

Paul Miracle d/b/a Chef's Touch Catering and Linden House Banquet Center,

Complainant,

V.

AT&T Ohio,

Respondent.

Case No. 09-1024-TP-CSS

AT&T OHIO'S MOTION TO DISMISS

AT&T Ohio, Respondent herein, pursuant to Ohio Admin. Code §4901-1-12, moves to dismiss the Complaint to the extent it seeks relief for alleged Yellow Pages advertising errors or omissions because those are matters over which the Commission lacks subject matter jurisdiction. A memorandum in support of this motion is attached.

AT&T Ohio

By: /s/ Jon F. Kelly

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MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

By this Complaint, Complainant seeks to have the Commission exercise jurisdiction over an historically unregulated activity of telephone companies, the sale and publication of Yellow Pages advertising. The Complaint alleges certain errors and omissions in Yellow Pages advertising provided by the Respondent's non-regulated affiliate. AT&T Ohio submits that the Commission lacks jurisdiction over the issue of Yellow Pages advertising.

Moreover, AT&T Ohio is not the provider of the Yellow Pages advertising in question. Rather, its non-regulated affiliate, Ameritech Publishing, Inc. d/b/a AT&T Advertising & Publishing, compiles, prints, and distributes the Yellow Pages.

The lack of jurisdiction has been confirmed by the Ohio Supreme Court. In turn, that Court's decision has been consistently followed by this Commission, as it must be.

The Commission derives its authority to regulate public utilities from the Ohio General Assembly. It is axiomatic that if the General Assembly has not conferred jurisdiction, the Commission is without authority to act. *See, Penn Central Trans. Co. v. Pub. Util. Comm.* (1973), 35 Ohio St. 2d 97, and cases cited therein.

As observed by the Ohio Supreme Court in Richard A. Berjian, D.O.. Inc. v. Ohio Bell Tel. Co. (1978), 54 Ohio St. 2d 147 at 155:

In Ohio, the General Assembly has assigned the Public Utilities Commission the responsibility of determining the type of service to be furnished by the telephone companies

* * *

Pursuant to this authority, the commission adopted Rule 4901:1-5-07, which states that telephone companies are required to provide alphabetical listings of their customers in a directory. No requirement is made that the companies in addition provide an advertising listing service for their customers. Therefore, in Ohio as well, the service of providing advertising is a matter of private endeavor only.

The Berjian court thus concluded that Yellow Pages advertising is not telephone service.

Therefore, it is firmly established in Ohio that Yellow Pages advertising is not a public utility service which telephone companies are obligated to provide. It follows that if the telephone company is not obligated to provide the service, it is not included within the concept of "telephone service" subject to this Commission's jurisdiction.

Complaints involving Yellow Pages advertising have been consistently dismissed by this Commission under the applicable legal precedents. See, e.g., In the Matter of the Complaint of Steven Carp v. AT&T Ohio, Case No. 07-91-TP-CSS, Entry, April 4, 2007. In that Entry, the Commission stated:

AT&T's motion is well-taken and should be granted. Yellow Page advertising is not a matter that is subject to the Commission's jurisdiction. AT&T properly relies upon *Berjian* for the principle that "the service of providing advertising is a matter of private endeavor only" (*Berjian* 54 Ohio St. 2d at 155). Accordingly, any issues relating to improper billing for Yellow Page advertising should be stricken. Such issues must be decided in another forum.

Entry, p. 2. The case was ultimately dismissed in its entirety. Entry, August 1, 2007.

Similarly, in the case of Dale S. Miller v. SBC Ohio (formerly Ameritech Ohio), Case No. 01-469-TP-CSS, the Commission specifically held that "any claims related to Yellow Pages ads are outside the jurisdiction of this Commission." Opinion and Order, March 13, 2003, p. 5, affirmed in Entry on Rehearing, May 14, 2003.

For all of the foregoing reasons, the Commission should dismiss those portions of the Complaint relating to Yellow Pages advertising because it is without jurisdiction to address or resolve them and because AT&T Ohio does not provide Yellow Pages advertising.

AT&T Ohio

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09-1024.motion to dismiss

Certificate of Service

I hereby certify that a copy of the foregoing has been served this 26th day of January, 2010 by first class mail, postage prepaid, on the party shown below.

/s/ Jon F. Kelly

Jon F. Kelly

Paul Miracle d/b/a Chef's Touch
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Summary: Motion to dismiss and memorandum in support electronically filed by Jon F Kelly
on behalf of AT&T Ohio