

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Application of |) | |
| The Ohio Bell Telephone Company d/b/a AT&T Ohio |) | Case No. 10-1412-TP-BLS |
| For A Commission Determination Pursuant to |) | |
| Ohio Revised Code Section 4927.12(C)(3). |) | |

MEMORANDUM CONTRA OCC'S MOTION TO DISMISS

I. INTRODUCTION

The Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio"), by its attorneys, opposes the Ohio Consumers' Counsel's ("OCC's") October 12, 2010 motion to dismiss the captioned application.¹

II. OCC'S MOTION TO DISMISS SHOULD BE DENIED

OCC once again demonstrates the fervor with which it opposes reasonable regulatory reform in Ohio. As the most outspoken critic of the legislation which formed the basis for the application AT&T Ohio filed on September 23, 2010, it should come as no surprise that OCC would oppose the first such application filed under the new law.

A. AT&T Ohio's Application is Unaffected by the Pendency of the Application in Case No. 09-494-TP-BLS

OCC relies on a Commission precedent under its now-obsolete BLES alternative regulation rules for the proposition that the application in this case is improperly duplicative of

¹ AT&T Ohio does not oppose OCC's motion to intervene, recognizing that OCC has broad rights of intervention and that the Commission customarily grants OCC's motions to intervene in such cases. AT&T Ohio would note, however, that the right to intervene in a Commission "proceeding" assumes that the Commission has determined that an application will be the subject of a "proceeding" for purposes of R. C. § 4903.221 and O. A. C. § 4901-1-11(A).

the Company's tenth BLES alternative regulation application still pending under those rules in Case No. 09-494-TP-BLS. OCC, p. 5. If AT&T Ohio had filed a second application seeking relief *under the Commission's rules* for the 16 exchanges at issue here, OCC would be correct in applying the principle it advances. OCC, p. 16. But that was then, and this is now. The enactment of Sub. S. B. 162 has changed the landscape. The captioned application was filed under the new Act, and the precedents established under the Commission's now-obsolete BLES alternative regulation rules do not necessarily apply. The Act specifies a process under which exchange areas where the Commission "has not made a prior determination that the exchange area qualified for alternative regulation of basic local exchange service under Chapter 4901:1-4 of the Ohio Administrative Code" can qualify for the pricing freedom under the law by filing an application making the requisite showing. R. C. § 4927.12(C)(3)(a). The law does not prohibit the filing of such an application because an application previously filed under that Chapter of the rules is pending at the Commission.

The Commission recently had its first occasion to interpret and apply the new law. In its recent Entry in the case in which the Commission is adopting the initial rules to implement the new law, the Commission stated that "[e]ffective September 13, 2010, new section 4927.12, Revised Code, *replaced* the prior alternative regulatory requirements for BLES pricing flexibility and established the pricing parameters for BLES provided by the ILECs." Case No. 10-1010-TP-ORD, Entry, September 15, 2010, pp. 1-2 (emphasis added). Thus, while OCC is technically correct that the BLES alternative regulation rules have not yet been rescinded (as directed by and according to the specific timeframe set forth in Section 3 of the Act), the processes set forth in those now-obsolete rules have, in the Commission's own words, been *replaced* by the process

outlined in the Act. The old regime has been replaced by the new one, and the precedent concerning the Pitchin Exchange has no application in the new one. It is clear, therefore, that AT&T Ohio's new application under the new law can and should proceed despite any rule or precedent to the contrary under the old BLES alternative regulatory regime.

B. AT&T Ohio's Application Complies with the Statutory Requirements

OCC's next line of attack is both familiar and time-worn. OCC argues that AT&T Ohio has not shown that alternative providers are offering competing service to AT&T Ohio's basic local exchange service in the 16 exchanges at issue. OCC, p. 7. OCC's clever use of ellipses in its quote from the statute ignores the operative words that undercut OCC's entire argument on this point. OCC, pp. 7-8. OCC notes that the Commission must determine that "the application demonstrates that two or more alternative providers offer, in the exchange area, competing service to the basic local exchange service offered by an incumbent local exchange carrier in the exchange area" OCC, pp. 7-8. OCC leaves out this important directive from the law, which appears right after the phrase that OCC quoted: " . . . regardless of the technology and facilities used by the alternative provider, the alternative provider's location, and the extent of the alternative provider's service area within the exchange area." R. C. § 4927.12(C)(3)(a).

OCC urges that the same analysis and same documentation should be required under the Act that were used under the BLES alternative regulation rules. But that was then and this is now. The law has eliminated from consideration many of the issues that OCC used to block or delay the implementation of BLES alternative regulation under the Commission's rules. In cases brought under those rules, OCC consistently argued about the technology used by

alternative providers, the location of their services or facilities, and whether they were serving the entire exchange. The Act has eliminated those issues and has created a more streamlined process. For example, the Commission's now-obsolete BLES alternative regulation rule's competitive market tests required showings that a certain percentage of residential access lines were "provided by" unaffiliated CLECs, the presence of a certain number of unaffiliated facilities-based CLECs "providing BLES to residential customers," or the existence of a certain number of alternative providers "serving the residential market." O.A.C. § 4901:1-4-10(C). Replacing these provisions, the Act requires that the Commission determine that the ILEC's application:

. . . [D]emonstrates that two or more alternative providers *offer*, in the exchange area, competing service to the basic local exchange service offered by an incumbent local exchange carrier in the exchange area, regardless of the technology and facilities used by the alternative provider, the alternative provider's location, and the extent of the alternative provider's service area within the exchange area. An alternative provider includes a telephone company, including a wireless service provider, a telecommunications carrier, and a provider of internet protocol-enabled services, including voice over internet protocol.

R. C. § 4927.12(C)(3)(a) (emphasis added). AT&T Ohio has made the necessary showing of the alternative providers' offerings under the Act, and the Staff can assist the Commission in readily confirming that its showing is a valid one.

OCC argues that "no less" than the previous showings and tests should be applied here. OCC, p. 8. OCC might prefer to revert to the old required showings and tests, but the new law has *replaced* (to use the Commission's own word) that regime with the new one. The Act requires a substantially reduced showing, when compared to the Commission's now-obsolete BLES alternative regulation rules. The Act makes this clear. And, as noted above, through the mandatory rescission of the BLES alternative regulation rules, that intent is also confirmed.

OCC's effort to engraft onto the new law the same criteria that existed under the BLES alternative regulation rules must be rejected. The BLES pricing provision of the Act is, as the Commission has already stated, "self-effectuating" and the Commission need not, and should not, adopt rules to implement that provision. Case No. 10-1010-TP-ORD, Entry, September 15, 2010, p. 2. No such rules have been proposed in that case, other than one addressing the mechanics of the application process. Case No. 10-1010-TP-ORD, Entry, July 29, 2010, Staff's proposed Rule 4901:1-6-14(C). To impose the requirements proposed by OCC would be to nullify the streamlined process that the General Assembly has created. This would be contrary to the Act and to the express will of the General Assembly.

III. CONCLUSION

For all of the foregoing reasons, OCC's motion to dismiss should be denied and the application should be approved via the statutory automatic process or in a Commission order.

Respectfully submitted,

AT&T OHIO

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Certificate of Service

I hereby certify that a copy of the foregoing has been served by e-mail this
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Summary: Memorandum Contra OCC's Motion to Dismiss electronically filed by Jon F Kelly on behalf of AT&T Ohio