BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

tw telecom of ohio llc,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 08-1215-TP-CSS
	)	
AT&T Ohio,	)	
	)	
Respondent.	)	

BRIEF OF tw telecom of ohio, llc

I. INTRODUCTION

This case comes before the Public Utilities Commission of Ohio's ("Commission" or "PUCO") because Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T") has violated its statutory, regulatory, and contractual duties by refusing to enter into good faith negotiations to amend its interconnection agreement with tw telecom of ohio llc ("TWTC") in order to reflect the Public Utilities Commission of Ohio's ("Commission" or "PUCO") carrier-to-carrier rules revised in Case No. 06-1344-TP-ORD as they relate to transit traffic compensation. TWTC requests that the Commission direct AT&T to promptly negotiate in good faith with TWTC and amend the agreement to conform to the Commissions rules, along with any other relief that the Commission deems necessary and appropriate.

II. STATEMENT OF FACTS

A. Essential Nature of the Transiting Function.

As defined in Ohio Administrative Code ("OAC") Rule 4901:1-7-13(A), transit traffic originates on one telephone company's network, terminates on a second telephone company's

network, and is transmitted using an intermediate third telephone company's network facilities. Because of the ubiquitous reach of AT&T's legacy monopoly telecommunications network and the fact that the vast bulk of local exchange traffic either originates or terminates on its network, virtually all local exchange carriers providing services in the AT&T service territories must directly interconnect with AT&T. Because a certain volume of traffic exchange is necessary in order to make direct interconnection between carriers economically practicable, CLECs that lack the size and geographic ubiquity of the ILEC cannot economically justify direct interconnection with every other CLEC or small ILEC. This distinction between ILECs and CLECs makes AT&T's provision of the transiting function essential for carriers interconnected with AT&T's network to reach those third-party carriers in instances where alternative routing of telecommunications traffic is not economically justifiable. Without access to ILEC-provided transit service, CLECs would not be able to provide their customers with reliable local exchange telecommunications services.

The Commission's Carrier to Carrier rules are based upon this reality and make the transiting function, along with the appropriate requirements for cost-based pricing, an explicit responsibility of ILECs that operate tandem switches in Ohio,. However, in order for CLECs to obtain the protection of the Commission's rules, ILECs must be willing to deal in good faith with CLECs where those CLECs have invoked the clear and unambiguous terms and conditions of their interconnection agreements.

B. The TWTC-AT&T Interconnection Agreement.

AT&T provides network interconnection, along with certain wholesale telecommunications services, to TWTC pursuant to the terms of an interconnection agreement ("Interconnection Agreement") entered into under Sections 251 and 252 of the

Telecommunications Act of 1996 (hereinafter "TA-96"),[1] and approved by the Commission on July 17, 2002 in Case No. 02-911-TP-NAG.[2] The section of the Interconnection Agreement directly relevant to this matter is Section 21.1 (the "Change of Law Provision"). This section states as follows:

> In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in this Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent jurisdiction *** the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party.

Under federal law, 47 U.S.C. §252(e), the Commission retains jurisdiction over the enforcement of the terms and conditions of the Interconnection Agreement.[3]

C. TWTC properly invoked the Change of Law Provision by complying with the dispute resolution processes set forth in Section 10 of the Interconnection Agreement.

As part of Case No. 06-1344-TP-ORD, the Commission adopted new "carrier-to-carrier" rules having an effective date of November 30, 2007. Both TWTC and AT&T were active parties in Case No. 06-1344-TP-ORD. As adopted by the Commission in Case No. 06-1344-TP-ORD, new Rule 4901:1-7-13(D) reads:

> The intermediate telephone company(ies) must be compensated at the intermediate telephone company's total element long run incremental cost

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 et seq.). When the Interconnection Agreement was executed and later became effective, AT&T operated under the name Ameritech Ohio, and TWTC operated in Ohio under the name Time Warner Telecom of Ohio, L.P. Effective July 1, 2008, Time Warner Telecom of Ohio underwent a formal name change to tw telecom of ohio llc, and is referred to herein as "TWTC."

[2] See Joint Exhibit 1 (excerpts from April 17, 2002 filing of the TWTC interconnection agreement, including general terms and conditions portion of the interconnection agreement).

[3] 47 U.S.C. §252(e); see, also, *Ohio Bell Tel. Co. v. Global Naps Ohio, Inc.* (S.D. Ohio 2008), 540 F. Supp.2d 914, 920 (holding that the "interpretation of the [TA-96] as a whole, and of § 252(e)(6), that is most consistent with Congress's broad grant of responsibility to state commissions, is one which requires litigants like Ohio Bell to first raise their breach-of-ICA claims before the state commissions").

> (TELRIC) based transit traffic compensation rates. Until such time as the commission approves telephone company-specific TELRIC-based transit traffic compensation rates, an intermediate telephone company should be compensated, on an interim basis, at its tariffed switched access rates subject to a true up of these rates.

Based upon this newly-enacted rule, TWTC exercised it rights under the Change of Law Provision as reflected in the Interconnection Agreement. On April 8, 2008, and as required by the Change of Law Provision, counsel for TWTC sent a formal written request to AT&T seeking an amendment to the Interconnection Agreement.[4] After receiving no response from AT&T, Pamela Sherwood, TWTC's Regional Vice President – Regulatory, sent a letter dated July 10, 2008 again invoking the Change of Law Provision.[5] In a responsive letter dated July 29, 2008, AT&T refused to amend the Interconnection Agreement, stating:

> In the Public Utilities Commission of Ohio (PUCO) order dated August 22, 2007 in Case No. 06-1344-TP-ORD Rule 4901:1-7-13 (E) states that, "This section shall not be construed to preclude telephone companies from negotiating other transit traffic interconnection and compensation arrangements.," [sic] The existing Transit Rates, as reflected in the negotiated interconnection agreement effective April 17, 2002 and extended to December 15, 2009 at the request of Time Warner Telecom pursuant to the BellSouth Merger Condition 4, meet the requirements in Rule 4901:1-7-13 (E), therefore an amendment based on change of law or Rule 4901:1-7-13(D) is unnecessary.[6]

On August 15, 2008, the parties participated in a conference call to work through the dispute regarding the new transit rules. As a follow-up to that conference call, TWTC and AT&T exchanged e-mail correspondence in which AT&T again refused to amend the Interconnection Agreement on the grounds that TWTC had "waived" its ability to request an amendment under the Change of Law Provision. AT&T's basis was that TWTC should have incorporated the "change in law," i.e. new rule 4901:1-7-13(D), as part of its Seventeenth

[4] See Joint Exhibit 2 (April 8, 2008 letter from Thomas J. O'Brien to G. James Soto).

[5] See Joint Exhibit 7 (July 10, 2008 letter from Pamela H. Sherwood to G. James Soto).

[6] See Joint Exhibit 3 (July 29, 2008 letter from G. James Soto to Pamela H. Sherwood).

Amendment to the Interconnection Agreement, executed on November 28, 2007 and filed with the Commission on January 15, 2008 in Case No. 08-0041-TP-NAG.[7]

In an e-mail dated August 22, 2008, TWTC explained that, on February 29, 2008, AT&T already had availed itself of the Change of Law Provision on a similar matter – namely to incorporate the holding from the PUCO's Entry, dated June 7, 2007, in Case No. 06-1345-TP-ORD (the retail deregulation case) regarding rates, terms and conditions of resale. It is notable that even though the Commission's Entry in that case was entered well before the filing of the Seventeenth Amendment, AT&T did not invoke the Change of Law Provision until early 2008. The August 22 e-mail also noted that, as part of the Seventeenth Amendment to the Interconnection Agreement, both parties reserved their rights regarding any future change of law.[8] In particular, the e-mail referenced Paragraph 4 of the Seventeenth Amendment to the Interconnection Agreement, which stated:

> In entering into this Amendment, neither Party waives, and each Party expressly reserves, any rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Agreement) with respect to any orders, decisions, legislation or proceedings and any remands thereof, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further review. (Emphasis added).[9]

Thus it is clear that at all relevant times, the Interconnection Agreement between AT&T and TWTC contemplated the possibility of either party invoking the change of law provisions in order to incorporate modifications based upon the current state of the law. By participating in

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[7] See Joint Exhibit 4 (copy of the Seventeenth Amendment to the Interconnection Agreement). The Seventeenth Amendment served the purpose of extending the duration of the Interconnection Agreement through December 15, 2009.

[8] Joint Exhibit 5 (copy of the August 22, 2008 e-mail).

[9] Furthermore, AT&T's contention that TWTC somehow "waived" the right to request a change of law amendment is specifically contradicted by the very language giving TWTC this right in its interconnection agreement with AT&T.

good faith negotiations regarding the proposed amendment to the Interconnection Agreement, TWTC has complied with the dispute resolution processes set forth in Section 10 of the Interconnection Agreement – a prerequisite to the filing of this action.

III. LAW AND ARGUMENT

A. Interpretation of the Clear and Unambiguous Interconnection Agreement is a Matter of Law.

The Ohio Supreme Court long ago expounded on this proposition, holding that "where the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties."[10] Therefore, when a contract is clear and unambiguous, Ohio law consistently assumes that the contract reflects the parties' intent,[11] and that the courts shall not attempt to reform the contract. In essence, the contract speaks for itself. Because the Change of Law Provision is clear and unambiguous, "its interpretation is a matter of law and there is no issue of fact to be determined."[12]

B. AT&T's Refusal to Amend the Terms of the Interconnection Agreement is in Contravention of the Clear and Unambiguous Language in the Change of Law Provision.

As identified above, the Change of Law Provision in Section 21.1 of the Interconnection Agreement states:

> In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in this Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative

[10] *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, 246.

[11] The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, syllabus.

[12] *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 66. When a contract is unambiguous, courts will not give the contract a construction other than what the plain language of the contract provides; it is of no matter that it may work a hardship upon one of the parties. *Aultman Hospital Assoc. v. Hospital Care Corp.* (1989), 46 Ohio St.3d 51, 55.

> bodies or courts of competent jurisdiction *** the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party.

This provision essentially requires that three prerequisites be satisfied before a "change in law" can serve as the basis for an amendment to the Interconnection Agreement:

1. A law or regulation serving as the basis for rates/terms/conditions in the Interconnection Agreement were modified;

2. By action a state or federal regulatory body; and

3. Either TWTC or AT&T filed a written request of the other party seeking an amendment to the Interconnection Agreement.

Here, all three of these elements have been satisfied.

1. The Commission's adoption of OAC Rule 4906:1-7-13(E) is a change in law warranting an amendment to the Interconnection Agreement.

The Change of Law Provision clearly entitles the parties the power to amend the rates in the Interconnection Agreement upon a change in the "rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale" for those rates. The Interconnection Agreement at issue in this proceeding was approved by the Commission on July 17, 2002. At that time, OAC Rule 4901:1-7-13 did not exist. The adoption of OAC Rule 4901:1-7-13(D) constitutes a regulatory modification that requires the rates charged by AT&T, and paid by TWTC, to be AT&T's "tariffed switched access rates." The regulatory modification imposed by Rule 4901:1-7-13(D) necessarily modifies the rates currently in force under the Interconnection Agreement, which are essentially "commercial" rates imposed by AT&T.

2. The Commission is a state regulatory body as required by the Change of Law Provision.

As part of Case No. 06-1344-TP-ORD, the Commission formally adopted new "carrier-to-carrier" rules by order dated August 22, 2007, and Entry on Rehearing dated October 17,

2007. It is axiomatic that the Commission is a state regulatory body with sufficient jurisdiction over the parties' Interconnection Agreement.

3. TWTC provided adequate written notice to AT&T requesting an amendment to the Interconnection Agreement based upon a change in law.

The Change of Law Provision requires that, upon a change or amendment to existing statutes or regulations, and upon the written request of either party, the terms of the Interconnection Agreement must be modified to reflect that change of law. On April 8, 2008, and as required by the Change of Law Provision, counsel for TWTC sent a formal written request to AT&T seeking an amendment to the Interconnection Agreement.[13] This written notice to AT&T was sufficient to trigger the Change of Law Provision in the Interconnection Agreement.

C. AT&T Cannot Prevent TWTC From Availing Itself of the Change of Law Provision When AT&T Previously Did So Under Similar Circumstances.

1. AT&T invoked the Change of Law Provision following the Federal Communication Commission's TRRO Order, and cannot refuse to allow TWTC to do so under similar circumstances.

In July 2005, this Commission initiated arbitration proceedings to "develop an interconnection amendment for the purpose of implementing the FCC's TRRO."[14] In AT&T's initial brief filed as part of those proceedings, AT&T stated that the "purpose of this proceeding is to conform SBC Ohio's [AT&T] current interconnection agreements with competing carriers to reflect the rules promulgated by the Federal Communications Commission *** in the August 2003 *Triennial Review Order* *** and the February 2005 *Triennial Review Remand Order*."[15] As part of these orders, the FCC had directed that ILECs and CLECs "modify their

[13] See Joint Exhibit 2 (April 8, 2008 letter from Thomas J. O'Brien to G. James Soto).

[14] November 9, 2005 Arbitration Award, PUCO Case No. 05-877-TP-UNC, p. 2.

[15] Filed August 4, 2005, p. 1.

interconnection agreements, including completing any change of law process to perform the tasks necessary for an orderly transition to alternative facilities or arrangements."[16]

TWTC and AT&T successfully negotiated an amendment to the Interconnection Agreement on June 27, 2007 to incorporate the FCC's holdings. To do so, AT&T availed itself of the Change of Law Provision, and TWTC obliged. Now that tables have turned, and TWTC seeks to avail itself of the benefits of the Change of Law Provision to implement a clearly legitimate change to Ohio's administrative code, AT&T refuses to allow it. AT&T cannot have its cake and eat it too—and must allow for the amendment of the Interconnection Agreement.

2. AT&T invoked the Change of Law Provision following this Commission's Order in Case No. 06-1345-TP-ORD (the retail deregulation case), and cannot refuse to allow TWTC to do so under similar circumstances.

In circumstances eerily similar to those of this proceeding, AT&T previously availed itself of the benefits of the Change of Law Provision. Here, the Change of Law Provision appears only to apply to those changes in law that AT&T likes, as evidenced by its unreasonable refusal to allow TWTC to have that same opportunity.

On February 29, 2008, AT&T invoked the Change of Law Provision in the Interconnection Agreement by requesting that TWTC amend the Interconnection Agreement to incorporate the holding from the PUCO's June 7, 2007 Entry in Case No. 06-1345-TP-ORD (the retail deregulation case). It is notable that, even though the Commission's Entry in that case (June 7, 2007) occurred well before the execution (November 28, 2007) and filing (January 15, 2008) of the Seventeenth Amendment, AT&T did not invoke the Change of Law Provision until February 2008. Now, and based on a similar time sequence, AT&T seeks to prohibit TWTC from following in its footsteps and amending the Interconnection Agreement to incorporate the

[16] November 9, 2005 Arbitration Award, PUCO Case No. 05-877-TP-UNC, p. 1.

holding from Case No. 06-1344-TP-ORD. AT&T's hypocritical actions must be condemned, and the Commission must allow TWTC to amend the Interconnection Agreement.

D. AT&T Must Not be Allowed to Relitigate the Transit Rate Issues Previously Ruled Upon by This Commission in PUCO Case No. 06-1344-TP-ORD.

AT&T's refusal to allow TWTC to amend the Interconnection Agreement based upon a recognized change of law is an improper continuation of its arguments in Case No. 06-1344-TP-ORD. The Commission reached final judgment on issues relating to transit traffic rates and new Rule 4901:1-7-13(D) in Case No. 06-1344-TP-ORD. Now, as part of this proceeding, the principles of res judicata and collateral estoppel prohibit AT&T from relitigating the previously rules upon transit traffic rate issues.

In 2007, the Commission adopted new carrier-to-carrier rules in Chapter 4901:1-7 of the Ohio Administrative Code. Both AT&T and TWTC were granted intervenor status in the proceeding in which these new rules were adopted (Case No. 06-1344-TP-ORD). During those proceedings, AT&T vigorously challenged the Commission's transit rate rules. More specifically, AT&T fought against new Rule 4901:1-7-13(D)—the subject of this case—which required that:

> The intermediate telephone company(ies) must be compensated **at the intermediate telephone company's total element long run incremental cost (TELRIC) based transit traffic compensation rates**. Until such time as the commission approves telephone company-specific TELRIC-based transit traffic compensation rates, an intermediate telephone company should be compensated, on an interim basis, at its tariffed switched access rates subject to a true up of these rates. (Emphasis added).

Following the Commission's approval of this rule by opinion and order dated August 22, 2007, AT&T filed an application for rehearing based (in part) on its belief that the Commission erred

in concluding that pricing for transit traffic be at TELRIC rates.[17] In its Entry on Rehearing, dated October 17, 2007, the Commission rejected AT&T's assertion that the use of TELRIC rates violated federal law.[18] In doing so, the Commission agreed with TWTC's argument that there was no federal law, regulation or pronouncement in conflict with new Rule 4901:1-7-13(D)[19]—or more specifically, the requirement that pricing for transit traffic be at TELRIC rates. AT&T did not appeal the Commission's final order and the time for appeal has passed.

Since the time of the Commission's deliberations in Case No. 06-1344-TP-ORD, the state of the law concerning AT&T's obligations to provide transit service has not materially changed. Indeed, further support for the proposition that ILECs are required to provide transit traffic at TELRIC rates derives from a recent decision in the United States District Court for the District of Nebraska. See *Qwest Corp. v. Cox Neb. Telcom, LLC*, Case No. 4:08CV3035, 2008 U.S. Dist. LEXIS 102032. In this case, the court concluded that ILECs have a duty to provide transit service when an ILEC seeks to interconnect with a third carrier. The Commission noted that even though the FCC has not determined whether an ILEC has a duty to provide transit service, its "statements in its current notice and comment rulemaking proceedings indicate that the FCC's existing rules and decisions do not preclude the Court's finding that Section 251(c) requires ILECs to provide transit service."[20] Because the court recognized that the FCC has approved TELRIC rates as proper interconnection rates, the court also concluded that the state public utilities commission "did not err when it determined that Qwest was required to provide transit service at TELRIC-based rates."

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[17] See AT&T's Application for Rehearing, September 21, 2007, pp. 1, 5.

[18] Entry on Rehearing, October 10, 2007, p. 14.

[19] Id., p. 12.

[20] This Commission also has recognized that the FCC has "not yet developed any rule to address transit service," and this includes any decision made as part of the Virginia Arbitration Order cited in Entry on Rehearing, October 10, 2007, p. 12.

The Ohio Supreme Court recognizes that the principles of res judicata and collateral estoppel apply in administrative proceedings, including Commission proceedings.[21] Together, these doctrines "operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon" by a court or administrative agency (i.e. this Commission).[22] More specifically, res judicata recognizes that a "valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action,"[23] even if the prior judgment was "erroneous."[24] By the same taken, collateral estoppel "prevents the relitigation of an issue that has been 'actually and necessarily litigated and determined in a prior action.'"[25]

As noted above, both AT&T and TWTC were parties to the Commission's examination and approval of the new carrier-to-carrier rules in Case No. 06-1344-TP-ORD. Having been granted intervening party status in that case, both AT&T and TWTC actively participated in the establishment of said rules. In fact, AT&T specifically lost its challenge to the transit traffic pricing language in new Rule 4901:1-7-13(D) on rehearing, thereby representing a full and final judgment on the merits by the Commission. In this proceeding between AT&T and TWTC, the same parties in Case No. 06-1344-TP-ORD, the principles of res judicata and collateral estoppel

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[21] *Office of Consumers' Counsel v. PUCO* (1985), 16 Ohio St.3d 9. See also *Office of Consumers' Counsel v. PUCO* (2007), 114 Ohio St.3d 340; *In the Matter of Yerian v. Buckeye Rural Elect. Cooperative*, August 24, 2005 Entry in Case No. 05-886-EL-CSS, 2005 Ohio PUC LEXIS 456.

[22] *Office of Consumers' Counsel v. PUCO* (1985), 16 Ohio St.3d at 10.

[23] *In the Matter of Yerian v. Buckeye Rural Elect. Cooperative*, August 24, 2005 Entry in Case No. 05-886-EL-CSS, 2005 Ohio PUC LEXIS 456, quoting *Grava v. Parkman Township* (1995), 73 Ohio St.3d 379, syllabus.

[24] *Office of Consumers' Counsel v. PUCO* (1985), 16 Ohio St.3d at 11.

[25] *In the Matter of Yerian v. Buckeye Rural Elect. Cooperative*, August 24, 2005 Entry in Case No. 05-886-EL-CSS, 2005 Ohio PUC LEXIS 456, quoting *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36.

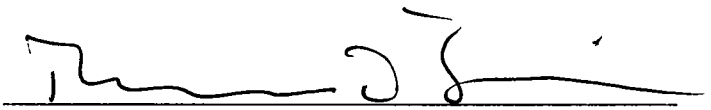
prohibit AT&T from again challenging the validity of new Rule 4901:1-7-13(D) or the transit traffic rates.

IV. CONCLUSION

WHEREFORE, TWTC requests that the Commission do the following:

- Find that the Commission's adoption of OAC Rule 4906:1-7-13(E) is a change of law warranting amendment of the Interconnection Agreement;
- Order AT&T to honor the Change of Law Provision and amend the terms of the Interconnection Agreement;
- Expedite its ruling on this Complaint pursuant to OAC Rule 4901:1-7-28 and based upon the actions of AT&T that violate the express language of the Interconnection Agreement; and
- Order any other relief that the Commission deems appropriate, just and reasonable.

Respectfully submitted,
tw telecom of ohio llc



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CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a copy of the foregoing was served by hand delivery or electronic mail as well as by regular U.S. Mail this 3rd day of February 2009.

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Summary: Brief of tw telecom of ohio llc electronically filed by Teresa Orahood on behalf of tw telecom of ohio llc