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 RESPONSE TO CONSUMER GROUPS' APPLICATION FOR REHEARING

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Dated: January 9, 2017

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The Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio") respectfully submits this response pursuant to OAC 4901-1-35(B) to the Application for Rehearing ("AFR") filed by the Consumer Groups.[1]

1. Consumer Groups' Assignment of Error No. 1.

The Consumer Groups contend that the definition of "reasonable and comparatively priced voice service" in Rule 4901:1-6-01(BB) is "vague concerning which threshold would apply for determining that a service is presumptively deemed competitively priced (subject to rebuttal)."[2] But the portion of the Rule that they contend is vague is in fact perfectly clear, because it employs a standard "either . . . or" structure that is routinely used in statutes and rules. Rule 4901:1-6-01 plainly says that the service is 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). That cannot be made more clear, and there is simply no need for the "clarification" the Consumer Groups suggest.

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[1] The "Consumer Groups" are 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.

[2] Consumer Groups' AFR at 3.

The Consumer Groups also assert that it is "unclear what would be the incumbent carrier's burden of proof for rebutting the presumption created by the Draft Rule," and suggest that the Rule specify that rebuttal must be by "clear and convincing evidence."[3] The Consumer Groups are confused. The incumbent carriers do not have the burden of proof at all. The presumption that the Rule creates is a presumption that the alternative voice service is competitively priced. When this presumption arises, it operates in favor of the incumbent. It is parties that want to establish that the alternative voice service is *not* competitively priced that would try to rebut the presumption. The Consumer Groups surely did not intend to advocate a high burden for their own constituents, but that is apparently what they have done.

2. Consumer Groups' Assignment of Error No. 2.

AT&T Ohio has no objection to the Consumer Groups' proposal to modify Rule 4901:1-6-01(QQ) to make explicit that the service must be provided at the customer's residence.

3. Consumer Groups' Assignment of Error No. 3.

AT&T Ohio agrees with Consumer Groups' Assignment of Error No. 3 for the reasons stated by the Consumer Groups.

4. Consumer Groups' Assignment of Error No. 4.

Rule 4901:1-6-21(F) requires a sole provider of voice service to give the Commission 30 days' notice before withdrawing or abandoning its provision of voice service. The Consumer Groups contend that the notice should go to customers as well as to the Commission, and that the notice period should be lengthened to 120 days. The Consumer Groups' contentions are without merit.

[3] *Id.* at 4.

As AT&T Ohio demonstrated in its Application for Rehearing (at 14-16), Rule 4901:1-6-21(F) must be removed because 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. 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. The Legislature did not 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. Furthermore, the Rule not only regulates providers that the Legislature chose not to regulate, but also regulates all "voice services" while the statute regulates only BLES. Because Rule 4901:1-6-21(F) is inconsistent with the statute it purports to implement – and also because it violates R.C. 4927.03(D)[4] – it must be removed, not expanded as the Consumer Groups propose.

Moreover, even if the Commission retains Rule 4901:1-21(F), the Consumer Groups' proposed modifications should be rejected. The Consumer Groups' proposal that the sole provider be required to give notice not only to the Commission but also to customers and that the notice period be extended to 120 days is based on a mistaken premise, namely, that "Customers may need more than 30 days to determine whether another carrier will provide voice service to their homes."[5] Under the scheme established in Rule 4901:1-21(F), customers do not make such a determination at all, because the withdrawing sole provider is required by law to give the Commission notice that is withdrawing. By definition, the notice informs the Commission that

[4] See AT&T Ohio's Application for Rehearing at 16.

[5] Consumer Groups' AFR at 7.

no alternative provider is available, and the Commission then takes any action it deems appropriate under Rule 4901:1-21(G).

Finally, the Consumer Groups' proposal would push the Commission even further away from the lawful implementation of H.B. 64. By its own terms, the Rule applies to VoIP providers only to the extent "consistent with the authority granted to the commission in division (A) of section 4927.03 of the Revised Code," *i.e.*, to the extent "necessary for the protection, welfare, and safety of the public."[6] Indeed, as the Order makes clear (at ¶¶ 205-206), the only justification the Commission found for requiring sole providers to give notice before withdrawing was to ensure that their customers would not lose access to 9-1-1, emergency services, and the ability to transmit information related to medical devices. As the Commission thus recognized, the Commission cannot lawfully establish rules to ensure that customers of VoIP providers retain access to voice service *generally*. In Rules 4901:1-21(F) and (G), the Commission went as far as it thought it could lawfully go, and while AT&T Ohio maintains that the Commission in fact went farther than it could lawfully go, it is certain the Commission cannot go farther in the ways the Consumer Groups propose.

5. Consumer Groups' Assignment of Error No. 5.

Rule 4901:1-6-21(G) provides that in certain specified circumstances that would leave a residential customer without access to emergency services, a provider that withdraws or abandons its voice service "may be subject to all the provisions of this rule on a case-by-case basis." While the Consumer Groups have not proposed actual language, they effectively propose to change that to "***will*** be subject to all the provisions of this rule" – with no case-by-case determination. That proposal should be rejected.

[6] O.R.C. 4927.03.

As AT&T Ohio demonstrated in its Application for Rehearing (at 16-18), Rule 4901:1-6-21(G), like Rule 4901:1-6-21(F), impermissibly adds to R.C. 4927.10 and should be removed altogether. Setting that aside for the sake of discussion, the Rule cannot be unreasonable or unlawful, as the Consumer Groups claim it is, because it says "may . . . on a case-by-case basis." As written, the Rule ensures that the withdrawing provider will be subjected to all the provisions of Rule 4901:1-6-21 in every instance where the Commission finds it appropriate. That may or may not turn out to be every instance in which one of the triggering circumstances arises – but if it does not, that will be because the Commission determines, on a case-by-case basis, that there are instances in which it is not appropriate. There is no basis for the Consumer Groups' unspoken premise that the Commission cannot be trusted to make the right decisions on a case-by-case basis.

Moreover, the inclusion of "may" and "on a case-by-case basis" was essential to the Commission's attempt to conform the Rule with R.C. 4927.03(A), which only allows the Commission to regulate VoIP service "***upon a finding*** that the exercise of the Commission's authority is necessary for the protection, safety, and welfare of the public" (emphasis added). With the Rule written as it is, the Commission is arguably able to make that finding in each instance based on the particular circumstances. With the modifications the Consumer Groups propose, there could be no such finding. In the absence of such a finding, Rule 4901:1-6-21(G), which AT&T Ohio believes is unlawful because it impermissibly adds to the statute it purports to implement, would become doubly unlawful because it would also exceed the Commission's limited authority under R.C. 4927.03(A).

6. Consumer Groups' Assignment of Error No. 6.

In this assignment of error concerning the customer notification requirements in Rule 4901:1-6-21(B), the Consumer Groups do not actually identify any error. Instead, they merely rehash arguments that the Commission already exhaustively considered and rejected.[7] They also accuse the Commission of being "unreasonable" for rejecting their recommendations. The Consumer Groups provide no cogent reason for the Commission to change its mind.

The Commission correctly found that the notification requirements it adopted "properly balance the need for timely customer education of the right to file a petition with the Commission and the burden to be incurred by carriers relative to customer notification."[8] The Consumers Groups suggest that no balancing is appropriate, and that instead, the Commission "should do all it can to ensure that customers are adequately informed that their basic service is being discontinued."[9] Under the Consumer Groups "all it can" view, any and all proposals to notify end users would have to be adopted, no matter how excessive. The Commission considered all the arguments on both sides and concluded that the notice provisions it adopted would give consumers the notice they need while avoiding excessive and unnecessary burdens on ILECs. There is nothing unreasonable or unlawful about that.

AT&T Ohio has previously demonstrated in detail why the Consumer Groups' proposed customer notification requirements should be rejected.[10] And as AT&T Ohio explained, some of the Consumer Groups' proposals went beyond being unnecessary and oppressively burdensome;

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[7] See Order ¶¶ 86-96.

[8] *Id*. ¶ 96.

[9] Consumer Groups' AFR at 11.

[10] AT&T Ohio's November 9, 2015, Reply Comments on Draft Changes to Ohio Adm. Code Chapter 4901:1-6, at pages 2-10.

they were actually at odds with R.C. 4927.10(B) and/or would confuse, rather than help educate, consumers. AT&T Ohio does not believe the Consumer Groups' Assignment of Error No. 6 warrants consideration, but if the Commission does consider it, AT&T Ohio respectfully urges the Commission to review AT&T Ohio's November 9, 2015, Reply Comments on Draft Changes to Ohio Adm. Code Chapter 4901:1-6, at pages 2-10.

7. Consumer Groups' Assignment of Error No. 7.

An administrative rule is not unlawful, as the Consumer Groups claim Rule 4901:1-6-21(A) is, merely because it does not recite each and every aspect of the statute it implements. In particular, there is no need for Rule 4901:1-6-21(A) to recite everything that section 749.10 of H.B. 64 says about the collaborative, because the Commission will be running the collaborative and will surely abide by the statute. Rule 4901:1-6-21(A) differs in this respect from an administrative rule governing, for example, actions to be taken by consumers, who could not reasonably be expected to be mindful of the statute the rule implements. Thus, there is no need to modify Rule 4901:1-6-21(A).

8. Consumer Groups' Assignment of Error No. 8.

The Draft Rules promulgated by Staff provided for *customers* to file petitions stating they would be unable to obtain reasonable and comparatively priced voice service upon the withdrawal of the customer's provider. The Consumer Groups urged the Commission to allow petitions to be filed by someone acting on behalf of the customer. The Commission judiciously clarified in its Order (at ¶ 196) that the petition could be filed by the customer or the customer's legal counsel – but (appropriately) did not modify Rule 4901:1-6-21(C) to so state. Now, the Consumer Groups claim that is unreasonable and that Rule 4901:1-6-21(C) should be modified to state that the petition can be filed by "any authorized representative." There is nothing

unreasonable about what the Commission did, and the Commission should reject the Consumer Groups' proposal.

There is no need for the Rule to say that the petition can be filed by the customer's legal counsel, because that goes without saying (though the Commission has now said it as an accommodation to the Consumer Groups' initial concern.) Similarly, some ILEC BLES customers' accounts may be managed by relatives or other persons properly authorized to act for the customers pursuant to the ILEC's policies and procedures, and petitions filed by such persons will surely be processed in the normal course – but again, there is no need for the Rule to say so. Alternatively, the Office of the Ohio Consumers' Counsel ("OCC") is authorized by law to represent consumers in matters before the Commission, and so can assist consumers who might be unable to represent themselves – but again, there is no need for Rule 4901:1-6-21(C) to so state.

In their October 26, 2015, Comments on the Draft Rules, the Consumer Groups proposed (at 17) that the Commission "allow petitions to be filed by someone acting on behalf of the customer." This was obviously too broad, because it would have permitted anyone and everyone to act on behalf of the customer – perhaps even without the customer's knowledge. Now, the Consumer Groups propose that filing be permitted by "any authorized representative," but that, too, is overly vague; if the Commission accepted the Consumer Groups' suggestion, it would need to define what an "authorized representative" is for purposes of the Rule. Must the authorization be writing? Must the authorization be pursuant to statute? Can the authorization be solely for the petition filing function?

There is yet another reason for not opening this can of worms. A principal purpose of the collaborative process that is the subject of Rule 4901:1-6-21(A) is to identify customers that will

be unable to obtain reasonable and comparatively priced voice service upon the incumbent's withdrawal of BLES, and customers identified by the collaborative "shall be treated as though the customer filed a timely petition." Rule 4901:1-6-21(C).

For all these reasons, the Commission should not modify Rule 4901:1-6-21(C) to provide that any authorized person may file a petition on behalf of customers.

9. Consumer Groups' Assignment of Error No. 9.

The Consumer Groups object to Rule 4901:1-6-14(J) because: (1) it removes the freeze on rates for nonrecurring and reconnection charges for BLES service; and (2) the Order says that any tariff filing to increase such rates will be subject to appropriate review.[11] Neither objection has merit.

The argument against lifting the six-year rate freeze is a rehash of the argument the Consumer Groups raised earlier in this proceeding.[12] It was fully considered by the Commission and was properly rejected. R.C. §4927.12 does not cap nonrecurring and reconnection charges, as the Consumer Groups contend. There is absolutely nothing in the rate cap provisions of R.C. §4927.12 that says it applies to nonrecurring or reconnection charges. On the contrary, those charges are specifically addressed in subsection (F), which simply requires that the "rates, terms, and conditions for basic local exchange service and for installation and reconnection fees for basic local exchange service shall be tariffed in the manner prescribed by rule adopted by the commission." In using the phrase "in the manner," R.C. §4927.12(F) allows the Commission to specify "how" these fees appear in the tariff, and the mechanics of how such fees can be altered, but gives it no authority over the determination of the level of those fees. And, as AT&T Ohio

[11] Consumer Groups' AFR at 14-15.

[12] Consumer Groups' Reply Comments, March 6, 2015, at 10-11.

argued in its opening Comments,[13] R. C. § 4927.03(D) states that without specific authorization in sections 4927.01 to 4927.21 of the Revised Code, the Commission has no authority over rates, terms, and conditions of telecommunications service. Since there is no specific authorization to freeze nonrecurring and reconnection charges, the Commission could not lawfully do what the Consumer Groups request.

The Consumer Group's second argument fares no better. It criticizes the statement in the Order that the Commission will subject any tariff filing that proposes to increase nonrecurring or reconnection rates to "appropriate review." That statement in the Order is entirely unobjectionable because it merely expresses the Commission's intent to conduct the type of review of a tariff filing that the law allows. No additional detail about how that review would be conducted is required; the Commission is the expert agency and will make the appropriate determinations at the time. More to the point, it is the rule itself that will control in this situation, not the language in the Order. And the rule in question here states that that "a standard of reasonableness will be applied" to rate changes. This is a correct statement of law under R.C. § 4927.21(A), which gives the Commission authority to review "unreasonable" rates. Nothing more needs to be in the rule.

10. Consumer Groups' Assignment of Error No. 10.

The Order revises Rule 19(J) to remove the requirement for automatic enrollment in the Lifeline program. Order at ¶¶ 136-139. As the Commission correctly recognizes,[14] this issue is

[13] AT&T Ohio Initial Comments, February 6, 2015 at 9-10.

[14] Order at ¶ 135.

governed by the FCC's *2012 Lifeline Reform Order*.[15] In that order, the FCC limited the "ability of states and their agents to automatically enroll a consumer in Lifeline without the consumer's express authorization in order to protect the Fund against duplicative Lifeline support, increase adherence to consumer certification rules, and ensure that all ETCs have an opportunity to compete for subscribers."

The FCC found that automatic enrollment may "prevent ETCs from complying with certification and other requirements we adopt in this Order meant to reduce waste in the Fund" and that "automatically enrolled consumers are unable to attest, under penalty of perjury, that they are the only person in their household receiving Lifeline prior to enrollment." In light of these concerns, the FCC ruled that "states with automatic enrollment programs must modify those programs, as necessary, to comply with our rules, so that consumers are not automatically enrolled without consumers' express consent." [16]

The Consumer Groups acknowledge that the FCC has directed states to eliminate automatic enrollment programs. They go on to argue, however, that there is an exception where the ILEC is the only Lifeline service provider in an exchange because (they assert) the FCC's concern with "duplicative Lifeline support" and competition among Lifeline providers does not exist when there is a single provider.[17] There is no such exception. There is nothing in the *2012 Lifeline Reform Order* that explicitly carves out special treatment for automatic enrollment in situations where there is a single provider of lifeline services. And the Consumer Groups cannot create such an exception by selectively picking among the reasons the FCC put forth to support

[15] *In re Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, et al., Report and Order (rel. Feb. 6, 2012), ¶¶ 170-173 ("2012 Lifeline Reform Order").

[16] *Id.* at ¶ 173.

[17] Consumer Groups' AFR at 17.

its ruling. They ignore, for example, the FCC's statement that "automatically enrolled consumers are unable to attest, under penalty of perjury, that they are the only person in their household receiving Lifeline prior to enrollment." This is a problem that exists whether or not the ILEC is the only Lifeline service provider, because other persons in the household could be receiving Lifeline discounts from a wireless ETC doing business in another exchange. So, the FCC's concern with potential waste exists whether or not there is just one provider in an exchange.

The Consumer Groups made all of their arguments earlier in this proceeding.[18] The Commission fully considered them and properly eliminated the automatic enrollment provisions of Rule 19(J) pursuant to the requirements of the *2012 Lifeline Reform Order*. The objection of the Consumer Groups should be denied.

11. Consumer Groups' Assignment of Error No. 11.

The Commission correctly found that it makes sense to use the same eligibility criteria for state and federal Lifeline benefits, and therefore correctly ruled that state eligibility criteria should be updated to remain aligned with federal eligibility criteria.[19] The Consumer Groups argue that Rule 19(H)(1)(i) should be changed to permit customers receiving Disability Financial Assistance ("DFA") to qualify for Lifeline benefits.[20] The Consumer Groups argue that DFA participants are the "poorest of the poor" and so should not lose Lifeline eligibility. Based on the Consumer Groups' characterization of DFA participants, it is likely that they are already qualified for Lifeline based on other eligibility criteria (e.g., income at or below 135% of the

[18] Consumer Groups' Initial Comments at 4-9.

[19] Order at ¶ 132.

[20] Consumer Groups' AFR at 18-19.

federal poverty level; eligibility for food stamps) and so this additional eligibility criteria would be redundant and unnecessary.

Moreover, the Consumer Groups' proposal is contrary to the FCC's *2016 Lifeline Third Report and Order*, which streamlines eligibility for Lifeline support and removes state-specific eligibility criteria for federal Lifeline benefits.[21] Rule 19 is structured to address federal-state combined Lifeline benefits. Rule 19(B)(1), for example, requires a recurring monthly discount for BLES service in an amount that provides the maximum contribution of federally available assistance. The Consumer Group's proposal would therefore require AT&T Ohio to give the full federal monthly discount (currently $9.25) to customers that do not qualify for federal Lifeline benefits under any of the FCC-authorized eligibility criteria. These discounts would not be reimbursable to AT&T Ohio under the federal Lifeline program.

In short, the Commission properly eliminated the state-specific Lifeline eligibility criteria in Rule 19(H)(1)(i). The objection of the Consumer Groups should be rejected.

12. Consumer Groups' Assignment of Error No. 12.

The Consumer Groups object to the elimination of the old Rule 19(J), which previously required the Commission to work with carriers and state agencies to acquire the data necessary to support automatic enrollment in the Lifeline program.[22] They argue that R.C. § 4927.13(C)(1) requires the Commission to undertake this activity. They are wrong because, as fully explained in AT&T Ohio's response to Issue 10, the FCC's *2012 Lifeline Reform Order* directed states to eliminate automatic enrollment. Since the automatic enrollment requested by the Consumer

[21] *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration (rel. April 27, 2016), at ¶¶ 212-216.

[22] Consumer Groups' Initial Comments at 5-8.

Groups is no longer allowed under federal law, there is no point in having the Commission expend its scarce resources to gather data pertaining to automatic enrollment.

13. Consumer Groups' Assignment of Error No. 13.

Finally, the Consumer Groups argue that the Commission improperly changed Rule 19(L) to provide a 30 day period for termination of Lifeline benefits after notice of impending de-enrollment, rather than 60 days.[23] The Commission's adoption of a 30 day time period was proper because it aligns the state requirements with the 30 day FCC requirement set forth in 47 C.F.R. § 405(e)(1).[24]

In fact, a more accurate alignment of state and federal de-enrollment intervals is possible, and would meet most of the Consumer Groups' objective because it would establish a 60 day interval for recertifications and retain the 30 day interval only for general de-enrollments that do not involve non-usage.

As AT&T Ohio explained in its AFR,[25] the FCC rules establish three separate de-enrollment categories, with different de-enrollment intervals:

> FCC Rule 405(e)(1) covers de-enrollment if the participant no longer qualifies for Lifeline benefits and establishes a 30 day interval;
>
> FCC Rule 405(e)(3) covers de-enrollment for non-usage and establishes a 15 day interval; and
>
> FCC Rule 405(e)(4) covers de-enrollment for failure of the participant to re-certify his or her eligibility to continue to receive Lifeline benefits and establishes a 60 day interval.

AT&T Ohio proposed that the Commission revise its rules to align with these FCC requirements. And it makes sense to do so because, from an administrative perspective, the Lifeline program

[23] Consumer Groups' AFR at 21.

[24] *2012 Lifeline Reform Order* at ¶¶ 142-143.

[25] AT&T Ohio Application for Rehearing, at 18-19.

can only operate under one set of rules – not two. In other words, an ETC cannot operate under conflicting state and federal rules, where compliance with one set of rules (e.g., an FCC requirement to de-enroll within 30 days) necessarily creates a violation of the other set of rules (e.g., a state requirement to wait 60 days to de-enroll). Rule 19 is structured for the operation of a single Lifeline program, with predominantly federal benefits, but also some state benefits. That single program must operate under a single set of basic administrative rules, and aligning the state de-enrollment rules with those of the FCC will go a long way to achieving that result.

For all these reasons, the Consumer Groups' objection to Rule 19(L) should be rejected and AT&T Ohio's proposal should be adopted.

Dated: January 9, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **AT&T OHIO'S RESPONSE TO CONSUMER GROUPS' APPLICATION FOR REHEARING** has been served this 9th day of January, 2017, by e-mail and/or U.S. Mail on the parties shown below.

/s/ Mark R. Ortlieb
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Summary: Reply AT&T Ohio's Response to Consumer Groups' Application for Rehearing electronically filed by Mr. Mark R Ortlieb on behalf of AT&T Entities and AT&T Ohio and Ohio Bell Telephone Company