BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )

The Ohio Bell Telephone Company d/b/a AT&T Ohio ) Case No. 10-1412-TP-BLS

For A Commission Determination Pursuant to )

Ohio Revised Code Section 4927.12(C)(3). )

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MEMORANDUM CONTRA OCC'S APPLICATION FOR REHEARING

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I. INTRODUCTION

The Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio"), by its attorneys, and pursuant to O.A.C. § 4901-1-35(B), submits this memorandum contra the application for rehearing filed by the Ohio Consumers' Counsel ("OCC") on November 22, 2010.

OCC once again demonstrates the fervor with which it opposes reasonable regulatory reform in Ohio. As the most outspoken critic of the legislation, Sub. S. B. 162, effective September 13, 2010 ("the Act"), which formed the basis for the application AT&T Ohio filed on September 23, 2010, it should come as no surprise that OCC would oppose the first such application filed under the Act and seek rehearing of its automatic approval under the Act.

II. R. C. § 4903.09 DOES NOT APPLY IN THIS CASE

OCC argues that the Commission did not comply with R. C. § 4903.09. But that statute does not apply in this case. It provides as follows:

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

R. C. § 4903.09. This was not a case "heard" by the Commission. Other than the pleadings filed, there were no "proceedings." No hearing was ordered and no hearing was held. Thus, there is no transcript. Rather, as OCC acknowledges, AT&T Ohio's application was approved by operation of law under R. C. § 4927.12(C)(3)(b).[[1]](#footnote-1) OCC App., p. 2; OCC Memo, p. 3. That new provision directs that:

Upon the filing of an application under division (C)(3)(a) of this section, the commission shall be deemed to have found that the application meets the requirements of that division unless the commission, within thirty days after the filing of the application, issues an order finding that the requirements have not been met.

R. C. § 4927.12(C)(3)(b). The law makes no mention of a different process applying if the case is "contested," as OCC suggests. OCC Memo, p. 3. The automatic approval process of the new law dispenses with the need for a Commission order.

To accept OCC's argument would be to undermine the many automatic approval processes that have been established in the Commission's rules, as well as the one at issue here that was established in the new law. The mere filing of a motion to intervene or the filing of objections does not take a case off an automatic approval track and require a Commission order that complies with R. C. § 4903.09. Only Commission action can take an application off an automatic approval track that it has created. And, under the statute applicable here, the application is deemed to have met the statutory requirements "unless the commission, within thirty days after the filing of the application, issues an order finding that the requirements have not been met." R. C. § 4927.12(C)(3)(b).[[2]](#footnote-2) The Commission did not do so, and the law prescribes that the Commission therefore "shall be deemed to have found that the application meets the requirements of that division . . . ." Id. This is a straightforward statutory process that OCC seeks to clutter with additional hurdles that do not exist under the Act. Its efforts should be rejected.

III. AT&T OHIO'S APPLICATION COMPLIED WITH THE STATUTORY REQUIREMENTS

OCC's next line of attack is both familiar and time-worn. OCC argues that AT&T Ohio has not shown that alternative providers are offering competing service to AT&T Ohio's basic local exchange service in the 16 exchanges at issue. OCC App., p. 2; Memo, pp. 7-9.

OCC notes that the Commission must determine that "the application demonstrates that two or more alternative providers offer, in the exchange area, competing service to the basic local exchange service offered by an incumbent local exchange carrier in the exchange area . . . ." OCC Memo, p. 7. AT&T Ohio's application clearly demonstrated that the alternative providers the Company relied on offer competing services to the Company's basic service. In Exhibit 2 to its application, the Company listed at least five (and in some cases, six) alternative providers that offer service in each of the 16 exchanges. Application, September 23, 2010, Exhibit 2, p. 2. Exhibit 2 also contained detailed evidence of those competing carriers' offerings.

OCC urges that the same analysis and same documentation should be required under the Act that were used under the previous and now-obsolete BLES alternative regulation rules. OCC Memo, p. 7. But that was then and this is now. The law has eliminated from consideration many of the issues that OCC used to block or delay the implementation of BLES alternative regulation under the Commission's rules. In cases brought under those rules, OCC consistently argued about the technology used by alternative providers, the location of their services or facilities, and whether they were serving the entire exchange. The Act has eliminated those issues and has created a more streamlined process. The Act specifies that this review is undertaken, " . . . regardless of the technology and facilities used by the alternative provider, the alternative provider’s location, and the extent of the alternative provider’s service area within the exchange area." R. C. § 4927.12(C)(3)(a). Contrary to OCC's assertion, the General Assembly, recognizing the competitive environment, changed the law and "watered down" the requirements of the previous rules. OCC Memo, pp. 7-8. Not only that, the General Assembly specifically ordered the rescission of those rules. *See* Sub. S. B. 162, Section 3, under which the BLES alternative regulation rules will be rescinded and are no longer enforceable.

Moreover, the Commission's now-obsolete BLES alternative regulation rule's competitive market tests required showings that a certain percentage of residential access lines were "provided by" unaffiliated CLECs, the presence of a certain number of unaffiliated facilities-based alternative providers "providing BLES to residential customers," or the existence of a certain number of alternative providers "serving the residential market." O.A.C. § 4901:1-4-10(C). Replacing these provisions, the Act requires that the Commission determine that the ILEC's application:

. . . [D]emonstrates that two or more alternative providers ***offer***, in the exchange area, competing service to the basic local exchange service offered by an incumbent local exchange carrier in the exchange area, regardless of the technology and facilities used by the alternative provider, the alternative provider’s location, and the extent of the alternative provider’s service area within the exchange area. An alternative provider includes a telephone company, including a wireless service provider, a telecommunications carrier, and a provider of internet protocol-enabled services, including voice over internet protocol.

R. C. § 4927.12(C)(3)(a) (emphasis added). AT&T Ohio made the necessary showing of the alternative providers' offerings under the Act.

OCC argues that "no less" than the previous showings and tests should be applied here. OCC Memo, p. 7. OCC might prefer to revert to the old required showings and tests, but the new law has ***replaced*** (to use the Commission's own word[[3]](#footnote-3)) that regime with the new one. The Act requires a substantially reduced showing, when compared to the Commission's now-obsolete BLES alternative regulation rules. Under the old standard, ported number and white page listing information was included in the application to demonstrate that carriers were not only offering to provide service but rather were actually doing so. The requirement to demonstrate actual provision of service has been replaced with the requirement to demonstrate the offering of service. The Act makes this clear. And, as noted above, through the mandatory rescission of the BLES alternative regulation rules, that intent is also confirmed. *See* Sub. S. B. 162, Section 3.

OCC's effort to engraft onto the new law the same criteria that existed under the BLES alternative regulation rules must be rejected. The BLES pricing provision of the Act is, as the Commission has already stated, "self-effectuating" and the Commission need not, and should not, adopt rules to implement that provision. Case No. 10-1010-TP-ORD, Entry, September 15, 2010, p. 2. To impose the requirements proposed by OCC would be to nullify the streamlined process that the General Assembly has created, after numerous hearings in both the Senate and House, during which OCC provided extensive testimony. This would be contrary to the Act and to the express will of the General Assembly.

Lastly, OCC asks the Commission to "abrogate" the automatic approval of the Company's application. OCC App., p. 2; Memo, p. 9. Nowhere is the Commission given the power to "abrogate" the automatic approval contemplated in the law. It is curious that OCC would use the term "abrogate" in this regard. Former R. C. § 4927.03 gave the Commission the power to "abrogate" certain of its prior alternative regulation orders.[[4]](#footnote-4) The Commission has no such power under the new law. That was then, and this is now.

IV. CONCLUSION

For all of the foregoing reasons, OCC's application for rehearing should be denied.

Respectfully submitted,

AT&T OHIO

By: \_\_\_\_\_\_\_/s/ Jon F. Kelly\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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10-1412.ar.memo contra

1. OCC errs when it concludes that the automatic approval date was Monday October 25, 2010 rather than Sunday October 24, 2010. R. C. § 1.14 does not extend the automatic approval date in the manner OCC suggests. However, this is not an issue that needs to be addressed here unless the Commission desires to clarify the point. [↑](#footnote-ref-1)
2. This language does not preclude the Commission from issuing an order within the 30-day timeframe approving an application, but it is not required to do so. [↑](#footnote-ref-2)
3. In its Entry in the case in which the Commission is adopting the initial rules to implement the new law, the Commission stated that "[e]ffective September 13, 2010, new section 4927.12, Revised Code, ***replaced*** the prior alternative regulatory requirements for BLES pricing flexibility and established the pricing parameters for BLES provided by the ILECs." Case No. 10-1010-TP-ORD, Entry, September 15, 2010, pp. 1-2 (emphasis added). [↑](#footnote-ref-3)
4. Former R. C. § 4927.03(C) provided as follows:

   The public utilities commission has jurisdiction over every telephone company providing a public telecommunications service that has received an exemption or for which alternative regulatory requirements have been established pursuant to this section. As to any such company, the commission, after notice and hearing, may *abrogate* or modify any order so granting an exemption or establishing alternative requirements if it determines that the findings upon which the order was based are no longer valid and that the *abrogation* or modification is in the public interest. No such *abrogation* or modification shall be made more than five years after the date an order granting an exemption or establishing alternative requirements under this section was entered upon the commission’s journal, unless the affected telephone company or companies consent.

   (Emphasis added.) That section was repealed effective September 13, 2010. [↑](#footnote-ref-4)