BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review Framework for Competitive Telecommunications Services Under Chapter 4927, Revised Code.	))))	Case No. 99-563- TP-COI

AT&T's COMMENTS TO COMMISSION'S OCTOBER 28, 1999 ENTRY

Pursuant to the Commission's October 28, 1999 Entry, AT&T Communications of Ohio, Inc, along with its affiliate TCG Ohio, both subsidiaries of AT&T Corp. ("AT&T"), provide these comments. By that entry, the Commission invited interested parties to provide comments on Staff's proposal to the 563 framework. AT&T also looks forward to filing reply comments in this matter in response to those comments filed by other stakeholders.

I. Introduction

AT&T fully supports the Commission's efforts to create a framework which is reflective of the current realities of the state of telecommunications in Ohio. However, it is essential that the framework reflect two critical underpinnings. First, the ILEC, based on its monopoly position in the local market, holds a superior marketing position to other competitive telecommunications service providers. While it is true that many providers in Ohio are in their starting blocks, not all the starting blocks are on the same mark. Second, competition and regulation are complimentary substitutes for each other. To the extent that one is present, the other should diminish. The Commission can ensure that its framework for the twenty-first century will best serve the Ohio consumer and foster

competition in Ohio if it keeps these two principle underpinnings in mind as it contemplates the proposed revisions.

AT&T provides the following comments on the Staff's proposed revisions to the framework.

II. Comments on Appendix A, Section I. Purpose and Scope

The Staff suggests that the 563 framework be applicable to all designated competitive services, regardless of the type of provider who offers the services.

The Staff recommends that all providers of "switchless, interexchange services" be subject to the 563 framework.

The Staff believes it is appropriate to delineate the types of services to which the 563 framework applies. The Staff invites specific comments regarding the services included in the list and whether any other services should be considered as well.

The Staff recommends deleting the reference to the Commission's policy on slamming because the Staff has specifically included in the new Section V1.C a requirement for compliance with current and future rules associated with slamming.

The Staff recommends several small textual changes.

In its proposal, Staff states, "[w]e no longer are in an environment under which one class of telecommunications providers competes solely against others in the same class, while the LECs have monopolies over all of their service offerings. Thus, the Staff is not convinced that application of the 563 framework should exclude LECs . . . After all, a number of the LECs are in competition with other entities for services that are not basic local exchange service."[1] The intent behind Staff's proposal is clear. The Staff wants symmetrical services to be treated equally in Ohio.

[1] Entry at p.1

While his approach may, on its face, appear fair, it will unfortunately lead to further inequities. The logic of this apparent "fairness" fails because it ignores the asymmetrical position of CTS providers in relation to the ILEC.

While the competitive service offerings may be the same and the potential customer is the same, one CTS provider, the ILEC, has the distinct advantage in that it controls the local exchange service of almost every customer in the state. This preexisting business relationship with the target customer gives the ILEC a distinct advantage in relation to its competitive offerings. In most cases, the ILEC is the only entity that can offer a customer a fully bundled bill of local service along with its competitive service offerings, advertise its competitive service offerings using current customer service mailing databases, and include advertisements for such services with its bill. The NEC CTS providers have none of these entrés to the customer.

In addition, the CTS provider that is also a NEC is otherwise disadvantaged because of the barriers to entry into the local exchange market, especially for residential customers. The ILECs have engaged in a three-year strategy of litigation to avoid their obligation under the 1996 Telecommunications Act to provide unbundled network elements in a manner that would allow NECs to more easily enter the local exchange market. The nascent level of competition in the Ohio local exchange market is evidence of the success of the ILEC's strategy. Indeed, while local business competition is spotty, at best, local residential competition is almost nonexistent.

In fact, the Commission examined the mirror image of this situation in 1996 in PUCO Case no. 95-845-TP-COI, In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues.

There, the Commission sought to establish competition in the local market. One of the issues raised by the commenters was that of regulatory symmetry.

> In that docket, the Commission rejected this concept and stated that
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> [s]ymmetrical regulation is only appropriate when circumstances are symmetrical. Given that the ILECs as of the issuance of these guidelines, control essential bottleneck monopoly facilities and retain the attributes of their status such as ownership and control over the assignment of telephone numbers, the circumstances are not perfectly symmetrical.

Id .at 32-33.

Here, the circumstances faced by NEC CTS providers as opposed to ILECs are not perfectly symmetrical. The entrenched position of the ILEC does not allow all providers of CTS to start out on equal footing. The lingering effect of the monopoly, and the ILEC's ability to leverage its monopoly position in the local market, gives the ILEC an advantage even in competitive services. If customers want "bundled" packages of services, it goes without saying that the ILEC has a distinct advantage in the ability to provide such a bundle today. The Commission should not ignore the competitive leverage that the local monopoly provides the ILEC in the competitive market.

Under R.C. § 4927.03, the public utilities commission "may prescribe different classifications and procedures, terms or conditions for different telephone companies." AT&T recommends that the Commission exercise this authority and provide a separate set of rules for CTSs provided by the ILEC. By implementing a set of special requirements for ILECs, the Commission can use regulation to compensate for the advantage for ILECs created by the former statutory and still existing effective monopoly. In this instance, using regulation will level the playing field for all providers of CTS. Until an intermediate set of rules is available for ILECs, their service offering

should continue to be provided pursuant to their applicable alternative regulation plans or the Local Service Guidelines.

AT&T also objects to the Staff's recommendation that all providers of switchless, interexchange services be subject to the 563 framework. At the time of the adoption of the 563 rules, the Commission did not "exempt" those carriers from the 563 rules on policy grounds. To the contrary, the Commission found that because those carriers do not "engage in the transmission of telephonic messages" that they are not public utilities subject to Commission jurisdiction. The Commission cannot create jurisdiction where it does not otherwise exist.

With respect to the delineation of the types of services to which the 563 framework applies, it is AT&T's position that the designated set of services is appropriate. However, AT&T does recommend that the Commission modify CTS service No. 10 ("Software Defined Network Service") to include all such network services and not just those that are "software defined."

AT&T agrees with the removal of the slamming rules from this section and supports the Staff and Commission's efforts in this direction.

AT&T would ask the Commission to clarify that the broad categories set forth in the Staff's proposed rules are intended to capture broad sets of services. Thus, if a CTS provider offered a new service that would fit into any of the designated categories it would not need to follow the 30-day pre-filing procedures. Although AT&T assumes that this was Staff's intent, that intent should be made more clear.

III. Comments on Appendix A, Section II. General Provisions

The Staff recommends that providers of qualifying 563 service be given the opportunity to either maintain informational tariffs on the file with the Commission or on their own web sites.

Staff recommends that the current AOS portion of the guidelines need to be updated.

The Staff proposes to redesign the manner in which the 563 framework addresses the provision of telephone service to persons with communications disabilities.

The Staff believes that the Commission should further relax the contract filing requirements as they relate to contracts involving only 563 qualifying services.

The Staff believes that for those LECs having fewer than 15,000 access lines the requirement for separate officers, directors and/or employees no longer be mandated.

The Staff recommends several small textual changes.

AT&T agrees with the Staff that the providers should have the option of filing tariff pages with the Commission or maintaining a web site for the informational filings. This option will allow each carrier to determine the process best suited for it. It would also allow carriers to respond more quickly to competitive pressures; and it would consequently ensure that Ohio consumers receive the benefits of competition as soon as possible.

AT&T reserves comment on the proposed revisions to the AOS section and will reply to those comments made by other parties. But in general, AT&T objects to price caps for CTSs. The price should set be what the market will bear.

With respect to the Staff proposal to redesign the manner in which the 563 framework addresses the provision of telephone service to persons with communications disabilities, AT&T reserves comment until it has reviewed the opening comments of

other stakeholders. AT&T does not object, however, to the idea of discounts for these individuals. but wishes to comment on any alternative proposals made by commenting parties.

AT&T does object to the proposal regulating behavior of contracting parties. The Staff proposes that an executed copy of the contract be provided to the customer, that the CTS provider maintain a copy of the contract for the term of the contract, and that the contract contain understandable pricing, terms, conditions, termination procedures, notice requirements, and penalties. While AT&T agrees with the good business practices described therein, it is objectionable on the grounds that the Commission should not be prescribing contractual terms for contracts created in a competitive market. Contracts are, by their very nature, arms length agreements come to by negotiation between parties.

In addition, the Commission's requirements are overly vague. It is impossible for AT&T to discern what is meant by "understandable pricing, terms and conditions of service." This vague and undefined requirement lends itself to unneeded controversy and disputes. The Staff's proposed vague and ambiguous addition serves no additional purpose except to engender potential litigation. An additional layer of regulation pertaining to the contractual matters is clearly not warranted and is excessive regulation and therefore, AT&T recommends that this proposed section be deleted.

In the affiliated transaction section, the Staff proposal provides that LECs have the option of using an affiliate to provide CTS. The framework then sets out a scheme that bifurcates corporate control and bookkeeping if a LEC uses a CTS affiliate.

AT&T strongly agrees that it makes no sense to not allow IXCs that are also NECs to be able to take advantage of the CTS rules for their competitive offerings.

Therefore, AT&T recommends that the Commission adopt Staff's proposal to allow entities like AT&T, which provides local and CTSs through the same entity, to avail itself of the 563 rules for its CTSs. AT&T recommends that whatever changes the Commission makes to the 563 rules that this recommendation remain.

However, based on the fact that a CTS provider can choose to provide local and CTS services through the same affiliate, absent any separate transaction rules, AT&T questions why there is a need to continue to have any affiliated transaction requirements for NECs that choose to provide CTS services through separate entities. In the Matter of the Application of TSC Communications Inc. for a Certificate of Public Convenience and Necessity to Operate a Paging Business in Allen, Auglaize, Mercer, Shelby, and Van Wert Counties, Case No. 94-795-TP-UNC Finding and Order (March 9,1995), the Commission opined that the affiliate transactions provisions are designed to eliminate two potential harms: cross-subsidization and anti-competitive conduct. Under the proposed framework, however, providers have the option of choosing to use an affiliate corporate structure, or providing service through one entity. For NEC CTS providers, AT&T feels this is a proper result since those NEC CTS providers have little ability to engage in anti-competitive conduct.

However, under Staff's proposal, the safeguards would still apply to those companies that select an affiliate corporate structure. Those companies that do not use an affiliate would not have this additional burden. AT&T does not see the logic in requiring bifurcation of board and employees if a company uses an affiliate and no regulation if the company does not use an affiliate. In effect, this section amounts to a penalty, possibly a very costly one, on a provider merely because of its corporate structure.

Because the affiliated transaction section will amount to a penalty for corporate structure and will not address the harms, AT&T urges that the entire section on affiliate transactions be deleted from the framework as they relate to NECs that are also CTS providers.

However, AT&T believes these safeguards do serve a purpose in regard to ILECs, who can leverage the monopoly position of their local affiliate in the competitive market. It is only in regard to the ILEC that the potential harms of cross subsidization and anti-competitive conduct is a possibility. Therefore, ILECs should be required to provide competitive services through a separate affiliate and should be subject to the affiliate transaction rules as previously written. AT&T does not object to the granting of an exemption from those affiliate transaction rules in regard to affiliates of small LECs, as defined by the Commission's rules.

IV. Comments on Appendix A, Section III. Registration Procedures for CTS-Only Providers Seeking Initial Authority to Operate in Ohio as Public Utilities

The Staff proposes a few changes, which primarily parallel earlier suggested modifications. Specifically, Staff clarifies that for initial certification, applicants must file a proposed hard copy tariff.

AT&T reserves the right to comment on this section upon review of comments filed by other stakeholders.

V. Comments on Appendix A, Section IV. Registration Procedures for Declaratory Rulings that a Particular Service Qualifies as a CTS and Should be Added to the List of Qualifying CTSs.

The Staff recommends that the relaxed regulatory framework apply to delineated CTSs.

The Staff recommends that the Commission reserve the right to alter the list of qualifying services.

The Staff recommends that the industry be able to petition for additions to the list through a 30-day application process.

The Staff advocates that if a large incumbent LEC makes a filing it must include in the application a demonstration that the service price covers its incurred costs. To the extent that a large incumbent LEC has a preexisting and still relevant cost study for the involved service, it can utilize that cost study in its new qualifying service application.

AT&T reserves the right to comment on this proposed section upon review of comments filed by other stakeholders. AT&T is in agreement, however, that if the Commission adopts a list of CTS, there should be a streamlined procedure in place to allow CTS providers, other than ILECs, to petition for additions to the list. Further, to allow for unhindered product introduction of cutting edge telecommunications services to Ohio consumers, the petition process should be quick and easy for CTS providers that are not ILECs. AT&T recommends that the 30 days process described in the Staff's proposed rules be limited to 10 days for non-ILEC CTS providers. The Commission should not be worried about such a streamlined process because the very fact that a non-ILEC CTS provider is providing a service is a strong indication that it is competitive.

The 30-day process should only apply to ILECs, whose offerings are not entirely competitive. In addition, the rules should specifically state that once an ILEC petitions for expansion of the CTS list, that a "proceeding" is established in which other carriers have a right to intervene. In addition, the Commission should make it clear that ILEC affiliates providing CTS services and applying for an expansion of the CTS qualifying list must follow the procedures identified for ILECs.

VI. Comments on Appendix A, Section V. Registration Procedures for Certified Providers of only CTSs in Notifying the Commission of a Change in Operations

It is proposed that the RRJ application option be eliminated.

The Staff recommends the elimination of the ATR, AMT, ZCO, and ZCN categories and the creation of one type of filing, a change in operations category (CIO) for these types of transactions.

The Staff recommends that these filings be zero-day, notice filings.

The Staff suggests eliminating the provision under which the automatic time frame associated with an ABN application would be tolled until an affidavit is submitted.

Staff recommends that the annual notification option for notice to customers of price increases for residential message, toll service, directory assistance, and traditional operator service only, be eliminated and all CTS providers whose residential service offerings include message toll service, directory assistance and traditional operator service be required to give real-time notice of price increases. Staff suggests such means of notice as direct mail, bill insert or bill notation.

AT&T supports the proposed changes, with one caveat, and applauds the Staff and the Commission for simplifying the tariff procedures for CTSs. AT&T does object to these proposed rules to the extent they would allow an ILEC to purchase a CTS provider and then seek approval of that purchase on an automatic approval basis. There are significant anti-competitive implications in instances where an ILEC and a CTS provider might merge.

VII. Comments on Appendix A, Section VI. Code of Conduct

Staff recommends standards to ensure accurate and straightforward communications with customers, to confirm orally placed service orders, to refrain from deceptive or misleading practices, to preserve customer proprietary information, and to avoid slamming.

The Staff recommends that only positive enrollment be allowed for CTS.

Staff believes that the 563 framework should include a reference to the anti-slamming provisions so as to eliminate any claim that they somehow do not apply to CTS providers.

AT&T agrees with the Staff that "rules of the road" should be devised to decrease customer confusion and block unethical CTS providers from deceptive practices. These rules should be written however, with the adage in mind that regulation is the substitution for competition. Unduly harsh and overly burdensome regulations for services that are competitive will only serve to create a hostile environment for CTS providers. Competition in Ohio could fail to grow and this would do a disservice to the Ohio consumer who should have as many CTS choices as consumers in other states.

Specific concerns raised by the proposed Code of Conduct follow. First, with respect to the proposed welcome package, §VI. B.2., it should be noted that in the FCC's anti-slamming docket the FCC prohibited the verification procedure commonly known as the "welcome or information package." The FCC specifically stated that "a state may not adopt the welcome package as an additional verification method because we have determined that the welcome package fails to protect consumers."[2] To the extent that the Staff proposed the welcome package as another weapon in the battle on slamming, its use is precluded by the FCC. However, as a marketing tool to avoid customer confusion, the welcome package can be a useful option, but it should not be required by rule.[3]

[2] *In the Matter of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers,* FCC Second Report and Order, CC Docket No. 94-129, (rel. December 23, 1998) ("Second Report and Order"), at ¶89.

[3] AT&T also recommends that the proposed 3 day timeframe for offering welcome packages be extended to 10 days from the date the customer orders the service, or, if the LEC is involved, 10 days from the LEC confirmation. This 10 day timeframe will allow carriers a more reasonable timeframe to comply with this rule

Those parts of §§VI, B.6 and 12 which provide that the CTS provider be subject to the enforcement rules should be deleted as the Commission does not have the authority to implement such an enforcement mechanism. AT&T provides additional comment on these enforcement mechanisms below.

AT&T strongly urges the Commission to delete §VI.B.9. This section prohibits the advertising of goods or services as "free" when the cost of such good or service is passed onto the consumer by raising the tariffed price of the goods or services that must be purchased in connections with the "free" offer. This regulation is not necessary in the marketplace when there is competition for the same types of goods or services. If the price of the free offer and the additional cost of goods or services that must be purchased in connection with the free offer are too high, the market will not bear it.

In addition, this regulation is impossible to apply in practice. In the competitive market it is almost impossible to determine whether the costs of offering one free service is specifically recovered by the pricing of another service above cost. Obviously, carriers recover their costs through the offering of all their services. The Staff's proposed rule, therefore, could have the unintended and harmful effect of discouraging carriers from offering promotions, including free services, in Ohio. Precluding a CTS provider from using this marketing tool for CTS is unnecessary and AT&T urges that it be deleted.

Proposed § V.B.10 requires an affirmative selection rather than negative acceptance scheme for CTS. AT&T agrees with Staff that Ohio consumers are best protected by this requirement and that the CTS are subject to cramming and slamming and therefore should come under the purview of the anti-slamming regulations.

Although AT&T does not have a specific objection to § V.C., AT&T does have a continuing objection to the slamming rules in the Local Service Guidelines. Specifically, Section XVIII.C(3) of the Local Service Guidelines states that a LEC (or in this case a CTS provider) must obtain written letters of authorization from customers "for use in resolving disputes regarding all changes in subscriber service." This implies that carriers can only utilize written letters of authorization as a defense to slamming complaints. On the other hand, the guidelines also allow carriers to use other methods of verification, including third-party verification, when changing a customer's carrier.

It makes no sense for the Commission's rules to on one hand allow third-party verification as a means to change a customer, but on the other hand not allow a carrier to rely on this verification in a dispute with a customer. Third-party verification provides sufficient protection to consumers, while it does not constitute an unreasonable barrier to competition. However, the requirement of a written letter of agency is burdensome and a barrier to competition. If a customer orally gives the CTS provider its authority to change it service provider, and that authorization is confirmed by a recorded third-party verification, the CTS provider should be able to rely on these steps in a dispute with the customer. This is especially true if the carrier is subject to forfeiture.

The written letter of authorization provides little additional protection to the customer, while it stands as a significant barrier to free competition. Indeed, the FCC does not require this procedure and customers are not demanding it. It should be removed from the Local Service Guidelines and certainly should not be applicable to CTS providers.

VIII. Comments on Appendix A, Section VII. Enforcement

While the existing complaint process may entice CTS providers to comply with existing requirements, the Staff believes that the existing complaint process has not proven to be a sufficient deterrent. While the Commission will continue to address end user complaints as they arise, Staff recommends an additional incentive to encourage the CTS providers to avoid and correct problematic situations.

Staff believes that the Commission has the authority under its general supervisory powers and under Section 4905.381 Revised Code, to institute the recommended incentive mechanism by which it can encourage compliance.

AT&T objects to this entire Section VII. on the grounds that the Commission lacks authority to enact the forfeiture scheme.

The Staff rests its authority for enacting this proposed enforcement section on R.C. § 4927.03. The Staff finds that this section "allows the Commission latitude to adopt the rules that it finds necessary for alternative regulation of CTS." The Staff also cites R.C. §§ 4905.04-4905.06 and §4905.381 as further authority. None of these sections provides that the Commission, or certainly its Staff, may assess forfeitures at its whim based on the claimed benefit of creating "an incentive mechanism".

As has been stated many times by the Ohio Supreme Court, the Commission is a creature of statute and can only exercise the jurisdiction provided it by statute. R.C. § 4927.03 simply provides that "the public utilities Commission may prescribe different classifications and procedures, terms or conditions for different telephone companies" and that "[t]he public utilities Commission shall adopt such rules as it finds necessary to carry out this section." These sections certainly do not provide the Commission, and certainly not its Staff, authority to assess fines, penalties, or forfeitures. This statutory section only provides the Commission the authority that it specifically provides for – i.e.,

the authority to prescribe rules to carry out its statutory authority to "prescribe different classifications and procedures, terms or conditions for different telephone companies."

If it had been the intent of the drafters to allow the Commission authority to enact a penalty, they certainly would have included it in the list of permissible acts. Indeed, while Staff cites to the Commission's authority to assess forfeitures on motor carriers as a basis for its proposed forfeiture rules, the Commission's authority to assess such forfeitures is derived from statute, not fiat. See §4905.57 Revised Code. Indeed, Section 4905.381 itself has a specific forfeiture provision which provides that any telephone company failing to comply with a Commission order after a hearing pursuant to 4905.26 "shall forfeit and pay to the state not less than one hundred dollars nor more than five thousand dollars." Given that the drafters of this §4905.381 included a specific forfeiture provision, it is quite clear that they did not intend the Commission to have the unrestricted ability to create its own forfeiture provisions absent any specific statutory grant of authority.

In fact, in order to protect the due process rights of carriers, the § 4905.381 specifically spells out the procedural predicates that must be satisfied before the Commission can assess a forfeiture: (1) A complaint must be filed against a carrier, (2) the Commission must then conduct a hearing, (3) the Commission must then order the carrier to take some action, (4) the carrier must fail to comply with the Commission's order, (5) the Commission must direct the attorney general to commence and prosecute an action for forfeiture in state court. Staff's proposal turns this procedure on its head and allows Staff to assess forfeitures without a hearing and before a complaint is filed pursuant to R.C. § 4905.26.

Because the Commission does not have the authority to adopt the proposed forfeiture section AT&T urges the Staff to delete the entire proposed enforcement section.

Notwithstanding the foregoing, AT&T has one specific comment on the enforcement section. The Staff proposed that a database be set up to track all "violations" which the Staff discovers through investigation, informal complaints, field investigations, and other monitoring processes. The Staff will use the database to track trends and to determine the amount of the forfeiture. This database will effectively eliminate the main incentive businesses have to settle matters—to make the matter go away. Knowing that a complaint will be entered on the database and knowing that there is a potential forfeiture, a CTS provider will have a diminished incentive to settle the matter early on with the customer since such a settlement will not make the matter go away, and in fact the settlement will just be an additional cost incurred in addition to the forfeiture. Further, the Staff proposes advising consumers regarding forfeitures that have been assessed before any hearing takes place -- a proposal that makes self evident the need to comply with the statutory due process rights given to carriers by the legislature in 4905.381.

In addition to the lack of Commission authority to implement the proposed forfeiture provision, AT&T specifically objects to the database because of the disincentives it will create.

IX. Conclusion

AT&T looks forward to working with the Commission and all interested stakeholders in shaping the future of telecommunications in Ohio. AT&T urges the Commission to accept the recommendations made herein because they are designed to assure that the best interest of the Ohio consumer are addressed while fostering growth of competition in Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Upon issuance by the Attorney Examiner of an Entry listing the initial commenters, AT&T will serve the foregoing AT&T Comments to Commission's October 28, 1999 Entry on those parties via regular U.S. mail, postage prepaid.