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

APPLICATION FOR REHEARING OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

June 28, 2019

TABLE OF CONTENTS

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I. Introduction

The Public Utilities Commission of Ohio ("Commission") adopted changes to its administrative rules in Chapter 4901:1-6 of the Ohio Administrative Code with the intention of having the rules conform to the statutory changes enacted in House Bill 402 of the 132nd General Assembly. The rules, as adopted, fall short of this goal because the adopted revisions in Rules 4901:1-6-01 and -14 fail to guard against pricing basic local exchange service ("BLES") below incremental cost as required by House Bill 402, and because the Commission failed to adopt any requirement for advance notice of material changes in wholesale services as required by House Bill 402.

House Bill 402 allows the incumbent local exchange carriers ("ILECs") greater flexibility in pricing their BLES and at the same time mandates that BLES cannot be priced below incremental cost. The General Assembly left the definition of "incremental cost" up to the Commission. *See* Ohio Revised Code Section 4927.12(A). The rules as adopted unexpectedly and unreasonably abandon the Commission's long-held definition for the incremental cost price

floor, despite the recommendation from its Staff and a nearly identical one from the OCTA to follow its precedent. No explanation or justification was provided.

The rules as adopted also presume that all decreases in ILEC BLES prices will be above the then-current incremental cost if the decrease is not more than 20 percent. The record in this proceeding reflects no support for such a presumption. Moreover, such presumption will unreasonably eliminate an ILEC's responsibility to show that its proposed tariff change complies with Ohio law. Further, by not requiring that ILECs demonstrate that their price reductions keep prices above incremental cost, the entire burden of proving the opposite – that prices are impermissibly low – shifts to any entity seeking to challenge a particular price decrease.

Section 4927.17(A) of House Bill 402 requires advance notice of material changes to wholesale services if there is no other applicable notice requirement. The rules as adopted fail to reflect this new obligation and fail to address the OCTA's claim that wholesale price decreases constitute material changes for which advance notice would be necessary if there is no other applicable notice requirement.

In all of these respects, the rules as adopted fail to fulfill what House Bill 402 intended. The Commission erred and should further modify its adopted rules consistent with the OCTA's proposals below.

II. Argument

A. The rules as adopted unexpectedly and unreasonably abandon the Commission's long-held definition for the incremental cost price floor.

The Commission rejected both the Staff's proposal to use long-run service incremental cost ("LRSIC") as the definition for "incremental cost" and the OCTA's modified proposal of LRSIC ("the forward-looking 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"). *See* Finding and Order at ¶ 24 (May 29, 2019). The Commission concluded that "incremental cost" should be defined anew in the rules and adopted the following definition: "'incremental cost' means the additional cost (expense) incurred by an ILEC to offer BLES to an additional subscriber, excluding cost recovered through service establishment/installation charges, over existing and/or new facilities." *Id*.

The Commission has been instructed to "respect its own precedents in its decisions to assure predictability which is essential in all areas of the law, including administrative law." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975), superseded on other grounds by statute. If the Commission seeks to depart from its precedent, it must explain why and that new course must be substantively reasonable and lawful. *In the Matter of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 52. In this matter, the Commission's explanation is insufficient and the new course is unreasonable.

First, the Order states, without citation, that use of LRSIC is "not appropriate for the purpose of analyzing pricing in a competitive market." Finding and Order at ¶ 24. This conclusion completely overlooks decades of the Commission's own competitive pricing principles as well as those at the federal level. The OCTA explained in its Initial Comments at 3-5 how LRSIC has been, since 1996 and the implementation of local competition, the pricing methodology by the Federal Communications Commission ("FCC") and how the Commission has used LRSIC for purposes of defining incremental cost and for setting a price floor. The OCTA cited multiple cases in which this Commission repeatedly adopted the same definition of LRSIC as the OCTA proposed here and adopted it **as the price floor for BLES** in Ohio. The Order does not cite, nor could it cite, anything in House Bill 402 that warrants this departure from the Commission's prior determinations. Furthermore, the Order does not note any

development in the competitive market in Ohio to justify the departure from the Commission's long-standing policy position. The Order therefore is not sufficient or reasonable on this issue.

The second basis set forth in the Order for rejecting LRSIC was (also stated at ¶ 24 of the Order) that consideration of theoretical forward-looking pricing fails to recognize the actual additional costs to offer BLES. In choosing embedded cost principles over forward-looking costs for the incremental cost floor, the Order reverses a longstanding Commission policy and does not comport with state or federal precedent. The FCC rejected embedded cost for competitive pricing in 1996, when it ruled "[i]n dynamic competitive markets, firms take action based not on embedded costs, but on the relationship between market-determined prices and forward-looking costs." *In the Matter of Implementation of Local Competition in the Telecommunications Act of 1996*, FCC 96-325 at ¶620 (August 8, 1996). Again, the Order does not cite anything in House Bill 402 or the competitive market in Ohio that warrants this departure from the Commission's prior determinations. Without a well-explained justification, the Commission cannot lawfully reverse course.

The third rationale stated in the Order is that the adopted definition will provide a defined standard and provide company-specific flexibility. This explanation is not sufficient or reasonable because the standards proposed by the Staff and the OCTA were defined and long-held standards. The Order does not explain a need for company-specific flexibility with a price floor. The OCTA pointed out in its Reply Comments (at page 3) that no circumstances justify measuring a price floor for BLES differently between ILECs. Encouraging "company-specific flexibility" for defining a price floor as the Commission has done has the strong potential of eviscerating the price floor, which would negate ORC Section 4927.12(A)'s directive for the Commission to adopt a definition of "incremental cost." It also does not comport with the intent

of House Bill 402 to encourage competition and BLES pricing flexibility while also retaining price-related protection that prohibits anti-competitive behaviors such as below-cost pricing, cross-subsidization, or price squeezes. The Order also does not explain how the adopted definition will provide flexibility more so than LRSIC. This conclusion is insufficient and unreasonable. The Commission should modify its Order and adopt LRSIC and define "incremental cost" in Rule 4901:1-06-01 as: "the forward-looking 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. Presuming that certain price decreases are above incremental cost is not based on any record evidence, and improperly eliminates and shifts the burden of proof from the ILEC to the party raising concerns with the price decrease.

In modifying the BLES pricing parameters (Rule 4901:1-06-14), the Order adopts in paragraph (G) new requirements for filing BLES price decreases and for consideration of such filings, namely:

- The filing shall be a zero-day notice filing in the company's tariff docket.
- The filing shall include an "affidavit attesting that the decreased rate is not below the ILEC's incremental cost."
- The decrease shall be presumed to be above the ILEC's incremental cost if the decrease is not more than 20 percent of the then-current BLES rate.

Order at Attachment A, page 14.

The OCTA commented in its Initial Comments at 11-12 that an affidavit would not provide enough information in the record to demonstrate that the price decrease is above incremental cost. Nothing in the Order addresses that record-sufficiency concern from the OCTA.

Moreover, the Order's approach presumes that a BLES price decrease is above incremental cost if the decrease is not more than 20 percent of the ILEC's then-current BLES rate. This approach was not presented by the Staff or any commenter in this proceeding. There is no record support for the 20 percent presumption and the Order cites nothing to conclude that it is reasonable to presume that price decreases of 20 percent or less will be above the ILEC's incremental cost. It is not reasonable to make that presumption because at some point in a series of BLES price decreases, another drop will fall below incremental cost. Without knowing where an ILEC's current BLES price is in relation to its incremental cost, this presumption cannot be found reasonable, much less be adopted as a standard applicable via an administrative rule to all ILECs in Ohio. Additionally, the presumption approach improperly eliminates the burden of proof from the ILEC (the applicant who is proposing a price decrease[1] of a service that must be tariffed and is still subject to Commission oversight and regulation,[2] and inappropriately imposes a burden on the party raising concerns with the price decrease. This rebuttable presumption approach is further unworkable because the ILECs hold the underlying incremental cost data. Changing the burden of proving whether a particular price decrease is below the ILEC's incremental cost and placing it on others is simply unfair. House Bill 402 did not shift that burden and the Commission's rules should not either.

[1] *In the Matter of the Ottoville Mut. Tel. Co. for Authority to Increase its Rates and Charges and to Revise its Tariffs on an Emergency and Temporary Basis Pursuant to Section 4909.16, Revised Code*, Case No. 73-356-Y, 1973 Ohio PUC LEXIS 3 at *4 ("* * * the applicant must shoulder the burden of proof in every application proceeding before the Commission * * *"). *See also In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Pipeline Infrastructure Replacement Program Cost Recovery Charge and Related Matters*, Case No. 09-458-GA-RDR, 2009 Ohio PUC LEXIS 1170 *23 ("DEO did not meet its burden of proof to establish that its proposed incremental [operation and maintenance] costs were actually incremental to DEO's base rates"); and *In the Matter of the Ohio Bell Tel. Co. for Authority to Amend Certain of its Intrastate Tariffs to Increase and Adjust its Rates and Charges and to Change its Regulations and Practices Affecting the Same*, Case No. 84-1435-TP-AIR, 1985 Ohio PUCO LEXIS 7 at *79 ("The applicant has the burden of establishing the reasonableness of its proposals").

[2] *See* Rule 4901:1-6-11 and ORC Section 4927.12 *et seq.*

As a result, the Commission should modify adopted Rule 4901:1-6-14(G) to ensure that the ILEC's filing contains the appropriate evidence and information demonstrating that the specific price decrease does not fall below the incremental cost of its BLES at that time. The OCTA proposes that the Commission modify adopted Rule 4901:1-6-14(G) in the following manner:

> (G) A decrease in BLES rates by a for-profit ILEC, under paragraphs (C), (D) or (F) of this rule, shall be change in the company's tariff pursuant to a zero-day notice filing under the company's tariff filing (TRF) docket ~~**and**~~**. The notice filing shall** include **a description of the amount by which the BLES rate is decreasing,** an affidavit attesting that the decreased rate is not below the ILEC's incremental cost **and other documentation that demonstrates the decreased rate is not in violation of law or commission rules, including not below the ILEC's incremental cost.** ~~**A decrease in an ILEC's BLES rate is presumptively deemed above the carrier's incremental cost, subject to rebuttal, if the rate decrease is not more than twenty percent of the ILEC's BLES rate at the time of the decrease.**~~

Ohio law requires this and the Commission's rules should be consistent. House Bill 402 did not provide unfettered price flexibility for BLES; rather, it intended that price decreases for BLES not fall below incremental cost and BLES rate adjustment filings be presented to the Commission.

C. The Order errs in deferring consideration of rule changes regarding the advance customer notice requirements as to wholesale services, and also in not substantively addressing and concluding that price decreases for wholesale services are material changes that can trigger advance customer notice.

1. Deferring possible rule revisions related to the wholesale-related customer notice contravenes House Bill 402.

ORC Section 4927.17(A), as revised by House Bill 402, states:

> Except as provided in sections 4927.01 and 4727.124 of the Revised Code, a telephone company **shall provide at least fifteen days' advance notice** to its affected customers **of any material change in** the rates, terms, and conditions of any retail service required to be tariffed by the public

> utilities commission or the federal communications commission, **any wholesale service as to which there is no other applicable notice requirement**, and any change in the company's operations that are not transparent to customer and may impact service.

(Emphasis added.)

Importantly, House Bill 402 changes the advance notification requirement in ORC Section 4927.17(A) by, among other things, adding in a specific requirement to provide the advanced notice of material changes in wholesale services to which there is no other applicable notice requirement. Section 3 of House Bill 402 mandates that the Commission make changes to its rules **to bring them into compliance** with the legislation. The rule changes shall be made within 120 days of House Bill 402 going into effect – March 20, 2019.

There is no dispute that House Bill 402 changed the existing advance notification requirements. Multiple parties recommended in this proceeding that rule revisions be made because of House Bill 402's changes to ORC Section 4927.17(A). For example, the OCTA twice recommended that the Commission's rules recognize the new requirements for customer notices, including the wholesale services. Workshop Transcript at 18-19; OCTA Initial Comments at 5-7. The OCTA was willing to have the language revision be part of Rule 4901:1-07. *Id*. In addition, AT&T commented during the Commission's workshop on this specific change too:

> We've identified six rules that are in need of change. * * *
>
> Our first one is Rule 7. That's the rule governing customer notice. There, of course, is a statutory change there, and our changes basically just track the change made in the statute. I do have a pending question about this one. The legislation added the concept of notice to wholesale customers; that, of course, **should probably be reflected in this rule**, but we also noted a question that **perhaps a provision like that or a similar provision should be included in the carrier-to-carrier rules** which, of course, addresses the wholesale relationships between the companies. Rule 2, in the carrier-to-carrier rules, might be a possible repository for that change.

Workshop Transcript at 8. Third, Staff proposed that Rule 4901:1-07 be changed because of ORC Section 4927.17(A). *See* Entry (March 20, 2019), attached Staff proposal at 6. Staff did not propose anything regarding notice to wholesale customers nor did Staff explain why its proposal did not address the concept of notice of material changes to wholesale customers.

In its Order, the Commission did not adopt language for its rules that adds in a specific requirement to provide the advanced notice of material changes in wholesale services to which there is no other applicable notice requirement. Instead, the Commission concluded at ¶ 31 that it "will address OCTA's requested revision in the context of the next review of Ohio Adm. Code Chapter 4901:1-7." That rule review is not underway and is not likely to take place for years – probably not until 2022 – because the Commission reviewed Chapter 4901:1-7 in October 2017.[3] The five-year review deadline for Chapter 4901:1-7 is not until July 2022. The Commission's deferral ruling contravenes House Bill 402 in two ways:

- The Commission is not bringing any rules into compliance with the specific new requirement in ORC Section 4927.17(A) to provide advance notice of material changes to wholesale customers.

- The Commission is not attempting to complete the necessary rule revisions within the timeframe required in Section 3 of House Bill 402.

The Commission opened this proceeding to modify its rules to implement House Bill 402, not to implement only parts of House Bill 402 and defer other parts until years down the road.[4] The Commission should revise its deferral ruling and add in a specific requirement for the provision of advance notice of material changes in wholesale services to which there is no other applicable

[3] *In the Matter of the Commission's Review of Ohio Adm.Code Chapter 4901:1-7, Local Exchange Carrier-to-Carrier Rules*, Case No. 16-2066-TP-ORD, Finding and Order (April 19, 2017).

[4] The Commission's statement in ¶ 6 of the Order that it opened this proceeding for the purpose of amending only Chapter 4901:1-6 does not correspond with the caption of this proceeding. More importantly, that statement does not preclude the Commission from finding that, to implement House Bill 402, the Commission's rules in Chapter 4901:1-7 must be modified and then adopting those modifications here as well.

notice requirement (and include, as argued below, that a decrease in the price of a wholesale service is a material change).

2. Ignoring the OCTA's claim that a decrease in the price of a wholesale service is a material change contravenes ORC Section 4903.09.

It is important that wholesale customers affected by material changes in rates, terms and conditions of wholesale services are notified as set forth in ORC Section 4927.17(A) in advance when no other applicable notice requirement applies. This is not just common sense, but Ohio law now requires it. The Commission's rules should also reflect this new requirement and in particular, the rules should indicate that wholesale price decreases constitute material changes for which advance notice is required when no other applicable notice requirement applies. This point was raised by the OCTA earlier in this proceeding. *See*, Workshop Transcript at 19; OCTA Initial Comments at 6-7. The Order, however, did not address this claim from the OCTA but instead deferred it.

ORC Section 4903.09 requires the Commission to set forth the reasons supporting the decisions arrived at and summary rulings and conclusions that do not develop the supporting rationale or record are prohibited. *See In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St.3d 352, 2014-Ohio-3764, ¶ 45, citing ***MCI Telecommunications Corp. v. Public Utilities Com.***, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987) and ***Indus. Energy Users-Ohio v. Pub. Util. Comm.***, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30. This Order does not address the question of wholesale services price decreases being material changes. It acknowledges the statutory requirement for advance notice, but summarily defers consideration of related rule changes and does not address whether wholesale price decrease constitute a material change. The Commission should grant rehearing

and revise its rules to indicate that wholesale price decreases constitute material changes for which advance notice is required when no other applicable notice requirement applies.

III. Conclusion

As outlined above, the Order and rules as adopted fail to implement the law as required by House Bill 402 in the adopted revisions for Rules 4901:1-6-01(P), -14(G) and -07(A). The Order sends the wrong signal to the competitive market and wholesale customers in Ohio. Rule revisions must conform to the legislative intent, and as explained above, the rules as adopted do not implement the required legislative changes, and lack the necessary bases in the record. The OCTA has presented specific language that will conform these rules to legislative requirements and they should therefore be adopted.

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 28th day of June 2019 upon all persons/entities listed below:

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