

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules)
to Implement Substitute Senate Bill 162.)

Case No. 10-1010-TP-ORD

THE AT&T ENTITIES' MEMORANDUM CONTRA THE
OPTC'S APPLICATION FOR REHEARING

Table of Contents

Introduction.....	2
Additional Notice To The OCC Is Neither Required Nor Authorized	3
The Exceptions To The BLES Service Quality Standards Are Reasonable And Lawful	4
The Treatment Of Postmarks Is Reasonable And Lawful	5
The Treatment Of Information Needed In Certification And ETC Applications Is Reasonable And Lawful	5
A Finding Of Inadequate Service Can Only Be Made Upon Notice and Hearing	6
Limiting Service Outage Credits To BLES Customers Is Reasonable And Lawful	6
The Commission Need Not Require A Toll-Free Number For Obtaining Directories.....	7
The Commission's Approach To The Lifeline Surcharge Is Reasonable And Lawful.....	7
The Treatment Of "Affected Customers" For Purposes Of COLR Relief Is Reasonable And Lawful	8
The COLR Waiver Process Is Reasonable And Lawful	8
The Treatment Of Wireless Service Provider Assessment Reports Is Reasonable And Lawful....	9
Conclusion	10
Certificate of Service	

THE AT&T ENTITIES' MEMORANDUM CONTRA THE
APPLICATIONS FOR REHEARING

Introduction

The AT&T Entities¹ ("AT&T"), by their undersigned counsel, and pursuant to Ohio Admin. Code § 4901-1-35(B), submit this memorandum contra the application for rehearing filed on November 26, 2010 by the Ohioans Protecting Telephone Consumers ("OPTC").²

OPTC claims that its fourteen grounds for rehearing are geared toward ensuring that "residential consumers receive adequate service at reasonable rates." OPTC Application, p. 1. But its suggestions cannot be judged by some ethereal test; they must be judged according to what the Commission's limited authority under Sub. S. B. 162 directs or allows. Measured by the proper test, each of the OPTC's fourteen grounds for rehearing fails and its suggestions cannot and should not be adopted by the Commission on rehearing. Rather than focusing on a "few respects" of the Commission's October 27, 2010 order, as OPTC claims it does (OPTC Memo, p. 1), OPTC's application for rehearing, for the most part, rehashes and restates its previously articulated positions, which find no support in the law or in good public policy. The Commission will have to look long and hard to find any new arguments to support those positions, because there are none.

¹ The AT&T Entities are The Ohio Bell Telephone Company d/b/a AT&T Ohio, AT&T Communications of Ohio, Inc., TCG Ohio, SBC Long Distance d/b/a AT&T Long Distance, SNET America, Inc. d/b/a AT&T Long Distance East, AT&T Corp. d/b/a AT&T Advanced Solutions, Cincinnati SMSA, L.P., and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility.

² Inexplicably, the OPTC has apparently lost AARP Ohio and Communities United for Action as members; those entities participated in the comments and reply comments filed by OPTC.

AT&T supports the application for rehearing filed by the Ohio Telecom Association ("OTA"). Thus, AT&T recommends that the Commission grant AT&T's application for rehearing and that of the OTA but that the Commission deny, in its entirety, the application for rehearing filed by OPTC.

Additional Notice To The OCC Is Neither Required Nor Authorized

OPTC's initial criticism of the Order lies in its demand that OCC be treated like a regulator and accorded essentially all of the same notices that the Commission - - as the statutory regulator - - should receive. OPTC Memo, p. 4. OPTC's claims that providing additional notices to the OCC is "*de minimis*" rings hollow when one considers that OPTC had proposed 13 additional instances of such notice, which, when added to those proposed by the Commission Staff, would have required notice in 18 situations. OPTC Memo, p. 6; see AT&T Reply Comments, p. 5. Such numerous notice requirements would be unnecessary, adding to regulatory burdens, compliance requirements, and costs. Sub. S. B. 162 had, as one of its purposes, the reduction of all three. OPTC repeatedly ignores this basic fact - - the Commission cannot.

OPTC argues extensively that the OCC's role as the statutory representative of residential customers entitles OCC to receive every notice that every one of those customers would receive. OPTC Memo, pp. 3-9. OCC's clients can bring to OCC's attention any such notice if they have a question or a concern about it. Of course, they can also raise any such

concern with the companies or the Commission. The Commission need not - - and cannot - - require every such notice to be sent to the OCC.

The Exceptions To The BLES Service Quality Standards Are Reasonable And Lawful

OPTC relies on a distinction without a difference in criticizing the Commission's reasonable and lawful exceptions to the BLES service quality standards. OPTC Memo, p. 10. OPTC acknowledges that the Commission can grant waivers from those requirements, but apparently believes that blanket waivers (or across-the-board exceptions) are not permitted. Here again, the Commission will have to look long and hard for legitimate support for OPTC's position, because there is none. As the Commission articulated, R. C. § 4927.08(C) requires that the rules provide for a waiver of the standards in circumstances determined appropriate by the Commission. Order, p. 17. In adopting the historic exceptions from the MTSS, the Commission has done nothing more and nothing less. Contrary to the OPTC's assertion, there is no prohibition against "generic exceptions." OPTC, p. 11. The historic MTSS exceptions are incorporated in AT&T Ohio's operating procedures, as they likely are for most, if not all, of the ILECs. The exceptions are reasonable and lawful, and are consistent with the Commission's power to waive the standards in appropriate circumstances. The General Assembly understood this and gave the Commission the power to carve out appropriate exceptions. The Commission has done so.

OPTC is wrong when it interprets new rule 12(C)(6) as *prohibiting* customer credits where such credits are not required. OPTC Memo, p. 11. Nowhere in the rules is a LEC

providing basic local exchange service *prohibited* from issuing customer credits in their discretion, even when they are not required to do so by the rules. This is simply a non-issue.

The Treatment Of Postmarks Is Reasonable And Lawful

OPTC also challenges the now-accepted definition of "postmark" that the Commission adopted in the MTSS several years ago. OPTC Memo, p. 12. OPTC forgets that the General Assembly did not define "postmark," while the Commission has done so.³ The General Assembly can be presumed to have understood and accepted the Commission's previous definition of the term, thus retaining the status quo. Contrary to OPTC's suggestion, the General Assembly did not direct a change in the status quo in this area. OPTC Memo, p. 12. The Commission has properly adopted a definition that is consistent with its long-standing practice and with its authority under the new law. OPTC's claims should be rejected.

The Treatment Of Information Needed In Certification And ETC Applications Is Reasonable And Lawful

OPTC quibbles with the rejection of its suggestion that information concerning activities in other states be included in the rules governing certification and ETC applications. OPTC Memo, pp. 13-14. The Commission saw merit in the suggestion, but concluded that the appropriate way to implement it is through modifications to the Telecommunications Application Form rather than through a rule. OPTC is not satisfied with this reasonable outcome. OPTC

³ See O.A.C. § 4901:1-5-01(Z).

Memo, p. 14. As a part of its application process, the Commission can obtain whatever information it deems appropriate about an applicant's activities in other states. All of the specific information need not be spelled out in a rule. OPTC's dissatisfaction with the Commission's rationale for rejecting its initial suggestion is baseless and should be ignored.

A Finding Of Inadequate Service Can Only Be Made Upon Notice and Hearing

OPTC argues that the Commission erred in failing to conclude that a violation of the service quality standards constitutes inadequate service *per se*. OPTC Memo, p.15. This radical position has no basis in the law. It would reverse long-standing precedent in Ohio utility law. OPTC forgets that R. C. § 4927.08(B) directs the Commission to adopt rules incorporating the specified standards. In this vein, the new law is really no different than the old one.⁴ And the Commission was correct when it concluded that every provider is entitled to due process before a finding of inadequate service can be made. OPTC Memo, p. 15; Order, p. 17. A violation of one of the adopted standards cannot be deemed to be inadequate service *per se* in any circumstance.

Limiting Service Outage Credits To BLES Customers Is Reasonable And Lawful

OPTC claims that the service outage credit was improperly limited to BLES customers. OPTC Memo, p. 17. This argument strains credulity since the statute, R. C. §

⁴ R. C. § 4927.08(B) provides, in pertinent part, as follows: "The public utilities commission *shall adopt rules prescribing the following standards* for the provision of basic local exchange service, and shall adopt no other rules regarding that service except as expressly authorized in this chapter" (Emphasis added.)

4927.08, applies only to *basic local exchange service*, and the particular provision, R. C. § 4927.08(B)(3)(a), speaks in terms of a "*basic local exchange service* outage." (Emphasis added.) Outage credits are clearly limited to BLES, despite OPTC's protestation to the contrary. Its baseless assertions should be rejected.

The Commission Need Not Require A Toll-Free Number For Obtaining Directories

OPTC claims that the Commission erred in not requiring a toll-free number for customers to call to obtain delivery of a printed white pages directory when such delivery is not automatic. OPTC Memo, p. 18. OPTC offers only that BLES customers should not have to make a toll call to make such a request. Id. The Commission did not err by not requiring a toll-free number for this purpose. Clearly, the Act does not require one. AT&T offers a toll free number for this purpose, but it does not advocate this as a requirement for other telephone companies. Many will likely offer a local number, in which case no toll charges would apply. OPTC's suggestion should not be adopted.

The Commission's Approach To The Lifeline Surcharge Is Reasonable And Lawful

OPTC objects to the adopted rule governing the lifeline surcharge. OPTC Memo, p. 19. OPTC claims that the Commission has created a situation in which expenses that have not been "prescribed by rule" might be recovered. But the Commission's two-tiered approach to implementing the statute is true to the statutory language and the legislative intent. The Commission has the authority to specify allowable expenses to be recovered and to establish a

second category in which other expenses can be examined for possible inclusion in the surcharge. This will make for efficient management and oversight of the surcharges and the processes governing them. The only expenses that will be recoverable are those prescribed by the rule or that are approved through the process prescribed in the rule. OPTC has not demonstrated that this approach is unreasonable or unlawful in any way. Its claims should be rejected.

The Treatment Of "Affected Customers" For Purposes Of COLR Relief Is Reasonable And Lawful

Here again, OPTC quibbles with the fact that OCC was left out of a notice requirement. OPTC Memo, p. 22. OPTC simply reiterates its suggestion that, in filing an application for COLR relief, notice should be given to local governments and to the OCC. Id. Here, OPTC's suggestions on behalf of, and its purported representation of, any entity of local government, must be questioned. Apart from that, the inclusion of OCC as a recipient of such notice is, once again, one of the examples of over-reaching that the Commission properly rejected. OPTC does not explain how "[l]ocal governments and OCC are 'affected' by such waiver requests," but it wants the Commission to take that claim at face value. OPTC Memo, p. 23. Instead, that claim should be rejected.

The COLR Waiver Process Is Reasonable And Lawful

In the context of COLR relief, OPTC also claims that the Commission erred in not adopting the suggestion it proposed in its comments. OPTC Memo, p. 24. Again, this does

not rise to the level of "unreasonable or unlawful." The Commission can examine the alternatives available in a COLR waiver case and can make the necessary statutory finding whether the application is "just, reasonable, and not contrary to the public interest." OPTC's suggestion goes well beyond the statutory requirements and should not be adopted. It would elevate form over substance. Implementation of the adopted rule will permit the Commission to make the necessary determination under the Act. It is to be expected that the Commission will closely examine and analyze each situation on a case-by-case basis.

The Treatment Of Wireless Service Provider Assessment Reports Is Reasonable And Lawful

OPTC claims that the treatment accorded wireless service provided annual assessment reports is contrary to the statute. OPTC Memo, pp. 25-26. First, OPTC does not explain how it is prejudiced or harmed in any way by the adopted rule. As the Commission noted, the only purpose served by such reports is the calculation of PUCO and OCC assessments. OPTC Memo, p. 25; Order, p. 39. Second, OCC receives copies of these reports, which it uses in calculating its budget assessments, so there is no harm to OCC by the practice adopted in the rule. This ground for rehearing should be rejected.

Conclusion

For all of the foregoing reasons, the Commission should deny the OPTC's application for rehearing in its entirety and should grant the application for rehearing filed by the AT&T and the Ohio Telecom Association.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 6th day of December, 2010 by e-mail or by prepaid first class mail, as noted, on the parties shown below.

/s/ Jon F. Kelly

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Summary: Memorandum contra the Ohioans Protecting Telephone Consumers' application for rehearing electronically filed by Jon F Kelly on behalf of The AT&T Entities