BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules )

to Implement Substitute Senate Bill 162. ) Case No. 10-1010-TP-ORD

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THE AT&T ENTITIES' APPLICATION FOR REHEARING

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The AT&T Entities[[1]](#footnote-1) ("AT&T"), by their undersigned counsel, and pursuant to R. C. § 4903.10 and Ohio Admin. Code § 4901-1-35, hereby apply for rehearing of the Commission's October 27, 2010 Opinion and Order ("Order") in this case. The Order is unreasonable or unlawful in the following respects:

1. The Commission Erred In Expanding Residential Basic Local Exchange Service Beyond A Single Line
2. The Commission Erred In Adopting A Rule Governing Basic Local Exchange Service Late Payment Charges
3. The Commission Erred In Capping Basic Local Exchange Service Installation And Reconnection Fees
4. The Commission Erred In Imposing Telephone Directory Scoping And Content Requirements
5. The Commission Erred In Imposing A Moratorium On CLEC Disconnection For Nonpayment While An Abandonment Application Is Pending
6. The Commission Erred In Adopting A Rule Specifying Emergency Operations Requirements

These issues are addressed in detail in the attached memorandum in support.

Respectfully submitted,

THE AT&T ENTITIES

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

Jon F. Kelly (Counsel of Record)

Mary Ryan Fenlon

AT&T Services, Inc.

150 E. Gay St., Rm. 4-A

Columbus, Ohio 43215

(614) 223-7928

Its Attorneys

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

MEMORANDUM IN SUPPORT OF

THE AT&T ENTITIES' APPLICATION FOR REHEARING

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Certificate of Service

# Introduction

In its Order, the Commission adopted the initial rules to implement Sub. S. B. 162 ("the Act"). After much work by the Staff in drafting proposed rules, the Commission received extensive comments and reply comments from the parties. The rules the Commission adopted are generally faithful to the limitations in the new law. With the exceptions noted here, the rules do not present a barrier to the successful implementation of the Act. However, there are several areas in which the Commission has exceeded its authority and has adopted rules that it has no power to adopt. On rehearing, the Commission should correct those errors and revise the rules in the manner suggested here.

# The Commission Erred In Expanding Residential Basic Local Exchange Service Beyond A Single Line

The Commission's interpretation of what constitutes basic local exchange service ("BLES") in the residential setting is wrong. As AT&T explained in its initial comments:

BLES is defined in the Act as:

a single line to a residential end user

or

a primary line to a small business end user[[2]](#footnote-2)

R. C. § 4927.01(A)(1). In the case of residential service, the presence of two or more lines precludes either one from being BLES, by definition.

AT&T Initial Comments, p. 13. Contrary to this clear definition, however, the Commission has opined that a residential BLES customer can have a second line. Order, p. 20. This opinion is clearly inconsistent with the law.

The language of the Act is clear. In the residential setting, BLES can only be a "single line to a residential end user," as specified in R. C. § 4927.01(A)(1). This definition was carefully crafted to reflect the public policy decision that the "safety net" of BLES pricing and service quality protections was intended to be very narrow. The General Assembly was cognizant of the multi-line issue and if the General Assembly had intended for any line on a multi-line residence account to be considered BLES, it would have said so, as it did for multi-line business accounts. For example, it might have defined residential BLES as the "primary line" to a residence, as it did in defining business BLES. But it did not do so. It limited BLES in the residential setting to a single line. Not the "primary line." Not "one of the lines of a multi-line account." It is only a single line. The clear language of the Act provides no room for the "interpretation" the Commission has given it. The General Assembly could not have been much clearer in its definition: ***a single line to a residential end user***.

Under the previous definition, the concept of a "primary line" applied in both the residential and business settings:

(A) “Basic local exchange service” means:

(1) End user access to and usage of telephone company-provided services that enable a customer, ***over the primary line serving the customer’s premises,*** to originate or receive voice communications within a local service area, and that consist of the following:

\* \* \*

Former R. C. § 4927.01(A)(1), repealed September 13, 2010 (emphasis added). Under the definition as revised by the Act, it does not. R. C. § 4927.01(A)(1), effective September 13, 2010. Under the Act, the term "primary access line" is a modifier only in the business setting. The adopted rule ignores this important change made by the Act. The Commission has erred in expanding residential BLES beyond a single line to a residential end user.

The Legislative Service Commission's Final Bill Analysis of Sub. S. B. 162 explicitly recognizes this important change in the statutory definition:

***Under prior law***, "basic local exchange service" was defined as "end user access to and usage of telephone company-provided services ***that enable a customer, over the primary line serving the customer's premises***, to originate or receive voice communications within a local service area, and that consist of" certain enumerated services. Those services were, and generally remain under the act, (1) local dial tone service, (2) touch tone dialing service, (3) access to and usage of 9-1-1 services, where available, (4) access to operator services and directory assistance, (5) provision of a telephone directory and a listing in that directory, (6) per call, caller identification blocking services, (7) access to telecommunications relay services, and (8) access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies. ***The act alters the definition by providing that the term means "residential-end-user access to and usage of telephone-company-provided services over a single line*** or small-business-end-user access to and usage of telephone-company provided services over the primary access line of service, which in the case of residential and small-business access and usage is not part of a bundle or package of services, that does both of the following: enables a customer to originate or receive voice communications within a local service area as that area existed on the effective date of the [act]; and consists" of certain enumerated services. The services include (1) to (8) described above, with a few changes and additions. With respect to additional services, "basic local exchange service" under the act also includes flat-rate telephone exchange service for residential end users. In addition, the act expands (5) above to allow the directory to be provided "in any reasonable format for no additional charge" and requires "reasonable accommodations for private listings." (R.C. 4927.01.)

Legislative Service Commission's Final Bill Analysis of Sub. S. B. 162, pp. 28-29, footnote 17 (emphasis added). See, http://www.legislature.state.oh.us/analyses.cfm?ID=128\_SB\_162&ACT=As%20Enrolled.

The Commission's erroneous reading of this fundamental definition has broad implications. First, it would subject one line of a multi-line residential account to the BLES pricing and service quality requirements of the law and the rules. Second, it would create significant operational issues for the companies. On a multi-line account, how does one determine which line is the one subject to the BLES regulatory regime? Would it be the one identified on the account as the "main number," would it be the "billed telephone number," or would it be a line that the company or perhaps the customer picks? These problems, and perhaps more, are the result of the Commission's erroneous interpretation. They can be avoided by following - - and not straying from - - the clear statutory definition and the legislative intent.

AT&T has been planning for the implementation of the new law and believed it to be very clear under the Act that in no circumstance does any line on a multi-line residential account qualify as a BLES line. Contrary to both the OPTC's unsupported assertion (OPTC Reply Comments, p. 23) and the Commission's erroneous conclusion, when a residential customer has two or more lines, all of the customer's lines are "non-BLES." As noted above, a multi-line residential account is not one that the public policy “safety net” of the Act was intended to include. The Commission should correct this error on rehearing and acknowledge that, in the residential setting, the statutory definition identifies only a "single line" as a BLES line.

# The Commission Erred In Adopting A Rule Governing Basic Local Exchange Service Late Payment Charges

Adopted rule 4901:1-6-14(I) purports to regulate the introduction of and increases to late payment charges assessed on an account with a BLES line. But the Commission is without authority under the Act to adopt such a rule. In its comments on this issue, AT&T stated:

It is even more of a stretch to suggest, in division (I), that "late payment charges for BLES" are subject to the Commission's rate-regulation authority. The statute does not give the Commission such power. It bears repeating, as noted in the Introduction:

Except as ***specifically authorized*** in sections 4927.01 to 4927.21 of the Revised Code, the commission has ***no authority*** over the quality of service and the service rates, terms, and conditions of telecommunications service provided to end users by a telephone company.

R. C. § 4927.03(D) (emphasis added). The Commission retains no authority over late payment charges, whether they apply to regulated services such as BLES, or deregulated or detariffed services. In the case of AT&T Ohio (and likely many other LECs), late payment charges apply to the entire bill, not just to the BLES or other discrete services that may be included in that bill. For these reasons, division (I) should not be adopted.

AT&T Initial Comments, p. 16.

In response to these and other industry comments, however, the Commission declined "to modify substantively the rule with respect to the limitations on late payment fees . . . . " Order, p. 21. By failing to "modify" the proposed rule "substantively," or, as it was required to do under the Act, ***reject*** the proposed rule on late payment charges, the Commission has erred. While the Commission might be of the view that the elimination of restrictions on late payment charges "would make no sense" (Order, p. 21), the General Assembly came to the opposite conclusion. The Act contains no provision under which the restrictions on late payment charges are authorized or justified. In fact, nowhere in the Act are late payment charges even mentioned. Here, too, the Commission has violated R. C. § 4903.09 by failing to justify its order on statutory grounds. On rehearing, therefore, the Commission must eliminate division (I) from the adopted rule.

# The Commission Erred In Capping Basic Local Exchange Service Installation And Reconnection Fees

In the adopted rule, BLES installation and reconnection fees are capped at the tariffed rates for such charges as of September 13, 2010. Rule 4901:1-6-14(J). There is no basis at all in the law for this cap. As AT&T explained in its initial comments:

The Act simply requires that the "rates, terms, and conditions for basic local exchange service and for installation and reconnection fees for basic local exchange service shall be tariffed in the manner prescribed by rule adopted by the commission." R. C. § 4927.12(F)(emphasis added). Through this language, the Act requires that installation and reconnection fees be tariffed, ***but it grants the Commission no price-regulation authority over these fees.*** In using the phrase "in the manner," the Act allows the Commission to specify "how" these fees appear in the tariff, and the mechanics of how such fees can be altered, ***but gives it no authority over the determination of the level of those fees***. That is left to the marketplace of competitive telecommunications services and providers. A customer who is dissatisfied with a LEC's installation or reconnection fees can complain to the LEC and can, ultimately, select another carrier. That is a function of the market-based pricing that the Act envisions for these, and many other, services.

AT&T Initial Comments, pp. 15-16 (emphasis added).

The Act specifies:

Except as ***specifically authorized*** in sections 4927.01 to 4927.21 of the Revised Code, the commission has ***no authority*** over the quality of service and the service ***rates, terms, and conditions*** of telecommunications service provided to end users by a telephone company.

R. C. § 4927.03(D) (emphasis added). Under this provision, the Commission has no authority over the ***level*** of the charges for BLES installation and reconnection; only the ***manner*** in which those charges are tariffed. This is an important distinction that the Commission has ignored.

Underlying the adopted restriction might be the presumption that because there is no mechanism to increase the charges at issue, they cannot be increased and must be capped at the rates in effect on the effective date of the Act. This presumption is unfounded. It is also inconsistent with the limitation on the Commission's authority quoted above. The conclusion that is consistent with the statute is one in which the monthly recurring charges for BLES are governed by R. C. § 4927.12, while the installation and reconnection fees associated with BLES are not so governed. The Commission cannot expand that authority to include BLES installation or reconnection fees. It matters not that "it would make no sense" to not have pricing parameters around those fees or charges, as the Order asserts. Order, p. 21.

The General Assembly did not impose pricing parameters around those fees and it did not give the Commission any discretion to do so. To illustrate this point, the rates for long distance service are not limited by the Act. Yet no one would argue that because there is no mechanism to increase those rates, they must, therefore, be capped at September 13, 2010 levels. As with all services for which no rate limitations are specified in the Act, the General Assembly has permitted the marketplace to set the rates. In the same vein, there are no rate limitations (other than those imposed by market forces and the general standard of reasonableness in R. C. § 4927.21) on BLES installation and reconnection fees or on late payment charges. The General Assembly clearly intended those fees to be market-based.

On rehearing, the Commission should eliminate division (J) of rule 4901:1-6-14. The standard of reasonableness required by R. C. § 4927.21 should be applied to BLES installation and reconnection fees and to late payment charges (discussed in the previous section) in the same manner as it will be applied to all other services for which no rate limitations are authorized. There is no reason - - and no statutory basis - - to single out these particular fees and charges and explicitly mandate more stringent and unauthorized pricing constraints for them.

# The Commission Erred In Imposing Telephone Directory Scoping And Content Requirements

Adopted rule 4901:1-6-15(A) requires, in part, that "[t]he telephone directory shall include all published telephone numbers in current use within the ILEC local calling area, including numbers for an emergency such as 9-1-1, the local police, the state highway patrol, the county sheriff and fire departments, the Ohio relay service, operator service, and directory assistance." Imposing these directory scoping and content requirements exceeds the Commission's authority under the Act.

As AT&T stated in its initial comments:

BLES includes "[p]rovision of a telephone directory ***in any reasonable format*** for no additional charge and a listing in that directory, with reasonable accommodations made for private listings." R. C. § 4927.01(A)(1)(b)(vi)(emphasis added). BLES also includes "[a]ccess to operator services and directory assistance." R. C. § 4927.01(A)(1)(b)(v). Nowhere does the Act specify the required geographic scope or the contents of the telephone directory, direct the availability of free directory assistance in any circumstance, or require that a printed directory be provided to any customer. And, nowhere does the Act give the Commission the authority to impose such requirements. Rather, these are matters that the Act leaves to the local exchange carriers' discretion and to the competitive marketplace. The proposed rule is a holdover from current MTSS Rule 3 (O.A. C. § 4901:1-5-03), a rule that will be rescinded under Section 3 of the Act. The proposed requirements far exceed those that the statute prescribes.

AT&T Initial Comments, pp. 16-17. The Order does not address the scoping and content issues raised. For the most part, the Order merely addresses the issue whether a directory still needs to be distributed or made available. In this regard, the Commission not only reached the incorrect result, it also failed to justify its Order, as required by R. C. § 4903.09.

On rehearing, the Commission should acknowledge that the scope of the directory and its contents (other than the required listings) are matters that are outside the Commission's authority under the Act. As is the case with the charges for BLES installation and reconnection, these are matters that the Act has left to the marketplace. The Act does not specify the required geographic scope or the contents of the telephone directory, and it does not give the Commission the authority to impose these requirements. As such, the Commission should modify O.A.C. § 4901:1-6-15(A) to require only that a LEC providing BLES make available to its customers, at no additional charge, a telephone directory in any reasonable format, including but not limited to a printed directory, an electronic directory accessible on the internet or available on a computer disc, or free directory assistance. This approach would comport with the Act and would not exceed the Commission's power under it.

# The Commission Erred In Imposing A Moratorium On CLEC Disconnection For Nonpayment While An Abandonment Application Is Pending

Division (I) of rule 4901: 1-6-26, as adopted in the Order, provides as follows:

No telephone company may discontinue services provided to a local exchange carrier (LEC) that has filed an application to abandon service prior to the commission ruling on such application to abandon service.

The Commission attempted to address, but did not resolve, an issue raised by AT&T in its initial comments. In those comments, AT&T said:

Proposed division (A)(8) appears to create a loophole through which an “abandoning” carrier could insist on the continuation of service even if it refused to pay for that service. This provision should be qualified with the addition of an introductory phrase, as follows: “Except in the case of disconnection for non-payment, no telephone company may discontinue services provided to an abandoning local exchange carrier (LEC) prior to the effective date that the LEC will abandon service.”

AT&T Initial Comments, p. 24. The revision to the Staff's proposed rule adopted by the Commission perpetuates a loophole, allowing a CLEC to stop paying for wholesale services, while continuing to receive wholesale services from the underlying ILEC, and while continuing to provide retail services to its end users and collecting revenue from them during the entire pendency of the abandonment case.

The adopted rule also creates a needless conflict with the carrier-to-carrier rules. The disconnection of carrier-to-carrier services is addressed in those rules, which provide in part as follows:

If it is determined by the commission, that further investigation is warranted or that immediate termination may not be in the public interest, the commission or an attorney examiner may direct the aggrieved LEC to stay the termination for further investigation.

O.A.C. § 4901:1-7-29(B). Therefore, the Commission already has the ability to delay disconnection, if necessary. There is no need to address this scenario in the rules to implement Sub. S. B. 162, which are, for the most part, retail rules.

The carrier-to-carrier rule quoted above also provides as follows:

This section is not intended to replace any default or dispute resolution provisions contained in an agreement between the LECs. Rather, it is an additional requirement should a default trigger the potential for termination of service(s) from the aggrieved LEC’s network.

O.A.C. § 4901:1-7-29(B). This recognizes that the requirements of interconnection agreements should be recognized and enforced, something that the rule adopted here does not do.

The adopted rule will cause undue delay when an ILEC is attempting legitimate collection action. It will also increase the potential for disputes and litigation. For example, a CLEC may have ordered collocation services or transport services with which no Ohio end users are involved. Imposing restraints upon the ILEC providing services will only result in additional financial losses for the ILEC and unfair advantage for the CLEC. The defaulting CLEC would only need to use this rule to delay disconnection without payment. The adopted rule would also create an incentive for a CLEC to file an abandonment application - - even without the intent of following through on the abandonment - - because the rule acts as a shield against possible and legitimate disconnection by the ILEC. Unfortunately, the adopted rule invites the unscrupulous to use the Commission's rules and processes to "game the system" and avoid their legal obligations.

It is also possible that completion of the abandonment proceeding could be delayed as a result of Commission action or actions taken or not taken by the defaulting CLEC. Once again, it is unfair for the serving ILEC to suffer additional financial losses due to the actions of others, especially if no end user basic service is affected.

On rehearing, the Commission should adopt AT&T's suggestion and modify the adopted rule to except from the rule situations where disconnection for non-payment is being pursued.

# The Commission Erred In Adopting A Rule Specifying Emergency Operations Requirements

Adopted rule 4901:1-6-31, in divisions (F) and (G), requires each facilities-based LEC to develop, implement, and maintain an emergency plan and to make it available for review by Commission Staff. The rule prescribes detailed requirements for such a plan and requires the plan to be amended in certain circumstances. In commenting on these aspects of the proposed rule, AT&T stated the following:

Divisions (F) and (G) of the proposed rule go beyond the Commission's statutory authority and should not be adopted. These provisions repeat provisions in MTSS rule 13 (O.A.C. § 4901:1-5-13), one of the rules slated for rescission under Section 3 of the Act. While the Act gives the Commission authority over outage reporting, consistent with federal requirements, it does not give the Commission authority to continue to dictate policies governing the telephone companies' emergency operations.

AT&T Initial Comments, pp. 24-25.

The Commission rejected these arguments and adopted the rule as proposed. The Commission erred in adopting a rule specifying emergency operations requirements for the facilities-based LECs. The Act specifies that "[e]xcept as specifically authorized in sections 4927.01 to 4927.21 of the Revised Code, the commission has no authority over the quality of service and the service rates, terms, and conditions of telecommunications service provided to end users by a telephone company." R. C. § 4927.03(D).

Because MTSS Rule 13, from which divisions (F) and (G) were adapted, is slated for rescission, because the Commission has no authority to adopt a new rule governing emergency operations, and because its rule would unnecessarily duplicate existing federal requirements, the Commission should grant rehearing and delete divisions (F) and (G) from the adopted rule.

R. C. § 4927.04(C) specifies the powers of the Commission relative to its obligations under federal law. These include, among others "[o]utage reporting consistent with federal requirements." But the adopted rule goes far beyond outage reporting and covers all aspects of emergency operations. In doing so, it adopted much of the current requirements of MTSS Rule 13 (O.A.C. § 4901-1-5-13), which is slated for rescission under Section 3 of the Act.

In its Order, the Commission tried to justify its action in two ways. First, it argued that the requirement to develop emergency plans "is necessary for the protection, welfare, and safety of the public.” Order, p. 37. Such a test does not apply in this context. The "protection, welfare, and safety of the public" test applies when the Commission attempts to exercise authority that the federal government gives it over VoIP and new services under R. C. § 4927.03(A). That test cannot be used to justify overreaching regulation of any kind in other contexts. The Commission also attempted to justify its action by a vague reference to the "Ohio Homeland Security Strategic Plan, as well as federal Homeland Security requirements." Order, p. 37. A review of the Ohio Homeland Security Strategic Plan provides no hint of justification for the adopted rule on emergency operations of the facilities-based LECs.[[3]](#footnote-3) Nor does the Commission provide any specific citation to federal homeland security law to support its exercise of authority in this area. In this regard, the Commission has also failed to justify its Order, as required by R. C. § 4903.09.

Emergency operations are governed by the FCC's rules (47 C.F.R. § 64.401 and its Appendix A, Telecommunications Service Priority [TSP] System for National Security Emergency Preparedness [NSEP]). There is simply no need for the Commission to duplicate at the state level these efforts and requirements at the federal level. AT&T Ohio has historically shared its TSP and NSEP information with the Staff and it will do so in the future.

On rehearing, the Commission should delete divisions (F) and (G) from the adopted rule.

# Conclusion

For all of the foregoing reasons, the Commission should grant rehearing and modify the adopted rules or its Order, as indicated, so it will faithfully implement the Act's provisions.

Respectfully submitted,

THE AT&T ENTITIES

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

Jon F. Kelly (Counsel of Record)

Mary Ryan Fenlon

AT&T Services, Inc.

150 E. Gay St., Rm. 4-A

Columbus, Ohio 43215

(614) 223-7928

Its Attorneys

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1. The AT&T Entities are The Ohio Bell Telephone Company d/b/a AT&T Ohio, AT&T Communications of Ohio, Inc., TCG Ohio, SBC Long Distance d/b/a AT&T Long Distance, SNET America, Inc. d/b/a AT&T Long Distance East, AT&T Corp. d/b/a AT&T Advanced Solutions, Cincinnati SMSA, L.P., and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility. [↑](#footnote-ref-1)
2. A "small business," in turn, is defined as "a nonresidential service customer with three or fewer service access lines." R. C. § 4927.01(A)(9). [↑](#footnote-ref-2)
3. The Ohio Homeland Security Strategic Plan may be viewed at http://homelandsecurity.ohio.gov, at the "resources" tab. [↑](#footnote-ref-3)