FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Chapter 4901:1-6, Ohio Administrative Code.	))	Case No. 06-1345-TP-ORD

MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

Pursuant to Ohio Adm. Code 4901-1-35(B), the Office of the Ohio Consumers' Counsel ("OCC") files this memorandum contra the applications for rehearing filed by the Ohio Cable Telecommunications Association ("OCTA"), the Ohio Telecom Association ("OTA"), and AT&T.[1] These applications for rehearing of the June 6, 2007 Opinion and Order ("O&O") of the Public Utilities Commission of Ohio ("PUCO" or "Commission"), if granted as to the portions discussed herein, would be to the detriment of the utility consumers that OCC represents.[2] The applications for rehearing should be denied.

[1] Verizon also filed an application for rehearing regarding a rule pertaining only to non-residential customers. OCC will not respond to Verizon's pleading.

[2] OCC is not responding to OCTA's allegations of error regarding pole attachments.

II. ARGUMENT

A. OCTA's allegation of error regarding certification should be rejected.

OCTA applies for rehearing from the Commission's decision to continue to require competitive local exchange carriers ("CLECs") to seek certification on an exchange-by-exchange basis.[3] The current rule, Ohio Adm. Code 4901:1-6-09(G)(2) provides that:

> The commission shall grant operating authority to all companies seeking certification as a CLEC on an exchange basis. ... Applications to amend a CLEC certificate to add additional exchanges, subsequent to certification, shall be filed as a zero-day application to amend certificate (AAC) case caption. A CLEC must include with its AAC application an affidavit signed by a company officer verifying that the CLEC has an interconnection and/or transport and termination traffic agreement with the ILEC serving the exchange area into which the CLEC intends to expand and identifying the specific case numbers in which the agreements were approved.

The rule adopted in the O&O, rule 4901:1-6-10(F), provides, in pertinent part:

> (2) The commission shall grant operating authority on an exchange basis to all companies seeking certification as a CLEC.
>
> (3) A notice to amend a CLEC certificate to add additional exchanges, subsequent to certification, shall be filed as a zero-day notice to amend certificate (AAC). A CLEC must include with its AAC notice filing an affidavit signed by an authorized employee verifying that the CLEC has an interconnection and/or transport and termination traffic agreement with the ILEC serving the exchange area into which the CLEC intends to expand and identifying the specific case numbers in which the agreements were filed.

[3] OCTA Application for Rehearing (July 6, 2007) ("OCTA Application") at 1; see also id., Memorandum in Support ("OCTA Memorandum") at 6-8.

Clearly, the rule has been minimally altered since issued in 2003.[4] The rule should not be further changed.

OCTA says that the Commission's rationale "for rejecting statewide certification is simply not true."[5] The Commission had indicated that "some CLECs may use statewide authority to avoid interconnection obligations...."[6] OCTA's reason why the Commission's decision is "unreasonable"[7] is that "statewide certification in no way absolves a competitive local exchange carrier from requesting interconnection and the attendant obligations of interconnection...."[8] That is true, but the Commission should have assurance of compliance with those requirements **before** a CLEC operates throughout the state.

OCTA similarly challenges the Commission's assertion that CLECs may "obtain telephone numbers in exchanges where they do not have certification."[9] OCTA (again correctly) notes that "the Commission has ultimate oversight over the use and distribution of numbering resources."[10] Yet again, this does not mean that the Commission must grant a statewide certificate.

The greatest problem with OCTA's argument is its complaint that not allowing statewide certification "simply adds additional costs and barriers to competitors and

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[4] See *In the Matter of the Commission Ordered Investigation of the Existing Local Exchange Competition Guidelines*, Case No. 99-998-TP-COI, and *In the Matter of the Commission Review of the Regulatory Framework for Competitive Telecommunications Services Under Chapter 4927, Revised Code*, Case No. 99-563-TP-COI (effective April 7, 2003).

[5] OCTA Memorandum at 6.

[6] Opinion and Order at 52-53.

[7] OCTA Application at 1; see R.C. 4903.10.

[8] OCTA Memorandum at 6.

[9] Id. at 6, quoting O&O at 52-53.

[10] OCTA Memorandum at 7.

deprives or forestalls Ohio consumers from having the benefits of increased competition."[11] With both the current rule and the newly-adopted rule, however, adding additional exchanges is merely a matter of making a zero-day filing that includes an affidavit identifying the dockets in which the relevant interconnection agreements were filed. This is not much of a burden.

On the whole, OCTA's arguments do not show that the Commission's decision to continue exchange-by-exchange certification is unreasonable. OCTA's application for rehearing in this regard should be denied.

B. All three of OTA's allegations of error should be rejected.

OTA's application for rehearing merely proposes changes to the rules adopted in the O&O, and does not even allege that the adopted rules are unreasonable or unlawful, as required by R.C. 4903.10.[12] This "application for rehearing" covers three topics: 1) the incorporation of other consumer protection dockets into the Retail Service Rules ("RSRs")[13]; 2) tariffs for bundled services[14]; and 3) "ambiguity" concerning electronic billing.[15] The application should be denied on all three points.

With regard to the first allegation of error, OTA "applauds" the Commission for incorporating into the RSRs "various orders formerly found in individual dockets."[16] But OTA complains that "[n]onethless, the principles and directives in question now reside

[11] Id.

[12] OTA Application for Rehearing (July 6, 2007) ("OTA Application") at 1.

[13] Id.; see also id., *Memorandum in Support* ("OTA Memorandum") at 1.

[14] OTA Application at 1; OTA Memorandum at 1-2.

[15] OTA Application at 1; OTA Memorandum at 2.

[16] OTA Memorandum at 1.

both in these rules and in the outstanding orders from which they originated."[17] Now OTA wants an order "in each of the superseded dockets to reflect that the cases are closed or are no longer effective...."[18] OTA does not explain why such an order is necessary, or, more pertinently, why the Commission's failure to issue such an order would be unjust or unreasonable.

In the first place, it does not appear that OTA raised this issue in its comments requesting that the directives in the earlier cases be incorporated into the RSRs.[19] More importantly, things are not as simple as OTA would have them.

In the O&O, the Commission described its decision in this area as follows:

> Consistent with this determination, Rule 4901:1-6-04(B) has been revised to incorporate the Commission's current requirements with respect to privacy blocking options. Specifically, adopted Rule 4901:1-6-04(B)(13) provides that:
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> > A LEC must provide free per-call blocking to all customers. Per line blocking shall be made available with no fee to nonpublished and nonlisted customers on an opt-in basis. Per-line blocking shall be made available on subscription basis to all other customers. The charge for subscription per-line blocking for these customers shall not exceed the LECs rate for nonpublished service.
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> Additionally, the Commission determines that the following language should be added as adopted Rule 4901:1-6-04(b)(14):

[17] Id.

[18] Id.

[19] See OTA Comments (January 5, 2007) at 3 ("If the Commission wishes to retain those regulations, let them be codified. If the Commission is unwilling to codify them, then let them be abandoned. The OTA urges the Commission to conform all of its regulations to the requirements of the Ohio Administrative Code.").

> Rates, terms, and conditions for intrastate carrier access, N-1-1 service, pole attachments and conduit occupancy, pay telephone services, toll presubscription, and telecommunications relay service are not affected by this rule **and shall continue to be subject to the applicable laws, rules and orders of the commission and the federal communications commission**.

Further, the Commission believes that Rule 4901:1-6-05(h) should be added to reflect the current requirements for the offering of discounts to persons with communication disabilities and telecommunications relay services. Finally, the Commission notes that adopted Rule 4901:1-6-06(B)(1)(e) is amended as follows:

> All telephone companies are subject to the commission's minimum telephone service standards (MTSS) found in Chapter 4901:1-5 of the Administrative Code. Telephone company tariffs should inform customers that they have certain rights and responsibilities under the MTSS and that these safeguards can be found in the appendix to Rule 4901:1-5-03 of the Administrative Code.[20]

Clearly, issuing an order "in each of the superseded dockets to reflect that the cases are closed or are no longer effective" is more easily said than done, especially for Rule 4901:1-6-04(b)(14). OTA's application for rehearing on this issue should be denied.

OTA's second item seeks to "harmonize" Rule 4901:1-6-05(D), which requires tariffs to contain prices only for the regulated tariffed parts of bundles, with Rule 4901:1-6-06(B)(1)(d), which requires "[a] complete list of rates, relative to the provision of each service and promotion, except where services are offered on an individual contractual basis."[21] OTA's solution is to remove the requirement that the tariff include prices for bundles that contain non-regulated services.[22] Consistent with OCC's application for

[20] O&O at 18 (emphasis added).

[21] OTA Memorandum at 2.

[22] Id. at 3.

rehearing on this rule,[23] OCC opposes OTA's proposal. If a bundle contains any regulated service, the full price for the bundle should be contained in the tariff.

OTA's third argument is that, because "customers must explicitly establish electronic billing arrangements, those customers who do so thereby consent to receive all billing information, including bill messages and bill inserts, electronically."[24] OTA therefore suggests that the customer's consent to electronic bill messages should be explicit in the rule.[25]

The problem with OTA's argument is that it assumes that customers who have consented to electronic billing have also consented to the receipt of all notices in that format. Amending OTA's proposed addition to the rule to read, "Agreement by the customer to electronic billing satisfies customer consent requirements with respect to bill messages, bill inserts, or any other information that would be provided as part of the customer's regular billing, if the customer's consent to receipt of electronic notices is explicitly stated in the customer agreement" would remove this problem.

C. Two of AT&T's allegations of error should be denied.

AT&T, for its part, attacks three areas of the RSRs. The first includes OTA's first assignment of error regarding prior PUCO orders, yet goes beyond it.[26] OCC opposes this ground, as with OTA's, and incorporates here the arguments in Section I., supra. The third objection is to the requirement that large ILECs have affiliates in order to operate as

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[23] See OCC Application for Rehearing, Memorandum in Support (July 6, 2006) at 2-4.

[24] OTA Memorandum at 2.

[25] Id.

[26] AT&T Application for Rehearing ("AT&T Application"), Memorandum in Support ("AT&T Memorandum") (July 6, 2007) at 3.

CLECs outside their traditional territory.[27] OCC also opposes this ground, for the reasons discussed below.

AT&T's second ground is slightly different. Although the application for rehearing states that "[t]he mandatory detariffing requirement in Rule 4901:1-6-05(G) for all services is unreasonable,"[28] AT&T's memorandum in support indicates that the objection is more limited. AT&T asserts that "there are two specific [interexchange carrier] IXC services that call for the continued filing of tariffs: Casual Calling and LEC-connect Traffic."[29] OCC agrees, and notes along with AT&T that the Federal Communications Commission ("FCC") has allowed those services to be tariffed on an interstate basis, despite the FCC's mandatory detariffing for other interstate long distance services.[30] If AT&T's application for rehearing in this regard is limited to asking the Commission to allow tariffing for Casual Calling and LEC-connect Traffic services, OCC agrees with AT&T. If the application for rehearing is more broadly construed, especially to allow permissive detariffing in the face of the FCC's mandatory detariffing, OCC opposes, for the reasons set forth in OCC's reply comments.[31]

With regard to AT&T's third objection, one would think from reading AT&T's memorandum that the Commission had newly concocted a policy requiring ILECs to compete outside their traditional territories using a separate affiliate.[32] As the

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[27] Id. at 5-6.

[28] AT&T Application for Rehearing at 1.

[29] AT&T Memorandum at 4. The services are described at pages 4-5 of the Memorandum.

[30] Id. at 5; see *In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket 96-61, 11 FCC Rcd 20730, 20732-20733 (1996).

[31] OCC Reply Comments (January 23, 2007) at 7.

[32] See AT&T Memorandum at 5.

Commission well knows, the policy has been in effect for more than ten years.[33] In all that time, despite the policy's alleged illegality,[34] no Ohio ILEC has challenged it in court.

It is particularly ironic for AT&T, the largest ILEC in this state and an affiliate of the largest telecommunications company in the nation, to complain about how the Commission's companion policy allowing small ILECs -- with their extremely limited resources -- to compete outside their territories without a separate affiliate, discriminates against AT&T. Surely AT&T cannot feel threatened by the "undue economic, competitive, and market advantage"[35] supposedly conferred by the policy.

And we are also supposed to believe that if the Commission changed its policy, AT&T and the other large ILECs would be vigorously competing in the territories of the small ILECs.[36] Given AT&T's track record of non-competition outside its territory, these quasi-promises need not be given any weight.[37] Indeed, AT&T is actively moving in the opposite direction. As part of the SBC/Ameritech merger AT&T (then SBC) committed to providing local exchange service in four local exchange markets in Ohio that are

[33] *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI, Entry on Rehearing (November 7, 1996) at 9-10 (footnote omitted).

[34] See AT&T Memorandum at 5.

[35] Id.

[36] Id. at 6.

[37] AT&T's citation to Am. Sub. S.B. 117, which allows statewide franchises for competing video services, should not influence the Commission. Perhaps AT&T's next project will be similar legislation on the telecom side.

outside of its territory for at least a three year period.[38] On June 29, 2007, AT&T filed a petition to abandon those markets.[39]

III. CONCLUSION

OCTA's, OTA's, and AT&T's applications for rehearing on the items discussed above should be denied.

Respectfully submitted,

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[38] *In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware, Inc., Ameritech Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control*, Case No. 98-1082-TP-AMT, Notice of Abandonment at http://dis.puc.state.oh.us/TiffToPDf/A1001001A07G02A93919H12780.pdf.

[39] *SBC Long Distance, LLC, d/b/a AT&T Long Distance – Cancellation of Certificate to Provide Local Exchange Services in Ohio and Withdrawal of SBC Long Distance, LLC, d/b/a AT&T Long Distance P.U.C.O Tariff No. 5*, Case No. 07-724-TP-ABN, http://dis.puc.state.oh.us/TiffToPDf/A1001001A07G02A93914C82461.pdf.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra the Applications for Rehearing have been served by first class United States Mail, postage prepaid, to the persons listed below, on this 16th day of July 2007.

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