

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**THE OHIO TELECOM ASSOCIATION'S MEMORANDUM CONTRA TO THE
APPLICATION FOR REHEARING OF THE EDMONT NEIGHBORHOOD
COALITION, LEGAL AID SOCIETY OF SOUTHWEST OHIO LLC, THE OFFICE OF
THE OHIO CONSUMERS' COUNSEL, OHIO POVERTY LAW CENTER, PRO
SENIORS, INC., AND SOUTHEASTERN OHIO LEGAL SERVICES**

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ATTORNEYS FOR THE OHIO TELECOM ASSOCIATION

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I. INTRODUCTION

The Ohio Telecom Association ("OTA") respectfully submits these comments in opposition to the application for rehearing in this proceeding regarding the Public Utilities Commission of Ohio's ("Commission") November 30, 2016, Finding and Order ("Order")¹ adopting the Telephone Company Procedures and Standards rules contained in Chapter 4901:1-6 of the Ohio Administrative Code ("OAC"). In the first assignment of error in their application for rehearing, the Edgemont Neighborhood Coalition, Legal Aid Society of Southwest Ohio LLC, The Office of The Ohio Consumers' Counsel, Ohio Poverty Law Center, Pro Seniors, Inc., and Southeastern Ohio Legal Services ("Coalition") again restate their argument urging the Commission to define "reasonable and comparatively priced voice service" that varies from the statutory definition contained in R.C. 4927.10.² Because the Coalition's assignment of error is not grounded in the controlling statute and

¹ Finding and Order November 30, 2016.

² This memorandum addresses only the Coalition's first assignment of error. The failure of OTA to respond to the other assignments of error does not indicate any agreement with the Coalition's other assignments of error.

repeats an argument the Commission already correctly rejected, the Commission should deny it.

II. THE COMMISSION CANNOT DEFINE TERMS THROUGH THE RULE MAKING PROCESS THAT EXCEED STATUTORY AUTHORITY

In its Order, the Commission defined “reasonable and comparatively priced voice service” by reference to the statutory definition found in R.C. 4928.10(B)(3), but then added an evidentiary rule that a service would be presumed competitively priced if the service does not exceed either the incumbent local exchange carriers (“ILEC”) basic local exchange service (“BLES”) rate by more than twenty percent or the urban rate floor established by the Federal Communications Commission (“FCC”). In their application for rehearing, the Coalition asserts that the Commission erred when it adopted Rule 4901:1-6-01(BB) because the rule is unreasonably vague.³ The Coalition recommends the insertion of a “fix” that the presumption apply if the rate does not exceed the lesser of the ... basic service rate by more than 20 percent or the urban rate floor as defined in 47 C.F.R. §54.318(a), and a shifting of the burden of proof such that the ILEC would be required to show by clear and convincing evidence that the presumption should not apply.⁴ The Commission should reject this assignment of error and the proposed fix because neither is grounded in Ohio law.

The Commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly.⁵ In R.C. 4927.10(B)(3), the General

³ Coalition Application for Rehearing at 3.

⁴ *Id.* At 4.

⁵ *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87 at 2.

Assembly provides the applicable definition as to what constitutes “reasonable and comparatively priced voice service”:

*For purposes of this division, the public utilities 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. (Emphasis added).*⁶

As OTA demonstrated in its application for rehearing, the definition of “reasonable and comparatively priced service” adopted by the Commission already exceeds that permitted under R.C. 4927.10(B)(3) because it includes the rebuttable presumption.⁷ Despite the express direction from the General Assembly, the Coalition urges the Commission to go even further and revise the definition to make it less “vague.” Without direction from the General Assembly, the Commission should not engage in this needless and unlawful expansion of the definition of “reasonable and comparatively priced voice service” or attempt to refine the definition as requested by the Coalition.

Additionally, the Commission should reject the Coalition’s attempt to assign a burden of proof to ILECs to demonstrate by clear and convincing evidence that there is a reasonable and comparatively priced service available because it does not conform to the statutory structure. Under R.C. 4927.10(B)(1), an ILEC may file notice of intention to withdraw service. After receiving notice, a residential customer may file a petition with the Commission that he or she is unable to obtain reasonable and comparatively priced service. Nothing in R.C. 4927.10 provides for assigning the burden of proof to the ILEC. Under standard rules of practice, moreover, the party seeking to demonstrate that a

⁶ OTA Application for Rehearing at 4.

⁷ Id at 5.

condition prevents the operation of the election should be assigned the burden of proof. See *Skinner v. Brooks*, 74 Ohio App. 288, 292 (1944) (party asserting affirmative defense has burden of proof of the defense). Accordingly, the Commission should reject the Coalition's attempt to rewrite R.C. 4927.10 and wrongly assign the burden of proof.

III. CONCLUSION

The Coalition recognizes that the Commission must conform its rules to the requirements of Ohio law, but in its first assignment of error then urges the Commission to expand the definition of reasonable and comparatively priced service in a way that is not supported by law or standard evidentiary practice. Aligning the Commission's rules on this matter with the underlying statutory guidance will ensure the exercise of appropriate authority as determined by R.C. 4927.10(B)(3). Therefore, the Commission should reject the Coalition's first assignment of error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Ohio Telecom Association's Memorandum Contra to The Application for Rehearing of the Edgemont Neighborhood Coalition, Legal Aid Society of Southwest Ohio LLC, the Office of the Ohio Consumers' Counsel, Ohio Poverty Law Center, Pro Seniors, Inc. and Southeastern Ohio Legal Services*, was served upon the following parties of record this 9th day of January 2017, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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Summary: Memorandum Contra to the Application for Rehearing of the Edgemont Neighborhood Coalition, Legal Aid Society of Southwest Ohio LLC, the Office of the Ohio Consumers' Counsel, Ohio Poverty Law Center, Pro Seniors, Inc. and Southeastern Ohio Legal Services electronically filed by Scott E. Elisar on behalf of Ohio Telecom Association