

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T CORP.,	)	
	)	
Complainant,	)	Case No. 16-1104-TP-CSS
	)	
v.	)	
	)	
TSC COMMUNICATIONS, INC.,	)	
	)	
Respondent.	)	

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RESPONDENT TSC COMMUNICATIONS, INC.'S  
MOTION TO DISMISS COMPLAINT

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Respondent TSC Communications, Inc. ("TSCCI"), by its attorney and pursuant to Section 4901:1-12 of the rules of the Public Utilities Commission of Ohio ("Commission"), moves to dismiss in large part the Complaint of Complainant AT&T Corp. ("AT&T") for the reason that it is barred by the filed-rate doctrine, as is more fully set forth in the attached memorandum in support.

Respectfully submitted,

/s/William A. Adams

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William A. Adams, Counsel of Record  
BAILEY CAVALIERI LLC  
10 West Broad Street, Suite 2100  
Columbus, OH 43215-3422  
(614) 229-3278 (telephone)  
(614) 221-0479 (fax)  
[William.Adams@baileycavalieri.com](mailto:William.Adams@baileycavalieri.com)  
*Attorneys for Respondent  
TSC Communications, Inc.*

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MEMORANDUM IN SUPPORT

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AT&T's Complaint in this case alleges that it has overpaid TSCCI intrastate access charges since January 1, 2009. Complaint ¶ 1. At all times since January 1, 2009, TSCCI charged AT&T National Exchange Carrier Association ("NECA") rates for the intrastate switched access services it provided. Complaint ¶ 33. AT&T stopped paying TSCCI's bills in full in February 2015 (Complaint ¶ 37), and seeks a refund back to 2009.

During this entire time, TSCCI was billing AT&T in accordance with its Commission-approved tariff, which provides as follows:

TSC Communications, Inc. ("TSC") hereby adopts the access service charge benchmark set by the FCC in its Seventh Report and Order released April 27, 2001, *In the Matter of Access Charge Reform*, CC Docket No. 96-262, and any future FCC decisions in its access proceedings as they may apply to rural CLECs competing with non-rural ILECs.

Complaint ¶ 14, Exhibit 3. The rural CLEC access charges authorized by that tariff are the NECA rates which TSCCI billed to AT&T. This tariff was first approved in Case No. 01-1348-TP-ATA. In its November 29, 2001 Finding and Order in that case, the Commission determined that TSCCI was a rural CLEC and authorized TSCCI to file a tariff charging the NECA access rates. TSCCI's tariff became effective on November 30, 2001, and the same language has been continually in effect since then, although incorporated into a new tariff document effective on May 10, 2011 in Case No. 11-2923-TP-ATA.

TSCCI is lawfully required to bill AT&T the tariffed NECA access rates approved by the Commission. Because TSCCI has been and is billing the Commission-approved rate, there is nothing to refund and AT&T may not offset its current intrastate switched access payments.

Ohio law is clear on this point, dating back to the Supreme Court of Ohio's *Keco* decision and before. *Keco Industries, Inc. v. The Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E. 2d 465 (1957). The Court consistently has reaffirmed *Keco* since then. In 1997, the Court undertook a fresh statutory analysis and concluded:

Thus, utility ratemaking by the Public Utilities Commission is prospective only. The General Assembly has attempted to balance the equities by prohibiting utilities from charging increased rates during the pendency of Commission proceedings and appeals, while also prohibiting customers from obtaining refunds of excessive rates that may be reversed on appeal. ***In short, retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme.***

*Lucas County Commissioners v. Public Utilities Commission*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997) (citations omitted; emphasis added). Recent Court decisions reaffirm and apply *Keco*. *Industrial Energy Users-Ohio v. Public Utilities Commission of Ohio*, 117 Ohio St.3d 486, 885 N.E.2d 195 (2008) (the Court declined to order a refund of \$24 million American Electric Power collected for new advanced coal plant research and development costs even though the approved rates collecting that amount were later determined to be unlawful); *In re Application of Columbus Southern Power Co v. Public Utilities Commission of Ohio*, 138 Ohio St.3d 863, 8 N.E.3d 863 (2014) (under *Keco* American Electric Power was allowed to keep \$368 million even though resulting in a windfall). Last year, in *In re Complaint of Pilkington N. Am., Inc.*, 145 Ohio St.3d 125, 131, 47 N.E.3d 786, 793 (2015), the Court stated, “The filed-rate doctrine holds that rates approved by and filed with the commission are the lawful rates, unless a litigant proves otherwise.”

TSCCI is required to charge its tariff rates, even if those rates ultimately are determined to be unlawful. Indeed, the tariff rates are the lawful rates until determined to be unlawful, as the Court wrote in the *Pilkington* case. Under *Keco*, the rates must continue to be charged until such time as the Commission approves new rates. Consequently, as a matter of law AT&T is not

entitled to a refund. Rather, AT&T must pay TSCCI the NECA rates billed until the tariff is changed. TSCCI does not owe anything to AT&T and its Complaint should be dismissed with prejudice, except for a determination of whether the tariff should be revised and applied on a prospective basis which is item (d) in the Complaint prayer for relief. Moreover, TSCCI's Counterclaim is meritorious and the Commission should order AT&T to pay TSCCI the amounts withheld.

Respectfully submitted,

/s/William A. Adams

William A. Adams, Counsel of Record

BAILEY CAVALIERI LLC

10 West Broad Street, Suite 2100

Columbus, OH 43215-3422

(614) 229-3278 (telephone)

(614) 221-0479 (fax)

[William.Adams@baileycavalieri.com](mailto:William.Adams@baileycavalieri.com)

*Attorneys for Respondent*

*TSC Communications, Inc.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Motion to Dismiss of Respondent TSC Communications, Inc.* was served this 28<sup>th</sup> day of June, 2016, by electronic transmission upon the following:

Mark R. Ortlieb  
AT&T Services, Inc.  
225 West Randolph, Floor 25D  
Chicago, IL 60606  
[mo2753@att.com](mailto:mo2753@att.com)

Dennis G. Friedman  
Mayer Brown LLP  
71 South Wacker Drive  
Chicago, IL 60606  
[dfriedman@mayerbrown.com](mailto:dfriedman@mayerbrown.com)

/s/William A. Adams

William A. Adams, Counsel of Record

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Summary: Motion to Dismiss Complaint of Respondent TSC Communications, Inc.  
electronically filed by Mr. William A. Adams on behalf of TSC Communications, Inc.