BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING
OF
THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

Pursuant to Ohio Revised Code 4903.10, and Ohio Administrative Code Rule 4901-1-35, the Ohio Cable Telecommunications Association ("OCTA") files this Application for Rehearing from the April 5, 2017 Second Entry on Rehearing issued by the Public Utilities Commission of Ohio ("Commission") in this matter. The OCTA was an active participant in this proceeding and files this application for rehearing because the Commission's April 5, 2017 Second Entry on Rehearing is unreasonable and unlawful with respect to the following:

1. It was unjust and unreasonable for the Commission to conclude that it has to "extend its reach" and regulate voice services, including voice over Internet Protocol services.
2. It was unjust and unreasonable for the Commission to endorse the filing of an Ohio Revised Code 4927.10(B) petition by myriad third parties and to not define an "authorized representative."
3. It was unjust and unreasonable for the Commission to fail to review/revise the Amended Business Impact Analysis in light of the adopted amended rules for Chapter 4901:1-6.

The facts and arguments supporting this Application for Rehearing are set forth in the attached memorandum in support. The OCTA respectfully requests that the Commission grant rehearing and modify its Second Entry on Rehearing accordingly.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

I. Introduction

In developing new administrative rules associated with the withdrawal or abandonment of basic local exchange service ("BLES") by incumbent local exchange carriers ("ILECs"), the Commission has improperly adopted new regulations that would apply to voice services not currently regulated by the Commission, including voice over Internet Protocol ("VoIP") services, and that would expand who may file petitions opposing market withdrawal or service abandonment by carriers of last resort ("COLRs"). The Commission has erroneously and unjustifiably concluded that it may extend its authority over deregulated voice services, including VoIP services. That conclusion, however, is not justified by the new statutory process for the withdrawal/abandonment of BLES. In addition, the Commission failed to make a requisite finding that the regulations are necessary, which they are not.[1] Further, the Commission has unjustly and unreasonably opened the door to allow various third parties to file petitions under Revised Code ("R.C.") 4927.10(B) on behalf of residential customers, contrary to the authorizing statute, the Commission's long-standing procedural rules and good public policy. Additionally, the Commission did not appropriately revise its September 2015 Amended

[1] Procedural failures and the inconsistency with statutory language aside, the proposal is inconsistent with efforts led by Ohio and more recently adopted as federal policy to encourage investment with a deregulatory approach. In contrast this proposal creates a barrier to investment. Companies will reconsider investment in new facilities (that are also capable of providing broadband service) if they fear that, in the end, their networks and services will be regulated as common carriers/COLRs. Moreover, market exit regulations, including provider-of-last-resort obligations, are quintessential common carrier requirements, which federal law permits to be imposed only upon telecommunications service providers regulated under Title II of the Communications Act. *See, e.g.,* 47 U.S.C. §153(51); *Verizon v. FCC*, 740 F.3d 623, 650 (2014). Imposition of such requirements on non-Title II providers conflicts with federal law and risks preemption either by the Federal Communications Commission ("FCC"), Congress, and/or the courts. Because the FCC has not classified interconnected VoIP services as subject to common carrier regulation under Title II, and has repeatedly declined to do so, the Commission's revised rules create precisely such a conflict.

Business Impact Analysis ("BIA") to account for the newly amended rules, nor did it ensure that a BIA reflecting the newly amended rules will be submitted to the Common Sense Initiative. Because of these errors, the Commission should grant rehearing and revise its decision in this matter consistent with the discussion below.

II. Background

This proceeding began in 2014 as a five-year rule review in order to re-examine the Commission's retail telecommunications rules in Ohio Administrative Code Chapter 4901:1-6. Before the Commission completed that review, Amended Substitute House Bill 64 ("H.B. 64") became law which amended certain portions of R.C. Chapter 4927. Thereafter, the Commission expanded the five-year review in this docket to include a rulemaking related to those new statutory provisions affected by H.B. 64; in September 2015, the Commission undertook a second phase of this proceeding by seeking comments on additional Staff proposals designed to implement H.B. 64.

The OCTA filed comments in both phases of this proceeding. The Commission issued a Finding and Order on November 30, 2016. Applications for rehearing were filed by the OCTA and others in December 2016. The Commission issued a substantive ruling on those applications for rehearing on April 5, 2016, in its Second Entry on Rehearing.

In the Second Entry on Rehearing, the Commission amended its earlier ruling and revised certain rules. The OCTA timely files this application in response to the Second Entry on Rehearing.

III. Argument

A. It was unjust and unreasonable for the Commission to conclude that it has to "extend its reach" and regulate voice services, including voice over Internet Protocol services.

Under the guise of defining the process by which ILECs may seek to withdraw or abandon BLES in a service area, the Commission has expanded the scope and reach of Chapter 4901:1-6 to all voice service providers operating in Ohio, including VoIP service providers. In particular, the rules as amended and adopted in the Second Entry on Rehearing specifically require:

- VoIP service providers to comply with the BLES withdrawal rule. (Adopted Rule 4901:1-6-02(C))
- Providers of any newer telecommunications service (as defined in the rule) to comply with the BLES withdrawal/abandonment rule. (Adopted Rule 4901:1-6-02(D))
- Non-ILEC voice service providers to file a notice with the Commission before withdrawing or abandoning the voice service. (Adopted Rule 4901:1-6-21(F))
- That a voice service provider may become subject to the BLES withdrawal/abandonment process (potentially resulting in the Commission mandating that the provider continue to provide the voice service, including VoIP service) upon a Commission investigation and issuance of specific determinations. (Adopted Rule 4901:1-6-21(G))

The Commission's Second Entry on Rehearing is unlawful and unreasonable for two reasons. First, nothing in H.B. 64 authorizes the Commission to impose new regulations on voice services, including VoIP services. On the contrary, H.B. 64 established a process pursuant to which incumbent providers of BLES may withdraw that service in certain circumstances and, to the extent that H.B. 64 invokes voice service providers, it does so solely to address the *identification* of a reasonable and comparatively priced voice service or a willing provider of voice service for the limited purpose of evaluating the ILEC's request for BLES

withdrawal/abandonment.[2] It is significant that the Legislature expressly distinguished BLES among other voice services in H.B. 64.[3] If the Ohio General Assembly had sought to direct the Commission to impose new regulations on voice services, including VoIP service, it would have included language to that effect. However, no such language appears in H.B. 64, and any interpretation of H.B. 64 that would justify imposing regulations on voice services that are not currently subject to such requirements clearly contradicts the Legislature's intent to enable service providers and customers to migrate from regulated BLES services to new, unregulated voice services. Accordingly, H.B. 64 does not grant the Commission the authority to create and apply new regulations to voice services, including VoIP services, merely because an ILEC files a BLES withdrawal/abandonment per H.B. 64. The Commission's decision to impose new regulations that "extend its reach" to voice services including VoIP services[4] was in error, and the Commission's conclusions in the Second Entry on Rehearing are unjust and unreasonable.

Second, the Commission improperly relies on R.C. 4927.03(A) to expand its regulatory authority to include voice services, including VoIP services. In the Second Entry on Rehearing, the Commission acknowledged this overreach:[5]

> The Commission recognizes that Ohio Adm. Code 4901:1-6-21 is premised on R.C. 4927.10, which addresses an ILEC's ability to file with the Commission for the purpose of withdrawing basic local exchange service. However, in the context of developing rules for the implementation of R.C. 4927.10, the Commission cannot just consider R.C. 4927.10 or any other statute on a stand-alone basis, but must concurrently consider other equally important and applicable statutory concerns, such as the protection, welfare, and safety of the public addressed in R.C. 4927.03(A). * * *
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> * * * [T]he Commission, in the context of developing its rules, must prospectively ensure that the ILEC's residential subscribers will continue

[2] *See*, R.C. 4927.10(B)(1) and (2).
[3] *See*, R.C. 4927.01(A)(1) and (A)(18).
[4] *See*, Second Entry on Rehearing at ¶91.
[5] *Id*. at ¶¶90 and 91.

> to have access to 9-1-1 service, subsequent to the ILEC abandoning the offering of BLES and even following a subsequent voice service provider's withdrawal or abandoning voice service. *Consequently, such an analysis results in the Commission having to extend the reach of its rule to include other providers of voice service in order to ensure that it properly satisfies its statutory obligation.* (Emphasis added.)

However, this construction turns R.C. 4927.03 on its head. R.C. 4927.03 was established in 2010 to *deregulate* new communication services, including VoIP services. The operative words of R.C. 4927.03(A) make this clear: "* * * 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 * * *." As such, the fundamental premise and overriding purpose of R.C. 4927.03 was to deregulate new communications services – and specifically VoIP services.

Therefore, the Commission's reliance on R.C. 4927.03 to justify new regulations for deregulated services is a serious error. Notably, the Commission has not previously found it "necessary"[6] to backtrack from its regulatory exclusions for voice services, including VoIP services. The Commission in this proceeding, however, would mandate that (a) any provider of voice service (if a sole provider) notify the Commission before withdrawing or abandoning the voice service and (b) voice service providers be subject to the BLES withdrawal/abandonment process (which could result in the Commission mandating the continuation of the voice service, including VoIP service) upon a Commission investigation and issuance of specific determinations. Nowhere in this proceeding has the Commission explained why it deems these rules suddenly "necessary for the protection, welfare, and safety of the public." Even more

[6] Pursuant to R.C. 4927.03(A), the Commission must make a prerequisite finding that "the exercise of the commission's authority is necessary for the protection, welfare, and safety of the public," before the Commission can exercise authority over VoIP.

curious is the inconsistency between the Commission's acknowledgement that necessity is an important component of the statute and its subsequent denial of the Ohio Telecommunications Association's argument that the Commission must find that the corresponding rule changes are actually necessary for the protection, welfare, and safety of the public, which it simply failed to do.[7]

These Commission-adopted rules are not "necessary." These rules could apply to providers who are neither telephone companies nor public utilities under Ohio law. These Commission-adopted rules could apply to regulate voice providers even when a BLES withdrawal/abandonment has not taken place because these rules contain no such condition precedent. And, as noted earlier, these Commission-adopted rules apply even though the withdrawal/abandonment process that would be applied to voice service providers is statutorily limited to only ILECs. In light of the contradiction with the purpose of H.B. 64 and the lack of a record-based finding by the Commission that expanding the rules to voice services is necessary, it is clear that the Commission's reliance on R.C. 4927.03(A) was improper and the Commission's conclusions in the Second Entry on Rehearing are unjust and unreasonable.

B. It was unjust and unreasonable for the Commission to endorse the filing of an Ohio Revised Code 4927.10(B) petition by myriad third parties and to not define an "authorized representative."

In the Second Entry on Rehearing, the Commission agreed with the Consumer Groups' claim that a petition filed pursuant to R.C. 4927.10(B) should not be limited to the residential customer or the residential customer's legal counsel, stating that "petitions" are tantamount to "notice filings."[8] The Commission further stated that the remedy proposed by the Consumer Groups' will "best accomplish" a timely identification of customers who will no longer have

[7] *See*, Second Entry on Rehearing at ¶¶77, 88 and 105.
[8] *See*, Second Entry on Rehearing at ¶71.

reasonable and comparatively priced service upon withdrawal/abandonment of BLES by the ILEC.[9] The remedy proposed by the Consumer Groups was to allow various third parties, such as relatives, friends or social service agencies, to file petitions with the Commission on the customer's behalf.[10] Although the Commission did not specify in the Second Entry on Rehearing or in adopted Rule 4901:1-6-21(C) who would qualify as an "authorized representative" of the residential customer, the Commission's ruling opens the door for various third parties to file petitions, especially since the Commission stated that the ILEC may contest whether a representative is authorized.

R.C. 4927.10(B) states that the petition must be filed by "a residential customer" and R.C. 4927.10(B)(1) states that the Commission must review and dispose of the petition. The Commission has defined "petition" in adopted Rule 4901:1-6-21(C) as a written statement from an affected customer claiming that the customer will be unable to obtain reasonable and comparatively priced service upon withdrawal/abandonment of BLES by the ILEC.[11] The petition will be more than a "notice filing" as it will make claims of which the Commission is statutorily required to dispose.

The Commission, however, has endorsed the filing of a petition for the residential customer by various third parties. As a result, the Commission ruling impermissibly expands the universe of authorized petitioners well beyond the statutory language in R.C. 4927.10(B). Moreover, allowing petitions to be filed by third parties with questionable authorization from an aggrieved party contradicts the Commission's long-standing procedural rule regarding filings at the Commission. Rule 4901-1-04 requires that all applications, complaints, or "other pleadings

[9] *Id*.
[10] Consumer Groups' Application for Rehearing at 12-14.
[11] The Merriam-Webster Dictionary defines "petition" differently, as a "formal written request to an official person or organized body (such as a court)." *See*, https://www.merriam-webster.com/dictionary/petition (accessed April 30, 2017).

filed by any person shall be signed by that person or by his or her attorney." Adopted Rule 4901:1-6-21(C) is contrary to this long-standing requirement. Moreover, the Commission's decision on this point could be inviting the unauthorized practice of law by third parties. It is not good policy to establish a rule that could lead to violations of law. For these reasons, the Commission erred and should grant rehearing on this point.

C. It was unjust and unreasonable for the Commission to fail to review/revise the Amended Business Impact Analysis in light of the adopted amended rules for Chapter 4901:1-6.

During the initial phase of this proceeding, the Commission sought comments on the initial Staff proposal and a BIA based on that proposal.[12] When the Commission began the second phase of this proceeding in September 2015, the Commission sought comments on the second Staff proposal and an Amended BIA.[13]

R.C. 121.82 requires the Commission to prepare a BIA that "describes its evaluation of the draft rule against the business impact analysis instrument, that identifies any features that were incorporated into the draft rule as a result of the evaluation, and that explains how those features, if there were any, eliminate or adequately reduce any adverse impact the draft rule might have on businesses." A "draft rule" is "any newly proposed rule and any proposed amendment, adoption, or rescission of a rule prior to the filing of that rule for legislative review under division (D) of section 111.15 or division (C) of section 119.03 of the Revised Code and includes a proposed amendment, adoption, or rescission of a rule in both its original and any revised form."

The Commission has adopted "draft rules" that differ in substance from the proposals addressed in the BIA and Amended BIA issued in 2015 in this proceeding. Thus, at a minimum,

[12] *See*, Attachment B to the Commission's January 7, 2015 Entry.
[13] *See*, Attachment B to the Commission's September 23, 2015 Entry.

Commission review of the Amended BIA was warranted. The Commission did not, however, review or revise the Amended BIA in the Second Entry on Rehearing based the amended rules adopted by the Commission. The Second Entry on Rehearing is silent.[14] It was unjust and unreasonable for the Commission to not address the Amended BIA in light of the rules adopted in the Second Entry on Rehearing or otherwise require that a BIA reflecting the newly amended rules be submitted to the Common Sense Initiative, consistent with R.C. 121.82.

IV. Conclusion

Rehearing should be granted to bring the Commission's rules in Chapter 4901:1-6 into compliance with the Commission's statutory authority and be just and reasonable by (a) removing the provisions that subject voice services to regulation in Rule 4901:1-6-21 and (b) revising Rule 4901:1-6-21(C) to properly identify who can file a petition with the Commission. Additionally, rehearing should be granted so that the Commission reviews and revises the Amended BIA in light of the adopted rules in Chapter 4901:1-6.

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[14] The November 30, 2016 Finding and Order also did not address the Amended BIA.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served via electronic mail on this 5th day of May, 2017 to the following:

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