BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

tw telecom of ohio llc,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 08-1215-TP-CSS
	)	
AT&T Ohio,	)	
	)	
Respondent.	)	

REPLY BRIEF OF tw telecom of ohio llc

A. Introduction

tw telecom of ohio llc ("TWTC") presents this Reply Brief in response to the Initial Brief filed by Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T") on March 3, 2009. TWTC repeats its request that the Commission direct AT&T to promptly negotiate in good faith with TWTC, and amend the parties' interconnection agreement ("ICA") to conform to the change of law established in the new carrier-to-carrier rules revised in Case No. 06-1344-TP-ORD; in particular, as they relate to transit traffic compensation

B. Telecommunications Act of 1996

AT&T offers a lengthy history of the Telecommunications Act of 1996, replete with references to the standards set forth in 47 U.S.C. 251 and 252 for the negotiation of interconnection agreements. AT&T emphasizes the fact that federal law allows carriers to waive the duties set forth in 47 U.S.C. 251(c) and (d) and pricing standards set forth in 47 U.S.C. 252(d), focusing on the fact that voluntary interconnection negotiations are not subject to the "strings" attached to interconnection arbitration proceedings. At the same time, AT&T blatantly

ignores the converse – that carriers can reserve their rights regarding the duties and pricing standards set forth in 47 U.S.C. 251(c) and (d) and pricing standards set forth in 47 U.S.C. 252(d). Notably, the Change of Law Provision at the heart of this case is just that sort of "reservation of rights," and AT&T conveniently ignores the Change of Law Provision when it does not suit its purpose. The purpose of the Change of Law Provision is to allow AT&T (and TWTC) to reserve its right to change the duties and pricing standards in the ICA following a change in law, regardless of whether the parties arrived at the ICA through negotiation or arbitration. AT&T's argument boils down to the illogical assertion that if you voluntarily cooperated on a business-to-business basis to arrive at a negotiated agreement, you would never get to take advantage of a subsequent change of law; but, if you arbitrated, you would. This assertion, however, ignores the plain language of the reservation of rights in the Change of Law Provision.

C. Clarification of the issues.

Regardless of the arguments set forth in AT&T's Brief, the simple fact remains that AT&T has violated its statutory, regulatory, and contractual duties by refusing to enter into good faith negotiations to amend its ICA with TWTC to reflect the Commission's change of law regarding transit traffic compensation in Case No. 06-1344-TP-ORD. Prior to the Commission's adoption of new Rule 4901:1-7-13(D), transit traffic rates could not be negotiated because CLECs (i.e. TWTC) either had to incur the cost of conducting a full-blown TELRIC study to justify the rates (a resource-intensive undertaking considering that the parties expected that a small amount of traffic would actually be subject to transit rates since most traffic would terminate to AT&T), or simply accept the rates imposed by ILECs (i.e. AT&T). In this case, TWTC lacked the time and resources to engage in a full-blown TELRIC proceeding. Instead,

TWTC was left to accept that, based upon the ubiquitous reach of AT&T's legacy monopoly telecommunications network and the fact that the vast bulk of local exchange traffic either originates or terminates on AT&T's network, TWTC would directly interconnect with AT&T (allowing AT&T to transit traffic to other ILECs) so that TWTC could provide its customers with reliable local exchange telecommunications services. And, TWTC would have to accept that any such transit traffic would be subject to AT&T's non-cost based transit rates as determined by AT&T.

The Commission's Carrier to Carrier rules, however, completely changed the interconnection negotiation process. New Rule 4901:1-7-13(D) reads:

> The intermediate telephone company(ies) must be compensated at the intermediate telephone company's total element long run incremental cost (TELRIC) based transit traffic compensation rates. Until such time as the commission approves telephone company-specific TELRIC-based transit traffic compensation rates, an intermediate telephone company should be compensated, on an interim basis, at its tariffed switched access rates subject to a true up of these rates.

This new rule created binding guidelines for interconnection negotiations regarding transit traffic rates. For ILECs that have not had TELRIC-based transit traffic compensation rates approved by the Commission (i.e. AT&T), the transit traffic rate is required to be its "tariffed switched access rates subject to a true up of these rates." As a result, the interim tariffed rates imposed by Rule 4901:1-7-13(D) necessarily modify the rates currently in force under the Interconnection Agreement, which are essentially "commercial" rates imposed by AT&T. Therefore, the adoption of OAC Rule 4901:1-7-13(D) constitutes a regulatory modification that requires the rates charged by AT&T, and paid by TWTC, to be AT&T's "tariffed switched access rates."

B. The Commission's adoption of OAC Rule 4906:1-7-13(E) is a change in law warranting an amendment to the Interconnection Agreement regardless of whether the rates in the Interconnection Agreement were negotiated.

The section of the TWTC-AT&T ICA directly relevant to this matter is Section 21.1 (the "Change of Law Provision"). This section states as follows:

> In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in this Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent jurisdiction *** the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party.

This provision essentially requires that three prerequisites be satisfied before a "change in law" can serve as the basis for an amendment to the ICA:

1. A law or regulation serving as the basis for rates/terms/conditions in the Interconnection Agreement was modified;

2. By action a state or federal regulatory body; and

3. Either TWTC or AT&T filed a written request of the other party seeking an amendment to the Interconnection Agreement.

As explained in great detail in TWTC's Initial Brief, each of these elements has been established.

AT&T, however, unconvincingly argues that Subsection (E) of new Rule 4901:1-7-13 prohibits TWTC from invoking the Change of Law Provision. In reality, Subsection (E) states that this new rule "shall not be construed to preclude telephone companies from negotiating other transit traffic interconnection and compensation arrangements." Nowhere has TWTC claimed that AT&T (or any other ILEC) is precluded from negotiating transit rates different from those specified in new Rule 4901:1-7-13. In fact, TWTC acknowledges that the transit traffic rates in the existing ICA were determined through a negotiated process. TWTC is asserting, however, that the implementation of new Rule 4901:1-7-13(D) completely changes the environment with respect to transit traffic rates and triggers the operation of the Change of Law Provision – itself a negotiated term of the ICA.

It also is worth noting that, despite the Commission's acknowledgement in new Rule 4901:1-7-13(E) that carriers are always free to negotiate, the framework for interconnection negotiations regarding transit traffic rates have forever changed. As AT&T acknowledges, "[a]t the time AT&T Ohio and TWTC signed their negotiated agreement, this Commission had never set cost-based rates for transiting, nor had it initiated a proceeding to determine such rates." Therefore, "[p]rior to 2006, the Commission did not have any binding rules for the provision of transit service," meaning negotiating parties could establish whatever rates they wanted regarding transit traffic. For example, as part of the ICA, AT&T was able to impose its own commercial transit traffic rates on TWTC. This all changed with the implementation of new Rule 4901:1-7-13(D). The new rule established binding rules for the provision of transit service – in particular, the rates charged for transit traffic. The interim tariffed rates imposed by new Rule 4901:1-7-13(D) necessarily modified the rates under the ICA – and will continue to provide negotiating parties with mandatory rate-making guidelines in the future. Parties will still be free to negotiate, but those negotiations will be limited by the requirements in new Rule 4901:1-7-13(D).

C. AT&T's Attempt to Distinguish its Use of the Change of Law Provision in Similar Circumstances Underscores a Distinction Without a Difference.

AT&T claims that it justifiably used the Change of Law Provision to its advantage following the Commission's implementation of the FCC's TRRO Order because the "'basis or rationale' for the relevant ICA provisions (those governing unbundled network elements) was the FCC's previous 'laws or regulations' on unbundled access." AT&T added that this was the case because the "ICA provisions on unbundled access plainly state that AT&T will offer UNEs only to the extent it is required to do so under the 1996 Act and the implementing FCC rules." It is irrelevant that the transit rate provisions in the existing ICA do not expressly reference state

and/or federal regulations regarding transit rates. In fact, it would have been impossible for the transit rate provision to do so because "[p]rior to 2006, the Commission did not have any binding rules for the provision of transit service." Whatever "negotiating" may have taken place at the time that transit rates were put into place, such negotiations were subject to a regulatory vacuum. Therefore, new Rule 4901:1-7-13(D) completely changed the landscape concerning the lawful rate for transit service by establishing unequivocal guidance. It is completely spurious of AT&T to argue that because the new rule acknowledges the parties' right to negotiate a different rate, that somehow sanctions the prior rate, determined before the rule took effect. "Negotiations" prior to the adoption of the new rule, simple do not equate with "negotiations" undertaken after the adoption of the new rule. This is absolutely no different than the situation presented by the TRO/TRRO amendments insisted upon by AT&T through its change of law language.

The rates for network elements and well as for interconnection have always been subject to the outcomes of regulated proceedings – except in those circumstances where regulation had not yet made a definitive determination as the appropriate rate. As the Commission determined in Case No. 06-1344-TP-ORD, the transit function is an ILEC obligation under Section 251(c)(2) of the 1996 Act, and would therefore carry the pricing obligations imposed by that section. Just as AT&T invoked the change in law provision in light of the FCC's TRO and TRRO decisions in instances where it was no longer obligated to abide by the pricing obligations that accompany Section 251(c)(3), TWTC is now invoking the change in law provision of the ICA in light of the Commissions determination that the transit function is an obligation under Section 251(c)(2) of the 1996 Act, and carries the *identical* pricing obligations.

At least since Case No. 02-1280-TP-COI, changes in regulated rates for network elements have been subject to routine incorporation into interconnection agreements, whether

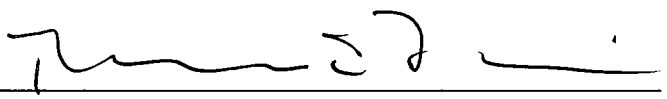
negotiated or arbitrated. The instant situation is no different - when the current rate was accepted by TWTC, there was no regulated rate. The law changed, and now there is such a rate. To the extent that the access rate is a proxy for a TELRIC rate, TWTC is *entitled* to that rate.

It is clear that both the implementation of the FCC's TRRO Order and the Commission's adoption of new Rule 4901:1-7-13(D) represent valid changes of law. Now that tables have turned, and TWTC seeks to avail itself of the benefits of the Change of Law Provision to implement a clearly legitimate change to Ohio's administrative code, AT&T cannot refuse to allow it when it works in the CLEC's favor but then avail itself of the same opportunity when it suits itself. AT&T cannot have its cake and eat it too—and must allow for the amendment of the ICA.

D. CONCLUSION

WHEREFORE, TWTC requests that the Commission order AT&T to honor the Change of Law Provision and amend the terms of the ICA, as well as any other relief that the Commission deems appropriate, just, and reasonable.

Respectfully submitted,
tw telecom of ohio llc



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CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a copy of the foregoing was served by hand delivery or electronic mail as well as by regular U.S. Mail this 20th day of March 2009.

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Summary: Reply Brief of tw telecom of ohio llc electronically filed by Teresa Orahood on behalf of tw telecom of ohio llc