

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The	)	
Ohio Bell Telephone Company d/b/a	)	Case No. 08-107-TP-BLS
AT&T Ohio for Approval of an Alternative	)	Case No. 08-594-TP-BLS
Form of Regulation of Basic Local	)	
Exchange and Other Tier 1 Services	)	
Pursuant to Chapter 4901:1-4, Ohio	)	
Administrative Code.	)	

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

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**I. INTRODUCTION**

On June 18, 2008, the Office of the Ohio Consumers’ Counsel (“OCC”), an intervenor on behalf of residential utility customers in these proceedings where AT&T Ohio seeks authority to increase certain rates,<sup>1</sup> moved the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to dismiss the above-referenced applications, in part, as they pertain to the Pitchin exchange.<sup>2</sup> OCC’s Motion noted that AT&T Ohio included additional information regarding the Pitchin exchange in the company’s application for alternative regulation (“alt. reg.”) of basic local exchange service (“basic service” or “BLES”) in Case No. 08-594-TP-BLS (“08-594”), despite having a pending basic service alt. reg. application involving the Pitchin exchange in Case No. 08-107-TP-BLS (“08-107”). By so doing, AT&T Ohio improperly supplemented its application in 08-107. In

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<sup>1</sup> OCC’s motion to intervene in the 08-107 proceeding was granted by Entry dated February 27, 2008. OCC filed a motion to intervene in the 08-594 proceeding on June 11, 2008.

<sup>2</sup> OCC filed the Motion pursuant to Ohio Adm. Code 4901-1-12.

the Motion, OCC urged the Commission to dismiss both the 08-107 and the 08-594 applications as they apply to the Pitchin exchange.

On June 25, 2008, the Commission issued an Opinion and Order in 08-107, in which the Commission denied AT&T Ohio basic service alt. reg. for the Pitchin exchange. The Commission determined that AT&T Ohio had not shown that there are five facilities-based alternative providers serving residential customers in the Pitchin exchange, as required under Ohio Adm. Code 4901:1-4-10(C)(4) (“Test 4”), the market test AT&T Ohio chose for the Commission to examine the exchange.<sup>3</sup> The Commission also ruled that because the 08-107 application was denied for the Pitchin exchange, OCC’s Motion was moot as it pertained to that application.<sup>4</sup> Nevertheless, “the Commission agree[d] with OCC that it is inappropriate for an applicant to file an application for a specific exchange while an application encompassing the same exchange is still pending before the Commission. Such an approach is a misuse of the procedures established for seeking alternative regulation of BLES pursuant to Chapter 4901:1-4, O.A.C.”<sup>5</sup>

On July 3, 2008, AT&T Ohio filed a memorandum contra OCC’s Motion. In its memorandum contra, AT&T Ohio stated that it “faced a dilemma here and responded reasonably, and consistent with its understanding of its rights under the law and the Commission’s rules, to it.”<sup>6</sup> Apparently, AT&T Ohio’s “dilemma” concerned the company’s “understanding of the Commission's latest precedents involving the review of

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<sup>3</sup> 08-107, Opinion and Order (June 25, 2008) (“08-107 Order”) at 22.

<sup>4</sup> Id. at 21.

<sup>5</sup> Id.

<sup>6</sup> Memorandum Contra at 1-2.

the competitive showings to be made” in basic service alt. reg. cases.<sup>7</sup> AT&T Ohio asserts that its filing of the Pitchin exchange in two applications did not “greatly inconvenience[]” the Commission, the PUCO Staff or OCC.<sup>8</sup> In addition, AT&T Ohio claims that because the Commission, for the first time in the 08-107 Order, specifically prohibited applicants from including an exchange in a basic service alt. reg. application while another application covering the exchange is pending, the Commission should apply the prohibition prospectively only.<sup>9</sup> AT&T Ohio argues that the Commission should not dismiss the 08-594 application as it applies to the Pitchin exchange.

## II. ARGUMENT

In this reply to AT&T Ohio’s memorandum contra,<sup>10</sup> OCC points out that the “dilemma” AT&T Ohio supposedly faced was of its own doing. Nothing in the Commission’s rules required AT&T Ohio to include the Pitchin exchange in the 08-594 application. Instead, as OCC’s Motion noted,<sup>11</sup> the Commission anticipated that applicants would cure deficiencies in an application by supplementing the application rather than filing a second application regarding an exchange while the first application was pending. In addition, the “latest precedents” that AT&T Ohio claimed it was responding to were not first enunciated in the 07-1312 Order,<sup>12</sup> as AT&T Ohio

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<sup>7</sup> Id. at 2.

<sup>8</sup> Id.

<sup>9</sup> See id. at 3.

<sup>10</sup> OCC files this reply pursuant to Ohio Adm. Code 4901-1-12(B)(1).

<sup>11</sup> Motion at 4-5.

<sup>12</sup> *In the Matter of the Application of The Ohio Bell Telephone Company d/b/a AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-1312-TP-BLS, Opinion and Order (May 14, 2008) (“07-1312 Order”).

suggests.<sup>13</sup> Rather, the type of proof needed to show that wireless carriers are facilities-based alternative providers was established in the Commission’s decision in AT&T Ohio’s first basic service alt. reg. case, Case No. 06-1013-TP-BLS (“06-1013”) – long before the 07-1312 Order was issued.

These facts do not support AT&T Ohio’s assertion that the inclusion of the Pitchin exchange in the 08-594 application was a reasonable response. Rather, the facts support the conclusion that AT&T Ohio was attempting to “game the system” by bringing additional information concerning the Pitchin exchange before the Commission in the 08-594 application while the 08-107 application was pending. The Commission should dismiss the 08-594 application as it applies to the Pitchin exchange.

**A. The “Latest Precedents” That AT&T Ohio Claims Caused the Company to Include the Pitchin Exchange in the 08-594 Application Actually Were Established in AT&T Ohio’s First Basic Service Alternative Regulation Case in 2006.**

AT&T Ohio claims that it included the Pitchin exchange in the 08-594 application because:

The Company was simply responding to its understanding of the Commission’s latest precedents involving the review of the competitive showings to be made in such cases. The Commission appears to be insisting on a showing of white pages listings, ported landline numbers, or some other proof of a carrier’s actual presence in order to “qualify” carriers as “unaffiliated facilities-based providers serving the residential market” for purposes of Test 4.<sup>14</sup>

The type of proof necessary to show a carrier’s presence in an exchange is nothing new, however.

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<sup>13</sup> Memorandum Contra at 2.

<sup>14</sup> Id., citing 07-1312 Order at 25.

The proof the Commission requires from an applicant to show that a carrier is present and serving the residential market in an exchange was established in AT&T Ohio's first basic service alt. reg. case, 06-1013. In its December 2006 Opinion and Order in that proceeding, the Commission rejected several alternative providers – wireline and wireless – because AT&T Ohio failed to show that the providers had ported numbers in several exchanges:

Specific to the Belfast Exchange, the Commission determines that, although AT&T Ohio identified ACN and Verizon Wireless as alternative providers, the record does not support the allegation that the carriers are providing residential service within the exchange (i.e., no evidence of white pages listings or ported numbers). Specific to the Lewisville and Murray City exchanges, the Commission determines that, although AT&T Ohio identified Alltel Wireless and Sprint/Nextel as alternative providers, the record does not support the allegation that the carriers are providing residential service within the exchanges (i.e., no evidence of ported numbers). Specific to the Salineville Exchange, the Commission determines that, although AT&T Ohio identified Alltel Wireless, Sprint/Nextel, and New Access as alternative providers, the record does not support the allegation that the carriers are providing residential services within the exchange (i.e., no evidence of white pages listings or ported numbers, respectively).<sup>15</sup>

AT&T Ohio did not seek rehearing of this, or any, issue in either the 06-1013 proceeding or the 07-1312 case. Further, applicants (including AT&T Ohio) and the Commission have relied on ported numbers for determining whether wireless carriers serve residential customers and thus qualify as alternative providers in other basic service alt. reg. cases.<sup>16</sup>

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<sup>15</sup> 06-1013-TP-BLS, Opinion and Order (December 20, 2006) at 32.

<sup>16</sup> See *In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Opinion and Order (December 19, 2007) at 27; *In the Matter of the Application of The Ohio Bell Telephone Company d/b/a AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-259-TP-BLS, Opinion and Order (June 27, 2007) at 25 (approving wireless carriers as facilities-based alternative providers based on ported numbers).

AT&T Ohio should have been aware, at the time it filed the 08-107 application, of the need to show that alternative providers have ported numbers in an exchange. The “dilemma” that AT&T Ohio supposedly faced was not caused by the 07-1312 Order, as AT&T Ohio suggests.

**B. Any “Dilemma” That May Have Prompted AT&T Ohio to Include the Pitchin Exchange in the 08-594 Application Was Caused by AT&T Ohio’s Own Prediction Regarding the Outcome of the 08-107 Application.**

AT&T Ohio does not explain the “dilemma” that supposedly occurred between the time that the 08-107 application was filed and the filing of the 08-594 application. The only reference AT&T Ohio makes in this regard is the company’s statement in the 08-594 application that “[t]he Pitchin exchange is included in this application out of an abundance of caution and due to more recent data becoming available.”<sup>17</sup>

AT&T Ohio, however, was under no obligation to include the Pitchin exchange in the 08-594 application. PUCO rules do not require it; indeed, as discussed in OCC’s Motion and subsequently made clear by the Commission,<sup>18</sup> PUCO rules disfavor including an exchange in an application while it is under consideration in another pending application. Further, there was no deadline – other than a possible internal deadline at the company – for AT&T Ohio to include the Pitchin exchange in the 08-594 application while the exchange was under consideration in the 08-107 application.

Thus, as OCC discussed in the Motion,<sup>19</sup> the only reason for AT&T Ohio to include the Pitchin exchange in the 08-594 application was to “hedge its bets” against the

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<sup>17</sup> Memorandum Contra at 2, citing 08-594 Application, Memorandum in Support at 2.

<sup>18</sup> 08-107 Order at 21.

<sup>19</sup> Motion, Memorandum in Support at 6-7.

possibility that the Commission would deny basic service alt. reg. in the 08-107 case, which the Commission ultimately did. It is clear that AT&T Ohio thought it had nothing to lose by including the Pitchin exchange in the 08-594 application. In the process, however, AT&T Ohio improperly placed before the Commission new information regarding the Pitchin exchange in the 08-594 proceeding even while the Commission was considering the exchange in the 08-107 proceeding.

As discussed herein, this was not a reasonable response to the situation, despite AT&T Ohio's claim to the contrary. Any "dilemma" was a product of AT&T Ohio's own doing and of AT&T Ohio's own imagination. The Commission should disregard AT&T Ohio's excuse for including Pitchin in the 08-594 application.

**C. The Commission Should Dismiss the 08-594 Application as It Applies to the Pitchin Exchange.**

AT&T Ohio argues that "[i]t would not be fair or lawful" to dismiss the 08-594 Application as it applies to the Pitchin Exchange.<sup>20</sup> AT&T Ohio asserts that the Commission cannot apply retroactively the prohibition against including an exchange in a basic service alt. reg. application while the exchange is under consideration in another pending basic service alt. reg. application. Because the basic service alt. reg. rules do not specifically **allow** the action taken by AT&T Ohio, however, it should not be accepted that this matter would involve a retroactive application of the prohibition.

Even if applying the prohibition to the 08-594 application could be construed as retroactive application of a rule, such a retroactive application is not precluded. As the United States Supreme Court has stated:

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<sup>20</sup> Memorandum Contra at 3.

[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.<sup>21</sup>

Courts have also recognized that the following factors may be taken into consideration in determining whether to retroactively apply a rule interpretation first pronounced in an adjudicatory proceeding:

- (1) Whether the particular case is one of first impression;
- (2) Whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law;
- (3) The extent to which the party against whom the new rule is applied relied on the former rule;
- (4) The degree of the burden which a retroactive order imposes on a party; and
- (5) The statutory interest in applying a new rule despite the reliance of a party on the old standard.<sup>22</sup>

Dismissing the 08-594 application as it pertains to the Pitchin exchange based on the prohibition against including exchanges in more than one pending application would pass this test. First, as OCC noted in the Motion, this is a case of first impression. No other basic service alt. reg. application has included an exchange that was under consideration in another pending application.

Second, the established practice for basic service alt. reg. applications has been to **not** include exchanges that were already under PUCO consideration in another pending application. Thus, applying the prohibition against including exchanges in more than one

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<sup>21</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1581 (1947).

<sup>22</sup> *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).



pending application would not be an abrupt departure from established practice. Further, the Commission is merely attempting “to fill a void” in the rules. The Commission’s basic service alt. reg. rules are silent on this specific issue because, in the rulemaking, the Commission likely did not anticipate that an applicant would have more than one application pending at the same time for an exchange.

Third, although AT&T Ohio relied on the absence of a specific prohibition in the rule, its reliance was unreasonable, as discussed above. Thus, AT&T Ohio’s reliance on the rule is of little significance.

Fourth, it seems that there would be little burden on AT&T Ohio if the 08-594 application is dismissed regarding the Pitchin exchange. The 07-1312 Order, which AT&T Ohio asserts prompted it to include the Pitchin exchange in the 08-594 application, was issued on May 14, 2008. The 08-594 application, which included three exchanges – Mantua, Philo and Olmsted Falls – for which AT&T Ohio was denied basic service alt. reg. in the 07-1312 Order as well as new information on the Pitchin exchange, was filed just 23 days later, on June 6, 2008. AT&T Ohio thus seems to have little difficulty in compiling information regarding exchanges for which it seeks basic service alt. reg.

Fifth, the Commission’s statutory interest in applying the prohibition to the 08-594 application is to ensure that the process that the Commission has implemented for basic service alt. reg. upholds the statutory criteria for alt. reg. in R.C. 4927.03. Particularly important is the directive in R.C. 4927.03(A)(3) that the Commission must find that there are no barriers to entry in an exchange before it may grant basic service alt. reg. for the exchange. This is crucial for helping to ensure fulfillment of the state policy

that adequate basic will be available to citizens throughout Ohio. The Commission's application process, especially the "competitive tests," is meant to determine whether there are barriers to entry in an exchange.

It would be lawful for the Commission to dismiss the 08-594 application as it applies to the Pitchin exchange. Given that AT&T Ohio has not justified its decision to include the Pitchin exchange in the 08-594 application while the exchange was under consideration in the 08-107 application, dismissing the 08-594 application as it applies to the Pitchin exchange would also be the right thing to do.

### **III. CONCLUSION**

AT&T Ohio's arguments against OCC's Motion are not supported by facts or law. The Commission should grant OCC's Motion and dismiss the 08-594 application as it applies to the Pitchin exchange.

Respectfully submitted,

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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 served by electronic mail to the persons listed below, on this 10th day of July 2008.

/s/ Terry L. Etter -----  
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Summary: Reply Reply to AT&T Ohio's Memorandum Contra By The Office of the Ohio Consumers' Counsel electronically filed by Mrs. Mary V. Edwards on behalf of Etter, Terry L. and Office of the Ohio Consumers' Counsel