**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| GRANITE TELECOMMUNICATIONS, LLC,  Complainant,  v.  OHIO Bell Telephone Company D/B/A AT&T OHIO    Defendant. | Case No. 17-1713 -TP-CSS |

**MEMORANDUM CONTRA AT&T OHIO’S MOTION TO DISMISS**

**GRANITE TELECOMMUNICATIONS, LLC’S AMENDED COMPLAINT**

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|  | Michael D. Dortch (0043897)  Richard R. Parsons (0082270)  Justin M. Dortch (0090048)  KRAVITZ, BROWN & DORTCH, LLC  65 East State Street, Suite 200  Columbus, Ohio 43215  Tel: 614-464-2000  Fax: 614-464-2002  E-mail: [mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)  rparsons@kravitzllc.com  jdortch@kravitzllc.com  *Counsel for Granite Telecommunications, LLC* |
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**MEMORANDUM CONTRA AT&T OHIO’S MOTION TO DISMISS**

**GRANITE TELECOMMUNICATIONS, LLC’S AMENDED COMPLAINT**

Granite Telecommunications, LLC (“Granite”) respectfully submits this Memorandum Contra in response to Ohio Bell Telephone Company’s (“AT&T”) Motion To Dismiss Amended Complaint of Granite Telecommunications, LLC and to AT&T’s Memorandum In Support Of Motion To Dismiss Amended Complaint (“AT&T Memorandum”) in the above-captioned proceeding.

1. **INTRODUCTION**

In its Amended Complaint, Granite described AT&T’s scheme to drive Granite from the market as a competitive provider of business telephone services in Ohio by increasing the price of essential inputs that Granite purchases from AT&T at wholesale while dropping AT&T’s retail prices. In an attempt to prevent the Public Utilities Commission of Ohio (the “PUCO” or “the Commission”) from reviewing the factual details of its scheme, AT&T argues that the Commission has no authority to address its conduct. To prevail on its pending Motion, the Commission must agree with AT&T that *no regulatory remedy is available in Ohio to address a telephone company’s unreasonable and discriminatory conduct because even the most blatantly anti-competitive conduct is not a legal wrong cognizable under Ohio law in the first place.* There is no basis for the Commission to reach this conclusion.

At its essence, Granite’s Amended Complaint is quite simple. Granite asserts that AT&T has acted and is acting to injure competition generally, and Granite specifically, in the market for TDM-based voice platform services by means of an anti-competitive “price squeeze.” The FCC describes a “price squeeze” as follows:

A price squeeze exists when (1) a firm operates as a seller of both retail and wholesale offerings, (2) one or more companies relies on the firm’s wholesale offerings to compete with the firm on the retail level, and (3) the difference between the retail prices for the service at issue and the firm’s price for the wholesale input – if any – is too narrow to allow its retail competitors to cover their costs by providing service in the retail market.. . . [[1]](#footnote-2)

The FCC recognizes “price squeezes” to be unlawful under Section 201(b) of the Communications Act of 1934 (the “Act”), which demands that “all charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. 47 U.S.C 201(b); *see also, e.g. INFONXX, Inc. v. New York Telephone Co., Memorandum Opinion and* Order, 12 FCC Rcd 3589, 3598 (recognizing price squeeze to be unlawful within the meaning of Section 201(b), although finding the complaining party’s complaint inadequate to sustain such a claim).[[2]](#footnote-3)

Price squeezes are also unlawful under Ohio law. Ohio Revised Code Chapter 4905 prohibits a public utility like AT&T from engaging in unjust, unreasonable, unreasonably discriminatory, or unreasonably preferential conduct, and the Commission’s own case law states that it is unlawfully discriminatory for a wholesale provider to discriminate in favor of its own affiliated retail operation and against unaffiliated wholesale customers.[[3]](#footnote-4)

Here, the facts alleged within Granite’s complaint – which must be accepted as true for purposes of ruling upon AT&T’s Motion to Dismiss – are as follows:

* For approximately twelve years, AT&T has offered Local Wholesale Complete (“LWC”) a wholesale TDM-based voice service “product” (to use AT&T’s own vernacular) upon which Granite relies in order to offer service to a defined segment of the retail market for “plain old fashioned telephone service (POTS)”.
* This segment of the retail market consists of companies and government offices that require relatively few POTS lines at any given location, but have multiple (often nationwide) locations, and thus the need for relatively large numbers of POTs lines.
* AT&T competes with Granite for POTS customers in that same defined retail market.
* The difference between the retail prices for the service at issue and AT&T’s price for the wholesale input is such that it does not allow AT&T’s retail competitors to cover their costs when they attempt to provide service in the retail market.
* Without explanation, and certainly without justification, AT&T demands that Granite pay more for the LWC product than AT&T charges or will charge its own retail customers seeking the same POTS service, supplied over the same facilities and therefore does not allow AT&T’s retail competitors to cover their costs when providing service in the retail market.

As Granite explained in its Amended Complaint, AT&T’s conduct threatens to eliminate competition in the provision of telephone services to multi-line business customers throughout Ohio. It is urgent that the Commission act quickly to address these harms. Sophisticated enterprise customers know that AT&T is engaged in unprecedented action to leverage its dominant power in wholesale markets. Absent prompt action by the Commission, Granite will be unable to offer the long-term contracts and resulting financial stability that enterprise customers demand. Customers who have depended on Granite for years are currently unable to sign new long-term contracts with Granite because Granite, like the customers themselves, does not know what will be the future pricing of services available to Granite. The longer AT&T’s scheme is allowed to continue, the greater the harm will be and the more difficult it will be for Granite to recover its position as a robust alternative to AT&T for business telephone service.

1. **THE APPLICABLE LAW**

Section 152(b) of the Communications Act establishes the default allocation of jurisdiction between the FCC and the states for regulating communications, including telephone communications, by wire and radio provided by common carriers. That provision states, in relevant part, as follows.

[N]othing in this chapter shall be construed to apply to or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

47 U.S.C. § 152(b). As the Supreme Court has held, “this provision fences off from FCC reach or regulation intrastate matters – indeed, including matters ‘in connection with’ intrastate service.” *La. Pub. Serv. Comm’n*, 476 U.S. 355, 370 (1986). In fact, even facilities that are used to provide both interstate and intrastate service are presumptively subject to dual jurisdiction, with the states allocated jurisdiction to the facilities and services to the extent that they are intrastate and the FCC allocated jurisdiction to the facilities and services to the extent that they are interstate and international services. *See id.* at 374-76.

There are exceptions to the default allocation of jurisdiction established in Section 152(b). For example, Section 332 of the Communications Act expressly preempts state entry and rate regulation of intrastate as well as interstate and international commercial and private mobile services. *See* 47 U.S.C. § 332(c)(3).

In addition, the Telecommunications Act of 1996 (“1996 Act”) added to the Communications Act a number of provisions, such as Sections 251-252 and Section 271, that expressly encompass intrastate communications. The Supreme Court has held that, where these provisions are at issue, the default allocation of jurisdiction in Section 152(b) does not apply. *See AT&T Corp. v. Iowa Utils Bd*., 525 U.S. 366, 377-84 (1999) (“*Iowa Utils Bd*.”). But the Court emphasized that Section 152(b) continues to apply in circumstances where the Communications Act does not expressly encompass intrastate communications. *See id.* at 381 n.8 (“Insofar as Congress has remained silent, however, § 152(b) continues to function.”).

This means that intrastate wholesale services that are not governed by the 1996 Act amendments to the Communications Act or some other express grant of authority to the FCC under the Communications Act are subject to state jurisdiction pursuant to Section 152(b). This is so even where the underlying facilities used to provide the service at issue are subject to the provisions of the 1996 Act. For example, special access services are not offered pursuant to the provisions of the 1996 Act. They are instead subject to the more general requirements that carriers offer services on just and reasonable and not unjustly or unreasonably discriminatory terms and conditions in Sections 201(b) and 202(a) of the Communications Act. *See* 47 U.S.C. §§ 201(b), 202(a). Because those provisions do not expressly encompass special access services, the default allocation of jurisdiction under Section 152(b) applies. This is why states have jurisdiction over intrastate special access services without regard to the requirements of the 1996 Act. *See* Ohio Bell Tel. Co., PUCO Tariff No. 20, Part 21, Section 1.A (setting forth rates, charges and condition for intrastate special access services). And this is true even though special access services encompass exactly the same facilities that are subject to the unbundling requirements in Sections 251(c)(3) and 271(c)(2)(B).

The FCC has held that the same regime applies to wholesale voice services like the ones AT&T offers under the LWC Agreement. Those services are not expressly governed by Sections 251-252, 271, or any other provision of the Communications Act. Instead, as the FCC has explained, those services are subject to the more general duties set forth in Sections 201(b) and 202(a) of the Communications Act. *See Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks; Lifeline and Link Up Reform and Modernization; Connect America Fund*, Memorandum Opinion and Order, 31 FCC Rcd. 6157, ¶ 31 (2015). LWC services are therefore subject to the default jurisdictional allocation established by Section 152(b). Indeed, the Commission recently explained that it does not have jurisdiction over intrastate wholesale voice services like LWC services.

Insofar as [wholesale voice services such as LWC services] are neither interstate services nor composed of only unbundled network elements that meet section 251’s impairment test, the Act does not grant us affirmative authority to regulate them. *See* 47 U.S.C. §§ 201, 251. And insofar as [those services] are intrastate, local services, it appears the Act affirmatively strips us of authority to regulate them. *See* 47 U.S.C. §§ 152, 221.

*Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459, ¶ 288 n.736 (2017).

There can be no question that AT&T provides intrastate telephone services in Ohio to Granite pursuant to the LWC Agreement. The Commission is therefore free to review those services to the full extent of its jurisdiction and without regard to the requirements of Sections 251, 252, 271 or any other provision in the 1996 Act.

Moreover, the Commission’s jurisdiction is more than sufficient to address the claims set forth in Granite’s Complaint under Ohio law. Ohio law defines a public utility to include a telephone company for purposes of the provision of telephone services. *See* O. R.C. §§ 4905.02, 4905.03(A). Chapter 4905 grants the Commission the authority, among other things, to (1) regulate public utilities and to require that public utilities provide services exacted by the Commission (*see id.* at § 4905.04); (2) ensure that charges made or demanded by public utilities for any service rendered or to be rendered are just and reasonable (*see id.* at§ 4905.22); (3) hear complaints alleging that any rate charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted by a public utility is in any respect unjust, unreasonable, unjustly discriminatory, or unjustly preferential or that any public utility practice affecting or relating to any service furnished by the public utility or in connection with service is, or will be, in any respect unjust, unreasonable, unjustly discriminatory, or unjustly preferential (*see id.* at§ 4905.26); and (4) ensure that no public utility shall make or give any undue or unreasonable preference or advantage to any customer or subject any customer to any undue or unreasonable prejudice or disadvantage (*see id.* at§ 4905.35).

In addition, Section 4927.04 grants the Commission such power and jurisdiction as is reasonably necessary for it to perform the obligations “authorized by” federal law. Given that Section 152 of the federal Communications Act authorizes the Commission to regulate intrastate TDM-based telephone services provided by AT&T under the LWC Agreement (as the FCC has recently confirmed), the Commission has the jurisdiction to engage in such regulation

Furthermore, although Section 4907.03 restricts the application of the Commission’s powers to telephone services in certain circumstances, it does not do so with regard to the services at issue here, namely TDM-based telephone services provided by a public utility to another public utility. Specifically, Section 4927.03 divests the Commission of jurisdiction (1) over interconnected VoIP services and services introduced after September 13, 2010 (*see*  *id.* at§ 4927.03(A)); (2) over wireless services except in certain contexts (*see*  *id.* at§ 4927.03(B)); (3) to apply provisions in Chapters 4903 and 4905 to telephone companies for purposes of Sections 4927.01 to 4927.21 except where necessary to implement those sections (*see*  *id.* at§ 4927.03(C)); and (4) over the quality of service and the rates, terms, and conditions of telecommunications services provided by a telephone company to end users except as permitted in Sections 4927.01 to 4927.21 (*see* *id.* at§ 4927.03(D)). None of these provisions in any way restricts the Commission’s authority to apply the provisions of Chapter 4905 to telephone companies where they provide TDM-based telephone service (which was introduced long before September 13, 2010) to another public utility. It is therefore clear that Chapter 4927 was not intended to insulate incumbents from unlawful conduct in the provision of the legacy TDM-based wholesale services at issue in this proceeding.

1. **ARGUMENT**

Under Ohio law, a motion to dismiss is rejected [as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to prevail.](https://advance.lexis.com/document/?pdmfid=1000516&crid=e11dc29a-6d7f-4179-b159-9d061699e1d7&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A51F9-4211-652N-R00X-00000-00&pdcomponentid=9250&pdteaserid=undefined&ecomp=-8ffk&earg=sr3&prid=c9208bb0-36ac-45b5-b3ce-39a5b411de0c)  *See* *Fink v. Twentieth Century Homes, Inc.,* 2010-Ohio-5486, ¶\*28 (applying standard adopted in *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Since the facts described in Granite’s complaint would allow Granite to prevail, AT&T’s motion must be denied.

1. **Granite’s Claims and Its Requested Relief Are Not Preempted By The FCC’s Elimination of Mandatory UNE-P Obligations.**

AT&T first argues that federal law preempts Commission jurisdiction over Granite’s claims regarding the LWC Agreement. *See* AT&T Memorandum at 13. AT&T claims that, since wholesale voice services such as those offered under the LWC Agreement purportedly resemble the UNE-P offering that AT&T is not compelled to offer under federal law, the Ohio Commission may not regulate the prices of those services *even though they are offered voluntarily*. There is no basis for this argument.

*First*, AT&T does not even mention, let alone attempt to refute, that the FCC has itself disavowed jurisdiction to regulate intrastate services provided under the LWC Agreement. The FCC’s holding is a complete refutation of AT&T’s preemption arguments because there is no way that federal law preempts the Commission’s jurisdiction over intrastate services provided under the LWC if the FCC has no jurisdiction over those services.

*Second,* the services AT&T provides under the LWC do *not* have the characteristics of unbundled network elements required under Section 251(c)(3) of the Communications Act. AT&T, in other contexts, has admitted that LWC is “an end-to-end wholesale local service solution.”[[4]](#footnote-5) As the LWC Agreement itself states:

Local Wholesale Complete (LWC)” refers collectively to the technology packages, operational support capabilities, and certain ancillary services supporting the provision of local exchange service by CARRIER, that are offered by **AT&T-13STATE** as an end-to-end service under this Agreement.

*See* Granite-AT&T Local Wholesale Complete Agreement, Attachment 2 § 2.11 *attached to AT&T’s Motion to Dismiss as Attachment No. 1.*  Unlike UNEs governed by Section 251(c)(3) or Section 271 of the Act, this “end-to-end” service is not comprised of piece-parts of AT&T’s network that can be combined with Granite’s facilities. It is a finished service, like special access service. And, like special access and unlike UNEs governed by Sections 251(c)(3) and 271, AT&T is not legally compelled to provide the services offered under the LWC Agreement.

*Third*, AT&T repeats over and over in its Memorandum that the absence of a legal compulsion to provide UNE-P means that there is no legal compulsion to provide services under the LWC Agreement but this is irrelevant because Granite has not asked the Commission to compel AT&T to offer LWC services. AT&T has already offered LWC services voluntarily. Once AT&T offers a telephone service, the rates, terms, and conditions on which it is offered are subject to state and federal jurisdiction as allocated under Section Agreement 152(b) of the Communications Act. Thus, to the extent that LWC involves interstate or international services, they would be subject to FCC jurisdiction and to all provisions of the Communications Act, including Sections 201 and 202. To the extent the LWC Agreement involves intrastate services, they are allocated under Section 152(b) of the Act to regulation by the States, and therefore are subject to the obligations set forth in, among provisions, O.R.C. §§ 4905.04, 4905.22, 4905.26, 4905.31, and 4905.32.

*Fourth*, AT&T offers no legal support for its argument that the FCC’s elimination of the compulsion to provide UNE-P has the effect of preempting the Commission’s jurisdiction over the rates that AT&T charges under the current or a future LWC Agreement. All of the cases cited by AT&T involved state action that directly conflicted with federal law, namely attempts to compel ILECs to offer UNEs that had been eliminated by the FCC, to impose rate regulations on Section 271 network elements that the FCC had rejected, and to restrict commingling rights established by the FCC.[[5]](#footnote-6) Preemption made sense in those cases because the states were essentially attempting to reverse federal law. But that would not the case here. Again, Granite is not asking the Commission to compel AT&T to offer a service or facility at all, let alone one that the FCC has decided incumbent LECs should not be required to offer. Nor is Granite asking the Commission to use a pricing methodology or to prevent the execution of some other requirement established by the FCC. On the contrary, as explained, the FCC has disavowed any authority to regulate the intrastate services offered under the LWC Agreement, thereby essentially inviting states to exercise their authority over these services.

In fact, from a jurisdictional perspective, LWC services are indistinguishable from special access services. Both services are offered voluntarily by AT&T. In both cases the FCC has disavowed any authority to regulate the prices for intrastate services. And, in both cases the state commissions have the authority to regulate the prices for the intrastate services voluntarily offered by the ILEC even though the services are provided using the same facilities as encompassed by the unbundling and resale provisions of Section 251.[[6]](#footnote-7)

1. **Granite’s Claims and Its Requested Relief Are Not Preempted by the Resale Provisions of Sections 251 and 252 of the Communications Act.**

AT&T alleges, without merit, that Granite is seeking resale-type rate regulation. AT&T Memorandum at 14-16. This allegation is untrue. Granite is not invoking a “resale” specific remedy, such as the “avoided cost” standards that applies to resale services governed by Section 251(c)(4).. *See* 47 U.S.C. § 252(d)(3) (establishing the avoided cost standard). Instead, Granite is bringing its claim under more general Ohio authorities in Chapter 4905 that relate to just, reasonable, not unjustly discriminatory or preferential rates.

Granite is not seeking specific, statutory rate discounts for LWC wholesale services. **[BEGIN CONFIDENTIAL INFORMATION]** It is seeking just and reasonable, non-discriminatory rates to defeat an overall scheme designed to drive Granite out of the Ohio market. **[END CONFIDENTIAL INFORMATION]** Granite is not asking for AT&T to lower its rates in the abstract—it is asking that AT&T halt its discrimination, by providing the same rate plans it is offering to retail customers for whom it is competing with Granite. Granite has pointed out the discrepancy in AT&T’s retail and wholesale rates to demonstrate that AT&T’s actions harm competition.

In any event, LWC services are fundamentally different from services ILECs must make available for resale under Section 251(c)(4). The terms of the LWC Agreement make this clear. For example, Granite has the right under the LWC Agreement to collect access charges for calls to customers it serves using LWC services as an input.[[7]](#footnote-8) In contrast, the FCC has ruled that competitors have no right to collect access charges for calls to customers served by services that are resold pursuant to Section 251(c)(4).[[8]](#footnote-9) This fundamental difference forecloses any claim that Granite is seeking to impose the Section 251(c)(4) resale regime on services purchased under the LWC Agreement.

1. **Granite’s Claims and Its Requested Relief Do Not Conflict With Federal or State Competition Policy.**

AT&T asserts that the remedies that Granite seeks would conflict with federal and state competition policy, but this too is incorrect. As to federal competition policy, that is irrelevant to intrastate services offered under the LWC Agreement because the FCC has held that it has no jurisdiction over those services. As to Ohio competition policy, the whole point of Granite’s complaint is to prevent AT&T from stopping competition from developing. It is therefore entirely consistent with the policy objective of relying on “market forces, *where they exist*, to maintain reasonable service levels for telecommunications service as reasonable rates.” O.R.C. § 4927.02(A)(#) (emphasis added).[[9]](#footnote-10)

1. **The State Statues Upon Which Granite Relies Apply to AT&T.**

AT&T argues that the provisions of the Ohio Revised Code on which Granite’s claims are based—namely R.C. §§ 4905.04, 4905.22, 4905.26, 4905.31, 4905.32, 4905.33, and 4905.35—do not apply to AT&T. *See* AT&T Memorandum at 17-18. In support of this assertion, AT&T quotes selectively from R.C. § 4927.03(C) to argue that the afore-mentioned Chapter 4905 provisions are inapplicable to it because it is a “telephone company.” *Id*. This argument misreads Section 4927.03(C).

Section 4927.03(C) states as follows:

For purposes of sections 4927.01 to 4927.21 of the Revised Code, sections 4903.02, 4903.03, 4903.24, 4903.25, 4905.04, 4905.05, 4905.06, 4905.13, 4905.15, 4905.16, 4905.17, 4905.22, 4905.26, 4905.27, 4905.28, 4905.29, 4905.31, 4905.32, 4905.33, 4905.35, 4905.37, 4905.38, 4905.39, 4905.48, 4905.54, 4905.55, 4905.56, and 4905.60 of the Revised Code do not apply to a telephone company or, as applicable, to an officer, employee, or agent of such company or provider, except to the extent necessary for the commission to carry out sections 4927.01 to 4927.21 of the Revised Code.”

The phrase “[f]or purposes of sections 4927.01 to 4927.21 of the Revised Code” plainly serves to limit the applicability of the language following the comma to instances in which a party is making a claim under (or an agency or court is making determinations regarding) Sections 4927.01 to 4927.21. It has no bearing on claims brought under Chapter 4905.

Moreover, the phrase “[f]or purposes of” is commonly used in statutes to limit the applicability of statutory language. For example, Section 153 of the Communications Act includes a definition of “telecommunications carrier” in 47 U.S.C. § 153(51). But Section 224 of the Communications Act, which governs pole attachments, contains a definition of telecommunications carrier that is different from the one in Section 153. The definition in Section 224 includes the limiting introductory phrase, “[f]or purposes of this section,” thereby showing Congress’ intent that it apply only in the context of pole attachments. 47 U.S.C. § 224(a)(5). That is how the FCC has applied that provision. *See Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 22983, ¶ 72 (2000) (“Section 224 . . . specifically excludes incumbent LECs from the definition of telecommunications carriers *with rights as pole attachers*.”) (emphasis added) (citing S. Conf. Rep. 104-230, 104th Cong., 2d Sess. at 113 (1996)). Moreover, the Communications Assistance for Law Enforcement Act (“CALEA”) includes yet another definition of “telecommunications carrier,” which applies “for purposes of this subchapter” (i.e., for purposes of the CALEA provisions). In implementing CALEA’s provisions, the FCC adopted an interpretation of CALEA’s “telecommunications carrier” definition that is specific to CALEA, the applicability of which does not extend beyond the CALEA subchapter. *See* *Communications Assistance for Law Enforcement and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989, ¶ 8 (2005). The D.C. Circuit upheld that decision. *See* *American Council on Educ. v. FCC*, 451 F.3d 226, 233 (D.C. Cir. 2006). It is clear that the phrase “[f]or purposes of” should be given a similarly limiting meaning in the context of Section 4927.03(C).

AT&T nevertheless tries to argue that Section 4927.03(C) does not mean what it says. *First*, AT&T argues that Granite’s interpretation of the phrase “[f]or purposes of” is inconsistent with the purported purpose of Section 4907.03(C), which, accordingly to AT&T, was to clarify that “many provisions in Chapters 4903 and 4905 that used to apply to telephone companies as public utilities no longer apply unless specifically necessary to implement some aspect of Chapter 4927.” AT&T Memorandum at 18. But this interpretation has no basis in the language of the statute since it fails to give any meaning to the phrase “[f]or purposes of.” In Ohio, courts do not add or delete phrases when interpreting a statutory provision, and there is no reason for the Commission to do so here *in lieu* of simply reading the statute as written. *See, e.g*., *State ex rel. Asti v. Ohio Dep’t of Youth Servs.*, 107 Ohio St. 3d 262, 266-67, 838 N.E.2d 658, 664 (2005).

The broader structure of Sections 4927.01 to 4927.21 confirms that Section 4927.03(C) was not intended to entirely preclude application of provisions in Chapters 4903 and 4905 to telephone companies except where necessary to implement Sections 4927.01 to 4927.21. For example, Section 4927.03(D) states that the Commission has no authority over the quality of service and the rates, terms, and conditions of telecommunications services provided “to end users” by a telephone company “[e]xcept as specifically authorized in sections 4927.01 to 4927.21.” This provision would have been unnecessary if, as AT&T asserts, Section 4907.03(C) said that “Chapters 4903 and 4905 that used to apply to telephone companies as public utilities no longer apply unless specifically necessary to implement some aspect of Chapter 4927.” In fact, by limiting the restriction in Section 4927.03(D) to “service provided to end users,” that provision clearly implies that the Commission retains authority over the quality of service and the rates, terms, and conditions of telecommunications service provided by telephone companies to other telephone companies. In other words, it clearly implies that the Commission retains authority over the service quality as well as the rates, terms, and conditions under which AT&T offers LWC service to Granite.

*Second*, AT&T argues that Granite’s reading of the statute causes Section 4927.03(C) to be rendered a “nullity.” It’s argument is that, under Granite’s interpretation, (1) the provisions listed in Section 4927.03(C) (including of course the provisions that Granite relies on in its Complaint) would always apply to telephone companies unless they are invoked for purposes of Sections 4927.01 to 4927.21, (2) when invoked for those purposes, the listed provisions would not apply except to the extent necessary to enforce Sections 4927.01 to 4927.21, but (3) that would supposedly be the only reason the listed statutes would be invoked in the first place. AT&T Memorandum at n.24. This argument rests on the incorrect assumption that the only reason that the listed statutes might be relevant to Sections 4927.01 to 4927.21would be where they are necessary to enforce those Sections.

In fact, the provisions listed in Section 4927.03(C) could be interpreted to dramatically alter or contradict the terms of Sections 4927.01 to 4927.21. For example, Section 4905.26 states that the Commission shall hear a complaint against “any” public utility filed by “any person, firm, or corporation” alleging that “any” “service rendered” is “in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.” At the same time, Section 4927.21 establishes a complaint process intended for the review of alleged violations of Sections 4927.01 to 4927.20. Absent the restriction that the provisions of Chapter 4905 be applied to Sections 4927.01 to 4927.21 only to the extent necessary for the Commission to carry out Sections 4927.01 to 4927.21, parties would be able to file complaints under Section 4905.26 alleging violations of Sections 4927.01 to 4927.20. This is significant, because complaints filed under Section 4927.21 are subject to several restrictions (such as limitations on the remedies that may be adopted under Section 4927.21(C)(1) and (2)) that do not apply in complaints brought under 4905.26. As this example demonstrates, the provisions enumerated in Section 4927.03(C) could be invoked for purposes of Sections 4927.01 to 4927.21 for reasons other than to enable the Commission to enforce Sections 4927.01 to 4927.21, and giving independent meaning to “[f]or purposes of” does not render Section 4927.03(C) a nullity.

Finally, if the Commission determines, for the first time and contrary to the plain language of the statute, that it does not have the authority to consider Granite’s claims alleging violations of Sections 4905.04, 4905.22, 4905.26, 4905.31, 4905.32, 4905.33, and 4905.35, the Commission may still apply those provisions in considering the Granite Complaint under Section 4927.21. Section 4927.03(C) states that Sections 4905.04, 4905.22, 4905.26, 4905.31, 4905.32, 4905.33, and 4905.35 apply to telephone companies “to the extent necessary for the commission to carry out sections 4927.01-4927.21.” This means that Sections 4905.04, 4905.22, 4905.26, 4905.31, 4905.32, 4905.33, and 4905.35 apply to the extent necessary for the Commission to rule on a complaint filed against AT&T under Section 4927.21. That provision also requires that the Commission hear complaints against a telephone company “alleging that any rate, practice, or service . . . is unjust, unreasonable, unjustly discriminatory, or in violation of or noncompliance with any provision of sections 4927.01 to 4927.20.” O.R.C. § 4927.21(A). All of Granite’s claims are encompassed by this grant of jurisdiction.[[10]](#footnote-11)

1. **The Terms of the LWC Agreement Do Not Prohibit Granite’s Claims And Requested Relief.**

AT&T asserts that Granite’s claims should not be heard by this Commission because Granite did not comply fully with the dispute resolution process related to the Agreement. *See* AT&T Memorandumat 20. However, basic principles of Ohio law mandate that the dispute resolution provision be deemed inapplicable to this proceeding. To begin with, it is clear that the Commission is the appropriate entity to rule on Granite’s claims. Under Ohio law, the Commission, rather than the courts or an arbitrator, has jurisdiction over a matter when (1) “the act complained of constitute[s] a practice normally authorized by the utility;” and (2) the Commission’s “administrative expertise [is] required to resolve the issue in dispute.” *See* *Allstate Ins. Co. v. Cleveland Elec. Illum. Co*., 119 Ohio St. 3d 301, ¶12, 893 N.E.2d 824 (2008).

This dispute meets both prongs of this test. The first prong is met because the wholesale intrastate voice telecommunications services that are the subject of this dispute are normally provided by AT&T, subject to the Commission’s authority. The second prong is met, because this dispute concerns the rates, terms, and conditions on which AT&T offers telephone service, subjects that are within the Commission’s unique expertise. Accordingly, there can be no doubt that the claims set forth in the Amended Complaint are squarely within the Commission’s exclusive jurisdiction.

Moreover, it is well established under Ohio law that a private contract cannot be used to circumvent a statutory prohibition or grant of authority. *See Office of Disciplinary Counsel*, 88 Ohio St. 3d at 158; 724 N.E.2d at 404 (“[A] private contract cannot be used to circumvent a statutory prohibition based on public policy.”); *Bell v. N. Ohio Tel. Co*., 149 Ohio St. 157, 158; 78 N.E.2d 42, 43 (1948) (“[I]t is elementary that no valid contract may be made contrary to statute. . . . Public utility service in this state is regulated by statute and no contract for service may be made by a public utility except as provided by statute”); *Bardes v. Todd*, 139 Ohio App. 3d 938, 941, 746 N.E.2d 229, 232 (2000) (“To the extent that a private contract clause seeks to circumvent a statutory grant of authority that is based on public policy, the clause is void.”). Interpreting the arbitration provision in the LWC Agreement as divesting the Commission of its authority to rule on Granite’s Amended Complaint would violate this principle. Doing so would circumvent the Commission’s exercise of its exclusive jurisdiction to judge the claims set forth in Granite’s Amended Complaint and would establish a harmful precedent.

Specifically, the Commission has the authority under Section 4905.04 to “supervise and regulate public utilities.” In exercising that authority, the Commission is charged with the obligations to ensure that a public utility’s charges are just, reasonable, and not unjustly discriminatory or preferential and to address complaints alleging that the public utility’s rates, services, and practices are not unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. *See, e.g.,* O.R.C. §§ 4905.22, 4905.26, 4905.33(A), 4905.35(A). The arbitration provision of the LWC Agreement cannot be used to divest the Commission of the authority to rule on Granite’s Amended Complaint alleging AT&T’s violation of these prohibitions.

Consistent with these principles, the Commission has exercised its authority to suspend operation of an alternative dispute resolution provisions in a public utility contract in order to allow a formal complaint to proceed. *See Orwell Natural Gas Company v. Orwell-Trumbull Pipeline Company, LLC*, No. 14-1654-GA-CSS *et al.*, Opinion and Order ¶ 10 (Ohio P.U.C. June 15, 2016) (“*Orwell*”); *Complaint of the Co-Operative Legislative Committee, Railroad Brotherhoods & Railroad Unions v. Norfolk Southern Corp.*, No. 97-176-RR-CSS, Entry ¶ 5 (Ohio P.U.C. June 10, 1997). In *Orwell*, the Commission held that,

While . . . the powers of the arbitrator are defined by the parties through the language contained in the arbitration provision of the Agreement, the arbitration provision is one clause . . . over which the Commission retains jurisdiction.

*Id*. ¶ 17. The logic of this decision confirms that the Commission may also disregard the provision in the LWC Agreement stating that the provisions of the Agreement are not subject to state commissions’ jurisdiction in order to hear the Amended Complaint. In fact, the Commission *must* do so in order the carry out its obligations under Ohio law.

AT&T entirely fails to address *Orwell*, preferring instead to rely on a case in which the Commission refused to modify an interconnection agreement governed by Section 252 of the Communications Act. *See* AT&T Memorandum at 21 (discussing *In the Matter of the Complaint of McLeodUSA Telecommunications services, Inc., v. AT&T Ohio*, 2011 WL 5023559 (Ohio PUC 2011). That case concerned a complaint filed by subsidiaries of a CLEC alleging that their interconnection agreement with AT&T contained unreasonable power charges for collocated equipment. The Commission granted AT&T’s motion to dismiss the complaint because allowing a party to challenge a single provision in an interconnection agreement would (1) be inconsistent with the statutory scheme governing “binding,” voluntarily negotiated interconnection agreements in Section 252(a) of the Act and (2) allowing a party to challenge a single, “agreed provision” in a contract would be at odds with principles of contract law. *See id*. at ¶ 36. These conclusions bear no relevance to the instant case because (1) the LWC Agreement is not governed by Section 252(a); (2) because of the absence of that legal framework, AT&T was able to dictate the terms of the agreement due to its overwhelming bargaining power meaning that the terms were hardly “agreed” as in normal contract negotiations; and (3) unlike the power charge at issue in McLeodUSA, the provision that Granite seeks to alter would, if not suspended, divest the Commission of jurisdiction over a matter that is at the core of its exclusive jurisdiction, namely the effect of an anticompetitive scheme on competition in the provision of business telephone services throughout Ohio.

Finally, it is especially appropriate that the Commission reject the arbitration provision in this case. This is because, again, the LWC Agreement is not the product of commercial negotiations between parties of relatively similar bargaining power. It is instead the result of a seller (AT&T) with market power largely dictating the terms of a sales contract to a buyer (Granite) that had little choice but to acquiesce to those terms. As Granite explained in its Amended Complaint, AT&T controls the only physical connection to 60-85 percent of Granite’s customer locations, there is little prospect that another provider would be able to deploy connections to these locations, and existing wireless connections are inadequate to meet the needs of Granite customers. *See* Amended Complaint ¶ 21 n.4. Moreover, AT&T’s conduct, specifically its decision to increase dramatically the prices for LWC services, confirms that it has a powerful stranglehold over the wholesale market for multi-location business telephone service. *See id*. ¶¶ 9-19. These circumstances result in a large imbalance in bargaining power between AT&T and wholesale customers like Granite. AT&T can, and does, exploit this power to dictate the terms of LWC agreements. In these circumstances it is inaccurate to assert, as AT&T does (*see* AT&T Memorandum at 13), that Granite voluntarily agreed to the alternative dispute resolution provisions in the LWC Agreement. There is therefore no public policy justification for enforcing that provision.

1. **The *Sierra-Mobile* Doctrine Permits The Commission To Adopt Any Appropriate Remedy To Address AT&T’s Conduct.**

AT&T next argues that the *Sierra-Mobile* doctrine bars the Commission from finding that AT&T’s current wholesale rates are unlawful. AT&T Memorandum at 14-15. This argument is easily rejected. As the Commission explained in *Orwell*, the *Sierra-Mobile* doctrine is a principle of *federal* law that is rooted in *federal* statutes that differ in many respects from Ohio public utility law. *Orwell* ¶ 37. AT&T has provided no basis for concluding that the doctrine applies to claims concerning *intrastate* services within the exclusive jurisdictions of a state regulatory commission. In fact, AT&T does not cite a single decision by an Ohio court or by the Commission decision in support of its argument.

Even if the *Sierra-Mobile* doctrine were to apply here, it would not bar the Commission from ruling on the lawfulness of the current LWC Agreement and modifying it as needed. Under the *Sierra-Mobile* doctrine, the Commission “has the power to prescribe a change in contract rates when it finds them to be unlawful, and to modify other provisions of private contracts when necessary to serve the public interest.”[[11]](#footnote-12) The FCC has frequently found that this standard is met.[[12]](#footnote-13)

It is met here as well. As Granite has explained in its Amended Complaint, the prices in the LWC Agreement are part of an unlawful scheme to drive Granite from the market. Those prices are therefore “unlawful.” Moreover, it is in the public interest for the Commission to mandate other changes in the LWC Agreement to the extent necessary to stop the harms caused by AT&T’s scheme. In fact, the broader harms posed by AT&T’s conduct make this an especially appropriate context in which to find that it is in the public interest to modify the parties’ Agreement. Granite has demonstrated that AT&T’s wholesale rates result in public harm to competition and consumer welfare in violation of Ohio Law and Sections 201(b) and 202(a) of the Communications Act. *See* Amended Complaint ¶¶ 5-23. And, as explained, the LWC Agreement is not a contract between parties with equal ability to negotiate favorable terms, as AT&T implies. AT&T Memorandum at 15 (referring to “the voluntarily negotiated LWC rates between two sophisticated businesses”). It is therefore clearly in the public interest for the Commission exercise its authority here to prevent AT&T’s anticompetitive conduct from harming multi-location businesses in Ohio.

1. **Granite’s Claims Regarding A Future LWC Agreement Are Ripe,**

AT&T alleges that Granite’s claims regarding the wholesale rates AT&T has proposed for the parties’ next LWC agreement are not ripe. *See* AT&T Memorandum at 23. There is no merit to this argument.

As a threshold matter, “[t]he traditional ripeness doctrine, which derives in part from Article III limitations on judicial power, does not apply to administrative decisionmakers.” *Newport News Shipbuilding & Dry Dock Co. v. Dir., Office of Workers’ Comp. Programs*, 474 F.3d 109, 112 (4th Cir. 2006) (internal quotations and citations omitted); *see also* *Chavez v. Dir., Office of Workers Comp. Programs*, 961 F.2d 1409, 1414 (9th Cir. 1992) (“[T]o the degree they are applicable at all, ripeness concerns should be given less weight in agency adjudications than in judicial ones.”) (citing *Central Freight Lines v. ICC*, 899 F.2d 413, 417-19 (5th Cir. 1990); *Cal. Ass’n of Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985)). This is because, unlike a court, the responsibilities of a regulatory agency like the Commission are not limited to resolving cases or controversies but, rather, also include an ongoing duty to monitor telephone companies’ compliance with the law. *See, e.g.*, O.A.C. § 4901:1-6-03. Against the backdrop of its broader function, it makes little sense to apply to the Commission a doctrine designed for courts.

But even if considerations of ripeness were applicable here, the terms of the relevant Ohio statutes show that those considerations do not limit the Commission’s review of claims regarding rates that AT&T has proposed for the parties’ next LWC agreement. For example, AT&T argues that Granite’s claims as to prices that AT&T proposes for the parties’ next LWC agreements are not ripe because Granite has not “been billed for or paid those proposed rates.” AT&T Memorandum at 23. But Section 4905.26 expressly requires the Commission to hear complaints alleging that “any rate, fare, charge, toll, rental, schedule, classification, or service” that is “*demanded*, exacted, or *proposed to be rendered, charged, demanded, or exacted*,” is “in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.” O.R.C. § 4905.26 (emphasis added). That provision also states that the Commission must hear any complaint alleging that “any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or *will be*, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential.” *Id*. (emphasis added). Thus, Section 4905.26, on its face, unambiguously authorizes complaints regarding “rate[s]” and “charge[s]” that have been “demanded” or “proposed” but not yet actually “rendered,” “charged,” or “exacted.” So long as the complaint has a reasonable basis, the Commission *must* hear the complainant out. *Id*. (“[I]f it appears that reasonable grounds for complaint are stated, the commission *shall* fix a time for hearing . . . .”) (emphasis added).

Other grants of jurisdiction to the Commission confirm that it has authority to assess whether proposed prices are just, reasonable, or unjustly discriminatory. For example, Section 4905.22 states that the prices “demanded for any service . . . to be rendered” by a public utility shall be just and reasonable, and Section 4905.33(A) states that a public utility may not “*demand*, . . . greater or lesser compensation for any services rendered, or to be rendered, except as provided in Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions.” *See* O.R.C. §§ 4905.22, 4905.33(A) (“emphasis added”).

Moreover, the case AT&T cites in support of its ripeness argument is inapposite. *See* AT&T Memorandum at pg. 23 n.29. In *Cincinnati Gas & Electric Co. v. City of Forest Park*, the Commission found that the utility’s claim was not yet ripe because the fees the utility was challenging had not yet been “established.” No. 05-0075-EL-PWC, Opinion and Order, at 8 (Ohio P.U.C. Mar. 7, 2006). But *Cincinnati Gas* did not involve a claim under Section 4905.26, which, as discussed above, expressly authorizes claims regarding proposed rates. In addition, the Commission was unable to rule on the dispute at issue in *Cincinnati Gas*, because the absence of any established rate required that it “base [its] decision on nonexistent evidence.” *Id*. at 9. This is not the case here, because Granite has pled with specificity the amounts AT&T has demanded and the extent to which those wholesale prices exceed retail prices that AT&T charges. *See* Amended Complaint ¶ 21.

1. **Granite Has Alleged Facts Sufficient To Demonstrate That The Current and Proposed LWC Rates Are Unreasonably Discriminatory.**

AT&T asserts that Granite’s claims regarding the discriminatory and anticompetitive prices that AT&T charges under the current LWC Agreement and that AT&T proposes to charge under a future LWC Agreement cannot be unlawful because (1) **[Begin Confidential]** AT&T charges Granite rates that are lower than LWC rates that it charges other wholesale customers **[End Confidential]** and (2) Granite has not shown that AT&T discriminates against Granite and in favor of another customer. AT&T Memorandum at 24. But Granite’s claim is not based on the assertion that AT&T is discriminating among its customers but rather that AT&T is discriminating in favor of its own retail operation and against Granite. In essence, AT&T is asserting that this discrimination is entirely lawful. But there is no basis for this conclusion.

Nowhere in the text of Chapter 4905 is there an indication that discrimination between retail and wholesale customers is somehow excluded from the scope of those provisions. In any event, the Commission has recognized that, when a telecommunications carrier offers its own retail services and also offers those services at wholesale to companies that resell the services, the carrier is effectively operating a “retail arm” that is a “customer” of the carrier’s wholesale operation, even when the retail arm is not a separate company.[[13]](#footnote-14) Thus, discrimination between the wholesale prices AT&T charges Granite and the retail prices AT&T charges end users constitutes discrimination and preferential treatment that is cognizable under Chapter 4905, and Sections 4905.33 and 4905.35 specifically.

This conclusion is consistent with federal law. Under 47 U.S.C. § 202(a) of the Communications Act, discrimination is unlawful if (1) the services are “like”; (2) there is a price difference between the services; and (3) that difference is unreasonable. *See, e.g.,* *Competitive Telecomms. Ass’n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *Nina Shahin v. Verizon Delaware LLC, Verizon Long Distance, and Verizon Online, LLC*, Memorandum Opinion and Order, 29 FCC Rcd. 4200, ¶ 9 (2014).[[14]](#footnote-15) AT&T’s conduct meets each one of these requirements.

There is no question that the wholesale and retail services at issue here are “like” under federal law. Courts and the FCC employ a “functional equivalency” test to determine whether services are like. *See, e.g.,* *MCI Telecomms. Corp.* 917 F.2d at 39 (D.C. Cir. 1990). Central to a finding of “functional equivalency” is that customers perceive the services at issue “as performing the same functions,” such that price becomes the deciding choice between them. *See MCI Telecomms. Corp.*, 917 F.2d at 39. Where a carrier sells a service platform to both wholesale and retail customers, there is no question that the offerings are “like.” *See Nat’l Commc’ns Ass’n Inc.*, 238 F.3d at 128.

Nor is there any question that the prices AT&T charges for these like services are dramatically different. Granite demonstrated that this is the case in its Amended Complaint. *See* Amended Complaint ¶¶ 21-23, .

Finally, it is clear that this discrimination is unreasonable. For example, the Second Circuit has found that unreasonable discrimination occurs when a carrier that sells a service at both wholesale and retail willfully discriminates against wholesale customers, viewed as competitors, to favor sales to its retail customers. *See Nat’l Commc’ns Ass’n Inc.*, 238 F.3d at 128-30. That precisely describes AT&T’s scheme to eliminate Granite as a competitive threat in the Ohio retail market that AT&T already dominates. Moreover, it has long been the FCC’s policy that “access services should be made available on a non-discriminatory basis and, as far as possible, without distinction between [retail] end user and . . . [wholesale] customers.”  *See Implementation of the Subscriber Carrier Selection Changes Provision of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers*, CC Docket 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 1508, 1541 n.438 (1998). The rate differential between AT&T’s wholesale and retail offerings of the same service is objectively unreasonable. *See* Amended Complaint ¶ 21.

**CONCLUSION**

For the foregoing reasons, Granite respectfully requests that the Commission deny AT&T’s Motion to Dismiss.

Respectfully submitted,

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|  | /s/ Michael D. Dortch  Michael D. Dortch (0043897)  Richard R. Parsons (0082270)  Justin M. Dortch (0090048)  KRAVITZ, BROWN & DORTCH, LLC  65 East State Street, Suite 200  Columbus, Ohio 43215  Tel: 614-464-2000  Fax: 614-464-2002  E-mail: [mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)  *Counsel for Granite Telecommunications, LLC* |

**CERTIFICATE OF SERVICE**

The PUCO’s e-filing system will serve notice of this filing upon all parties of record registered with the PUCO’s e-filing system. Further, I hereby certify that a true and accurate copy of the foregoing was served upon the Attorney Examiner and upon counsel for AT&T on this Wednesday, October 25, 2017, by electronic mail.

L. Douglas Jennings

Public Utilities Commission of Ohio

180 East Broad Street

Columbus, OH 43231

[doug.jennings@puc.state.oh.us](mailto:doug.jennings@puc.state.oh.us)

Mark R. Ortlieb J. Tyson Covey

AT&T Services, Inc. Mayer Brown LLP

[mo2753@att.com](mailto:mo2753@att.com) [jcovey@mayerbrown.com](mailto:jcovey@mayerbrown.com)

/s/ Michael D. Dortch

Michael D. Dortch

1. Order on Remand, *Unbundled Access to Network Elements,* 20 FCC Rcd 2533 at ¶59, fn. 129. (2005), (“*Triennial Review Remand Order*”), aff’d *Covad Communications v. FCC* 450 F.3d 528 (D.C. Cir. 2006) (citing *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 18 (1st Cir. 1990); *Cities of Anaheim, Riverside, Banning, Colton, and Azusa, California,* et al*., v. Fed. Energy Regulatory Comm’n*, 941 F.2d 1234, 1237 (D.C. Cir. 1991)). [↑](#footnote-ref-2)
2. The Commission may also wish to note that it was the *risk* that Incumbent Local Exchange Carriers (ILECs) would engage in price squeezing behavior, coupled with the practical limitations inherent to the existing means of legally challenging such price squeezes, that were the specific reasons the FCC cited when it refused to find that the existence of tariffed alternatives to unbundled network elements (“UNEs”) justified declaring those same UNEs to be non-impaired. The FCC instead was concerned that “. . . the prospects that existing market, tariff review, or enforcement mechanisms by themselves are not sufficient to adequately reduce the risk to competition of price squeezes in violation of the Commission’s rules, at least not sufficiently quickly to prevent harm to competition due to such abuse.” *Triennial Review Remand Order*, ¶¶ 62 and 63, fn. 168. [↑](#footnote-ref-3)
3. *See Complaint of Westside Cellular, Inc. dba Cellnet v. New Par Companies dba AirTouch Cellular & Cincinnati SMSA L.P*., No. 93-1758-RC-CSS, Opinion and Order, at 51 (Ohio P.U.C. Jan. 18, 2001) (“*Westside Cellular*”). [↑](#footnote-ref-4)
4. *See AT&T Voice Services: AT&T Local Wholesale Complete (LWC)*, AT&T, https://www.  
   business.att.com/content/productbrochures/w\_att\_local\_wholesale\_complete.pdf (last visited Oct. 11, 2017). [↑](#footnote-ref-5)
5. *See* AT&T Memorandum at 14. Specifically, AT&T cites (1) *Qwest Corp. v. Minnesota Public Utils. Comm’n*, 684 F.3d 721 (8th Cir. 2012), in which the Minnesota PUC’s attempt to set prices for Section 271 UNEs at rates other than market rates was found to be unlawful because the FCC has exclusive authority to set those rates and it had set them at market rates; (2) *BellSouth Telecomms., Inc., v. Kentucky Pub. Serv. Comm’n*, 669 F.3d 704 (6th Cir. 2012), in which, in relevant part, the Kentucky PSC’s attempt to compel AT&T to provide UNEs that the FCC had eliminated was found to be unlawful because the FCC has exclusive jurisdiction to determine which UNEs are required; and (3) *Illinois Bell Tel. Co., Inc. v. Box*, 548 F.3d 607 (7th Cir. 2008), in which, in relevant part, the Illinois Commerce Commission’s attempt to compel Illinois Bell to provide UNEs that the FCC had eliminated was again found to be unlawful because the FCC has exclusive jurisdiction to determine which UNEs are required. AT&T also cites *NuVox Comms., Inc. v. BellSouth Comms*., Inc. 530 F.3d 1330 (11th Circ. 2008), in which, in relevant part, the Florida PSC’s rejection of a CLEC’s request to compel Bellsouth to commingle Section 271 and Section 251 UNEs was found to be unlawful because the FCC had held that such commingling was required. Again, none of these cases concerned a state commission’s exercise of authority over an intrastate service that (1) the incumbent LEC offered voluntarily and (2) over which the FCC had held it had no jurisdiction. [↑](#footnote-ref-6)
6. While AT&T makes much of its assertion that services offered under the LWC Agreement are supposedly “UNE-P replacements,” it would be just as easy to characterize special access services as “UNE-loop replacements.” Nevertheless, there is no question that the states continue to have jurisdiction over intrastate special access services just as they do over intrastate services offered under the LWC Agreement. [↑](#footnote-ref-7)
7. *See* Granite-AT&T Local Wholesale Complete Agreement, Attachment 2 § 12.2. [↑](#footnote-ref-8)
8. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499, 15982-83 ¶ 980 (1996), *vacated on other grounds by* *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000). [↑](#footnote-ref-9)
9. AT&T also states that, under federal antitrust law, competitive carriers cannot bring claims alleging refusal to deal, denial of essential facilities, or price squeezes against incumbent LECs. *See* AT&T Memorandum at 16, n. 23. This argument, however, is irrelevant because none of Granite’s complaints to this Commission is based upon federal antitrust law. Instead, Granite’s claims are based firmly upon Ohio law and the obligations that Ohio law imposes upon all common carriers – including even telephone companies. [↑](#footnote-ref-10)
10. Granite maintains that its claims arise outside of Chapter 4927. Even so, Granite amended its Complaint to include a claim that AT&T’s conduct is unjust, unreasonable, and unjustly discriminatory under O.R.C. § 4927.21(A) in order to address any concern this Commission may have that its claims arise under those provisions. *See* the Fifth Claim of Granite’s Amended Complaint, filed September 29, 2017.

    [↑](#footnote-ref-11)
11. *W. Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (internal citations omitted). [↑](#footnote-ref-12)
12. *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd. 5385, ¶ 17 (2008) (“The Commission has clear authority to ‘modify . . . provisions of private contracts when necessary to serve the public interest.’ The Commission has exercised this authority previously when private contracts violate sections 201 through 205 of the Act.); *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion and Order, 9 FCC Rcd. 5154, ¶¶ 197-208 (1994), *remanded on other grounds, Pac. Bell v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996); *see also* *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 14107,¶ 101 n.365 (2013) (explaining that the FCC has the authority to modify contractual provisions and abrogate contracts and has done so previously), *appeal docketed sub nom. Securus Techs., Inc. v. FCC*, No. 13-1280 (D.C. Cir. Nov. 14, 2013). [↑](#footnote-ref-13)
13. *See* *Westside Cellular* at 51 (finding that, where Ameritech offered services directly to end users at retail and also at wholesale to companies including Cellnet, “[b]oth Cellnet and Ameritech Mobile’s retail are wholesale customers of Ameritech Mobile’s wholesale”). AT&T attempts to distinguish this case by asserting that it did not involve the relationship between an incumbent LEC and a CLEC that is governed by federal law. AT&T Memorandum at n.23. But as explained above, the instant dispute is not governed by federal law. AT&T also argues that *Westside Cellular* concerned a competitor’s resale of a retail service, whereas this case concerns a wholesale product not subject to a resale requirement. *Id*. In fact, AT&T offers its retail customers the same services that it offers to Granite under the LWC Agreement, just as was the case in *Westside Cellular*. [↑](#footnote-ref-14)
14. Once it is established that the services are like and there is a price difference between them, the burden shifts to the defendant to prove that the price difference is reasonable. *See MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); *Nat’l Commc’ns Ass’n Inc. v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001). Accordingly, by pleading facts sufficient to show that the wholesale and retail services at issue are “like” and that there is a price difference between them, Granite has established a *prima facie* claim under Section 202(a). [↑](#footnote-ref-15)