

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
Ohio Bell Telephone Company d/b/a)	Case No. 08-107-TP-BLS
AT&T Ohio for Approval of an Alternative)	Case No. 08-594-TP-BLS
Form of Regulation of Basic Local)	
Exchange and Other Tier 1 Services)	
Pursuant to Chapter 4901:1-4, Ohio)	
Administrative Code.)	

**MOTION TO DISMISS THE APPLICATIONS, IN PART, AS THEY PERTAIN
TO THE PITCHIN EXCHANGE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), an intervenor on behalf of residential utility customers in these proceedings where AT&T Ohio seeks authority to increase certain rates,¹ moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to dismiss the above-referenced applications, in part, as they pertain to the Pitchin exchange.² Despite having a pending application for basic service alternative regulation ("alt. reg.") involving the Pitchin exchange in Case No. 08-107-TP-BLS ("08-107"), the applicant in these proceedings, AT&T Ohio, included additional information regarding the Pitchin exchange in the company's application in Case No. 08-594-TP-BLS ("08-594"). By so doing, AT&T Ohio improperly supplemented its application in 08-107, and the Commission should dismiss the 08-107 application as it applies to the Pitchin exchange.

¹ OCC's motion to intervene in the 08-107 proceeding was granted by Entry dated February 27, 2008. OCC filed a motion to intervene in the 08-594 proceeding on June 11, 2008.

² OCC files this Motion pursuant to Ohio Adm. Code 4901-1-12.

In addition, by submitting a second set of information regarding the Pitchin exchange, AT&T Ohio has needlessly caused duplicative work for the Commission and its staff. Allowing AT&T Ohio to manipulate the Commission's basic service alt. reg. process in such a manner would be bad public policy and would set an injudicious precedent for future basic service alt. reg. proceedings. The PUCO should send a clear message to AT&T Ohio and future applicants that such duplicate applications are not appropriate, by also dismissing the Pitchin exchange in 08-594.

The Commission should dismiss both applications as they apply to the Pitchin exchange. There is good cause for the granting OCC's motion, as explained in the following memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On February 8, 2008, AT&T Ohio filed its fourth application for basic service alt. reg., in 08-107. In that proceeding, AT&T is seeking basic service alt. reg. in eight exchanges, including the Pitchin exchange, under Ohio Adm. Code 4901:1-4-10(C)(4) (“Test 4”), which would allow AT&T Ohio to increase monthly rates up to \$1.25 per year for basic service and up to \$0.50 for Caller ID. The Commission suspended the application on June 3, 2008,³ thus preventing automatic approval of the 08-107 application under PUCO rules.⁴ In suspending the application, the Commission stated that “[i]n light of fact that AT&T Ohio had 2 BLES applications recently pending before the Commission, both requiring significant Commission review, this matter shall be

³ 08-107, Entry (June 3, 2008).

⁴ Under Ohio Adm. Code 4901:1-4-09(G), an application for basic service alt. reg. “shall be approved automatically and become effective on the one hundred twenty-first day after the initial filing, unless suspended by the commission, the legal director, or an attorney examiner.” Thus, under this rule, the 08-107 application would have been automatically approved on June 7, 2008 absent PUCO action. The rule also provides that, once an application is suspended, the Commission “will render a decision on the application within two hundred seventy days of filing.”

suspended consistent with Rule 4901:1-4-09(G), O.A.C., in order to provide the Commission with additional time to consider this request.”⁵

On June 6, 2008, three days after the Commission suspended the 08-107 application, AT&T Ohio filed its fifth application for basic service alt. reg., in 08-594. This latest application seeks basic service alt. reg. for five exchanges, including the Pitchin exchange, which is under consideration in the pending 08-107 proceeding.⁶ As in the 08-107 proceeding, AT&T Ohio is seeking basic service alt. reg. for the Pitchin exchange under Test 4 in the 08-594 application. AT&T Ohio states that the Pitchin exchange is included in the 08-594 application “out of abundance of caution and due to more recent data becoming available” regarding the exchange.⁷

By including the Pitchin exchange in the 08-594 application during the pendency of the 08-107 application, which also included the Pitchin exchange, AT&T Ohio has improperly supplemented its 08-107 application as it pertains to the Pitchin exchange. AT&T Ohio’s manipulation of the Commission’s basic service alt. reg. process should not be tolerated. The Commission should dismiss both the 08-107 and the 08-594 applications as they apply to the Pitchin exchange.⁸

⁵ Id.

⁶ The other exchanges are one exchange (Tremont City) for which AT&T Ohio has never sought basic service alt. reg. and three exchanges (Mantua, Olmsted Falls and Philo) for which AT&T Ohio was denied basic service alt. reg. in the 07-1312 proceeding. *In the Matter of the Application of AT&T Ohio For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier I Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code*, Case No. 07-1312-TP-BLS (“07-1312”), Opinion and Order (May 14, 2008) (“07-1312 Order”).

⁷ 08-594 Application, Memorandum in Support (“08-594 Memorandum”) at 4.

⁸ By submitting this motion to dismiss in 08-594, OCC does not relinquish its right under Ohio Adm. Code 4901:1-4-09(F) to file a written statement regarding the application or any portion thereof.

II. STANDARD OF REVIEW

The Commission's procedural rules contain no specific standard for granting a motion to dismiss. Ohio Adm. Code 4901:1-4-09(F), however, establishes a "good cause" standard for submitting a written statement as to why a basic service alt. reg. application should not be granted. OCC's motion to dismiss, limited to the unique circumstances of the 08-107 and 08-594 applications regarding the Pitchin exchange, should also be reviewed under a "good cause" standard.

III. ARGUMENT

This is a case of first impression for the Commission, but it is also a case where the PUCO's precedent, applied to these circumstances, precludes the approach of AT&T Ohio. For the first time in the seven basic service alt. reg. cases that have been filed, an applicant has included in an application an exchange that the Commission is considering in another pending application. The Commission's rules neither allow nor specifically prohibit this situation.

Nevertheless, there are strong precedential and public policy reasons for prohibiting a basic service alt. reg. applicant from "hedging its bets" by having multiple applications for the same exchange(s), using the same competitive test(s), at the same time. Such simultaneous applications result in duplicative and inefficient use of Commission resources. They also raise the issue of whether the unscrutinized and unverified data submitted in a later application could influence the Commission's decision regarding an earlier, pending application.

A. By Submitting New Information Concerning the Pitchin Exchange in the 08-594 Application, AT&T Ohio Has Improperly Supplemented Its Showing Regarding the Pitchin Exchange in the 08-107 Application, Which Is Pending Before the Commission.

By including “more recent data” regarding the Pitchin exchange in the 08-594 application,⁹ AT&T Ohio has put before the Commission information that supplements AT&T Ohio’s showing for the Pitchin exchange in the 08-107 application. The Commission thus now has before it new information that AT&T Ohio claims to be true regarding AT&T Ohio’s loss of access lines since 2002¹⁰ and the number of alternative providers allegedly serving the residential market in the Pitchin exchange.¹¹ This information amounts to a material modification of the 08-107 application. In addition, the information has not yet received the scrutiny necessary to measure its validity.

Although the Commission’s basic service alt. reg. rules do not address the supplementing of basic service alt. reg. applications, the PUCO, in the basic service alt. reg. rulemaking, recognized that an application could be supplemented “to rectify any deficiencies” in the application.¹² Apparently, the “deficiency” AT&T Ohio sees in the 08-107 application is that the Pitchin exchange will not be approved for basic service alt. reg. based on the record in the 08-107 proceeding. But AT&T Ohio did not attempt to modify its earlier application; it instead filed a new application for the Pitchin exchange.

⁹ 08-594 Memorandum at 2.

¹⁰ AT&T Ohio bases the new line loss estimate on data that the Company compiled as of March 31, 2008. Id. at 4.

¹¹ A review of the Pitchin exchange summary sheets in the two applications shows that instead of the eight alternative providers named in the 08-107 application, AT&T Ohio names only five alternative providers in the 08-594 application, including one that was not named in the 08-107 application.

¹² *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Case No. 05-1305-TP-ORD, Entry on Rehearing (May 3, 2006) (“05-1305 Rehearing Entry”) at 4.

In the rulemaking, the Commission's discussion of supplementing applications addressed only those situations where the new information is brought to the Commission's attention **before** the automatic approval timeframe is tolled.¹³ The Commission viewed the risk to the applicant in supplementing an application solely in terms of suspending the automatic approval of the application:

[W]e do believe that, depending upon the significance of the additional material, the Commission may find it necessary, pursuant to Rule 4901:1-4-09(J), O.A.C., to change the time frames associated with approval of the application, including the 45-day deadline for objections to an application. Of course, the Commission may, at any time, suspend an application as set forth in Rule 4901:1-4-09(G), O.A.C., including allowing for review of supplemental information if the Commission deems it appropriate due to a material change in the substance of the application.¹⁴

But the PUCO has already suspended the 08-107 application. Thus, suspension of that application is not a risk that AT&T Ohio faces in submitting new information regarding the Pitchin exchange. By including the Pitchin exchange – with new information regarding the Test 4 criteria – in the 08-594 application, AT&T Ohio apparently believes that it has everything to gain and nothing to lose. The new information before the Commission in the 08-594 application could at least give the Commission the perception that the Pitchin exchange could pass Test 4 – even though the information has not received the proper scrutiny required by the basic service alt. reg. rules. Allowing AT&T Ohio to make its request simultaneously in two cases is not fair.

¹³ The Commission's basic alt. reg. rules provide that "[t]he commission, legal director, or attorney examiner may modify the time frames stated herein based upon a material modification filed subsequent to the initial application." Ohio Adm. Code 4901:1-4-09(J).

¹⁴ 05-1305 Rehearing Entry at 5.

In order to restore fairness to the process, the Commission should remove the Pitchin exchange from consideration in the 08-107 application. If AT&T Ohio believed that the Pitchin exchange would not pass Test 4 in the 08-107 proceeding, the Company should have withdrawn the exchange from that proceeding before submitting the exchange in the 08-594 application. AT&T Ohio did not, however. Thus, the Commission should dismiss the 08-107 application as it pertains to the Pitchin exchange.

B. The Commission Should Also Dismiss the 08-594 Application as It Pertains to the Pitchin Exchange, and Should Prohibit Future Basic Service Alternative Regulation Applicants from Submitting Applications that Include Exchanges the Commission Is Already Considering in a Pending Basic Service Alternative Regulation Docket.

AT&T Ohio states that the Pitchin exchange is included in the 08-594 application “out of an abundance of caution....”¹⁵ In other words, AT&T Ohio does not believe that it will receive basic service alt. reg. for the Pitchin exchange in the 08-107 proceeding.¹⁶

If AT&T Ohio is concerned that the Pitchin exchange will be rejected in the 08-107 case, an appropriate course of action would be for AT&T Ohio to withdraw the Pitchin exchange from that application. Another appropriate action would be to wait for the PUCO to issue a decision in the 08-107 case before including the exchange in another application. Instead, AT&T Ohio resubmitted the exchange, once again under Test 4 and with new data, in the 08-594 application while the Commission is considering the 08-107 application.

¹⁵ 08-594 Memorandum at 2.

¹⁶ That belief may be based on the Commission’s recent 07-1312 order, where the Commission rejected some wireless companies as alternative providers for some exchanges because the wireless companies did not port numbers in those exchanges. 07-1312 Order at 24. In the 08-594 application, AT&T Ohio stated that it “reserves the right to challenge the Commission’s approach in counting wireless carriers.” 08-594 Memorandum at 2. AT&T Ohio, however, did not seek rehearing of the 07-1312 Order. It is also noteworthy that AT&T Ohio has not included any wireless carriers among the alternative providers named in the Pitchin exchange summary sheet in the 08-594 application.

Due to AT&T Ohio's actions, the Commission's staff will likely have to duplicate its efforts in analyzing the Pitchin exchange for basic service alt. reg. purposes. The PUCO staff now has a second set of data for the Pitchin exchange – including an alleged alternative provider that was not included in the 08-107 application – to examine, verify and analyze.

The question now becomes, under which data – the 08-107 data or the 08-594 data – should the Commission examine the Pitchin exchange for basic service alt. reg.? The answer cannot be “both”; given that AT&T Ohio is manipulating the Commission's basic service alt. reg. process, the correct answer should be “neither.”

The Commission should not tolerate basic service alt. reg. applicants' “hedging their bets” by filing an application that includes any exchange already being considered by the PUCO in another, pending basic service alt. reg. case. Such applications are an abuse of the Commission's basic service alt. reg. process, and a waste of Commission resources. And such duplicative applications create an appearance of impropriety by inappropriately placing before the Commission information that has a bearing on a pending application.

The Commission should send a clear message that basic service alt. reg. applications that include any exchange being considered in a pending application will not be allowed. In addition to dismissing the 08-107 application as it pertains to the Pitchin exchange, the Commission should also dismiss the 08-594 application as it pertains to the Pitchin exchange. The Commission should also state that it will not accept any future basic service alt. reg. applications that include any exchange being considered in a pending application.

IV. CONCLUSION

As discussed herein, it was improper for AT&T Ohio to seek basic service alt. reg. for the Pitchin exchange in the 08-594 application while the Commission is considering whether to grant AT&T Ohio basic service alt. reg. for the exchange in the pending 08-107 docket. The Commission should grant OCC's motion and dismiss both applications as they pertain to the Pitchin exchange. The Commission should also state that it will not accept future basic service alt. reg. applications that include exchanges being considered in pending basic service alt. reg. cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss the Applications, in Part, as They Apply to the Pitchin Exchange by the Office of the Ohio Consumers' Counsel was served by electronic mail to the persons listed below, on this 18th day of June 2008.

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Summary: Motion Motion to Dismiss the Applications, In Part, as They Pertain to the Pitchin Exchange by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Etter, Terry L Mr.