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

REPLY COMMENTS OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

I. Introduction

The Public Utilities Commission of Ohio ("Commission") should adopt the recommendations of the Ohio Cable Telecommunications Association ("the OCTA") so that the Commission's retail telecommunications rules fully reflect a measurable price floor for basic local exchange service ("BLES") allowing for evaluation of BLES price decreases, and at the same time reject the proposals by the Ohio Telecom Association ("OTA") that would ineffectively define "incremental cost" in Rule 4901:1-6-01 of the Ohio Administrative Code,[1] and not reflect long-run service incremental cost ("LRSIC") as the price floor for BLES in Rule 6-14. Additionally, the Commission should reject the suggestion from eight consumer groups[2] to omit the Staff-proposed BLES exemption Rule 6-14(G). Lastly, the Commission should eliminate a cross-reference error in the Staff-proposed changes for Rule 6-29 to ensure that the statutorily required notice to the Commission is filed when a change in operations filing is made

[1] For ease, the rule references in these comments will be simply to "Rule 6-__."

[2] The groups are: the Greater Edgemont Community Coalition; The Legal Aid Society of Cleveland; Legal Aid Society of Southwest Ohio, LLC; The Office of the Ohio Consumers' Counsel; Ohio Association of Community Action Agencies; Ohio Poverty Law Center; Pro Seniors, Inc.; and Southeastern Ohio Legal Services (collectively, "Consumer Groups").

with the Federal Communications Commission ("FCC"). The fixes for Rule 6-29 proposed by the OTA and the Consumer Groups fall short of what is needed, however. The Commission's rule revisions must conform to House Bill 402 of the 132nd General Assembly ("HB 402") and carry out the Legislature's intent, and the OCTA's recommendations herein (as well as those contained in its initial comments) will result in conforming rules.

II. Reply Arguments

A. Rules 6-01(W), 6-14(C) and 6-14(H): A uniform "incremental cost" floor must be established and defined in the rules, and long-run incremental service cost (as defined by the OCTA) is the appropriate definition to be adopted as the price floor for BLES.

The OTA's proposal regarding incremental cost flies in the face of HB 402 and Commission precedent, and, therefore, should be swiftly rejected. The OTA proposes that the retail rules only vaguely define incremental costs in Rule 6-01(W), and omit any standard from Rules 6-14(C) and (H) so as to leave it "open to alternative approaches" each time an incumbent local exchange carrier ("ILEC") decreases its BLES rates. OTA Initial Comments at 2-3. The OTA is advocating for an undefined incremental cost standard, ignoring the important words of HB 402 and its legislative intent:

- HB 402 repeatedly mandates that, while allowing the ILECs pricing flexibility for their BLES, there is an actual limit upon price decreases – the ILECs may not price BLES below "incremental cost." *See* Ohio Revised Code ("ORC") Sections 4927.12(B)(1), (B)(2), (B)(3)(a), and ORC Section 4927.123(E).

- The HB 402 limitation on price decreases continues after an ILEC has an exemption from restrictions for price increases. *See* ORC Section 4927.123(E).

- HB 402 requires the Commission to define "incremental cost" – meaning ascribe one definition. It does not state that the Commission shall define and re-define "incremental cost" on a case-by-case basis.

- HB 402 is deregulation legislation that encourages competition but it does not dispense with protections against anti-competitive behaviors such as below-cost pricing, cross-subsidization, or price squeezes.

- HB 402 continued the telecommunications policy of Ohio's vision that telecommunication services, including BLES, will be provided at *reasonable* rates. *See* ORC Section 4927.02(A)(3).

The OTA also ignores multiple Commission rulings in which it established a measure for incremental costs in rules applicable to the ILECs. The Commission has previously established by rule that the price floor for BLES is determined by LRSIC. *See* OCTA initial comments at 3-4. Those rules involved local competition guidelines, alternative regulation of BLES, and retail service rules. As fully explained by the OCTA in its initial comments, it is reasonable and logical for the Commission to follow suit in these updated retail service rules.

The OTA contends that the circumstances of individual price-decrease applications are important to determining how to measure incremental costs. OTA Initial Comments at 3. The OTA did not identify any such "circumstances" that could justify measuring a price floor for the same ILEC service differently depending on why the ILEC has applied because there are none. HB 402 mandates a price floor for one service – BLES. Only one measurement is appropriate and it should be spelled out in the rules.

The two cases cited by the OTA are inapplicable. Not only did they involve pricing of completely different services, they did not involve the question of what should be the *price floor* for BLES. Instead, they involved (a) access to the ILEC network by other carriers to initiate and complete long distance calls, (b) access the ILEC local loops by other carriers, and (c) directory assistance listings. More specifically, in *AT&T Communs. v. PUC*, 88 Ohio St. 3d 549 (2000), the Supreme Court of Ohio upheld the Commission's decision concluding it was reasonable to price intrastate access by mirroring FCC rates for interstate access. In *Cincinnati Bell Tel. Co. v. PUC*, 92 Ohio St. 3d 177 (2001), the Court upheld the Commission's determinations to price

access to the local loop (facilities between switches) based in part on a weighting of business and residential loops and to price directory assistance database listings by mirroring FCC rates. These cases cannot be relied upon to draw the conclusion that the retail rules should not set a specific measure for the price floor of BLES.

The OTA proposal is contrary to HB 402, the legislative intent and Commission precedent. The incremental cost price floor for BLES should be set forth in Rules 6-14(C) and (H) as LRSIC, and LRSIC should be defined in Rule 6-01(W) as "the ***forward-looking*** economic cost for a new or existing product that is equal to the per-unit cost of increasing the volume of production from zero to a specified level, while holding all other product and service volumes constant."

B. Rule 6-29: The proposed change in operations rule does contain a cross-reference error, which should be resolved as recommended by the OCTA not the other commenters.

Concerns with the Staff-proposed changes to Rule 6-29 were raised in all initial comments. The OTA and the Consumer Groups each commented that there is an error with the proposed language because Subsection (E)(2) requires notice to be filed with the Commission per Subsection (C), while Subsection (C) does not require the notice when (E)(2) is triggered. OTA Initial Comments at 4-5; Consumer Groups Initial Comments at 4-5. The OCTA agrees there is a cross-reference error in the proposed revisions to Rule 6-29.

The OTA and the Consumer Groups proposed different remedies for the cross-reference error; however, their remedies are inadequate to provide the filing guidance needed when a company files a change-in-operations application with the FCC. The OTA suggested that Subsection (E)(2) only say that notice must be filed with the Commission (specifically suggesting that "following the procedures set forth in paragraph (C) of this rule" be deleted). OTA Initial Comments at 5. Under this proposal, the form and timing of the notice filing with

the Commission would not be explained in the rule, which would result in omission of fundamental filing information. For that reason, the OTA "remedy" should not be adopted. The Consumer Groups suggested that Subsection (E)(2) specify the notice procedures. Consumer Groups' Initial Comments at 5. They, however, did not propose actual language or identify the notice procedure they mention. This is equally ineffective.

The OCTA, however, specified in its initial comments that the notice filing triggered with an FCC application should be filed the same day as the FCC application. OCTA Initial Comments at 13. The OCTA supports the notice filing being made with the Commission's telecommunications filing form and suggested that be done at the Commission workshop in this matter. Workshop Transcript at 18. The Staff likely intended this same approach by its reference to Subsection (C) wherein the standard filing form under a zero-day notification would be required. For these reasons, the OCTA continues to support the modifications to Subsection (E) that it proposed in its initial comments and further suggests added clarification to Subsection (E) and a revision to Subsection (C)(1) to fix the identified error. Collectively, the revisions to Rule 6-29 would be as follows:

> (C) Procedures for notifying the commission of updates to certification authority and certain changes in operations by telephone companies.
>
> > (1) All telephone companies~~, except LECs providing BLES,~~ shall file a telecommunications filing form pursuant to paragraph (A) of rule 4901:1-6-04 of the Administrative Code and the required attachments as set forth on that form when notifying the commission of the following changes in operation (CIO)**, except when obtaining the prior approval of the commission pursuant to paragraph (E)(1) of this rule**:
>
> > * * *
>
> (E) Procedures for ~~merger and~~ change**s** in control applications of **a ~~LEC providing BLES~~ domestic telephone company or a holding company of a**

domestic telephone company, and for mergers of domestic telephone companies

> (1) A LEC providing BLES shall obtain the prior approval of the commission for a change in control (ACO) or approval of a merger with another telephone company (AMT) under section 4905.402 of the Revised Code. * * *
>
> (2) Paragraph (E)(1) of this rule does not apply in any instance where there is a pending application with the federal communications commission (FCC) regarding either the acquisition of control of a domestic telephone company or a holding company controlling a domestic telephone company**,** or a merger of ~~a~~ domestic telephone ~~company~~ **companies**. 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 **that same day, using the telecommunications filing form** ~~following the procedures set forth in~~ **pursuant to** paragraph (~~C~~**A**) of ~~this~~ rule **4901:1-6-04 of the Administrative Code under the zero-day notice filing process**. Such notice shall include an internet link to the application.

C. Rule 6-14(G): The BLES rate exemption has to be included in the rules and should be in Rule 6-14(G), with the slight revisions recommended by the OCTA.

The General Assembly directed the Commission in Section 3 of HB 402 to amend its rules, stating in pertinent part that "[n]o later than one hundred twenty days following the effective dates of H.B. 402 of the 132nd General Assembly, the Public Utilities Commission shall amend its rules to the extent necessary **to bring them into conformity with this act**…." (Emphasis added.) The Consumer Groups' recommendation to not include *any* rule about the ILEC applying for an exemption from the BLES price restrictions[3] does not comport with Section 3 of HB 402. Similarly, not addressing a BLES pricing exemption now would violate the Legislature's intent. The Commission has already recognized this legislative intent. Its own draft Business Impact Analysis reflects that the regulatory intent of HB 402 includes a directive

[3] Per ORC Section 4927.123(E), the ILEC still cannot alter its BLES rates below incremental cost.

for the Commission to adopt rules allowing "an ILEC to apply for an exemption for the price cap requirements for BLES." March 20, 2019 Entry at Attachment B, page 1-2.

While the Consumer Groups claim in their initial comments that the enabling statute (ORC Section 4927.123) could change before the opportunity arises for an ILEC to file an exemption application, that claim does not justify omitting exemptions in the rules. Consumer Groups' Initial Comments at 2-3. The Consumer Groups do not know whether ORC Section 4927.123 will change before an ILEC has the opportunity to apply for an exemption. The Consumer Groups' claim is one of conjecture even though the telephone industry has periodically proposed statutory changes in the past, as the Consumer Groups noted in their initial comments at footnote 3. The Commission should adopt rules that conform to the entire enabling statute; it should not fail to comply because one segment of the interested stakeholders believes there *may* be additional statutory changes in the future. If the statute does change, the Commission can make adjustments to its rules at that time.

The Consumer Groups also claim that there is no need for an exemption rule now because the ILECs cannot request an exemption for a period of time per ORC Section 4927.123. Consumer Groups' Initial Comments at 3. This effectively suggests that the Commission conduct another rule-review – targeted on the exemption process – within the next couple of years. The rules in Chapter 4901:1-6 do not currently address a BLES pricing exemption and HB 402 requires otherwise. A piecemeal approach is inefficient and inappropriate.

The Consumer Groups state as an alternative that, if exemption-related language is to be included in the rules, the language should not actually detail the exemption process but should instead point to the enabling statute. Consumer Groups' Initial Comments at 3-4. The Consumer Groups specifically propose that Rule 6-14(G) state "[a]fter March 20, 2023, an ILEC

may apply for an exemption from the limitations on basic local exchange service price increases in paragraph (C) of this rule for any exchange meeting the standards found in section 4927.123 of the Revised Code, using the process found in section 4927.123 of the Revised Code." *Id*. at 4. The Consumer Groups' language does not identify what should be in an exemption application, does not identify the process and does not specify the important limitation that an ILEC exemption does not allow an ILEC to alter its BLES rates below its incremental costs. Their language simply says "comply with the enabling statute," which is inadequate.

All of the above reasons justify rejection of the Consumer Groups' proposals for Rule 6-14(G). Instead, the Commission should adopt the Staff's proposed Rule 6-14(G) with the slight revisions for the opening paragraphs proposed by the OCTA in its initial comments (as explained on pages 10-11 of those initial comments) and for ease of reference are included here:

> **(1)** 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~~** subject to paragraph (G)(3) of this rule.
>
> **~~(1) Upon not less than thirty days' notice, pursuant to paragraph (F)(5) of this rule, a for-profit ILEC may apply for an exemption from the requirements of paragraph (C) of this rule provided that:~~**
>
> (a) **In the exemption application,** the ILEC **~~shows~~ shall demonstrate** it has experienced at least fifty percent line loss in the exchange area since January 1, 2002 and one of the following applies:
>
> (i) the ILEC, within twelve months prior to September 13, 2010, increased the ILECs rates for BLES for the exchange area;
>
> (ii) the commission has made a prior determination that the exchange area qualified for alternative regulation of BLES under Chapter 4901:1-4 of the Administrative Code, as that chapter existed on September 13, 2010 or;

(iii) the ILEC filed an application for the exchange area that was approved or deemed approved pursuant to paragraph (C)(l)(c) of this rule.

III. Conclusion

The OCTA appreciates the opportunity to comment on updates to the Commission's rules in Chapter 4901:1-6 to implement statutory changes enacted in HB 402. The rule updates must include a measurable price floor for BLES and allow for evaluation of BLES price decreases. The OTA's proposals for a vague definition of incremental cost and no measurable standard are contrary to HB 402 and must be rejected. Likewise, the Consumer Groups' attempt to eliminate the exemption concept from the rules should be recognized as contrary to HB 402. Lastly, further adjustment to proposed Rule 6-29 is needed and the OCTA's language above should be adopted because the "remedies" made by the OTA and the Consumer Groups are inadequate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, 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 the 22nd day of April 2019 upon all persons/entities listed below:

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