

AT&T's attempt to dismiss the valid complaint before the Commission is a further attempt to continue to unlawfully charge and collect for services that have been terminated. AT&T continues to charge for late fees and interest on these disputed charges, and will continue its unreasonable, unfair, misleading, deceptive, and anti-

competitive practices until this Commission orders it to cease.

First, AT&T admits to providing local exchange services to Frank Gates, a matter that AT&T clearly confesses is within the Commission's jurisdiction. Motion to Dismiss at 2; Answer at 2. AT&T also explicitly states: "AT&T Ohio admits to being subject to the Commission's jurisdiction for certain services provided." Answer at 2. Despite these admissions, AT&T claims that the Commission has no jurisdiction in this case "over all, or most of, the services at issue." Motion to Dismiss at 1. AT&T apparently is attempting to limit the Commission's jurisdiction in this particular case based upon the type of services provided, or at least with respect to some of the services provided. *Id.* at 3. However, the admission alone that one or some of the services provided are within the Commission's jurisdiction is sufficient to deny AT&T's Motion to Dismiss. AT&T is a public utility and telephone company as defined in Sections 4905.02(E) and 4905.03(A)(1), Revised Code, and is subject to the Commission's jurisdiction pursuant to Chapter 4905, Revised Code.

AT&T further argues that the Commission lacks jurisdiction over any of AT&T's actions in this proceeding that fall outside the context of "public utility services." *Id.* at 3-4. AT&T conveniently fails to recognize, however, the jurisdiction conferred to the Commission by the General Assembly with regard to promoting the policy of the state to promote diversity of supply, prevent unfair or deceptive acts and practices "in connection with the offering or provision of **any** telecommunications service in this state," ensure the provision of service on a reasonable and nondiscriminatory basis, and provide notice of material changes. Sections 4927.02, 4927.06 (emphasis added), 4927.11, and 4927.17, Revised Code. Thus, even assuming, *arguendo*, that some of the services fall outside of

those regulated by Chapter 4905, Revised Code, the Commission retains jurisdiction for those services pursuant to Chapter 4927, Revised Code. Furthermore, Section 4927.21, Revised Code, confers jurisdiction to the Commission over hearing complaints regarding such matters.

Specifically, Section 4927.02, Revised Code, states:

(A) It is the policy of this state to:

- (1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;
- (2) Provide incentives for competing providers of telecommunications service to provide advanced, high-quality telecommunications service to citizens throughout the state;
- (3) Rely primarily on market forces, where they exist, to maintain reasonable service levels for telecommunications services at reasonable rates;
- (4) Encourage innovation in the telecommunications industry and the deployment of advanced telecommunications services;
- (5) Create a regulatory climate that provides incentives to create and maintain high technology jobs for Ohioans;
- (6) Promote diversity and options in the supply of telecommunications services and equipment throughout the state;
- (7) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of telecommunications services where appropriate;
- (8) Consider the regulatory treatment of competing and functionally equivalent services and, to the extent practicable, provide for equivalent regulation of all telephone companies and services;
- (9) Not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services; and

(10) Protect the affordability of telephone service for low-income subscribers through the continuation of federal lifeline assistance programs.

(B) The public utilities commission shall consider the policy set forth in this section in carrying out this chapter.

The state policy and the Commission's statutory mandate to enforce such policy are at issue in this case. For example, AT&T's unjust, unreasonable, unfair, and deceptive practices in the termination of service, attempts to terminate service, and billing for services, as described in the complaint, constitute anti-competitive behavior in direct violation of the policy of the state as delineated above.

Section 4927.06, Revised Code, states, in pertinent part:

(A) No telephone company shall commit any unfair or deceptive act or practice in connection with the offering or provision of any telecommunications service in this state. A failure to comply with any of the following requirements shall constitute an unfair or deceptive act or practice by a telephone company:

(1) **Any communication** by the company, including, but not limited to, a solicitation, offer, or contract term or condition, shall be truthful, clear, conspicuous, and accurate in disclosing any material terms and conditions of service and any material exclusions or limitations.

Emphasis added. AT&T's unfair and deceptive acts and practices in connection with providing service to Frank Gates is another issue presently before the Commission through this complaint.

Additionally, the Commission's rules implementing Section 4927.06, Revised Code, explain that any communication by the company includes, but is not limited to, "solicitations, offers contract terms and conditions, or customer agreements, **as well as any other communications** whether written or oral." Rule 4901:1-6-16(B)(1), O.A.C. (emphasis added). Any unfair and deceptive acts and practices on behalf of AT&T are

also in violation of Rules 4901:1-6-16(A), 4901:1-6-16(B)(1)(a) and (b), and 4901:1-6-16(C), O.A.C. AT&T's contract language and its practices implementing such contract language and alleged contract conditions are additional issues pending before the Commission. Furthermore, "other communications," both written and oral, between AT&T's account managers and representatives and AT&T's customer raise issues and concerns that are pending before the Commission.

The Commission has jurisdiction to determine whether services by an incumbent local exchange carrier were provided on a reasonable and nondiscriminatory basis. Section 4927.11, Revised Code. This is another issue present in the pending complaint.

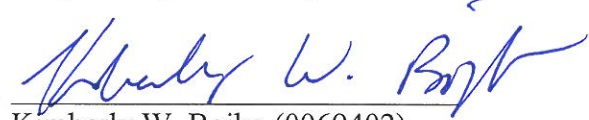
Moreover, questions of AT&T's policies and practices regarding the implementation of its termination provisions and contract language are at issue, as well as the inconsistent application of those policies and practices. The inconsistent application of its policies and practices in order to retain a customer and further collect from that customer when the customer has either switched providers or announced its decision to switch is unfair, unjust, unreasonable, anti-competitive, unjustly discriminatory, and prohibited by numerous provisions of Ohio law and the Commission's rules. Additionally, failure to notify an affected customer of any material change in the "conditions of a service and any change in the company's operations that are not transparent to customers and may impact service" is expressly prohibited by Section 4927.17, Revised Code.

Clearly, the numerous issues present in the complaint fall squarely within the Commission's jurisdiction. AT&T has not demonstrated that dismissal is appropriate. AT&T cannot prevail on its motion because it has not shown, and cannot show, that even

if the allegations of Frank Gates' complaint are true, the complaint fails to state a claim upon which relief may be granted.¹ Additionally, AT&T is a public utility and telephone company as defined in Sections 4905.02(E) and 4905.03(A)(1), Revised Code, and is subject to the Commission's jurisdiction pursuant to Chapters 4905 and 4927, Revised Code.

WHEREFORE, for the reasons stated herein, Frank Gates respectfully requests that the Commission deny AT&T's Motion to Dismiss, find that reasonable grounds for the Complaint exist pursuant to Sections 4905.26 and 4927.21, Revised Code, and set the matter for hearing.

Respectfully submitted,



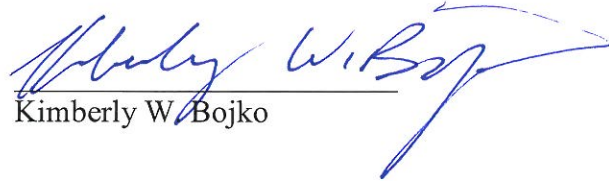
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¹See *Volbers-Klarich v. Middletown Mgmt.*, 929 N.E.2d 434, 437 (Ohio 2010); *RPC Elecs., Inc v. Wintronics, Inc.*, 2012 Ohio App. Lexis 1057, *4 (Ohio App. 2012).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 10th day of December, 2012 by electronic mail if available or by regular U.S. mail, postage prepaid, upon the persons listed below.


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Summary: Memorandum Memorandum Contra Motion to Dismiss electronically filed by Mrs. Kimberly W. Bojko on behalf of The Frank Gates Service Company