

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY TO AT&T OHIO’S MEMORANDUM CONTRA MOTION TO DISMISS
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

On October 12, 2010, the Office of the Ohio Consumers’ Counsel (“OCC”) moved to intervene in this case where the Public Utilities Commission of Ohio (“PUCO” or “Commission”) will consider authorizing increases in the rates residential consumers pay for basic local exchange service (“basic service”) in 16 exchanges of The Ohio Bell Telephone Company d/b/a AT&T Ohio (“AT&T Ohio” or “Company”).¹ OCC also moved to dismiss AT&T Ohio’s application.

OCC’s Motion to Dismiss cited two reasons why the application should be dismissed. First, the Company has another pending application for authority to raise the rates customers pay for basic service in the 16 exchanges under the Commission’s basic service alternative regulation rules in Ohio Adm. Code Chapter 4901:1-4 (“Chapter 4901:1-4”) in Case No. 09-494-TP-BLS (“09-494”). The Commission has ruled it is

¹ See Application (September 23, 2010), Memorandum in Support at 2.

inappropriate for a company to have more than one pending application for authority to raise basic service rates in an exchange.² Second, the documentation AT&T Ohio submitted with the application does not show that two or more alternative providers offer service competing with the Company's basic service in each exchange, as required by new R.C. 4927.12(C)(3)(a).³

On October 18, 2010, AT&T Ohio filed a memorandum contra OCC's Motion to Dismiss.⁴ AT&T Ohio asserted that the new law replaces Chapter 4901:1-4 and thus the precedents under those rules "do not necessarily apply."⁵ AT&T Ohio also claimed that because the new law specifies a different process from Chapter 4901:1-4, the Commission's previous ruling that it is inappropriate for two pending applications for authority to increase basic service rate in the same exchange(s) does not apply in the new "regime...."⁶ The Company further contended that the information submitted with the application is sufficient to make the statutorily required showing for authority to increase the rates customers pay for basic service in the 16 exchanges.⁷

² OCC Motion to Intervene and Motion to Dismiss (October 12, 2010), Memorandum in Support ("Motion to Dismiss") at 5-7.

³ Id. at 7-9.

⁴ AT&T Ohio did not oppose OCC's Motion to Intervene. Memorandum Contra at 1, n.1. The Company, however, stated that "the right to intervene 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)." Id. AT&T Ohio's view on the subject is archaic. The Supreme Court of Ohio, in addressing the PUCO's denial of OCC's motion to intervene in a case involving accounting changes by an electric company, stated that "whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO. The Consumers' Counsel explained her interest in the cases in her motions to intervene and also explained that her views would not be adequately represented by the existing parties. In the absence of some evidence in the record calling those claims into doubt or showing that intervention would unduly prolong or delay the proceedings, intervention should have been granted." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶ 19-20 (2006).

⁵ Memorandum Contra at 2.

⁶ Id. at 2-3.

⁷ Id. at 3-5.

OCC replies to AT&T Ohio's memorandum contra. First, the Commission's precedent regarding simultaneously pending applications for authority to increase basic service in an exchange was not rendered a nullity by the enactment of new R.C. 4927.12(C). To the contrary, the precedent is essential to avoid the duplicative effort that results from multiple pending applications addressing the same exchange(s).

Second, although the new law changed the process for companies to obtain authority to increase the rates customers pay for basic service, the new law still requires the Commission to make its own independent determination whether an applicant meets the statutory requirements.⁸ The Commission must have adequate information in order to make the statutorily required determination, and the information AT&T Ohio used to support its application is insufficient for the Commission to make the determination required by law.

The Commission should grant OCC's Motion to Dismiss.

II. ARGUMENT

A. The Precedents Established In The Cases Decided Under Chapter 4901:1-4 Are Still Valid.

In the Motion to Dismiss, OCC noted that the application in this proceeding includes the same 16 exchanges addressed in AT&T Ohio's application 09-494, which is still pending.⁹ OCC cited to the Commission's previous ruling that an applicant cannot

⁸ New R.C. 4927.12(C)(3)(b).

⁹ See Application, Memorandum in Support at 2.

include an exchange in two pending applications for basic service rate increases.¹⁰ This proceeding raises the same issue the PUCO previously addressed.

AT&T Ohio, however, would have the Commission ignore its prior ruling. In its memorandum contra, the Company contended that because the new law replaces Chapter 4901:1-4, the precedents under those rules “do not necessarily apply.”¹¹ The Company did not cite any case law or statutory provision to support its assertion.

AT&T Ohio went on to conclude that because the new law specifies a different process from Chapter 4901:1-4, the Commission’s previous ruling that it is inappropriate for two pending applications for authority to increase basic service rate in the same exchange(s) no longer applies.¹² Again, the Company provided no case law or statutory support for its conclusion.

AT&T Ohio’s position is flawed. The value of the Commission following the precedent established in prior cases is in consistency, fairness and administrative efficiency. If the Commission were to follow the Company’s flawed thinking, the Commission would continually be facing the same situations (e.g., multiple applications from a single company addressing the same subject) and would be continually relitigating the same issues.

The fact that the law has changed does not diminish the value of the Commission’s determination in the 08-107 Order that it is inappropriate for a company to

¹⁰ Motion to Dismiss at 6, citing *In the Matter of the Application of The Ohio Bell Telephone Company d/b/a AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 08-107-TP-BLS, Opinion and Order (June 25, 2008) (“08-107 Order”) at 21.

¹¹ Memorandum Contra at 2.

¹² Id. at 2-3.

have two pending applications for authority to increase basic service rates in the same exchange(s). The Commission has not reversed itself on this subject in any subsequent decision, and thus the Commission's ruling remains good law.

B. The Commission Is Required By Law To Make An Independent Determination Whether An Applicant Meets The Burden Of Proof Required By R.C. 4927.12(C)(3)(A).

Under new R.C. 4927.12(C)(3)(a), 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...” (Emphasis added.) Thus, the applicant has the burden to show that the services offered by the alternative providers identified in the application compete with the applicant's basic service. In the Motion to Dismiss, OCC noted that the documentation AT&T Ohio used to support its application – screen shots of alternative providers' webpages – does not show that the carriers listed for each exchange offer service competing with AT&T Ohio's basic service in the exchange.¹³

In defending its application, AT&T Ohio claimed that OCC ignored a portion of new R.C. 4927.12(C) which states that the Commission should make its statutorily required determination “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.”¹⁴ AT&T Ohio, however, ignored reality.

OCC did not bring up these issues because they are irrelevant to the Commission's determination and to the issue presented in the Motion to Dismiss. The

¹³ Motion to Dismiss at 8.

¹⁴ Memorandum Contra at 3, citing new R.C. 4927.12(C)(3)(a).

focus of the Commission's statutorily required determination – and thus the focus of OCC's Motion to Dismiss – is on the showing made by AT&T Ohio, and whether that showing is sufficient for the Commission to determine whether the Company has met the burden of proof in the statute (i.e., whether at least two alternative providers offer service that competes with AT&T Ohio's basic service in the 16 exchanges).

Although AT&T Ohio alluded to OCC's arguments in cases under Chapter 4901:1-4,¹⁵ *in this proceeding* OCC did not challenge the Company's showing based on the alternative providers' technology, facilities or location, or on the extent of their service. Rather, OCC correctly noted that the information provided by AT&T Ohio does not show that any of the services compete with the Company's basic service in any of the 16 exchanges.

The Commission previously noted that if customers view an alternative provider's service to be a substitute for an incumbent carrier's basic service, then the alternative provider's service competes against the incumbent's basic service.¹⁶ In previous cases, whether customers viewed an alternative provider's service as competition to the incumbent's basic service was measured through information such as ported residential numbers, residential White Pages listings, residential Local Wholesale Complete access line data and residential 9-1-1 data. AT&T Ohio included none of this information to support its application in this proceeding.

¹⁵ Id. at 3-4.

¹⁶ See *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Case No. 05-1305-TP-ORD, Opinion and Order (March 7, 2006) at 25.

AT&T Ohio would apparently have the Commission do nothing more than mechanically approve applications for authority to increase the rates customers pay for basic service, regardless of the documentation used to support the applications. This is contrary to the independent determination that the Commission is required to make under new R.C. 4927.12(C)(3)(a). In order to follow the law, the Commission must have information sufficient to determine whether an alternative provider's service competes with the incumbent's basic service. The information AT&T Ohio submitted with its application is insufficient to make the statutorily required showing.

III. CONCLUSION

The arguments AT&T Ohio made in its memorandum contra are flawed. To protect consumers, the Commission should grant OCC's motion to dismiss the application in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply to AT&T Ohio's Memorandum Contra Motion to Dismiss by the Office of the Ohio Consumers' Counsel* was served by electronic mail to the persons listed below, on this 21st day of October 2010.

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Summary: Reply Reply to AT&T Ohio's Memorandum Contra Motion to Dismiss by the Office of the Ohio Consumers' Counsel electronically filed by Mrs. Mary V. Edwards on behalf of Etter, Terry L. and Office of the Ohio Consumers' Counsel