

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA OF OHIO TELECOM ASSOCIATION TO APPLICATION FOR
REHEARING OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION**

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ATTORNEYS FOR OHIO TELECOM ASSOCIATION

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I. INTRODUCTION

Substitute House Bill 402 ("HB 402") includes changes to Ohio telecommunication laws that include, among other things, authorization for expanded pricing flexibility for basic local exchange service. That flexibility includes an authorization for an incumbent local exchange company to reduce prices subject to a floor of incremental cost. R.C. 4928.12(B). Under HB 402, the Public Utilities Commission of Ohio ("Commission") is given discretion to define incremental cost for purposes of establishing an incremental cost floor. R.C. 4928.12(A).

In an Entry on March 20, 2019, the Commission published draft rules to implement the new provisions contained in HB 402 and requested comments from interested parties. Entry (Mar. 20, 2019). In the draft rules, the Commission proposed a definition of incremental cost based on long run service incremental cost. *Id.*, Draft Rules at 9. On April 10 and 22, 2019, Ohio Telecom Association,¹ the Ohio Cable Telecommunications

¹ Initial Comments of Ohio Telecom Association (Apr. 10, 2019) ("OTA Comments").

Association (“OCTA”),² and a group including the Office of the Ohio Consumers’ Counsel filed comments and reply comments.

The Commission issued a Finding and Order adopting the draft rules with some modifications on May 29, 2019. Finding and Order (May 29, 2019). In the Finding and Order, the Commission rejected a definition of “incremental cost” based on long run service incremental cost (“LRSIC”), approved a more flexible definition of incremental cost, and adopted a rebuttable presumption that a price reduction of 20% or less did not reduce prices below incremental cost. *Id.* at ¶¶ 24 & 54.

In an Application for Rehearing filed on June 28, 2019, OCTA complains that the modification of the definition of incremental cost “abandoned” a long-held definition and was therefore unlawful. Application for Rehearing of the Ohio Cable Telecommunications Association at 2-5 (June 28, 2019) (“OCTA Application for Rehearing”). To avoid an alleged “elimination” or “shift” of the burden of proof that a rate reduction is not unlawful, OCTA also urges the Commission to lard up a phone company’s notice of a price reduction with a description of the amount of the reduction 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.” *Id.* at 7.³

The premise of OCTA’s complaint that the Commission unlawfully broke from some prior position without explanation is contradicted by the Finding and Order. Further,

² Initial Comments of the Ohio Telecommunications Association (Apr. 10, 2019) (“OCTA Comments”).

³ OCTA also complains that the Commission should take immediate steps to expand notice requirements for wholesale price changes not otherwise subject to notice instead of leaving that matter to the mandatory five-year review that the Commission is required to undertake. *Id.* at 10. The Commission previously and adequately addressed this concern when it noted that this matter was outside the scope of this proceeding and that advance notice is required relative to material changes in rates, terms, and conditions of any wholesale service to which there is no other applicable notice requirement. Finding and Order at ¶ 31. Further, notice requirements are also the subject of interconnection and resale agreements. Simply put, OCTA has not alleged any immediate need for the Commission to expand its rulemaking.

the “fixes” offered by OCTA are the sort of asymmetric regulation that will frustrate the investment goals the General Assembly sought to advance in HB 402. Accordingly, the Commission should deny OCTA’s attempt to impose its definition of “incremental cost” and unjustified notice and information requirements on incumbent local exchange carriers that may seek to reduce prices for basic local exchange service.

II. ARGUMENT

A. The Commission Should Reject OCTA’s Attempt to Impose Pricing Limitations that Are Not Required by HB 402 and that Would Frustrate the Goals of HB 402

Under HB 402, basic local exchange rate reductions are subject to an incremental cost floor, but the new law leaves to the Commission to determine the definition of incremental cost. R.C. 4927.12. In the Finding and Order, the Commission rejected OCTA’s recommendation that the Commission adopt LRSIC as its definition of incremental cost and instead adopted a more generic “incremental cost” definition.

In support of its attempt to have the Commission impose LRSIC, OCTA repeats the same argument it made in its Comments that the Commission has used LRSIC in the past. See OCTA Comments at 4, citing former Rules 4901:1-6-01(A)(9), 4901:1-4-01(K), and 4901:1-6-01(M). In this instance, however, past should not foretell the future. As Ohio Telecom Association explained in its initial comments, the use of LRSIC may be wholly inappropriate to the reasonableness of a reduction in basic local exchange pricing. OTA Comments at 3. Thus, the Commission correctly concluded that allowing some flexibility made sense. Finding and Order at ¶ 24.

Further, the Commission has reviewed and rejected OCTA’s argument that LRSIC should be used as the price floor for price reductions for basic local exchange service.

Accordingly, these repeated and rejected claims do not provide a basis to grant rehearing. *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1692-EL-RDR, *et al.*, Fifth Entry on Rehearing ¶ 83 (Apr. 5, 2017).

Next, OCTA offers that the Commission has adopted a definition of incremental cost that is based on embedded cost. OCTA Application for Rehearing at 4. This argument misreads the Commission's decision: As the Commission explained, the definition it adopted permits parties to advance cost information based on the context. In some instances, using a forward-looking incremental cost might make sense; in others, it might not. The Commission correctly allowed parties to present their reasoning to the Commission if an issue regarding a price reduction arises. Finding and Order at ¶ 24.

Finally, OCTA asserts that the Order does not cite anything in HB 402 that warrants departure from LSRIC. HB 402, however, assigns to the Commission the responsibility to define "incremental cost," and the Commission has executed that directive. R.C. 4927.12(A). While OCTA may not like the way the Commission acted on the legislative directive, the Commission has more than adequately explained its rationale for adopting that definition based on the arguments presented to it. Therefore, the Commission should reject OCTA's assignment of error seeking its preferred definition of incremental cost.

B. The Commission Should Reject OCTA's Claims that the Commission Both Eliminated and Shifted the Burden of Proof and Should Impose a Detailed Demonstration that a Price Reduction Does Not Violate the Cost Floor

OCTA also complains that the Commission adopted a rebuttable presumption without record support and both eliminated and shifted the burden of proof on whether a

price change is below incremental cost. To address its concerns, OCTA seeks to impose additional reporting requirements on incumbent local exchange carriers. The Commission should reject both parts of OCTA's attempt to impose additional asymmetric regulation on incumbent local exchange carriers.

Initially, OCTA's claim that the Commission eliminated the burden of proof is substantively and legally incorrect. The Commission did not eliminate the burden of proof. Instead, it created a rebuttable presumption. Finding and Order at ¶ 54. While a rebuttable presumption may affect the obligation of going forward with evidence, it does not eliminate or shift the burden of proof. Ohio Evid.R. 301; Richard Markus, Trial Handbook for Ohio Lawyers at 419 (2d ed. 1982). The burden of proof is generally with the applicant, whether the application is from a telephone company or is initiated by complainant. See, e.g., R.C. 4905.26. The creation of a rebuttable presumption, on the other hand, simplifies the evidentiary process for the pragmatic reason that it is unlikely that an incumbent will engage in the sort of predatory pricing that OCTA claims it fears. See discussion that follows.

Second, OCTA's claim is logically inconsistent. The creation of a rebuttable presumption cannot both eliminate and shift the burden of proof. What is eliminated cannot be shifted. As discussed above, however, the creation of a rebuttable presumption neither eliminates nor shifts the burden of proof.

OCTA's real complaint, however, appears to be a concern about informational asymmetry and predatory pricing. To advance this argument, OCTA posits a scenario in which an incumbent local exchange carrier adopts multiple sequential price reductions of less than 20% to stay within the presumption that it is not reducing its price below

incremental cost. OCTA Application for Rehearing at 6. To address this implausible series of events, OCTA would impose on an incumbent local exchange carrier a duty to file a notice and other documentation that demonstrates that the rate reduction does not fall below the applicant's incremental cost. *Id.* at 7.

OCTA's solution, however, is still looking for a problem to solve. First, OCTA itself has to assume multiple price reductions that drive price to levels below incremental cost; i.e., the incumbent will engage in predatory pricing or a retail-wholesale price squeeze. *Id.* at 7. Predatory pricing, however, is extremely unlikely. As Professor Breyer explained:

For a firm to have an incentive to price predatorily, ... two preconditions must be met: (1) the predator must be powerful enough to outlast its competitors once prices are cut below variable costs; and (2) reentry into the market must be so difficult that the predator can maintain prices well above costs long enough to recoup its prior losses. Unless a firm is reasonably certain that both these conditions will obtain, it is irrational for it to attempt predatory pricing.

Stephen Breyer, *Regulation and its Reform* 32 (1982). Absent from OCTA's Application is any empirical support that either of the conditions exists to support price discrimination.

Quite to the contrary, OCTA's solution imposes an asymmetric obligation on the incumbent local exchange company when the conditions for price discrimination are not possible. Before an incumbent can flex its prices either upward or downward, it must be subject to competition, R.C. 4927.12(B), and it is already required by federal law to provide network elements to its competitors at tariffed prices. Telecommunications Act of 1996, § 251(c)(3). Given the current competitive and legal environment of telecommunications, the price predation or price squeeze on which OCTA premises the need for special and detailed notice is not probable. Thus, the OCTA proposal to impose

additional notice requirements to address a nonexistent problem is simply an attempted use of the regulatory system to undercut competition, not a solution to a real problem.

Finally, this additional requirement also does not square with current practice. OCTA does not point to any Commission rule or practice that requires a detailed filing when a rate reduction is proposed. The practice is otherwise. See, e.g., Rule 4901:1-6-11(C). See, also, R.C. 4909.18 (price reductions are subject to reduced regulatory requirements). It makes sense that the filing requirements should be minimal when customers would benefit from a reduction in rates. Only if there is some demonstration of an anticompetitive effect should the Commission then investigate. OTA Comments at 3.

III. CONCLUSION

HB 402 includes changes to Ohio law concerning the regulation of incumbent local exchange carriers that were enacted to accelerate telecommunications investment in Ohio. Rather than advance those outcomes, OCTA attempts through its application for rehearing to encourage asymmetric rules that burden incumbent local exchange carriers in markets that have been demonstrated to be competitive. The Commission should reject that attempt.

Respectfully submitted,

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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

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Summary: Memorandum Memorandum Contra of Ohio Telecom Association to Application for Rehearing of the Ohio Cable Telecommunications Association electronically filed by Mr. Frank P Darr on behalf of Ohio Telecom Association