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**

AT&T OHIO'S APPLICATION FOR REHEARING

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The Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio"), respectfully applies to the Public Utilities Commission of Ohio pursuant to R.C. 4903.10 for rehearing of the Finding and Order entered in this case on November 30, 2016 (the "Order"). Specifically, AT&T Ohio requests that the Commission reconsider or clarify the rules discussed in Section III below that were promulgated in the Order, each of which is unreasonable or unlawful.

I. INTRODUCTION

In September 2014, pursuant to R.C. 106.03 and R.C. 111.15, the Commission opened this proceeding to review the retail telecommunications service standards contained in A. C. Chapter 4901:1-6, and on January 7, 2015, issued Commission staff-proposed revisions to these rules. The Commission received comments on the proposed changes on February 6, 2015 and March 6, 2015.

During the pendency of this case and rulemaking, the 131st Ohio General Assembly adopted Am. Sub. House Bill 64 ("H.B. 64") that, among other things, amended Ohio telecommunications law by adding section 4927.10 to the Revised Code and amending certain other statutes. These legislative changes were the result of carefully considered policy changes made by the Legislature after long and vigorous public debate about how to encourage the

deployment of new telecommunications technologies, while at the same time ensuring that existing customers continue to have reasonable alternatives for service.

The compromise adopted in H.B. 64 was to lift the prohibition against an incumbent local exchange carrier ("ILEC") withdrawing or abandoning its provision of basic local exchange service ("BLES") in an exchange, so long as the ILEC receives permission from the Federal Communications Commission ("FCC") to withdraw the interstate portion of BLES and so long as the ILEC provides at least 120 days' prior notice of such withdrawal to the Commission and to affected customers. If any residential customer is unable to obtain "reasonable and comparatively priced voice service," there is a Commission-enforced fail-safe mechanism for ensuring service to that customer. ILECs that withdraw BLES in accordance with the statute are relieved of their duties as carrier of last resort ("COLR") for the exchange. H.B. 64 directed the Commission to adopt rules to implement these reforms.

On September 23, 2015, the Commission issued an Entry setting forth staff's further proposed changes to A.C. 4901:1-6 implementing the COLR reforms. These revised draft rules included a new rule at section 4901:1-6-21 ("Rule 6-21"), to address the statutory changes in H.B. 64. The Commission received comments on these revised draft rules on October 26, 2015 and November 9, 2015. On November 30, 2016, the Commission entered the Order that is the subject of this Application. In certain respects, identified in Section III below, the Rules promulgated in the Order impermissibly conflict with H.B. 64 or are ambiguous with one possible reading impermissibly in conflict with that statute. Moreover, Rule 19 ("Lifeline Requirements") requires further clarification in order to ensure consistency with the FCC's Lifeline rules. AT&T Ohio urges the Commission to modify the Rules addressed below to make them unambiguously lawful.

II. GOVERNING LEGAL STANDARD

The Ohio Supreme Court has long recognized that "administrative rules, in general, may not add to or subtract from . . . the legislative enactment." *Central Ohio Joint Voc. Sch. Dist. Bd. of Ed. v. Ohio Bur. of Employment Servs.*, 21 Ohio St.3d 5, 10, 487 N.E.2d 288, 292 (1986) ("a rule is invalid where it clearly is in conflict with any statutory provision"). *Accord, Vargas v. State Bd. of Med. Bd. of Ohio*, 972 N.E.2d 1076, 1080 (Ohio App. 10th Dist. 2012) (summarizing cases). "In order for regulations to be valid, they must be consistent with the statute under which they are promulgated[.] An administrative rule's impermissible addition to or subtraction from a statute is one means of creating a clear conflict between a statute and a rule." 2 Ohio Jur. 3d, Admin. Law § 41 (3d ed. 2015).

As an example, in *Franklin Iron & Metal Corp. v. Ohio Petroleum Underground Storage Tank Release Comp. Bd.*, 117 Ohio App.3d 509, 690 N.E.2d 1310 (2d Dist. 1996), the relevant statute provided that the compensation board "shall issue" a certificate of coverage under a state financial assistance fund when the applicant met two conditions: paying the statutory fee and demonstrating financial responsibility. The governing statutes also authorized the compensation board to adopt administrative rules. The compensation board adopted a rule requiring storage tanks to be certified as assurable before a certificate of coverage would be issued and providing that failure to take certain steps would result in non-issuance or revocation of a certificate of coverage. Franklin Iron submitted the required fee and affidavit of financial responsibility but was denied a certificate of coverage because it did not complete a certification of assurability form for its storage tanks. "These additional conditions created a conflict between the statute and the rule, and, therefore, the rule was invalid." *Vargas*, *supra*, 972 N.E.2d at 1081-82. *See also State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm.*, 117 Ohio St.3d 441, 884

N.E.2d 589 (2008) (Ohio Supreme Court found that an administrative rule conflicted with the governing statute because it required a respondent to wait for a complaint to be issued before requesting a subpoena, a condition that was not included in the statute).

III. DISCUSSION

AT&T Ohio respectfully urges the Commission to reconsider and/or clarify the Rules in each of the eight issues for rehearing set forth below. In each instance, we first set forth the Rule as it appears in the Order. We then explain how the Rule unlawfully conflicts with H.B. 64 or is ambiguous or is unreasonable, and propose a modification to cure the defect. In the case of the Rule 4901:1-6-19, we point out that the proposed Ohio rule is not consistent with new FCC lifeline requirements.

1. DEFINITION OF "CARRIER OF LAST RESORT"

4901:1-6-01(F) "Carrier of last resort" means an incumbent local exchange carrier (ILEC) or **successor telephone company** that is required to provide basic local exchange service on a reasonable and non-discriminatory basis to all persons or entities in its service area requesting that service as set forth in section 4927.11 of the Revised Code. (Emphasis added.)

"Successor telephone company" in Rule 4901:1-6-01(F) could be read to mean the provider of a reasonable and comparatively priced voice service to former residential customers of the ILEC that withdraws BLES. As explained below, this does not appear to be the Commission's intent, but the Rule should be modified to make this clear, because it would be unlawful for the Rule to impose COLR obligations on such a provider. H.B. 64 provides for the removal of the COLR obligation from the ILEC that withdraws BLES in an exchange. R.C. 4927.10(A)(2). The statute includes no language or suggestion that the COLR obligation may survive the withdrawal of BLES by an ILEC or may be imposed on a carrier that is not an ILEC

or that provides reasonable and comparatively priced voice service to former ILEC BLES customers.

The ILEC COLR obligations arose in the context of a monopoly market with one carrier serving customers over a traditional telephone network. H.B. 64 recognizes that a COLR obligation is no longer necessary in today's communications environment, where service is provided by a variety of carriers on a competitive basis using a variety of technologies and service arrangements. However, Rule 4901:1-6-01(F) could be read to impose the COLR requirement on carriers regardless of the level of competition or the technology used to provide the service. Continuing to impose this legacy regulatory burden on non-ILEC carriers in competitive markets would conflict with the statute. It would also violate R.C. 4927.03(D), which provides:

> Except as specifically authorized in sections 4927.01 to 4927.21 of the Revised Code, the commission has no authority over the quality of service and the service rates, terms, and conditions of telecommunications service provided to end users by a telephone company.

Plainly, nothing in R.C. 4927.01 to 4927.21 specifically authorizes the Commission to impose COLR obligations on non-ILECs that provide reasonable and comparatively priced voice service to former customers of ILECs that withdraw BLES.

As stated above, it does not appear that the Commission intended by the use of the word "successor" in Rule 4901:1-6-01(F) to impose COLR obligations on providers of reasonable and comparatively priced voice services to former customers of ILECs. Rather, it appears the Commission was merely trying to harmonize Rule 4901:1-6-01(F) with the definition of ILEC in R.C. 4927.01(A)(5)(b)(ii), which provides:

> (5) "Incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that:
>
> (a) On February 8, 1996, provided telephone exchange service in such

> area; and
>
> (b) (i) On February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R. 69.601(b); or (ii) Is a person or entity that, on or after February 8, 1996, became a **successor** or assign of a member described in division (A)(5)(b)(i) of this section. (Emphasis added.)

That this was the Commission's intent is strongly suggested by the statement in paragraph 33 of the Order that, "In response to the commenters' objections to the inclusion of the 'and successors' qualification the Commission points out that pursuant to R.C. 4927.01(A)(5)(b)(ii), an ILEC includes an entity that becomes a successor or assign of a member described in division (A)(5)(b)(i)."[1]

Assuming the Commission's intent was as it appears to have been, the Commission should modify Rule 4901:1-6-01(F) so that it cannot be misread. AT&T Ohio suggests that a good way to do this would be to make the following addition (underlined) and deletion (shown with strike-through) to the Rule as it appears in the Order:

> "Carrier of last resort" means an incumbent local exchange carrier (ILEC), as defined in R.C. 4927.01(A)(5) ~~or successor telephone company~~ that is required to provide basic local exchange service on a reasonable and non-discriminatory basis to all persons or entities in its service area requesting that service as set forth in section 4927.11 of the Revised Code.

This effectively incorporates "successor" with its precise statutory meaning, while eliminating any possibility of misunderstanding.

If the Commission does not make this or a similar change, the Rule will be susceptible to challenge later on the ground that it impermissibly extends the COLR obligation to non-ILECs.

[1] As used in the statute, of course, a "successor" of an ILEC is not merely a company that serves former ILEC customers. Rather, it is a company that through merger, buy-out or other means, generally acquires the assets, liabilities, rights and obligations of an ILEC, and thus is the legal successor or assign of that company.

2. DEFINITION OF "REASONABLE AND COMPARATIVELY PRICED VOICE SERVICE"

4901:1-6-01(BB) "Reasonable and comparatively priced voice service" is a voice service that incorporates the definition set forth in division (B)(3) of section 4927.10 of the Revised Code and is presumptively deemed competitively priced, subject to rebuttal, if the rate does not exceed either: (1) the ILEC's BLES rate by more than 20% or (2) the federal communications commission's (FCC) urban rate floor as defined in 47 C.F.R. 54.318(a).

This definition can be read in two different ways, one of which is unobjectionable and the other of which is unlawful. First, it can be read to mean this (starting with the actual Rule and with additions underlined and deletions shown with strike-through):

> "Reasonable and comparatively priced voice service" is a voice service that incorporates the definition set forth in division (B)(3) of section 4927.10 of the Revised Code. A voice service ~~and~~ is presumptively deemed competitively priced, subject to rebuttal, if the rate does not exceed either: (1) the ILEC's BLES rate by more than 20% or (2) the federal communications commission's (FCC) urban rate floor as defined in 47 C.F.R. 54.318(a).

If that is what the Rule means, it is unobjectionable: It says that "Reasonable and comparatively priced voice service" means exactly what the statute says it means,[2] with a rebuttable presumption that the voice service is competitively priced under the specified circumstances.

But the Rule can also be read to mean that in order to qualify as a reasonable and comparatively priced voice service, the voice service must fulfill two conditions: It must satisfy the definition set forth in R.C. 4927.10(B)(3), *and it must also* be presumptively deemed competitively priced, subject to rebuttal, if the rate does not exceed either: (1) the ILEC's BLES rate by more than 20% or (2) the FCC's local urban floor defined in 47 C.F.R. 54.318(a). If that is what the Rule means, it is unlawful, because the Commission cannot properly require a service

[2] R.C. 4927.10 (B)(3) requires the commission to "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."

to do any more than meet the statutory definition in order to qualify as reasonable and comparatively priced. In other words, the Commission cannot lawfully establish a rule that requires a person to fulfill a statutory requirement by fulfilling the statutory requirement *plus* something in addition.

Accordingly, AT&T Ohio requests that the Commission clarify Rule 4901:1-6-01(BB) by modifying it to read as indicated in the mark-up above – but with one minor modification. Specifically, the Rule should read:

> "Reasonable and comparatively priced voice service" is a voice service that satisfies the definition set forth in division (B)(3) of section 4927.10 of the Revised Code. A voice service is presumptively deemed competitively priced, subject to rebuttal, if the rate does not exceed either: (1) the ILEC's BLES rate by more than 20% or (2) the federal communications commission's (FCC) urban rate floor as defined in 47 C.F.R. 54.318(a).[3]

Otherwise, the Rule will be subject to challenge on the ground that it unlawfully goes beyond what H.B. 64 contemplates.

3. REGULATION OF VOIP PROVIDERS

4901:1-6-02(C) A provider of interconnected voice over internet protocol-enabled service is exempt from all rules in Chapter 4901:1-6 of the Administrative Code, except for rules 4901:1-6-21 (withdrawal of BLES) for the protection, welfare, and safety of the public, and 4901:1-6-36 (TRS).

At a minimum, this Rule is much broader than it should be. There appears to be only one circumstance under the Rules in which a provider of interconnected voice over internet protocol-enabled service (a "VoIP provider") would be subject to the Rules, and that is if the VoIP provider is the sole provider of voice service, in which case it must give notice before withdrawing (4901:1-6-21(F)) and may be subjected to additional requirements, on a case-by-

[3] The only difference between this language and the mark-up above is that it changes "incorporates" to "satisfies." "Incorporates" is not the right word; one would not say that a service *incorporates* a definition; rather, it *satisfies* or *meets* the definition.

case basis, if 911 service would be unavailable to a residential customer if it withdraws (4901:1-06-21(G)). And indeed, the only scenario in which the Order purports to justify the imposition of any regulation on a VoIP provider for the protection, welfare, and safety of the public pursuant to R.C. 4927.03 is the situation in which end users would otherwise be without access to E-9-1-1 service. See Order ¶¶ 204-206. AT&T Ohio explains below why that justification is inadequate and why Rules 4901:1-6-21(F) and (G) should be eliminated, but assumes for purposes of this discussion of Rule 4901:1-6-02(C) that they will be retained.

With that assumption, Rule 4901:1-6-02(C) should be modified to clarify that VoIP providers are subject only to Rules 4901:1-6-21(F) and (G) and not to indicate, as it now does, that VoIP providers are *generally* subject to rule 4901:l-6-21.

Similarly, Rule 4901:1-6-02(C) is overly broad because of the way it uses the phrase "for the protection, welfare, and safety of the public." As written, the Rule says, in effect, that for the protection, welfare, and safety of the public, VoIP providers are subject to Rule 4901:1-6-21 (in its entirety) – as if the protection, welfare, and safety of the public require subjecting VoIP providers to that Rule in its entirety. AT&T Ohio believes that rather than "for the protection, welfare, and safety of the public," the Commission meant (or should have meant) "***to the extent necessary*** for the protection, welfare, and safety of the public.

Accordingly, AT&T Ohio proposes that if Rule 4901:1-6-02(C) is to be retained, it should be modified by the addition of the material shown with underscore below:

> A provider of interconnected voice over internet protocol-enabled service is exempt from all rules in Chapter 4901:1-6 of the Administrative Code, except for rules 4901:1-6-21<u>(F) and (G)</u> (<u>concerning</u> withdrawal of BLES), <u>to the extent necessary</u> for the protection, welfare, and safety of the public, and 4901:1-6-36 (TRS).

If Rules 4901:1-6-21(F) and (G) are eliminated, as AT&T Ohio urges below, then Rule 4901:1-6-02(C) should be eliminated as well.

4. REGULATION OF SERVICES NOT COMMERCIALLY AVAILABLE AS OF SEPTEMBER 13, 2010

4901:1-6-02(D) A provider of any telecommunications service that, consistent with R.C. 4927.03, was not commercially available as of September 13, 2010, and that employs technology that subsequently became available for commercial use only after September 13, 2010, is exempt from all rules set forth in Chapter 4901:1-6 of the Administrative Code, except for rules 4901:1-6-21 (withdrawal of BLES) and where applicable, 4901:1-6-36 (TRS), in the event such provider is subsequently required under federal law to provide to its customers access to telecommunications relay service.

For the same reasons just discussed in connection with Rule 4901-6-02(C), Rule 4901:1-6-02(D) should be eliminated (if Rules 4901:1-6-21(F) and (G) are eliminated) or modified by the addition of the material shown with underscore below:

> A provider of any telecommunications service that, consistent with R.C. 4927.03, was not commercially available as of September 13, 2010, and that employs technology that subsequently became available for commercial use only after September 13, 2010, is exempt from all rules set forth in Chapter 4901:1-6 of the Administrative Code, except for rules 4901:1-6-21<u>(F) and (G)</u> (<u>concerning</u> withdrawal of BLES) and where applicable, 4901:1-6-36 (TRS), in the event such provider is subsequently required under federal law to provide to its customers access to telecommunications relay service.

5. REQUIREMENT THAT NOTICE INCLUDE FCC ORDER APPROVING WITHDRAWAL OF INTERSTATE ACCESS COMPONENT OF BLES

4901:1-6-21(B)(1) An incumbent local exchange carrier (ILEC) shall not discontinue offering BLES within an exchange without filing a notice for the withdrawal of BLES (WBL) to withdraw such service from its tariff. . . . As part of this notice and investigation process an ILEC must provide the following:

> (1) A copy of the federal communication commission order that allows the ILEC to withdraw the interstate-access component of its BLES under 47 U.S.C. 214.

On its face, this Rule requires the ILEC to provide a copy of the FCC order either with the WBL notice or during the 120-day investigation period that follows (*i.e.*, "[a]s part of this notice and investigation process"). The Order, however, makes clear that the Commission

intended to require the ILEC to file the FCC order with the WBL notice.[4] This is directly at odds with the statute, which allows the ILEC to withdraw BLES "beginning when the [FCC's] order is adopted." R.C. 4927.10(A). A requirement that the WBL notice include the FCC order would impose a delay of at least 120 days between the issuance of the FCC order and the withdrawal of BLES. This impermissibly conflicts with the statute, which allows the required 120-day investigation period to run while the ILEC is pursuing FCC approval.

The Order attempts to justify the requirement that the FCC order be filed with the WBL notice, but unsuccessfully. It states the following at ¶ 176 (with underscoring for reference below):

> Based on R.C. 4927.10(A), it is clear that the FCC order allowing an ILEC to withdraw the interstate-access component of its BLES . . . is a necessary precedent prior to filing of the WBL notice which triggers the 120-day time frame referenced in R.C. 49.27.10. The process set forth in R.C. 4927.10 includes the requisite customer notice and potential customer petition and/or Commission/collaborative investigation prior to the withdrawal or abandonment of BLES. The adopted rule properly reflects these conditions and time frames. The 120-day process is necessary to provide for the proper customer notification and ensure that the resulting Commission/collaborative analysis, if any is completed in a timely manner prior to an ILEC withdrawing BLES. Therefore, the notice filing should not be made until the FCC 47 U.S.C. 214 application has been approved. It would be premature for the Commission to engage in our analysis without all of the necessary information before it, and would not provide the public with sufficient time to file petitions with the Commission.

This fails to justify the requirement that the WBL notice include the FCC order. The underscored sentences may all be true, but they have nothing to do with the FCC order. The "Therefore" sentence that comes after those underscored sentences simply does not follow from them.

To put a fine point on it, FCC approval is a prerequisite to the withdrawal of BLES under H.B. 64, but in its 120-day investigation, the Commission does not do anything with or about the

[4] See Order ¶ 176.

FCC approval order. Rather, the purpose of the investigation is to determine whether the ILEC's withdrawal will leave any residential customers without reasonable and comparatively priced voice service. Under the statute, the ILEC gives its customers and the Commission 120 days' advance notice of its withdrawal. During the 120 days that follow, residential customers may (i) file petitions with the Commission asserting that they will be unable to obtain reasonable and comparatively priced voice service upon the carrier's withdrawal or abandonment of BLES, or (ii) be identified through the collaborative process as being such customers. If the Commission then determines after an investigation that no reasonable and comparatively priced voice service will be available to an affected customer at the customer's residence, the Commission must attempt to identify a willing provider of a reasonable and comparatively priced voice service to serve the customer. If no willing provider is identified, the Commission may order the withdrawing or abandoning carrier to provide a reasonable and comparatively priced voice service to the customer at the customer's residence.

If, however, the Commission does not order the withdrawing or abandoning ILEC to do so, the ILEC may then withdraw or abandon BLES, *as long as the carrier has obtained the required FCC approval with respect to the interstate-access portion of its BLES.* That is how the FCC approval order fits into the process prescribed in R.C. 4927.10.

For present purposes, the important point is that the process, as established by the Legislature in R.C. 4927.10, does not contemplate that the Commission will analyze, review or do anything else with the FCC approval order. This is eminently sensible, because the statute does not contemplate that the Commission will approve the withdrawal. Rather, the ILEC gives 120 days' notice of the withdrawal, and then withdraws as long as (1) the Commission has not

required it to provide a reasonable and comparatively priced voice service at any customer's residence, and (2) the ILEC has obtained approval from the FCC.

Thus, there is no compelling reason for requiring the ILEC to provide the FCC approval order to the Commission *at all*. And there is certainly no justification for requiring the ILEC to provide the FCC approval order as part of the WBL notice and thus impermissibly delaying the withdrawal by several months beyond what H.B. 64 allows when it says BLES may be withdrawn "beginning when the [FCC's] order is adopted." Accordingly, the Commission should delete subsection (1) from Rule 4901:1-6-21(B). That said, AT&T Ohio understands that the Commission would like to have the assurance of knowing that the FCC order has in fact issued, and so would not object to a requirement that the withdrawing ILEC furnish a copy of the FCC approval order before it actually withdraws BLES.

There is a second, independent, reason that Rule 4901:1-6-21(B)(1) is inconsistent with R.C. 4927.10(A): The statute is keyed to *adoption* of the FCC order (". . . if the federal communications commission *adopts* an order . . .) (emphasis added), while the Rule impermissibly delays the filing of the WBL notice until after the order is *issued*. The FCC adopts an order at a meeting, and only later issues its written order. This is why FCC orders show an "adopted" date and a "released" date. The period between those two dates can be several weeks long. Even if one were to read R.C. 4927.10(A) as making the FCC order a prerequisite to the WBL notice rather than as a prerequisite to the withdrawal, Rule 4901:1-21(B)(1) is indisputably at odds with the statute, because it does not allow the ILEC to file the WBL notice until the written FCC order is available, which can be well after the order is issued.

6. IMPOSITION OF NOTICE REQUIREMENT ON SOLE PROVIDER OF VOICE SERVICE

4901:1-6-21(F) If the sole provider of voice service seeks to withdraw or abandon such voice service, it shall notify the Commission at least thirty days prior to the withdrawal or abandonment through the filing of a withdrawal of voice service (WVS) consistent with the authority granted to the commission in division (A) of section 4927.03 of the Revised Code.

This Rule should be removed for several reasons. First, it impermissibly adds to, and does not properly implement, R.C. 4927.10. The statute imposes no obligation whatsoever on the provider of a reasonable and comparatively priced voice service to former customers of the ILEC that withdrew BLES. In other words, that provider does not violate the statute if it withdraws or abandons service, with or without giving notice, and regardless whether it is the sole provider. The Legislature saw fit to regulate the ILEC's withdrawal of BLES by requiring it to give 120 days' notice and by conditioning the withdrawal on the availability of an alternative provider of a reasonable and comparatively priced service, and the Legislature also saw fit not to regulate the subsequent withdrawal of that alternative provider. The Commission cannot properly impose on that alternative provider a regulatory burden when the Legislature chose to impose none. Accordingly, Rule 4901:1-6-21(F) unlawfully conflicts with the statute it purports to implement and so must be removed.[5]

Second, the Rule not only regulates providers that the Legislature chose not to regulate, but also regulates services that the Legislature chose not to regulate. H.B. 64 governs the withdrawal of *BLES*, while Rule 4901:1-6-21(F) governs the withdrawal of *voice service*, which is broader than BLES. Rule 4901:1-6-01(PP) gives "voice service" the same definition it has in R.C. 4927.01(A)(18), which states that voice service "includes all of the applicable

[5] Of course, "telephone companies" are required to provide 30 days prior notice before withdrawing a "telecommunications service". R.C. 4927.07. In light of that existing requirement, Rule 4901:1-6-21(F) is even more unnecessary and unreasonable.

functionalities described in 47 C.F.R. 54.101(a)."[6] "BLES," which is defined in R.C. 4927.01,[7] is limited to single-line residential or small business service, without any bundle or package of services. "Voice service" is not subject to either limitation.

By imposing regulation on providers and services that the Legislature chose not to regulate in H.B. 64, Rule 4901:1-06-21(F) impermissibly adds to, and thus conflicts with, H.B. 64. "[A]dministrative rules, in general, may not add to or subtract from . . . the legislative enactment." *Central Ohio Joint Voc. Sch. Dist. Bd. of Ed. v. Ohio Bur. of Employment Servs.*, 21 Ohio St.3d 5, 10, 487 N.E.2d 288, 292 (1986) ("a rule is invalid where it clearly is in conflict with any statutory provision"). *Accord, Vargas v. State Bd. of Med. Bd. of Ohio*, 972 N.E.2d 1076, 1080 (Ohio App. 10th Dist. 2012) (summarizing cases). "In order for regulations to be

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[6] **47 C.F.R. § 54.101 Supported services for rural, insular and high cost areas.**

(a) *Services designated for support.* Voice telephony services and broadband service shall be supported by federal universal service support mechanisms.

(1) Eligible voice telephony services must provide voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation services to qualifying low-income consumers as provided in subpart E of this part.

(2) Eligible broadband Internet access services must provide the capability to transmit data to and receive data by wire or radio from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up service.

[7] The statute provides: (1) "Basic local exchange service" means residential-end-user access to and usage of telephone-company-provided services over a single line or small-business-end-user access to and usage of telephone-company-provided services over the primary access line of service, which in the case of residential and small-business access and usage is not part of a bundle or package of services, that does both of the following:

(a) Enables a customer to originate or receive voice communications within a local service area as that area exists on September 13, 2010, or as that area is changed with the approval of the public utilities commission;

(b) Consists of all of the following services:

(i) Local dial tone service;

(ii) For residential end users, flat-rate telephone exchange service;

(iii) Touch tone dialing service;

(iv) Access to and usage of 9-1-1 services, where such services are available;

(v) Access to operator services and directory assistance;

(vi) Provision of a telephone directory in any reasonable format for no additional charge and a listing in that directory, with reasonable accommodations made for private listings;

(vii) Per call, caller identification blocking services;

(viii) Access to telecommunications relay service; and

(ix) Access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies.

"Basic local exchange service" excludes any voice service to which customers are transitioned following a withdrawal of basic local exchange service under section 4927.10 of the Revised Code."

valid, they must be consistent with the statute under which they are promulgated[.] An administrative rule's impermissible addition to or subtraction from a statute is one means of creating a clear conflict between a statute and a rule." 2 Ohio Jur. 3d, Admin. Law § 41 (3d ed. 2015). Furthermore, Rule 4901:1-06-21(F) also violates R.C. 4927.03(D), which provides, "Except as specifically authorized in sections 4927.01 to 4927.21 of the Revised Code, the commission has no authority over the quality of service and the service rates, terms, and conditions of telecommunications service provided to end users by a telephone company." Plainly, nothing in sections 4927.01 to 4927.21 of the Revised Code specifically authorizes the Commission to require non-ILEC providers of voice services to provide the notice mandated by Rule 4910:1-06-21(F) (other than "telephone companies" withdrawing a "telecommunications service" – which is already addressed in Rule 4901:1-6-25).

For all of these reasons, Rule 4901:1-6-21(F) should be eliminated.

7. ADDITIONAL WITHDRAWAL OBLIGATIONS

4901:1-6-21(G) If the Commission determines that: (1) a residential customer of voice service will not have access to 9-1-1 service if the customer's current provider withdraws or abandons its voice service; or (2) the current provider of voice service is the sole provider of emergency services to residential customers, pursuant to the authority granted to the commission in division (A) of section 4927.03 of the Revised Code, that provider may be subject to all the provisions of this rule, on a case-by-case basis.

This Rule, like the Rule just discussed, impermissibly adds to, and does not properly implement, R.C. 4927.10. The statute imposes no obligation whatsoever on the provider of a reasonable and comparatively priced voice service to former customers of the ILEC that withdrew BLES. In other words, that provider does not under any circumstances violate the statute if it withdraws or abandons service. The statute regulates the ILEC's withdrawal of BLES, but the Legislature chose not to regulate withdrawal by a provider of a reasonable and

comparatively priced voice service to former customers of the ILEC that withdrew. Again, the Commission cannot properly impose on that alternative provider, or on voice service as opposed to BLES, a regulatory burden when the Legislature chose to impose none. Accordingly, Rule 4901:1-6-21(G) unlawfully conflicts with the statute it purports to implement and so must be removed.

The Order attempts to justify Rule 4901:1-6-21(G), but without success. It states (at ¶ 205):

> [T]he Commission highlights our responsibility, pursuant to R.C. 4927.03, to regulate any interconnected VoIP service or any telecommunications service that employs technology that became available for commercial use only after September 13, 2010, to ensure the protection, welfare, and safety of the public. Absent this obligation, which ***may be placed upon either the ILEC or the remaining sole provider of voice service***, the protection, welfare, and public safety of those identified as at risk residential subscribers who do not have access to voice service may be jeopardized. (Emphasis added.)

That attempted justification fails, for two reasons. First, the bold italicized language is incorrect. R.C. 4927.03 cannot justify the application of Rule 4901:1-6-21(G) to any sole provider that is *not* what we here refer to as a "new technology provider," *i.e.*, a provider of an interconnected voice over internet protocol-enabled service or any telecommunications service that was not commercially available on September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010.

Second, R.C. 4927.03 does not legitimize the application to new technology providers of a regulation that is unlawful generally because it is an improper implementation of H.B. 64. The main thrust of R.C. 4927.03(A) is that "the public utilities commission has no authority over any interconnected voice over internet protocol-enabled service or any telecommunications service that is not commercially available on September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010." The statute identifies

three exceptions: (1) "[e]xcept as provided in divisions (A) and (B) of section 4927.04 of the Revised Code" (which concern implementation of the federal Telecommunications Act of 1996); (2) "except to the extent required to exercise authority under federal law"; and (3) unless the commission, upon a finding that the exercise of the commission's authority is necessary for the protection, welfare, and safety of the public, adopts rules specifying the necessary regulation." Those three exceptions are merely carve-outs from the general prohibition against regulation of new technology providers. They do not authorize regulation of new technology providers that is impermissible with respect to providers in general. As demonstrated above, Rule 4901:1-06-21(G) is unlawful because it conflicts with H.B. 64. That conflict pertains to new technology providers just as it pertains to other providers, and the conflict is not somehow cured or excused with respect to new technology providers by R.C. 4927.03.

8. LIFELINE REQUIREMENTS

4901:1-6-19

~~(L)~~(K) An ILEC ETC shall provide written notification if the carrier determines that an individual is not eligible for lifeline service enrollment and shall provide the person an additional thirty days to prove eligibility.

~~(M)~~(L) An ILEC ETC shall provide written customer notification if a customer's lifeline service benefits are to be terminated due to failure to submit acceptable documentation for continued eligibility for that assistance and shall provide the customer an additional ~~sixty~~ thirty days to submit acceptable documentation of continued eligibility or dispute the carrier's findings regarding termination of the lifeline service.

(M) Following any continuous thirty-day period of non-usage of a lifeline service that does not require the ETC to assess or collect a monthly fee from its subscriber, an ETC shall notify the customer through any reasonable means that he/she is no longer eligible to receive lifeline benefits, and shall afford the customer a fifteen-day grace period during which the customer may demonstrate usage.

In as much as it is the Commission's intent that Ohio's Lifeline eligibility, certification and re-certification criteria and processes be consistent with the recently revised federal Lifeline

rules set forth at 47 CFR § 54.419, (See, e.g., Order at ¶¶ 132, 143 and 147), several modifications to Rule 19 are required in order to make clear the alignment of the state and federal subscriber response timeframes to certification or re-certification efforts. AT&T Ohio suggests the following additions (underlined) and deletions (shown with strike-through) to the Rule to achieve consistency with the FCC lifeline rules:

4901:1-6-19

~~(L)~~(K) An ILEC ETC shall provide written notification if the carrier determines that an individual is not eligible for lifeline service enrollment and shall provide the person an additional thirty days to prove eligibility.

~~(M)~~(L) *General de-enrollment*: An ILEC ETC shall provide written customer notification if it has a reasonable basis to believe that a Lifeline subscriber no longer meets the criteria to be considered a qualifying low-income consumer and the subscriber's ~~customer's~~ lifeline service benefits are to be terminated due to failure to submit acceptable documentation for continued eligibility for that assistance. The ILEC ETC ~~and~~ shall provide the ~~customer~~ subscriber ~~an additional~~ ~~sixty~~ thirty days following the date of the impending termination letter to submit acceptable documentation of continued eligibility or dispute the carrier's findings regarding termination of the lifeline service.

(M) *De-enrollment for non-usage:* Following any continuous thirty-day period of non-usage of a lifeline service that does not require the ETC to assess or collect a monthly fee from its subscriber, an ETC shall notify the subscriber through any reasonable means that he/she is no longer eligible to receive lifeline benefits, and shall afford the subscriber a fifteen-day grace period during which the subscriber may demonstrate usage.

(N) *De-enrollment for failure to re-certify*. An ILEC ETC shall de-enroll a Lifeline subscriber who does not respond to the carrier's attempts to obtain re-certification of the subscriber's continued eligibility as required by CFR 47 §54.410(f); or who fails to provide the annual one-per-household re-certifications as required by CFR 47 §54.410(f). Prior to de-enrolling a subscriber under this paragraph, the ILEC ETC shall notify the subscriber in writing that failure to respond to the re-certification request will trigger de-enrollment. A subscriber must be given 60 days to respond to re-certification efforts.

IV. CONCLUSION

For the reasons set forth above, AT&T Ohio respectfully urges the Commission to eliminate or modify the Rules discussed above as appropriate to make the Rules implementing H.B. 64 proper and lawful, and to update its Lifeline rules to be consistent with new FCC requirements.

Dated: December 30, 2016

Respectfully submitted,

AT&T Ohio

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **AT&T OHIO'S APPLICATION FOR REHEARING** has been served this 30h day of December, 2016, by e-mail and/or U.S. Mail on the parties shown below.

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