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

FINDING AND ORDER

The Commission finds:

(1) Section 119.032, Revised Code, requires all state agencies, every five years, to conduct a review of each of its rules and to determine whether to continue its rules without change, amend its rules, or rescind its rules. Specifically, Section 119.032(C), Revised Code, requires that the Commission determine:

(a) Whether the rule should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rule was adopted;

(b) Whether the rule needs amendment or rescission to give more flexibility at the local level;

(c) Whether the rule needs amendment to eliminate unnecessary paperwork; and

(d) Whether the rule duplicates, overlaps with, or conflicts with other rules.

(2) In addition, on February 12, 2008, the governor of the state of Ohio issued Executive Order 2008-04S, entitled "Implementing Common Sense Business Regulation," (executive order) which sets forth several factors to be considered in the promulgation of rules and requires the Commission to review its existing body of promulgated rules. Specifically, among other things, the Commission must review its rules to ensure that each of its rules is needed in order to implement the underlying statute; must amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that unnecessarily impede economic growth, or that have had unintended negative consequences; and must

reduce or eliminate areas of regulation where federal regulation now adequately regulates the subject matter.

(3) In order to assist the Commission in making the determinations required by Section 119.032(C), Revised Code, the staff of the Commission, based on its own analysis and review, recommended that the Commission should proceed to rescind current Chapter 4901:1-3, Ohio Administrative Code (O.A.C.). Further, the staff proposed to delete certain rules currently codified in Chapter 4901:1-3, O.A.C., and rearrange, condense, and renumber certain other rules in the chapter and place those revised rules in Chapter 4901:1-6, O.A.C. In an entry issued on May 7, 2008, the Commission invited interested persons to comment on the staff's recommendations.

(4) By attorney examiner's entry issued on May 22, 2008, the initial and reply comment cycles were extended to June 13 and June 30, 2008. Initial comments were filed by AT&T Ohio (AT&T) and by the Ohio Telecom Association (OTA). Reply comments were filed by the Office of the Ohio Consumers' Counsel (OCC). Throughout this order, references to AT&T and OTA will be to those commenters' initial comments while the reference to OCC will be to OCC's reply comments. Rules proposed by staff and issued for comment shall be referred to as "proposed rules." Any recommended change that is not discussed below or incorporated into the amended rules attached to this order should be considered denied.

(5) Regarding the proposed rule on accounting requirements affecting all telephone companies (proposed Rule 4901:1-6-19), AT&T and OTA claim that proposed paragraph (A) setting forth Uniform System of Accounts for all incumbent local exchange carriers (ILECs) is merely a reiteration of Federal Communication Commission (FCC) requirements. Therefore, paragraph (A) should be rescinded in its entirety as there is no purpose served by duplicating a federal rule in Ohio regulation (AT&T at 3; OTA at 2). AT&T next asserts that paragraph (B) of proposed Rule 4901:1-6-19 is unnecessary as the Commission need not "reserve the right" to do anything in a rule when the Commission already has the statutory right to act (AT&T at 4). As to the new requirement set forth as paragraph (C) of proposed Rule 4901:1-6-19 that purports to apply Generally Accepted Accounting Principles (GAAP) to competitive local

exchange carriers (CLECs) and competitive telecommunication service (CTS) providers, AT&T and OTA submit these accounting requirements are already set forth in Rule 4901:1-7-26(A)(2), O.A.C. Therefore, repetition here is unnecessary *(Id.;* OTA at 2). If the Commission nonetheless believes that a rule on the subject of accounting requirements is necessary, AT&T and OTA recommend exempting those ILECs operating under alternative regulation from such a rule and permitting such companies to follow GAAP rather than USOA in order to achieve competitive parity (AT&T at 4; OTA at 2). Further, AT&T submits that should accounting requirements be retained, the Commission should explicitly recognize the potential for FCC forbearance under 47 U.S.C. §160 (AT&T at 4).

(6) In its reply comments, OCC points out that the Commission has not, in all instances, refrained from incorporating FCC rules into Commission regulations. OCC offers as an example, the recently adopted minimum telephone service standards codified in Chapter 4901:1-5, O.A.C. (OCC reply comments at 5). OCC continues that the USOA requirement helps further the public policy of ensuring that all Ohioans have adequate service available to them at reasonable rates and helps ensure that ILECs in Ohio do not unfairly impede telephone competition (*Id.* at 6). The USOA requirement also 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 (*Id.*). OCC also contends that the USOA requirement is an affirmative requirement of the Commission's elective alternative regulation rules for ILECs. Therefore, according to OCC, in order to remove the USOA requirement for elective alternative regulation ILECs, the Commission would need to conduct a separate rulemaking proceeding (*Id.* at 8). OCC agrees with OTA that the Commission should review the threshold for Class A telephone companies under the proposed rule, however, the Commission should not set the threshold so high as to qualify larger Ohio ILECs as Class B telephone companies (*Id.* at 9-10). Regarding AT&T's forbearance arguments, OCC, citing to *Petition of AT&T Inc. For Forbearance Under 47 U.S.C. §160 From Enforcement of Certain of the Commission's Cost Assignment Rules* (AT&T Forbearance order), WC Docket No.

07-21, Memorandum Opinion and Order, FCC 08-120 (rel. April 24, 2008), points out that the FCC specifically stated that states were not prevented from adopting similar accounting provisions to the extent that the states have authority under state law to do so (OCC at 7).

Having thoroughly considered the arguments expressed by the commenters concerning proposed Rule 4901:1-6-19, the Commission determines that the rule need not be adopted. In making this determination, we note that accounting requirements for ILECs are already set forth in Rule 4901:1-7-26(B), O.A.C., while accounting requirements for CLECs and CTS providers are set forth in Rule 4901:1-6-10(D)(4), O.A.C.

Regarding AT&T's argument that the Commission should explicitly recognize the potential for FCC forbearance, we disagree. In fact, in the same FCC forbearance order cited by AT&T in its comments, the FCC emphasized that it was not preempting any state accounting requirements adopted under state authority. Further, the FCC noted that the state commissions may exercise their own state authority to conduct rate and other regulation as permitted under state law (AT&T Forbearance order at ¶ 33). Sections 4905.05, 4905.13, and 4905.15, Revised Code, provide the state authority by which the Commission designates the system of accounts for intrastate public utility purposes. For our intrastate purposes today, we are satisfied with the ILECs following the FCC's accounting treatment for intrastate purposes. However, should the FCC grant ILECs forbearance from USOA treatment in the future, we instruct the involved ILEC(s) to notify the Commission immediately so that we may determine, for intrastate purposes, whether to follow the FCC's forbearance or adopt some other accounting methodology.

(7) AT&T and OTA next submit that there is no longer any need to continue to require telephone companies to create or maintain detailed boundary maps with the Commission (proposed Rule 4901:1-6-20) (AT&T at 5; OTA at 3). AT&T avers that the use of maps has given way to more modern, useful, and detailed resources such as a street address guide (SAG) to track telephone company facilities and customer locations (AT&T at 5-6). OTA states that paragraphs (A) through (D) have outlived their purpose and should be rescinded (OTA at 3). For the

same reasons that maps should not be required, AT&T claims that the Commission should not require a listing of overlap customers as set forth in proposed paragraph (B). AT&T argues that it should be sufficient that company records are maintained on all overlap customers without the need for lists of overlap customers to be maintained and filed with the Commission (AT&T at 7). For the same change in technology reasons listed above, AT&T argues that the filing of maps with boundary change applications should no longer be necessary. However, if this proposed rule is adopted, AT&T recommends that the Commission also consider extending this rule to those facilities-based CLECs that do not mirror the ILECs' exchange boundaries (*Id.*). Regarding the boundary borderline provisions of proposed paragraph (E), AT&T recommends that the terminology used in this paragraph be reviewed and updated in order to reflect current conditions and not historic concepts (*Id.* at 8).

(8) OCC points out that the Commission uses exchange areas for many regulatory purposes including, for example, basic local exchange service alternative regulation. Detailed maps will help the Commission better gauge the effect of exchange-based regulations on consumers and on the industry. Therefore, OCC asserts that the Commission should adopt the rule as proposed (OCC at 10).

(9) We disagree with the position advocated by AT&T and OTA that boundary maps, which visually illustrate telephone exchange boundaries, are no longer necessary. While other more modern resources may exist to identify telephone company facilities and customer locations, we note that telephone exchange boundary maps still fulfill a useful purpose in identifying telephone exchange areas which continue to be used for numerous regulatory purposes. Therefore, we see no valid reason to eliminate this helpful regulatory resource at this time. For similar reasons, we also disagree with AT&T that revised maps are no longer needed when an ILEC files an application seeking to change the exchange boundary. We do clarify, however, that we do not expect the telephone companies to create their own maps but rather the telephone companies shall use their own technology and the Commission's map as the source document when fulfilling this mapping function. Moreover, we have modified the language

within the rule to more clearly capture what we expect to be filed in a telephone exchange boundary change application.

We do agree with AT&T, however, there have been few overlap disputes between ILECs that the Commission has had to step in and resolve. Therefore, the Commission determines that the overlap list provision of the proposed rule (proposed paragraph B) is no longer necessary and should be amended accordingly. We do, however, direct the ILECs to maintain documentation on areas where overlap situations exist and, should a dispute arise that requires Commission intervention, the involved ILECs must provide the appropriate documentation upon request. As a final matter regarding this proposed rule, we agree with OTA that the companies have been able to informally settle boundary disputes among themselves without Commission intervention. Therefore, we are striking the detailed provisions of proposed paragraph (E) and replacing those provisions with a statement that borderline boundary disputes may be brought before the Commission as a formal complaint pursuant to Section 4905.26, Revised Code, if they are not resolved informally.

(10) Proposed Rule 4901:1-6-21 addresses the filing of contracts by telephone companies subject to Commission jurisdiction. OTA and AT&T submit that the proposed rule appears to backtrack from recent Commission efforts at reducing regulation and would not, therefore, be consistent with the Governor's Executive Order on common sense business regulation (OTA at 4; AT&T at 8). AT&T continues that the proposed rule is not even limited to regulated services and, therefore, would require the filing of real estate contracts and contracts for the purchase and sale of surplus poles between two telephone companies (AT&T at 9). AT&T recommends replacing the proposed rule with a provision that would exempt from filing with the Commission all contracts except those required by federal law and by Rules 4901:1-6-14(B)(1)(c) and 4901:1-6-17, O.A.C. (*Id.*).

(11) OCC urges the Commission to not adopt the broad exemption from filing of contracts proposed by AT&T. According to OCC, there is no need for such a broad exemption that could hinder the Commission's ability to require telephone companies to file contracts that may relate to telephone company activities that the Commission regulates (OCC at 11).

(12) We agree with the commenters that the rule, as proposed, was broader than intended. Therefore, we have modified the language of the adopted rule so as to make the language of the adopted rule track more closely the language of the corresponding rescinded rule.

(13) AT&T and OTA question the continued vitality and the need for a rule concerning line extension charges (proposed Rule 4901:1-6-22). These commenters assert that line extension issues rarely arise today and when those issues do arise the issues are resolved through Commission-approved tariffs (AT&T at 10; OTA at 5). Should the Commission determine to adopt the revised rule, OTA recommends substituting the phrase "public rights of way" in place of "highway rights of way." According to OTA, the term "public rights of way" recognizes that there are public areas beyond highways to which excess construction charges apply (OTA at 5). Additionally, OTA recommends that the distance after which excess construction charges apply should be reduced from one-half mile to one-tenth of a mile. This will, in OTA's opinion, reduce a burden that only applies to ILECs and will, therefore, promote a more equitable market (*Id.*).

(14) OCC responds that the rule as proposed should be adopted. According to OCC, AT&T and OTA once again fail to acknowledge that only the ILECs maintain provider of last resort responsibilities. Moreover, the rule, as proposed, serves to balance the interests of the ILECs and of consumers who should be protected from having to pay upfront the entire, ILEC-determined, cost of line extensions (OCC at 12). Additionally, the notion that individual company tariffs could take the place of this rule ignores the interest in uniformity for such line extensions that meet the provider of last resort responsibility (*Id.*). Regarding OTA's proposal to reduce the distance over which consumers would not have to pay for line extensions, OCC argues that OTA has produced no information to support its contention that this policy represents a burden on ILECs. Thus, OCC urges the Commission to reject OTA's recommendation (*Id.* at 13).

(15) The Commission determines that the rule does continue to fulfill a vital purpose by balancing the interests of consumers with the interests of local telephone companies. We agree that

line extension issues rarely arise today mainly due, in our opinion, to the fact that the rule has existed in the Ohio Administrative Code for so long. We note that the principal modification made in the proposed rule was to replace the more general phrase "telephone company" with the more specific phrase "local exchange carrier (LEC)." Further, OTA presented no information to support its contention that LECs' responsibility for the first one-half mile of line extensions overburdens its members. However, we do agree with OTA's recommendation to substitute the phrase "public rights of way" in place of "public highways." That modification has been made in the adopted rule.

(16) Upon consideration of the staff proposal and the initial and reply comments, the Commission concludes that existing Chapter 4901:1-3, O.A.C., should be rescinded and that new Rules 4901:1-6-20 through 4901:1-6-23, O.A.C., should be adopted.

It is, therefore,

ORDERED, That existing Chapter 4901:1-3, O.A.C., be rescinded and that the attached new Rules 4901:1-6-20 through 4901:1-6-23, O.A.C., should be adopted and should be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission in accordance with divisions (D) and (E) of Section 111.15, Revised Code. It is, further,

ORDERED, That the final rules be effective on the earliest date permitted by law. Unless otherwise ordered by the Commission, the review date for Chapter 4901:1-6, O.A.C., shall be May 31, 2012. It is, further,

ORDERED, That a copy of this finding and order, with the attached rules, be served upon all telephone companies under the Commission's jurisdiction, the Ohio Telecom Association, the Office of the Ohio Consumers' Counsel, and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Entered in the Journal

SEP 2 4 2008

Reneé J. Jenkins
Secretary

*** DRAFT – NOT FOR FILING ***

4901:1-6-20 **Zones of operation, boundary changes, and administration of borderline boundaries.**

This rule applies to all incumbent local exchange carriers (ILECs) whether the ILEC is subject to a qualifying alternative regulation plan or not.

(A) Commission maintained telephone exchange boundary maps shall be the official source/documentation of ILEC boundaries.

(B) Whenever an ILEC proposes to change the boundary of an exchange area, the ILEC shall file an application seeking to change the boundary. Whenever the exchange area involves the exchange area of two or more ILECs, the application shall be filed jointly by the companies involved.

(C) Such application is subject to the fourteen-day automatic approval procedure set forth in paragraph (A) of rule 4901:1-6-08 of the Administrative Code. An ILEC application submitted for approval shall include:

(1) A description of the change being made to the boundary. The company shall work with staff to ensure that the commission's maps reflect accurately the boundary changes, using the company's latest technology and the telephone boundary quadrangle maps as found on the commission's website as a basis for the boundary change.

(2) The reasons for making the change, and one of the following:

(a) A statement explaining the effect of the change, if any, on existing subscribers.

(b) A statement attesting that the change does not adversely affect the service being furnished to any existing subscriber.

(c) A statement attesting that each existing subscriber whose service is adversely affected has consented to the change.

(D) Any borderline boundary dispute between ILECs or between an ILEC and a customer shall be subject to the complaint procedures under section 4905.26 of the Revised Code.

4901:1-6-21 **Filing by telephone companies of contracts, agreements, notes, bonds, or other arrangements entered into between telephone companies or with any telephone management, service, or operating company.**

(A) All telephone companies are exempted from filing with the commission, pursuant to the provisions of the second paragraph of section 4905.16 of the Revised Code, a copy of any contract, agreement, note, bond, or other arrangement entered into with any telephone management, service, or operating company.

(B) This rule does not relieve any telephone company doing business in the state of Ohio of any duty or obligation imposed by law, nor does it relieve any such telephone company from making any filing directed by an existing order of the commission.

4901:1-6-22 **Excess construction charges applicable to certain line extensions for the furnishing of local exchange telephone service.**

The following rules and regulations are established for certain line extensions as maximum construction charges applicable thereto for permanent facilities on public rights-of-way outside the base-rate area of an exchange in connection with the furnishing of local exchange telephone service.

(A) Where a local exchange carrier (LEC) constructs permanent facilities on public rights-of-way in order to furnish service to an applicant or applicants in the territory where no facilities are available, the maximum construction charges applicable shall be determined in the following manner, regardless of the actual route to be followed by such construction:

(1) Where only one applicant is to be furnished service, the length of construction required to reach the point of entrance of the applicant's private property, measured along the public right-of-way either from the nearest existing distributing plant of the LEC or the nearest point to which the LEC plans to extend its facilities under an approved construction program, whichever is closer, shall be determined by the LEC.

For the length thus determined, the applicant may be required to pay construction charges in excess of the cost one-half mile of standard pole line in place. A credit against the cost of excess construction charges may be given where an applicant performs the labor of digging holes, or trimming or removing trees in the right-of-way in accordance with the LEC's specifications.

(2) Where more than one applicant is to be furnished service along the same route, the length of construction required to reach the point of entrance on each applicant's private property, measured along the public right-of-way either from the nearest existing distributing plant of the LEC or from the nearest point to which the LEC plans to extend its facilities under an approved construction program, whichever is closer, shall be determined. For the length thus determined, the applicants as a group may be required to pay construction charges in excess of the cost of one-half mile of standard pole line in place, multiplied by the number of applicants.

(3) If the LEC elects to attach its facilities to poles of other utility companies in lieu of providing standard pole line construction, the LEC will place one-half mile of circuit for each subscriber without construction charges. For placing facilities in excess of one-half mile on other utility companies' poles, the excess construction charges to be applied shall not exceed the lesser of the actual cost of the attachments to the other companies' poles beyond one-half mile of circuit for each subscriber, or those which would have been applied if standard pole line construction had been provided by the LEC.

(B) The total amount of construction charges to be paid by the applicants as a group shall be apportioned among them in such manner as the group may determine. The necessary construction need not be started, however, until satisfactory arrangements have been made for the payment of such construction charges. In the event the applicants fail to agree upon an apportionment of construction charges within sixty days of the LEC's quotation of charges, then the LEC may suggest prorated distribution of charges, based on relative distances of extension of pole lines among the applicants involved. If this suggestion is unacceptable to all applicants, then the LEC may handle each applicant separately, in accordance with paragraphs (A)(1) and (A)(3) of this rule.

(C) In case the LEC has on file other applications for service, from applicants located along the route to be used to serve the applicants referred to in paragraphs (A)(1) or (A)(2) of this rule, the LEC shall combine the construction projects for the current applicants and the applicants who previously applied for service in accordance with and subject to paragraphs (A)(1) and (B) of this rule, if such action will serve to reduce the amount of construction charges to be paid by either of such groups.

(D) If the application of paragraphs (A) to (C) of this rule would result in unusual hardship to a LEC, the commission may by order, upon written application and proper showing, authorize such LEC to apply construction charges in excess of those provided by paragraphs (A) to (C) of this rule.

(E) The LECs in the state of Ohio desiring to establish construction charges as provided in this rule shall forthwith amend their tariffs to comply at least with the rules stated in paragraphs (A) to (C) of this rule.

*** DRAFT – NOT FOR FILING ***

4901:1-6-23 **Filing of reports by telephone companies subject to the federal communications commission.**

Upon request, each telephone company operating within the state of Ohio shall submit to the director of the utilities department of the commission or the director's designee, a copy of any reports filed with the federal communications commission pursuant to 47 C.F.R. 43 as effective in paragraph (G) of rule 4901:1-6-02 of the Administrative Code.