BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Implementation of Substitute House Bill 402 of the 132nd Ohio General Assembly	))))	Case No. 19-173-TP-ORD

INITIAL COMMENTS OF OHIO TELECOM ASSOCIATION

Frank P. Darr (Reg. No. 0025469)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mwncmh.com
(willing to accept service by e-mail)

ATTORNEYS FOR OHIO TELECOM ASSOCIATION

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I. INTRODUCTION

Effective March 20, 2019, Substitute House Bill 402 ("HB 402") includes changes to Ohio law concerning the regulation of incumbent local exchange carriers that were enacted to maintain and accelerate telecommunications investment in Ohio. Among other things, the new law provides pricing flexibility for basic local exchange service and lowers filing requirements on mergers and acquisitions.

To implement the provisions of the new law, HB 402 directs the Public Utilities Commission of Ohio ("Commission") to amend its rules to the extent necessary to bring them into conformity with the Act within 120 days of its effective date. HB 402, 132 Gen. Assembly § 3 (effective Mar. 20, 2019). In an Entry on March 20, 2019, the Commission published draft rules. Entry at 1 (Mar. 20, 2019). Ohio Telecom Association encourages the Commission to adopt the proposed rules with some minor changes.

II. DISCUSSION

A. Correction of Typographical Error in Rule 4901:1-6-14(G)

R.C. 4927.123 provides for an exemption from the price caps applicable to basic local exchange service under R.C. 4927.12 four years after the effective date of the section. The Commission has proposed Rule 4901:1-6-14(G) to implement the

exemption. The first paragraph of subdivision (G) of the rule has an apparent typographical error: “are” should read “area.” With the correction, the first paragraph would read as follows:

> Not earlier than four years after the effective date of section 4927.123 of the Revised Code, an ILEC may apply for an exemption from the requirements of paragraph (C) of this rule for an exchange ~~are~~ area subject to paragraph (G)(3) of this rule.

B. Definition of Incremental Cost

New provisions of R.C. 4927.12 authorize an incumbent local exchange company to lower its basic local exchange rates, but the reduction cannot be less than incremental cost. *See, e.g.*, R.C. 4927.12(B)(3)(a). “‘Incremental cost’ has the meaning defined by the commission.” R.C. 4927.12(A).

In the proposed rules, the Commission did not define “incremental cost,” but instead proposed to add a definition for long run service incremental cost. Rule 4901:1-6-01(W). “Long run service incremental cost” does not appear elsewhere in the pricing rules. Based on the structure of the rules, it is not clear that the Commission’s proposal is intended to guide decisions regarding the application of the incremental cost price floor contained in various subdivisions of R.C. 4928.12 and the proposed rules. If the intent is to define incremental cost with this definition, the Commission should modify the rule to address whether a rate decrease violates the incremental cost floor on prices on a case by case basis.

The statute leaves to the Commission to decide the definition of incremental cost. This deference suggests that the Commission should be open to alternative approaches to defining incremental cost when an incumbent local exchange carrier is seeking to

decrease rates so long as the definition used in the particular case is designed to maintain or increase investment in telecommunications in Ohio.

Further, the context for setting pricing is important. *See AT&T Communications of Ohio, Inc. v. Pub. Utils. Comm's of Ohio*, 88 Ohio St. 3d 549 (2000) (TELRIC is not appropriate measure for determining intraLATA access charges). For example, the problem addressed in the determination of incremental cost associated with the pricing of network elements is far different than that presented when a carrier is seeking to reduce rates. In the former case, TELRIC is used to encourage competitive entry and the concern is that prices are set too high. *Cincinnati Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 92 Ohio St. 3d 177 (2001). In the latter case, the seller is seeking to meet competition from other competitive local exchange carriers. In this latter case, the appropriate marginal cost measure should reflect the fact that retail customers will benefit from reduced prices unless the pricing results from unfair competition. The definition of the measure of incremental costs, therefore, should be left to decision in individual applications and should be an issue only if the application suggests that the pricing is anticompetitive.

Because the context for applying the incremental cost floor should reflect the goals of the new law, the Commission should remove the current definition of long run service incremental costs, Rule 4901:1-6-01(W), and instead insert as a new division a generic definition of "incremental cost." For example, the definition could provide: "'*Incremental cost' is the amount of money it would cost a company to make an additional unit of product*." Use of a more general definition would permit the parties to demonstrate, if

the issue arises, the costs that it believes are incremental and to provide a basis for the adoption of the party's particular approach to its cost analysis.

C. Clarification of Merger and Acquisition Filing Requirement

Prior to the enactment of HB 402, R.C. 4905.402(B) and (C) required an application from the person seeking approval of any telephone company merger or acquisition and "prior approval" of the application. As amended by HB 402, a domestic telephone company or a holding company controlling a domestic telephone company that files an application seeking authority for a merger or transfer of control with the Federal Communications Commission ("FCC") must file notice of the application, including an internet link, with the Commission. R.C. 4905.402(G). The requirements to file an application seeking approval of a merger or acquisition and the requirement for approval do not apply if there is a pending application with the FCC unless the FCC waives the exercise of its authority or otherwise chooses not to exercise its authority. R.C. 4905.402(H).

The Commission recommends two amendments to implement R.C. 4905.402(G) and (H). Proposed Rule 4901:1-6-29(E)(2) provides an exemption from the filing requirements of division (E)(1) and directs the telephone company that files an application for a merger or acquisition with the FCC to file a notice of the application with the Commission that includes an internet link to the FCC application. It further provides that the notice filing should follow the procedures set forth in paragraph (C) of Rule 4901:1-6-29. A proposed revision to Rule 4901:1-6-29(C), however, specifically exempts companies that are providing notice under division (E)(2) from the requirements of division (C). As a result, the provisions of division (C) and (E)(2) appear to conflict:

division (C) exempts a company which is covered by division (E)(2) from making a filing under the rule while division (E)(2) directs a company to make a filing under division (C).

To conform Commission rules to the change to the Commission's authority to review mergers and acquisitions of domestic telephone companies and resolve the conflict in between Rule 4901:1-6-29(C) and (E)(2), the rule should be modified to provide for a requirement for a stand-alone notice that is described in division (E)(2). The next to last sentence of division (E)(2) would be modified to read: "A domestic telephone company or a holding company controlling a domestic telephone company that files an application with the FCC seeking authority for a transfer of control or merger shall file notice of the application with the public utilities commission of Ohio ~~following the procedures set forth in paragraph (C) of this rule~~." The exemption in division (C) would remain unchanged.[1]

D. Revision of Rule 4901:1-6-12 to Conform the Rule to Amended State Policy Statement

Rather than mandating availability of telecommunications services, the General Assembly has recognized that competitive alternatives exist and amended the State Policy to focus on adequacy and reliability of local exchange and voice service. *See, e.g.*, R.C. 4927.07 and 4927.10. In HB 402, the General Assembly amended the State Policy set out in R.C. 4927.02(1) by removing the term "availability."

[1] Notice of the filing of an application with the FCC is independent of the determination whether the Commission retains authority to review the merger or acquisition. If the FCC does not exercise its authority over an acquisition or merger, then the limitation on Commission review contained in R.C. 4905.402(H) would not apply and the Commission could direct the applicant to make the necessary compliance filing.

This revision in the State Policy, however, was not carried over to Rule 4901:1-6-12(A). To conform the rule to the amendment of R.C. 4927.02(A)(1), Rule 4901:1-6-12 should be amended to read:

> A local exchange carrier (LEC) providing basic local exchange service (BLES) shall conduct its operations so as to ensure that the service is ~~available,~~ adequate~~,~~ and reliable consistent with applicable industry standards.

III. CONCLUSION

HB 402 marks another step toward the evolution of telecommunications service in Ohio. In particular, it affords pricing flexibility to incumbent providers in recognition of the growing competition in Ohio's telecommunications marketplace. The proposed rules, with minor modifications, largely conform to the General Assembly's recent action.

Respectfully submitted,

/s/ Frank P. Darr
Frank P. Darr (Reg. No. 0025469)
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mwncmh.com

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the interested parties.

/s/ Frank P. Darr
Frank P. Darr

Summary: Comments Initial Comments of Ohio Telecom Association electronically filed by Mr. Frank P Darr on behalf of Ohio Telecom Association