

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

The Frank Gates Service Company,)	
)	
)	Case No. 12-2638-TP-CSS
Complainant,)	
)	
v.)	
)	
AT&T Ohio,)	
)	
Respondent.)	

AT&T OHIO’S MOTION TO DISMISS

The Ohio Bell Telephone Company d/b/a AT&T Ohio (“AT&T Ohio”)¹, Respondent herein, pursuant to Ohio Admin. Code §4901-1-12, moves to dismiss the Complaint filed by The Frank Gates Service Company (“Frank Gates”) that seeks relief for alleged billing issues against AT&T Ohio. The Public Utilities Commission of Ohio (“Commission”) lacks subject matter jurisdiction over all, or most of, the services at issue. A memorandum in support is attached.

By: /s/ Mary Ryan Fenlon

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¹ The complaint names The Ohio Bell Telephone Company d/b/a AT&T Ohio as the Respondent. In keeping with the Commission's practice, the name AT&T Ohio is used in this pleading.

MEMORANDUM IN SUPPORT

By this Complaint, Frank Gates seeks to have the Commission exercise jurisdiction over AT&T Ohio, “and all other entities that it is doing business under with regards to this dispute and the services provided pursuant to the telecommunications services agreement.” Complaint p. 1. Frank Gates further alleges that several AT&T Corp. entities provided “local telephone, long distance, toll-free, and managed data services” that are pertinent to this complaint. Complaint p. 4.

The Commission lacks jurisdiction over all, or most of, the services that are “relevant to this complaint.” What appears relevant to this Complaint is the billing dispute that AT&T filed in the Southern District of Ohio. That filing involves a collection action for information services that are not subject to jurisdiction with this Commission. The services are not public utility services as defined under R.C. 4905.02. AT&T Ohio admits that it is a local exchange service provider and at times provided local services to the Frank Gates. But Frank Gates has failed to identify what public utility services were subject to the “termination of services” issue that is in dispute.

The Commission derives its authority to regulate public utilities from the Ohio General Assembly. The Commission’s jurisdiction is limited, and the Commission “has no power to exercise any jurisdiction beyond that expressly conferred by statute.”² It is axiomatic that if the General Assembly has not conferred jurisdiction, the Commission is without authority to act. See, Penn Central Trans. Co. v. Pub. Util. Comm. (1973), 35 Ohio St. 2d 97, and cases cited

² *City of Washington v. Public Utility Commission*, 99 Ohio St. 70, 72, 124 N.E. 46, 47 (Sup. Ct. Ohio 1918). *See also, e.g., Dworkin v. East Ohio Gas Co.*, 1990 Ohio App. LEXIS 1077, *4 (Ohio Ct. App. 1990) (“PUCO is an administrative board and has only the authority conferred by the statutes by which it was created.”).

therein. The question presented is, what is the nature of the jurisdiction conferred by the General Assembly.

Pursuant to Ohio Revised Code, Section 4905.02, “public utility” includes every corporation, company, co-partnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section [4905.02](#) of the Revised Code, including any public utility that operates its utility not for profit, **except** the following:

(E) Any provider, including a telephone company, with respect to its provision of any of the following:

(1) **Advanced services** as defined in 47 C.F.R. 51.5;

(2) **Broadband service**, however defined or classified by the federal communications commission;

(3) **Information service** as defined in the “Telecommunications Act of 1996,” 110 Stat. 59, 47 U.S.C. 153(20);

(4) Subject to division (A) of section 4927.03 of the Revised Code, **internet protocol-enabled services** as defined in section 4927.01 of the Revised Code.

(5) Subject to division (A) of section 4927.03 of the Revised Code, any telecommunications service as defined in section 4927.01 of the Revised Code to which both of the following apply;

(a) The service was not commercially available on the effective date of the amendment of this section by S.B. 162 of the 128th general assembly.

(b) The service employs **technology** that became available form commercial use only after the effective date of the amendment of this section by S.B. 162 of the 128th general assembly.

(emphasis added)

The Ohio Revised Code vests in the Commission the power to regulate public utilities. R.C. 4905.04. In particular, the Commission’s jurisdiction extends over customer complaints concerning a public utility’s services.

The services that Frank Gates alleges are subject to “improper charges” are not traditional telecommunications service subject to the jurisdiction of the Commission. Rather, they fall in the category of exceptions under Section 4905.02(E). They are not included within the concept of “telephone service” subject to this Commission’s oversight. The disconnect dispute primarily involves the PNT Network (MPLS Circuits) which would involve **interstate** traffic and not the Convergent Billing which was used as an umbrella for the various local services around the country. They are internet service and internet protocol services. The Commission is precluded from adopting service quality regulations and penalties for such services.

Furthermore, Frank Gates alleges that the 30-day disconnection process set forth in the *Master Services Agreement* that they entered into with AT&T Corp. is duplicative and confusing. The contract interpretation issues raised in this Complaint are better left to the District Court.

Frank Gates has failed to identify what telecommunication services that AT&T Ohio, not the affiliates of AT&T Corp., inadequately provided them that are public utility services subject to the Commission’s jurisdiction under R. C. 4905.02. The General Assembly has defined this Commission’s authority and the services that are relevant to this Complaint are beyond the explicit subject matter jurisdiction of the Commission. For these reasons, the Commission should dismiss this complaint.

Because AT&T Ohio has challenged the Commission’s jurisdiction, Frank Gates bears the burden of establishing it.³

³ E.g., *McDaniel v. Phelps*, 2003 Ohio 41, 2003 Ohio App. LEXIS 42, *4 (Ohio App. Ct. 2003) (“Once the existence of subject-matter jurisdiction has been challenged, the burden of establishing jurisdiction rests on the party asserting it.”); *Marrie v. Int’l Local 717*, 2002 Ohio 3148, 2002 Ohio App. LEXIS 3134, *23 (Ohio Ct. App. 2002) (“if a motion to dismiss is premised on a lack of subject matter jurisdiction and the relevant facts are contested, the party asserting jurisdiction bears the burden of establishing the required jurisdictional facts by competent proof”)

Respectfully submitted,

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I certify that a copy of the foregoing was served via email, on the parties listed below on this 23rd day of November, 2012.

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Summary: Motion to dismiss compliant filed by Frank Gates electronically filed by Mrs. Verneda J. Engram on behalf of AT&T Ohio