47

FILE

RECEIVED-DOCKETING DIV
2011 JUL 20 PM 5:05
PUCO

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services, Complainant | ) | |
| v. | ) | Case No. 11-3407-TP-CSS |
| AT&T Ohio, Respondent. | ) | |

**MEMORANDUM CONTRA TO AT&T-OHIO'S MOTION TO DISMISS**

## TABLE OF CONTENTS

**Page**

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services, Complainant | ) | |
| v. | ) | Case No. 11-3407-TP-CSS |
| AT&T Ohio, Respondent. | ) | |

**MEMORANDUM CONTRA TO AT&T-OHIO'S MOTION TO DISMISS**

## I. INTRODUCTION

AT&T-Ohio's Motion to Dismiss should be recognized for what it is: AT&T-Ohio's attempt to continue assessing unlawful discriminatory, anticompetitive overcharges for Direct Current ("DC") power to McLeodUSA Telecommunications Services, L.L.C d/b/a PAETEC Business Services and LDMI Telecommunications, Inc. (collectively "PAETEC"). The discriminatory treatment creates a material cost advantage for AT&T-Ohio over its primary competitors. However, as several state commissions have recently concluded,[1] AT&T-Ohio's methodology, which it does not apply to itself, is unlawful under federal and state laws promoting competition and must be corrected without delay.

By PAETEC's calculations, AT&T-Ohio's method for assessing collocation DC power charges has resulted in PAETEC overpaying for DC power (i.e., paying more than PAETEC would pay were AT&T-Ohio using the same method for recovering DC power costs from

[1] Complaint, ¶¶ 45, 50 *and see* Wisconsin Public Service Commission, Case No. 6720-TI-221, June 10, 2010 Decision at p.3.

PAETEC as it does for itself) by, on average, $441,408 every year.[2] AT&T-Ohio could buy a brand new central office power plant each year just with the *overcharges* it assesses on PAETEC.[3] Extrapolating these overcharges on PAETEC over the seven and one-half (7 ½) years since AT&T-Ohio first began applying its method to the $9.68 rate, AT&T Ohio has to date secured more than $3.3 Million in overcharges from PAETEC alone. This does not account for the overcharges AT&T-Ohio has assessed other § 251(c)(6) collocators.

Because AT&T-Ohio uses the very same power plant as PAETEC and other collocators, the excessive over recovery of DC power costs from competitors means that AT&T-Ohio effectively uses DC power without charge, severely jeopardizing PAETEC's right to meaningfully compete against AT&T-Ohio. This goes directly to the heart of the stringent nondiscrimination obligation imposed under §251(c) of the 1996 Telecommunications Act ("the federal Act"), as well as Ohio law (Ohio Revised Code §§ 4905.22, 4905.33 and 4905.35) prohibiting undue and unreasonable preferences or advantages or charging or receiving a greater compensation to or from any corporation than it charges or receives from another corporation (here, AT&T-Ohio) for like service under substantially the same circumstances and conditions.[4]

---

[2] This amount assumes the difference between PAETEC being charged the $9.68 rate for 70 amps versus 20 amps each month over its 76 Ohio collocations. The 70 amps represents the average size of one of two redundant feeds serving a sample of PAETEC's Ohio collocations, or the increment AT&T-Ohio currently uses for billing the DC power rate. The 20 amps represents the average measurement of PAETEC's actual usage at the same sample PAETEC Ohio collocations. *See also* Complaint, ¶ 26.

[3] This is based on a comparison of the annual overcharges discussed in footnote 2 to the total investment in a central office DC power plant assumed in the CCM cost study used to derive the $9.68 DC power rate in Ohio.

[4] Despite AT&T negotiating with competitive local exchange carriers ("CLECs") to resolve this problem in some states and even voluntarily making a usage-based DC power rate proposal similar to what PAETEC seeks here in another state, AT&T has apparently decided to take a hard line in Ohio. This is not surprising given that each additional month AT&T-Ohio successfully postpones implementing the nondiscriminatory method for assessing DC power charges enables it to extract tens, if not hundreds, of thousands of dollars of additional monopoly rents from its primary competitors. This problem could have also been solved when AT&T recently negotiated and implemented a measured DC power rate amendment with PAETEC in Michigan which PAETEC requested in May 2011 that AT&T-Ohio implement in Ohio. Thus, AT&T-Ohio could have solved the problem without litigation.. AT&T-Ohio has been rewarded for its refusal of that request to the tune of about $73,568 in overcharges from PAETEC in those two short months. This is precisely the kind of anti competitive behavior by an incumbent local exchange carrier ("ILEC") that federal law (e.g., § 251(c)(6) of the Act) was intended to prevent.

AT&T-Ohio's Motion to Dismiss ignores the facts in this matter, even though the Commission must accept as true the facts alleged in PAETEC's Complaint for purposes of a motion to dismiss.[5] Examining AT&T-Ohio's DC power rate application is fully consistent with the Parties' interconnection agreements ("ICAs"), past precedent of this and other state commissions and applicable law.

First, it is undisputed that state commissions have the authority to hear disputes over ICAs.[6] The Commission did exactly this in the NuVox complaint case in Case No. 03-802-TP-CSS in which NuVox complained that the rate application methodology SBC-Ohio (n/k/a AT&T-Ohio) used for billing DC power violated the nondiscrimination requirements of federal and state law.[7] Federal cases also establish that state commissions can remedy ICA disputes as well as enforce state law obligations on carriers.[8]

AT&T-Ohio is wrong to suggest that the Commission has approved AT&T-Ohio's method of treating CLECs differently than it treats itself in regards to DC power charges.[9] As explained in detail in this Memorandum, the Commission has never reviewed the issue of whether applying the DC power rate on a cable distribution capacity basis, as AT&T-Ohio does, violates the nondiscrimination obligations of federal and state law.[10] Nor has the Commission

---

[5] *See Lucas County Commissioners v. Public Utilities Commission of Ohio,* 80 Ohio St. 3d 344, 347.

[6] *See Michigan Bell Telephone Company v. Climax Telephone Company*, 202 F.3d 862, 868 (6th Cir. 2000) (noting it is a function of the state commission to enforce the ICA).

[7] *In re. Complaint of NuVox Communications of Ohio, Inc. v. SBC Ohio*, Case No. 03-802-TP-CSS, Complaint, March 24, 2003, ¶¶ 19, 20, 26.

[8] *Michigan Bell Telephone Company v. Climax Telephone Company*, 202 F.3d 862, 868 *and see Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 359 ("The Commission can enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.")

[9] AT&T-Ohio Motion, pp. 13-14.

[10] The PUCO's 271 Order (00-942-TP-COI) was issued 6/26/03. The underlying PUCO report on SBC's 271 compliance is also dated 6/26/03. The Accessible Letter CLECAM03-325 in which SBC introduced the billing method that was reviewed by the FCC in its 271 order and ultimately incorporated into the 2003/2004 DC power amendments is dated 9/29/03. This shows that the PUCO could not have reviewed AT&T-OH's current billing

ever reviewed the merits of the DC power measurement process proposed by PAETEC[11] to solve the discrimination caused by AT&T-Ohio's method. More important, the fact that AT&T-Ohio's rate application method assigns more DC power costs to CLECs than AT&T-Ohio does for itself is exactly the type of conduct that runs afoul of federal law nondiscrimination requirements (incorporated into the Parties' ICA), Ohio law and Rule 4901:1-7-11 which prohibits discrimination in regards to collocation power and requires that collocation be provided consistent with the Commission's policies and decisions.

Contrary to AT&T-Ohio's claim,[12] the Commission may exercise jurisdiction over the portions of PAETEC's Complaint that assert violations of ORC Chapter 4905. AT&T-Ohio claims that ORC § 4927.03(C) prevents the Commission from applying Chapter 4905 provisions to remedy AT&T-Ohio's conduct. AT&T-Ohio is wrong. ORC § 4927.03(C) was not drafted to limit the Commission's authority over carrier-to-carrier matters and the express terms of § 4927.03(C) allows the Commission to apply Chapter 4905 as necessary. Indeed, accepting AT&T-Ohio's argument would essentially preclude the Commission from requiring telephone companies to comply with the mandates of Chapter 4905 in regards to carrier-to-carrier services. As noted by then Commissioner Ronda Hartman Fergus's legislative testimony, S.B. 162 would not change the Commission's authority over carrier-to-carrier services.[13]

---

methodology as a part of its Order in the 00-942-TP-COI proceeding because that method wasn't introduced until after the PUCO had issued its opinion on SBC's 271 checklist compliance.

[11] Complaint, Attachment H.

[12] AT&T-Ohio Motion, p. 15.

[13] *See Commissioner Ronda Hartman Fergus's testimony before the Senate Energy and Public Utilities Committee regarding Senate Bill 162*, available at http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/legislative-testimony/

Granting AT&T-Ohio's Motion to Dismiss would permit AT&T-Ohio to continue to collect a windfall of discriminatory profits. Reasonable grounds exist for the Complaint and a review of the law supports the Commission's denial of AT&T-Ohio's Motion to Dismiss.[14]

## II. ARGUMENT

The overarching theme of AT&T-Ohio's Motion is that the Parties have existing, effective ICAs governing how DC power charges are to apply, which cannot be changed by the Commission in the context of a Complaint proceeding. AT&T-Ohio claims that the Complaint is an improper challenge to those ICAs (and amendments), and the Commission has no authority to "reform" the ICA terms at the request of one party.[15] AT&T-Ohio further claims that once a CLEC enters into an ICA with an ILEC, "the stand-alone obligations of Section 251(c)(6) no longer apply."[16] In other words, according to AT&T-Ohio, PAETEC negotiated away its right to nondiscriminatory access to DC power.[17] AT&T-Ohio is wrong on all counts.

---

[14] AT&T-Ohio goes as far to claim that the Commission cannot hear the Complaint based on the doctrines of laches, estoppels and waiver. This argument ignores the fact that the Commission as a creature of statute does not have equitable powers, and also reflects how desperate AT&T-Ohio is to retain its unfair (and profitable to AT&T) method of treating CLECs differently when charging for DC power. *See e.g. State Alarm, Inc. v. Ameritech Ohio*, Case No. 95-1182-TP-CSS, Entry dated February 21, 1996, 1996 Ohio PUC LEXIS 148, *5-6.

[15] AT&T-Ohio Motion, pp. 3-4.

[16] AT&T-Ohio Motion, p. 6.

[17] AT&T-Ohio Motion, p. 5 ("AT&T Ohio and a requesting CLEC are free to enter into an interconnection agreement that, for example, gives the CLEC more (or less) than it is entitled to under the 1996 Act. The Complainants and AT&T Ohio have entered into such interconnection agreements here.")

## A. The Parties' Interconnection Agreement Does *Not* Bar PAETEC's Complaint.

### *1. The Interconnection Agreements Incorporate the Nondiscrimination Requirements of § 251(c)(6) of the federal Act and the Commission Requires ICAs to be Implemented in Accordance with Ohio Law.*

Initially, it is important to note that AT&T-Ohio's argument that § 251(c) obligations no longer exist once parties enter into an ICA is thoroughly inconsistent with the terms of the controlling ICAs.[18]

Section 2.6.1 of McLeodUSA's ICA with AT&T-Ohio provides:

> In the event of a conflict between the provisions of this Agreement and the Act, the provisions of the Act shall govern. If any provision of this Agreement conflicts with an applicable tariff, the provisions of this Agreement will prevail.

This provision expressly recognizes that even though there is an ICA in place, the federal Act obligations supersede any inconsistent provisions in the ICA. Thus, the ICA expressly recognizes that the federal Act obligations remain in full force and effect. Accepting AT&T-Ohio's argument that the federal Act is irrelevant once an ILEC and CLEC sign an ICA would render section 2.6.1 of the McLeodUSA/AT&T-Ohio ICA superfluous, in violation of a long precedent of basic contract law.[19]

More importantly, the premise of AT&T Ohio's argument that PAETEC agreed to be discriminated against when it entered into the ICA is wholly without merit. To the contrary, the provisions of the ICAs expressly require AT&T-Ohio to abide by the nondiscrimination requirements of state and federal law, including the § 251(c)(6) nondiscrimination obligations.

---

[18] Its argument also ignores the Ohio prohibitions against discriminatory pricing and the creation of undue disadvantages.

[19] The purpose of contract construction is to discover and effectuate the intent of the parties. *Saunders v. Mortensen* (2004), 101 Ohio St.3d 86, 2004 Ohio 24, 801 N.E.2d 452, *citing Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, syll. at para. 1. The intent of the parties is presumed to reside in the language the parties chose to use in their agreement. *Kelly, supra.* When the terms of a contract are clear and unambiguous, its interpretation is a question of law, *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246, and "[w]hen interpreting a contract . . . [courts] avoid interpretations that render portions meaningless and unnecessary." *Wohl v. Swinney*, 188 Ohio St.3d 277, 2008-Ohio-2334, at ¶ 22.

The plain language clearly states that the §251(c)(6) nondiscrimination obligation is incorporated directly into the ICAs – a point AT&T-Ohio has admitted.[20] The LDMI interconnection agreement with AT&T-Ohio states:

> Physical collocation shall be provided on a nondiscriminatory basis, on a "first come, first served" basis, and otherwise in accordance with the requirements of the Act (including 47 U.S.C. 251(c)(6)), and applicable FCC rules thereunder.[21]

The McLeodUSA interconnection agreement with AT&T-Ohio states:

> The incumbent must provide power and Physical Collocation services and facilities, subject to the same nondiscrimination requirements as applicable to any other Physical Collocation arrangement.[22]

The Parties' ICAs also state that the nondiscrimination obligation means that AT&T-Ohio must treat McLeodUSA and LDMI the same as AT&T-Ohio treats itself with respect to DC power:

> At a minimum, the Power and [AT&T]-Ohio's associated performance, availability, restoration, and other operational characteristics shall be at parity with that provided to [AT&T]-Ohio's substantially similar telecommunications equipment unless otherwise mutually agreed in writing...[AT&T]-Ohio will provide negative DC and AC power, back-up power, lighting, ventilation, heat, air conditioning and other environmental conditions necessary for the [McLeodUSA] equipment in the same manner and at the same standards that [AT&T]-Ohio provides such conditions for its own similar equipment or facilities within that Eligible Structure.[23]

The ICAs are clear: AT&T-Ohio must provide DC power to PAETEC under the nondiscrimination obligations of §251(c)(6) of the federal Act. So even if "the only possible

---

[20] AT&T-Ohio Motion, p. 6 ("These agreements and amendments incorporate the obligations imposed on AT&T Ohio by sections 251(b) and (c) of the 1996 Act – including the collocation obligations in section 251(c)(6).")

[21] *See In re. Application of SBC-Ohio and LDMI Telecommunications, Inc. for an Interconnection Agreement*, Case No. 03-0667-TP-NAG, March 10, 2003 filing, part 1 of 3 containing LDMI ICA, Attachment A, p. 10 of 46, section 4.1 (pdf page 152 of 200 of Part 1 to the filing). *See also id.*, LDMI ICA, Attachment A, p. 27 of 46 (pdf page 169 of 200) ("This Appendix and the Collocation provided hereunder is made available subject to and in accordance with Sections...8.10.4 Any statutory and/or regulatory requirements in effect at the time of the submission of the Physical Collocation application or that subsequently become effective and then when effective.") The nondiscrimination obligation of section 251(c)(6) has been in effect during the relevant time period.

[22] McLeodUSA ICA, Appendix IV "Collocation," Section 16.5.2, p. 19.

[23] McLeodUSA ICA, Appendix IV "Collocation," Sections 7.6 and 7.6.1, p. 10. The first sentence of the above block quote is also included in LDMI ICA, Attachment A, Section 8.13, p. 29.

source of a CLEC's collocation rights is its interconnection agreement" as AT&T-Ohio claims,[24] then AT&T-Ohio must still treat PAETEC at parity with how it treats itself in relation to DC power charges because that is what the Parties' ICAs require. PAETEC explained in its Complaint how AT&T-Ohio's DC power rate application methodology treats PAETEC and other CLECs differently (and less favorably) than AT&T-Ohio itself.[25] These provisions in the ICAs make clear that the Commission need not "reform" the Parties' ICAs but rather just enforce the provisions by requiring nondiscrimination for DC power. That outcome has been required by the ICAs from the beginning.

Not only do the express terms of each ICA require nondiscriminatory access to DC power, the terms also state that a party to the agreement does not waive its rights under the agreement unless it expressly waives those rights in writing.[26] There is no such written agreement wherein PAETEC expressly waived rights that require nondiscriminatory rates, terms and conditions granted by §251(c)(6) of the federal Act and the collocation sections of the ICAs granting access to collocation on nondiscriminatory terms and conditions.[27] It would also not have been possible for PAETEC to have "agreed" to be discriminated against. Until recently, neither CLECs nor state commissions could have known that the application of the DC power rate element based on amps of ordered power cable capacity is not how AT&T assigns costs to itself for using DC power. Thus, the true discriminatory nature of AT&T-Ohio's different (and less favorable) treatment of collocated CLECs in relation to assigning DC power costs between

[24] AT&T-Ohio Motion, p. 5.

[25] Complaint, ¶26.

[26] McLeodUSA-AT&T Ohio ICA, Section 36 and LDMI-AT&T Ohio ICA, Attachment A (Collocation), Section 19.11.

[27] *See e.g.* McLeodUSA ICA, GT&C, p. 24 ("Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law.") "Applicable Law" is defined as "all laws, statutes, common law, regulations, ordinances, codes, rules, guidelines, orders and decisions of courts of competent jurisdiction, permits, tariffs and approvals, including but not limited to those relating to the environment of health and safety." McLeodUSA ICA, GT&C, Definitions, p. 33.

AT&T-Ohio and CLECs came to light long after AT&T-Ohio implemented the ICAs and the Amendments. The discriminatory nature of the DC power rate application methodology was uncovered through a series of proceedings related to DC power which began in 2006. PAETEC uncovered the discriminatory nature of this ILEC billing method through extensive discovery, cross examination and costly litigation. For example, after multiple rounds of discovery, multiple rounds of testimony, evidentiary hearings, and multiple rounds of briefs in Wisconsin, the Wisconsin Public Service Commission, in June 2010, found that, "AT&T's [then] current billing method based on ordered amps is discriminatory and will provide competitors less favorable terms and conditions than those AT&T provides to itself' and required AT&T-Wisconsin to use usage-based billing for DC power instead.[28] As noted in PAETEC's Complaint, AT&T-Ohio's costs of provisioning DC power are incurred based on (*i.e.*, are incremental to) actual DC power usage.[29]

Ohio law provides an independent basis for the Complaint that AT&T-Ohio's Motion ignores. Ohio law requires AT&T-Ohio to provide PAETEC with DC power in a nondiscriminatory manner. The Commission's carrier-to-carrier rules require that collocation be provided "consistent with the commission's policies and decisions." The Commission has specifically indicated that ICAs be implemented in a manner to advance the policies of Ohio and in accordance with Ohio law.[30] ORC § 4905.35 prohibits a public utility from subjecting any person or corporation to any undue or unreasonable prejudice or disadvantage. ORC § 4905.33

---

[28] Wisconsin Public Service Commission, Final Order, Docket 6270-TI-221, June 10, 2010, pp. 3-6.

[29] Complaint, ¶ 29.

[30] *See e.g. In re Petition of AT&T Communications of Ohio, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated*, Case No. 96-832-TP-ARB, 1998 Ohio PUC LEXIS 740, December 22, 1998, Supplemental Opinion and Order at *19 and *see In re Petition of MCI Telecommunications Corporation for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio*, Case No. 96-888-TP-ARB, March 13, 1997, Opinion and Order at p. 7.

prohibits discriminatory pricing for services and ORC § 4905.22 requires that charges not be in excess of that allowed by law. Clearly, an arrangement where AT&T-Ohio is charging itself multiple times less than its competitors for the same power usage is discriminatory pricing that creates an undue disadvantage to PAETEC. In addition, Ohio law incorporates federal rules effectively prohibiting the same.[31]

PAETEC's Complaint details the various means by which AT&T-Ohio's billing for DC power violates a variety of federal regulations incorporated under the Ohio law and at the same time creates an undue disadvantage for PAETEC:

- PAETEC notes that Rule 4901:1-7-11(C) of the OAC requires collocation to be provided pursuant to rates, terms and conditions that are just, reasonable and nondiscriminatory pursuant to 47 C.F.R. § 51.323 and consistent with the Commission's policies and decisions (Complaint, ¶ 34).
- PAETEC explains that ORC Section 4905.041 requires the Commission to *not* establish requirements or pricing for network interconnection that is inconsistent with or prohibited by federal law, including federal regulations (Complaint, ¶ 35).
- PAETEC explains that ORC Section 4927.16 requires that the Commission *not* establish pricing for interconnection in a manner that is inconsistent with or prohibited by federal law, including federal regulations, and that the Commission must comply with federal law, including federal regulations (Complaint, ¶ 39).
- OAC 4901:1-7-17(B)(2)(a) incorporates the same requirement as FCC Rule 47 CFR §51.507(a), and OAC Rule 4901:1-7-17(B)(2)(c) incorporates the same requirement as FCC Rule 47 CFR §51.507(c).

A discriminatory DC power rate application violates each of these state laws and regulations. A DC power rate application that provides an undue disadvantage not only violates these laws and regulations, but also violates federal law, incorporated through the Commission's regulations and into the Parties' ICAs.

[31] *See* ORC § 4927.04 and OAC Rule 4901:1-7-11.

### *2. The 2003/2004 DC Power Amendment Does Not Bar PAETEC's Complaint.*

That AT&T-Ohio's Motion does not discuss the 2003/2004 DC power amendments itself is not surprising.[32] The Amendments do not prevent PAETEC's Complaint from going forward. The express language of the 2003/2004 DC power amendments in the ICAs AT&T-Ohio has with both McLeodUSA and LDMI in Section 8 permit the Commission to reject and/or modify the Amendments:

> 8. ... In the event that all or any portion of this Amendment as agreed-to and submitted is rejected and/or modified by the PUCO, this Amendment shall be automatically suspended and, unless otherwise mutually agreed, the Parties shall expend diligent efforts to arrive at mutually acceptable new provisions to replace those rejected and/or modified by the PUCO; provided, however, that failure to reach such mutually acceptable new provisions within thirty (30) days after such suspension shall permit either Party to terminate this Amendment upon ten (10) days written notice to the other.

Based on the information provided by PAETEC showing that AT&T-Ohio is unlawfully discriminating against CLEC collocators with respect to DC power, the Amendments contemplate the Commission can modify the Amendments, which will result in automatic suspension of the Amendments and require AT&T-Ohio and PAETEC to "expend diligent efforts to arrive at mutually acceptable new provisions to replace those rejected and/or modified by the PUCO..." Given that PAETEC discovered the unlawful discrimination subsequent to its execution of the Amendments and that it has averred in its complaint and supporting documents that it will prove that AT&T Ohio is unlawfully discriminating, which allegations must be accepted as true for purposes of ruling on the Motion to Dismiss, the Amendments cannot be used as a basis to dismiss the Complaint.

---

[32] As cited by AT&T-Ohio at page 3 of its Motion but not discussed, LDMI and McLeodUSA both executed DC power amendments which were effective in December 2003 (Case No. 03-2357-TP-AEC) and January 2004 (Case No. 04-133-TP-AEC). These amendments will be described herein as the 2003/2004 DC power amendments or "the Amendments."

Section 10 of the Amendments specifically provide that by entering into the Amendments, neither party is waiving and they each expressly reserve any rights, remedies or arguments it may have at law. As discussed in Section A.1, the remedies that PAETEC has at law require that the Commission move forward with the Complaint and eliminate AT&T-Ohio's discriminatory behavior relating to assessing DC power charges to PAETEC.

The context in which the 2003/2004 DC power amendment arose is also noteworthy. The 2003/2004 DC power amendment was a temporary measure designed to fix one of two problems with AT&T's (then SBC's) DC power rate application. Prior to 2003, AT&T (in both Ohio and Michigan) applied the DC power rate to the capacity (in amps) of both the "A" and "B" leads. The Michigan Commission rejected this AT&T practice. The Michigan Commission concluded:

> The Commission finds that its September 21 order adopted AT&T's proposal in this case for collocation, as modified to include the previously determined cost of capital, depreciation, and fill factors. **Contrary to SBC's argument, the Commission intended its decision to include charging a CLEC only for the DC power that it uses, not for the redundancy that is required to ensure that the CLEC will have the power that it needs *or* for capacity rather than power use**. The Commission is aware that AT&T and SBC have reached an agreement **concerning the redundancy issue**, which is codified in an amendment to the interconnection agreement, approved by the Commission in the September 21, 2004 order in Case No. U-12465. That amendment provides that SBC will charge AT&T for the power ordered, not for the redundancy required to ensure that power is available. The Commission finds that SBC should treat all CLECs similarly with respect to this issue. As to the metering issue, the Commission's order did not choose a method for **measuring DC power use**, because the Commission believed that SBC should be permitted to choose the least cost, safest method available. However, after reviewing the arguments of the parties and the record evidence on this issue, the Commission is now persuaded that there is no proposed measuring method that does not have significant problems associated with it. Some of those problems, as noted in SBC's response to the requests for rehearing, relate to accuracy and safety, both crucial concerns. *Therefore, the Commission finds that it should not, at this time, require SBC to meter CLECs' DC power use. However, the Commission encourages the parties to collaborate and negotiate with each other and other industry participants with respect to implementing a reasonable method of measuring DC power usage that*

*will not place an undue burden on either SBC or the collocating CLEC. The Commission is open to revisiting this issue in an appropriate proceeding.*[33] (emphasis added)

This excerpt shows that the Michigan Commission found two problems with AT&T-Michigan's method at that time of applying the DC power rate to the capacity of both power leads:

(1) that charging CLECs for DC power based on both the "A" and "B" leads results in over-recovery (the "redundancy issue") and
(2) that charging CLECs for DC power based on capacity of cables instead of the power the CLEC actually uses results in over-recovery (the "measuring issue").

The Michigan Commission found two separate and distinct flaws with the application of DC power charges using the "ordered" cable capacity. The ICA amendment offered by AT&T addressed only one of the problems (i.e., the "redundancy issue") that provided for AT&T to charge for power based on a single power lead instead of both "A" and "B" leads.

The amendment AT&T offered to solve the "redundancy issue" is the same DC power amendment PAETEC executed in Ohio in 2003/2004. However, the second problem (i.e., the "measuring issue") was not rectified by the 2003/2004 Amendment, but the Michigan Commission encouraged parties to collaborate to develop a reasonable method of measuring DC power usage so that the "measuring issue" could be addressed in a manner allowing AT&T-Michigan to bill CLECs for actual power usage instead of cable capacity. PAETEC and other CLECs resolved the "measuring issue" with AT&T first in Texas in 2006 based on a DC power measuring amendment substantially similar to the DC power measurement amendment PAETEC attached to its Complaint (Attachment H). However, AT&T refused to implement that solution in Michigan until 2010, just before the evidentiary hearings in the Michigan complaint proceeding – enabling AT&T to delay the implementation of measured power for nearly six

[33] MPSC Rehearing Order, Case No. U-13531, December 21, 2004, pp. 19-20.

years after being directed by the Michigan Commission to negotiate a usage-based rate application method and more than three years after AT&T implemented substantially the same solution in Texas. The recent Michigan power measuring amendment finally solved the second problem with AT&T's method (the "measuring issue").

It is important to point out that, while the 2004 Order discussed above was issued by the Michigan Commission, the key point is the $9.68 rate AT&T-Ohio charges for DC power is the Michigan rate, adjusted downward to eliminate the cost of one power plant component recovered through a separate rate element in Ohio.[34] This means that applying the $9.68 Ohio rate as AT&T-Ohio does (based on the capacity of a power cable) allows AT&T Ohio to overcharge for DC power because the rate was designed to recover costs based on a measurement of DC power usage. That is because AT&T-Ohio's costs for providing DC power is caused by the amount of DC power actually used; the capacity of the distribution cables does not affect AT&T Ohio's cost of providing DC power.[35] PAETEC's Complaint must not be dismissed as the Commission is required by both federal and state law to eliminate AT&T Ohio's anticompetitive discriminatory practices.

AT&T-Ohio apparently relies upon the 2003/2004 DC power amendments as support for its claim that it is fully compliant with the terms of the existing ICAs.[36] As previously discussed, AT&T-Ohio is not fully compliant with the prohibitions on discriminatory practices incorporated into the existing ICAs. If language in that amendment results in a violation of federal law and/or conflicts with the nondiscrimination requirements of the ICAs (and it does both), then the

---

[34] AT&T-Ohio Answer, ¶ 17. The DC power rate element approved by the Michigan Commission (on which the Ohio rate is based) is $10.69. Removing the BDFB costs from this rate (because AT&T-Ohio recovers those in other rate elements) produces the $9.68 rate AT&T-Ohio charges.

[35] Complaint, ¶27.

[36] AT&T-Ohio presumably relies on the language of the 2003/2004 DC power amendments which state that SBC-Ohio will "bill the CLEC for DC collocation power at a monthly recurring rate of $9.68 per AMP applied to fifty percent (50%) of the ordered capacity that is fused."

Commission must change it. That the Ohio Commission approved an ICA amendment that contains a description of AT&T-Ohio's existing DC power rate application does not mean that it must allow the discrimination that was not corrected by the amendment to continue in perpetuity. The Commission has the duty to fix that discrimination when such discrimination is identified (as PAETEC has here). In *Michigan Bell v Climax Telephone Company*, Michigan Bell brought suit against Climax as well as the Michigan Commissioners in their official capacity. The Michigan Commissioners challenged being named as defendants in the case and requested that the case against them be dismissed. Michigan Bell argued that the Michigan Commissioners were proper defendants. The U.S. Court of Appeals for the Sixth Circuit applied the *Ex Parte Young* doctrine to the dispute and found:

> ***The PSC not only approved the interconnection agreement, it is responsible for ongoing enforcement of the agreement. Ameritech alleges that the agreement violates federal law, and is seeking equitable relief. *** If Ameritech is correct in its claim that the agreement violates federal law, the PSC's ongoing enforcement of the interconnection agreement constitutes an ongoing violation of federal law[.] ****** ... Michigan did, in fact, arbitrate and review the agreement, precisely the action complained of. The state cannot have it both ways. The United States did not compel its actions and, consequently, the Tenth Amendment does not bar Ameritech's suit. ***It is the PSC's duty, if it chooses to regulate, not the other party's, to ensure that the agreement meets the requirements of the Act both at the time of arbitration, 47 U.S.C. § 252(c), and at the time of approval, 47 U.S.C. § 252(e)(2)(B). Furthermore, it is the PSC's function, not the other party's, to enforce the agreement...***[37]

The Sixth Circuit has stated that a commission cannot simply approve an interconnection agreement amendment and then rest on its laurels when a legitimate violation of federal law is subsequently raised about the agreement. The Commission has the authority and responsibility to not only approve ICAs and amendments, but to also enforce them – and both approval and enforcement must be in accordance with federal nondiscrimination obligations. PAETEC has stated facts sufficient to show that the DC power rate application methodology described in the

[37] *See Michigan Bell Telephone Company v. Climax Telephone Company*, 202 F.3d 862, 868 (6th Cir. 2000).

2003/2004 DC power amendments violate federal law. That same Amendment governed AT&T's application of the DC power rate in Wisconsin until the Wisconsin Commission held that the rate application methodology contained in the 2003/2004 Amendments was discriminatory. By not resolving the discriminatory practices of AT&T-Ohio and under *Michigan Bell v. Climax Telephone Company*, the Commission's ongoing enforcement of that rate application methodology constitutes an ongoing violation of federal law. That must be corrected.

### B. The Parties' ICAs and Precedent Confirm that the Negotiation/Arbitration Process Should not be Used to Address PAETEC's Complaint.

The plain language of the Parties' ICAs show that, despite AT&T-Ohio's claims to the contrary,[38] negotiations/arbitration is *not* the only means by which to resolve this dispute. For instance, Section 12.3.1 of the McLeodUSA ICA provides:

> The Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement that the Parties themselves cannot resolve by Informal Dispute Resolution, may be submitted to the Commission at any time for resolution. However, Formal Dispute Resolution procedures, including arbitration or other procedures as appropriate, may be invoked not earlier than thirty (30) calendar days after receipt of the letter initiating Dispute Resolution under Section 12.1.

In addition, Section 12.3.2 of the AT&T-Ohio/McLeodUSA ICA states that AAA arbitration can only be used if both parties agree to it (which has not occurred here). PAETEC's Complaint serves as notice by PAETEC that it does not agree to use AAA arbitration for this dispute. While the terms of the LDMI ICA differ from McLeodUSA's ICA, the result is the same. The LDMI ICA states: "[i]f both Parties do not agree to arbitration, then either Party may

[38] AT&T-Ohio Motion, pp. 5, 7.

proceed with any remedy available to it pursuant to law, equity or agency mechanism."[39] The LDMI ICA goes on to list "Claims Not Subject to Arbitration" that "must be resolved through any remedy available to a Party pursuant to law, equity or agency mechanism[.]" Included in this list of claims that are not subject to arbitration is: "[a]ll claims arising under federal or state statute(s)..." PAETEC's Complaint arises under both federal and state law.[40] Hence, the ICA terms provide broad authority for PAETEC to state its claims, and does not require PAETEC to pursue a negotiation/arbitration of an entirely new ICA.

AT&T-Ohio's suggestion that PAETEC negotiate/arbitrate all of the terms, conditions and/or rates of an ICA to fix a single unlawful action by AT&T-Ohio also cannot be supported. First, the parties have already negotiated an ICA in which AT&T Ohio and PAETEC have agreed that AT&T Ohio would provide access to collocation, and hence DC power, on nondiscriminatory terms and conditions, Evidence has subsequently come to light, which for purposes of ruling on the motion to dismiss, must be deemed true, that AT&T Ohio is not abiding by the terms of the ICA. A competitor should not be forced into negotiating all terms and conditions of an ICA to correct a practice that violates the existing terms of the ICA that provides the ILEC an undue advantage over competitors in violation of Ohio's policy promoting competition in the Ohio telecommunications market. Particularly in cases like this one, wherein such practice was not disclosed at the time the ICA or the subsequent relevant amendment were executed. It makes no sense for PAETEC "to seek to negotiate a successor agreement at this

[39] LDMI ICA, GT&C, Section 10.7.3, p. 45.

[40] *See* ORC §§. 4905.33, 4905.35, OAC Rule 4901:1-7 10 (noting that complaints can be filed to resolve disputes); *See also In re Petition of AT&T Communications of Ohio, Inc. for Arbitration with GTE North Incorporated*, Case No. 96-832-TP-ARB, Supplemental Opinion and Order, December 22, 1998 (in which the Commission approved the proposed alternative dispute resolution process "to the extent the dispute does not involve interpretation of a Commission rule or policy, for which the Commission remains as the forum for further resolution." As a creature of statute, the Commission's policy must be compliant with Ohio laws.)

time[,]"[41] and requiring PAETEC to do so in order to rectify AT&T-Ohio's discriminatory treatment is inconsistent with state and federal laws.

In addition to the ICA language, the precedent established by this Commission and other state commissions shows that an aggrieved party can pursue a dispute about violations of § 251(c)(6) nondiscrimination obligations within the context of a complaint proceeding, even when an existing interconnection agreement exists. In PUCO Case No. 03-802-TP-CSS, NuVox Communications of Ohio, Inc. filed a Complaint against SBC-Ohio (dated March 24, 2003) related to the rate application methodology SBC-Ohio used for billing DC power.[42] At that time, SBC was applying the DC power rate element to the number of amps associated with both the "A" and "B" power leads (even though leads are provisioned in redundant pairs such that the capacity of one lead remains idle unless one lead fails). NuVox had an effective ICA with SBC at the time. Other interested CLECs intervened.[43] Like AT&T-Ohio in this instance, SBC-Ohio's defenses against NuVox's complaint included:

- "NuVox fails to state reasonable grounds for the claims in its complaint..."[44]
- "NuVox's causes of action are barred by the doctrines of equitable estoppels and waiver."[45]
- "SBC Ohio has complied fully with the terms and conditions of its interconnection agreement with NuVox and has not breached that agreement."[46]

The Commission initiated a docket to hear NuVox's complaint despite AT&T-Ohio's defenses, and ultimately approved ICA amendments between SBC-Ohio and NuVox (and other

---

[41] AT&T-Ohio Motion, p. 4.

[42] *In re. Complaint of NuVox Communications of Ohio, Inc. v. SBC Ohio*, Case No. 03-802-TP-CSS, March 24, 2003 Complaint dated March 24, 2003.

[43] These CLECs include: AT&T Communications of Ohio, Inc. (then a CLEC), TCG Ohio, MCImetro Access Transmission Services LLC, Brooks Fiber Communications Inc., MCI WorldCom Communications Inc., XO Ohio Inc., Sprint Communications Company LP. Entry, Case No. 03-802-TP-CSS, 1/7/04.

[44] SBC-Ohio Answer, Case No. 03-802-TP-CSS, April 14, 2003, p. 20, first affirmative defense.

[45] SBC-Ohio Answer, Case No. 03-802-TP-CSS, April 14, 2003, p. 20, second affirmative defense.

[46] AT&T Answer, Case No. 03-802-TP-CSS, April 14, 2003, p. 20, fourth affirmative defense.

CLECs, including PAETEC) that changed SBC-Ohio's DC power rate application methodology after SBC-Ohio agreed to settle NuVox's complaint.[47] The resulting amendments were the 2003/2004 DC power amendments, which, as discussed above, only resolved the redundancy issue. The 2003/2004 DC power amendments were not the result of a change in law.[48] That the Commission initiated a complaint docket to consider NuVox's concerns about SBC-Ohio's DC power rate application methodology when there was an existing, effective ICA between the ILEC and CLEC undermines the arguments in AT&T-Ohio's Motion that PAETEC's concerns about AT&T-Ohio's DC power rate application methodology must be handled through the negotiation/arbitration process.

When the Michigan Commission entered orders (similar to those in PUCO Case 02-1280-TP-UNC) that approved increases in AT&T's unbundled loop rates and deemed the effective date by fiat outside the negotiation/arbitration process, certain competitive providers filed a complaint in federal court seeking declaratory and injunctive relief to prevent the pricing amendment from going into effect, claiming the imposition of the new rates violated the federal negotiation and arbitration framework created by §§ 251 and 252 of the federal Act and the terms of their ICAs. Those arguments, however, were rejected by the federal court. In *Quick Communications, Inc. et al. v Michigan Bell Telephone Company*, Case No. 2:05-cv-72396, United States District Court, Eastern District of Michigan (2006) *affirmed* 515 F3d 581 (6th Cir, 2008), the District Court granted AT&T-Michigan's motion for summary judgment and concluded that the Michigan Commission had broad discretion in the manner in which new rates

[47] It is important to note that a record was not established on the issue of how DC power was to be billed. AT&T-Ohio issued an accessible letter announcing the opportunity for other CLECs to adopt a similar ICA amendment. Therefore, the issue of nondiscrimination that has been uncovered since those amendments was never litigated before the Commission.

[48] *See* AT&T-Ohio Motion, p. 4 ("It should be noted that this is not a situation where a 'change of law' might form the basis for renegotiating a provision of an interconnection agreement.")

were determined and then implemented. The District Court rejected the notion that rates could be modified only pursuant to a specific procedure. The District Court held:

> The Act itself contains no language mandating a particular implementation procedure for rate revision. Nor does the Act contain any restraint on a state commission's authority to require parties to amend their interconnection agreement to incorporate new or revised pricing information. Relevant case law likewise lends support to the course of action taken by the MPSC.[49]

And even though the dispute in *Quick* related to revised rate levels versus a revised rate application like in this case, the *Quick* court's holding applied to "pricing information" which is broader than the level of a rate itself and on its face applies to both rate level and rate application.

Most recently, in Michigan Case U-16467, AT&T-Michigan filed a motion to dismiss PAETEC's complaint regarding AT&T-Michigan's DC power rate application methodology (which at the time was identical to AT&T-Ohio's methodology that is the subject of this complaint). AT&T-Ohio's motion to dismiss PAETEC's complaint here in Ohio is based on the same grounds as AT&T's motion to dismiss PAETEC's similar complaint in Michigan. AT&T claimed in Michigan, as it does here, that: PAETEC "fail[ed] to state a claim[,]" the state commission has "no subject matter jurisdiction[,]" "the stand-alone obligations of Section 251(c)(6) no longer apply" once an ICA is executed, PAETEC's "sole remedy is pursuant to its interconnection agreement with AT&T..."[50] and that negotiation/arbitration is the only "procedurally proper way that gives the Commission subject matter jurisdiction."[51] The Michigan complaint proceeding went forward despite AT&T-Michigan's motion to dismiss with PAETEC and AT&T-Michigan both filing testimony. AT&T-Michigan ultimately agreed to

---

[49] *See Quick Communications, Inc. v. Michigan Bell Telephone Company*, 515 F.3d 581, 586 (6th Cir. 2008).

[50] AT&T-Michigan Answer and Affirmative Defenses to Petition and Application, Case No. U-16467, November 5, 2010, p. 8.

[51] AT&T-Michigan Answer and Affirmative Defenses to Petition and Application, Case No. U-16467, November 5, 2010, p. 10.

implement a usage-based DC power rate amendment before the case went to evidentiary hearings (and before a decision was rendered on AT&T-Michigan's motion). That AT&T-Michigan agreed to implement a usage-based DC power rate via an ICA amendment with PAETEC in Michigan while its motion to dismiss was pending belies the merits of the AT&T-Ohio's nearly identical Motion.

### C. PAETEC's Complaint Does Not Circumvent the Negotiation/Arbitration Process.

AT&T-Ohio not only claims that PAETEC's Complaint would "reform" existing ICAs,[52] but also that PAETEC's Complaint circumvents the negotiation/arbitration process,[53] and would supersede the ICAs and amendment.[54] The analysis of the plain language of the ICAs demonstrates that PAETEC's Complaint does none of these things. Rather, PAETEC's Complaint seeks to enforce the existing obligations under the ICAs, the federal Act and Ohio law. It requests that the Commission require AT&T-Ohio to implement a nondiscriminatory billing methodology for DC power based on evidence showing that the current billing methodology violates AT&T-Ohio's obligation to provide DC power on nondiscriminatory rates, terms and conditions.

AT&T-Ohio's Motion relies heavily upon the Sixth Circuit's decisions in *Verizon North Inc. v Strand*, 309 F.3d 935 (6th Cir. 2002), and *Verizon North Inc. v Strand*, 367 F.3d 577 (6th Cir. 2004) to support its claim that the Commission cannot establish a process that would allow competitors to circumvent the negotiation and arbitration process set out in § 252 of the Act.[55] A

[52] AT&T-Ohio Motion, p. 12.
[53] AT&T-Ohio Motion, p. 7.
[54] AT&T-Ohio Motion, p. 8.
[55] AT&T-Ohio Motion, p. 7.

reading of these cases and other Sixth Circuit decisions shows that AT&T-Ohio's reliance on these cases is misplaced and that such a holding does not apply to PAETEC's Complaint.[56]

As an initial point, the Sixth Circuit has expressly stated that the authority of a state commission is not limited to the negotiation and arbitration of interconnection agreements. *Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 359 (2003) ("The Commission can enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services."). The *MCIMetro* Court further explained this point, stating:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition, stating that the Act does not prohibit state commission regulations "if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261. Additionally, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).
>
> The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act."[57]

The Sixth Circuit has also noted that it is the function of a state commission to enforce interconnection agreements. *Michigan Bell Telephone Company v. Climax Telephone Company*, 202 F.3d 862, 868 (6th Cir. 2000). Thus, it is well established that state commissions have authority beyond the negotiation and arbitration processes of the federal Act.

---

[56] AT&T-Ohio also mistakenly relies on *Verizon North v. Strand*, 309 F.3d 935 as support for the claim at page 5 of its Motion that "one party may give up a right it has with respect to collocation in order to extract more favorable terms on an interconnection or some other issue." The Court's holding in that case made no mention regarding giving up rights through the bargaining process.

[57] *Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 358 (2003).

The *Verizon North* decisions have no affect on the Commission's authority to remedy PAETEC's dispute with AT&T-Ohio because both decisions are factually distinguishable from this matter. For example, in *Verizon I* (*Verizon North v. Strand*, 309 F.3d 935), the state commission had directed incumbent carriers to file tariffs with the state setting the rates, terms and conditions under which competitors could acquire network elements and services. The Sixth Circuit, in its *MCIMetro* decision, highlighted the fact that the tariff filing requirement at issue in *Verizon I* allowed competitors to receive services "... *without the necessity of negotiating an interconnection agreement.*" (Emphasis in original.) As the Sixth Circuit noted:

> We distinguish this case, though. The parties in *Verizon North* were not disputing **whether to allow the use of a term from an existing interconnection agreement** or from an existing tariff, as is the situation in the instant case. In *Verizon North* we found the Commission's order improper because it **'provided an alternative route around the entire interconnection process** (with its attendant negotiation/arbitration, state commission approval, FCC oversight, and federal court review procedures.' [58] (Emphasis added).

In the PAETEC Complaint, the parties have an interconnection agreement under which a dispute exists. This fact alone distinguishes *Verizon I* from PAETEC's Complaint.

Similar, distinguishable facts as in *Verizon I* also existed in *Verizon II* (367 F.3d 577). There, the state commission ordered the incumbent carrier to pay reciprocal compensation to a competitor with whom it had no interconnection agreement, all on the basis of a state tariff filed by the competitor setting the price for such services. When the incumbent carrier refused to pay the charges, the competitor filed a complaint with the state commission to resolve the dispute. The district court reversed the state commission's order that required the incumbent carrier to pay the reciprocal compensation. On appeal, the Sixth Circuit affirmed the district court's decision. The court noted that there was no interconnection agreement, no request for

[58] *Id.* at 360.

negotiations and no state-administered arbitration, but rather a bypass of the federal process for reaching interconnection agreements via the filing of a unilateral tariff.

That is simply not the case with PAETEC's Complaint. PAETEC has existing interconnection agreements with AT&T-Ohio. PAETEC has attempted to negotiate a resolution of this dispute. Unlike the circumstances reviewed by the *Verizon II* court, PAETEC's Complaint does not ask the Commission to act in the absence of an ICA, nor does it involve a separate avenue (e.g., a tariff) for requesting carriers to obtain interconnection and network elements like in *Verizon I* and *Verizon II*. Regardless of how AT&T-Ohio characterizes the Court's holding in the *Verizon I* and *Verizon II* cases, the facts in those cases are easily distinguishable from the facts in PAETEC's Complaint.

AT&T-Ohio also raises a number of other issues about bypassing negotiation/arbitration. For instance, AT&T-Ohio claims that this approach would create "duplicative (and potentially inconsistent) obligations."[59] This is not a legitimate concern. PAETEC's ICAs with AT&T-Ohio incorporate "Applicable Law" by reference (including §251(c)(6) of the federal Act and Ohio law) to avoid the very outcome raised by AT&T-Ohio. The LDMI ICA states: "this Agreement shall be governed by and construed in accordance with the Act, the FCC Rules and Regulations interpreting the Act and other applicable federal and state law."[60] The LDMI ICA further provides:

> [e]ach Party shall comply at its own expense with all Applicable Laws that relate to that Party's obligations to the other Party under this Agreement. **Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law.**[61]

[59] AT&T-Ohio Motion, p. 6.

[60] LDMI ICA, GT&C, p. 64.

[61] LDMI ICA, GT&C, p. 65. (emphasis added)

Applicable Law is defined as: "all laws, statutes, common law, regulations, ordinances, codes, rules, guidelines, orders, permits, tariffs and approvals, including those relating to the environment or health and safety, of any Governmental Authority that apply to the Parties or the subject matter of this Agreement."[62] The nondiscrimination obligations of federal and state law are clearly a "mandatory requirement of Applicable Law" which means that neither AT&T-Ohio nor PAETEC is permitted to contravene those obligations. As a result, there is no inconsistency between PAETEC's ICAs and federal and Ohio law with respect to the stringent nondiscrimination obligations of § 251(c) of the federal Act and Ohio law. Thus, the ICA language is designed specifically to ensure consistency between the ICA and federal and state law.

AT&T-Ohio also claims that PAETEC's Complaint voids the give and take of private negotiations, and goes as far as to claim that the Complaint effectively removes the incumbent from any dispute resolution process.[63] These claims are without substance. The give and take of negotiations already occurred, and the result was that AT&T-Ohio agreed to provide DC power on a nondiscriminatory basis as is required by the stringent nondiscrimination obligation under §251(c)(6) of the Act and Ohio law. Further, PAETEC has alleged in its Complaint that evidence has come to light after the ICA was entered that AT&T-Ohio implemented a billing methodology that violates its federal and state nondiscrimination obligations, which obligations are separately set forth in the existing ICA.[64] Since this discovery, PAETEC asked for measured power numerous times over the course of several years.[65] That AT&T has steadfastly refused to

[62] LDMI ICA, GT&C, p. 7. Governmental Authority includes any "federal, state, or local, court, government, department, commission, .... with jurisdiction over the subject matter at issue."

[63] AT&T-Ohio Motion, p. 10.

[64] Complaint, ¶ 27.

[65] Complaint, ¶ 51.

implement measured power in Ohio despite doing so elsewhere shows that AT&T-Ohio has not been removed from the dispute resolution process, but instead has absolute control over it. The only way to efficiently resolve the single issue in dispute is to conduct a complaint proceeding for the purposes of enforcing the ICAs and federal and state law and ensuring that AT&T-Ohio provides DC power to PAETEC on the same rates, terms and conditions as it provides for its own use.

Importantly, a state commission and reviewing court have already reviewed PAETEC's discrimination claims *within the context of a complaint case* and found that such a rate application methodology results in impermissible discrimination. In 2006, PAETEC filed a complaint against Qwest in Iowa (FCU-06-20) alleging, among other things, that Qwest's DC power rate application based on cable capacity – the same as AT&T-Ohio's application – violated the nondiscrimination obligation under §251 of the Act. In its order in the complaint case, the Iowa Utilities Board ("IUB") found that despite potential discriminatory and over recovery problems with Qwest's practice of assessing DC power rates based upon cable capacity, Qwest might have a reasonable basis that would justify the discriminatory treatment and denied relief to McLeodUSA. McLeodUSA and the Iowa Office of Consumer Advocate appealed.

On May 6, 2008, the US District Court for the Southern District of Iowa (Central Division) ruled on McLeodUSA's appeal, remanding the case back to the IUB on the basis that the IUB had failed to properly apply the nondiscrimination standard embodied in the Telecommunications Act of 1996.[66] Where the IUB had determined Qwest's discrimination might be excused if it was "reasonable" discrimination, the Court ruled that § 251(c)(6) of the federal Act required a more stringent nondiscrimination standard that could be overcome only if

[66] *McLeoudUSA Telecommunications Services, Inc. v. Iowa Utilities Board*, 550 F.Supp. 2d 1006 (2008), *Memorandum Opinion and Order*, Case 4:07-cv-214 issued 5/6/08.

Qwest could substantiate a difference in cost that warranted the different manner by which it recovered costs from McLeodUSA compared to its own cost of accessing DC power.[67] The IUB recently issued its order on remand, concluding that, "Qwest is discriminating against McLeodUSA and other CLECs in violation of 47 U.S.C. § 251(c)(6), Iowa Code § 476.100" and the Qwest ICAs with CLECs. The IUB required Qwest to pay PAETEC millions of dollars in refunds going back to 2004 based on the overcharges assessed to PAETEC resulting from the discriminatory DC power rate application methodology.[68]

Finally, history consistently shows that attempting to negotiate this issue with AT&T-Ohio has not stopped the discriminatory practice. AT&T-Ohio will only act once it is ordered to do so by a regulator, or if such an order is imminent as in Michigan. And, there is no reason for delay – all of the intricacies regarding collecting power measurements, reporting power measurements, billing procedures, audit procedures and enforcement procedures surrounding the DC power measuring process have been established. *See* Attachment H to PAETEC's Complaint. As discussed above and in paragraph 51 of PAETEC's Complaint, PAETEC has diligently attempted to negotiate this issue with AT&T-Ohio on numerous occasions – all to no avail. AT&T-Ohio's refusal of measured power in May 2011, and its more recent motion to dismiss, clearly demonstrate that AT&T-Ohio would prefer to continue to reap the windfall it receives from DC power overcharges than to remedy its discriminatory practice.

---

[67] *McLeoudUSA Telecommunications Services, Inc. v. Iowa Utilities Board*, 550 F.Supp. 2d 1006, 1017-1018 (2008), *Memorandum Opinion and Order*, Case 4:07-cv-214 issued 5/6/08. After the Iowa court's decision, the state commissions in the states of Wisconsin and Minnesota came to similar conclusions, specifically concluding that there is no cost difference that justifies discriminatory treatment by the ILEC in terms of how DC power costs are allocated between the ILEC and CLECs. The cost of an amp to serve a CLEC is no different than the cost of an amp to serve an ILEC; the cost of shared power plant is indifferent as to which entity is using the amps it generates.

[68] IUB Order on Remand, Docket No. FCU-06-20, April 29, 2011. Qwest's request for reconsideration of the IUB's remand order was denied on June 17, 2011. IUB Order Denying Request for Reconsideration, Docket No. FCU-06-20, June 17, 2011.

## D. The Commission's Authority over this Proceeding is not Limited by ORC §§ 4927.03(C).

AT&T-Ohio claims that ORC § 4927.03(C) bars the Commission from considering PAETEC's Complaint under §§ 4905.04, 4905.05, 4905.06, 4905.22, 4905.33, and 4905.35.[69] According to AT&T-Ohio, § 4927.03(C) lists these and other sections from ORC §§ 4903 and 4905 and then states that these sections "of the Revised Code ***do not apply to a telephone company*** or, as applicable, to an officer, employee, or agent of such company or provider, except to the extent necessary for the commission to carry out sections 4927.01 to 4927.21 of the Revised Code." (emphasis in AT&T-Ohio's Motion).[70] Contrary to AT&T-Ohio's claim, ORC § 4927.03(C) does not limit the Commission's authority to apply the provisions of Chapter 4905 that prohibit unreasonable charges, unfair compensation and discrimination between carriers.

The express language of ORC § 4927.03(C) makes it clear that the statute does not limit the applicability of Chapter 4905 when addressing carrier-to-carrier issues:

> For purposes of sections 4927.01 to 4927.21 of the Revised Code, sections 4903.02, 4903.03, 4903.24, 4903.25, 4905.04, 4905.05, 4905.06, 4905.13, 4905.15, 4905.16, 4905.17, 4905.22, 4905.26, 4905.27, 4905.28, 4905.29, 4905.31, 4905.32, 4905.33, 4905.35, 4905.37, 4905.38, 4905.39, 4905.48, 4905.54, 4905.55, 4905.56, and 4905.60 of the Revised Code do not apply to a telephone company or, as applicable, to an officer, employee, or agent of such company or provider, **except to the extent necessary for the commission to carry out sections 4927.01 to 4927.21 of the Revised Code.** (Emphasis added).

The majority of the Chapter 4905 statutory sections listed in ORC § 4927.03(C) are not relevant to carrier-to-carrier issues. For example, § 4905.13 (system of accounts), § 4905.15 (reports and accounts), § 4905.17 (construction accounts), § 4905.39 (additions and extensions) and § 4905.55 (liability for agents) would not have applicability in carrier-to-carrier matters. This

[69] AT&T-Ohio Motion, p. 15.

[70] AT&T-Ohio Motion, p. 15. *See also* AT&T-Ohio Answer, ¶¶ 6-7.

fact coupled with the language emphasized above establishes that the provisions of Chapter 4905 that have relevance to carrier-to-carrier issues do continue to apply in Commission proceedings.

In fact, then Commissioner Ronda Hartman Fergus emphasized this in her legislative testimony on S.B. 162, available under the Legislative Testimony section of the Commission's website.[71] In a September 29, 2009 presentation, Commissioner Fergus gave an overview of the proposed legislation. In that presentation, Commissioner Fergus specified that the "PUCO authority remains the same for: Wholesale services: existing carrier to carrier rules and competition protections, including interconnection provisions, mediation and arbitration of disputes; ...Carrier to carrier complaints." Commissioner Fergus's comments demonstrate that the Commission's view of ORC § 4927.03 was that nothing would change in carrier-to-carrier complaints.

The Commission should also consider the consequences of accepting AT&T-Ohio's argument. The gist of AT&T-Ohio's argument in its Motion is that the Commission does not have jurisdiction to hear PAETEC's claims under Chapter 4905 by virtue of ORC § 4927.03(C). Under AT&T-Ohio's interpretation, the limitations of ORC § 4927.03(C) would apply to both carrier-to-carrier and to end user issues. However, while Chapter 4927 prohibits unfair and deceptive practices clearly relating to end user services (ORC § 4927.06), it is silent as to any prohibitions in regards to carrier-to-carrier services. With no prohibitions in Chapter 4927 on carrier-to-carrier services, AT&T-Ohio and other ILECs could claim that it would never be necessary for the Commission to apply the provisions of Chapter 4905 that prohibit discrimination to carry out ORC §§ 4927.01 through 4927.21. Such a consequence would render nugatory the General Assembly's express directive in ORC § 4927.03(C) that the Commission

[71] *See Commissioner Ronda Hartman Fergus's testimony before the Senate Energy and Public Utilities Committee regarding Senate Bill 162*, available at http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/legislative-testimony/

may apply the provisions of Chapter 4905 "...to the extent necessary for the commission to carry out sections 4927.01 to 4927.21 of the Revised Code."[72] Such a limit on the Commission's jurisdiction over telephone companies in regards to carrier-to-carrier services was never intended.

ORC §§ 4905.04, 4905.05, 4905.06, 4905.22, 4905.33 and 4905.35 are also useful and necessary to assist the Commission in carrying out the Commission's obligations under Chapter 4927. One statutory provision that the Commission must carry out is ORC § 4927.02, the state's policy on telecommunications. Specifically, the Commission must implement the State's policy, codified at ORC § 4927.02(A)(9), to "[n]ot unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services[.]" This simple policy language alone is sufficient to allow the Commission to apply the provisions of ORC §§ 4905.22, 4905.33 and 4905.35 to AT&T-Ohio to assist the Commission in meeting the state's policy of providing a level playing field for providers.

The provisions of ORC §§ 4905.22, 4905.33 and 4905.35 also are necessary for the Commission to carry out ORC § 4927.04. That section gives the Commission "... such power and jurisdiction as is reasonably necessary for it to perform the obligations authorized by or delegated to it under federal law, including federal regulations, which obligations include performing the acts of a state commission[.]"[73] One such authorization under federal law (47 U.S.C. § 251(d)(3)) is the ability of a state commission to establish and enforce "... state regulations that establish interconnection and are consistent with the Act."[74] The Commission highlighted this authorization in its 2007 carrier-to-carrier rulemaking process, noting that "... in

---

[72] ORC § 4927.03(C).

[73] ORC § 4927.04.

[74] *See Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 358 (6th Cir. 2003).

many cases, specific sections of federal law specifically delegate particular authority to state commissions. **For example, 47 U.S.C. 251, 47 U.S.C. 252, and 47 U.S.C. 253 recognize the rights of states to engage in specific jurisdictional activities.** The Commission has incorporated such references in the rules for the purpose of codifying and enforcing such authority."[75] (Emphasis added).

One rule is Rule 4901:1-7-11 which provides "[c]ollocation shall be provided pursuant to the rates, terms, and conditions that are just, reasonable, and nondiscriminatory pursuant to 47 C.F.R. 51.321 and 47 C.F.R. 51.323, as effective in paragraph (A) of rule 4901:1-7-02 of the Administrative Code, **and consistent with the commission's policies and decisions**."[76] (Emphasis added). This rule was in effect well before the implementation of Sub. S.B. 162, and any violations of the rule could be brought through a complaint initiated under ORC § 4905.26. In fact, the Commission left this rule untouched when implementing the Sub. S.B. 162 rules, leading one to the conclusion that a party can still remedy a violation of Rule 4927:1-7-11 through an ORC § 4905.26 complaint. This is exactly what PAETEC has done by virtue of paragraphs 55 to 58 of the Complaint. Further, the rule is important for purposes of applying ORC § 4927.03(C) in this proceeding because the rule not only incorporates the antidiscrimination requirements of federal law, but also requires that collocation be provided in a manner consistent with the Commission's policies and decisions.

The Commission's policies referred to in Rule 4901:1-7-11 include ORC §§ 4905.22, 4905.33 and 4905.35. As a creature of statute, the Commission's policies are derived through statute. Examples of carrier-to-carrier policies are the policies embodied at ORC §§ 4905.22 (duty to provide necessary and adequate service and facilities and prohibition against unjust or

[75] *In the Matter of the Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, 2007 Ohio PUC LEXIS 572, August 22, 2007, Opinion and Order at **6-7.

[76] OAC Rule 4901:1-7-11(C).

unreasonable charges), 4905.33 (duty of uniform pricing/nondiscrimination) and 4905.35 (prohibiting utilities from discrimination). Significantly, Chapter 4927 does not contain any such principles or duties intended to regulate carrier-to-carrier services. The closest a statute comes to addressing these principles or duties in Chapter 4927 is ORC § 4927.06, but that statute addresses unfair or deceptive acts or practices in regards to retail telecommunication services.[77] Chapter 4927 simply does not have any express statutory provision that sets forth the Commission's policies regulating carrier-to-carrier conduct. Those policies are set forth in ORC §§ 4905.22, 4905.33 and 4905.35 and collocation must be provided in accordance with those statutory provisions.

Collocation must also be provided in a manner consistent with the Commission's decisions. For example, in its Opinion and Order in Case No. 96-888-TP-ARB, the Commission approved the parties interconnection agreement, stating that:

> Ameritech and MCI will be expected to implement the terms and provisions under the approved arrangement as soon as possible and, at all times, the contract will be implemented in a manner to advance the policies of the state of Ohio as set forth in Section 4927.02, Revised Code, and the policies embodied in the 1996 Act. The Commission shall continue to exercise its jurisdiction to ensure that the execution and approval of this contract **continues to effectuate the telecommunications policies of the state of Ohio.**[78] (Emphasis added).

Likewise, in Case No. 96-0832-TP-ARB, the Commission made a similar statement that the

> .... agreement will be implemented in a manner to advance the policies of the state of Ohio as set forth in Section 4927.02, Revised Code, and the policies embodied in the Act. In addition, at all times this agreement shall be implemented in accordance with **Ohio law** and consistent with the Commission

[77] ORC § 4927.01(A)(12) defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

[78] *In re Petition of MCI Telecommunications Corporation for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio*, Case No. 96-888-TP-ARB, March 13, 1997, Opinion and Order at p. 7.

policy, rules, and regulations, including any related tariff provisions.[79] (Emphasis added).

These decisions establish that collocation must be provided in a manner to effectuate the telecommunications policy of Ohio and in accordance with Ohio law. This means that the provisions of Chapter 4905 referenced in PAETEC's Complaint are fully applicable to AT&T-Ohio and necessary to carry out ORC § 4927.04 and Rule 4901:1-7-11.

Lastly, it is worth noting that AT&T-Ohio's arguments regarding ORC § 4927.03(C) are jurisdictional arguments. This includes AT&T-Ohio's argument that ORC §§ 4905.04, 4905.05, 4905.06 should be dismissed. Yet, in its answer at ¶¶ 6 and 7, AT&T-Ohio admitted that this Commission has subject matter jurisdiction over the Complaint. Specifically, AT&T stated: "AT&T Ohio admits that the Commission has jurisdiction over the subject matter of the Complaint pursuant to several of the cited section[s] of the Ohio Revised Code, but denies that it has jurisdiction pursuant to others." Thus regardless of AT&T-Ohio's 4927.03(C) argument, the Commission has jurisdiction over the Complaint, and reasonable grounds exist for a hearing on the allegations in the Complaint.

## E. Contrary to AT&T-Ohio's Characterizations, the Commission has not Authorized AT&T-Ohio's Discriminatory Billing Method; Nor has the FCC Rejected Measured Usage-Based Billing.

AT&T-Ohio claims at page 13 of its Motion that this Commission has specifically approved AT&T-Ohio's method of allocating collocation power costs. To support this claim, AT&T-Ohio points to three Commission cases and a FCC order at pages 13-14 of its Motion. A closer look shows that they are distinguishable and irrelevant to the issues raised in the Complaint.

---

[79] *In re Petition of AT&T Communications of Ohio, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated*, Case No. 96-832-TP-ARB, 1998 Ohio PUC LEXIS 740, December 22, 1998, Supplemental Opinion and Order at *19.

As an initial point and as noted in ¶ 34 of the complaint, under the section 251(c)(6) stringent nondiscrimination obligation, an ILEC has to provide collocation (and elements of collocation such as DC power) on the same terms and conditions to all requesting carriers, *and equal to the terms and conditions under which the incumbent LEC accesses such elements for its own use.*[80] The FCC recognized two limited exceptions to providing equal treatment to CLECs: (1) if providing access in the same way as the ILEC provides for itself is "technically infeasible," or (2) if the ILEC proves "legitimate cost differences." The burden is on the ILEC to prove the existence of either exception to justify discriminatory treatment.[81]

In the prior Ohio TELRIC docket and when the Amendments were submitted for approval, AT&T did not offer evidence showing that either of these exceptions had been met. That is due, in part, to the fact that AT&T Ohio never disclosed the discriminatory nature of its billing methodology. More importantly, AT&T has since admitted that neither exception to the stringent nondiscrimination standard is satisfied. AT&T Wisconsin admitted that it was not technically infeasible to use measured power to bill CLECs for accessing DC power (and AT&T Michigan just agreed to do so, further confirming that it is technically feasible), and admitted that there was not a cost difference in providing DC power used by CLECs and AT&T for use by its own equipment.[82] PAETEC has averred that the same facts exist in Ohio, which facts must be

---

[80] *In re Implementation of the Local Competition Provisions in the Telecommunications Act 1996,* 11 F.C.C.R. 15499, 1996 WL 452885 (Aug. 8, 1996) ("*Local Competition Order*"), ¶ 315.

[81] *McLeodUSA Tel. Svcs., Inc., v. Iowa Util. Board,* 550 F. Supp. 2d 1006, 1018 (S.D. Iowa 2008) *citing Local Competition Order.* ¶ 313.

[82] AT&T has admitted that neither of the two exceptions (legitimate cost difference or technical infeasibility) to stringent nondiscrimination apply to the DC power issue presented by PAETEC in its Complaint. In Wisconsin Docket 6720-TI-221, AT&T admitted that technical infeasibility doesn't apply in response to PAETEC's Data Request 9 (*See* Attachment 1, where AT&T Wisconsin admits it is technically feasible to measure a collocator's power usage. As for the measurement concerns stated, as noted in ¶48 of the Complaint, in Illinois, Texas, and Wisconsin AT&T uses actual usage for billing collocators for DC collocation power. Thus, the concerns about not having a process for billing based on power usage have apparently been resolved to the satisfaction of AT&T, CLECs and regulators in other states. In the same Wisconsin docket, AT&T admitted that the cost difference did not apply in response to PAETEC's Data Request 14 (*See* Attachment 1, where AT&T Wisconsin admits that it

accepted for purposes of ruling on the motion to dismiss. The Commission must rectify AT&T Ohio's violation of the federal and state nondiscrimination obligations, and the ICA provision that mirrors the federal statute.

It is also important to note that AT&T-Ohio's reliance on prior cases thoroughly ignores that all are factually distinguished from the current case. That is because information demonstrating the discriminatory nature of AT&T-Ohio's DC power rate application methodology to CLECs compared to how it assigns DC power costs for its own use of DC power was never disclosed by AT&T Ohio nor uncovered by CLECs. It was only through litigation pursued by PAETEC initiated in 2006 that new facts came to light that demonstrate the anticompetitive discriminatory nature of the billing method used by AT&T Ohio (and other ILECs) for DC power. [83] This new information includes capital spending records, central office cable and power plant capacity data, power engineering manuals, and other information showing how ILECs size and allocate costs of DC power for their own use versus the use of collocators and how ILECs actually incur DC power plant costs. This new information, much of which is indisputable, was not disclosed to regulators by ILECs when those DC power rates and rate applications were initially established or when the Amendments were submitted to the state commissions. It was only after PAETEC uncovered information and brought that information to light in fact-intensive regulatory proceedings that regulators finally had a complete factual record showing the discriminatory and grossly anticompetitive nature of the cable capacity-based billing methodology ILECs have used to assess DC power rates. That is perhaps one reason why AT&T Ohio seeks to have the Complaint dismissed on procedural grounds (and why AT&T agreed to

---

incurs the same investment cost for supplying DC power to any user of that power, whether it be a collocator or AT&T itself. As to the BDFB concerns in the admission, as noted in ¶17 of the Complaint, the BDFB costs were subtracted from the Michigan rate to derive the Ohio rate because BDFB costs are recovered by other rate elements in Ohio.)

[83] *See e.g.* Complaint ¶¶27, 29.

implement measured power in Michigan just before that complaint went to hearing): it has no valid defense to the substance of PAETEC's Complaint that AT&T-Ohio's billing method is discriminatory in violation of federal and state law and the terms of the existing ICA.

As for the cases cited by AT&T-Ohio, none addresses the issue presented to the Commission by PAETEC's Complaint: whether AT&T-Ohio's existing billing method based on 50% of total cable capacity should be rejected in favor of a method based on measured usage. As explained above, prior to the 2003/2004 DC power amendments, AT&T-Ohio applied the monthly recurring collocation power charges, not only to the AMPs associated with the primary power cabling, but also to the AMPs associated with the redundant power cabling.[84] This means that all decisions involving AT&T-Ohio's DC power rate application prior to the 2003/2004 DC power amendments involved a different rate application methodology than what AT&T-Ohio uses today (which is based on the capacity of one power lead).[85] This includes the orders issued in the TELRIC case (96-922-TP-UNC) referenced by AT&T-Ohio dated June 24, 1999, June 24, 2002 and March 13, 2003.[86] This also includes any orders in the second case referenced by

---

[84] *See e.g. In re. Complaint of NuVox Communications of Ohio, Inc. v. SBC Ohio*, Case No. 03-802-TP-CSS, March 24, 2003 Complaint, ¶15.

[85] Although AT&T-Ohio's rate application after the 2003/2004 DC power amendments is different than the application that applied before the amendments, they both result in overcharges to CLECs because they are both based on the capacity of power cables and not the amount of power the CLEC actually uses.

[86] The only order from 96-922-TP-UNC that discusses the DC power rate application is the order dated March 13, 2003. A review of the quote from the March 2003 order referenced in AT&T-Ohio's Motion shows that the Commission was faced with a decision of whether to adopt a DC power rate application for cageless and shared cage collocation that differed from the rate application it had previously adopted for physical caged and virtual collocation. Because the Commission did not find any information in the record to support such a difference, it stuck with the same methodology it had approved "long ago." *See,* 96-922-TP-UNC Order, 3/13/2003, p. 20 ("Ameritech states that it long ago received the Commission's approval to charge for power consumption on a per amp fuse basis and, to the extent the Commission would consider re-examining this charge, the evidence of record supports the same holding.") However, that long-standing methodology – what the Commission and AT&T-Ohio referred to in the March 2003 order as "per fuse amp" – is not the methodology AT&T-Ohio uses today. *See* Case No. 96-922-TP-UNC, Order, 3/13/2003, pp. 20, 32. Therefore, the Commission did not in the TELRIC docket (in 2003 or any other time) approve the approach currently used by AT&T Ohio. The "fuse amp" methodology discussed by the Commission in its March 2003 order was shortly thereafter replaced by the 2003/2004 DC power amendments. But as noted, the amendments only resolved the redundancy issue and not the metering issue. While the 2003/2004 DC power amendments may have reduced the overcharges by limiting it to one lead instead of two, these overcharges are still very significant and discriminatory.

AT&T-Ohio, Case No. 00-1368-TP-ATA. The third case discussed by AT&T-Ohio (Complaint of NuVox Communications of Ohio, Inc., Case No. 03-802-TP-CSS) did not approve the approach used by AT&T Ohio either. In a different docket (Case No. 03-2113-TP-AEC), the Commission approved a DC power amendment between NuVox and SBC (similar to the 2003/2004 DC power amendments between PAETEC and SBC), but in neither the NuVox complaint case nor the following ICA amendment case did the Commission consider measured usage-based collocation power charges.

AT&T-Ohio's reference to the orders in the state and federal 271 proceedings fare no better. AT&T-Ohio refers to the Commission's June 26, 2003 order in Case 00-942-TP-COI.[87] This order as well as the Commission's Report and Evaluation on which the order is based, pre-date the 2003/2004 power amendments and therefore, did not address AT&T-Ohio's existing billing method or the issue in dispute.

AT&T-Ohio also refers to the FCC order approving AT&T's § 271 authority to provide in-region long-distance services in Illinois, Indiana, Ohio and Wisconsin (FCC 03-243, dated October 14, 2003),[88] but even that order did not address the issue in dispute. In the FCC's 2003 order, the FCC considered CLECs' concerns that SBC's "fused amp" rate application methodology for DC power rates in the states of Ohio and Indiana impacted SBC's compliance with the 14-point § 271 checklist. In the midst of the FCC's consideration of these issues, SBC filed an accessible letter that provided an offering that changed the billing of DC power in those states from the "fused amp" method to a method based on the capacity of only one lead (i.e., 50% of both leads) and to a rate element of $9.68 per amp. This is the same rate and billing method incorporated into the 2003/2004 DC power amendments. Ultimately, the FCC

[87] AT&T-Ohio Motion, p. 14, footnote 4.

[88] AT&T-Ohio Motion, p. 14, footnote 4.

concluded that the newly-filed accessible letter was sufficient to demonstrate compliance with § 271 checklist item 1. What the FCC did *not* do is reject usage-based collocation power charges in favor of AT&T-Ohio's current rate application. This is evidenced by the fact that the FCC, in the same order, approved SBC's § 271 authority in Illinois – a state in which the regulatory commission has required usage-based DC power charges since 1998.[89] Moreover, that the FCC's 271 Order does not preclude a state commission from adopting a measured usage-based DC power rate application methodology is evidenced by the fact that the FCC's order also granted AT&T § 271 approval in the State of Wisconsin. The Wisconsin Commission, like the Ohio Commission, approved numerous 2003/2004 DC power amendments between AT&T and CLECs following the FCC's 271 Order, but the Wisconsin Commission recently found the rate application method contained in those amendments to be discriminatory and required AT&T-Wisconsin to begin assessing DC power rates based on measured usage.[90]

**F. The Complaint is *Not* Barred by the Doctrines of Laches, Estoppel or Waiver.**

As a last resort, AT&T-Ohio argues that the Compliant should be dismissed "because the claims are barred by the doctrines of laches, estoppel, and waiver."[91] This argument is without merit because as the Supreme Court of Ohio has consistently recognized, "...the Public Utilities Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 307. As a creature of statute, the Commission has no powers of equity to apply the doctrines of laches, estoppels, and waiver. *See e.g. In re Ohio Edison Company, The Cleveland*

[89] The most that can be said about AT&T-Ohio's reliance on this decision is that the FCC found that both AT&T-Ohio's existing rate application methodology and a usage-based DC power rate application methodology pass muster under for Section 271 checklist compliance.

[90] *See* Complaint, ¶ 27.

[91] AT&T-Ohio Motion, pp. 14-15.

*Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Fifth Entry on Rehearing dated November 10, 2010 ("[h]owever, the Commission will reiterate that we lack jurisdiction to hear 'pure contract' claims, including claims based on reliance or promissory estoppel or claims seeking equitable remedies").

For example, the presiding Attorney Examiner in *State Alarm, Inc. v. Ameritech Ohio*, Case No. 95-1182-TP-CSS, denied Ameritech's motion to dismiss the complaint on equitable principles such as laches.[92] In its motion, Ameritech argued that State Alarm's complaint should be dismissed on "...a principle analogous to the equitable doctrine of laches[.]"[93] State Alarm responded that "... the Commission, as a creature of statute, has no powers of equity to apply the doctrine of laches to matters which are strictly statutory."[94] The presiding Attorney Examiner agreed with State Alarm, finding that "...given the Commission's statutorily-defined jurisdiction, statutes of limitations and similar doctrines do not necessarily apply in Commission proceedings."[95] The Attorney Examiner further stated that "[t]herefore, Ameritech's motion to dismiss the complaint, at this point in the process, on the principle analogous to the equitable doctrine of laches or fundamental fairness is denied."[96] Thus, considering the Commission's jurisdictional limitations, AT&T-Ohio cannot raise the defenses of laches, estoppel and waiver in the matter at bar.

Nevertheless, AT&T-Ohio has no factual basis for asserting the defenses of laches, estoppel and waiver. PAETEC has been fighting AT&T discriminatory collocation billing

---

[92] *State Alarm, Inc. v. Ameritech Ohio*, Case No. 95-1182-TP-CSS, Entry dated February 21, 1996, 1996 Ohio PUC LEXIS 148, *5-6.
[93] *Id.* at *4.
[94] *Id.*
[95] *Id.* at *6.
[96] *Id.*

methods for a number of years in various states. For example, PAETEC successfully settled a petition in Michigan to alter the manner by which AT&T Michigan applied DC collocation power rates.[97] In January 2008, PAETEC requested that AT&T-Ohio port the Illinois interconnection agreement, including the provision for measured DC power, to Ohio pursuant to the AT&T/BellSouth merger conditions."[98] AT&T-Ohio refused.[99] So PAETEC has been attempting to address and resolve this issue for many years and has not been "sitting on its rights." Thus, even if this Commission could exercise equitable powers, the allegations in the Complaint (which must be accepted as true for purposes of a motion to dismiss)[100] refute AT&T-Ohio's claim that the Complaint is barred by the doctrines of laches, estoppels and waiver.

[97] PAETEC Complaint, ¶50.

[98] *Id.* at ¶ 51.

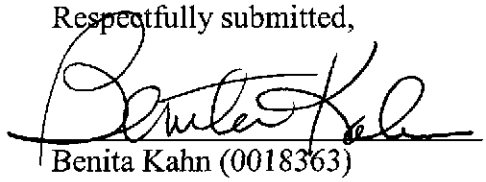
[99] *Id.*

[100] *Lucas County Commissioners v. Public Utilities Commission of Ohio* (1997), 80 Ohio St. 3d 344, 347 (noting Commission has adopted same standard used by courts in a civil case and "...deems all of the complainants' factual allegations to be true.").

## III. CONCLUSION

For the foregoing reasons, AT&T-Ohio's Motion to Dismiss should be denied in full. Reasonable grounds exist for PAETEC's Complaint and the Commission should exercise its statutory mandated jurisdiction to remedy AT&T-Ohio's discriminatory conduct

Respectfully submitted,



Benita Kahn (0018363)
Michael J. Settineri (0073369)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
614-464-6487 (telephone)
614-719-4792
bakahn@vorys.com
mjsettineri@vorys.com

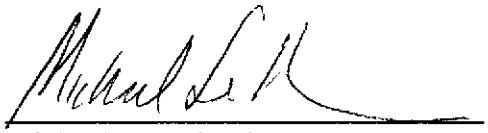
Attorneys for McLeodUSA Telecommunications Services, L.L.C. d/b/a PAETEC Business Services, Talk America Inc. d/b/a Cavalier Telephone and LDMI Telecommunications, Inc.

William A. Haas
Corporate Vice President Public Policy & Regulatory
1 Martha's Way
Hiawatha, IA 52233
319-790-7295 (telephone)
319-790-7901 (facsimile)
William.haas@paetec.com

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document was served upon the following persons via electronic mail this 20th day of July, 2011:

Jon F. Kelly
Mary Ryan Fenlon
AT&T Services, Inc.
150 E. Gay St., Room 4-A
Columbus, Ohio 43215



Michael J. Settineri

**BEFORE THE**
**PUBLIC SERVICE COMMISSION OF WISCONSIN**

| | | |
|---|---|---|
| **TDS Metrocom and McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services Petition to Determine Rates and Costs for Unbundled Network Elements Or Unbundled Service Elements of Wisconsin Bell, Inc. d/b/a AT&T Wisconsin** | ) ) ) ) ) | **Docket No. 6720-TI-221** |

**AT&T WISCONSIN'S RESPONSES TO**
**TDS METROCOM'S FIRST SET OF DATA REQUESTS**

AT&T Wisconsin hereby objects and provides responses to request numbers 1, 2, 3, 6, 8, 14, 15, 24, 25 and 26 of TDS Metrocom, LLC ("TDS") and McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services' ("McLeodUSA") First Set of Data Requests to AT&T Wisconsin, as set forth below:

**RESERVATION OF RIGHTS**

AT&T Wisconsin's investigation into these Data Requests is ongoing. AT&T Wisconsin reserves the right to supplement or modify its responses, and to present further information and produce additional documents as a result of its ongoing investigation. Notwithstanding this reservation, AT&T Wisconsin objects to the Requests to the extent they seek to impose on AT&T Wisconsin an obligation to supplement these responses except to the extent required by applicable Wisconsin law.

**GENERAL OBJECTIONS**

1. AT&T Wisconsin objects to these Requests to the extent they purport to impose any different or additional obligations from those imposed under applicable law.

2. AT&T Wisconsin objects to these Requests and the Definitions and Instructions to the extent they seek documents or information protected by the attorney client privilege, the attorney work product doctrine or any other applicable privileges or doctrines. Any inadvertent

**Docket No. 6720-TI-221**
**AT&T Wisconsin's Responses to**
**PAETEC Business Services 1st Set of Data Requests**

**Request 9:** Admit or deny that it is technically feasible for AT&T to use a measurement of a collocator's actual power usage as the basis for assessing DC Power Consumption rate elements. *If your response is anything other than an unequivocal admit,* please explain.

**Response:** It is technically feasible to measure a collocator's power usage. However, this feasibility does not include the guarantee of accuracy of measurement of the actual power usage. It requires manual monitoring, and AT&T Wisconsin does not have a process in place by which a collocator's power usage can be properly billed. Please refer to AT&T Wisconsin's response to TDS/McLeodUSA Data Request No. 1-10, as well as Staff's Data Request No. 1-9.

**Responsible Person:** Jim Hamiter

**Docket No. 6720-TI-221**
**AT&T Wisconsin's Responses to**
**PAETEC Business Services 1st Set of Data Requests**

**Request 14:** Admit or deny that AT&T Wisconsin incurs the same cost to produce one amp of DC power regardless of the owner of the telecommunications equipment that ultimately consumes that amp of DC power (i.e., collocator or AT&T itself). If your response is anything other than an unequivocal admit, please explain.

**Response:** AT&T Wisconsin incurs the same investment cost for supplying DC power to any user of that power, whether it be a collocator or AT&T itself. However, the cost recovery can differ depending on whether a Battery Distribution Fuse Bay (BDFB) or other items are included in the investment mix or not DC power supplied is recouped in a like manner so long as the investment configuration is the same. This issue will be more fully addressed in the testimony submitted by AT&T Wisconsin in response to the direct testimony of TDS and McLeodUSA in this proceeding.

**Responsible Person:** Bill Vangel