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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO,

Complainant,

v.

UNITED TELEPHONE COMPANY OF
OHIO D/B/A/ EMBARQ,

Respondent.

Case No. 07-755-TP-CSS

AT&T OHIO'S MEMORANDUM CONTRA
EMBARQ'S MOTION TO DISMISS

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BEFORE

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UNITED TELEPHONE COMPANY OF)	
OHIO D/B/A/ EMBARQ,)	
)	
Respondent.)	

**AT&T OHIO'S MEMORANDUM CONTRA
EMBARQ'S MOTION TO DISMISS**

AT&T Ohio, by its undersigned attorneys, submits this Memorandum Contra Embarq's Motion to Dismiss the Complaint.

INTRODUCTION

This is a dispute between two public utilities, both of which are subject to the jurisdiction of this Commission, regarding tariff services and rates, which are regulated by the Commission. The dispute is the result of Embarq's attempt to bill AT&T Ohio retroactively for amounts higher than the previously billed tariff rates. Embarq's conduct is in conflict with numerous provisions in Chapter 4905 of the Revised Code, which is administered by this Commission. This case thus falls squarely within the regulatory authority of the Commission by virtue of its general supervisory powers over public utilities and by the nature of the disputes at issue. Accordingly, Embarq's Motion to Dismiss the Complaint for lack of jurisdiction should be denied.

Specifically, Embarq has made repeated demands upon AT&T Ohio for payment of above-tariff rates for telecommunications services regulated by the Commission that Embarq provided as a subcontractor for AT&T Ohio for the State of Ohio Multi-Agency Communications System (SOMACS) project. AT&T Ohio has resisted Embarq's demands to pay these retroactive above-tariff rates because it believes these rates and this retroactive billing practice are illegal for a number of reasons, including that they violate the clear and unambiguous language of Sections 4905.22 and 4905.26, Revised Code. As AT&T Ohio's Complaint demonstrates on its face, AT&T Ohio is seeking from the Commission, among other forms of relief, a declaration that the rates retroactively demanded by Embarq for its telecommunications services are unjust, unreasonable, and more than the charges allowed by either law or order of the Commission. Paragraphs 3 and 4 of AT&T Ohio's Complaint invoke the jurisdiction of the Commission under Title 49 of the Revised Code, in particular Sections 4905.06, 4905.22, 4905.26, and 4905.31. Paragraphs 4-20 and 32-41 then allege facts, which must be taken as true with respect to Embarq's Motion to Dismiss,¹ that state claims under Sections 4905.22, 4905.26, and 4905.31 of the Revised Code. Because each of these claims is within the jurisdiction of the Commission as a matter of law, Embarq's Motion to Dismiss must be denied.

To be sure, AT&T Ohio's Complaint does contain numerous allegations concerning the appropriate interpretations of the parties' Subcontractor Agreement (the "Subcontract") and whether Embarq has waived any claim that AT&T Ohio must pay the higher Subcontract rates for the telecommunications services that Embarq provided to the

¹ See Entry, *In re Cincinnati Gas & Electric Company v. City of Forest Park*, Case No. 05-75-EL-PWC (Ohio Pub. Utils. Comm'n July 12, 2006), at ¶7 ("When a motion to dismiss is being considered, all material allegations of the complaint must be accepted as true and construed in favor of the complaining party").

State of Ohio. But those allegations address Embarq's anticipated arguments that the above-tariff rates that it now – 8 years later – demands are somehow justified by the Subcontract and thus control, rather than the lower tariff rates that were actually billed by Embarq and paid by AT&T Ohio. While AT&T Ohio in its Complaint asks the Commission to reject Embarq's interpretation of the Subcontract as a basis for demanding more money from AT&T Ohio, AT&T Ohio's Complaint plainly asserts that Embarq's retroactive demands for the payment of above-tariff amounts by AT&T Ohio are unjust, unreasonable, and violate several public utility regulatory statutes administered by the Commission.

In a recent Entry, which Embarq's motion ignores, the Commission rejected jurisdictional arguments by The Dayton Power and Light Company ("DP&L") that are nearly identical to Embarq's contentions in this case. (See *In Re AT&T Ohio v. The Dayton Power and Light Co.*, PUCO Case No. 06-1509-EL-CSS, Entry, ¶¶5-6 (March 28, 2007) ("the DP&L case").) Specifically, the Commission concluded that Sections 4905.06, 4905.22, and 4905.26, Revised Code, give the Commission jurisdiction over a public utility's complaint that another public utility's rates under a contract between the two are unjust, unreasonable, and unlawful. (Id. at ¶¶ 5-6.) That precedent is dispositive here and, therefore, Embarq's Motion to Dismiss should be denied.

To avoid that inevitable outcome, Embarq argues alternatively that the Complaint should be dismissed by the Commission for lack of jurisdiction because the Subcontract is supposedly a "reduced rate" contract under Section 4905.34, Revised Code. This is nonsense. First, Embarq's position has been that its Subcontract with AT&T Ohio gives Embarq the right to collect higher, not lower, rates than what its tariffs would otherwise

allow. As a result, the Subcontract is not a "reduced rate" contract, but is rather an "increased rate" contract. Moreover, the Subcontract is not between Embarq and the State, as required for Section 4905.34, Revised Code, to apply; it is between Embarq and AT&T Ohio.

ARGUMENT

A. The Commission Has Jurisdiction Under Sections 4905.06, 4905.22, 4905.26, And 4905.31, Revised Code, To Prohibit A Public Utility From Charging Rates For, And Engaging In Practices Affecting Or Relating To, Its Services That Are Unjust, Unreasonable, Or Otherwise Unlawful

Both Embarq and AT&T Ohio are telephone companies and public utilities under Sections 4905.03 and 4905.02, Revised Code. As a consequence, they are subject to the Commission's regulatory and supervisory jurisdiction under Sections 4905.04 and 4905.05, Revised Code.

In addition to the Commission's general supervisory and regulatory authority over Embarq under Section 4905.06, Revised Code, the Commission oversees and enforces a multitude of specific statutory obligations for public utilities. Perhaps the most fundamental obligation is Section 4905.22's requirement that public utilities' rates be just, reasonable, and not more than what is allowed by law or the Commission's orders:

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. *All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission*, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

(Section 4905.22, Revised Code (emphasis added).)

Another fundamental obligation of all public utilities is Section 4905.26's requirement that a public utility's practices affecting or relating to any service it provides must be, in all respects, just and reasonable:

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, 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, or 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, or that any service is, or will be, inadequate or cannot be obtained and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. Such notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

(Section 4905.26, Revised Code (emphasis added).)

In addition, Section 4905.31, Revised Code, invests the Commission with authority to supervise and regulate contractual arrangements between public utilities, and makes such arrangements "subject to change, alteration, or modification by the commission." (Id.)

Section 4905.26, Revised Code, permits any person (including another public utility such as AT&T Ohio) to file a complaint with the Commission that any rate a public utility (such as Embarq) seeks to charge for its service, or that any practice affecting or relating to any service the public utility provides, is in any respect unjust, unreasonable, or otherwise unlawful. If the complaint appears to state reasonable

grounds, the Commission must hold a hearing and resolve the claims made in the complaint.

AT&T Ohio's Complaint against Embarq falls squarely within the Commission's jurisdiction under Sections 4905.06, 4905.22, 4905.26, and 4905.31, Revised Code.

Embarq billed, and AT&T Ohio paid, tariff rates for service provided by Embarq.

Embarq now claims, however, that its Subcontract with AT&T Ohio allows Embarq retroactively to collect millions of dollars more than it has already collected through its tariff rates for the services it provided to the State of Ohio Department of Administrative Services (SODAS). Embarq, after billing and collecting tariff rates, has now repeatedly demanded after the fact that AT&T pay the higher Subcontract rate.

As Counts III and IV of AT&T Ohio's Complaint allege, Embarq's attempt to disavow the parties' course of conduct and, instead, to retroactively preclude AT&T Ohio from obtaining Embarq's services at the tariff rates in order to extract millions of dollars of above-tariff charges from AT&T Ohio is an unlawful practice under Section 4905.26, Revised Code, that would result in unjust and unreasonable rates in violation of Sections 4905.22 and 4905.26, Revised Code.

AT&T Ohio also asserts in Counts I and II of its Complaint that Embarq's interpretation of the Subcontract is incorrect. AT&T Ohio alleges that Embarq's incorrect interpretation must be rejected because, among other reasons, it would result in Embarq charging rates that are unjust and unreasonable, in violation of Sections 4905.22 and 4905.26, Revised Code. Moreover, Embarq's attempt to backbill AT&T Ohio at above-tariff rates for services Embarq provided for the SOMACS project, after having established a practice over eight years of ordering, provisioning, and billing for the

services through Embarq's tariff and at the tariff rates, is unjust and unreasonable.² In Count IV of its Complaint, AT&T Ohio asserts that Embarq's backbilling demand, under the circumstances, is an unlawful practice under Section 4905.26, Revised Code; violates Section 4905.22's requirement that public utilities provide services and facilities that are adequate and in all respects just and reasonable; and violates the requirement of both Sections 4905.22 and 4905.26, Revised Code, that all charges for utility services must be just and reasonable.

Even if Embarq were correct, which it is not, that the Subcontract calls for billing at a rate higher than Embarq's tariffs, that would result in an agreement between two public utilities through which one would be charging and collecting from the other unjust and unreasonable rates, in violation of Sections 4905.22 and 4905.26, Revised Code. Accordingly, in ¶41 of its Complaint, AT&T Ohio, as an alternative means of remedying such a result, has requested that the Commission exercise its jurisdiction under Section 4905.31, Revised Code, to reform the Subcontractor Agreement, if necessary, to confirm that Embarq was, and is, allowed to charge no more than the tariff rates that it already has billed and collected.

The Ohio Supreme Court has held that issues like those raised in AT&T Ohio's Complaint – including whether rates and retroactive billing practices and demands are just and reasonable and whether violations of Title 49, Revised Code, have occurred – are within the Commission's exclusive jurisdiction under Sections 4905.22 and 4905.26, Revised Code. (See *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common*

² Regardless of Embarq's flawed interpretation of the Subcontract's pricing provisions, Embarq established, and AT&T Ohio followed, a practice of ordering, provisioning, and billing for the services that Embarq provided for SOMACS through Embarq's tariff and at the tariff rates. Nothing in the Subcontract, or Ohio law, precluded the parties from utilizing Embarq's tariff to order, provision, and bill for the services.

Pleas, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, 96 (2002) (“the commission has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service”) (citation omitted); *id.* at 97 (“[a]llegations of violations of R.C. Chapter 4905 and commission regulations are within the exclusive initial jurisdiction of the commission.”); *Milligan v Ohio Bell Tel. Co.*, 56 Ohio St.2d 191, 383 N.E.2d 575 (1978), at paragraph two of the syllabus (“A court of Common Pleas is without jurisdiction to hear a claim alleging that a utility has violated R.C. 4905.22 by charging an unjust and unreasonable rate and wrongfully terminating service, since such matters are within the exclusive jurisdiction of the Public Utilities Commission”).)

Consistent with those Ohio Supreme Court decisions, the Commission recently confirmed in the *DP&L* case, *supra*, its authority under Sections 4905.06, 4905.22, 4905.26, and 4905.31, Revised Code, to address the same types of claims that AT&T Ohio has brought in this case. *DP&L* involved a complaint by one public utility against another. The complaint contended, among other things, that the amounts the respondent attempted to charge the complainant for the joint use of poles, pursuant to the respondent’s interpretation of the parties’ joint-use pole agreement, violated Section 4905.22’s just and reasonable requirement.

In its Entry in *DP&L* denying the respondent’s motion to dismiss, the Commission rejected arguments that, because the complaint involved a contract, the Commission was without jurisdiction to hear it. The Commission’s decision regarding its jurisdiction included the following conclusions, at ¶¶5-6 of the Entry:

Both the complainant and respondent in this case are public utilities as defined in Sections 4905.02 and 4905.03, Revised Code, and are subject to

the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code. Therefore, the rates, terms, and conditions associated with the operation and maintenance of utility facilities and services, including poles, by AT&T Ohio and DP&L fall within the regulatory authority of the Commission by virtue of the Commission's general supervisory powers contained in Sections 4905.06 and 4905.22, Revised Code.

* * *

Furthermore, we would note that, pursuant to Sections 4905.31 and 4905.48, Revised Code, the Commission has jurisdiction over contracts between public utilities and all such transactions are subject to approval by the Commission.

* * *

Section 4905.26, Revised Code, requires, among other things, that the Commission set for hearing a complaint filed, "against any public utility by any person, firm, or corporation . . . , that any rate, fare, charge, toll, rental . . . , or any joint rate, fare, charge, toll, rental . . . charged, demanded, or 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" After review of the pleadings filed in this matter, the Commission finds AT&T Ohio is a proper party to bring this complaint under Section 4905.26, Revised Code. Furthermore, we conclude that AT&T Ohio has stated reasonable grounds for complaint.

In *DP&L*, the Commission was asked to determine whether the charges demanded for the joint use of poles were contrary to Section 4905.51, Revised Code. Here the Commission is being asked to determine whether the charges demanded for tariff services are contrary to Sections 4905.22 and 4905.26, Revised Code. Just as the Commission determined that it had jurisdiction to remedy the claims of unjust, unreasonable, and otherwise unlawful rates that the respondent sought to impose on the complainant in *DP&L*, it should likewise conclude that it has jurisdiction to hear AT&T Ohio's complaint against Embarq to remedy the claims of unjust, unreasonable, and otherwise unlawful rates that Embarq seeks to impose here.

B. AT&T Ohio's Complaint Does Not Raise Pure Contract Claims

Embarq mischaracterizes AT&T Ohio's Complaint as simply a request that the Commission adjudicate the parties' contractual rights and liabilities and then cites several cases stating that the Commission does not have jurisdiction to adjudicate purely contractual disputes. (Motion to Dismiss at 7-11.) Embarq's reading of the Complaint is wrong, and the cases that it cites are inapposite. More pointedly, Embarq's Motion to Dismiss ignores that the Commission in *DP&L* rejected the same jurisdictional arguments Embarq makes in this case.

The dispute here involves allegations that the rates and charges that Embarq is attempting to collect for its services, as well as its practices affecting and relating to those services, are unjust and unreasonable and violate several provisions of Chapter 4905, Revised Code. Embarq relies upon its interpretation of the parties' Subcontract to justify the rates and charges that it seeks to collect retroactively. But regardless of whether Embarq's interpretation of the Subcontract is correct, and AT&T Ohio is confident that it is not, the crux of the Complaint remains the same: the rates and charges Embarq seeks to collect and its conduct are unjust and unreasonable and violate Chapter 4905.

These are matters that the Ohio Supreme Court has held are exclusively within the Commission's jurisdiction. Indeed, in *Illuminating Co.*, the Court held that "the commission has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and services, effectively denying to all Ohio courts (except this court) any jurisdiction over such matters." (*Id.*, 776 N.E.2d at 96 (citation omitted).) In addition, the Court held, "[a]llegations of violations of R.C. Chapter 4905 and commission regulations are within the exclusive initial jurisdiction of

the commission.” (Id. at 97 (citation omitted).) Also, as the Court held in *Milligan*, “[a] Court of Common Pleas is without jurisdiction to hear a claim alleging that a utility has violated 4905.22 by charging an unjust and unreasonable rate and wrongfully terminating service, since such matters are within the exclusive jurisdiction of the Public Utilities Commission.” (Id., 383 N.E.2d at 575, at paragraph two of the syllabus.) In the *DP&L* case, *supra*, the Commission followed the applicable law. It took jurisdiction over precisely the same types of claims that AT&T Ohio’s Complaint raises in this case.

Embarq ignores the relevant law, including the Commission’s precedent in *DP&L* that is directly on-point, and instead relies on the proposition that the Commission has no power to determine contract rights. Embarq likewise ignores that both parties are public utilities, subject to Commission jurisdiction, and that the crux of the claim is a violation of Chapter 4905, Revised Code. Instead, Embarq mischaracterizes AT&T Ohio’s Complaint as asserting only contract claims. (See Motion to Dismiss at 7-11.) That argument goes nowhere. Although it is true that the Commission has no power to determine “purely contractual claims that are independent of any claim that [defendant] violated any provision of R.C. Title 49 or commission regulations” (*Illuminating Co.*, 776 N.E.2d at 99), AT&T Ohio’s claims here are *not* independent of Embarq’s violations of Chapter 4905. The Ohio Supreme Court has explained that “[a] pure contract case is one having nothing to do with the utility’s service or rates – such as perhaps a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier.” *Hull v. Columbia Gas of Ohio*, 110 Ohio St.3d 96, 102, 850 N.E. 2d 1190, 1195 (2006). Such is not the case here. The present dispute involves Embarq’s

rates and its conduct in trying to collect those rates from AT&T Ohio. It thus is not a “pure contract case” and the Commission has subject matter jurisdiction over it.

Embarq nonetheless urges the Commission to elevate form over substance and narrowly construe the allegations in AT&T Ohio’s Complaint as pure contract claims. Embarq states that “Counts I–III of AT&T’s Complaint, on their face, plainly ask the Commission to adjudicate the parties’ dispute regarding their rights under the Subcontractor Agreement.” (Motion to Dismiss at 7). It also contends that “although Count IV of AT&T’s Complaint purports to seek relief under Chapter 4905 of the Revised Code, in substance it seeks exactly the same thing as Counts I–III – a determination regarding the meaning of, and the parties’ rights under, the Subcontractor Agreement.” (Id.)

While certain of the counts in AT&T Ohio’s Complaint are couched in terms of breach of contract,³ they should not be construed as narrowly as Embarq would like. In addition, Count IV brings claims directly under Title 49 of the Revised Code which are supported by the facts alleged by AT&T. As this Commission has stated, “just because a complainant identifies a cause of action in a particular manner does not necessarily mean that such a claim is or is not within the exclusive jurisdiction of the Commission.” (Entry, *S.G. Foods., Inc. v. First Energy Corp.*, Case Nos. 04-28-EL-CSS et al., at ¶46 (Ohio Pub. Utils. Comm’n March 7, 2006).) “Rather, the Ohio Supreme Court has instructed that an analysis of the claims be undertaken to determine . . . the substance of the complaint[.]” (Id. See also *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102

³ AT&T Ohio detailed the contract provisions in order to demonstrate why Embarq’s conduct under the contract is unjust and unreasonable. The Commission should interpret the contract so it produces a just and reasonable result under Chapter 4905 of the Revised Code. To the extent necessary, the Commission should reform the contract to achieve this objective.

Ohio St.3d 349, 810 N.E.2d 953, 957 (2004) (fact that “allegations in the underlying case [] sound in tort is insufficient to confer jurisdiction upon” the court) (citation omitted); *Illuminating Co.*, 776 N.E.2d at 97 (“[W]e must review the substance of the claims rather than mere allegations that the claims sound in tort or contract In other words, ‘casting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court’ when the basic claim is one that the commission has exclusive jurisdiction to resolve.”) (quoting *Higgins v. Columbia Gas of Ohio, Inc.*, 136 Ohio App.3d 198, 202, 736 N.E.2d 92 (Ohio App. 2000)); *Ayers-Sterrett, Inc. v. American Telecommunications Systems, Inc.*, 162 Ohio App.3d 285, 833 N.E.2d 348, 351 (Ohio App. 2005) (“[T]he mere fact that the claims . . . are couched in tort or contract terms is insufficient to confer jurisdiction upon a common pleas court Instead, courts must look beyond the language used in the complaint and examine the underlying nature of the claims.”))⁴

Here, AT&T Ohio’s Complaint (at ¶ 3) alleges jurisdiction under sections 4905.05, 4905.22, 4905.26 and 4905.31, Revised Code, and sets forth facts (in ¶¶ 4 - 41) establishing Embarq’s violation of those and other sections of the Code. In addition, in each Count, AT&T Ohio incorporates by reference the jurisdictional basis set forth in ¶ 3 as well as all of the factual allegations in the paragraphs preceding the Count. AT&T Ohio articulated its Complaint in the same manner that the Commission concluded was

⁴ In *Ayers-Sterrett*, the appellate court set forth a “two-step approach to determining whether a cause of action is manifestly service-related and belongs under PUCO’s exclusive jurisdiction.” 833 N.E.2d at 351. “The first step is to determine whether PUCO’s administrative expertise is required to resolve the dispute,” and the “second step is to determine whether the act complained of constitutes a practice normally engaged in by the utility.” *Id.* Both steps are met in this case. First, the Commission’s expertise is necessary to determine whether the charges Embarq seeks to collect, and the practices in which it has engaged relating to its efforts to collect those charges, are just and reasonable under Chapter 4905, Revised Code. Second, only public utilities engage in the action complained of – charging rates for regulated utility services.

sufficient to state "reasonable grounds for complaint" in the *DP&L* case, *supra* (at ¶6 of the Entry). The Complaint here, likewise, states reasonable grounds for claims over which the Commission has jurisdiction.

Embarq ignores this controlling precedent and instead relies upon decisions that are not applicable. In *Marketing Research Services, Inc. v. Pub. Util. Comm.*, 34 Ohio St.3d 52, 517 N.E.2d 540 (1987), the Commission had dismissed a complaint by a customer against a telephone company on the grounds that the regulatory issues it raised were related to interstate services subject to the exclusive jurisdiction of the Federal Communications Commission (FCC). The Commission had also ruled that, to the extent the remaining aspects of the Complaint simply raised contractual issues, it had no jurisdiction to adjudicate such matters. The Ohio Supreme Court affirmed the Commission's decision. In the instant case, by comparison, the crux of AT&T Ohio's Complaint is that Embarq is violating several provisions of Chapter 4905 over which the Commission does have regulatory jurisdiction. The fact that Embarq's conduct involves a contract between the parties does not divest the Commission of jurisdiction over the Complaint.

In *State ex rel. Ohio Power Co. v. Harnishfeger*, 64 Ohio St.2d 9, 412 N.E.2d 395 (1980), the Ohio Supreme Court declined to issue a writ of prohibition against a Common Pleas Court judge. The electric utility argued that the judge was exercising jurisdiction over a matter involving rates that was within the exclusive jurisdiction of the Commission. The judge contended that the matter was based upon breach of contract. After reciting that courts have jurisdiction over contract claims and that the Commission

does not have authority to adjudicate controversies between parties as to contract or property rights, the Supreme Court concluded that:

It would be premature for this court to determine now that there is no state of facts that the plaintiffs might prove in the Court of Common Pleas which would exclude their case from the jurisdiction of the Public Utilities Commission and make it properly cognizable by that court.

(Id. at 11, 412 N.E.2d at 397.)

Harnishfeger supports the proposition that a customer might be able to plead a dispute with a public utility as a pure contract matter and, thus, avoid dismissal of its lawsuit in the Common Pleas Court. It does not support the proposition that because a dispute between two public utilities involves a contract, the Commission necessarily has no jurisdiction over the controversy.

Again, the Commission's recent decision in *DP&L* is applicable and compels rejection of Embarq's arguments that the Commission has no jurisdiction because the Complaint involves a contract between the parties.

C. Section 4905.34, Revised Code, Does Not Prevent the Commission From Exercising Jurisdiction Over The Complaint

With two strikes against it, Embarq lastly contends that its Subcontract with AT&T Ohio is a utility service contract that grants a reduced rate to the State of Ohio. As a result, Embarq argues, it is a contract that falls within Section 4905.34, Revised Code, and is immune from the Commission's oversight. This is strike three. Section 4905.34⁵ provides as follows:

Except as provided in sections 4905.33 and 4905.35 and Chapter 4928. of the Revised Code, Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code do not prevent any public utility or railroad

⁵ R.C. Section 4905.34 was amended by S.B. 3. The amended version, quoted above, became effective on January 1, 2001.

from granting any of its property for any public purpose, or granting reduced rates or free services of any kind to the United States, to the state or any political subdivision of the state All contracts and agreements made or entered into by such public utility or railroad for such use, reduced rates, or free service are valid and enforceable at law

Section 4905.34, Revised Code, does not insulate Embarq's illegal conduct from the Commission's oversight.

First, Embarq is trying to use the Subcontract to collect above-tariff rates. Accordingly, under Embarq's own interpretation, the agreement is not one that "grants reduced rates or free service" to anyone. Indeed, under Embarq's view of it, the agreement is the antithesis of the type of contract that falls within Section 4905.34.

Second, Embarq's Subcontract is with AT&T Ohio, not the State of Ohio. The rates that the State has paid, and the extent to which they are "reduced rates," are the direct result of the agreement between AT&T Ohio and the State, not the Subcontract.

Moreover, the Subcontract does not govern the rates for Embarq's telecommunications services for the SOMACS project. AT&T Ohio had the right, separate and independent from the Subcontract, to obtain those services through Embarq's tariff and at the tariff rates.

Accordingly, Embarq's reliance upon Section 4905.34, Revised Code, and *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 678 N.E.2d 922 (1997), is misplaced. The Subcontract is not a reduced-rate contract with the state or a political subdivision, and does not govern the rates for Embarq's services.

In any event, whether a particular agreement is a reduced-rate contract is an issue of fact and law that the Commission must resolve based on an evidentiary record. Embarq attempts to get the Commission to prejudge the issue based on the very limited

and self-serving statements in the affidavit attached to its motion. AT&T Ohio disputes the factual assertions that Embarq makes, and disagrees with Embarq's conclusion that those assertions (even if accurate) demonstrate that the Subcontract is a reduced-rate contract under Section 4905.34, Revised Code. The Commission should not prejudge any of these issues at this stage of the proceeding.

CONCLUSION

AT&T Ohio's Complaint contends that the above-tariff rates that Embarq is trying to impose on AT&T Ohio are unjust, unreasonable, and unlawful. It also contends that Embarq's efforts to backbill AT&T Ohio using above-tariff rates and to preclude AT&T Ohio from ordering, provisioning, and paying for services through Embarq's tariff are unjust, unreasonable, and unlawful practices. The Commission has jurisdiction under Sections 4905.06, 4905.22, 4905.26, and 4905.31, Revised Code, to hear AT&T Ohio's Complaint and, after a hearing, provide the relief that AT&T Ohio has requested. Embarq's Motion to Dismiss should be denied.

Dated: October 11, 2007

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on October 11th, 2007 by e-mail and hand delivery, as indicated, on the following parties:

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