should, to the fullest extent practicable, refer to all of OTG members as participating in the SOMAES Project and shall be subject to prior approval of the parties.

8. Notice and Demand. Except as otherwise provided under this Agreement, all notices, demands, or requests which may be given by any party to the other party shall be in writing and shall be deemed to have been duly given on the date delivered in person, or deposited, postage prepaid, in the United States mail via Certified Mail, return receipt requested, and addressed as follows:

To Company: United Telephone Company of Ohio
665 Lexington Avenue
Mansfield, Ohio 44907
Attn: Thomas L. Jacobs

To Ameritech: Ameritech Custom Business Services
150 East Gay Street
Room 18-S
Columbus, Ohio 43215
Attn: Contract Manager

If personal delivery is selected as the method of giving notice under this Section, a receipt of such delivery shall be obtained. The address to which such notices, demands, requests, elections or other communications are to be given by a party may be changed by written notice given by such party to the other party pursuant to this Agreement.

9. Termination. (a) This Agreement may be terminated by either party upon written notice to the other party of the occurrence of any of the following events: (i) if a party commits a breach of any provision of this Agreement, and fails to cure such breach within thirty (30) days of written notice thereof; or (ii) if a party becomes insolvent, is not paying its bills when they become due without just cause, or takes any material step leading to its cessation as a going concern, or ceases or suspends its operations for reasons other than a force majeure.

(b) This Agreement may be terminated upon written notice by Ameritech if the United States Department of Justice or any judge (whether by appealable order, final judgment or otherwise) decides (and such decision is not stayed or delayed) that the performance of this Agreement is inconsistent with the terms of the Modification of Final Judgment in United States v. Western Electric, 552 F. Supp. 131 (1982), Case No. 82-0192 entered in the United States District Court for the District of Columbia on August 24, 1982, as subsequently modified, and certain subsequent related rulings (the "MFJ"). If the performance of this Agreement may be modified so that it no longer is inconsistent with the MFJ, and such modification is acceptable to both parties hereto, then the parties shall so modify this Agreement in order to avoid a termination hereof.

(c) No delay by either party in sending any notice specified in the preceding paragraph shall constitute a waiver of its right to terminate this Agreement.

10. Audits and Examinations. Each party shall maintain in accordance with generally accepted accounting practices complete and accurate records of all amounts payable to and payments made pursuant to this Agreement. Each party shall retain these records for a period of three (3) years from the date of the performance of the service(s) in question. Upon not less than thirty (30) days prior written notice to the other party, either party may request an audit of the other party (to be performed at the requesting party's expense), whereupon a qualified independent auditing firm reasonably acceptable to both parties shall have access to such records at a mutually agreeable time and location for purposes of auditing compliance with the terms and conditions of this Agreement.

11. Confidential Information. (a) Any information furnished by one party to the other party (orally, visually or in writing) under or in contemplation of this Agreement, or to which a party has access through performance of this Agreement which is identified by the disclosing party as confidential (hereinafter "Information") shall be and remain the disclosing party's property, shall be treated as confidential, and shall be returned to the disclosing party immediately upon termination or expiration of this Agreement. The receiving party shall: (i) restrict disclosure of the Information to that party's employees with a "need to know" (*i.e.*, employees that require the Information to perform their responsibilities under this Agreement) and not disclose it to any other person or entity without the prior written consent of the disclosing party; (ii) use the Information only for purposes of performing this Agreement; (iii) advise those employees who access the Information of their obligations with respect thereto; and (iv) copy the Information only as necessary for the employees who are entitled to receive it and ensure that all confidentiality notices are reproduced in full on such copies.

(b) Information shall not be considered confidential if the receiving party can demonstrate that the Information: (i) is or becomes available to the public through no breach of this Agreement; (ii) was previously known by the receiving party without any obligation to hold it in confidence; (iii) is received from a third party free to disclose such Information without restriction; (iv) is approved for release by written authorization of the disclosing party, but only to the extent of such authorization; (v) is required by law or regulation to be disclosed, but only to the extent and for the purposes of such required disclosure; or (vi) is disclosed in response to a valid order of a court or governmental body of the United States or any political subdivisions thereof, but only to the extent of and for the purposes of such

order, and only if the receiving party first notifies the disclosing party of the order and permits the disclosing party to seek an appropriate protective order.

(c) Ameritech and Company recognize and agree that the unauthorized use or disclosure of the Information would cause irreparable injury to the owner thereof for which it would have no adequate remedy at law, and that an actual or contemplated breach of this Section shall entitle the owner of the Information to obtain immediate injunctive relief prohibiting such breach, in addition to any other rights and remedies available to it. The obligations herein contained shall expressly survive the termination or expiration of this Agreement.

12. Indemnity. (a) Each party shall indemnify and hold harmless the other party, its employees, parents, partners, agents, subcontractors and affiliates, if any, against all injury, loss, damage or expense (including court costs and reasonable attorneys' fees) which either party may sustain or become liable for on account of injury to or death of persons, or on account of damage to or destruction of tangible property resulting in whole or substantial part from any act or omission of the indemnitor in connection with this Agreement. The obligation of the indemnitor under this Section shall not extend to any liability with respect to or arising out of any claim or suit which is attributable in whole or major part to the willful or negligent act or omission of the indemnitee, or its authorized employees, parents, partners, agents, other subcontractors, or affiliates, whichever is applicable. In case any action, suit or proceeding is brought against indemnitee in connection with this Agreement which is or may be covered by the indemnification provided above, based upon the allegations therein, the indemnitor shall, at its expense, resist and defend such action, suit or proceeding, or cause the same to be resisted and defended. Notwithstanding the foregoing, the indemnitee shall have the option, at its own expense, to participate in the defense of such claim, suit or proceeding with counsel of its choosing.

(b) Except to the extent of a party's gross negligence or willful misconduct, neither party shall have any liability to the other for any indirect, incidental, or consequential damages, including lost profits, sustained or incurred in connection with the performance or non-performance of this Agreement, regardless of the form of action, whether in contract, tort, strict liability or otherwise, and whether such damages are foreseeable.

13. Miscellaneous.

(a) *Assignment*. Except with respect to an assignment to a subsidiary or affiliate of a party hereto or a merger or acquisition by which one of the parties hereto becomes part of another party, any assignment by either Ameritech or Company of any right, obligation or duty, in whole or in part, or of any interest

hereunder, without the prior written consent of the other party shall be void. For an assignment of this Agreement that does not require the prior consent of the other party, the assigning party agrees to give notice to the other party of the assignment. All obligations and duties of any party under this Agreement shall be binding on all successors in interest and assigns of such party.

(b) *Waiver*. No waiver of or failure to exercise any options, right or privilege under this Agreement on any occasion shall be construed to be a waiver of such term or any other option, right or privilege on any other occasion(s).

(c) *Governing Law*. This Agreement shall be construed in accordance with and governed by the domestic laws of the State of Ohio, and all disputes arising under this Agreement shall be resolved in the appropriate forum in the State of Ohio.

(d) *Headings*. The Section headings in this Agreement are for convenience only and shall not be construed to define or limit any of the terms herein or affect the meanings or interpretation of this Agreement.

(e) *Severability*. If any provision of this Agreement is held to be illegal or invalid, then Ameritech and Company shall negotiate an adjustment consistent with the purposes of this Agreement. Subject to the foregoing, the illegality or invalidity of any provision of this Agreement will not affect the legality or enforceability of the remaining provisions, and this Agreement shall then be construed as if such unenforceable or unlawful provision had not been contained herein; *provided that*, if such illegality or invalidity materially adversely affects any of the benefits or rights of a party hereto, such affected party may terminate this Agreement within a reasonable time after the decision becomes final which rendered such provision illegal or invalid.

(f) *Force Majeure*. Neither Ameritech nor Company shall be liable to the other for any delay or failure in performance hereunder due to fires, strikes, threatened strikes, stoppage of work, requirements imposed by governmental regulations, civil or military authorities, acts of God or other causes which are beyond the control of the party delayed or unable to perform (hereinafter "force majeure"). If a force majeure occurs, the party delayed or unable to perform shall give immediate notice to the other party.

(g) *Ameritech Company Liability*. Each affiliate of Ameritech shall be responsible only for the services performed by it under this Agreement. Company shall not seek to hold one or more than one affiliate of Ameritech responsible for the services performed by another Ameritech affiliate. Similarly, each Ameritech

affiliate agrees that Company's breach of or liability under this Agreement as to one Ameritech affiliate shall not be construed as a breach or liability as to all.

(h) *Modification.* Any supplement to or modification or waiver of any provision of this Agreement must be in writing and signed by authorized representatives of both parties.

(i) *Entire Agreement.* This Agreement together with the attachments referred to herein sets forth the entire understanding and agreement between the parties with respect to the subject matter hereof, and supersedes all prior understandings and agreements between the parties relating hereto. Neither party shall be bound by any definition, condition, provision, representations, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer of the party to be bound thereby.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

UNITED TELEPHONE COMPANY OF OHIO	AMERITECH CUSTOM BUSINESS SERVICES
By: Don Williams	By: Michael Intemann
Title: V.P.	Title: V.P.
Date: 2/7/96	Date: 2/12/96

affiliate agrees that Company's breach of or liability under this Agreement as to one Ameritech affiliate shall not be construed as a breach or liability as to all.

(h) *Modification.* Any supplement to or modification or waiver of any provision of this Agreement must be in writing and signed by authorized representatives of both parties.

(i) *Entire Agreement.* This Agreement together with the attachments referred to herein sets forth the entire understanding and agreement between the parties with respect to the subject matter hereof, and supersedes all prior understandings and agreements between the parties relating hereto. Neither party shall be bound by any definition, condition, provision, representations, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer of the party to be bound thereby.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

UNITED TELEPHONE COMPANY OF OHIO	AMERITECH CUSTOM BUSINESS SERVICES
By: Don Williams	By: Michael Fatten
Title: V P	Title: V.P.
Date: 2/9/96	Date: 2/12/96

EXHIBIT 2

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. 07-755-TP-CSS**
	)	
UNITED TELEPHONE COMPANY OF OHIO D/B/A EMBARQ,	)	
	)	
	)	
Respondent.	)	

AFFIDAVIT OF EMILY E. BINDER

State of Kansas)
County of Johnson ss)

I, Emily E. Binder, being duly sworn under oath, declare and state the following:

1. I am the Director of Wholesale Product Management and Marketing at Embarq Corporation ("Embarq"). My job duties at Embarq include Product Management and Marketing for all Wholesale products, including Special Access, Switched Access, Unbundled Network Elements, Database, and Leased Services. I am over the age of eighteen and am competent to make the declarations and statements set forth herein. If called as a witness, I would testify consistently with the declarations and statements set forth herein.

2. Within Embarq, I am the principal business person responsible for dealing with the dispute between Embarq and AT&T Ohio ("AT&T"), concerning a February 1, 1996 contract between the parties (the "Subcontractor Agreement"). Although I was not personally involved in the negotiations and/or execution of the Subcontractor Agreement, I am making this Declaration based on my review of the Subcontractor Agreement, as well as my own personal

knowledge regarding the dispute between Embarq and AT&T regarding the Subcontractor Agreement.

3. The Subcontractor Agreement set forth certain terms and conditions under which Embarq was to provide services to the State of Ohio Department of Administrative Services ("SODAS"), for a project referred to as the State of Ohio Multi-Agency Communications System (the "SOMACS" project). As stated in the Subcontractor Agreement, AT&T was the primary contractor with SODAS for the SOMACS project, and Embarq was a subcontractor for AT&T.

4. In the Subcontractor Agreement, Embarq provided certain prices for the services it was providing to SODAS for the SOMACS project. In the Subcontractor Agreement, Embarq "reaffirm[ed] that the prices it quoted" for those services "shall be firm for ten (10) years from the date" of the Subcontractor Agreement. (Subcontractor Agreement, ¶ 3(b).)

5. In connection with this dispute, I directed Embarq employees to perform an analysis comparing the rates for the services Embarq provided in the Subcontractor Agreement, with the rates for those same services under Embarq's applicable tariffs at the time the Subcontractor Agreement was signed. This analysis showed that, in the aggregate, the rates in the Subcontractor Agreement were lower than Embarq's tariffed rates for the same services at the time the Subcontractor Agreement was signed.

6. Based on my understanding of the telecommunications industry, at the time the Subcontractor Agreement was signed, it would have been generally understood that Embarq's tariffed rates could increase over time. Therefore, it is my belief that Embarq's pricing contained in the Subcontractor Agreement, and its commitment to maintain firm pricing for ten years, not only constituted an agreement to provide services to the State at reduced rates, but also offered protection for the State from potential price increases for those services over time.

7. It is my understanding that, due to the manner in which AT&T ordered services from Embarq and the nature of Embarq's billing system, Embarq invoiced AT&T for services provided to SODAS at Embarq's tariffed rates, rather than the rates set forth in the Subcontractor Agreement.

8. It is my understanding that, in its Complaint, AT&T claims that it has only billed and collected from SODAS the amounts submitted on Embarq's original bills charging Embarq's tariffed rate. However, at least one AT&T employee has informed Embarq that AT&T would not reduce its bills to SODAS for Embarq's services once Embarq's tariffed rates decreased. Specifically, on or about November 27, 2006, during a phone conference regarding this dispute, Dee Skinner, an AT&T employee, stated in substance that AT&T would not reduce its bills to SODAS once Embarq's tariffed rates decreased because AT&T charges SODAS one postalized rate for all circuits within Ohio.

9. I declare, under penalty of perjury, that the foregoing statements in this Declaration are true and correct, to the best of my knowledge, information, and belief.

Emily E. Binder

Sworn to before me and subscribed in my presence this 18th day of September 2007.

NOTARY PUBLIC - State of Kansas
CYNTHIA BISHOP
My Appt. Exp. 8-20-10

Notary Public

My commission expires: August 20, 2010