

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Amendment of the)
Minimum Telephone Service Standards as) Case No. 00-1265-TP-ORD
Set Forth in Chapter 4901:1-5 of the Ohio) Case No. 05-1102-TP-ORD
Administrative Code.)

MEMORANDUM CONTRA
APPLICATION OF THE OHIO TELECOM ASSOCIATION FOR WAIVER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

On March 20, 2008, the Ohio Telecom Association ("OTA") asked the Public Utilities Commission of Ohio ("Commission" or "PUCO") to change a PUCO rule so as to allow local telephone companies to disconnect all of a customer's local telephone services even if the customer pays enough to stay connected by continuing to receive the most basic form of local service. OTA seeks for all of its member local exchange companies ("Companies") a permanent waiver of the service termination provision of the new Minimum Telephone Service Standards ("MTSS") that protects consumers by limiting how Companies can disconnect basic local exchange service ("basic service").¹

Specifically, the Companies seek to avoid the obligations of Ohio Adm. Code 4901:1-5-10(B) that, among other things, prohibits a telephone company from disconnecting the basic service of any residential or small business customer who has

¹ Application of the Ohio Telecom Association for an Order Granting Waiver of Ohio Administrative Code Section 4901:1-5-10 (March 20, 2008) ("Application").

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made a payment sufficient to cover the company's tariffed rate for basic service.² OTA asserts that the cost of compliance with Rule 10(B) is "prohibitive and unnecessary given the relatively few customers that would be impacted by the rule's disconnection changes."³ OTA asks the Commission to reinstate previous Ohio Adm. Code 4901:1-5-17(A), which allowed for disconnection of local service only "for subscriber nonpayment of charges for local services regulated by the commission,"⁴ at least until the next five-year review of the MTSS.

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential telephone customers,⁵ opposes the Application.⁶ As discussed herein, the Application would undermine the consumer protections of the MTSS by allowing OTA's member companies to disconnect a customer's entire local service – including basic service – for nonpayment of any regulated local service. In addition, the Application runs counter to the Commission's long-held view against blanket requests for MTSS waivers. The Commission should deny the Application.

Moreover, the waiver process is not a substitute for the rulemaking process that the General Assembly set forth in R.C. 111.15, a process that includes an opportunity for the Joint Committee on Agency Rule Review to consider proposed rules. What OTA

² See id. at 1. Rule 10(B) does not become effective until June 1, 2008.

³ Id. at 4.

⁴ Id. at 1.

⁵ OCC has legislative authority to represent the residential utility consumers of Ohio pursuant to Chapter 4911 of the Ohio Revised Code.

⁶ Although OTA has labeled its filing as an "application," the Commission requires telephone companies to seek MTSS waivers through a motion and supporting memorandum. Ohio Adm. Code 4901:1-5-02(B)(1). Thus, OCC submits this Memorandum Contra pursuant to Ohio Adm. Code 4901-1-12(B)(1) and 4901-1-07(B).

proposes here is an industry-wide “waiver” that would circumvent the General Assembly’s rulemaking process by essentially making a rule in the name of a waiver.

II. STANDARD OF REVIEW

MTSS waivers may be granted for “good cause shown....”⁷ The PUCO has not clearly delineated requirements for the “good cause” standard. Nevertheless, the burden of proof is on the applicant, in this case OTA.⁸

The PUCO has, however, noted the importance of maintaining the integrity of the MTSS: “The Commission has already determined that these standards are essential to providing Ohio consumers a minimal level of service, and, as a general matter, the Commission is not inclined to grant waiver requests that would have the effect of abrogating the essential minimum level of telephone service available to Ohio consumers.”⁹ Thus, in examining a waiver request the key consideration should be the waiver’s effect on “the essential minimum level of service” to the applicant’s customers.

OTA’s allegations regarding the economic burden companies face in complying with the rule are similar to requests for “unreasonable hardship” waivers allowed in previous iterations of the MTSS.¹⁰ In adopting the “unreasonable hardship” waiver, the PUCO required telephone companies to show an inability to comply with a rule:

While the Commission understands that, especially for many smaller companies, waivers of certain rules may be necessary, we would at this time warn all LECs not to abuse this provision. In

⁷ Ohio Adm. Code 4901:1-5-02(B)(1).

⁸ *In the Matter of the Application of NOW Communications, Inc. to Offer Resold Local Exchange and Intrastate Interexchange Services*, Case No. 98-1466-TP-ACE, *et al*, Opinion and Order (November 2, 2000) at 58.

⁹ *Id.*

¹⁰ See 00-1265, Entry on Rehearing (September 13, 2001) (“00-1265 Rehearing Entry”), Appendix A at Ohio Adm. Code 4901:1-5-02(D).

the final comments submitted in this docket, a few LECs threatened to file waivers for a number of the proposed standards if enacted. The Commission would caution these and all other LECs to file for waivers only in those instances where actual hardship in implementing these rules exist, and not in those situations where the company simply disagrees with a rule or does not wish to change its policies or equipment to meet the minimum standards.¹¹

A showing of “actual” hardship should be supported by documentation, rather than by mere bald assertions.¹²

In addition, the Commission has refused to exempt an entire class of local exchange carriers from the MTSS.¹³ The Commission has also recognized the need for MTSS waivers to be addressed on a case-by-case basis.¹⁴

III. ARGUMENT

OCC notes at the outset that the Commission considered and rejected a proposal similar to OTA’s in the most recent MTSS rulemaking. Embarq claimed that implementation of Rule 10(B) would be economically burdensome.¹⁵ At that time, Embarq estimated the cost of implementing the rule at \$50,000 (increased from the \$20,000 cited in its MTSS comments).¹⁶ Embarq asked the Commission to reinstate Rule

¹¹ *In the Matter of the Revision of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 83-869-TP-COI, Finding and Order (October 18, 1988) (“83-869 Order”), 1988 Ohio PUC LEXIS 978, *3.

¹² The PUCO has not included the “unreasonable hardship” standard in the current MTSS. However, the PUCO has consistently required companies seeking anything other than de minimus (e.g., delays in directory publication dates) MTSS waivers to document the alleged hardship on the company. See, e.g., Case No. 00-1265-TP-ORD, Entry (January 9, 2005) at 4-5 (discussing need for documentation of “act of God” waiver requests and that Verizon had failed to provide sufficient documentation for one exchange).

¹³ See 00-1265, Opinion and Order (May 29, 2001) at 3.

¹⁴ *Id.*

¹⁵ 05-1102, Embarq Application for Rehearing (March 9, 2007) at 3-4.

¹⁶ *Id.* at 4.

17(A),¹⁷ as OTA has done here. The Commission rejected Embargo's proposal, stating: "[T]he Commission's intention is to create a payment allocation process that would permit residential and small business customers to avoid local service disconnection by availing themselves of stand-alone BLES, where it is offered, so long as the customer pays for that service alone, including ... any taxes and government mandated fees associated with that service."¹⁸ To Commission should not revisit its rule now, especially in the form of a blanket waiver that raises concerns about compliance with R.C. 111.15.

A. The Change Proposed by OTA Does Not Adequately Protect, and Would Cause Harm to, Consumers.

The Companies, in essence, want the PUCO to change a rule to protect them. But the PUCO adopted the rule to protect Ohioans from unreasonable disconnection practices by the Companies. Ohio Adm. Code 4901:1-5-10(B) states:

Basic local exchange service (BLES), when offered to residential and small business customers as a stand-alone service not part of a service package, cannot be disconnected for the nonpayment of past due charges if a customer's payment is sufficient to cover the local exchange carrier's (LEC) tariffed rate for stand-alone BLES service and all associated taxes and government-mandated surcharges (i.e., universal service fund and 9-1-1 service charges). BLES, when offered to residential and small business customers as part of a service package of bundled regulated services and/or bundled regulated and unregulated services, cannot be disconnected for nonpayment of past due charges when the LEC also offers BLES as a stand-alone option and the customer's payment is sufficient to cover the LEC's tariffed rate for stand-alone BLES and all associated taxes and government-mandated surcharges. In cases in which payment is only sufficient to cover the tariffed rate of stand-alone BLES and all associated taxes and government-mandated surcharges, the LEC may disconnect any regulated and/or unregulated service(s) other than BLES, not covered by the customer's payment. If the LEC does not offer BLES on a stand-alone basis, then insufficient payment of the

¹⁷ Id. at 5.

¹⁸ 05-1102, Entry on Rehearing (July 11, 2007) ("05-1102 Rehearing Entry") at 43.

package price may result in disconnection of all services included in the package.

Thus, the rule prevents local exchange carriers from disconnecting a customer's local service if the customer has paid enough to cover the carrier's tariffed rate for stand-alone basic service. In such instances, the customer may lose other regulated local services, but would retain a wireline connection to the world in the form of stand-alone basic service.

Notably, only a year ago OTA supported the adoption of Rule 10(B) in the latest MTSS rulemaking.¹⁹ (OTA's waiver request does not mention its earlier support for the rule change.) In the MTSS rulemaking, OTA stated that Rule 10(B) "is consistent with current practice permitting customers to maintain their basic service" by paying the basic service amount plus associated taxes and surcharges.²⁰

Now, however, OTA has done an about-face. In place of Rule 10(B), OTA recommends that the Commission reinstate previous Ohio Adm. Code 4901:1-5-17(A). Unlike Rule 10(B), however, former Rule 17(A) said nothing about the allocation of partial payments. Former Rule 17(A) offered only a general statement regarding disconnection of local service:

Local service may only be disconnected for subscriber nonpayment of charges for local services regulated by the commission. For purposes of this rule, local service is defined as every regulated service provided by the local service provider other than toll service and 900 and 976-like services.²¹

The allocation of partial payments was addressed in former Rule 17(C):

¹⁹ 05-1102, OTA Application for Rehearing (March 9, 2007) at 12-13.

²⁰ Id. at 12. Embarras concurred with OTA's stance as an alternative position. Embarras Application for Rehearing at 4. AT&T was the only other ILEC to apply for rehearing on Rule 10(B). AT&T, however, argued only that the rule was not competitively neutral, since it does not apply to non-ILECs unless they tariff a stand-alone basic service. 05-1102, AT&T Application for Rehearing (March 9, 2007) at 29-30.

²¹ See 00-1265 Rehearing Entry, Appendix A at Ohio Adm. Code 4901:1-5-17(A).

Partial payments applied towards any past due amount on a bill or the balance due on a disconnection notice must be apportioned to past due regulated local service charges, then to any current local charges, before being applied by a telecommunications provider to any toll or nonregulated charges unless the subscriber pays the entire amount due or more. In that case any amount paid over the amount past due shall be applied first to current local charges.²²

The partial payments provision helped to further the Commission's goal of ensuring that consumers at least would be able to maintain basic service.

Without former Rule 17(C), the language of former Rule 17(A) would allow ILECs to disconnect a customer from **all** local service for nonpayment of **any** local service amount. This is unfair to customers and places them and their families at risk where they are without local service. In addition, the Companies – and not the consumers paying the bills – would have complete discretion as to how and where to apply consumers' partial payments.

Replacing Rule 10(B) with former Rule 17(A) alone, as OTA recommends, would harm consumers by taking away an essential protection from disconnection of their local service. The Commission has clearly stated that the intention of Rule 10(B) is to “create a payment allocation process that would permit residential and small business customers to avoid local service disconnection....”²³ Following OTA's recommendation would contravene the public interest.

B. The Commission Should Deny a Blanket Waiver of the MTSS to Such a Diverse Group of ILECs.

To support the grant of a blanket waiver of any MTSS provision for several ILECs, the ILECs should be required to demonstrate that they are similarly situated, i.e.,

²² See *id.*, Appendix A at Ohio Adm. Code 4901:1-5-17(C).

²³ 05-1102 Rehearing Entry at 43.

that the cost of compliance would be equally or nearly equally burdensome for each company. This would likely be difficult for OTA's member companies, given the wide disparity in their size and financial situations.

First, there is the size of each company. OTA's member companies include five ILECs – AT&T Ohio, Verizon, Embarq, Windstream and CenturyTel – that are subsidiaries of large national corporations. Cincinnati Bell, although a more localized company, nevertheless is much larger than most of the small local exchange carriers (“SLECs”). There is even size disparity among the SLECs. Five are subsidiaries of TDS Telecom,²⁴ which owns telephone companies in numerous states. Frontier, Germantown and Telephone Service Company also are owned by multi-state companies. The rest are locally owned. The larger companies would likely be able to absorb the costs of implementation better than the smaller companies.

Second, as the Attachment to this Memorandum shows, there is a wide disparity in the returns on equity of the Companies, as shown by their annual reports to the PUCO. For example, for 2006 the returns on equity ranged from 74.58% for Cincinnati Bell to a negative 10.10% for Sycamore Telephone Company. The Companies' returns on equity over the last five years also varied widely. Companies with higher returns on equity would likely be able to absorb the costs of implementation better than other companies.

Third, as OTA notes, “most OTA member companies use different billing systems....”²⁵ Thus, not all of the companies require the same alterations to their billing systems, which would result in costs that vary by company.

²⁴ Arcadia, Continental, Little Miami, Oakwood and Vanlue.

²⁵ Application at 4, n. 1.

Because the Companies are not similarly situated, a blanket MTSS waiver is not appropriate. The Commission should deny the Application.

C. OTA Has Not Submitted Documentation Sufficient to Support a Waiver of Rule 10(B) for Any ILEC.

One major theme in the Application is that the cost of implementing Rule 10(B) would be prohibitive for the Companies. OTA, however, does not provide specifics as to the financial impact on any specific company. OTA instead uses generalities, stating that “most companies” would have to change a number of systems in order to separate optional features and services from the private line for disconnection purposes.²⁶

OTA does provide some estimates for altering billing systems to meet Rule 10(B), stating: “[O]ne member organization received a quote of approximately \$600,000 from its vendor; another received an initial estimate of more than \$300,000; another is estimated at more than \$1,000,000.”²⁷ OTA, however, does not identify the companies that received these estimates, nor is there detail provided regarding the estimates for the allegations to be tested. Thus, the Commission and the parties cannot ascertain from OTA’s bald assertions whether the cost of implementation is “prohibitive” on any particular company.²⁸ Further, as discussed supra, the Commission already rejected, during the rulemaking, the arguments of Embarq regarding the cost of implementation.

OTA has not provided documentation sufficient for the Commission to grant a waiver of Rule 10(B) even to any one company, let alone all ILECs in Ohio. The Application should be denied.

²⁶ Id. at 3 (emphasis added). This also lends support to the previous point that the companies are not similarly situated.

²⁷ Id. at 4, n. 1.

²⁸ Id. at 4.

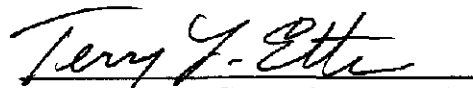
IV. CONCLUSION

OTA claims that the cost of implementing Rule 10(B) is “prohibitive and unnecessary given the relatively few number of customers” that would be affected by the waiver request.²⁹ But the Commission made its decision to protect consumers from inappropriate disconnections of local telephone service after considering Embarks’ arguments about cost and with most telephone companies’ supporting the rule they now seek to waive. In a recent AT&T Ohio waiver request regarding changes to its billing system, the Commission recognized that “few residential customers would be impacted” by the change, and allowed AT&T Ohio only a short extension of time – rather than the open-ended extension that AT&T Ohio had requested – in order to make the changes that AT&T Ohio asserted were necessary.³⁰

As discussed herein, OTA has not carried its burden of showing that a waiver of Rule 10(B) is necessary for even one ILEC, let alone all ILECs in Ohio. The Commission should deny the Application.

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²⁹ Id.

³⁰ 05-1102, Entry (December 5, 2007) at 4.

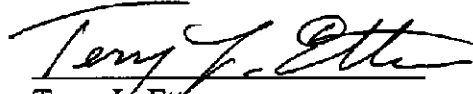
2006 RETURN ON EQUITY

Company:	Earned Return
Cincinnati Bell Telephone	74.58%
Orwell Telephone Company	46.72%
United Telephone of Ohio	41.55%
McClure Telephone	33.87%
Centurytel Telephone	28.27%
Oakwood Telephone Company	25.41%
Little Miami Communications	22.23%
Western Reserve Telephone	21.62%
Chillicothe Telephone	17.18%
Verizon North Incorporated ¹	16.40%
Wabash Mutual Telephone	15.46%
Alltel Ohio	14.25%
Ottoville Mutual Telephone	13.60%
Continental Telephone	12.95%
Arthur Mutual Telephone	12.91%
Ohio Bell Telephone	12.15%
New Knoxville Telephone	11.67%
Ayersville Telephone Company	11.41%
Telephone Service Company	10.42%
Farmers Mutual Telephone	10.41%
Vanlue Telephone	10.04%
Arcadia Telephone	9.80%
Kalida Telephone	9.40%
Sherwood Mutual Telephone	8.87%
Champaign Telephone	7.42%
Glandorf Telephone Company	7.30%
Conneaut Telephone	6.92%
Bascom Mutual Telephone	6.77%
Pattersonville Telephone	6.57%
Middle Point Home Telephone	6.13%
Columbus Grove Telephone	5.64%
Minford Telephone	5.38%
Frontier Communications of Mich.	5.32%
Vaughnsville Telephone	4.65%
Benton Ridge Telephone	4.41%
Doylestown Telephone Company	4.06%
Nova Telephone	2.67%
Fort Jennings Telephone Company	2.59%
Buckland Telephone Company	0.43%
Ridgeville Telephone	0.24%
Germantown Independent	-8.29%
Sycamore Telephone	-10.10%

¹ Verizon North Common Equity not available as of Oct. 12, 2007. Assumed beginning and ending common equity balance same as 2005 ending common equity balance.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Application of the Ohio Telecom Association for Waiver by the Office of the Ohio Consumers' Counsel was served by first class United States Mail, postage prepaid, to the persons on the attached list, on this 7th day of April 2008.


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