BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Chapter	)	
4901:1-3 of the Ohio Administrative Code.	)	Case No. 08-539-TP-ORD

REPLY COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Respectfully submitted,

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I. INTRODUCTION

On May 7, 2008, the Public Utilities Commission of Ohio ("Commission" or "PUCO") issued an Entry seeking comments on the PUCO Staff's proposed changes to certain rules applicable to telephone companies in Ohio Adm. Code Chapter 4901:1-3. By and large, the PUCO Staff proposed retaining the rules, renumbering the rules and placed the rules in the Ohio Adm. Code Chapter 4901:1-6. These rules relate to, among other matters, the system of accounts for telephone companies, exchange boundary modifications involving more than one incumbent local exchange carrier ("ILEC"), the filing of certain contracts and line extensions.

On June 13, 2008, AT&T Ohio and the Ohio Telecom Association ("OTA") filed comments on the proposed changes. Both called for the Commission to change or eliminate several of the rules because, AT&T Ohio and OTA argued, the rules are applicable only to ILECs and not to other carriers that provide service in Ohio.[1] Both urged the Commission to no longer require that ILECs maintain records through the

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[1] AT&T Ohio Comments at 1; OTA Comments at 6.

Uniform System of Accounts ("USOA"),[2] or to maintain service area maps with the Commission.[3] Both also opposed retaining rule language concerning charges for excess construction of line extensions,[4] and language that would require telephone companies to file all contracts made with other telephone companies regarding the construction, maintenance or use of facilities or regarding rates and service.[5]

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility customers,[6] submits these Reply Comments.[7] The arguments set forth by AT&T Ohio and OTA fail to recognize that not all competitors are on equal footing with ILECs and that ILECs are still the dominant carriers in their service territories. In addition, ILECs have provider of last resort obligations that make the requirements of some of the proposed rules necessary. The Commission should reject the recommendations made by AT&T Ohio and OTA.

II. AT&T OHIO AND OTA PRESENT AN OVERLY NARROW VIEW OF THE NEED FOR REGULATION.

AT&T Ohio and OTA offered similar advice to the Commission regarding how it should determine whether a rule is necessary. AT&T Ohio stated:

> The Commission should approach each of the proposed rules with that issue in mind: Is this rule necessary and appropriate in today's competitive environment? A rule is not necessary where current industry practices are reasonable and a rule may limit flexibility that is

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[2] AT&T Ohio Comments at 3-4; OTA Comments at 2.

[3] AT&T Ohio Comments at 5-8; OTA Comments at 2-3.

[4] AT&T Ohio Comments at 10-11; OTA Comments at 5.

[5] AT&T Ohio Comments at 8-10; OTA Comments at 4.

[6] OCC has legislative authority to represent the residential utility consumers of Ohio pursuant to Chapter 4911 of the Ohio Revised Code.

[7] On June 13, 2008, OCC filed a letter indicating that it would not be filing initial comments but reserving the right to file reply comments. If OCC does not address an argument presented in the comments, that fact should not be construed as OCC acquiescing to the argument.

> otherwise present. A rule is not be [sic] appropriate if it simply repeats the language of an existing federal rule, as that could result in unintended consequences. A rule is not appropriate if it cannot be enforced uniformly upon all competitors. In reviewing the proposed rules, the Commission must also consider that regulation was developed as a substitute, or surrogate, for competition. Because vibrant competition for telecommunications services is now well-established, fewer rules should be necessary and any proposal to impose new rules must be closely scrutinized.[8]

OTA suggested that the Commission should ask the following questions:

- Is it necessary to retain rules that are no more than a reiteration of existing federal rules?
- Is the rule equitable for all providers of telecommunications services?
- Does a problem exist for which the rule is necessary?
- Has the rule out-lived its original purpose?[9]

In focusing on the supposed existence of a competitive environment, AT&T Ohio and OTA ignore specific ILEC obligations. Thus, the approach recommended by AT&T Ohio and OTA is wrongly focused.

The Commission must begin with the state telecommunications policy established in R.C. 4927.02(A). The statute, in relevant part, states that it is the policy of the state to:

> 1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;
>
> (2) Rely on market forces, **where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market**, to maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications service;
>
> **…**
>
> (5) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of public telecommunications services **where appropriate**;

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[8] AT&T Ohio Comments at 1-2.

[9] OTA Comments at 1.

> (6) **Consider** the regulatory treatment of competing and functionally equivalent services in determining the scope of regulation of services that are subject to the jurisdiction of the public utilities commission;
>
> (7) Not **unduly** favor or advantage any provider and not **unduly** disadvantage providers of competing and functionally equivalent services;….[10]

The public policy expressed in R.C. 4927.02(A) makes it incumbent upon the Commission to consider more than just the effect of regulation on the ILECs.

The Commission has noted that it is "the sole entity charged with the exclusive responsibility for protecting the public interest and overseeing the operations of telecommunications companies when it comes to the provision of utility service within Ohio."[11] Thus, the Commission must not simply defer to supposedly "reasonable" industry practices, but instead must determine for itself whether regulation serves a greater purpose, such as to protect consumers and/or to allow the Commission to fulfill its statutory mission of ensuring that telephone service promotes the public convenience.[12] Regulation can do more than cure problems; often, regulation is necessary to prevent problems.

The Commission should adopt several of the proposed rules, as discussed herein. These rules help ensure that the Commission can effectively monitor the activities of the ILECs, which in turn will help make certain that the ILECs do not use their dominance in less-competitive services to gain an unfair advantage in more competitive services. The

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[10] Emphasis added.

[11] *In the Matter of the Amendment of the Minimum Telephone Service Standards As Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 05-1102-TP-ORD, Entry on Rehearing (July 11, 2007) ("MTSS Rehearing Entry") at 53.

[12] See R.C. 4905.24; R.C. 4905.381; R.C. 4905.402(B); R.C. 4905.49.

rules will also help ensure that ILECs continue to fulfill their provider of last resort obligations.[13]

III. THE COMMISSION SHOULD ADOPT THE UNIFORM SYSTEM OF ACCOUNTS RULE AS PROPOSED IN THE ENTRY.

A. The Uniform System of Accounts Rule Is Consistent with Commission Practice and with Executive Order 2008-04S.

The Commission has recognized the need for incorporating Federal Communications Commission ("FCC") rules into PUCO regulations. Nonetheless, both AT&T Ohio and OTA urge the Commission to reject the requirement in proposed Ohio Adm. Code 4901:1-6-19 ("Rule 19") that ILECs maintain accounting records in accordance with the USOA. They argue that the rule reiterates FCC requirements, and thus is unnecessary.[14] They also point to the Commission's recent refusal to incorporate FCC rules in the carrier-to-carrier rules because, the Commission determined, that such a move would be cumbersome and problematic.[15] The arguments are not applicable to the present circumstances.

The Commission has not, in all instances, refrained from incorporating FCC rules into PUCO regulations, and has recognized the need to do so. For example, several provisions of the Minimum Telephone Service Standards ("MTSS"), adopted in July 2007, incorporate by reference specific FCC rules.[16] In adopting the rules, the Commission stated that "[i]t seems most likely that, in most instances, there will be

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[13] Ohio Adm. Code 4901:1-5-02(D)(2).

[14] AT&T Ohio Comments at 3; OTA Comments at 2.

[15] AT&T Ohio Comments at 3; OTA Comments at 2, each citing *In the Matter of the Review of Chapter 4901:1-6*, Case No. 06-1344-TP-ORD.

[16] See Ohio Adm. Code 4901:1-5-04(F); Ohio Adm. Code 4901:1-5-05(C); Ohio Adm. Code 4901:1-5-07(B); Ohio Adm. Code 4901:1-5-09(A); Ohio Adm. Code 4901:1-5-13(F)(1).

sufficient time before any changes in the federal standards go into effect, for … any … affected company, to make a formal motion for whatever MTSS waiver relief they feel they may then need or be entitled to."[17] The Commission's action is supported by Executive Order 2008-04S, which recognizes that "[f]ederally promulgated rules should be implemented as written, unless separate state rules are permitted and appropriate to achieve an Ohio-specific public policy goal."[18] Nothing in federal law precludes the Commission from adopting a USOA requirement that is appropriate to achieving an Ohio-specific public policy goal.

The USOA requirement in Rule 19, which retains the substance of current Ohio Adm. Code 4901:1-3-01, helps to further the public policy of ensuring that all Ohioans have adequate service available to them at reasonable rates, and helps to ensure that ILECs in Ohio do not unfairly impede telephone competition. Ohio's ILECs provide a wide array of services, e.g., local landline, long distance, broadband, wireless and television delivery. Some of these services are regulated by the PUCO, while others are not. By contrast, the carriers that these ILECs compete with generally offer some, but not all, of these services.

In addition, the ILECs are at least dominant in many of these service markets. The USOA requirement allows the Commission to monitor the activities of the ILECs in order to determine whether they are unfairly using their dominance in less competitive product markets in order to gain an undue advantage in more competitive product markets.

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[17] MTSS Rehearing Entry at 55-56.

[18] Executive Order 2008-04S (February 12, 2008) at 2.

In this regard, the fact that the FCC has issued an order granting forbearance from some of its cost allocation rules[19] makes inclusion of the USOA in the PUCO's rules **more** important. Fundamental to the FCC's decision was the conclusion that cost allocations were no longer needed on the federal level and that it lacked "authority under sections 2(a) and 10 of the [Communications] Act to maintain federal regulatory requirements that meet the three-prong forbearance test with regard to interstate services in order to maintain regulatory burdens that may produce information helpful to state commissions for intrastate regulatory purposes solely."[20] The PUCO will be unable to rely on FCC monitoring of the large ILECs' activities.

Further, AT&T Ohio asserts that "[t]he Commission should … recognize FCC forbearance actions with regard to all of its affected rules."[21] The FCC's views on this subject are pertinent:

> [W]e do not in this Order preempt any state accounting requirements adopted under state authority. We recognize, as the State Members point out, that section 10(e) states that "[a] State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying" under section 10. Although states will not have authority to enforce the federal Cost Assignment Rules as they apply to AT&T once this relief is effective, we do not read section 10(e) to prevent states from adopting similar provisions to the extent that they have authority under state law. In the wake of this decision, we would expect that any states that may rely on the Cost Assignment Rules

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[19] See AT&T Ohio Comments at 4.

[20] *Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket No. 07-21, Memorandum Opinion and Order, FCC 08-120 (rel. April 24, 2008) ("*AT&T Cost Allocation Forbearance Order*"), ¶ 32. It is at least disingenuous for AT&T Ohio to fail even to mention that the petitions in question were filed by its corporate parent. It should also be noted 1) that the National Association of State Utility Consumer Advocates (of which OCC is a member) has filed an appeal of this FCC Order; 2) there is a pending Petition for Reconsideration of the Order at the FCC; and 3) that the FCC has required that AT&T file (and have approved) a detailed compliance plan that gives the FCC access to the same information required by the rules.

[21] AT&T Ohio Comments at 4, n.4.

> and resulting data for state regulatory purposes would assert their jurisdiction to obtain the needed information from AT&T.[22]

To the extent that ILECs are able to obtain forbearance from federal rules, this Commission should consider adopting independent state requirements for the intrastate portion of the information that is covered by those rules.

B. The Commission's Elective Alternative Regulation and Basic Service Alternative Regulation Rules Require Companies to Maintain Records in Accordance with the Uniform System of Accounts.

Both AT&T Ohio and OTA urge the Commission, if it adopts Rule 19, to allow ILECs operating under alternative regulation ("alt. reg.") to use Generally Accepted Accounting Principles ("GAAP") rather than USOA because, they argue, competitive local exchange carriers are able to use GAAP instead of USOA.[23] The USOA requirement, however, is an affirmative requirement of the Commission's elective alt. reg. rules for ILECs.[24] And, because basic service alt. reg. is available only to ILECs that have been approved for elective alt. reg.,[25] the USOA is a requirement for basic service alt. reg.

Elective alt. reg. is intended to be an "off-the-shelf" process, i.e., ILECs must meet all the requirements of the rules in order to gain elective alt. reg. status. Agreeing to abide by USOA is one of the requirements. In order to remove the USOA requirement for elective alt. reg. ILECs, therefore, the Commission would need to conduct a separate rulemaking. The current rulemaking should not take such a step.

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[22] *AT&T Cost Allocation Forbearance Order*, ¶ 33.

[23] AT&T Ohio Comments at 4; OTA Comments at 2.

[24] Ohio Adm. Code 4901:1-4-05.

[25] Ohio Adm. Code 4901:1-4-08.

C. The Commission Should Review the Threshold for Class A Telephone Companies Under the Rule, but Should Reject OTA's Proposed One Hundred Million Dollar Threshold.

The Commission should consider raising the threshold for classifying telephone companies as Class A ILECs for USOA purposes, a topic raised by OTA, but not set the revenue cut-off as high as that proposed by OTA.[26] OTA criticizes proposed Rule 19 as being "severely outdated – it uses a $5 million revenue cutoff for classification as Class A, instead of the current FCC rule which is indexed and presently in excess of $100 million."[27]

It is true that the five million dollar threshold was set at least 14 years ago.[28] A review of the ILECs' annual reports for 2007 that were filed with the Commission shows that at least three small ILECs – Champaign, Conneaut and Orwell – have regulated operating revenues of more than five million dollars, and are considered large telephone companies for USOA purposes. Thus, it would be appropriate for the Commission to re-examine the appropriate revenue for accounting requirements for large telephone companies (Class A) and for small telephone companies (Class B).

OTA's recommended one hundred million dollar threshold, however, would classify some of the larger ILECs in Ohio as Class B for USOA purposes. According to their 2007 annual reports filed with the PUCO, three of the largest eight ILECs in Ohio – Windstream Ohio, CenturyTel and Chillicothe – had less than one hundred million

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[26] OTA Comments at 2.

[27] Id.

[28] See *In the Matter of the Revision of Rule 4901:1-3-01, Ohio Administrative Code, Concerning the Uniform System of Accounts for Telephone Companies*, Case No. 94-250-TP-ORD, Finding and Order (March 24, 1994), 1994 WL 120915 (Ohio P.U.C.).

dollars in regulated operating revenues, and thus would qualify as Class B companies for USOA purposes under OTA's approach.

The Commission should consider raising the threshold for classifying telephone companies as Class A ILECs for USOA purposes. The Commission, however, should not set the level so high that larger ILECs qualify as Class B.

IV. THE COMMISSION SHOULD REQUIRE THAT APPLICATIONS CONCERNING MODIFICATION OF EXCHANGE BOUNDARIES INVOLVING MORE THAN ONE INCUMBENT CARRIER INCLUDE DETAILED BOUNDARY MAPS.

Exchange maps serve a greater purpose than that described by AT&T Ohio and OTA. Both AT&T Ohio and OTA oppose adoption of the proposed rule that continues the requirement for detailed maps to accompany applications concerning the modification of exchange boundaries that involve more than one ILEC. They assert that the rule is unnecessary because telephone companies use computerized systems to confirm that a new customer's address is within the company's service area.[29]

The Commission, however, uses exchange areas for many regulatory purposes. For example ILECs must seek basic service alt. reg. on an exchange-by-exchange basis.[30] The focus of AT&T Ohio and OTA is, again, too narrow.

Detailed maps will help the Commission to better gauge the effect of exchange-based regulations on consumers and the industry. The Commission should adopt the rule as proposed.

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[29] AT&T Ohio Comments at 5; OTA Comments at 3.

[30] See Ohio Adm. Code 4901:1-4-10(A).

V. THE COMMISSION SHOULD NOT ADOPT THE BROAD EXEMPTION FOR THE FILING OF CONTRACTS PROPOSED BY AT&T OHIO.

Proposed Ohio Adm. Code 4901:1-6-21(A) ("Rule 21(A)") would require the filing of "any contract, agreement, or arrangement … with any other telephone company relating in any way to the construction, maintenance or use of its plant or property, or to any service rate or charge." While the rule may be overly broad, as AT&T Ohio and OTA suggest,[31] the rule serves a useful purpose.

AT&T Ohio suggests replacing the rule with the following language:

> EXCEPT AS REQUIRED BY FEDERAL LAW AND BY OHIO ADMIN. CODE §§ 4901:1-6-14(B) AND 4901:1-6-17, ALL TELEPHONE COMPANIES ARE HEREBY EXEMPTED FROM FILING ANY AGREEMENT WITH ANY PARTY FOR COMMISSION REVIEW AND APPROVAL.[32]

Ohio Adm. Code 4901:1-6-14(B) requires the filing of applications regarding transactions between telephone companies "for the purchase, sale, or lease of property, plant, or business which may affect the operating authority of a party to the transaction pursuant to section 4905.48 of the Revised Code." Ohio Adm. Code 4901:1-6-17 requires the filing of customer contracts.

AT&T Ohio's proposal is at the opposite extreme of proposed Rule 21(A). AT&T Ohio would create a broad exemption to the filing of contracts for Commission review and approval. There is no need for such a broad exemption. The Commission should not hinder its ability to require telephone companies to file contracts that are not already required to be filed but which may relate to telephone companies' activities that the PUCO regulates. The Commission should reject AT&T Ohio's proposed rule.

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[31] AT&T Ohio Comments at 8-9; OTA Comments at 4.

[32] AT&T Ohio Comments at 9.

VI. THE COMMISSION SHOULD ADOPT THE PROPOSED RULES ADDRESSING LINE EXTENSIONS.

Both AT&T Ohio and OTA urge the Commission to eliminate proposed Ohio Adm. Code 4901:1-6-22. Among other things, the rule sets forth the methodology for apportioning the cost among customers for line extensions. Here again, AT&T Ohio and OTA complain that this rule unfairly burdens the ILECs because it does not apply to CLECs.[33] But once again, AT&T Ohio and OTA fail to recognize that only the ILECs maintain provider of last resort responsibilities. The rule was originally adopted to cover just those situations where the provider of last resort responsibility is problematic, i.e., where meeting the responsibility is an expensive proposition. It represents a balance between the interests of the ILECs and of consumers, who are protected from having to pay the entire (ILEC-determined) cost of a line extension up front.

The notion that individual company tariffs could take the place of this rule[34] ignores the interest in uniformity for such line extensions that meet the provider of last resort responsibility, and encourages individual ILECs to place unreasonable conditions on such extensions.[35] AT&T Ohio argues that Commission oversight of such tariffs likely would be limited[36] in an area where such oversight is desirable.

The arguments presented by AT&T Ohio and OTA for eliminating the line extension rule are, in fact, contradictory. AT&T Ohio asserted that "[t]he rule is rooted in history, when the ILECs were monopoly providers of service and public policy

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[33] AT&T Ohio Comments at 10-11; OTA Comments at 5.

[34] AT&T Ohio Comments at 10.

[35] An equivalent on the electric side was seen in *OCC, on Behalf of Jim and Helen Heaton et. al. v. Columbus and Southern Ohio Electric Company*, Case No. 83-1279-EL-CSS, Opinion and Order (April 16, 1985).

[36] AT&T Ohio Comments at 10.

weighed in favor of 'averaging' the costs of service across a large and captive body of customers."[37] Thus, AT&T Ohio suggests that the rule is unnecessary because competition exists. OTA, on the other hand, attempted to show that the rule is inequitable because it applies only to ILECs: "[W]hile the Entry highlights that this rules [sic] applies to all LECs, in reality this rule only applies to ILECs. CLECs can simply choose not to serve a customer if facilities are not available, while ILECs must serve the customer as the carrier of last resort."[38] But if CLECs are not required to make facilities available, there is no real competition regarding line extensions. Neither AT&T Ohio nor OTA has presented a valid reason for rejecting the proposed rule.

Further, OTA argued that the Commission should reduce the distance from one-half mile to one-tenth mile that customers would not be charged for a standard pole line extension. According to OTA, "reducing the distance will reduce a burden that is placed only on the ILECs, and will therefore promote a more equitable market."[39] OTA, however, produced no information to support its contention. On the other hand, reducing the distance would increase costs to those consumers who need a line extension longer than one-tenth mile. The Commission should reject OTA's recommendation.

VII. CONCLUSION

The Commission should re-examine the threshold for classification under the USOA, as discussed herein. Otherwise, a continuing need exists to protect consumers and competition, and the Commission should adopt the rules proposed by the PUCO Staff.

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[37] Id.

[38] OTA Comments at 5.

[39] Id.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments by the Office of the Ohio Consumers' Counsel was served electronically to the persons listed below, on this 30th day of June 2008.

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