

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

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THE AT&T ENTITIES' MEMORANDUM CONTRA THE
OPTC'S APPLICATION 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 February 18, 2011 by the Ohioans Protecting Telephone Consumers ("OPTC").²

This is the third application for rehearing filed in this case by either the Office of the Ohio Consumers' Counsel ("OCC") or the OPTC. In this application for rehearing, OPTC claims that its four 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 and what common sense and reasonable deference to the management prerogatives of the Commission and its Staff dictate. Measured by the proper test, each of the OPTC's four grounds for rehearing fails and its suggestions cannot and should not be adopted by the Commission on rehearing. In many respects, OPTC rehashes its previously articulated positions, which find no support in the law or in good public policy.

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, BellSouth Long Distance, Inc. d/b/a AT&T Long Distance Service, 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 as a member; that entity participated in the comments and reply comments filed by OPTC.

The OPTC is intent on over-regulating the process of regulatory reform that was mandated by Sub. S. B. 162. OPTC would probably like to rewrite some provisions of the new law to its liking, but it is too late for that. Because of this, it seizes on several minor issues, making mountains out of molehills, and advocates complicating - - and necessarily delaying - - the needed regulatory reforms. It speaks volumes that OPTC's 18-page application for rehearing is directed at an Entry that was only five pages long, with several attachments. Instructively, OPTC itself acknowledges the "hypertechnical" nature of some of its criticisms. OPTC Memo, p. 8, note 18.

As part of its nostalgic look at the past, OPTC asks the Commission to "abrogate" its January 19, 2011 Entry. OPTC App., p. 4; Memo, pp. 3, 16. It is curious that OPTC would use the term "abrogate" in this regard. Former R. C. § 4927.03 gave the Commission the power to "abrogate" certain of its prior alternative regulation orders.³ While the rehearing process has not changed, this specific power of "abrogation" was repealed. The Commission can certainly change its mind on rehearing, if it properly justifies such a change. But nothing that OPTC offers here would form a proper basis for the Commission to change its mind.

³ Former R. C. § 4927.03(C) provided as follows:

The public utilities commission has jurisdiction over every telephone company providing a public telecommunications service that has received an exemption or for which alternative regulatory requirements have been established pursuant to this section. As to any such company, the commission, after notice and hearing, may *abrogate* or modify any order so granting an exemption or establishing alternative requirements if it determines that the findings upon which the order was based are no longer valid and that the *abrogation* or modification is in the public interest. No such *abrogation* or modification shall be made more than five years after the date an order granting an exemption or establishing alternative requirements under this section was entered upon the commission's journal, unless the affected telephone company or companies consent.

(Emphasis added.) That section was repealed effective September 13, 2010.

OPTC correctly cites R. C. § 4905.30, as amended by Sub. S. B. 162, effective September 13, 2010, which in conjunction with R. C. § 4927.03(E), forms the basis for the detariffing ordered by the Commission. OPTC Memo, p. 2. But despite this clear statutory authority, OPTC quibbles with the means the Commission chose to accomplish detariffing. Such quibbling does not rise to the level of "unreasonable or unlawful" necessary to support an application for rehearing under the statute.

OPTC asks why the Commission has not "explore[d] the implications of the change" in the customer/utility relationship. OPTC Memo, p. 3. To respond with a question, "Why should the Commission do this when it has been given clear direction by the Ohio General Assembly?"

For the reasons set forth herein, OPTC's latest application for rehearing should be denied.

The Commission-Prescribed Customer Notice Is Not Inadequate

It sets the tone for OPTC's initial argument that it suggests that a Commission-prescribed customer notice is somehow converted into a "communication by the company" that is subject to the requirements of R. C. § 4927.06(A)(1). OPTC Memo, p. 4, note 9. This is an absurd position. There is simply no basis for the suggestion that the requirements of that law apply to actions taken by the Commission.

OPTC highlights, and then roundly criticizes, the residential customer notice prescribed in the January 19, 2011 Entry. OPTC Memo, pp. 7-8. OPTC focuses its criticism of the prescribed customer notice on the singular portion of the notice that it has emphasized rather than considering the overall message being communicated. OPTC Memo, p. 7. In so doing, OPTC ignores the clear and direct information being imparted in the very opening paragraphs of the notice: 1) that telecommunication services are being "detariffed," that is, they "will no longer be on file at the Public Utilities Commission of Ohio (PUCO)," and 2) that **"This modification does not automatically result in a change in the prices, terms, or conditions of those services to which you currently subscribe."** OPTC Memo, p. 7 (emphasis added). OPTC quibbles with a direct, succinct approach to the customer notice – an approach which, in fact, successfully ushered in the initial detariffing actions back in 2007 and was prescribed in the Entry adopted September 19, 2007 in Case No. 06-1345-TP-ORD.

OPTC would like nothing more than a further delay in the reforms wrought by Sub. S. B. 162 and the Commission's implementing rules. Viewed with that goal in mind, the OPTC's claims amount to less than molehills.

The Process For Detariffing Is Reasonable And Lawful

Beyond its criticism of the Commission-prescribed customer notice, OPTC also argues that the underlying "process" for the detariffing of various services is likewise flawed. OPTC Memo, p. 9. It suggests that the Commission - - at the very least - - should have put the contents of the customer notices, as well as other related issues, out for public comment. Id.

Here, OPTC goes well beyond advocacy on behalf of its constituents and into the management prerogatives of the Commission and its Staff. OPTC thinks the Commission should have done more to "recognize and implement the fundamental change" in the company/customer relationship brought about by the amendment to R. C. § 4905.30. Id., p. 10. That OPTC would have done things differently does not amount to unreasonable or unlawful conclusions by the Commission. Moreover, the very same process and a very similar notice were utilized very successfully during the initial detariffing process in 2007. At that time, all business services other than the primary, second, and third business access lines and all toll, residential and business, were detariffed. The process was smoothly implemented and few, if any, customer issues arose from the transition. The Commission has implemented the statutory changes in a reasonable and lawful manner, albeit displeasing to OPTC.

The OPTC's penchant for disruption and delay emerges clearly in its commentary on pp. 10-13 of its application for rehearing. Here, it tees up what it says is a "small sampling of other key issues" that it believes should have been addressed as part of this proceeding. OPTC Memo, p. 10. These include early termination fees, arbitration clauses, and customer complaints. Id., pp. 10-11. OPTC would clearly have preferred that these issues, and doubtless many others, be addressed for a long, long time before any of the changes envisioned by Sub. S. B. 162 could be implemented. OPTC even suggests that the Commission should have consulted with the FCC on its experience with the detariffing process. Id., p. 13. None of these arguments rise to the level necessary to support an application for rehearing. The Commission's decision not to address these issues was neither unreasonable nor unlawful.

A Further Rulemaking Was Not Necessary And Would Have Been Counterproductive

Ultimately, OPTC argues that what the Commission has accomplished with a five-page entry and several clear and concise attachments should have been accomplished via a further rulemaking with comments, reply comments, and opportunities for rehearing, and perhaps even industry workshops and local public hearings around the state. These features would likely not have improved the Commission's work product, but they would surely have played into OPTC's game of delay. Moreover, given the successful implementation of the initial phase of detariffing conducted in 2007 using a similar approach as the approach prescribed by the Commission in this Entry, a further rulemaking would have clearly been counterproductive.

OPTC errs when it suggests that the Commission has not implemented detariffing in its rules. OPTC Memo, p. 14. O. A. C. § 4901:1-6-11, adopted as part of the rules that took effect on January 20, 2011, specifies the services required to be tarified and directs that all other telecommunications services "shall not be included in tariffs" O. A. C. § 4901:1-6-11(A)(2). Thus, contrary to OPTC's argument, these issues *were* considered in a rulemaking. OPTC Memo, p. 14. As a reminder, it was the rulemaking just concluded, in which OPTC was an active and vocal participant.

The Commission's Approach To Certification Applications Was Reasonable And Lawful

Lastly, OPTC criticizes the Commission for reneging on what OPTC views as a promise made in the rulemaking phase of this case. As OPTC notes, several matters that it raised

were deferred to this implementation phase of the case. OPTC Memo, pp. 15-16. OPTC ignores that the Commission deferred these matters to the consideration of the "telecommunications filing form *and to future Commission procedural entries*." The matters of applicants' operations in other states and complaints against them in other states, to the extent not addressed in the responses to the forms, can certainly be pursued in Staff Data Requests or *future Commission procedural entries* seeking data from the applicants in those cases. Once again, OPTC has attempted to make a mountain out of a molehill.

Conclusion

For all of the foregoing reasons, the Commission should deny the OPTC's application for rehearing in its entirety.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 28th day of February, 2011 by e-mail or by prepaid first class mail, as noted, on the parties shown below.

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Summary: Memorandum contra the OPTC's application for rehearing electronically filed by Jon F Kelly on behalf of The AT&T Entities