

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

FINDING AND ORDER

The Commission finds:

- (1) On November 12, 2008, tw telecom of ohio, llc. (TWTC or complainant) filed a complaint and a request for expedited ruling against AT&T Ohio (respondent) alleging that the respondent is in violation of its statutory, regulatory, and contractual duties by refusing to execute TWTC's proposed transit traffic amendment to the parties' interconnection agreement, which was approved in Case No. 02-911-TP-NAG (02-911), *In the Matter of the Application of Ameritech Ohio for Approval of an Agreement Pursuant to Section 252 of the Telecommunications Act of 1996*. Specifically, TWTC asserts that, consistent with Rules 4901:1-7-13(D) and (E), Ohio Administrative Code (O.A.C.), the parties' existing interconnection agreement should be amended to reflect that it be allowed to pay tariffed switched access rates until such time as AT&T Ohio receives approval of total element long run incremental cost (TELRIC)-based transit traffic rates. In support of its position, TWTC contends that the adoption of Rule 4901:1-7-13(D), O.A.C., constitutes a regulatory modification that, consistent with the agreement's "Change of Law Provision," necessitates the appropriate interconnection agreement amendment.

With respect to the specific counts of the complaint, in Count One, the complaint asserts that, pursuant to the interconnection agreement, AT&T Ohio must honor the "Change of Law" Provision and agree to jointly amend the interconnection agreement to reflect the rates required by Rule 4901:1-7-13(D), O.A.C. Pursuant to Count Two of its complaint, TWTC asserts that, by failing to enter

into good faith negotiation with TWTC to amend the interconnection agreement, AT&T Ohio has violated Section 251(c) of the Telecommunications Act of 1996 (1996 Act) and Rule 4901:1-07-06(A)(3), O.A.C. Pursuant to Count Three, TWTC alleges that the rates that it currently pays are significantly higher than AT&T Ohio's tariffed switched access rates that are required in accordance with Rule 4901:1-7-13(D), O.A.C. Further, TWTC asserts that by refusing to allow it to amend its interconnection agreement to reflect the change in law, AT&T Ohio continues to demand and collect unjust and unreasonable rates for telecommunications services in violation of Section 251(c)(2)(D) of the 1996 Act and Section 4905.26, Revised Code. Finally, pursuant to Count IV, TWTC asserts that, in refusing to grant its amendment request, AT&T Ohio continues to charge rates in excess of those mandated by Rule 4901:1-7-13(E), O.A.C., thereby violating Section 4905.22, Revised Code.

- (2) On December 10, 2008, AT&T Ohio filed its answer in response to TWTC's complaint. While AT&T Ohio acknowledges that the Commission adopted carrier-to-carrier rules pursuant to Case No. 06-1344-TP-ORD (06-1344), *In the Matter of the Establishment of Carrier-to-Carrier Rules*, it denies that such rules are applicable to the negotiated rates, terms, and conditions at issue in this proceeding. Additionally, while AT&T Ohio recognizes that the applicable interconnection agreement contains an "Intervening Law" section, it denies that the quoted language is applicable to the negotiated rates, terms, and conditions at issue in this proceeding.
- (3) Pursuant to the attorney examiner Entry of November 21, 2008, a prehearing conference was held on December 9, 2008, at the offices of the Commission. During this prehearing it was determined that a settlement in this matter was not possible. Due to the fact that the issue in dispute is limited to an interpretation of law, and does not involve a factual dispute, it was decided that, in lieu of a formal evidentiary hearing, this case could be presented before the Commission in the form of legal briefs. Consistent with the procedural schedule set forth in the attorney examiner's Entry of December 12, 2008, TWTC filed its initial brief on February 3, 2009, and its reply brief on March 20, 2009. AT&T Ohio filed its initial brief on March 3, 2009.
- (4) In support of the allegations set forth in its complaint, TWTC asserts that the Commission has jurisdiction of this matter consistent with its authority pursuant to Section 252(e) of the 1996

Act to enforce the terms and conditions of the interconnection agreement.

TWTC submits that, because a certain volume of traffic exchange is necessary in order to make direct interconnection between carriers economically practicable, competitive local exchange carriers (CLECs) that lack the size and geographic ubiquity of the incumbent local exchange company (ILEC) cannot economically justify direct interconnection with every other CLEC or small ILEC. Noting that virtually all local exchange carriers providing service in AT&T Ohio's service territory must directly interconnect with AT&T Ohio, the complainant avers that AT&T Ohio's provisioning of the transiting function is essential for carriers interconnected with AT&T Ohio's network to reach third-party carriers in instances where alternative routing of telecommunications traffic is not economically justifiable.

TWTC identifies Section 21.1 (Intervening Law Provision) of the interconnection agreement approved in 02-911 as the applicable provision relative to this dispute. Specifically, TWTC focuses on the following language:

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.

TWTC submits that the purpose of Section 21.1 is to allow either party to reserve the right to change the duties and pricing standards of the interconnection agreement following a change in law, regardless of whether the parties arrived at the interconnection agreement through negotiation or arbitration.

TWTC asserts that the intent of this provision is clear and unambiguous. Specific to the enforcement of Section 21.1, the complainant references the Commission's adoption of Rule 4901:1-7-13(D), O.A.C., which became effective November 30, 2007, subsequent to the interconnection agreement approval on July 17,

2002. TWTC focuses on the language of the Rule 4901:1-7-13(D), O.A.C., which provides 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 [C]ommission 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(D), O.A.C. TWTC opines that the rule modifies the rates currently in force under the interconnection agreement because rather than the "commercial" rates imposed by AT&T Ohio, the transit rate is required to be the TELRIC-based transit rates or, in the alternative, tariffed switched access rates subject to a true-up of those rates.

TWTC believes that in response to the enactment of Rule 4901:1-7-13(D), O.A.C., it properly exercised its rights pursuant to Section 21.1 of the interconnection agreement. Specifically, TWTC references its letters of April 8, 2008, and July 10, 2008, invoking the "change of law" provision for the purpose of seeking an amendment to the interconnection agreement. In doing, TWTC contends that the enactment of Rule 4901:1-7-13(D), O.A.C., satisfies the following criteria of Section 21.1 of the interconnection agreement:

- (a) A law or regulation serving as the basis for rates/terms/conditions in the Interconnection Agreement is modified;
- (b) By action of a state or federal regulatory body; and
- (c) Either TWTC or AT&T filed a written request of the other party seeking an amendment to the Interconnection Agreement.

TWTC dismisses AT&T Ohio's argument that Rule 4901:1-7-13(E), O.A.C., prohibits TWTC from invoking the Intervening Law provision. The complainant appears to assert that exercising the Intervening Law provision is independent of whether the parties

can negotiate different transit traffic interconnection and compensation arrangements.

As further support of its position, TWTC asserts that it is attempting to invoke the Intervening Law provision based on the Commission's decision in 06-1344 that the transit function is an obligation under Section 251(c)(2) of the 1996 Act and carries the associated pricing obligation. TWTC notes that AT&T Ohio had previously, in 2008, availed itself of the "change in law" provision in a manner similar to this case regarding the rates, terms, and conditions of resale established in Case No. 06-1345-TP-ORD (06-1345), *In the Matter of the Review of Chapter 4901:1-6, Ohio Administrative Code*. TWTC points out that AT&T Ohio did not invoke the "change in law provision" until February 2008, despite the fact that the relevant Commission entry was issued in June 7, 2007, which was well before the Seventeenth Interconnection Agreement Amendment that AT&T Ohio now relies upon as the basis for its denial of TWTC's requested "change in law."

Finally, TWTC asserts that AT&T Ohio should not be allowed to relitigate the transit rate issues previously addressed by the Commission in 06-1344. In support of its position, TWTC points out that AT&T Ohio had opposed Rule 4901:1-7-13(D), O.A.C., in 06-1344.

- (5) AT&T Ohio highlights the fact that the interconnection agreement in question in this proceeding was negotiated, and not arbitrated between the parties. According to AT&T Ohio, pursuant to the negotiation process, the parties may agree to terms without regard to the substantive requirements contained in Sections 251(b) and (c) of the 1996 Act. Specific to this case, AT&T Ohio states that the transit traffic rates agreed to between the parties were fixed rates, which were not tied in any way to any past, pending, or future proceeding before the Commission. Additionally, AT&T Ohio argues that the Commission cannot order TWTC to pay different transit rates from those set forth in the existing interconnection agreement because, by negotiating its interconnection agreement with AT&T Ohio, TWTC entered into a binding agreement. To this point, AT&T Ohio asserts that once a negotiated agreement has been approved by the Commission it is binding and the only remaining role for this Commission is to enforce the agreement's terms. Therefore, AT&T Ohio opines that "the Commission could not have lawfully applied Rule 4901:1-7-13, [O.A.C.], to the transit rates contained in the interconnection agreement in this case

because the 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."

AT&T Ohio discusses that prior to 2006, the Commission did not have any binding rules for the provision of transit traffic and, instead, addressed transit traffic in its Local Service Guidelines that were adopted in Case No. 95-845-TP-COI, *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*. AT&T Ohio notes that relative to transit traffic compensation, the Local Service Guidelines provided that intermediate carriers shall be compensated at their tariffed exchange access rates. At the same time, AT&T Ohio points out that the Local Service Guidelines also stated that local exchange companies were not precluded from negotiating other transit traffic interconnection and compensation arrangements.

With respect to the Commission's adoption of Rule 4901:1-7-13, O.A.C., as part of the approval of the Carrier-to-Carrier Rules in 06-1344, AT&T Ohio opines that the rule established interim rates for transiting which can be used by carriers that do not already have an agreement covering transiting. In support of its position, AT&T Ohio notes that Rule 4901:1-7-13(E), O.A.C., provides that this section shall not be construed to preclude telephone companies from negotiating other transit interconnection and compensation arrangements. Therefore, in light of the fact that the interconnection agreement approved in 02-911 contains negotiated transit traffic rates, AT&T Ohio submits that Rule 4901:1-7-13(D), O.A.C., does not apply (*Id.* at 8, 9). In support of its position, AT&T Ohio submits that the Commission has previously stated its Carrier-to-Carrier rules did not affect existing negotiated transiting arrangements (See, e.g., Opinion and Order, 06-1344, 2007 Ohio PUC LEXIS 572 [Aug. 22, 2007]).

As further support for its position, AT&T Ohio indicates that the applicable interconnection agreement provision does not provide for or anticipate any modification of transit rates by the Commission or by either party.

Analyzing Section 21.1 of the existing interconnection agreement, AT&T Ohio believes that the provision does not allow a carrier to amend an agreement any time the Commission or the Federal Communications Commission (FCC) issues a decision setting rates,

terms, or conditions of interconnection. Rather, AT&T Ohio avers that Section 21.1 only applies to contract provisions whose basis or rationale is some law or regulation and when the legal basis or rationale has been changed. Specific to this interconnection agreement, AT&T Ohio asserts that Rule 4901:1-7-13, O.A.C., does not invalidate or modify TWTC's transit rates, because the rule, by its own terms, expressly exempts negotiated transit rates. Additionally, AT&T Ohio submits that the rule does not invalidate, modify, or stay the basis or rationale for TWTC's negotiated transit rates since the basis of the existing transit rates was the private negotiation between the parties. AT&T Ohio points out that the contract does not reference any Commission-set rates, the Commission's Local Service Guidelines, any other Commission rules on transiting, or any existing or future Commission rate-making proceeding.

AT&T Ohio attempts to distinguish TWTC's stated examples of the respondent utilizing the Intervening Law Provision. With respect to the example of AT&T Ohio attempting to incorporate the FCC's holdings in its *Triennial Review Remand Order* (TRRO), AT&T Ohio responds that, unlike the current case, the intervening law provision applied because: "(i) the 'basis or rationale' for the relevant [interconnection agreement] provisions . . . 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"

With respect to the example of AT&T Ohio implementing the Commission's directive to detariff certain services in 06-1345, AT&T Ohio explains that this action was necessary because the underlying laws or regulation that formed the basis or rationale for the contract terms had been invalidated, modified, or stayed. In contrast, AT&T Ohio submits that, in the current case, the negotiated transit rates were based on pure negotiations, and not on any laws or regulations.

- (6) Upon a review of the arguments presented, the Commission finds that the Intervening Law provision of the relevant interconnection agreement is applicable to TWTC's April 8, 2008, request to amend the agreement in order to incorporate AT&T Ohio's switched access rates as a proxy for TELRIC-based transiting rates subject to a true-up.

As discussed supra, Section 21.1 was incorporated within the relevant interconnection agreement and, due to the absence of any

restrictive terms within the agreement, is applicable to transit traffic provided the conditions of Section 21.1 have been satisfied. Upon reviewing the prerequisite conditions of Section 21.1, the Commission has reviewed the applicable language and finds that such criteria have been satisfied. Specifically, the Commission finds that the enactment of Rule 4901:1-7-13, O.A.C., constitutes an action of a state regulatory body.

Further the Commission recognizes that at the time of the execution of the disputed interconnection agreement, the Local Service Guidelines in effect provided that local exchange companies could either negotiate transit traffic interconnection and compensation arrangements or the intermediate carrier may provide transit traffic functionality either by:

- (a) Carrying the call over its public switched network, in which case the intermediate carrier shall be compensated at its tariffed exchange access rates under the same terms and conditions applicable to other ILECs for the provision of a similar functionality (i.e., excluding carrier common line charge, residual interconnection charge, information surcharge, and local switching charge); or
- (b) Providing direct connection, if technically feasible, between the originating and terminating carriers if they are both collocated in the intermediate carrier's premises provided that the collocated equipment is also used for interconnection with the intermediate carrier or for access to such intermediate carrier's unbundled network elements. The requesting carrier shall provide a detailed proposal of how the actual connection is to be established, the required equipment to be provided by the intermediate carrier for that purpose, and the requested compensation method. The intermediate carrier shall be compensated for all services, functionalities, and facilities it provides pursuant to Sections II, IV, and V of these guidelines.

(Local Service Guidelines, Case No. 95-845-TP-COI, Section IV, E.). Pursuant to these parameters, TWTC elected to enter into a negotiated agreement for the purpose of transit traffic, which established independent fixed rates for the transiting service.

Pursuant to the enactment of Rule 4901:1-7-13, O.A.C., carriers seeking the establishment of transit traffic rates could afford themselves of the following process:

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 [C]ommission 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.

A comparison of the pricing protocol provided pursuant to Local Service Guideline, Section IV.E. and the pricing protocol provided pursuant to Rule 4901:1-7-13(D), O.A.C., reflects that the basis or rationale for such rates, terms, and/or conditions in this Agreement are invalidated, modified, or stayed. In reaching this determination, the Commission first points to the fact that the TELRIC-based transit traffic pricing afforded pursuant to Rule 4901:1-7-13(D), O.A.C., is premised on an entirely different methodology than that afforded under the access-based pricing afforded pursuant to Local Service Guideline, Section IV.E. Such a distinction may certainly impact whether a local exchange carrier elects to purchase transit service pursuant to a methodology established by a particular rule/guideline or whether it elects to purchase such service pursuant to a negotiated rate.

AT&T Ohio argues that, in light of the fact that the parties entered into a negotiated agreement for the purpose of transit traffic, the basis or rationale for such rates, terms, and/or conditions in this Agreement are not invalidated, modified, or stayed. The Commission disagrees with this contention. Specifically, the Commission points out that even though the parties entered into a negotiated agreement, the rationale utilized for such a decision was dependent on the factors (e.g., the rules and rates) that existed at the time of such a decision. This includes the fact that a TELRIC-based option did not exist at that time. Additionally, the Commission highlights that the access rates have changed from the time of the original decision and that pursuant to Rule 4901:1-7-13, O.A.C., TWTC should be allowed to consider the current access rates, which will be subject to a true-up, as part of its decision to

exercise its rights pursuant to Section 21.1. As a result of the above discussion, the Commission finds that the current dispute is not distinguishable from the scenarios summarized above in which AT&T Ohio exercised the Intervening Law provision.

In response to AT&T Ohio's reliance on Rule 4901:1-7-13(E), O.A.C., relative to the ability of the parties to enter into an interconnection agreement that provides for negotiated rates, the Commission first points out that the independent agreement negotiated by the parties incorporates Section 21.1, pertaining to the application of the "Intervening Law" provision. Additionally, concerning AT&T Ohio's arguments regarding the applicability of Rule 4901:1-7-13(E), O.A.C., the Commission finds that Rule 4901:1-7-13(E), O.A.C., does not supersede Section 21.1 but, rather, only applies to the parties initially entering into an interconnection agreement following a change in law provision and the application of a new rule.

- (7) Based on the above determination and consistent with the requested relief in this proceeding, the Commission finds that the change in law provision is applicable to the rate dispute set forth in the complaint as of TWTC's April 8, 2008, request to amend the agreement. Accordingly, the parties are directed to amend the applicable terms of the interconnection agreement consistent with Section 21.1 of the interconnection agreement as discussed supra.

It is, therefore,

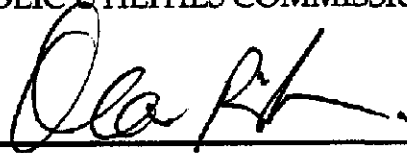
ORDERED, That the parties comply with the directives set forth in Finding (7). It is, further,

ORDERED, That, to the extent not addressed in this Finding and Order, all other allegations are denied. It is, further,

ORDERED, That nothing in this Finding and Order shall be binding upon the Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, rule, or regulation. It is, further,

ORDERED, That a copy of this Finding and Order be served upon all parties of record.

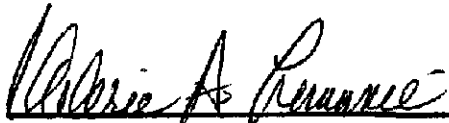
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



Paul A. Centolella



Valerie A. Lemmie



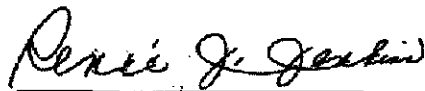
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Entered in the Journal
NOV 22 2010



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