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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

2008 APR 10 PM 4:01

In the Matter of the Application of The	)	
Ohio Bell Telephone Company d/b/a	)	Case No. 06-1013-TP-BLS
AT&T Ohio For Approval of an	)	
Alternative Form of Regulation of Basic	)	Case No. 07-259-TP-BLS
Local Exchange Service and Other Tier 1	)	
Services Pursuant to Chapter 4901:1-4	)	
Ohio Administrative Code.	)	

PUCO

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REPLY TO AT&T OHIO'S MEMORANDUM CONTRA  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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April 10, 2008

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC"), an intervenor in these cases on behalf of residential utility consumers,<sup>1</sup> replies to the Memorandum Contra filed by The Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio") in these proceedings on March 31, 2008.<sup>2</sup> At issue is whether the Public Utilities Commission of Ohio ("PUCO" or "Commission") should require AT&T Ohio to show cause as to why the alternative regulation ("alt. reg.") of its basic local exchange service ("basic service" or "BLES") in eleven telephone exchanges should not be revoked.<sup>3</sup>

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<sup>1</sup> OCC was granted intervention in Case No. 06-1013 ("06-1013") by Entry dated September 1, 2006 and in Case No. 07-259 ("07-259") by Entry dated April 11, 2007.

<sup>2</sup> OCC files this Reply pursuant to Ohio Adm. Code 4901-1-12(B)(2). OCC's failure to respond to any argument presented by AT&T Ohio in its memorandum contra should not be construed as OCC's acquiescence to the argument.

<sup>3</sup> The eleven exchanges are Beallsville, Belfast, Danville (Highland), Graysville, Guyan, Marshall, Newcomerstown, Rio Grande, Shawnee, Vinton and Walnut. The cases were closed, but were reopened by memoranda docketed on April 12, 2007 (06-1013) and on September 26, 2007 (07-259).

On March 13, 2008, OCC moved the Commission to issue a show cause order pursuant to Ohio Adm. Code 4901:1-4-12(B) and R.C. 4927.03(C). OCC noted that because First Communications acquired New Access Communications (“New Access”), AT&T Ohio no longer meets the “competitive test” under which the Commission granted alt. reg. for AT&T Ohio’s basic service in the eleven exchanges. Thus, the findings upon which the Commission based its decision are no longer valid, and the Commission should determine whether AT&T Ohio’s basic service alt. reg. for those exchanges should be revoked under R.C. 4927.03(C) and Ohio Adm. Code 4901:1-4-12(B).

In its Memorandum Contra, AT&T Ohio does not deny that New Access no longer provides service in the eleven exchanges.<sup>4</sup> AT&T Ohio, however, argues that OCC’s Motion is not ripe for consideration because AT&T Ohio has not increased its basic service rates in the eleven exchanges.<sup>5</sup> AT&T Ohio also asserts that the “competitive tests” are thresholds rather than benchmarks that must be constantly maintained,<sup>6</sup> and argues that Commission should only consider revocation of basic service alt. reg. if there has been a “significant failure of the marketplace.”<sup>7</sup> In addition, AT&T Ohio claims that a show cause order is not in the public interest and would “hamstring” the Commission and incumbent local exchange carriers (“ILECs”).<sup>8</sup> Finally, AT&T Ohio states that its due process rights are implicated.<sup>9</sup>

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<sup>4</sup> See Memorandum Contra at 3.

<sup>5</sup> Id. at 6.

<sup>6</sup> Id. at 9.

<sup>7</sup> Id. at 10.

<sup>8</sup> Id. at 11-16. The Commission’s basic service alt. reg. rules apply only to incumbent local telephone companies. See Ohio Adm. Code 4901:1-4-08(A).

<sup>9</sup> Memorandum Contra at 16.

AT&T Ohio claims that behind OCC's Motion is a "very thin reed...."<sup>10</sup> In reality, the "very thin reed" was supporting the grant of basic service alt. reg. in the eleven exchanges. When it approved basic service alt. reg. in the exchanges, the Commission found that there were just enough alternative providers in the exchanges for AT&T Ohio to meet the criteria of Ohio Adm. Code 4901:1-4-10(C)(3) ("Test 3"), the test AT&T Ohio chose for consideration of basic service alt. reg. in the exchanges. The basis for granting basic service alt. reg. in the eleven exchanges has disappeared, as discussed in the Motion. The Commission should issue a show cause order under Ohio Adm. Code 4901:1-4-12(B).

## II. ARGUMENT

AT&T Ohio would have the Commission believe that the basic service alt. reg. statute was written solely for the benefit of incumbent local telephone companies. To the contrary, the statutory requirements to obtain and retain basic service alt. reg. are meant to ensure that consumers do not face rate increases – actual or potential – without there being a healthy and sustainable competitive market.<sup>11</sup> This is evidenced by the additional requirement, under R.C. 4927.03(A)(3), for the Commission to determine that there are no barriers to entry for basic service.

Rather than launching an assault on the Commission's basic service alt. reg. rules, as AT&T Ohio alleges,<sup>12</sup> OCC's Motion actually asks the Commission to **uphold** its rules and the statute on which they are based. If the "competitive tests" are in fact a

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<sup>10</sup> Id. at 3.

<sup>11</sup> See R.C. 4927.02(A)(2).

<sup>12</sup> See Memorandum Contra at 6.

substitute for the statutory requirements for basic service alt. reg., then the Commission must ensure that an ILEC continues to meet the statutory requirements after alt. reg. has been approved. Otherwise, the safeguards contained in R.C. 4927.03(C) and Ohio Adm. Code 4901:1-4-12(B), that are designed to protect consumers, would be meaningless.

The fact that there are now fewer alternative providers in the eleven exchanges than the Commission found when it granted basic service alt. reg. – which AT&T Ohio does not deny<sup>13</sup> – means that the market in the eleven exchanges “has changed such that it **may no longer** meet one of the competitive market tests....”<sup>14</sup> The Commission should therefore grant OCC’s Motion, and order AT&T Ohio to show cause as to why basic service alt. reg. in the eleven exchanges should not be revoked, pursuant to Ohio Adm. Code 4901:1-4-12(B).

**A. AT&T Ohio’s Characterization of the Statute and the Commission’s Rules Would Render Meaningless the Commission’s Authority and Process for Determining Whether an Incumbent Telephone Company’s Basic Service Alternative Regulation Should Be Revoked.**

AT&T Ohio characterizes the Commission’s basic service alt. reg. rules as “threshold tests; they are not permanent benchmarks that are etched in stone that must be monitored and met every day.”<sup>15</sup> AT&T Ohio’s view is wrong and directly contradicts the Commission’s own pronouncements regarding the nature and purpose of the rules.

Ohio Adm. Code 4901:1-4-10(C) states, “If the applicant can demonstrate that at least one of the following competitive market tests is satisfied in a telephone exchange area, the applicant will be deemed to have met the statutory criteria found in division (A) of section 4927.03 of the Revised Code for BLES and other tier one services in that

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<sup>13</sup> See id. at 3.

<sup>14</sup> Ohio Adm. Code 4901:1-4-12(B).

<sup>15</sup> Memorandum Contra at 9.

telephone exchange area.” R.C. 4927.03(A)(1) allows alt. reg. “**provided the commission finds** that any such measure is in the public interest and either of the following conditions exists: (a) The telephone company or companies are subject to competition with respect to such public telecommunications service; (b) The customers of such public telecommunications service have reasonably available alternatives.” (Emphasis added.) For basic service alt. reg., R.C. 4927.03(A)(3) states, “**the commission additionally shall find** that there are no barriers to entry.” (Emphasis added.)

Thus, the “competitive tests” are the means by which the Commission makes the findings required by the statute. R.C. 4927.03(C) allows the Commission to modify or abrogate an alt. reg. plan “if it determines that the findings upon which the order **was** based **are** no longer valid....” (Emphasis added.) The statute phrases the validity of the findings in the present tense, meaning that the current situation is such that the basis for the Commission’s findings no longer exists. Thus, in order to retain alt. reg. authority, ILECs must meet the criteria upon which the authority is based on an ongoing basis. That is reflected in Ohio Adm. Code 4901:1-4-12(B), which states that a show cause order may be issued if the Commission has reason to believe “that the market in a telephone exchange area(s) has changed such that it may **no longer meet** one of the competitive market tests....” (Emphasis added.)

In addition, AT&T Ohio argues that the Commission should not consider revoking an ILEC’s alt. reg. unless there has been “a significant failure of the

marketplace.”<sup>16</sup> AT&T Ohio does not define the term and does not cite any law that supports its argument.

The Commission should reject AT&T Ohio’s position. In establishing the basic service alt. reg. rules, the Commission determined that having five alternative providers in an exchange was part of the means by which the Commission would deem that an ILEC had met the statutory requirements for basic service alternative regulation.<sup>17</sup> The Commission should not wait until there are three, or two, or one alternative provider(s) in the exchange to question whether an ILEC meets the statutory criteria for basic service alternative regulation. The fact is (which AT&T Ohio does not dispute) there now are not enough alternative providers recognized by the Commission in the eleven exchanges to meet the “competitive test” on which basic service alt. reg. was granted. That is the single criterion which the Commission has chosen for issuing a show cause order under Ohio Adm. Code 4901:1-4-12(B).

In the basic service alt. reg. rulemaking AT&T Ohio argued against the show cause revocation process. Similar to its stale arguments regarding entry barriers in the Memorandum Contra,<sup>18</sup> AT&T Ohio asserted that no revocation process was needed because, according to AT&T Ohio, the basic service market is “irreversibly open.”<sup>19</sup> In the basic service alt. reg. rulemaking, however, the Commission rejected AT&T Ohio’s position, stating that “it would be unwise given the newness of BLES alternative

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<sup>16</sup> Id. at 10.

<sup>17</sup> See *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Case No. 05-1305-TP-ORD (“05-1305”), Entry on Rehearing (May 3, 2006) (“05-1305 Rehearing Entry”) at 18-19.

<sup>18</sup> See Memorandum Contra at 11-15.

<sup>19</sup> 05-1305, SBC Ohio Initial Comments at 27. At the time, AT&T Ohio was known as SBC Ohio.



regulation to concede that the market for BLES is irreversibly open to competition.”<sup>20</sup>

The Commission then adopted the show cause revocation process.

Notably, AT&T Ohio does not argue that it still meets Test 3 – or any other “competitive test” – in the eleven exchanges. AT&T Ohio’s only argument is that it does not have to meet any test. That is contradictory to the plain language of Ohio Adm. Code 4901:1-4-12(B) and, by implication, to R.C. 4927.03(C).

Indeed, the Supreme Court of Ohio has recognized the statutory right for revocation, including OCC’s opportunity to notify the PUCO if conditions change, consistent with OCC’s motion for revocation. In the recent appeal of the order in 06-1013, the Court stated: “R.C. 4927.03(C) reserves to the commission the right to modify or abrogate an award of alternative regulatory treatment should any evidence show that the findings relied upon are no longer valid. OCC can notify the commission if any conditions change.”<sup>21</sup>

OCC has set forth reasonable grounds for the Commission to issue a show cause order under Ohio Adm. Code 4901:1-4-12(B) and R.C. 4927.03(C). AT&T Ohio has not provided the Commission with any reason to refrain from doing so.

**B. AT&T Ohio’s Reading of the Basic Service Alternative Regulation Statute and the Commission’s Rules Is Erroneous.**

If one were to believe AT&T Ohio’s view of R.C. 4927.03, the sole purpose of the statute is to give ILECs the unfettered ability to raise the rates they charge consumers. But AT&T Ohio’s view of the statute is distorted.

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<sup>20</sup> 05-1305, Opinion and Order (March 7, 2006) (“05-1305 Order”) at 51.

<sup>21</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, Slip Opinion No. 2008-Ohio-861, ¶ 37. See also *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, Slip Opinion No. 2008-Ohio-860, ¶ 35.

R.C. 4927.03 contains numerous consumer protections. By requiring that alt. reg. can be achieved for a telecommunications service only if the service is subject to competition or if there are reasonably available alternatives for the service,<sup>22</sup> the statute is designed to ensure that consumers have adequate alternatives to the ILEC's service and protection against abusive rate increases by ILECs with the market power to set prices that are unconstrained by competition.

In addition, for basic service alt. reg., there is the requirement that the Commission find that there are no barriers to entry.<sup>23</sup> This provision is meant to ensure that the competitive market for basic service is healthy and sustainable,<sup>24</sup> so that consumer choice will not deteriorate. Further, the revocation provision, R.C. 4927.03(C), allows the Commission to maintain oversight of ILECs' alt. reg. plans, at least for the first five years, to ensure that the competitive market upon which the grant of alt. reg. was based does not erode.

As the Commission stated:

The Commission is not surprised that the ILECs are opposed to anything less than unfettered pricing flexibility. As stated in the Opinion and Order, the Commission attempted to "strike a balance between the important public policy of ensuring the availability of stand-alone BLES at just and reasonable rates, while at the same time recognizing the continuing emergence of a competitive environment through flexible regulatory treatment"....<sup>25</sup>

The Commission should ignore AT&T Ohio's one-sided view of the statute, and should ensure that consumers are not harmed by erosion of the competition upon which an ILEC is granted alternative regulation.

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<sup>22</sup> R.C. 4927.03(A)(1)(a) and (b).

<sup>23</sup> R.C. 4927.03(A)(3).

<sup>24</sup> See R.C. 4927.02(A)(2).

<sup>25</sup> 05-1305 Rehearing Entry at 23, quoting 05-1305 Order at 40.

AT&T Ohio also argues that OCC's Motion is not ripe for consideration because AT&T Ohio has not yet raised basic service rates for residential customers in any of the eleven exchanges.<sup>26</sup> That approach is not founded in law or rule, and the Commission should not be content to wait until an ILEC actually raises its rates before invoking Ohio Adm. Code 4901:1-4-12(B). As the rule notes, "Pending any review of alternative regulation of BLES, the ILEC will maintain the pricing flexibility previously granted until or unless otherwise modified by the commission." Thus, if an ILEC were to raise basic service rates under alt. reg. authority, apparently even while a revocation proceeding were pending, those rates would remain in effect even if the Commission ultimately determines that alt. reg. should be revoked for a given exchange. As a result, some consumers would not be recompensed for paying a higher rate for basic service than they should have. The PUCO should avoid such unjust treatment of consumers.

In addition, AT&T Ohio's criticisms of OCC's proposals for a process under Ohio Adm. Code 4901:1-4-12(B) are baseless. OCC's Motion presented the Commission with logical suggestions on the conduct of a revocation proceeding consistent with the Commission's basic service alt. reg. rules. AT&T Ohio's response is essentially that it should not be required to make any showing that it still qualifies for basic service alt. reg. in the eleven exchanges.<sup>27</sup> Instead, AT&T Ohio would place some unspecified burden on OCC as "the movant" here.<sup>28</sup>

AT&T Ohio's position is misguided. OCC is "the movant" only for purposes of the show cause order. Under Ohio Adm. Code 4901:1-4-12(B), OCC's burden is to state

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<sup>26</sup> Memorandum Contra at 6.

<sup>27</sup> See *id.* at 15.

<sup>28</sup> *Id.*

reasonable grounds for the Commission to issue a show cause order (which OCC has done). Once the Commission issues a show cause order, the burden will be on AT&T Ohio to show that its basic service alt. reg. should not be revoked in the eleven exchanges.<sup>29</sup> Further, Ohio Adm. Code 4901:1-4-10(A) places the burden on the applicant – AT&T Ohio – to demonstrate that it meets one of the “competitive tests” to be granted basic service alt. reg. in an exchange.

Contrary to AT&T Ohio’s assertions,<sup>30</sup> OCC’s Motion did not suggest that the Commission prohibit AT&T Ohio from attempting to use a test other than Test 3. OCC merely noted that because AT&T Ohio chose Test 3 to attain basic service alt. reg. for the eleven exchanges in the 06-1013 and 07-259 dockets, it would not be appropriate for AT&T Ohio to use a test other than Test 3 in response to a show cause order in these dockets.<sup>31</sup> The other tests in Ohio Adm. Code 4901:1-4-10(C) require showings that are much different from that required by Test 3. The other showings have not been made in the record of these proceedings. Thus, if AT&T Ohio wants to use a test other than Test 3 in any of the eleven exchanges, then it should be required to file a new application.<sup>32</sup>

Finally, the Commission, in the basic service alt. reg. rulemaking, has already addressed AT&T Ohio’s harangue about due process.<sup>33</sup> In response to telephone industry concerns about due process in a revocation proceeding, the Commission stated:

The show cause provision does nothing more than provide the ILEC an opportunity to respond to an allegation that a telephone

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<sup>29</sup> See, e.g., *In the Matter of the Commission Staff’s Investigation into the Alleged MTSS Violations of Buzz Telecom*, Entry (December 13, 2006) at 2.

<sup>30</sup> Memorandum Contra at 15.

<sup>31</sup> Motion at 16.

<sup>32</sup> Id.

<sup>33</sup> Memorandum Contra at 16.

exchange area may no longer meet one of the competitive tests outlined in adopted Ohio Adm. Code 4901:1-4-10(C). As noted in the sentence that follows the show cause provision, the Commission will determine, after reviewing all the information provided on the subject, whether to close its review, initiate a more formal investigation or schedule a hearing concerning whether to pursue a revocation of the ILEC's authority in the identified telephone exchange area. ... [W]e view this provision as providing the ILECs more, not less, due process....<sup>34</sup>

The Commission, therefore, should not be deterred from moving forward with a show cause order. Indeed, as noted above in Section II.A., the Ohio Supreme Court made a point of referencing the recourse of revocation.

### **III. CONCLUSION**

AT&T Ohio would have the Commission equate ILECs' interests with the public interest. The basic service alt. reg. statute, however, is designed to protect consumers by requiring that an ILEC's basic service be subject to competition or that consumers have reasonably available alternatives to the ILEC's basic service at all times during the term of the alt. reg. plan. The statute also requires that there be no barriers to entry for basic service in an exchange. The Ohio Supreme Court noted the opportunity for revocation as a check on the granting of alternative regulation.

The Commission has determined that, in order for these statutory criteria to be met, a certain level of competition must exist for the benefit of customers, based on the number of providers in the market and the number of residential access lines that the ILEC has lost. AT&T Ohio does not dispute the fact that the level of competition required by the Commission's basic service alt. reg. rules no longer exists.

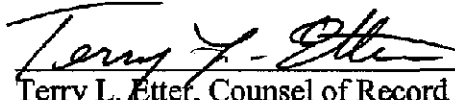
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<sup>34</sup> 05-1305 Order at 51. Notably, AT&T Ohio did not seek rehearing on this issue.

OCC has presented reasonable grounds for the Commission to issue an order requiring AT&T Ohio to show cause as to why its basic service alt. reg. should not be revoked under R.C. 4927.03(C) and Ohio Adm. Code 4901:1-4-12(B). AT&T Ohio has offered nothing of substance to dispute OCC's position that a show cause order is appropriate. In order to protect consumers in the eleven exchanges, the Commission should proceed with the show cause order.

Respectfully submitted,

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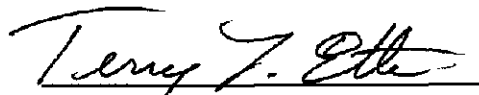
A handwritten signature in black ink, appearing to read "Terry L. Etter", is written over a horizontal line.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to AT&T Ohio's Memorandum Contra by the Office of the Ohio Consumers' Counsel was sent by First Class United States Mail, postage prepaid, to the persons listed below this 10<sup>th</sup> day of April 2008.

  
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