BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules to Implement Substitute Senate Bill 162.	)))	Case No. 10-1010-TP-ORD

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING BY MEMBERS OF OHIOANS PROTECTING TELEPHONE CONSUMERS

I. INTRODUCTION

The undersigned members of Ohioans Protecting Telephone Consumers ("OPTC")[1] submit this Memorandum Contra the Applications for Rehearing filed by the AT&T Entities ("AT&T") and by the Ohio Telecom Association ("OTA"). Both applications for rehearing should be denied in their entirety.[2]

There is some overlap between the two Applications for Rehearing, so this Memorandum Contra will be organized according to the specific rules adopted in the Opinion and Order ("O&O") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this proceeding on October 27, 2010, as to which AT&T and OTA have applied for rehearing. The O&O set forth rules regarding the implementation of Substitute Senate Bill 162 ("Sub. S.B. 162"), which became effective on September 13, 2010. The O&O addressed the draft rules submitted by PUCO staff in an Entry dated July 29, 2010.

[1] OPTC is an alliance of consumer, legal and low-income advocates that united to ensure that consumer protections were contained in Sub. S.B. 162, and continue that advocacy for the rules implementing the new law.

[2] OPTC files this Memorandum Contra pursuant to Ohio Adm. Code 4901-1-35(B).

II. ARGUMENT

A. Rule 4901:1-6-14 -- definition of residential BLES[3]

Both AT&T and OTA reargue the points in their comments and reply comments that "in the case of residential service, the presence of two or more lines precludes either one from being BLES, by definition."[4] Neither adds anything significant to their prior comments, other than reference to "the Commission's erroneous conclusion...."[5]

The Commission adequately addressed this issue in the O&O, stating,

> [W]e do not accept AT&T's interpretation with respect to the word "single" foreclosing a BLES customer from having a second line. Rather, we agree with OPTC that, for purposes of the definition of BLES in Section 4927.01(A)(1), Revised Code, residential access and usage of services "over a single line" does not preclude a customer from having a second non-BLES line, as long as such service "is not part of a bundle or package of services." In other words, the first residential line can still be BLES, even if a customer purchases other a la carte services or features, including a second line.[6]

The point is that a customer can have only one BLES line; the fact that the customer also subscribes to a second line does not make that first line non-BLES.

The fact that "AT&T has been planning for the implementation of the new law and believed it to be very clear under the Act that in no circumstance does any line on a multi-line residential account qualify as a BLES line"[7] does not demonstrate error on the

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[3] AT&T Allegation of Error 1; OTA Allegation of Error 1.

[4] AT&T Memorandum in Support of Application for Rehearing ("AT&T Memo") at 4-5, citing AT&T Initial Comments at 13; see also Memorandum in Support of the Application of the Ohio Telecom Association for Rehearing ("OTA Memo") at 3.

[5] AT&T Memo at 7.

[6] O&O at 20.

[7] AT&T Memo at 7.

Commission's part.[8] AT&T's and OTA's application for rehearing on this issue should be denied.

B. Rules 4901:1-6-14(I), (J) – BLES late payment charges, installation and reconnection fees[9]

AT&T and OTA object to the rules that limit BLES late payment charges, installation and reconnection fees. Here again, AT&T and OTA refer only to their comments and reply comments, and add nothing new.[10] And here again, their arguments are refuted by the Commission's finding:

> Section 4927.12, Revised Code, gives the Commission the authority to prescribe by rule **the manner in which the terms and conditions for BLES and for installation and reconnection fees shall be tariffed.** Given the lengths that the law goes to in protecting BLES rates, it would make no sense, in our view, to have no pricing parameters around BLES fees which could easily put BLES out of reach for some customers. Moreover, we do not find compelling AT&T's argument as to the unfairness of applying this restriction only on the ILECs, since the law only places the requirement to provide BLES on the ILECs.[11]

AT&T creates a straw man with its argument that "[u]nderlying the adopted restriction might be the presumption that because there is no mechanism to increase the charges at issue, they cannot be increased and must be capped at the rates in effect on the effective date of the Act."[12] AT&T analogizes to the fact that there is no mechanism in Sub. S.B. 162 for increasing toll charges, but "no one would argue that because there is no mechanism to increase those rates, they must, therefore, be capped at September 13,

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[8] Neither do the "operational issues" identified by AT&T. Id.

[9] AT&T Allegation of Error 2 and 3; OTA Allegation of Error 1.

[10] AT&T Memo at 8-9, 9-10; OTA Memo at 3, 4.

[11] O&O at 21 (emphasis added).

[12] AT&T Memo at 1 (referring to Sub. S.B. 162 as "the Act").

2010 levels."[13] This reasoning appears nowhere in the O&O. AT&T's argument ignores the direct and intimate connection between BLES and these fees; as the Commission stated, "[I]t would make no sense to have no pricing parameters around BLES fees which could easily put BLES out of reach for some customers."[14]

AT&T's and OTA's application for rehearing on this issue should be denied.

C. Rule 4901:1-15(A) – telephone directory scope and content[15]

AT&T and OTA object to this rule's requirements for the format and content of phonebooks. Again, AT&T and OTA merely refer to their comments.[16] In this instance, however, the Commission did not address these specifics in the O&O, other than the requirement to offer BLES customers the option of a printed directory.[17] With regard to that issue, the Commission stated,

> Section 4927.01(A)(1), Revised Code, mandates that BLES includes the provision of a telephone directory "in any reasonable format." The Commission acknowledges that the law does not expressly require a printed directory. We further recognize that the time may come in the very near future that a printed directory may become completely obsolete, but, given the current state of broadband access and subscribership in Ohio at this time, we determine that, for BLES customers, "reasonable format" must include the option, at a customer's request, to have a printed directory.[18]

Neither AT&T nor OTA directly addresses this reasonable conclusion.

With regard to the other required content for directories, OPTC stated, in reply comments, that "the requirement in paragraph (A) that directories include all published

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[13] Id.

[14] O&O at 21.

[15] AT&T Allegation of Error 4; OTA Allegation of Error 2.

[16] AT&T Memo at 11-12; OTA Memo at 4.

[17] See O&O at 22-23.

[18] Id.

numbers and information regarding emergency services and operator access furthers public safety and welfare. It is disappointing that the companies object to providing this information."[19] It is even more disappointing that the telephone companies are so unconcerned with the public safety and welfare that they feel compelled to challenge this requirement on rehearing. The rule adopted by the Commission was reasonable, and AT&T's and OTA's application for rehearing on this rule should be denied.[20]

D. Rule 4901:1-6-16 – "impracticable" disclosures[21]

OTA argues that this rule should contain blanket exemptions for disclosures that are impracticable.[22] Notably, OTA did not argue this point in its initial or reply comments.

As OPTC stated in reply comments, in response to this argument as raised by CBT:

> CBT argues that the rules should globally limit requirements against "an unfair or deceptive act or practice ... to those that are practicable in a given communication." CBT, however, ignores the fact that the limitation was included in the legislation as originally introduced, but was removed. The General Assembly replaced the limitation with a provision that says the Commission "**may** prescribe, by rule, a ... review process to determine when disclosing such information is not practicable...." CBT's proposal is thus directly contrary to legislative intent.[23]

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[19] OPTC Reply Comments at 29.

[20] It is noteworthy that in its application for rehearing in this proceeding AT&T contended that the Commission "failed to justify its Order, as required by R. C. § 4903.09" (AT&T Memo at 12, 17) yet just four days later in another proceeding AT&T argued that R.C. 4903.09 applies only in those proceedings in which a hearing is held. *In the Matter of the Application of The Ohio Bell Telephone Company d/b/a AT&T Ohio for a Commission Determination Pursuant to Ohio Revised Code Section 4927.12(C)(3)*, Case No. 10-1412-TP-BLS, AT&T Memorandum Contra (November 30, 2010) at 1-3.

[21] OTA Allegation of Error 3. AT&T does not include a similar allegation in its Application for Rehearing.

[22] OTA Memo at 4-5;

[23] OPTC Reply Comments at 4 (footnotes omitted).

Just as CBT's proposal was contrary to legislative intent, so is OTA's argument on rehearing. OTA's application for rehearing on this point should be denied.

E. Rule 4901:1-6-31(F) and (G) – emergency operations requirements[24]

AT&T and OTA object to the requirements of this rule regarding emergency plans.[25] In the O&O, the Commission ruled that these provisions were necessary:

> We ... deny the companies' request to eliminate the requirement for companies to develop and implement emergency plans. The Commission believes that this requirement is necessary for the protection, welfare, and safety of the public, and fulfills requirements of the Ohio Homeland Security Strategic Plan, as well as federal Homeland Security requirements.[26]

AT&T creates another straw man, by asserting that the "protection, welfare and safety of the public" test applies only "when the Commission attempts to exercise authority that the federal government gives it over VoIP and new services under R. C. § 4927.03(A)."[27] In this situation, the Commission was not applying the test for whether it should exercise authority over VoIP and new services; instead the Commission was attempting to maintain public safety. AT&T also condemns what it calls the Commission's "vague reference" to state and federal Homeland Security directives and plans.[28] AT&T's insouciance regarding these issues – apparently in its disdain for any state regulation, even that designed to protect public safety – is a fundamental reason for the need for this particular regulation to protect the public.

AT&T's and OTA's applications for rehearing of this rule should be denied.

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[24] AT&T Allegation of Error 6; OTA Allegation of Error 4.

[25] AT&T Memo at 15-17; OTA Memo at 5.

[26] O&O at 37.

[27] AT&T Memo at 16.

[28] Id.

F. Rule 4901:1-6-33 – excess construction charges[29]

OTA's initial comments simply opposed the adoption of this rule.[30] In reply comments, OTA opposed OPTC's suggestions on the rule.[31] Now, however, OTA "proposes" changes to the rule, without arguing that the Commission erred in adopting the rule.[32] Indeed, OTA merely proposes those changes, and does not even argue that without those changes the rule is unlawful or unreasonable, as required by R.C. 4903.10 for applications for rehearing.[33]

OTA's suggestion that the change should be made "in order to avoid any negative inferences"[34] is clearly insufficient to justify the change. Indeed, the rule's directive that "[a]n ILEC may not charge an applicant for any excess construction charges for BLES unless provisions for such charges are set forth in the company's tariff and approved by the commission" is clear, straightforward and leaves no room for doubt that customers cannot be subject to charges for excess construction that are not in a Commission-approved tariff. The Commission should deny OTA's application for rehearing of this rule.

III. CONCLUSION

For the reasons set forth herein, the applications for rehearing by AT&T and OTA should be denied.

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[29] OTA Allegation of Error 5. AT&T does not include a similar allegation in its Application for Rehearing.

[30] OTA Comments at 8.

[31] OTA Reply Comments at 8.

[32] OTA Memo at 5.

[33] See OTA Allegation of Error 5; OTA Memo at 5.

[34] OTA Memo at 5.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

David C. Bergmann, Counsel of Record
Terry L. Etter
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 – Telephone
bergmann@occ.state.oh.us
etter@occ.state.oh.us

Joseph P. Meissner
Legal Aid Society of Greater Cleveland
3030 Euclid, Suite 100
Cleveland, Ohio 44115
jpmeissn@lasclev.org
Attorney for Citizens Coalition

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
333 West First Street, Suite 500B
Dayton, Ohio 45402
(937) 535-4419 – Telephone
(937) 535-4600 – Facsimile
ejacobs@ablelaw.org
Attorney for Edgemont Neighborhood Coalition

Noel M. Morgan
Senior Attorney
Legal Aid Society of Southwest Ohio LLC
215 E. Ninth St.
Cincinnati, Ohio 45202
513-362-2837
nmorgan@lascinti.org
Attorney for Communities United for Action

Michael R. Smalz
Joseph Maskovyak
555 Buttles Avenue
Columbus, Ohio 43215-1137
(614) 221-7201 – Telephone
(614) 221-7625 – Facsimile
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org
Attorneys for Ohio Poverty Law Center

Michael A. Walters
Legal Hotline Managing Attorney
Pro Seniors, Inc.
7162 Reading Road, Suite 1150
Cincinnati, Ohio 45237
(513) 458-5532 – Telephone
mwalters@proseniors.org
Attorney for Pro Seniors, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Applications for Rehearing was served by first class United States Mail, postage prepaid, to the persons listed below, on this 6th day of December 2010.

David C. Bergmann
Assistant Consumers' Counsel

SERVICE LIST

William Wright
Assistant Attorney General
Chief, Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291

Ron Bridges
Director, Policy & Governmental Affairs
AARP Ohio
17 South High Street, Suite 800
Columbus, Ohio 43215

Benita Kahn
Stephen M. Howard
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
Columbus, Ohio 43215

Jon F. Kelly
Mary Ryan Fenlon
AT&T Services, Inc.
150 E. Gay Street, Rm. 4-A
Columbus, Ohio 43215

Jouett K. Brenzel
Cincinnati Bell Telephone Company LLC
221 East Fourth Street, 103-1280
Cincinnati, Ohio 45202

Carolyn S. Flahive
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215-6101

Charles Carrathers
Verizon General Counsel – Central Region
600 Hidden Ridge HQE03H52
Irving, Texas 75038