

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Cavalier)
Telephone d/b/a Cavalier Business) Case No. 09-539-TP-WVR
Communications d/b/a Cavalier Telephone &)
TV for a Waiver of Certain Minimum)
Telephone Service Standards Pursuant to)
Chapter 4901:1-5, Ohio Administrative Code.)

**MOTION TO INTERVENE
AND
COMMENTS ON CAVALIER'S MOTION FOR A WAIVER
OF OHIO ADMINISTRATIVE CODE SECTION 4901:1-5-07(C)
TO ALLOW ITS AUTHORIZED PAYMENT AGENTS TO CHARGE
CUSTOMERS MORE THAN TWO DOLLARS TO PROCESS PAYMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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July 14, 2009

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The Office of the Ohio Consumers’ Counsel (“OCC”) moves to intervene in this case where Cavalier Telephone d/b/a Cavalier Business Communications d/b/a Cavalier Telephone & TV (“Cavalier”) proposes that its authorized payment agents be able to charge consumers more than \$2.00 for processing payments, the limit required by Ohio Adm. Code 4901:1-5-07(C) (“Rule 7(C)”)¹. OCC is filing on behalf of Cavalier’s residential consumers.² The reasons the Public Utilities Commission of Ohio (“Commission” or “PUCO”) should grant OCC’s Motion are further set forth in the attached Memorandum in Support.

In addition, OCC files comments on Cavalier’s Waiver Request. Although Cavalier admits that it leads its customers to believe that four companies – Global

¹ See Cavalier’s Request for Waiver (June 29, 2009) (“Waiver Request”) at 3.

² OCC seeks intervention pursuant to R.C. Chapter 4911, R.C. 4903.221 and Ohio Adm. Code 4901-1-11.

Express (“Global”), CheckFree Pay (“CheckFree”), MoneyGram and Western Union – are authorized payment agents,³ Cavalier asserts that these companies are nothing more than “payment intermediaries” over which the Commission, Cavalier and its customers have no control, especially regarding the fees the companies charge for money transfers.⁴ Cavalier also contends that using these companies, and incurring their fees, is largely a matter of customer choice.⁵

Although OCC favors having as many convenient ways as possible for customers to make payments to utilities, OCC is concerned that consumers who use Cavalier’s payment agents out of necessity may be least able to afford the higher fees for payment processing. These consumers, who may already be struggling to make ends meet because of economic problems, can ill afford to increase the cost of their telephone service by as much as 28%.

A literal reading of Ohio Adm. Code 4901:1-5-01(B) (“Rule 1(B)”) shows that the payment processors are “authorized payment agents” of Cavalier under the Minimum Telephone Service Standards (“MTSS”). The Commission should therefore closely scrutinize the relationship between Cavalier and the four companies to determine whether Cavalier, in fact, cannot negotiate with local agents of the payment processors to bring the fees they charge consumers for payment processing within the limits of Rule 7(C). If a payment processing company will not bring its fees within the limits of Rule 7(C), then the Commission should order Cavalier to cease holding out the payment processing

³ Waiver Request at 2. Because the fees charged by Global and CheckFree are within the limits of Rule 7(C) (id.), it appears that the Waiver Request at this time applies only to MoneyGram and Western Union. Because Cavalier is seeking the waiver regarding the fees charged by all four companies, however, OCC’s Comments will also include Global and CheckFree.

⁴ Id. at 3-4.

⁵ Id. at 4.

company as an authorized payment agent in Ohio. On the other hand, if the Commission grants Cavalier's Waiver Request, then the Commission should ensure that Cavalier's customers are adequately informed about the lower-cost payment options – especially when compared to MoneyGram and Western Union – that are available to them.

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. MOTION TO INTERVENE.....	4
III. COMMENTS ON THE WAIVER REQUEST	7
A. In These Difficult Economic Times, the Use of Payment Processors Has Become a Necessity, Rather Than a Convenience, for Many Ohio Consumers.....	7
B. The Applicable Law and Standard of Review for MTSS Waivers.....	8
C. The Four Companies Cavalier Uses to Process Payments Fit the MTSS Definition of “Authorized Payment Agent”	9
D. Cavalier’s Ability to Control the Four Companies’ Fees for Payment Processing Appears to Be Irrelevant for Rule 7(C) Purposes.....	10
E. Should the Commission Approve the Waiver Request, It Should Ensure that Cavalier’s Customers Are Adequately Informed About the Fees that the Four Companies Charge to Process Payments and the Lower-Cost Alternatives to the Payment Processors’ Services	11
IV. CONCLUSION.....	12
CERTIFICATE OF SERVICE	

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**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
AND
COMMENTS ON CAVALIER’S WAIVER REQUEST**

I. INTRODUCTION

MTSS Rule 7(C) states: “Authorized payment agent fees shall not exceed more than two dollars per transaction for processing payments by cash, check or money order.” Rule 1(B) defines “authorized payment agent” as “any individual or business designated by a telecommunications provider to act as its representative for accepting payments.”

At the prompting of PUCO Staff,⁶ on June 29, 2009, Cavalier filed with the PUCO a request for a waiver of Rule 7(C) regarding the four money transfer companies that Cavalier uses for processing bill payments from customers. Two of the companies, Global and CheckFree, each charge within the limit set by Rule 7(C) to process payments from Cavalier’s customers.⁷ But MoneyGram charges Cavalier’s customers \$3.50 (at WalMart) and \$3.95 (elsewhere) for payment processing, and Western Union charges Cavalier’s customers \$6.95 to process payments.⁸

⁶ Waiver Request at 2-3.

⁷ Id. at 2. According to Cavalier, Global charges \$1.00 to \$1.50 and CheckFree charges \$1.50 to \$2.00.

⁸ Id.

Although Cavalier admits that it leads its customers to believe that the four companies are authorized payment agents,⁹ Cavalier, in its Waiver Request, asserts that these companies are nothing more than “payment intermediaries” over which the Commission, Cavalier and its customers have no control regarding the fees the companies charge for money transfers.¹⁰ Cavalier asserts that incurring these additional charges for payment processing is a matter of customer choice,¹¹ and that the fee limitation in Rule 7(C) is no longer necessary due to the existence of carriers not subject to the MTSS.¹²

Although Cavalier offers customers numerous options to make payments without incurring fees higher than that allowed under Rule 7(C), these options generally require consumers to have a bank account or credit card. Many consumers, however, do not have such accounts, and thus cannot use these payment options. Use of the four companies designated by Cavalier thus becomes a necessity for these consumers. Further, these consumers are likely to be under financial stress, and thus can ill afford the large fees that MoneyGram and Western Union charge to process payments, which can add as much as 14% to 28% to the amount that a Cavalier customer pays for telephone service each month.¹³

⁹ Id.

¹⁰ Id. at 3-4.

¹¹ Id. at 4.

¹² Id. at 5-6. Cavalier’s reference to the Commission’s recent designation of a wireless carrier as a Lifeline carrier (as justification for doing away with Rule 7(C)) is completely off-point, since that prepaid carrier offers its Lifeline service for free to qualified consumers, who thus will have no need for a payment intermediary. *In the Matter of the Commission Investigation into the Intrastate Universal Service Discounts*, Case No. 97632-TP-COI, Supplemental Opinion and Order (May 21, 2009).

¹³ Cavalier’s lowest rate for local service is \$24.95 per month. See <https://www.cavtel.com/home-services/>. MoneyGram’s \$3.50 fee would add 14% to a customer’s payment and its \$3.95 fee would add 16% to a customer’s payment. Western Union’s \$6.95 charge would increase a customer’s payment by 28%.

Among the four payment processors named in the Waiver Request, MoneyGram and Western Union – the most expensive – appear to be the most widely available for customers. A review of CheckFree’s website shows that, although it has numerous locations throughout Ohio, apparently the only locations that process payments for Cavalier are in the Cleveland and Toledo areas. In addition, Global is very inconvenient for first-time customers to use; the only way to find Global locations is through that company’s customer service number, which is available only from 9:00 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday.

This is the dilemma that the Waiver Request presents for Cavalier’s customers who do not have a bank account, and who thus out of necessity, rather than choice, regularly make payments to Cavalier through either MoneyGram or Western Union. If the Commission denies the Waiver Request, these consumers may have fewer options for making payments to Cavalier. On the other hand, if the Commission grants the Waiver Request, these consumers may continue to pay as much as an additional 28% – possibly more if Western Union further increases its payment processing fee – even though these consumers may be least able to afford it.

Consumers should receive all the protections of the MTSS, including Rule 7(C). The heart of Cavalier’s argument is that it cannot control the fees the payment processors charge for payment processing, but the ability to control payment agents’ rates has not been a cornerstone for compliance with Rule 7(C). Instead, Rule 7(C) presents a bright-line standard – if the payment processor is unwilling to charge \$2.00 or less to process payments, it should not be held out to customers as an “authorized payment agent.” Based on a literal reading of the rule, the Commission should deny the Waiver Request.

If, however, the Commission decides to grant the Waiver Request, it should require Cavalier to better inform customers of their lower-cost options for making payments. In particular, customers who do not have bank accounts should be encouraged to use money orders, which may cost less than one dollar,¹⁴ that are mailed directly to Cavalier, or to use companies that charge little for payment processing services. Cavalier should also provide its customers with a comparison of the payment processors' fees.

OCC also realizes that Cavalier is not the only telephone company that makes payment processors like MoneyGram and Western Union available to consumers for remitting payments. The situation described in the Waiver Request likely affects tens of thousands of Ohio consumers. Thus, in an effort to ensure that, as a matter of public policy, all consumers have adequate access to affordable payment options, the Commission should consider opening an inquiry into industry practices concerning the use of payment processors to handle customer payments.

II. MOTION TO INTERVENE

R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio’s residential consumers may be “adversely affected” by this case,¹⁵ especially if the consumers were unrepresented in a proceeding that would give Cavalier the authority to allow its authorized payment processors to charge consumers more than \$2.00 to remit payments to Cavalier. Thus, OCC satisfies this element of R.C. 4903.221.

¹⁴ See Section III.E., *supra*.

¹⁵ Cavalier provides telephone service to residential customers. See Talk America d/b/a Cavalier Telephone d/b/a Cavalier Business Communications d/b/a Cavalier Telephone & TV P.U.C.O. Tariff No. 4, Original Page 42.

R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest is representing Cavalier's residential consumers in order to ensure that they receive all the protections of the MTSS, including with regard to the limits on fees that are charged by authorized agents for payment processing. This interest is different from that of any other party and especially different from that of Cavalier, whose advocacy includes the financial interest of stockholders.

Second, OCC's advocacy for consumers will include advancing the position that consumers should have low-cost options to make payments and adequate information regarding their payment options. OCC's position is therefore directly related to the merits of this case that is pending before the PUCO, the authority with regulatory control of public utilities' rates and service quality in Ohio.

Third, OCC's intervention will not unduly prolong or delay the proceeding. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest.

Fourth, OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues. OCC will obtain and develop information

that the PUCO should consider for equitably and lawfully deciding the case in the public interest.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a “real and substantial interest” according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate, OCC has a very real and substantial interest in this case where Cavalier is seeking removal of the limit, contained in the MTSS, on the fees that authorized payment processors may charge consumers for remitting payments to Cavalier.

In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the “extent to which the person’s interest is represented by existing parties.” While OCC does not concede the lawfulness of this criterion, given the language of R.C. 4903.221(B), OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio’s residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed OCC’s right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by

denying its intervention. The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.¹⁶

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. The PUCO should grant OCC's Motion to Intervene on behalf of Ohio residential consumers.

III. COMMENTS ON THE WAIVER REQUEST

A. In These Difficult Economic Times, the Use of Payment Processors Has Become a Necessity, Rather Than a Convenience, for Many Ohio Consumers.

To its credit, Cavalier does provide customers with numerous payment methods, most of which are at little or no cost to the customer.¹⁷ Based on the availability of these payment options, Cavalier describes the customer's use of payment processors as "a conscious choice by the consumer to incur the vendor's charge."¹⁸ Although some consumers may choose to use a payment processing company to pay their bills, more consumers are finding the use of payment processing companies a necessity.

The recent economic downturn is putting many Ohio consumers under financial stress. Ohio is among the leading states in foreclosures on residences.¹⁹ In May 2009, unemployment in Ohio reached 10.8%.²⁰ Twelve counties had more than 14% of their

¹⁶ See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶ 13-20 (2006).

¹⁷ See Waiver Request at 2.

¹⁸ *Id.* at 4.

¹⁹ Ohio ranked seventh in the nation in foreclosures for the first quarter of 2009. See http://www.trulia.com/blog/loanmodexpert/2009/05/state_foreclosure_rate_r.

²⁰ See Ohio Department of Job and Family Services ("ODJFS"), "Ohio and U.S. Employment Situation" (June 19, 2009) (available at <http://jfs.ohio.gov/RELEASES/unemp/200906/UnempPressRelease.asp>).

workforce unemployed.²¹ Many unemployed consumers, and many of Ohio’s “working poor” who have a job but are living from paycheck to paycheck, cannot maintain a bank account.²² Thus, for these consumers, alternative means of paying bills – such as use of payment processing companies like Western Union and MoneyGram – are a necessity. And because of their economic situation, these consumers are the least able to afford the fees for payment processing that MoneyGram and Western Union charge.

As it considers the Waiver Request, the Commission should keep in mind those consumers who have little or no choice but to use payment processing companies for paying bills. The Commission should also consider a broader inquiry into the use of payment processors for remitting payments to telephone companies, and the affect of these companies on Ohio consumers.

B. The Applicable Law and Standard of Review for MTSS Waivers

MTSS Rule 7(C) states: “Authorized payment agent fees shall not exceed more than two dollars per transaction for processing payments by cash, check or money order.” In the recent MTSS rulemaking, the Commission stated its rationale for adopting Rule 7(C) as:

Upon review, we are convinced that it is both reasonable and appropriate to place a ceiling of some amount on authorized payment agent fees. The fact there is no requirement on telecommunications providers to offer customers the ability to pay their bills in person presents an opportunity that third party payment processors can use to leverage utility service customers into other types of payment

²¹ See ODJFS, May 2009 Ranking of Ohio County Unemployment Rates (Not Seasonally Adjusted) (available at <http://lmi.state.oh.us/laus/Ranking.pdf>). The counties were, in order of ranking, Williams, Defiance; Crawford; Huron, Van Wert, Morgan, Highland, Pike, Trumbull, Henry, Paulding and Meigs.

²² The Federal Deposit Insurance Corporation (“FDIC”) estimates that approximately ten percent of households in the United States do not have banking accounts. See “FDIC Survey of Banks’ Efforts to Serve the Unbanked and Underbanked, Executive Summary of Findings and Recommendations” (February 2009) at 3, citing studies by the Federal Reserve and The Center for Financial Services Innovation (available at http://www.fdic.gov/unbankedsurveys/unbankedstudy/FDICBankSurvey_ExecSummary.pdf).

arrangements, not all of which the market alone can be counted upon to prevent from becoming possibly predatory or abusive. On the other hand, we agree that if regulation in fact functions to set artificially low rates for the payment agent service, such service may not prove profitable and the ability of customers to find many third-party payment processors willing to offer the service might be unreasonably jeopardized. Thus, the tougher question for us has been in determining at what price level the fee cap should be set. We think that our established practice of setting the cap at twice the price of a first class stamp, while capable of being defended on rationality grounds, might well be striking such a blow at profitability as to already be jeopardizing the widespread availability of reasonable and appropriate customer choice in this arena that could (and, if so, should) otherwise exist. We think that setting the cap at a flat \$2.00 per transaction for processing payments by cash, check, or money order is a reasonable compromise between the current cap (that we suspect may be too low) and the idea of setting either a much higher cap or no cap at all.²³

Under Ohio Adm. Code 4901:1-5-02(B)(1), the Commission may waive these requirements “[f]or good cause shown....” Under Ohio Adm. Code 4901:1-5-02(B)(2), the PUCO may, “[a]s it deems necessary in any proceeding, prescribe different standards for the provision of any telecommunications services the commission regulates.”

C. The Four Companies Cavalier Uses to Process Payments Fit the MTSS Definition of “Authorized Payment Agent.”

Rule 1(B) defines “authorized payment agent” as “any individual or business designated by a telecommunications provider to act as its representative for accepting payments.” Based on a literal reading of the rule, the four companies that Cavalier describes as “payment intermediaries” in the Waiver Request fit this definition.

Rule 1(B) presents a very broad view of the types of companies that may be an “authorized payment agent” subject to Rule 7(C). The definition applies to “any ... business” a telecommunications provider designates to accept payments. Thus, the

²³ *In the Matter of the Review of the Commission’s Minimum Telephone Service Standards Found in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 05-1102-TP-ORD, Entry on Rehearing (July 11, 2007) at 29.

Commission did not limit “authorized payment agents” only to local businesses.

Telecommunications providers may contract with national companies to be “authorized payment agents.”

On the other hand, the “agency” under the definition is for the specific purpose of being a “representative for accepting payments.” The definition does not require that the “payment agent” provide any other services (e.g., allowing customers to order service) for the telecommunications provider. The definition also does not specify that the “agent” use a specific means for transferring the payment to the telecommunications provider, or that the telecommunications provider has any control over the locations that the “agent” uses for accepting payments.

The four companies named in the Waiver Request fit the definition of “authorized payment agent” in Rule 1(B). Through its website and in other communications with customers, Cavalier has designated these companies to accept payments from customers in its service areas, including Ohio. The means that the companies use to transfer the payment to Cavalier is irrelevant. The Commission thus should rule that, based on a literal reading of the rule, the four companies named in the Waiver Request are “authorized payment agents” under Rule 1(B).

D. Cavalier’s Ability to Control the Four Companies’ Fees for Payment Processing Appears to Be Irrelevant for Rule 7(C) Purposes.

At the heart of Cavalier’s argument in support of the Waiver Request is its stated inability to control the payment processing fees that the four companies charge consumers.²⁴ This issue, however, apparently has not been addressed by the Commission, and thus appears to be irrelevant to the Commission’s determination here.

²⁴ Waiver Request at 3

Instead, it seems that the only determination to be made is whether an “authorized payment agent” – here, the payment processor – abides by Rule 7(C). If not, the PUCO should reject the processor as an “authorized payment agent.”

In this regard, Cavalier’s assertions that it cannot control the fees charged by the four companies lack adequate support. As Cavalier noted, “[t]he fee structure is determined by these money transfer providers, **as well as the local agents** for those services.”²⁵ Although Cavalier stated that it has a national agreement with the four companies,²⁶ it did not assert that it could not negotiate with local agents in Ohio to charge payment fees that comply with Rule 7(C). The Commission could order Cavalier to attempt such negotiations.

Given these difficult economic times, the Commission should ensure that Ohio consumers who rely on payment processors to make payments to utility companies have adequate choices and are charged fees that comply with Rule 7(C). Cavalier’s Waiver Request falls short of this requirement.

E. Should the Commission Approve the Waiver Request, It Should Ensure that Cavalier’s Customers Are Adequately Informed About the Fees that the Four Companies Charge to Process Payments and the Lower-Cost Alternatives to the Payment Processors’ Services.

As discussed above, the Commission has either rejected or not provided for the reasons behind Cavalier’s Waiver Request, and thus there does not appear to be good cause to grant the Waiver Request. If, however, the PUCO decides to grant the Waiver Request, the Commission should ensure that Cavalier adequately informs its customers that they may incur substantially higher charges to use these companies – at least

²⁵ Id. at 2 (emphasis added).

²⁶ Id.

MoneyGram and Western Union – to process payments. Cavalier should notify its customers – through its website and its welcome letter – that their charges for telephone service may increase substantially due to these companies’ payment processing fees.

In addition, Cavalier should encourage customers without bank accounts to use lower-cost alternatives to the payment processors’ services. In particular, such customers should be informed that money orders may save them considerably compared to the payment processors’ fees. According to local retailers that OCC has contacted, Western Union money orders cost only 59 cents and MoneyGram money orders can be purchased for 69 cents. (These charges cannot be determined through the companies’ websites.) The United States Postal Service charges only \$1.10.²⁷ While the use of money orders might not be adequate in all situations (e.g., where the customer faces disconnection), customers who now use the payment processors to make monthly payments would save considerably by using money orders instead of payment processors.

The consumers who use the payment processors are likely to be those who are least able to afford the higher charges associated with these services. Should the Commission grant the waiver request, it should ensure that Cavalier’s customers are better informed about the fees the payment processors charge and about lower-cost options for making payments.

IV. CONCLUSION

The Commission should grant OCC’s intervention in this proceeding. In addition, for the reasons discussed herein, Cavalier has not presented good cause for the waiver. If, however, the Commission decides that there is good cause for the waiver, the

²⁷ See <http://www.usps.com/money/sendingmoney/moneyorders/welcome.htm>.

Commission should ensure that Cavalier's customers who do not have bank accounts are better informed about the low-cost options for making payments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion to Intervene and Comments by the Office of the Ohio Consumers' Counsel was provided electronically to the persons listed below this 14th day of July 2009.

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Summary: Motion Motion to Intervene and Comments on Cavalier's Motion for a Waiver of Ohio Administrative Code Section 4901:1-5-07(C) to Allow its Authorized Payment Agents to Charge Customers More than Two Dollars to Process Payments by the Office of the Ohio Consumers' Counsel electronically filed by Mrs. Mary V. Edwards on behalf of Etter, Terry L. and Office of the Ohio Consumers' Counsel