

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T CORP.,	)	
	)	
Complainant,	)	Case No. 16-1104-TP-CSS
	)	
v.	)	
	)	
TSC COMMUNICATIONS, INC.,	)	
	)	
Respondent.	)	

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REPLY MEMORANDUM IN SUPPORT OF  
RESPONDENT TSC COMMUNICATIONS, INC.'S  
MOTION TO DISMISS COMPLAINT

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Complainant AT&T Corp.'s ("AT&T") Response to Motion to Dismiss filed in this docket on July 13, 2016 attempts to confuse the straight-forward position raised in Respondent TSC Communications, Inc.'s ("TSCCI") Motion to Dismiss. TSCCI made clear in its Motion that it did not address the prospective application of AT&T's claims. (Motion to Dismiss p. 4.) TSCCI agrees with AT&T's third argument (AT&T Response p. 5) that the Complaint should proceed to determine whether TSCCI's current tariff should be revised on a prospective basis only. TSCCI's position in this Motion to Dismiss is that the Public Utilities Commission of Ohio ("Commission") cannot order retroactive relief as a matter of law, which precludes the refunds that AT&T seeks. Ohio law prohibits retroactive changes to Commission-approved rates. *Keco Industries, Inc. v. The Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

TSCCI's rural CLEC intrastate access rate was approved in Case No. 01-1348-TP-ATA (Finding and Order, November 29, 2001). In that Finding and Order, the Commission specifically acknowledged that the Federal Communications Commission ("FCC") in its Seventh Report and

Order released April 27, 2001, *In the Matter of Access Charge Reform*, CC Docket No. 96-262, "determined that qualifying rural CLECs may tariff rates at the level of those in the NECA access tariff ...." (Finding and Order ¶ 2.) The Commission authorized TSCCI to adopt, "the FCC's interstate benchmarks for rural CLECs ...", which were and are the NECA rates. (Finding and Order ¶ 7.) The final approved tariff language which was filed the day after the Finding and Order was issued is the exact same language which had been filed with the Commission on November 6, 2001 and approved in the Finding and Order. In other words, the Commission expressly authorized TSCCI, as a rural CLEC, to charge NECA access rates on an intrastate basis.

AT&T's Complaint specifically pleaded that TSCCI has been charging NECA rates for intrastate switched access since at least January 1, 2009, which TSCCI admitted in its Answer. (Complaint ¶ 33; Answer and Counterclaim ¶ 14.) The NECA rates always have been readily determined in the FCC tariff and simply have been incorporated by reference into TSCCI's intrastate tariff through the language approved by the Commission in Case No. 01-1348-TP-ATA.

Given this, TSCCI must charge AT&T the Commission-approved NECA intrastate access rates:

Pursuant to R.C. 4909.17, a utility may not increase, decrease, or change its tariff rates without commission approval. A utility may seek commission approval to change its rates by filing an application under R.C. 4909.18. If the application seeks a rate decrease, the commission may, if it finds the decrease reasonable, approve the decrease without a hearing. However, while a rate is in effect, ***a public utility must charge its consumers in accordance with the commission-approved rate schedule.*** R.C. 4905.32.

Pursuant to R.C. 4905.26 and 4909.15(D), the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust or unreasonable. ***The substitution has prospective effect only.***

*Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344, 347, 686 N.E.2d 501 (1997) (emphasis added; citations omitted). This is true even if the rate is reversed on appeal and results in a windfall. *In re Application of Columbus Southern Power Co v. Public Utilities Commission of Ohio*, 138 Ohio St.3d 863, 8 N.E.3d 863 (2014) (under *Keco American Electric Power* was allowed to keep \$368 million even though resulting in a windfall). If a new rate is set by a complaint case, like the present, the new rate has prospective application only. The Commission consistently applies this binding precedent, as recently as June 15, 2016. *In the Matter of the Complaint of Orwell Natural Gas Co. v. Orwell-Trumbull Pipeline Co., LLC*, PUCO Case Nos. 14-1654-GA-CSS, 15-637-GA-CSS (Opinion and Order, June 15, 2016) at ¶ 102.

Because "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme" (*Lucas County Commissioners*, 80 Ohio St.3d at 348), the Commission may not grant AT&T's refund request as a matter of law. If AT&T wanted to seek earlier relief from TSCCI's Commission-approved tariff rate, it could have filed a complaint case long ago, rather than waiting over seven years to seek relief.

Moreover, the weakness of AT&T's position is underscored by its reliance on an FCC decision applying federal law in its Response. (AT&T Response p. 8.) How the FCC applies federal law with respect to retroactive ratemaking has no bearing on this Commission. This Commission is bound by Ohio statutes as interpreted by the Supreme Court of Ohio, which prohibit retroactive ratemaking and require prospective-only application of rate changes approved by the Commission. AT&T's interstate access claims will be adjudicated in federal court with federal law (United States District Court for the Northern District of Ohio, Western Division, Case No. 3:13-cv-01143), as AT&T makes clear in footnote 2 of its Complaint in this case.

AT&T makes two arguments in its Response which are relevant to the prospective application of any new rates set in this complaint case, but have no bearing on retroactive rates. (AT&T Response pp. 2-5.) As mentioned earlier, TSCCI does not seek to dismiss prospective relief if AT&T were to prevail on these arguments. Nevertheless, TSCCI has meritorious responses to AT&T's arguments.

AT&T's first argument (AT&T Response pp. 2-4) is that TSCCI's intrastate access tariff does not contain any rates and TSCCI failed to bill in accordance with the tariff. While it is true that TSCCI's intrastate access tariff does not have a specific dollar figure included, this does not mean that it does not have a rate. As the Commission explained in the Finding and Order in Case No. 01-1348-TP-ATA, discussed earlier, it authorized TSCCI to charge the rural CLEC access rate, which is the NECA rate. (Finding and Order ¶¶ 2, 7.) The Commission's standard tariffing preference is to reference interstate tariffs that are mirrored on an intrastate basis to alleviate the need to amend the intrastate tariff any time the interstate tariff is revised.

Moreover, the Commission's own rules authorize rural CLEC's to charge NECA rates for intrastate access:

(E) A facilities-based CLEC filing for certification, an ILEC's affiliate filing for a CLEC certification, or an ILEC proposing to operate outside its ILEC service area, shall establish their initial switched access reciprocal compensation rates, at a level that does not exceed the current rates of the ILEC providing service in the CLEC's service area, for the termination and origination of intrastate switched access reciprocal compensation traffic, ***unless the CLEC is a rural CLEC competing with a nonrural ILEC and its rates are capped at national exchange carrier association switched access reciprocal compensation rates.***

Ohio Adm. Code § 4901:1-7-14(E) (emphasis added). The substance of this rule has not changed since it was first promulgated in Case No 06-1344-TP-COI (Entry on Rehearing, October 17, 2007). Similarly, the FCC rules adopted in the Access Charge Reform case allowed rural CLECs

to charge NECA access rates:

[A] rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff ... .

47 C.F.R. § 61.26(e). *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order (April 26, 2001). Since adoption, the quoted rule language has not changed and the FCC rules have permitted rural CLECs to charge NECA rates for interstate access.

Since TSCCI's intrastate access tariff was approved in Case No. 01-1348-TP-ATA on November 30, 2001, it has charged NECA rates for intrastate access. Indeed, both parties admit that TSCCI has billed AT&T NECA rates for intrastate access since before January 1, 2009. (Complaint at ¶ 33; Answer and Counterclaim at ¶ 14.) Consequently, there is no merit to AT&T's first argument and certainly nothing that would prevent granting TSCCI's Motion to Dismiss AT&T's request for refunds.

AT&T's second argument (AT&T Response pp. 4-5) is that somehow the FCC's rules governing CLEC access reform have a bearing on this case. In particular, AT&T references the Commission orders in Case No. 10-2387-TP-COI and the certification letters that TSCCI filed in that docket. TSCCI always has complied with the Commission's orders in that docket. TSCCI's most recent letter filed on May 31, 2016, which also is included as Exhibit 1 to its Answer and Counterclaim in this case, makes clear that its intrastate access rates conform to the access rate cap required for rural CLECs in 47 C.F.R. § 61.26(e). As the NECA interstate access rates have declined, so have TSCCI's intrastate access rates declined. TSCCI has been in compliance at all times. Consequently, there is no merit to AT&T's second argument and certainly nothing that would prevent granting TSCCI's Motion to Dismiss AT&T's request for refunds.

The Commission should grant TSCCI's Motion to Dismiss AT&T's claims seeking refunds. For the same reason, the Commission should order AT&T to pay TSCCI all amounts it has withheld until such time as the Commission should order new rates to be effective. This case should proceed solely to determine whether TSCCI's intrastate access rates should be modified on a prospective basis.

Respectfully submitted,

/s/ William A. Adams

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Reply Memorandum in Support of Motion to Dismiss of Respondent TSC Communications, Inc.* was served this 20<sup>th</sup> day of July, 2016, by electronic transmission upon the following:

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Summary: Reply Memorandum in Support of Respondent TSC Communications, Inc.'s Motion to Dismiss Complaint electronically filed by Mr. William A. Adams on behalf of TSC Communications, Inc.