BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of Chapter 4901:1-6 of the Ohio Administrative Code, Regarding Telephone Company Procedures and Standards.	)))))	Case No. 14-1554-TP-ORD

REPLY COMMENTS OF THE OHIO TELECOM ASSOCIATION

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NOVEMBER 9, 2015 **ATTORNEYS FOR THE OHIO TELECOM ASSOCIATION**

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The Ohio Telecom Association ("OTA") filed initial comments in this proceeding on October 26, 2015, regarding the draft rules to implement Amended Substitute House Bill 64 ("HB 64"). As identified in OTA's initial comments, many of the Staff's proposed rules extend beyond the Public Utilities Commission of Ohio's ("Commission") statutory authority under R.C. 4927.10. AT&T Ohio ("AT&T"), the Ohio Cable Telecommunications Association ("OCTA"), and Cincinnati Bell Telephone Co. LLC ("Cincinnati Bell") filed comments raising the same concerns expressed by OTA. In addition, several Verizon affiliates (collectively, "Verizon") also filed a letter in support of OTA's initial comments. Accordingly, the OTA respectfully requests that the Commission adopt the recommendations set forth in OTA's initial comments.

The Commission should also reject the recommendations contained in joint comments submitted by the Office of the Ohio Consumers' Counsel and several other entities[1] (collectively, "OCC") that request that the Commission modify the draft proposed rules and expand them well beyond the Commission's statutory authority.

[1] The other entities joining OCC's comments include: Edgemont Neighborhood Coalition, Legal Aid Society of Southwest Ohio LLC, Ohio Poverty Law Center, Pro Seniors, Inc., and Southeastern Ohio Legal Services.

OCC's comments are largely premised on the assumed unavailability of a reasonable or comparatively priced alternative service following the withdrawal or abandonment of basic local exchange service ("BLES") by the Incumbent Local Exchange Carrier ("ILEC"). As OCC's comments acknowledge, however, alternative services will be available for customers that would be affected by BLES withdrawal.[2]

Additionally, adoption of OCC's recommendations would hinder Ohio's ability to move beyond an outdated monopoly-era regulatory regime and into the twenty-first century with a modern and innovative telecommunications network. The presence of competitive choices obviates the need for the outdated monopoly regulatory model. The relief provided by HB 64 further benefits both customers and telecommunications providers by enabling companies to invest and modernize the telecommunications network to provide customers with technology options that meet customers' respective needs.

OCC's comments would, if adopted, also create confusion between the applicable process for consumers, ILECs, the Commission and Staff, as the statute and the rules would contain inconsistent (and sometimes conflicting) obligations.

Moreover, OCC's comments ask the Commission to codify by rule what OCC presented to the General Assembly and which the General Assembly declined to adopt in HB 64. The General Assembly passed HB 64 after vigorous public debate (which included input from OCC and the other entities that joined OCC's comments[3]) concerning the best means of encouraging the modernization of Ohio's

[2] OCC Comments at 3, n. 10.

[3] *See, e.g.*, OCC Comments at 18, n. 24.

telecommunications industry and the deployment of new technologies while at the same time ensuring that existing customers continue to have reasonable alternatives for service. The Commission is not authorized to "rewrite" the requirements of HB 64 to meet the policy outcomes urged by OCC that the General Assembly rejected.

To prepare for and take advantage of Ohio's transition away from legacy networks and technologies towards the modern and innovative telecommunications network and services and based on the broad industry support expressed in initial comments, the OTA respectfully requests that the Commission adopt the recommendations set forth in the OTA's initial comments and reject the recommendations of OCC, which exceed the Commission's statutory authority and would impede that transition.

I. ARGUMENT

A. The process to withdraw or abandon BLES in R.C. 4927.10 is not vague

Although OCC argues that the statutory process to withdraw or abandon BLES pursuant to R.C. 4927.10 is vague and, therefore, the Commission should adopt OCC's recommendations to create a more specific process for the abandonment or withdrawal of BLES,[4] the statutory process enacted by the General Assembly is sufficiently specific. R.C. 4927.10 places a condition precedent on the withdrawal [Federal Communications Commission ("FCC") action], requires notice, establishes a petition process for customers, requires the Commission to intervene if petitioned and to take certain actions to determine the availability of reasonable and comparatively priced alternative voice service and the availability of willing providers, and provides the

[4] OCC Comments at 3-4.

Commission with the option to order the withdrawing ILEC to provide a reasonable and comparatively priced alternative voice service utilizing any technology or service arrangement to provide the voice service.[5] This process is not vague.

OCC is asking the Commission to insert into its rules provisions that OCC presented to the General Assembly and which the General Assembly for good reason declined to adopt.[6] The Commission should not accept OCC's invitation to second-guess the General Assembly's action.

B. The additional notice requirements recommended by OCC are unnecessary

OCC's comments request that the Commission adopt expansive, redundant, and unnecessary notice requirements. Among these, OCC requests that the statutory process contained in R.C. 4927.10 be extended by up to 4 days,[7] or in some cases suspended entirely.[8] OCC also requests, contrary to the statute, that notice be provided directly with specific language, but only directly through electronic means if additional authorizations are obtained.[9] After direct notice is provided, OCC further requests that the Commission require duplicative notice through newspapers, radio, and television advertisements.[10] The Commission should not adopt OCC's recommendations as the recommendations are unnecessary, unduly burdensome, and have no basis under R.C. 4927.10.

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[5] R.C. 4927.10.

[6] OCC Comments at 18, n. 24.

[7] OCC Comments at 9.

[8] OCC Comments at 18-29.

[9] OCC Comments at 5-6, 24.

[10] OCC Comments at 9-12.

Direct notice is the best means to provide notice to the affected residential customers, and the Commission should allow each ILEC flexibility in providing that ***direct*** notice (*e.g.*, through a bill insert, mail and, where the residential customer has previously consented, electronically). Additionally, OCC's request to require language in the notice differing from the statutory language and request to require that language be included on the outside of envelopes and in email subject lines will likely cause additional confusion for the affected residential customer. Furthermore, the FCC may specify, as part of an order authorizing an ILEC to withdraw the interstate component of BLES, the specific language to include in customer notices. Accordingly, OCC's recommended language should not be adopted and the adoption of any specific language to include in notices is at this time premature.

OCC also requests that the Commission adopt rules that would allow for a modification to the 120-day statutory timeframe. The statute does not permit any modification to the 120-day timeframe and, therefore, OCC's recommendation should be rejected. Even if the Commission could modify the statutory timeframe, OCC does not demonstrate any measurable benefit to extending the 120-day timeline by an additional 1-4 days to account for notices sent through U.S. mail or electronic mail received after 5:30 p.m. on any given day. Allowing alterations or exceptions to the 120-day timeline will only create confusion for affected residential customers as to when BLES may be withdrawn or abandoned and the due date for any affected customer petitions.

Finally, OCC's recommendation to require a duplicative notice through mass media advertising after direct notice is provided would also create unnecessary regulations and costs, contrary to the Governor's Common Sense Initiative.[11]

Accordingly, the Commission should not adopt these recommendations by OCC.

C. There is no statutory basis for the Commission to waive the petition requirement in R.C. 4927.10(B)

OCC requests that the Commission waive the petition requirement in R.C. 4927.10(B) if a customer cannot find a reasonable and comparatively priced alternative voice service.[12] The Commission may not waive statutory requirements in its rules.[13] Under R.C. 4927.10(B), if a customer, after receiving notice of the withdrawal or abandonment of BLES, believes it will not be able to obtain a reasonable or comparatively priced alternative voice service, the customer "may" petition the Commission. Alternatively, the petition requirement may be satisfied through the collaborative process.[14] However, if the Commission has not been timely petitioned, no action by the Commission is permitted, and the ILEC may withdraw or abandon BLES.[15] Because the Commission cannot waive statutory requirements, there is no basis for the Commission to waive the petition requirement in this statutorily defined process.

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[11] Entry at Attachment B (Sep. 23, 2015).

[12] OCC Comments at 4.

[13] *See, e.g.*, Rule 4901:1-6-02(E) Ohio Administrative Code ("O.A.C.") (the Commission may waive any requirement of the chapter, except requirements imposed by statute).

[14] R.C. 4927.10(B).

[15] If the Commission was timely petitioned, BLES would still end; however, the Commission could require the ILEC to provide a reasonable and comparatively priced alternative voice service through any technology or service arrangement to provide the voice service. R.C. 4927.10.

D. OCC's recommendation for a process to challenge the contents of an application is not necessary as R.C. 4927.10 does not require an ILEC to file an application

OCC requests that the Commission modify the draft rules to include a process for challenging the assertions made by an ILEC in its application to withdraw or abandon BLES.[16] As discussed in OTA's comments, HB 64 and R.C. 4927.10 do not require an ILEC to file an application with the Commission to withdraw or abandon BLES.[17] Accordingly, OCC's recommended rule is unnecessary and should not be adopted.

E. OCC's request that others be able to petition the Commission on an affected residential customer's behalf is unnecessary, and could violate the Commission's rule on practice before the Commission as well as the Court's rules on the unauthorized practice of law

OCC requests that "a relative, a friend, a social service agency or anyone else who files with the customer's permission and without charge to the customer be permitted to file a petition under R.C. 4927.10(B)."[18] In support, OCC argues that an affected residential customer may "be infirm or otherwise impaired, or might not understand the process."[19] OCC's argument in support of its recommendation appears to suggest that this third person might be authorized to do more than just file a petition.[20] OCC's recommendations are unnecessary as the General Assembly has already provided an alternative petition process under the collaborative process established under Section 749.10 of HB 64.

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[16] OCC Comments at 15-16.

[17] R.C. 4927.10.

[18] OCC Comments at 17.

[19] *Id.*

[20] *Id.*

Additionally, an alternative course of action could be for the OCC itself to provide assistance to those consumers who may be unable to represent themselves. The OCC holds the statutory authority to represent consumers in these matters before the Commission. As such, the OCC is appropriately subsidized and well positioned to represent these aforementioned interests.

OCC's recommendation might also run afoul of the Commission's and Supreme Court's rules regarding the practice of law before the Commission. The Commission's rule on practice before the Commission, Rule 4901-1-8, O.A.C., requires that "each party not appearing in propria persona shall be represented by an attorney-at-law authorized to practice before the courts of this state." The Supreme Court has held that preparing and filing legal pleadings and other papers before administrative agencies may constitute the practice of law.[21] Thus, to the extent that the third party assisting the affected residential customer is not an attorney authorized to practice law in Ohio, the third party may be violating the Commission's and Supreme Court's rules.

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[21] In *Cleveland Metro. Bar Ass'n. v. Davie*, 133 Ohio St.3d 202, 2012-Ohio-4328, ¶ 18-19, the Court held:

> The Ohio Constitution, Article IV, Section 2(B)(1)(g) gives this court original jurisdiction over all matters relating to the practice of law, including the unauthorized practice of law. Pursuant to this authority, we have defined the unauthorized practice of law as "the rendering of legal services for another by any person not admitted to practice in Ohio." The rendering of legal services includes more than the handling of cases in court. We have held that it encompasses "preparing and filing legal pleadings and other papers, appearing in court cases, and managing actions and proceedings on behalf of clients before judges, whether before courts or administrative agencies."

(internal cites and quotes omitted). The Court continued,

> "Because this court has exclusive power to regulate, control, and define the practice of law in Ohio, we also have the ultimate authority to determine the qualifications of persons engaged in the practice of law before an administrative agency. Even if a statute or administrative rule purports to permit laypersons to practice law before a board or an administrative agency, this court retains the ultimate authority to determine what activities a layperson may engage in without crossing the line into the unauthorized practice of law."

Id. at ¶ 40 (internal cites and quotes omitted).

Accordingly, OCC's proposal is at the least unnecessary, if not unlawful, and should therefore be rejected.

F. OCC's proposed definition of a reasonable and comparatively priced alternative voice service has no basis in the statute and is otherwise without merit

OCC requests that the Commission define reasonable and comparatively priced alternative voice service to be capped at no more than 10 percent above the existing BLES rates while ignoring any additional functionalities of those alternative services. OCC also requests that the Commission remove the costs of voice grade access and access to 9-1-1 from its definition and any future comparison. OCC further requests that the Commission place no value on additional features that are not a component of the consumer's current service, but place additional value on the fact that basic service does not rely on back-up power, due to line-powering.[22] OCC's recommendations are contrary to the statute and presuppose that the Commission is unable to determine whether an alternative voice service is a reasonable and comparatively priced alternative following its investigation.

R.C. 4927.10(B)(3) provides that the Commission shall define the term "'reasonable and comparatively priced voice service' to include service that provides voice grade access to the public switched network or its functional equivalent, access to 9-1-1, and that is competitively priced, when considering all the alternatives in the marketplace and their functionalities." There is no basis in the statute for an arbitrary limitation of reasonable and comparatively priced alternatives to only those services that cost less than 10 percent more than BLES, regardless of what additional functionality is

[22] OCC comments at 22-23.

offered in the yet-to-be-identified alternative service. In fact, the statutory language compels the Commission to consider the additional functionalities contained in the yet-to-be-identified alternative service and the competitive price of the yet-to-be-identified alternative service.

Furthermore, OCC's recommendations are premature. The Commission will only need to consider whether an alternative service is reasonable and comparatively priced if petitioned. If it is petitioned, the Commission is well equipped to conduct the investigation required by statute to determine whether the price of an alternative service that is yet-to-be-identified is reasonable and comparatively priced.

OCC's recommended definition is also premature given the potential for the FCC to prescribe parameters around what constitutes reasonable and comparative alternative services as part of an order authorizing an ILEC to withdraw the interstate access component of BLES.

Finally, OCC's recommendations suggest that the Commission is not equipped to measure the "subjective value" of functionality such as mobility.[23] Contrary to the implications in OCC's comments, the OTA is confident that the Commission can carry out its statutory duty to determine if a "reasonable and comparatively priced voice service will be available to the affected customer at the customer's residence if petitioned to do so."[24]

Accordingly, the Commission should not adopt OCC's recommended changes to the definition of a reasonable and comparatively priced alternative voice service. As

[23] OCC Comments at 22.

[24] R.C. 4927.10(B)(1).

discussed in the OTA's initial comments, the Commission should also revise the proposed definition to mirror the statutory guidance contained in R.C. 4927.10(B)(3).

G. There is no statutory basis, or need, to require ILECs to file with the Commission under seal customer information to support the collaborative process set forth in Section 749.10 of HB 64

OCC requests that the Commission impose a requirement that ILECs file under seal the name, address, and telephone number of each affected basic service customer and requests that the Commission provide access to this information to all members of the collaborative process set forth under Section 749.10 of HB 64.[25] OCC's request is beyond the statutory authority contained in HB 64, unnecessary, serves no public purpose, raises significant privacy concerns relating to the treatment of customer proprietary network information, and should not be adopted.

II. CONCLUSION

For the reasons discussed above, the OTA requests that the Commission adopt the recommendations set forth in OTA's initial comments, which are supported by the comments and letters filed in this docket by AT&T, OCTA, Cincinnati Bell, and Verizon, and reject the recommendations set forth in the comments filed by OCC.

Respectfully submitted,

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[25] OCC Comments at 24.

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply Comments of the Ohio Telecom Association* was sent by, or on behalf of, the undersigned counsel for Ohio Telecom Association to the following parties of record this 9th day of November 2015, *via* electronic transmission.

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Summary: Reply Comments of the Ohio Telecom Association electronically filed by Scott E. Elisar on behalf of Ohio Telecom Association