BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

AT&T OHIO'S BRIEF

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INTRODUCTION

This case concerns whether tw telecom of ohio llc ("TWTC") can force AT&T Ohio to charge rates for transit service that are different from the rates TWTC and AT&T Ohio agreed to in their negotiated Interconnection Agreement ("ICA"). According to TWTC, this Commission's adoption of Rule 4901:1-7-13, effective November 30, 2007, entitles TWTC to invoke the ICA's "intervening law" provision and amend the ICA to include new, lower transit rates. But TWTC misreads both the intervening law provision of the ICA (§ 21.1 of the General Terms and Conditions) and the alleged "intervening law" itself (Rule 4901:1-7-13). The intervening law provision applies only where "laws or regulations" are the "basis or rationale" of a contract provision and that legal basis or rationale is *invalidated, modified or stayed* by an administrative, judicial or legislative action. Rule 4901:1-7-13 does not purport to invalidate, modify or stay the negotiated transit rates contained in ICAs like TWTC and AT&T Ohio's; instead, it explicitly recognizes that the rule has no effect on negotiated transit rates, like those to which TWTC agreed. Furthermore, the "basis or rationale" for the ICA's transit rates was not "invalidated, modified or stayed" by this Commission's adoption of Rule 4901:1-7-13. TWTC and AT&T Ohio agreed to simple, fixed transit rates, and did not set the rates by reference to any "laws or regulations." Thus, Rule 4901:1-7-13 did not invalidate, modify or stay the basis or rationale for the ICA's negotiated transit rates. As further demonstrated below, TWTC is required to pay the transit rates to which it voluntarily agreed, and its complaint should be denied in full.

STATEMENT OF FACTS

I. The Telecommunications Act of 1996

The Telecommunications Act of 1996 ("1996 Act" or "Act") dramatically transformed the telecommunications market by "establish[ing] negotiations and ICAs" – rather than regulation and tariffs – as "the method of setting the business relationship between incumbent [local exchange carriers] and their competitors." *In re TelCove Operations, Inc.*, Case No. 04-1822-TP-ARB, 2006 WL 176437, at *45 (Ohio P.U.C. Jan. 25, 2006). In Section 252 of the Act, Congress set out a detailed process by which telecommunications carriers, like AT&T Ohio and TWTC, "enter into a binding agreement." 47 U.S.C. § 252(a)(1). The process relies primarily on private negotiations between carriers, through which parties may agree to terms "without regard" to the substantive requirements contained in Sections 251(b) and (c) of the 1996 Act. 47 U.S.C. § 252(a)(1). As this Commission has explained, "[a]n ICA is the result of a negotiation process involving give-and-take, where parties agree to a comprehensive binding set of rates, terms and conditions that, as a whole, meets both parties' needs and business plans." *TelCove*, 2006 WL 176437, at *45. When parties negotiate an ICA, it is "within the prerogative" of each party to "waive any of its statutory rights" under Section 251(b) and (c). *Re Ameritech Ohio Inc.*, Case No. 96-565-TP-UNC, 1996 WL 631790, at *6 (Ohio P.U.C. Aug. 29, 1996). *See also Qwest Corp. v. Pub. Utils. Comm'n of Colorado*, 479 F.3d 1184, 1188 (10th Cir. 2007) (explaining that "the 'without regard' clause [in Section 252(a)(1)] indicates that the parties may make agreements that go beyond or contradict the specific statutory requirements that an incumbent must follow") (internal quotation marks and citation omitted).

Once parties have reached a negotiated agreement, the state Commission must accept the agreement as-is, unless its rates, terms or conditions "discriminate[] against a carrier not a party

to the contract, or [are] otherwise shown to be contrary to the public interest." *Verizon Communications, Inc. v. FCC,* 535 U.S. 467, 492 (2002); *see also* Ohio Admin. Code § 4901:1-7-07(D). After the Commission approves the negotiated agreement, it has "the binding force of law." *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

If carriers' attempts to negotiate fail, then either carrier can ask its state commission to conduct an arbitration. But that "option comes with strings," as it "subjects the parties to the duties specified in § 251 and the pricing standards set forth in § 252(d)." *Verizon*, 535 U.S. at 492-93. Thus, it is only when parties agree to forgo private negotiation and accept the "strings" of arbitration that state commissions are to "set a 'just and reasonable' and 'nondiscriminatory' rate for interconnection or the lease of network elements based on 'the cost of providing the . . . network element.'" *Id*. at 493 (quoting 47 U.S.C. § 252(d)(1)).

II. AT&T Ohio and TWTC's Interconnection Agreement

AT&T Ohio and TWTC negotiated their current interconnection agreement in March 2002. This Commission approved the agreement, without modification, on July 17, 2002, in Case No. 02-911-TP-NAG. The negotiated agreement sets forth the rates, terms and conditions under which TWTC agrees to buy products and services from AT&T Ohio.

One of the services AT&T Ohio provides to TWTC under the ICA is transit service, or transiting. Transit service is a service AT&T Ohio provides to carriers that are not directly interconnected. AT&T Ohio provides transit service when it carries "transit traffic," which this Commission has defined as "traffic that 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." Ohio Admin. Code § 4901:1-7-13(A). Under TWTC and AT&T Ohio's negotiated agreement, the following rates apply to transit service:

Tandem Switching: $0.004587 per minute of use ("MOU")

Tandem Termination: $0.000226 per MOU

Tandem Facility: $0.000188 per MOU

See ICA Appendix Pricing (Joint Exhibit 6), at p. 14.

At the time AT&T Ohio and TWTC signed their negotiated agreement, this Commission had never set cost-based rates for transiting, nor had it initiated a proceeding to determine such rates. TWTC did not ask this Commission to arbitrate cost-based rates for transit service or any other service. The rates AT&T Ohio and TWTC agreed to were simple, fixed rates, which were not tied in any way to any past, pending, or future proceeding before the Commission.

III. Commission Decision 06-1344-TP-ORD and Rule 4901:1-7-13

Prior to 2006, the Commission did not have any binding rules for the provision of transit service. Instead, the Commission addressed transit service in its "Local Service Guidelines" ("Guidelines"), which were adopted in Case No. 95-845-TP-COI and took effect in February 1997. The Guidelines defined Transit Traffic and provided recommendations regarding compensation for such traffic. *See* Entry on Rehearing, *In re Establishment of Local Exchange Competition*, Case No. 95-845-TP-COI, 1997 WL 120529, at *16-17 (Ohio P.U.C. Feb. 20, 1997). The Guidelines stated that when the transiting carrier (which in this case would be AT&T Ohio) carries a call over its public switched telephone network, that "intermediate carrier shall be compensated at its tariffed exchange access rates . . . ." *Id*. at *16. At the same time, however, the Guidelines made clear that they "shall not be construed to preclude LECs from negotiating other transit traffic interconnection and compensation arrangements." *Id*. at *17. Accordingly, AT&T Ohio and TWTC's 2002 agreement does not reference the Guidelines, or adopt their

recommendation regarding transit rates. Rather, the agreement provides for fixed, negotiated transiting rates.

In 2006, this Commission initiated Case No. 06-1344-TP-ORD, in which it set out to replace the Guidelines with carrier-to-carrier rules. In its August 22, 2007 decision in that case, the Commission promulgated Rule 4901:1-7-13, which defines "transit traffic" and explains carriers' obligation to carry transit traffic. Rule 4901:1-7-13 also establishes interim rates for transiting, which can be used by carriers that do not already have an agreement covering transiting. Specifically, subsection (D) of Rule 4901:1-7-13 provides: "The intermediate telephone company 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."

Rule 4901:1-7-13 makes abundantly clear that the interim rates set forth in subsection (D) do *not* apply where parties have agreed to negotiated rates – like AT&T Ohio and TWTC did in their ICA. Subsection (E) of Rule 4901:1-7-13 emphasizes: "This section shall not be construed to preclude telephone companies from negotiating other transit interconnection and compensation arrangements."

IV. The Parties' Dispute

On November 28, 2007, AT&T and TWTC filed an amendment to their ICA in which they agreed to extend the term of the negotiated agreement. Approximately five months later, on April 8, 2008, TWTC sent a letter to AT&T Ohio announcing that it wanted different rates for transiting than those set forth in the negotiated ICA and extended by the 2007 amendment. *See*

Joint Exhibit 2 (Apr. 8, 2008 letter from Thomas J. O'Brien to G. James Soto). In the letter, TWTC purported to invoke the ICA's "intervening law" provision. That provision is found in § 21.1 of the ICA's General Terms and Conditions (Joint Exhibit 1), which provides in relevant part:

> This Agreement is entered into as a result of both private negotiation between the Parties and the incorporation of some of the results of arbitration by the Commission. **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. (Emphasis added.)

According the TWTC, the Commission's issuance of Rule 4901:1-7-13 constituted a "change of law" that entitled TWTC to modify the transit rates contained in its negotiated agreement.

In response to TWTC's letter, AT&T Ohio explained that Rule 4901:1-7-13 did not change the transit rates contained in the negotiated ICA, and pointed out that the Rule expressly provided that it was "not be construed to preclude telephone companies from negotiating other transit interconnection and compensation arrangements." Ohio Admin. Code § 4901:1-7-13(D). *See also* Joint Exhibit 3 (July 29, 2008 letter from G. James Soto to Pamela H. Sherwood). TWTC and AT&T Ohio were not able to resolve their dispute independently, and TWTC therefore initiated this complaint.

ARGUMENT

I. The Proper Rates for Transit Services Are The Negotiated Rates That Are Unambiguously Set Forth In The Parties' Binding Interconnection Agreement.

The issue in this case is which rates TWTC's negotiated interconnection agreement requires TWTC to pay AT&T Ohio for transit service. Yet TWTC never cites, addresses, or

even mentions the contract provision that addresses transit prices. That provision is found on page 14 of the ICA's Appendix Pricing (Joint Exhibit 6). It sets forth, in unambiguous black and white, the following rates for "Transit Service":

Tandem Switching: $0.004587 per MOU

Tandem Termination: $0.000226 per MOU

Tandem Facility: $0.000188 per MOU

These rates do not come from any tariff, Commission order, or FCC order. Nor do they reference any current or prospective Commission rate-making proceeding. Moreover, the ICA's provision on transit service does not provide for or anticipate any modification of rates by the Commission or by either party.

As a result, the ICA's provision on transit service is dispositive. By negotiating its ICA with AT&T Ohio, TWTC has "[e]nter[ed] into a binding agreement." 47 U.S.C. § 252(a)(1). *See also In re TelCove*, 2006 WL 176437, at *45 (ICAs are "binding" agreements). This Commission cannot order TWTC to pay different transit rates than those set forth in the ICA, because doing so would "contravene[] the Act's mandate that interconnection agreements have the binding force of law." *Pac West Telecomm*, 325 F.3d at 1127. If TWTC wishes to negotiate different rates for transit service once its current ICA expires, it is free to do so. But it cannot force a change in the current negotiated rates that were established by the parties' explicit agreement.

II. TWTC Does Not Have A Right To Invoke The Change of Law Provision To Amend Its Negotiated Transit Rates.

Unable to confront the contract provision on transiting to which it agreed, TWTC claims that the ICA's "intervening law" provision, § 21.1, entitles it to pay different rates for transit service than the rates it negotiated. However, TWTC grossly oversimplifies that provision's

requirements. Section 21.1 does not allow a carrier to amend its agreement *any* time this Commission or the FCC issues a decision setting rates, terms or conditions of interconnection. Instead, by its plain terms, Section 21.1 applies only to contract provisions whose "basis or rationale" is some "law[] or regulation[]," and only when that legal "basis or rationale" has been changed.

The first sentence of § 21.1 recognizes that "[t]his Agreement is entered into as a result of both private negotiation between the Parties and the incorporation of some of the results of arbitration by the Commission." Section 21.1 contemplates that the intervening law provision can be invoked only in the latter circumstance. Thus, § 21.1 allows amendment of the ICA *only* when: (1) "the rates, terms and/or conditions [in the ICA] . . . are invalidated, modified or stayed" by a court or agency, or when (2) "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." Neither of those conditions exists here. The Commission's issuance of Rule 4901:1-7-13 does not invalidate or modify TWTC's transit rates, because the Rule, by its own terms, expressly exempts negotiated transit rates. Nor does Rule 4901:1-7-13 invalidate, modify or stay the "basis or rationale" for TWTC's negotiated transit rates. The basis for those rates was the private negotiation between the parties – not any "laws or regulations" – and the Rule does not purport to invalidate, modify, or stay any party's right, under federal law, to negotiate rates.

A. The Commission's Rule On Transit Rates Expressly Exempts From Its Coverage Negotiated Transit Rates Like Those Contained In TWTC And AT&T Ohio's Interconnection Agreement.

According to TWTC (at 7), Rule 4901:1-7-13(D) was "a regulatory modification that requires the [transit] rates charged by AT&T, and paid by TWTC, to be AT&T's 'tariffed switched access rates.'" In fact, however, Rule 4901 :1-7-13 does not purport to invalidate or

modify negotiated transit rates like those between TWTC and AT&T Ohio. Just the opposite: the Rule expressly recognizes that it does not interfere with carriers' ability, as provided in the 1996 Act, to negotiate agreements without regard to the substantive requirements of Section 251(b) and (c) of the Act. Subsection (E) of Rule 4901:1-7-13 therefore explains that the Rule "shall not be construed to preclude telephone companies from negotiating other transit traffic interconnection and compensation arrangements." Ohio Admin. Code § 4901:1-7-13(E). Carriers retain their right to negotiate whatever rates they choose for transit service, taking into account "both parties' needs and business plans." *In re TelCove*, 2006 WL 176437, at *45.

The plain language of Rule 4901:1-7-13(E) is reinforced by the Commission Opinion and Order in which the rule was adopted. *See* Opinion and Order, *In re Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, 2007 Ohio PUC LEXIS 572 (Aug. 22, 2007). There, the Commission made clear at several turns that its new rules did not affect existing negotiated transiting arrangements. First, in the proceeding leading up to the issuance of the new transiting rule, the Ohio Telecom Association ("OTA") commented that, "while the proposed rule [4901.1-7-13(D)] requires that intermediate carriers must be compensated at TELRIC rates, in virtually all cases where negotiated rates exist, they are not TELRIC rates." *Id*. at *93. OTA therefore recommended that "the rule should provide for compensation at negotiated rates if they exist, and access rates if they do not exist." *Id*. The Commission addressed OTA's concerns by explaining: "*With respect to OTA's request that the proposed rule be revised to allow for the negotiated transit nonTELRIC-based rates, the Commission notes that adopted Rule 4901:1-7-13(E) provides for such an option*." *Id*. at *94; Opinion and Order at 53 (emphasis added).

Second, the Commission's Opinion and Order also rejected a proposal by Cincinnati Bell that "the Commission require that ILECs treat transit traffic destined to an affiliate CLEC within

its territory as its own traffic and subject such traffic to reciprocal compensation rates, and not transit traffic rates." *Id*. at *94; Opinion and Order at 53. In rejecting this proposal, the Commission expressly confirmed the supremacy of private negotiation: "*rather than impacting existing arrangements*, this issue is better addressed in the negotiation/arbitration of interconnection agreements when an in-territory CLEC affiliate of an ILEC requests interconnection with other LECs." *Id*. at *95; Opinion and Order at 53-54 (emphasis added).

Third, in addition to adopting the new rule for transit service, the Commission's Opinion and Order also adopted a rule governing transport and termination. *See* Ohio Admin. Code § 4901:1-7-12. That Rule, like the transit service rule, contains language making clear that the rule "shall not be construed to preclude telephone companies from negotiating and voluntarily agreeing to other interconnection and compensation arrangements." Ohio Admin. Code § 4901:1-7-12(F). In regard to the transport and termination rule, the Commission explained that it "recognizes that carriers are always free to negotiate mutually agreed upon rates, terms, and conditions. Consistent with this point, the Commission has added Rule 4901:1-7-12(F) to reflect that flexibility." Opinion and Order, *In re Establishment of Carrier-to-Carrier Rules*, 2007 Ohio PUC LEXIS 572 at *76.

Rule 4901:1-7-13's unambiguous preservation of private negotiations, and the Commission's repeated statements to the same effect in the underlying proceeding, are consistent with – and indeed required by – the 1996 Act, which limits the role state commissions play in approving, interpreting and enforcing negotiated ICAs. Once a negotiated agreement has been approved by the Commission – as TWTC and AT&T Ohio's was in 2002 – it is "binding" (*In re TelCove*, 2006 WL 176437, at *45), and the only remaining role for this Commission is to enforce the agreement's terms. The Commission "cannot take action" that will "effectively

change[] the terms of applicable interconnection agreements," because that would "contravene[] the Act's mandate that interconnection agreements have the binding force of law." *Pac West Telecomm*, 325 F.3d at 1127. The Commission could not lawfully have applied Rule 4901:1-7-13 to the transit rates contained in negotiated agreements like the one between TWTC and AT&T Ohio, because such an action would have ignored the legally binding nature of the agreement and nullified the parties' rights under the 1996 Act to negotiate rates without regard to the Act's substantive requirements.

B. The Agreement's Change of Law Provision Does Not Apply to Negotiated Rates that are Set Without Reference to Commission-Determined Rates or Commission Ratemaking Proceedings.

TWTC may invoke the "intervening law" provision only if (1) the rates, terms and/or conditions [in the ICA] . . . are invalidated, modified or stayed" by a court or agency, or (2) "the laws or regulations that were the basis or rationale for such rates, terms, and/or conditions . . . are invalidated, modified or stayed." As demonstrated above, the first of those two conditions does not exist here, because Rule 4901:1-7-13 does not purport to change the transit rates contained in negotiated interconnection agreements. Moreover, the second condition is not satisfied either, because the ICA's intervening law provision applies to rates that are set by reference to some "laws or regulations" and where that legal basis has been changed or removed.

In TWTC and AT&T Ohio's negotiated agreement, there are no "laws or regulations" that form the "basis or rationale" for the transit rates. Those rates are simple, fixed rates. The contract does not reference any Commission-set rates (nor could it, as the Commission had not set formal rates for transiting), the Commission's Local Service Guidelines, or any other Commission rules on transiting. The contract does not reference any Commission rate-making proceeding – or even the general possibility that the Commission might someday determine cost-

based rates for transit service. And there is absolutely nothing in the ICA suggesting that the "basis or rationale" for its transit rates was any "law or regulation." Instead, TWTC's transit rates are negotiated rates (or, as TWTC itself puts it (at 7), "commercial rates") . Subsection (E) of Rule 4901:1-7-13 expressly preserves carriers' right to bargain for such negotiated rates. And the Local Service Guidelines that preceded Rule 4901:1-7-13 – and that were in effect when the parties negotiated their ICA – also recognized that carriers may negotiate their own rates for transiting. *See In re Establishment of Local Exchange Competition*, 1997 WL 120529, at *16-17.

C. TWTC's Attempt To Distract The Commission With The Application Of The Intervening Law Provision In Different Contexts Only Confirms That The Provision Does Not Apply In This Context.

Going even further afield, TWTC tries to distract the Commission by talking about AT&T Ohio's application of the intervening law provision in two contexts that are entirely different from the negotiated transiting rates at issue here (and where there was no dispute that the provision did apply). To the extent these examples have any relevance, they simply illustrate why TWTC is not entitled to invoke the intervening law provision here.

First, TWTC asserts (at 8-9) that AT&T Ohio invoked the ICA's intervening law provision in 2007 "to incorporate the FCC's holdings" in its *Triennial Review Remand Order* ("TRRO"). In the *TRRO*, "the FCC put in place new rules applicable to incumbent local exchange carriers' (ILECs') unbundling obligations with regard to mass market local circuit switching, high-capacity loops and dedicated interoffice transport." Entry, *In re Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand*, Case No. 05-887-TP-UNC, 2005 Ohio PUC LEXIS 590, at *1 (Ohio P.U.C. Nov. 23, 2005). The FCC

decided that incumbents could no longer be required to provide these UNEs to competing carriers in certain contexts,[1] and implemented a "transition period" during which "the ILECs and the CLECs were directed to modify their interconnection agreements, including completing any change of law processes to perform the tasks necessary for an orderly transition to alternative facilities or arrangements." *Id*. at *1-2. The FCC's order was based on its finding that competing carriers would not be "impaired" without unbundled access.

The intervening law provision of TWTC and AT&T Ohio's ICA applied in that context only because (i) the "basis or rationale" for the relevant ICA provisions (those governing unbundled network elements) was the FCC's previous "laws or regulations" on unbundled access, and (ii) that legal "basis or rationale" had been invalidated or modified by the new FCC rules issued with the *TRRO*. The ICA provisions on unbundled access plainly state that AT&T Ohio will offer UNEs only to the extent it is required to do so under the 1996 Act and the implementing FCC rules: Section 2.2.9 of the UNE Appendix makes clear that AT&T Ohio will provide TWTC with nondiscriminatory access to UNEs "[o]nly to the extent it has been determined that these elements are required by the 'necessary' and 'impair' standards of the Act (Act, Section 251 (d)(2))." *See* Attachments, at p. 2 (ICA Appendix UNE, § 2.2.9, filed April 17, 2002 in Case No. 02-911-TP-NAG). In the *TRRO*, the FCC determined that certain elements did not satisfy the "necessary" and "impair" standards of the Act. Thus, the legal "basis or rationale" for unbundled access under the ICA had been removed, and there is no dispute that AT&T Ohio correctly used the change of law provision to implement the FCC's directive.

[1] With respect to switching, the FCC imposed a "nationwide bar" on unbundling requirements in all circumstances. For high-capacity loops and transport facilities, the FCC barred unbundling requirements where certain conditions were met. *See id.*

Second, TWTC next points to the implementation of this Commission's "retail deregulation" docket, Case No. 06-1345-TP-ORD. TWTC claims (at 9) that its attempted use of the intervening law provision to change the rates it pays for transit service is "eerily similar" to AT&T Ohio's use of the provision to amend the agreement "to incorporate" this Commission's holdings in the retail deregulation case. In fact, the two cases could not be more different. In the retail deregulation case, this Commission ordered the detariffing of certain services that previously had been tariffed. Specifically, in promulgating Rule 4901:1-6-05(G), the Commission held that it "is mandatory that all regulated nonresidential Tier 2 services and all regulated toll services shall not be included in tariffs or contracts filed with the Commission." *In re Review of Chapter 4901:1-6, Ohio Administrative Code*, Case No. 06-1345-TP-ORD, 2007 WL 1805600, at *26 (Ohio P.U.C. June 6, 2007). The Commission therefore ordered that "all of the required detariffing must be completed within 18 months of the effective date of these rules," and that "all telephone companies must, no later than six months of the effective date of these rules, file the appropriate ATA application with the Commission reflecting the applicable removal of the detariffed services from the respective tariffs." *Id*. at *27.

In TWTC and AT&T Ohio's negotiated agreement, certain rates, terms and conditions had been set by reference to AT&T Ohio's filed tariffs. For instance, § 1.4 of the Resale Appendix provides that "[t]he prices at which [AT&T Ohio] agrees to provide TWTC with Resale Services are contained in the applicable Appendix Pricing and/or *the applicable Commission ordered tariff* where stated." *See* Attachments, at p. 1 (ICA Appendix Resale § 1.4, filed April 17, 2002 in Case No. 02-911-TP-NAG) (emphasis added). *See also id.* (ICA Appendix Resale § 3.1) ("Except as otherwise expressly provided herein, for Telecommunications Services included within this Appendix that are offer by [AT&T Ohio] to

[AT&T Ohio's] End Users through tariff(s), the rules and regulations associated with AT&T Ohio's retail tariff(s) shall apply when the services are resold by TWTC, with the exception of any tariff resale restrictions; provided, however, any tariff restrictions on further resale by the End User shall continue to apply."). Since the Commission's detariffing decision required AT&T Ohio to remove certain services from its tariffs, the parties *had* to change the contract provisions that had set rates and terms by reference to those tariffs. Otherwise, the contract would have referenced non-existent tariffs, and there would not be any rates, terms or conditions governing the formerly tariffed services.

When AT&T Ohio and TWTC filed their ICA amendment to implement the change of law resulting from the retail deregulation decision, the parties explained that the Commission had "held that all regulated nonresidential Tier 2 services and all regulated toll services shall no longer be included in tariffs filed with the Commission," and that "on April 1, AT&T Ohio will move the rates, terms and conditions for certain of its regulated retail services . . . from the retail tariff to the AT&T Ohio Guidebook." Case No. 08-1153-TP-NAG, Amendment - Retail Tariff, p. 1 (filed Oct. 6, 2008). Thus, as TWTC and AT&T Ohio both recognized when they amended their ICA, "the laws or regulations that were the basis or rationale for" the ICA's prices for Tier 2 services – namely, the resale tariffs that the ICA had expressly referenced – had been "invalidated" by this Commission. *See* ICA § 21.1 (Joint Exhibit 1).

In sum, when the parties applied the intervening law provision in the past, they did so because the contract had made clear that certain "laws or regulations" formed the "basis or rationale" for contract terms, and because those underlying laws or regulations were invalidated, modified or stayed. In this case, by contrast, the negotiated transit rates were not based on any "laws or regulations" but on pure negotiation. The transit rates are simple, fixed rates, set

without reference to any Commission-determined rates or any Commission rate-making proceeding. The Commission's Rule does not invalidate or change – and in fact expressly preserves – such negotiated rates. Those rates must be enforced as written.

CONCLUSION

For the foregoing reasons, AT&T Ohio respectfully requests that the Commission find that the adoption of Rule 4901:1-7-13 does not entitle TWTC to alter the transit rates contained in its negotiated interconnection agreement, and deny TWTC's complaint in full.

Dated: March 3, 2009

Respectfully submitted,

AT&T Ohio

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ATTACHMENTS

APPENDIX RESALE

1. INTRODUCTION

1.1 This Appendix set forth terms and conditions for Resale Services provided by the applicable SBC Communications Inc. (SBC) owned Incumbent Local Exchange Carrier (ILEC) and TWTC.

1.2 SBC Communications Inc. (SBC) means the holding company which owns the following ILECs: Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, Michigan Bell Telephone Company, Nevada Bell Telephone Company, The Ohio Bell Telephone Company, Pacific Bell Telephone Company, The Southern New England Telephone Company, and/or Southwestern Bell Telephone Company and/or Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin.

1.3 As used herein, **AM-OH** means the applicable above listed ILEC doing business in Ohio.

1.4 The prices at which SBC agrees to provide TWTC with Resale Services are contained in the applicable Appendix Pricing and/or the applicable Commission ordered tariff where stated.

2. DESCRIPTION AND CHARGES FOR SERVICES

2.1 A list of Telecommunications Services currently available for resale at the wholesale discount rate for each service determined by the appropriate Commission is set forth in Appendix Pricing. Except as otherwise expressed herein, consistent with **AM-OH**'s obligation under Section 251(c)(4)(A) of the Act and any other applicable limitations or restrictions, TWTC may resell other Telecommunications Services offered at retail by **AM-OH** at the discount set forth in Appendix Pricing.

3. TERMS AND CONDITIONS OF SERVICE

3.1 Except as otherwise expressly provided herein, for Telecommunications Services included within this Appendix that are offered by **AM-OH** to **AM-OH**'s End Users through tariff(s), the rules and regulations associated with **AM-OH**'s retail tariff(s) shall apply when the services are resold by TWTC, with the exception of any tariff resale restrictions; provided, however, any tariff restrictions on further resale by the End User shall continue to apply. Use limitations shall be in parity with services offered by **AM-OH** to its End Users.

3.2 TWTC shall only sell Plexar®, Centrex and Centrex-like services to a single End User or multiple End User(s) in accordance with the terms and conditions set forth in the corresponding **AM-OH** retail tariff(s) applicable within that state.

2.2.1 At any technically feasible point (Act, Section 251(c)(3); 47 CFR Section 51.307(a));

2.2.2 At the rates, terms, and conditions which are just, reasonable, and nondiscriminatory (Act, Section 251(c)(3); 47 CFR Section 51.307(a));

2.2.3 In a manner that allows TWTC to provide a Telecommunications Service that may be offered by means of that UNE (Act, Section 251(c)(3); 47 CFR Section 51.307 (c);

2.2.4 In a manner that allows access to the facility or functionality of a requested Unbundled Network Element to be provided separately from access to other elements, and for a separate charge (47 CFR Section 51.307(d));

2.2.5 With technical information regarding **AM-OH**'s network facilities to enable TWTC to achieve access to UNEs (47 CFR Section 51.307(e));

2.2.6 Without limitations, restrictions, or requirements on requests that would impair TWTC's ability to provide a Telecommunications Service in a manner it intends (47 CFR Section 51.309(a));

2.2.7 In a manner that allows TWTC purchasing access to UNEs to use such UNE to provide exchange access service to itself in order to provide interexchange services to subscribers (47 CFR Section 51.309(b));

2.2.8 Where applicable, terms and conditions of access to UNEs shall be no less favorable than terms and conditions under which **AM-OH** provides such elements to itself (47 CFR Section 51.313(b)).

2.2.9 Only to the extent it has been determined that these elements are required by the "necessary" and "impair" standards of the Act (Act, Section 251 (d)(2)).

2.3 As provided for herein, **AM-OH** will permit TWTC exclusive use of an unbundled network facility for a period of time, and when TWTC is purchasing access to a feature, function, or capability of a facility, **AM-OH** will provide use of that feature, function, or capability for a period of time (47 CFR § 51.309(c)).

2.4 **AM-OH** will maintain, repair, or replace UNEs (47 CFR § 51.309(c)) as provided for in this Agreement.

2.5 Where technically feasible, the quality of the UNE and access to such UNE shall be at least equal to what **AM-OH** provides itself or any subsidiary, affiliate, or other party (47 CFR § 51.311(a), (b)).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on March 3, 2009 by e-mail as shown below on the following party:

tw telecom of ohio llc

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Summary: Brief electronically filed by Jon F Kelly on behalf of AT&T Ohio