

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Walter J. Skotynsky)	
)	
v.)	Case No. 17-2554-TP-CSS
)	
The Ohio Bell Telephone Company d/b/a AT&T Ohio)	

AT&T OHIO’S MOTION TO DISMISS

The Ohio Bell Telephone Company d/b/a AT&T Ohio (“AT&T Ohio”) respectfully moves to dismiss the Complainant filed by Walter J. Skotynsky (“Complainant”) on December 26, 2017. The grounds for the Motion to Dismiss are set forth in the attached Memorandum in Support.

Dated: January 16, 2018

Respectfully Submitted,

AT&T Ohio

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The Ohio Bell Telephone Company d/b/a AT&T Ohio)	

MEMORANDUM IN SUPPORT OF AT&T OHIO’S MOTION TO DISMISS

I. FACTUAL BACKGROUND

As of April, 2017, Mr. Skotynsky was receiving the following service from AT&T Ohio at his office at 1018 Adams Street in Toledo:

1. Telephone number 419-255-4864 – business landline
2. Telephone number 419-243-0519 – business landline
3. Telephone number 419-241-8811 – consumer (residential) U-verse
4. Telephone number 419-241-7267 – consumer (residential) U-verse
5. U-verse Internet Service

The two business landlines were cancelled by Mr. Skotynsky effective June 14, 2017. There are no allegations concerning these two lines.

The service on the two residential U-verse lines was “Voice over Internet Protocol” or “VoIP” service. On or about April 24, 2017, Mr. Skotynsky placed orders with AT&T Ohio to migrate the service on the residential U-verse lines to a business account. Complaint Form at 2. These lines were, in fact, migrated from residential U-verse to business U-verse service. In connection with that service migration, the residential U-verse account #129896868 account was disconnected on April 26, 2017, and the numbers were transferred to the business U-verse account #136641627.

On June 14, 2017, U-verse VoIP telephone number 414-241-8811 was removed from the U-verse account and telephone number 419-241-7267 remained. On October 19, 2017, the

U-verse account was moved to Mr. Skotynsky's new address at 1900 Monroe Street in Toledo, with U-verse Internet service and VoIP number 419-241-7267.

Mr. Skotynsky alleges that the migration of these U-verse lines and his internet service in April, 2017 was not handled properly and that he experienced problems with those services in the November/December, 2017 timeframe.

II. THE COMMISSION HAS NO JURISDICTION OVER THIS COMPLAINT REGARDING INTERNET SERVICE AND VoIP

Ohio law does not authorize the Commission to exercise jurisdiction over internet services. R.C. § 4905.02(A)(5) (A telephone company is not a "public utility" with respect to its provision of any "broadband service," "information service" or "Internet Protocol-enabled service"). Internet access is a "broadband service," an "information service" and an "Internet Protocol-enabled service" and therefore is outside the scope of the Commission's statutory authority.

Likewise, except in extraordinary situations not present here, Ohio law does not authorize the Commission to exercise jurisdiction over VoIP services. R.C. § 4927.03(A) ("...the public utilities commission has no authority over any interconnected voice over Internet Protocol-enabled service"). In recognition of this black-letter law, the Commission ruled in 2013 that it lacked subject matter jurisdiction over a "slamming" complaint involving VoIP service. *Kalvich v Level 3 Communications*, PUCO Case No. 07-904-TP-CSS, Entry (November 3, 2013). There, the Commission found that under R.C. § 4927.03 it did not have the authority to hear the complaint because it involved VoIP service: "We find that the slamming activities alleged in this complaint relate to the provision of VoIP services over which the Commission, pursuant to Section 4927.03, Revised Code, lacks subject matter jurisdiction. Accordingly, the Commission

finds that this case should be dismissed for failure of the complaint to state reasonable grounds for complaint on a subject matter over which the Commission has jurisdiction.” *Kalvich* at 3.

The AT&T Ohio services Mr. Skotynsky complains about are internet service and VoIP services (i.e., voice service provided over Internet Protocol technology rather than traditional “plain old telephone service”) and are therefore outside the subject matter jurisdiction of the Commission, and the complaint must be dismissed.

III. AT&T OHIO HAS LIMITED LIABILITY AND MR. SKOTYNSKY CANNOT RECOVER THE DAMAGES HE SEEKS

Mr. Skotynsky apparently seeks damages for false representations, negligence and tortious interference with business relations. Complaint Form at 2. None of these damages are recoverable.

First, the Commission does not have the statutory authority to adjudicate these tort claims or to award any damages on such tort claims.

Second, the limitation of liability provisions in the relevant service agreements preclude any such damages.

With respect to U-verse Internet Service, it is an unregulated service provided pursuant to an agreement – not a tariff. The terms of service for U-verse Internet Service are governed by the AT&T Internet Terms of Service Agreement, available at <https://www.att.com/legal/terms.internetAttTermsOfService.html>. Section 14 of this agreement contains a limitation of liability as follows:

You expressly understand and agree that, unless prohibited by law, AT&T shall not be liable to you for any indirect, incidental, special, consequential, punitive or exemplary damages, including, but not limited to, damages for personal injury, property damage, loss of revenue or profits, business or goodwill, use, data, or other intangible losses (even if AT&T has been advised of the possibility of such damages), resulting from: (a) use of the services (which includes equipment, software, and inside or outside wiring), (b) the performance or nonperformance of the services, (c) the installation, maintenance,

removal, or technical support of the services, even if such damage results from the negligence or gross negligence of an AT&T installer, technician, or other representative, and/or (d) any inability to reach 911 emergency services, any alleged interference with alarm or medical monitoring signals, or any failure of alarm or medical monitoring signals to reach their intended monitoring stations allegedly as a result of the services.

In any event, your sole and exclusive remedy for any dispute with AT&T in connection with the service is a refund not to exceed the total amount of service fees paid during the immediately preceding twelve month period.

With respect to AT&T Ohio VoIP service, it is also provided pursuant to an agreement rather than a tariff. The terms of service for AT&T Ohio VoIP service are governed by the AT&T Phone for Business Service General Agreement available at <https://www.att.com/legal/terms.businessU-verseAttTermsOfService.html>. Section 18 of this agreement contains a limitation of liability as follows:

You expressly understand and agree that neither AT&T nor its subsidiaries, affiliates, officers, employees, agents, partners or licensors will be liable to you for any indirect, incidental, special, consequential or exemplary damages, including but not limited to damages for loss of profits, goodwill, use, data or other intangible losses (even if AT&T has been advised of the possibility of such damages), resulting from: (a) the use or the inability to use the service, the equipment and/or software; (b) the cost of procurement of substitute goods and services; (c) unauthorized access to or alteration of your transmissions or data; (d) statements or conduct of any third party on the service and/or software; (e) failure to insure the compatibility of your system (including the equipment, devices, and software that you provide to receive the service) with the service, and/or software; (f) any other matter relating to the service, and/or software; and/or (g) battery backup.

These provisions bar any recovery of damages for fraud, negligence or tortious interference because they prohibit “any indirect, incidental, special, consequential or exemplary damages, including but not limited to damages for loss of profits, goodwill, use, data or other intangible losses.” Given these limitation of liability provisions, there is no basis for awarding Mr. Skotynsky the damages he seeks, and this Complaint should be dismissed.

IV. AT&T OHIO DID NOT CHANGE THE TERMS OF SERVICE IN VIOLATION OF RULE 4901:1-6-07

Mr. Skotynsky alleges that A&T Ohio violated Commission Rule 4901:1-6-07, i.e., that it made a material change in rates, terms or conditions of the services provided without providing 15 days advanced notice. This allegation should be dismissed.

To begin with, Mr. Skotynsky makes no specific allegation as to the rate, term or condition of service that AT&T Ohio allegedly changed. The document in which Mr. Skotynsky alleges the violation of Rule 4901:1-6-07, the PUCO Complaint Form Dated August 21, 2017, does not allege that any rate, term or condition of service was changed.

Moreover, the only rate-related allegation in that document is the assertion that a static IP number could have been assigned to a residential line, rather than a business line. That is not an allegation that AT&T Ohio made a material change in rates, terms or conditions. Therefore, there can be no violation of Commission Rule 4901:1-6-07.

Finally, the allegation concerning static IP relates exclusively to internet service – and the Commission has no authority to entertain complaints about that service.

V. THE COMPLAINT DOES NOT PROPERLY ALLEGE A DECEPTIVE ACT OR PRACTICE

Mr. Skotynsky alleges a violation of Commission Rule 4901:1-6-16, but does not set out any alleged unfair or deceptive act or practice within the scope of the rule.

The rule applies to any “unfair or deceptive act or practice” in connection with offering or providing a “telecommunications service.” This case does not deal with any “telecommunications service.” Rather, it concerns two unregulated services – (1) internet service and (2) VoIP service. Since the rule only applies to “telecommunications services,” it cannot apply in this case and Mr. Skotynsky cannot state a cause of action under this rule.

Moreover, the Rule is specific as to the acts or practices that are prohibited as follows:

- (1) Any communication by a telephone company, including but not limited, to solicitations, offers, contract terms and conditions, or customer agreements, as well as any other communications whether written or oral, shall be truthful, clear, conspicuous, and accurate in:
 - (a) Disclosing applicable information, including but not limited to: material terms and conditions, material limitations, contract length, prices, fees, features, rates, termination fees or penalties, discretionary charges, government mandated charges, and estimated taxes for services offered.
 - (b) Identifying, in written or printed advertising or promotional literature, any material exclusions, reservations, limitations, modifications, or conditions, which must be located in close proximity to the operative words in the solicitation, offer, or marketing materials.
- (2) Telephone companies shall disclose the company's name and contact information on any written service solicitation, marketing material, offer, contracts, or agreement, as well as on any written response to a service-related inquiry or complaint the company receives from a customer or others.
- (3) Local exchange carriers (LECs) shall inform customers calling the company to report a service outage or service problem of their rights and responsibilities concerning the repair and maintenance of customer-owned equipment, inside wire, and the use of a network interface device (NID) to test for service problems. During such call, the LEC must notify the customer of any charges that the company imposes for a diagnostic visit.
- (4) In the event a NID is not in place, the LEC shall inform a customer calling to report a service outage or service problem that the LEC is required to visit the customer premise at no charge to diagnose whether service difficulties exist with network wire or inside wire.
- (5) As applicable, and in any reasonable manner, a LEC shall provide customers a description of the NID. That description shall include: all customer options for repairing inside wire; the function and probable location of a NID; and an explanation as to how to use a NID to test for service problems. The explanation shall also detail the customer's rights and responsibilities concerning NID installation if a NID is not present on the premise and the customer's responsibility to utilize a NID to diagnose service problems or risk a service fee.

O.A.C. 4901:1-6-16(B).

With respect to part (B)(1), Mr. Skotynsky does not allege that AT&T Ohio made any solicitation or offer to him, or that AT&T Ohio failed to disclose any material terms and

conditions of its service or any material exclusions or limitations to its service. Rather, Mr. Skotynsky complains about the performance of AT&T Ohio's internet and VoIP service. None of the actions he complains of involve the failure to disclose any material terms and conditions of AT&T Ohio's service.

With respect to part (B)(2) of the rule, Mr. Skotynsky does not allege that any communication failed to disclose AT&T Ohio's company name and contact information. Therefore, he does not state a violation of Rule 4901:1-6-16(B)(2).

With respect to part (B)(3), Mr. Skotynsky does not allege that AT&T Ohio failed to inform him of his rights and responsibilities concerning the repair and maintenance of customer-owned equipment, inside wire and the use of a network interface device to test for service problems. Therefore, he states no violation of Rule 4901:1-6-16(B)(3).

With respect to part (B)(4), Mr. Skotynsky makes no allegations concerning the absence of a NID, or any failure to advise him concerning the Company's obligation to diagnose at no charge whether service difficulties exist with network wire or inside wire. The Complaint therefore does not state a claim for violation of Rule 4901:1-6-16(B)(4).

With respect to part (B)(5), Mr. Skotynsky makes no allegations concerning any failure of AT&T Ohio to provide a description of a NID. The Complaint therefore does not state a claim for violation of Rule 4901:1-6-16(B)(5).

Finally, Mr. Skotynsky has not made any specific allegations of an unfair or deceptive act or practice that would permit the Commission to find a violation under part (C) of the rule in the context of an adjudication of an individual complaint.

VI. AT&T OHIO HAS NOT VIOLATED RULE 4901:1-6-25 GOVERNING THE WITHDRAWAL OF TELECOMMUNICATIONS SERVICE

Mr. Skotynsky alleges a violation of Commission Rule 4901:1-6-25, but that rule has nothing to do with this case. The rule applies to the “withdrawal” of a “telecommunications service.” This case does not deal with any “telecommunications service.” Rather, it concerns two unregulated services – internet service and VoIP service. Since the rule only applies to “telecommunications services,” it does not apply in this case.

Even if the rule did apply here, there has been no “withdrawal” of any service – i.e., AT&T Ohio has not “ceased offering” any service purchased by Mr. Skotynsky – and therefore there can be no violation of the requirements in the rule.

VII. CONCLUSION

For all of the reasons set forth above, AT&T Ohio requests that the Complaint be dismissed, with prejudice.

Dated: January 16, 2018

Respectfully Submitted,

AT&T Ohio

/s/ Mark R. Ortlieb

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served this 16th day of January 2018
by U.S. Mail and/or electronic mail on the parties shown below.

/s/ Mark R. Ortlieb
Mark R. Ortlieb

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Summary: Motion AT&T Ohio's Motion to Dismiss electronically filed by Mr. Mark R Ortlieb on behalf of AT&T Entities and AT&T Ohio and Ohio Bell Telephone Company