BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Mark Drake,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 10-411-TP-CSS
	)	
AT&T Ohio,	)	
	)	
Respondent.	)	

AT&T OHIO'S MOTION TO DISMISS

AT&T Ohio, Respondent herein, pursuant to Ohio Admin. Code §4901-1-12, moves to dismiss the Complaint to the extent it seeks relief concerning digital subscriber line ("DSL") provisioning or billing because those are matters over which the Commission lacks subject matter jurisdiction. A memorandum in support of this motion is attached.

AT&T Ohio

By: /s/ Jon F. Kelly

Jon F. Kelly
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150 E. Gay St., Room 4-A
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(614) 223-7928

Its Attorney

10-411.motion to dismiss

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

Based on the informal complaint which preceded it, as reflected in the attachment, by this Complaint, Complainant seeks to have the Commission exercise jurisdiction over digital subscriber line ("DSL") service and billing, matters over which both this Commission and the Federal Communications Commission ("FCC") have held are subject to the FCC's exclusive jurisdiction because DSL has been found to be an interstate information service. Those precedents require that this complaint be dismissed and that Complainant must, if he seeks to pursue relief, do so at the FCC.

Since 2005, the FCC has consistently ruled that DSL is an interstate information service that is not subject to state commission jurisdiction. It has stated as follows:

> First, we find that we have subject matter jurisdiction over providers of broadband Internet access services. These services are unquestionably "wire communication" as defined in section 3(52) because they transmit signals by wire or cable, or they are "radio communication" as defined in section 3(33) if they transmit signals by radio. The Act gives the Commission subject matter jurisdiction over "all interstate and foreign communications by wire or radio . . . and . . . all persons engaged within the United States in such communication" in section 2(a). Second, with regard to consumer protection obligations, we find that regulations would be "reasonably ancillary" to the Commission's responsibility to implement sections 222 (customer privacy), 255 (disability access), and 258 (slamming and truth-in-billing), among other provisions, of the Act. Similarly, network reliability, emergency preparedness, national security, and law enforcement requirements would each be reasonably ancillary to the Commission's obligation to make available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . for the purpose of the national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communication."

In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, Released September 23, 2005, para. 110 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf). At footnote 333 of the same order, the FCC stated:

> Similarly, in its GTE DSL Order, the Commission found that GTE's asynchronous DSL (ADSL) service offering was interstate and appropriately tariffed with the Commission. GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148, 13 FCC Rcd 22466, para. 1 (1998) (GTE DSL Order), recon., 17 FCC Rcd 27409 (1999) (GTE DSL Reconsideration Order).

Id., footnote 333.

This Commission has, consistently and on numerous occasions, adopted and followed the guidance provided by the FCC. In *Don Damyanic v. Verizon North Inc.*, PUCO Case No. 06-270-TP-CSS, the Commission concluded as follows:

> Verizon's motion to dismiss should be granted. The Federal Communications Commission has deemed retail DSL service offered by Verizon Online to be an information service. Therefore, Mr. Damyanic's complaint should be pursued at the federal level. Thus, this matter should be dismissed and closed of record.

Entry, April 10, 2006, p 3.

In *Louis Green & Associates v. AT&T Ohio*, Case No. 07-108-TP-CSS, the Commission found that the FCC had asserted exclusive jurisdiction over DSL service. Entry, April 7, 2007. It reiterated that finding in its Entry adopted August 1, 2007, citing its earlier Entry for the proposition that it "determined that high speed Internet service is an interstate service subject to the exclusive jurisdiction of the Federal Communications Commission (FCC)."

Most recently, in *Barbara Gadstka v. AT&T Ohio*, Case No. 08-1128-TP-CSS, it was concluded that "[t]he Federal Communications Commission has deemed retail DSL service to be an information service. Both DSL service and any charges or credits related to it are matters beyond the Commission's jurisdiction." Entry, November 17, 2008, pp. 1-2.

For all of the foregoing reasons, given that the Complaint appears to relate to DSL service and billing, the Commission should dismiss the Complaint in its entirety.

AT&T Ohio

By: _____/s/ Jon F. Kelly__ _____

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Appeal Email

Date Sent: 3/9/2010

From: Carey Wade [cw2534@att.com]

To: ContactThePUCO@puc.state.oh.us

Subject: AT&T Response For Mark Drake / MDRA062209X0

Subject: Mark Drake

Customer had DSL Express (25.00). The customer also had Complete Choice (30.00), Unlimited Nationwide 5 Cent (5.00), and Lifeline (12.42cr).

11/10/09, the customer's DSL was downgraded to Basic (19.95 - 5.00cr x 12mos).

12/11/09, the customer's DSL was upgraded back to Express (25.00 - 5.00cr x 12mos).

1/4/10 statement totaled 86.30 (47.00 past due + 39.30 current charges). The current charges consisted of monthly phone charges totaling 34.10 and DSL charges totaling 5.20 (24.25cr Express 11/10-12/8, 14.50 Basic 11/10-12/8, & 14.95 Basic 12/9-1/8).

1/8/10, a payment of 47.00 posted.

2/4/10 statement totaled 98.15 (39.30 past due + 58.85 current charges). The current charges consisted of monthly phone charges totaling 34.10 and DSL charges totaling 24.75 (14.05cr Basic 12/11-1/8, 18.80 Express 12/11-1/8, & 20.00 Express 1/9-2/8).

2/16/10, a credit of 1.00 was applied to the account.

2/17/10, the long distance was removed.

2/19/10, a payment of 34.10 posted, reducing the account balance to 63.05.

(The customer has a history of asking for changes to be made to his service, then calling back in for credit stating he never requested the change. Once we change the service back to the way they were, then he calls back again making the same previous request, etc... He has done this several times with his long distance and is now doing it with the DSL.)

3/8/10. I spent almost 2 hours on the phone explaining the billing and confirmed it is correct. The customer claims he never requested any changes to his DSL service; yet, he claims his rate should be 14.95. He also said he wants the same services he previously had.

The customer seemed very confused, but I think he was wanting the Express speed at the Basic price with the 5.00 discount.

I explained if he wants the same DSL service/speed he previously had, then he will have Express but it is not 14.95. I advised if he wants the 14.95 rate, then his DSL speed will be lower than what he previously had. The customer decided he would rather pay less, than have a faster speed.

I advised no credits are warranted, but agreed to have his DSL downgraded again back to Basic. Also, I changed the customer from the grandfathered Complete Choice package to our current Complete Choice Enhanced package (26.00).

I advised the customer to pay 63.05 and the phone rate after changes made today will be approximately 25.10 going forward.

3/9/10, I called the customer and left a detailed message explaining our position remains the same. I confirmed his DSL was downgraded and the Complete Choice package was updated. I also confirmed the past due balance of 63.05 is correct and provided my contact information.

Certificate of Service

I hereby certify that a copy of the foregoing has been served this 19th day of April, 2010 by first class mail, postage prepaid, on the party shown below.

/s/ Jon F. Kelly
Jon F. Kelly

Mark Drake, Complainant

Mark Drake
1307 Springfield St.
Dayton, OH 45403

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Case No(s). 10-0411-TP-CSS

Summary: Motion to Dismiss and Memorandum in Support electronically filed by Jon F Kelly on behalf of AT&T Ohio