BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code.	))))))	Case No. 11-776-AU-ORD

INITIAL COMMENTS OF THE AT&T ENTITIES

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Introduction

The AT&T Entities[1], by their attorneys, submit these initial comments in response to the Entry adopted on March 2, 2011 in the referenced case. In its periodic review of its procedural rules, the Commission has made substantial progress over the years in updating and streamlining its procedures. Especially in the area of e-filing, the Commission has demonstrated that it is not only possible, but worthwhile, to move to a paperless e-filing system that is readily accessible to all interested parties. In the latest proposed revisions, the Commission continues the trend toward e-filing. In a few respects, though, it has retained antiquated and cumbersome processes that could and should be eliminated, as explained in these comments. The Commission should also revisit the need to protect trade secrets that are filed with it under seal, consistent with Ohio law, and to remove from its rule any arbitrary time limit on their protection.

The Procedural Rules - Chapter 4901-1

Rule 2(D)(2)(b)

Why is it that a notice of appeal cannot be e-filed? R. C. § 4903.13 requires only that a notice of appeal be "filed" with the Commission. There appears to be no prohibition against e-filing that notice. The Commission should consider further amending this rule accordingly.

[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.

Rule 2(D)(4)

This new provision allows the docketing division to "reject any filing that does not comply with the electronic filing manual and technical requirements, is unreadable, includes anything deemed inappropriate for inclusion on the commission's website, or is submitted for filing in a closed or archived case." In some of these circumstances, the filer should be given an opportunity to cure the defect and refile and still have the filing considered timely. The proposed rule, though, does not allow for this. The rule should include a provision allowing for an opportunity to cure a technical defect with the filing within a short timeframe. The proposed rule indicates that an "e-mail message will be sent to inform the filer of the rejection and the reason for the rejection," but does not give the filing party the opportunity to cure the defect where that is appropriate.

Rule 2(D)(5)

E-filing would constitute service on those parties who are electronically subscribed to the case via the Commission's docketing information system ("DIS") website. If the amendment as proposed is adopted, a review of the DIS is in order in order to assure that those parties using e-filing can clearly and accurately identify the parties who are subscribed to the case in the DIS. But, more importantly, the rule requires continued use of traditional service on the parties who are not electronically subscribed. The AT&T Entities propose a better alternative in the discussion of Rule 5(B) below.

Rule 2(E)(2)

The permission of the legal department would be needed to reopen a "closed" case to make any additional filings. Cases are sometimes closed inadvertently by the Staff, which

might not be aware of on-going or infrequent, periodic filings that must be made, such as cases where a motion to extend a protective order is required. The proposed change is not problematic if it is coupled with an internal review of the process for closing cases that ensures that cases where such on-going or periodic filings may be needed are not prematurely closed.[2]

Rule 5(B)

Under this proposed change, a certificate of service must include those served in the traditional manner and those served by e-filing. But how can a party to a Commission case certify that the DIS will do its job? It should be enough that the document was e-filed, since the DIS then proceeds to send out the filing alert to subscribers. (See related comments on Rule 2(D)(5) above.)

The proposed revisions do not go far enough. The Commission should consider eliminating all requirements to serve hard copies of any filing, unless ordered for just cause in a particular case.[3] The proposed rule seems to assume that only those who have subscribed to a case will receive the filings. This is not the case. Anyone with internet access, anywhere in the world, can access the DIS and review any document filed in any case (other than those filed under seal). Why should the Commission retain an antiquated system of serving hard copies by mail on those who choose not to participate in e-filing when even those who choose not to participate in e-filing do in fact have access to the case documents?

[2] Adoption of the AT&T Entities' proposal on Rule 24 below would alleviate some of the problems with the filing of multiple requests to extend protective orders in otherwise "closed" cases.
[3] For example, a party might be able to demonstrate some unreasonable hardship that might support the continuation of traditional "hard copy" service of pleadings and other filings on them.

According to the 2010 Annual Report of the Ohio Public Library Information Network (OPLIN):

> The number of computers available for public use in libraries has risen to 11,840, and the computers available for staff use is now 10,331, which is a total of 22,171 computers in Ohio public libraries. These numbers continue to increase every year as the use of technology and Internet access become a necessary focus of public libraries.

OPLIN 2010 Annual Report, p. 3, available at http://www.oplin.org/content/annual-reports. The Commission can rest assured that all Ohioans have reasonable access to the internet, either in an office, at home, or at a nearby public library. With such widespread availability of access to the internet, the Commission should reconsider retaining a "hard copy" service rule at all, which is a relic of the last century. Dispensing with that rule would also do away with the need for certificates of service. This would be a progressive and reasonable next step in the evolution of the Commission's e-filing processes.

To adopt this reasonable alternative to what has been proposed in the draft rule amendments, the AT&T Entities propose the following language:

> Rule (2)(D)(5) <u>If an e-filing is accepted, notice of the filing will be sent via electronic mail (email) to all persons who have electronically subscribed to the case, including the filer. This e-mail notice will constitute service of the e-filed document upon those persons electronically subscribed to the case. UNLESS OTHERWISE ORDERED FOR GOOD CAUSE SHOWN, THE FILER NEED NOT SERVE COPIES OF THE DOCUMENT IN ACCORDANCE WITH RULE 4901-1-05 OF THE ADMINISTRATIVE CODE UPON PARTIES TO THE CASE WHO ARE NOT ELECTRONICALLY SUBSCRIBED TO THE CASE.</u>
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> The first sentence of Rule 5(A) should be amended accordingly as follows:
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> <u>(A) Unless otherwise ordered by the commission, the legal director, the deputy legal director, or an attorney examiner, AND SUBJECT TO RULE 4901-1-02(D)(5) AND PARAGRAPH (B) OF THIS RULE, all pleadings or papers filed with the commission subsequent to the original filing or commission entry initiating the proceeding shall be served upon all parties, no later than the date of filing.</u>

Rule 5(B) should also be amended to be consistent with the above language:

(B) If an e-filing is accepted by the docketing division, an e-mail notice of the filing will be sent by the commission's e-filing system to all persons who have electronically subscribed to the case. The e-mail notice will constitute service of the document upon the recipient. UNLESS OTHERWISE ORDERED FOR GOOD CAUSE SHOWN, THE FILER NEED NOT SERVE COPIES OF THE DOCUMENT IN ACCORDANCE WITH THIS RULE UPON PARTIES TO THE CASE WHO ARE NOT ELECTRONICALLY SUBSCRIBED TO THE CASE.

Rule 7

The new "forward" and "backward" computation of time would appear to cut short the "backward" time in some instances. The example used for expert testimony demonstrates this. Assume a hearing is scheduled for Tuesday, November 29, 2011. If expert testimony is filed, it must be filed five days before the hearing, which would be Thursday, November 24, 2011. But since that day is Thanksgiving, the proposed rule would move the deadline forward ("toward the start of the hearing") to Friday, November 25, 2011. This would cut short the opportunity of opposing parties to review the expert testimony and prepare for the hearing. Where the due date falls on a Saturday, Sunday, or holiday the due date should be moved backwards (not forward) to solve this dilemma.

Rule 15(C)

Some minor edits are necessary here to make the terminology consistent. The rule now uses the terms "application for review" and "interlocutory appeal" interchangeably. It would be better to use the term "interlocutory appeal" throughout.

Rule 21(N)

The word "solely" should be added to the new language on the use of a deposition. If a deposition is to be used for purposes other than impeachment (even if in addition to impeachment), it should be prefiled. One could avoid the prefiling requirement if the deposition is used for other purposes but is also used to impeach. The new language should read: A deposition need not be prefiled if used solely to impeach the testimony of a witness at hearing.

Rule 24(F)

The proposed revision extends to 24 from 18 months the term of a protective order. It also provides that the Commission can "reexamine" the granting of a protective order at any time. While the extension of the term of a protective order from 18 months to 24 months is some small progress, the Commission should further revise the procedure followed in these circumstances. The AT&T Entities urge the Commission to amend its rules to provide proper protection for trade secrets that parties file with the Commission. The current rules do not comply with the trade secrets law and do not provide adequate protection to the owners of trade secrets. If the Commission has filing space constraints in connection with storing confidential information that is filed under seal, that problem can be readily addressed by scanning the confidential information, maintaining electronic files of the scanned documents on a secure computer or server, and destroying the hard copies or returning them to the originating party. By doing so, the Commission would reduce its docket activity, as utilities would no longer need to continue to make repetitive filings to extend protective orders every 18 (or 24) months.[4]

[4] This would be consistent with the goal of reducing unnecessary red tape expressed in Governor John R. Kasich's Executive Order 2011-01K, entitled "Establishing the Common Sense Initiative."

At the outset, Ohio law provides that trade secrets are not public records. R. C. § 149.43 provides in relevant part as follows:

> As used in this section:
>
> (1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for profit entity operating such alternative school pursuant to section 3313.533 [3313.53.3] of the Revised Code. "Public record" does not mean any of the following:
>
> * * *
>
> (v) Records the release of which is prohibited by state or federal law.

R. C. § 149.43(A)(1)(v). Contrary to the Commission's apparent view, trade secrets are not public records that are, in an agency's discretion, allowed to be exempted from public disclosure for a limited period of time. Rather, the law provides that trade secrets are not public records. Assume that a list of customers' social security numbers or non-published telephone numbers is to be filed and put into evidence in a Commission case. Is this information a public record that the Commission may exempt from disclosure, in its discretion, for 18 months? The answer to this questions should be "no." The information in question is not a public record. That should end the debate. The Commission may not exercise discretion by failing to protect trade secrets or other information "the release of which is prohibited by federal or state law." That is what the public records law says, and the Commission should adhere to it.

The Supreme Court of Ohio has addressed numerous cases involving the interplay between Ohio's public records law and its trade secrets law. The following excerpt is instructive:

> In determining whether information submitted to a public agency is exempt from disclosure pursuant to trade secret status under R.C. 1333.51, we have applied a two-step analysis. See State ex rel. Allright Parking v. Cleveland, 63 Ohio St.3d at 776, 591

> N.E.2d at 711. First, the court in which the action is brought must undertake an in camera review of the documents to determine if the documents contain trade secret information. If the documents do not contain trade secrets, full disclosure is required. However, if any of the documents do contain trade secrets, the court must determine whether the statutory requirements for submitting the documents explicitly places them in the public record. See id.; State ex rel. Seballos v. School Emp. Retirement Sys., 70 Ohio St.3d at 670, 640 N.E.2d at 832. Where the statute requiring submission of the documents is silent as to the public record status of the submissions, information in the submitted documents that constitutes trade secrets pursuant to R.C. 1333.51 is exempt from public disclosure. See Seballos at 671, 640 N.E.2d at 832.

State ex rel. The Plain Dealer v. Ohio Dept. of Ins. (1997), 80 Ohio St.3d 513, 523-524. Under this standard, trade secret information submitted to or filed with the Commission is entitled to protection under the trade secrets law and is exempt from public disclosure because it is not a public record. The Commission cannot and should not limit its protection to 18 months or some other arbitrary time frame.

In connection with the protection of trade secret information, the AT&T Entities submit that the following principles should be adopted in any Commission rule or policy on the subject.

1. There ought to be a presumption that if a party is seeking to protect a trade secret (as Ohio law defines it), their motion for a protective order will be granted;

2. The rule ought to require parties filing confidential information to provide it on a CD, a flash drive, or other electronic medium to facilitate its long-term storage at the Commission. This would address any storage space concerns that arise, real or imagined.

3. The Commission should repeal the arbitrary and unlawful provision under which protective orders expire in 18 months (and not just extend that period to 24 months) unless a party requests renewal and renewal is granted;

4. Protective orders should be permanent, unless another interested person can demonstrate why they should be lifted, and the burden of proof should be on that person. Alternatively, the party seeking a protective order should be permitted to request a specific duration for the requested protective order, with the proposed 24 months serving as the minimum duration.

In summary, information that meets the definition of a trade secret under Ohio law must be protected from public disclosure because, under Ohio law, it is not a public record. The Commission does not have the authority to ignore a document's trade secret status and treat it like a public record after the expiration of an arbitrary time limit. A trade secret does not lose that status by the mere passage of time.

Rule 25

While the subpoena rule has generally been improved, it does not address one important facet, which is the availability of the subpoenaed party to appear at the scheduled hearing. Provision should be made for possible schedule conflicts. The person requesting the subpoena should have the obligation to work with the subpoenaed party or their representative on mutually acceptable dates for the subpoenaed party's appearance at a deposition or at a Commission hearing.

Rule 30

This rule would require parties to "file or provide" testimony in support of a full or partial stipulation, unless otherwise ordered. It does not appear that this is necessary in all cases. The AT&T Entities suggest that the requirement be reversed: if ordered, the parties must file or provide such testimony. Much depends on the nature of the stipulation. But it does not seem wise to require testimony in all such cases unless the necessity is established and it is otherwise ordered. It should only be required when it is ordered.

The Tariff Rule, 4901:1-1-01

The Commission should revisit the requirement that tariff provisions (or even a complete tariff) must be provided to a customer in the format they request and that paper copies be provided at no cost. Tariff provisions are now readily available on-line and can even be found on the Commission's own website. And as noted above in the discussion of Rule 5(B), the Commission can rest assured that all Ohioans have reasonable access to the internet, either in an office, at home, or at a nearby public library. The fact that the previously applicable, telephone industry-specific MTSS provision was rescinded effective January 20, 2011 means that this provision would now apply to telephone companies. The rescission of that rule, though, was not intended to subject telephone companies to the more general provision under review here. If they are, subjecting them to a burdensome paper compilation and distribution process would be unreasonable in light of the availability of ready internet access to applicable tariff provisions.

Conclusion

For all of the foregoing reasons, the AT&T Entities submit that the Commission should amend its procedural rules consistent with these initial comments.

Respectfully submitted,

The AT&T Entities

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Summary: Comments AT&T Entities electronically filed by Mrs. Verneda J. Engram on behalf of AT&T Ohio