BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of Chapter 4901:1-7 of the Ohio Administrative Code, Local Exchange Carrier-to-Carrier Rules.	))))	Case No. 12-922-TP-ORD

APPLICATION FOR REHEARING OF THE AT&T ENTITIES

The AT&T Entities[1] ("AT&T"), by their attorneys and pursuant to R. C. § 4903.10 and section 4901-1-35 of the Commission's rules, seek rehearing of the Finding and Order ("Order") adopted on October 31, 2012 in the captioned case. Several aspects of the Order and the rules adopted in the Order are unreasonable and unlawful and must be corrected on rehearing. A memorandum in support of this application is attached.

Respectfully submitted,

The AT&T Entities

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[1] For purposes of this case, the AT&T Entities include The Ohio Bell Telephone Company d/b/a AT&T Ohio, AT&T Corp., TCG Ohio, Inc., SBC Long Distance, LLC d/b/a AT&T Long Distance, and New Cingular Wireless PCS LLC. AT&T Communications of Ohio, Inc., which was previously listed as one of the AT&T Entities, merged into its parent, AT&T Corp., on October 31, 2012.

MEMORANDUM IN SUPPORT OF
APPLICATION FOR REHEARING OF THE AT&T ENTITIES

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1. Introduction

The Commission's authority over interconnection is limited by state law, federal law, and federal regulations. Since the passage and implementation of the Telecommunications Act of 1996, the Commission has been careful to avoid inconsistency or conflicts with the federal law and rules governing interconnection. For example, when it first adopted its Local Service Guidelines in 1996, the Commission stayed certain sections of the guidelines because it recognized that they might be inconsistent with the FCC's rules in the same area. *Local Service Guidelines*, Case No. 95-845-TP-COI, Entry on Rehearing, November 7, 1996, Appendix A, p. 1. In many respects, the Guidelines referred to and incorporated the applicable FCC rules. Id., Appendix A, Section III.

In 2005, the Commission's sound policy to follow the lead of federal law and rules was adopted in Ohio law with the passage of H. B. 218 and the enactment of R. C. §§ 4905.041 and 4905.042, which required adherence to federal law and rules in, among others, the areas of interconnection and the regulation of internet protocol-enabled service.[2]

In this case, the Commission has adopted certain rules that appear to be inconsistent with or in conflict with state and federal law and federal regulations. As demonstrated in this application for rehearing, it is not consistent with federal or state law for the Commission to require, among other things, that "[e]ach telephone company has the duty to interconnect directly or indirectly with the facilities and equipment of other telephone companies for the exchange of telecommunications traffic ***regardless of the network technology underlying***

[2] R. C. § 4905.041 was repealed and reenacted as R. C. § 4927.16 in 2010.

the interconnection pursuant to 47 U.S.C. 251(a)." Order, Attachment A, p. 9 (Rule 6(A)(1))(emphasis added). This far-reaching language prejudges a wide variety of issues that are pending before the FCC and, therefore, is in conflict with existing federal law and regulations and thus also violates state law.

At best, then, the rules as adopted by the Commission are premature. However, the Commission can - - and should - - amend its rules as necessary once the FCC acts on this issue. For the Commission to amend its rules as it has done so in this case was not only premature, but was also in violation of the state laws that demand consistency with, and no conflicts with, federal law and rules.

2. The Commission Either Misunderstood, Or Unreasonably Rejected, AT&T's Comments

In its initial comments, AT&T stated that, for the most part, the Staff's proposed changes to the carrier-to-carrier rules were appropriate and should be adopted. AT&T Initial Comments, p. 1. In several cases, however, AT&T expressed concerns or raised questions about the proposed changes that merited further review prior to their adoption by the Commission. In particular, and as detailed in AT&T's initial comments, AT&T expressed concern with the proposed addition of the phrase "regardless of the network technology underlying the interconnection" in several rules related to interconnection and intercarrier compensation. Id. While the Commission may have thought it was exercising good foresight in adopting several rules with that phrase included, the resulting rules are both premature and problematic, as explained below.

The Commission's March 21, 2012 Entry explained that the Staff's proposed changes to these rules were intended to be "consistent" with the FCC's recent orders involving intercarrier compensation. Entry, p. 2. But, as AT&T explained, the addition of the "regardless" phrase might have unintended adverse consequences that are contrary to, and not consistent with, the FCC's orders. AT&T Initial Comments, p. 1. For these reasons, AT&T recommended that the phrase "regardless of the network technology underlying the interconnection" be removed from rules 4901:1-7-06(A)(1) and (2) and 4901:1-7-12(A)(1)(a). Id. AT&T agreed that the phrase could be retained in rule 4901:1-7-06(A)(3) because that provision is limited to good faith negotiations for voice telecommunications traffic. Id., p. 2. As such, the negotiation rule, as modified, should not be read as purporting to extend this Commission's authority, or carriers' rights and duties under Section 251 of the Telecommunications Act, to interstate and information services that do not fall under the definition of "telecommunications service" in the Act. *See* 47 U.S.C. §153(50) and (53).

AT&T explained that the changes it proposed were necessary because the FCC has initiated a further notice of proposed rulemaking ("FNPRM") to consider the specific elements of a policy framework for the transition to all Internet Protocol (IP) networks, and in particular the legal and policy considerations concerning IP-to-IP interconnection. FCC 11-161, Paragraph 1010, and Section XVII, FNPRM, "P. IP-IP Interconnection Issues," Paragraphs 1335-1398. At the current time, and during the pendency of that FNPRM, the FCC did nothing more in its Transformation Order than indicate that it "expect[s] all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic." FCC 11-161, Paragraph 1011.

AT&T noted that the majority of the discussion in the Transformation Order concerning the transition to all-IP networks, and the related issue of IP interconnection, appears in the section of the document devoted to the FNPRM. In that FNPRM, the FCC has sought comment on a number of issues, including both whether it possessed statutory authority to regulate IP-to-IP interconnection and the propriety, as a matter of sound public policy, of engaging in such regulation even if it possessed such authority. In its FNPRM, the FCC does not assume that an IP-to-IP interconnection policy will mirror its existing TDM interconnection policy. For example, it recognizes that: "[i]t is important that any IP-to-IP interconnection policy framework adopted by the Commission be narrowly tailored to avoid intervention in areas where the marketplace will operate efficiently. We thus seek comment on the scope of traffic exchange that should be encompassed by any IP-to-IP interconnection policy framework for purposes of this proceeding." Id., Paragraph 1344. Likewise, the FCC does not assume that any IP-to-IP interconnection policy it adopts in the future will be based on Section 251: "***If*** the Commission were to adopt IP-to-IP interconnection regulations under the section 251 framework, would those regulations serve as a default in the absence of a negotiated IP-to-IP interconnection agreement between parties?" Id., Paragraph 1381(emphasis added).

Therefore, as AT&T explained in its comments to this Commission, nothing in the FCC order or the FNPRM requires or supports an amendment of the Ohio rules to include the "regardless" phrase the Staff proposed, and speculation concerning steps the FCC might take as a result of the still-unresolved FNPRM certainly cannot serve as a basis for any such amendments. Indeed, in its comments to the FCC in response to the FNPRM, AT&T has demonstrated that "FCC regulation of IP-to-IP interconnection would be not only unwise as a policy matter, but

also unlawful." Comments of AT&T, *In the Matter of Connect America Fund, et al.*, WC Docket No. 10-90, et al., February 24, 2012, p. 4.[3] AT&T concluded that, unless and until the issues presented in the FNPRM are fully addressed and finally resolved by the FCC, the "regardless" phrase should not be grafted onto the Ohio rules specified above.

In its order, the Commission dismissed the concerns expressed by AT&T - - and similar concerns raised by Cincinnati Bell and the Ohio Telecom Association - - stating that it "finds nothing in federal law that prohibits the Staff-proposed language . . . ." Order, p. 5. The Commission quoted the FCC's Transformation Order for the proposition that the ***duty to negotiate*** does not depend upon the network technology underlying the interconnection. Order, p. 5. The Commission concluded that "adopting the rules as proposed provides us with more flexibility to accommodate specific IP interconnection standards issues by the FCC should we maintain such a role in the future." Order, p. 5. Thus, the Commission effectively acknowledged that the rules it adopted go beyond any current federal requirement for IP-to-IP interconnection.

However, as AT&T explained in its comments in this proceeding and further demonstrates below, the rules as revised are unreasonable and unlawful. The adopted rules arguably impose specific interconnection obligations "regardless of the network technology underlying the interconnection" (see rule 6(A)(1) and (2)). Accordingly, the Commission should grant rehearing and adopt the modifications proposed by AT&T in its initial comments. At a minimum, the Commission should clarify that nothing in the adopted rules was intended to

[3] AT&T's Comments and Reply Comments in response to the FNPRM are available at http://apps.fcc.gov/ecfs/document/view?id=7021866084 and http://apps.fcc.gov/ecfs/document/view?id=7021905413.

extend the Commission's authority, or the rights and duties of carriers, over traffic that is not subject to Section 251 of the Telecommunications Act.

3. The Commission Erred By Adopting A Rule That Appears To Impose Requirements For IP-to-IP Interconnection

As noted in the introduction, AT&T did not object to the insertion of the phrase "regardless of the network technology underlying the interconnection" in rule 4901:1-7-06(A)(3) because that provision addresses only good faith negotiations for voice telecommunications traffic. As such, the rule as modified should not be read as purporting to extend the Commission's authority, or carriers' rights and duties under Section 251 of the Telecommunications Act, to traffic - - such as interstate and information services - - that does not fall under the definition of "telecommunications service" in that Act. *See* 47 U.S.C. §153(50) and (53). However, the Commission erred in revising its other rules so as to arguably impose specific interconnection obligations, under the legacy regime of the federal Telecommunications Act, on new technologies and, in particular, IP-to-IP interconnection. See rule 6(A)(1) and (2). The rules adopted can be read - - and in fact certain parties already are interpreting them - - to actually require IP-to-IP interconnection under the specific legacy Telecommunications Act regime that neither Congress nor the FCC has extended to such interconnection.[4]

[4] For example, Communications Daily reported on November 8, 2012 as follows:

> CompTel CEO Jerry James agreed the industry is moving to an IP-to-IP platform — a position the competitive sector adopted earlier, he said. "We disagree, though, on how to get there," he said, arguing the Act already calls for IP-to-IP interconnection rights. Several states have agreed with CompTel's position, he said, and staff at the Ohio Public Utilities Commission recently ruled that IP interconnection rights are inherent in the Act, and that the Act is technology neutral, he said.

And that is something that the Commission could not have intended, as it is something it cannot do. It is important in that regard to define just what "IP-to-IP interconnection" means in this context. As AT&T uses it here, IP-to-IP interconnection refers to interconnection between IP networks, such as by two providers of Voice-over-IP (VoIP) services. Because such VoIP services are, in almost all cases, considered to be information services, and not telecommunications services, it is AT&T's position that Section 251 interconnection obligations do not apply.

The Transformation Order is not to the contrary. Certainly, the Transformation Order does express the FCC's expectation of good faith negotiations for "IP-to-IP interconnection for the exchange of voice traffic." FCC 11-161, Paragraph 1011. But nothing in that Order explicitly tied the FCC's "expectation" concerning such negotiations to any affirmative statutory obligation, much less a duty to interconnect under Section 251 of the Telecommunications Act. Indeed, as AT&T has demonstrated in its Comments to the FCC in the still-pending FNPRM, regulation of IP-to-IP interconnection would not only be bad public policy, but the FCC itself lacks statutory authority to regulate interconnection between IP networks.

That issue, of course, is still pending before the FCC in the FNPRM. And that is the precise reason this Commission cannot adopt regulations that anticipate a resolution to a proceeding that is still pending before the FCC. The comment cycle in the FNPRM was completed in March 2012, but no schedule has been set for issuance of an FCC order. In the meantime, there has been no evidence of any issues arising in the IP ecosystem that would

warrant action by this Commission concerning IP interconnection - - even if it possessed authority to act in this area - - before the FCC has addressed the matter. In fact, there is nothing remotely new about IP interconnection. It has been going on successfully for two decades - - in the form of peering and transit arrangements - - and has always been completely unregulated. The free market already has produced efficient arrangements for this interconnection, and there is no reason to think it will not continue to do so. To be sure, it will not serve the interests of the public to potentially shackle the burgeoning IP networks of the 21st century with outdated regulatory requirements.

4. The Commission Violated State Law By Establishing Interconnection Requirements That Exceed Those Required By Federal Law And Regulations

Insofar as the revised regulations purport to impose interconnection and other requirements that exceed those required under federal law, the Commission has violated R. C. § 4927.16. That law provides, in pertinent part, that:

> The public utilities commission shall not establish any requirements for the unbundling of network elements, for the resale of telecommunications service, ***or for network interconnection that exceed or are inconsistent with or prohibited by federal law, including federal regulations***.

R. C. § 4927.16(A) (emphasis added).

State law also limits the Commission's authority with regard to internet protocol-enabled services, as follows:

> Regarding advanced services or internet protocol-enabled service as defined by federal law, including federal regulations, the public utilities commission shall not exercise any jurisdiction over those services that is prohibited by, or is inconsistent with its jurisdiction under, federal law, including federal regulations.

R. C. § 4905.042.

By adopting rules that arguably can be read as expanding current, legacy interconnection obligations to include such matters as IP-to-IP interconnection, the Commission has established requirements that exceed federal law and federal regulations, as presently constituted, in violation of both R. C. §§ 4927.16(A) and 4905.042. The Commission acknowledges this flaw in its Order by suggesting that the changes provide it "with more flexibility to accommodate specific IP interconnection standards issued by the FCC ***should we maintain such a role in the future***." Order, p. 5 (emphasis added). It clearly does not have that role today, and it has violated state law in assuming that role before the FCC establishes a national IP-to-IP interconnection policy "…as defined by federal law, including federal regulations…." When it comes to IP-enabled services, the Commission's jurisdiction is defined by federal laws and federal regulations, by acting on IP-to-IP services before the FCC has established federal regulations regarding IP-to-IP interconnection, the Commission has exceeded its jurisdiction under R. C. § 4905.042.

In short, the issues surrounding IP-to-IP interconnection are pending in an open docket at the FCC and have not been resolved by that agency. In the absence of any federal requirements for the interconnection of IP networks, the Commission acted not only too soon, but also unlawfully, insofar as the revised rules purport to expand interconnection obligations to include IP-to-IP interconnection. Nothing prevents the Commission from amending its rules, as necessary, when the FCC addresses these issues in a final order. To have done so in this five-year review of the rules, in advance of FCC action, was unreasonable and unlawful.

5. The Expansion Of State Traffic Compensation Rules "Regardless Of The Network Technology Utilized" Is Unreasonable And Unlawful

It is also the case that the adoption of the "regardless of the network technology" phrase in the traffic compensation rule results in a rule that is inconsistent with federal regulations and, thus, violates R. C. § 4927.16(B). That section provides as follows:

> The commission shall not establish pricing for such unbundled elements, resale, or interconnection that is inconsistent with or prohibited by federal law, including federal regulations, and shall comply with federal law, including federal regulations, in establishing such pricing.

R. C. § 4927.16(B).

And, and explained in the previous section, state law also limits the Commission's authority with regard to internet protocol-enabled services, as follows:

> Regarding advanced services or internet protocol-enabled service as defined by federal law, including federal regulations, the public utilities commission shall not exercise any jurisdiction over those services that is prohibited by, or is inconsistent with its jurisdiction under, federal law, including federal regulations.

R. C. § 4905.042.

Several commenting parties criticized the Staff's proposed revisions to rule 4901:1-7-12, which deals with compensation for the transport and termination of non-access telecommunications traffic. For its part, AT&T objected to the insertion of the phrase "regardless of the network technology underlying the interconnection" in division (A)(1)(a) of Rule 12. AT&T Initial Comments, p. 2. However, the Commission adopted the Staff's proposed revisions with only minor edits. Order, pp. 7-9. AT&T's comment on division (A)(1)(a) was not mentioned in the Order. The Order suggests the adoption of the Staff's proposals, with minor edits, is appropriate in order to give "continued guidance on intrastate access and compensation

principles." Order, p. 7. The appropriate guidance in this regard, however, can come only from the FCC. As noted above, nothing prevents the Commission from amending its rules, as necessary, when the FCC addresses these issues in a final order. To have done so in this five-year review of the rules, in advance of FCC action, was unreasonable and unlawful.

6. Conclusion

For all of the foregoing reasons, the Commission should grant rehearing, should remove the offending "regardless of the network technology" clause from the three rules noted above, and should make any other necessary conforming edits.

Respectfully submitted,

The AT&T Entities

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Certificate of Service

I hereby certify that a copy of the foregoing has been served this 30th day of November, 2012 by e-mail, as indicated, on the parties shown below.

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Summary: Application for rehearing and memorandum in support electronically filed by Jon F Kelly on behalf of The AT&T Entities