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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO,

Complainant,

v.

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

Respondent.

Case No. 07-755-TP-CSS

EMBARQ'S ANSWER TO AT&T'S COMPLAINT

Pursuant to Rule 4901-9-01 of the Ohio Administrative Code ("O.A.C."), and any other statutes and regulations deemed applicable, Respondent United Telephone Company of Ohio d/b/a Embarq ("Embarq") by and through undersigned counsel, answers Complainant AT&T Ohio's Complaint 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.

ANSWER: Embarq admits the allegations contained in Paragraph 1 of the Complaint.

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.

ANSWER: Embarq admits the allegations contained in Paragraph 2 of the Complaint.

JURISDICTION AND VENUE

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

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**ANSWER:** Embarq denies the allegations contained in Paragraph 3 of the Complaint. Further answering, Embarq states that this Commission does not have jurisdiction over this Complaint for all of the reasons stated in Embarq's Motion to Dismiss and the accompanying Memorandum of Law.

#### **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.

**ANSWER:** Embarq states that the allegations in Paragraph 4 of AT&T's Complaint purport to characterize the relief sought in the Complaint, that the Complaint speaks for itself, and that, therefore, no answer is required to Paragraph 4 of the Complaint. Further answering, Embarq denies that AT&T is entitled to any of the relief sought in the Complaint.

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 (as defined to include the RFP) "IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE CONTRACT BETWEEN THE PARTIES."

**ANSWER:** Embarq admits the allegations contained in the first sentence of Paragraph 5 of the Complaint. Embarq further states that the remaining allegations in Paragraph 5 of AT&T's Complaint purport to characterize the RFP described in Paragraph 5, that the RFP speaks for itself, and that, therefore, no answer is required to the remaining allegations in Paragraph 5 of the Complaint.

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

**ANSWER:** Embarq states that the allegations in Paragraph 6 of AT&T’s Complaint purport to characterize the RFP described in Paragraphs 5 and 6, that the RFP speaks for itself, and that, therefore, no answer is required to the allegations in Paragraph 6 of the Complaint.

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 carrier (“ILECs”) in Ohio.

**ANSWER:** Embarq admits the allegations contained in the first and second sentences of Paragraph 7 of the Complaint. Embarq lacks information sufficient to form a belief as to the last sentence of Paragraph 7.

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.

**ANSWER:** Embarq admits the allegations contained in the first sentence of Paragraph 8 of the Complaint. Embarq lacks information sufficient to form a belief as to the last sentence of Paragraph 8.

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.

**ANSWER:** Embarq admits that, on February 1, 1996 AT&T Ohio and Embarq entered into a Subcontractor Agreement with respect to the SOMACS project. Embarq lacks information sufficient to form a belief as to the remaining allegations of Paragraph 9.

10. The Subcontractor Agreement specified that AT&T Ohio would, from time to time, 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.

**ANSWER:** Embarq states that the allegations in Paragraph 10 of AT&T's Complaint purport to characterize the Subcontractor Agreement described in Paragraph 10, that the Subcontractor Agreement speaks for itself, and that, therefore, no answer is required to the remaining allegations in Paragraph 10 of the Complaint.

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."

**ANSWER:** Embarq states that the allegations in Paragraph 11 of AT&T's Complaint purport to characterize the Subcontractor Agreement described in Paragraph 11, that the Subcontractor Agreement speaks for itself, and that, therefore, no answer is required to the remaining allegations in Paragraph 11 of the Complaint.

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.)

**ANSWER:** Embarq states that the allegations in Paragraph 12 of AT&T's Complaint purport to characterize the Subcontractor Agreement described in Paragraph 12, that the

Subcontractor Agreement speaks for itself, and that, therefore, no answer is required to the remaining allegations in Paragraph 12 of the Complaint.

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."

**ANSWER:** Embarq states that the allegations in Paragraph 13 of AT&T's Complaint purport to characterize the Subcontractor Agreement described in Paragraph 13, that the Subcontractor Agreement speaks for itself, and that, therefore, no answer is required to the remaining allegations in Paragraph 13 of the Complaint.

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.

**ANSWER:** Embarq admits that AT&T Ohio and Embarq began to operate under the Subcontractor Agreement after the Subcontractor Agreement was signed. Embarq further admits that, because of the manner in which AT&T ordered services from Embarq and Embarq's billing systems, Embarq billed AT&T under Embarq's tariffed rates. Embarq denies that AT&T complied with the terms and conditions of the Subcontractor Agreement, and it denies the remaining allegations of Paragraph 14.

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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 15 of the Complaint. Further answering, Embarq states that AT&T did not pay Embarq in accordance with the Subcontractor Agreement.

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).

**ANSWER:** Embarq admits that, because of the manner in which AT&T ordered services from Embarq and Embarq's billing systems, Embarq billed AT&T under Embarq's tariffed rates. Embarq denies that AT&T complied with the terms and conditions of the Subcontractor Agreement.

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.

**ANSWER:** Embarq admits that, because of the manner in which AT&T ordered services from Embarq and Embarq's billing systems, Embarq billed AT&T under Embarq's tariffed rates. Embarq denies that AT&T complied with the terms and conditions of the Subcontractor Agreement, and it denies the remaining allegations of Paragraph 17.

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.

**ANSWER:** Embarq admits that, on or about September 16, 2004, it notified AT&T that AT&T had not complied with the terms and conditions of the Subcontractor Agreement. Further answering, Embarq states that the remaining allegations of Paragraph 18 purport to characterize the September 16, 2004 communication from Embarq to AT&T, that the September 16, 2004 communication speaks for itself, and that no further response is required to the allegations in Paragraph 18.

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").

**ANSWER:** Embarq admits that, based on current information, including discussions with AT&T, it currently believes the amount AT&T owes to be approximately \$5 million. Embarq specifically reserves the right to revise that figure in the event information is uncovered

indicating that a different amount is owed. Embarq denies the remaining allegations contained in Paragraph 19 of the Complaint.

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.

**ANSWER:** Embarq admits that the parties have engaged in efforts to resolve this dispute. Embarq further admits that those efforts have been unsuccessful. Embarq admits that the Subcontractor Agreement states that "all disputes arising under this Agreement shall be resolved in the appropriate forum in the State of Ohio." However, Embarq denies that this Commission is the appropriate forum for AT&T's Complaint. Embarq denies the remaining allegations of Paragraph 20.

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).

**ANSWER:** Embarq states that the allegations contained in Paragraph 21 of the Complaint purport to quote and/or characterize R. C. § 2721.04 and the Supreme Court's decision in *Herrick v. Kosydar*, 339 N.E.2d 626, 627 (Ohio. 1975), that those authorities speak for themselves, and that no response therefore is required. Embarq denies that this Commission is the appropriate forum for AT&T's Complaint.

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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 22 of the Complaint.

## COUNT I

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

**ANSWER:** Embarq restates its answers to Paragraphs 1-22 of the Complaint as if 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."

**ANSWER:** Embarq states that the allegations in Paragraph 24 of AT&T's Complaint purport to characterize the Subcontractor Agreement, that the Subcontractor Agreement speaks for itself, and that, therefore, no answer is required to the remaining allegations in Paragraph 24 of the Complaint.

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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 25 of the Complaint.

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

**ANSWER:** Embarq denies the allegations contained in Paragraph 26 of the Complaint.

## COUNT II

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

**ANSWER:** Embarq restates its answers to Paragraphs 1-26 of the Complaint 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 pre-empt particular provisions of the RFP or Contractor response, such tariffs shall supersede the affected provisions.”

**ANSWER:** Embarq states that the allegations in Paragraph 28 of AT&T’s Complaint purport to characterize the RFP, that the RFP speaks for itself, and that, therefore, no answer is required to the remaining allegations in Paragraph 28 of the Complaint.

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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 29 of the Complaint.

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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 30 of the Complaint.

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

**ANSWER:** Embarq denies the allegations contained in Paragraph 31 of the Complaint.

### COUNT III

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

**ANSWER:** Embarq restates its answers to Paragraphs 1-31 of the Complaint 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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 33 of the Complaint.

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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 34 of the Complaint.

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

**ANSWER:** Embarq denies the allegations contained in Paragraph 35 of the Complaint.

#### **COUNT IV**

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

**ANSWER:** Embarq restates its answers to Paragraphs 1-35 of the Complaint 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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 37 of the Complaint.

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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 38 of the Complaint.

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.

**ANSWER:** Embarq states that the allegations in Paragraph 39 of AT&T's Complaint purport to characterize R.C. § 4905.22, that R.C. § 4905.22 speaks for itself, and that, therefore, no answer is required to the allegations in Paragraph 39 of the Complaint.

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.

**ANSWER:** Embarq denies the allegations contained in Paragraph 40 of the Complaint.

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.

**ANSWER:** Embarq states that the allegations in the first sentence of Paragraph 41 of AT&T's Complaint purports to characterize R.C. § 4905.31, that R.C. § 4905.31 speaks for itself, and that, therefore, no answer is required to the allegations in the first sentence of Paragraph 41 of the Complaint. Embarq denies the remaining allegations in Paragraph 41.

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

**ANSWER:** Embarq denies the allegations contained in Paragraph 42 of the Complaint.

### **DEFENSES**

Pursuant to Rule 4901-9-01 of the Ohio Administrative Code ("O.A.C."), and any other statutes and regulations deemed applicable, Respondent Embarq by and through undersigned counsel states the following defenses to the claims raised in AT&T's Complaint:

1. With respect to all counts, lack of jurisdiction over the subject matter of the Complaint (as described more fully in Embarq's Motion to Dismiss);
  2. With respect to all counts, failure to state of claim up which relief can be granted;
- and
3. With respect to all counts, unclean hands.

Dated: September 19, 2007

Respectfully submitted,

UNITED TELEPHONE COMPANY OF OHIO  
D/B/A EMBARQ

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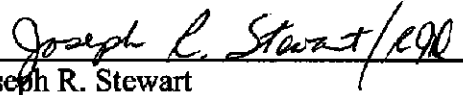
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**CERTIFICATE OF SERVICE**

I, Joseph R. Stewart, hereby certify that I caused a true and correct copy of Respondent Embarg's Answer to Complainant 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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