

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA AT&T OHIO’S MOTION
FOR A PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

On March 13, 2008, the Office of the Ohio Consumers’ Counsel (“OCC”), an intervenor in the above-captioned cases on behalf of residential utility consumers,¹ filed a Motion asking the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to issue an order requiring The Ohio Bell Telephone Company d/b/a AT&T Ohio (“AT&T Ohio”) to show cause why its alternative regulation (“alt. reg.”) for basic local exchange service (“basic service” or “BLES”) should not be revoked in eleven exchanges.² On June 13, 2008, OCC filed a similar Motion concerning eight additional exchanges.³

¹ OCC was granted intervention in Case No. 06-1013-TP-BLS (“06-1013”) by Entry dated September 1, 2006 and in Case No. 07-259-TP-BLS (“07-259”) by Entry dated April 11, 2007.

² Beallsville, Belfast, Danville (Highland), Graysville, Guyan, Marshall, Newcomerstown, Rio Grande, Shawnee, Vinton and Walnut. AT&T Ohio was granted basic service alt. reg. in these exchanges, under Ohio Adm. Code 4901:1-4-10(C)(3) (“Test 3”), by Opinion and Order in 06-1013 dated December 20, 2006.

³ Burton, Cheshire, Dresden, Ironton, Lowellville, New Lexington, Rogers and Toronto. AT&T Ohio was granted basic service alt. reg. in these exchanges, under Adm. Code 4901:1-4-10(C)(4) (“Test 4”), by Opinion and Order in 07-259 dated June 27, 2007. OCC’s Motions were filed pursuant to Ohio Adm. Code 4901:1-4-12(B).

On August 15, 2008, the Attorney Examiner issued an Entry ruling that OCC set forth reasonable grounds in its Motions, as required by Ohio Adm. Code 4901:1-4-12(B).⁴ The Attorney Examiner directed AT&T Ohio “to show cause as to why alternative regulation of BLES and other tier one services in the involved telephone exchange areas should not be revoked.”⁵ AT&T Ohio has the burden of proof in this show cause proceeding.

Per the Entry, AT&T Ohio filed its showing on August 29, 2008, and OCC replied to AT&T Ohio’s showing on September 8, 2008. OCC’s Reply described the many deficiencies in AT&T Ohio’s showing, including AT&T Ohio’s failure to identify the alleged alternative providers of residential service in the Test 3 exchanges and questions concerning the calculation of residential access lines in the Test 4 exchanges.

In order to obtain more information about the claims AT&T Ohio made in its showing, OCC served discovery on AT&T Ohio on September 16, 2008. OCC asked questions about the alternative providers that AT&T Ohio alleges to be providing residential service in the eleven Test 3 exchanges and about the residential line losses that AT&T Ohio alleges to have occurred in the eight Test 4 exchanges.

On September 25, 2008, AT&T Ohio filed a Motion for Protective Order asking the PUCO to rule that AT&T Ohio need not respond to OCC’s discovery. AT&T Ohio argues that “[t]he Commission has not taken steps to commence a show cause ‘proceeding’ in which discovery is appropriate.”⁶ In this Memorandum Contra,⁷ OCC

⁴ Entry at 4.

⁵ Id.

⁶ Motion at 1.

⁷ OCC files this Memorandum Contra pursuant to Ohio Adm. Code 4901-1-12(A).

shows that AT&T Ohio is wrong. The Commission should deny AT&T Ohio's motion and direct AT&T Ohio to respond to OCC's discovery.

II. THE APPLICABLE LAW.

R.C. 4903.082 states, in relevant part: "All parties and intervenors shall be granted ample rights of discovery."

Ohio Adm. Code 4901-1-16(B) provides:

Except as otherwise provided in paragraphs (G) and (I) of this rule, any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission. The frequency of using these discovery methods is not limited unless the commission orders otherwise under rule 4901-1-24 of the Administrative Code.⁸

In addition, Ohio Adm. Code 4901-1-17(A) provides, in relevant part, "discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible."

III. AT&T OHIO'S INTERPRETATION OF THE COMMISSION'S RULES (AND OHIO LAW) IS WRONG.

AT&T Ohio argues that the Commission's August 15 Entry did not "commence" a proceeding in which discovery "would be appropriate."⁹ According to AT&T Ohio, "[i]t would be wasteful to require the Company to respond to OCC's discovery requests,

⁸ OCC's discovery is not limited by Ohio Adm. Code 4901-1-16(G), which does not allow discovery of information available in a document filed in the pending proceeding; indeed, OCC's discovery seeks information that AT&T Ohio **did not** file in its response to the Entry. Ohio Adm. Code 4901-1-16(I), which exempts the PUCO Staff from discovery, is not relevant here.

⁹ See Motion at 1.

since there is no indication that the fruits of that discovery could be used by OCC in any manner.”¹⁰ AT&T Ohio further asserts that “requiring AT&T to respond to OCC’s untimely discovery request would result in an undue burden and expense to the Company.”¹¹ AT&T Ohio is wrong.

Ohio Adm. Code 4901-1-17(A) provides that “discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible.” This is in furtherance of R.C. 4903.082, which requires that parties to proceedings must have ample discovery rights. In addition, the Supreme Court of Ohio, in reversing the Commission for failing to grant an OCC motion to compel discovery responses, stated that “[t]he text of Ohio Adm. Code 4901-1-16(B), the commission’s discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.”¹²

Under the Commission’s rules, a proceeding may “commence” in a variety of ways (e.g., by the filing of an application,¹³ by the issuance of a Commission entry, by the filing of a complaint, by the filing of a motion¹⁴). Indeed, OCC’s two motions for the Commission to issue a show cause order, which were filed pursuant to Ohio Adm. Code 4901:1-4-12(B), commenced the proceeding regarding whether basic service alt. reg. in

¹⁰ Id. at 2.

¹¹ Id.

¹² *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 83, citing *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331.

¹³ For example, the filing of a certification application under Ohio Adm. Code 4901:1-6-10.

¹⁴ Such as the filing of a motion for waiver under Ohio Adm. Code 4901:1-5-08(D)(1).

the 19 exchanges should be revoked. At the least, the Entry commenced the show cause phase of the proceeding.

OCC could have served discovery on AT&T Ohio immediately after filing either of the Motions, or immediately after the Entry was issued. This would be similar to the situation in complaint cases. Parties may conduct discovery under Ohio Adm. Code 4901-1-17 in complaint cases even before it has been determined that the complainant has stated reasonable grounds for the complaint, let alone before a hearing has been scheduled.¹⁵

OCC, however, waited until AT&T Ohio made specific assertions regarding the number of alternative providers in the eleven Test 3 exchanges or the residential access line losses in the eight Test 4 exchanges named in the Motions.¹⁶ The Company provided only vague information concerning the supposed nature of competition in the 19 exchanges until its August 29 filing. For example, as OCC noted in its September 12 Reply, AT&T Ohio provided a number but no specifics regarding the identity of any of the alleged alternative providers in the eleven Test 3 exchanges.¹⁷

It is not for the responding party, AT&T Ohio, to avoid answering discovery under the PUCO's rules according to its perspectives on when and how the requesting

¹⁵ See *Embarq v. The Village of Jefferson*, Case No. 08-616-TP-PWC, Entry (May 23, 2008) at 2.

¹⁶ AT&T Ohio's responses to OCC's Motions argued only general issues about the nature of telephone competition in Ohio, and did not provide specific information about the 19 exchanges.

¹⁷ OCC's September 12 Reply at 12-13. OCC did not have adequate time to conduct discovery on the information contained in the Company's response for inclusion in OCC's September 12 Reply. AT&T Ohio filed its response to the Entry on the Friday before the Labor Day holiday. Thus, OCC was not able to begin analyzing AT&T Ohio's filing until Tuesday, September 2 – just ten days before the September 12 Reply was due. Even if OCC had been able to serve discovery on September 2, it is unlikely that the Company would have provided responses to the discovery in time for OCC to analyze the responses and incorporate the information in them into the September 12 Reply. The basic service alt. reg. rules require applicants to respond to discovery within ten days after service of discovery. Ohio Adm. Code 4901:1-4-09(I). OCC served discovery at the earliest opportunity available after the Company filed its response to the Entry.

party, OCC, may use the information in a case.¹⁸ It similarly is not for AT&T Ohio to control, by not answering discovery, what information a party may present for the Commission's consideration – including when that consideration relates to protecting approximately 33,000 consumers in the 19 exchanges from increases in their basic telephone service rates.¹⁹

OCC, a party to this proceeding, has a right under statute and the PUCO's rules to conduct discovery and to receive the information that the Company relied upon in formulating its response to the Entry. This is especially necessary given AT&T Ohio's recent attempt to have the Commission base a decision on information that was provided to PUCO Staff but never docketed.²⁰ OCC should at least have the same information that AT&T Ohio may have provided to PUCO Staff regarding OCC's Motions and/or the Entry, in addition to any other pertinent information that OCC seeks.

In addition, there should be no “undue burden or expense to the Company” in responding to OCC's discovery. The information that OCC seeks in its discovery is the kind of information that AT&T Ohio compiled or should have compiled in preparing its response. Thus, there should be minimal burden or expense for the Company to provide the information OCC requests in its discovery.

Finally, AT&T Ohio asserts that, in accordance with Ohio Adm. Code 4901-1-24(B), it has “exhausted all other reasonable means of resolving any differences with

¹⁸ At its discretion, OCC may use the discovery for a variety of purposes, such as filing a supplemental pleading based on information that was not available to OCC when OCC filed its September 12 Reply.

¹⁹ See Schedule 28 of The Ohio Bell Telephone Company's 2007 Annual Report filed with the PUCO.

²⁰ *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 Nos. 00-1265-TP-ORD and 05-1102-TP-ORD, Entry on Rehearing (July 9, 2008) at 5, 7-8.

OCC” regarding the discovery responses.²¹ Ohio Adm. Code 4901-1-16(F), however, states that “[n]othing in rules 4901-1-16 to 4901-1-24 of the Administrative Code precludes parties from conducting informal discovery by mutually agreeable methods or by stipulation.” AT&T Ohio has not offered to provide – informally or otherwise – the information that OCC seeks. Instead, AT&T Ohio’s only offer was a September 16, 2008 proposal to “hold the discovery request in abeyance until the procedural posture is clarified by the Commission.”²²

The same communication, sent the day that OCC served the discovery, contained the following ultimatum: “If we cannot agree to that moratorium, [AT&T Ohio] plan[s] to seek a protective order under the applicable rule.”²³ Thus, AT&T Ohio was determined to seek a protective order from the day that OCC served its discovery. AT&T Ohio filed its motion for protective order the day after OCC responded to AT&T Ohio’s September 16 proposal. The Company hardly “exhausted all other reasonable means of resolving any differences with OCC” regarding the discovery responses. In addition, AT&T Ohio’s approach does not “minimize commission intervention in the discovery process,” as the Commission expects under Ohio Adm. Code 4901-1-16(A).

IV. CONCLUSION

OCC is properly conducting discovery pursuant to the Commission’s expectation for discovery to be “completed as expeditiously as possible.”²⁴ Contrary to Ohio law, PUCO rule and Ohio Supreme Court precedent, AT&T Ohio has sought to impair the

²¹ Motion at 3.

²² Motion, Affidavit of Jon F. Kelly, e-mail from Jon Kelly to Terry Etter dated September 16, 2008, printout dated 9/24/08, page 2 of 2.

²³ Id.

²⁴ Ohio Adm. Code 4901-1-17(A).

discovery rights that OCC is exercising on behalf of Ohio residential consumers toward protecting the rates they pay for basic telephone service. The Commission should deny AT&T Ohio's motion for a protective order.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

/s/ Terry L. Etter
Terry L. Etter, Counsel of Record
David C. Bergmann
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
etter@occ.state.oh.us
bergmann@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra AT&T Ohio's Motion for a Protective Order by the Office of the Ohio Consumers' Counsel was sent by First Class United States Mail, postage prepaid, to the persons listed below (and electronically to counsel for AT&T Ohio) this 8th day of October 2008.

/s/ Terry L. Etter

Terry L. Etter

Assistant Consumers' Counsel

SERVICE LIST

Stephen Reilly
William Wright
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793

Robert J. Triozzi
Director of Law
Harold A. Madorsky
Assistant Director of Law
City of Cleveland
City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
333 West First Street, Suite 500B
Dayton, Ohio 45402

Jon F. Kelly
Mary Ryan Fenlon
AT&T Ohio
150 East Gay Street
Columbus, Ohio 43215

Kerry Bruce
Senior Attorney
Leslie A. Kovacik
Senior Attorney
City of Toledo
One Government Center, Suite 2250
Toledo, Ohio 43604

Michael R. Smalz
Ohio State Legal Services Association
555 Buttles Avenue
Columbus, Ohio 43215

Joseph P. Meissner
Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, Ohio 44113

Brian J. Ballenger
Law Director
Counsel for Northwood
Ballenger & Moore
3401 Woodville Road, Suite C
Toledo, Ohio 43619

Mathew Beredo
Law Director
Counsel for Perrysburg
201 West Indiana Avenue
Perrysburg, Ohio 43551

James E. Moan
Law Director
Counsel for Sylvania
4930 Holland-Sylvania Road
Sylvania, Ohio 43560

Douglas D. Hart
Attorney at Law
441 Vine Street
Suite 4192
Cincinnati, Ohio 45202

Sheilah H. McAdams
Law Director
Counsel for Maumee
Marsh & McAdams
204 West Wayne Street
Maumee, Ohio 43537

Paul S. Goldberg
Law Director
Phillip D. Wurster
Assistant Law Director
Counsel for Oregon
5330 Seaman Rd.
Oregon, Ohio 43616

Paul Skaff
Assistant Village Solicitor
Counsel for Holland
Leatherman, Witzler, Dombey & Hart
353 Elm Street
Perrysburg, Ohio 43551

Lance M. Keiffer
Assistant Prosecuting Attorney
Counsel for Lucas County
711 Adams Street, Second Floor
Toledo, Ohio 43624-1680

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