**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| **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** |

# ENTRY ON REHEARING

Entered in the Journal on July 31, 2019

## I. SUMMARY

**{¶ 1}** The Commission denies the application for rehearing filed by the Ohio Cable Telecommunications Association of the Finding and Order issued on May 29, 2019.

## II. DISCUSSION

### *A. Applicable Law*

**{¶ 2}** The 132nd Ohio General Assembly adopted Substitute House Bill 402 (Sub. H.B. 402) that, among other things, directed the Commission to: adopt rules that permit incumbent local exchange companies (ILECs) to increase rates for basic local exchange service (BLES) by up to $2.00 on an annual basis; docket a report no later than three years after the effective date to examine the number of BLES lines in service, the aggregate amount of line loss in the state of Ohio since the bill was enacted, and the change in price for BLES in each exchange area since the effective date; submit a report to the standing committees in the House of Representatives and the Senate; permit, no earlier than four years from the effective date of the legislation, an ILEC to apply for an exemption from the price cap requirements for BLES; exempt telephone companies from treble damages; and, limit the Commission's ability to consider domestic telephone company change of control applications.

**{¶ 3}** R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

*B. Procedural History*

**{¶ 4}** On January 24, 2019, the Commission opened this case for the purpose of amending the existing Ohio Adm.Code Chapter 4901:1-6 consistent with Sub. H.B. 402.

**{¶ 5}** On February 7, 2019, the Commission held a workshop in this proceeding to enable interested stakeholders to propose revisions to the rules in Ohio Adm.Code Chapter 4901:1-6 to implement Sub. H.B. 402 for the Commission's consideration. Interested stakeholders attended the workshop. Representatives from AT&T Ohio, Ohio Telecom Association (OTA), and Ohio Cable Telecommunications Association (OCTA) provided comments at the workshop.

**{¶ 6}** Pursuant to Entry of March 20, 2019, proposed amendments to Ohio Adm.Code Chapter 4901:1-6 to implement Sub. H.B. 402 were issued for comment. Initial comments were filed by: OCTA; OTA; and jointly by Greater Edgemont Community Coalition, the Legal Aid Society of Cleveland, the Legal Aid Society of Southwest Ohio LLC, the Office of the Ohio Consumers' Counsel, the Ohio Association of Community Action Agencies, the Ohio Poverty Law Center, Pro Seniors, Inc., and Southeastern Ohio Legal Services (collectively, Consumer Groups). Reply comments were filed by OCTA, OTA, and Consumer Groups.

**{¶ 7}** Pursuant to its May 29, 2019 Finding and Order, the Commission adopted amended rules in Ohio Adm.Code Chapter 4901:1-6 in accordance with Sub. H.B. 402.

**{¶ 8}** On June 28, 2019, OCTA filed an application for rehearing of the Commission's May 29, 2019 Finding and Order.

**{¶ 9}** On July 8, 2019, OTA filed a memorandum contra OCTA's application for rehearing.

**{¶ 10}** On July 17, 2019, the Commission issued its Entry on Rehearing granting rehearing for the limited purpose of further consideration of the matters specified in the application for rehearing.

*C. Assignments of Error*

**{¶ 11}** In its first assignment of error, OCTA contends that the rules as adopted unexpectedly and unreasonably abandon the Commission's long-held definition for the incremental cost price floor. In support of its position, OCTA notes that in the process of adopting a new definition of "incremental cost," the Commission rejected both the Commission Staff's proposal to use long-run service incremental cost (LRSIC) as the definition for "incremental cost" and OCTA's modified proposed definition of LRSIC 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." (Application for Rehearing at 2-3.)

**{¶ 12}** OCTA submits that the Commission has failed to provide a sufficient explanation as to why it is departing from its precedent of relying on LRSIC for the purpose of defining incremental cost and the setting of a price floor. OCTA asserts that the Commission has repeatedly adopted the same definition of LRSIC as proposed by OCTA in this case, and adopted it as the price floor for BLES in Ohio. According to OCTA, there is nothing in Sub. H.B. 402 that warrants the departure from the Commission's prior determinations. Additionally, OCTA states that there is no development that has occurred in the competitive market to justify the departure from the Commission's past policy precedent. (Application for Rehearing at 3-4.)

**{¶ 13}** Specific to the Commission's determination that consideration of theoretical forward-looking pricing fails to recognize the actual additional costs to offer BLES, OCTA contends that the FCC, in *In re Implementation of Local Competition in the Telecommunications Act of 1996*, FCC 96-325 at ¶620 (Aug. 8, 1996) rejected embedded cost for competitive pricing (Application for Rehearing at 4).

**{¶ 14}** OCTA rejects the belief that there is a need for the adopted definition in order to provide a defined standard and company-specific flexibility. Rather, OCTA asserts no circumstances justify measuring a price floor for BLES differently between ILECs and that encouraging company-specific flexibility for defining a price floor has the strong potential

of eviscerating the price floor. As a result, OCTA believes that the decision in this case will negate the directive in R.C. 4927.12(A) requiring the Commission to adopt a definition of "incremental cost." Further, OCTA believes that the Commission's Finding and Order is not consistent with the requirement in Sub. H.B. 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. (Application for Rehearing at 4-5.)

**{¶ 15}** In response to OCTA's arguments against the Commission's adopted definition of "incremental cost," OTA submits that the Commission should deny OCTA's attempt to impose pricing limitations that are not required by Sub. H.B. 402 and would frustrate the goals of the legislation (OTA Memorandum Contra at 4).

**{¶ 16}** In support of its position, OTA claims that OCTA has again raised the same arguments that the Commission previously rejected in its Finding and Order. OTA notes that, pursuant to Sub. H.B. 402, the definition of incremental cost is delegated to the Commission. OTA believes that the Commission properly utilized this delegated authority to allow for some flexibility on a company-specific basis OTA disputes OCTA's argument that LRSIC should be relied upon in this case because it has been utilized in the past when defining incremental cost. OTA points out that the use of LRSIC may be wholly inappropriate as the standard for determining/evaluating the reasonableness of a reduction in BLES pricing. (OTA Memorandum Contra at 4-5.)

**{¶ 17}** With respect to OCTA's first assignment of error, the Commission finds that the application for rehearing should be denied. In reaching this determination, the Commission finds that OCTA has failed to raise any new arguments for the Commission's consideration that have not already been addressed by the Commission. Additionally, the Commission highlights the differences between the concepts of LRSIC and incremental cost. LRSIC was a cost methodology employed by the Federal Communications Commission (FCC) at the time of the introduction of local competition pursuant to the Telecommunications Act of 1996. LRSIC as used by the FCC to incent competition in the

local exchange market is constructed upon the assumption of pricing out a theoretical network as if it was being built today using the latest technology. Conversly, incremental cost, as set forth in these rules, recognizes the actual technology and network routing on which an ILEC's current network is constructed. Thus, contrary to OCTA's position, the Commission had a reasonable purpose for defining incremental cost in the manner we have. OCTA's first assignment of error is, therefore, denied.

**{¶ 18}** In its second assignment of error, OCTA rejects the Commission's decision that a 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. OCTA avers that this presumption 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 support of its position, OCTA opines that it is not reasonable to make this presumption because at some point in a series of BLES price decreases, another drop will fall below the incremental cost. Therefore, OCTA states that without knowing where an ILEC's current BLES price is in relation to its incremental cost, this presumption cannot be found to be reasonable.

**{¶ 19}** As a result, OCTA recommends that consistent with Ohio law, including Sub. H.B. 402, the Commission should modify adopted Rule 4901:1-6-14(G) to ensure that the ILEC's filing contains 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 that the decreased rate is not in violation of law or Commission rules, including not below the ILEC's incremental cost.

**{¶ 20}** According to OTA, the Commission did not eliminate or shift the burden of proof but, instead, created a rebuttable presumption. Specific to OCTA's concern regarding a series of price reductions that would drive price levels below incremental cost, OTA responds that OCTA has failed to demonstrate that the conditions for predatory pricing or a retail-wholesale price squeeze exist. Rather, OTA argues that "[g]iven the current competitive and legal environment of telecommunications, the price predation or price squeeze on which OCTA premises the need for special notice is not probable" (OTA

Memorandum Contra at 7). Further, OTA contends that OCTA's proposed additional filing requirements do not comport with the Commission's practice when a rate reduction is proposed (OTA Memorandum Contra at 8).

**{¶ 21}** With respect to OCTA's second assignment of error, the Commission finds that the application for rehearing should be denied. In reaching this determination, the Commission emphasizes that the permitted decrease of not more than 20 percent of the then-current BLES rate does not negate the ILEC's burden of proof but rather creates a rebuttable presumption for which entities can present evidence regarding specific concerns, including those related to price levels below incremental cost. Additionally, the Commission highlights that adopted Rule 4901:1-6-14(G) requires the filing of an affidavit for each requested decrease attesting that the decreased rate is not below the ILEC's incremental cost. Thus, contrary to OCTA's second assignment of error, the Commission has not eliminated the ILEC's burden of proving that the new rate does not fall below the ILEC's incremental cost of providing BLES.

**{¶ 22}** In its third assignment of error, OCTA contends that the Commission erred 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. In support of its position, OCTA references the language in R.C. 4927.17(A) that requires a telephone company to provide at least 15 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 Commission or the FCC, 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 customers and may impact service.

**{¶ 23}** Specifically, OCTA responds to the Commission determination that it will, in the context of its next review of Ohio Adm.Code Chapter 4901:1-7 address OCTA's proposal to include a requirement of advanced notice of material change in wholesale services to which there is no other applicable notice requirement. Specifically, OCTA notes that the

rule review is not underway and is not likely to take place until 2022. Therefore, OCTA submits that the Commission's deferral ruling contravenes Sub. H.B. 402 by not attempting to complete the necessary rule revisions within the time frame required in Section 3 of the legislation.

**{¶ 24}** In regard to OCTA's third assignment of error, the Commission finds that the application for rehearing should be denied. In reaching this determination, the Commission fully explained in the May 29, 2019 Finding and Order that it is more appropriate to address notice provisions for wholesale services in the carrier-to-carrier rules set forth in Ohio Adm.Code Chapter 4901:1-7 and stated that it would address OCTA's requested revision in the context of the next review of Ohio Adm.Code Chapter 4901:1-7. The Commission notes that although this review is not currently scheduled to occur until 2022, the notice requirements for wholesale services outlined in R.C. 4927.17, as amended by Sub. H.B. 402, will control and will apply regardless of whether the Commission adopts a rule in this area.

## III. ORDER

**{¶ 25}** It is, therefore,

**{¶ 26}** ORDERED, That the application for rehearing be denied as set forth above. It is, further,

**{¶ 27}** ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
***Approving:***
Sam Randazzo, Chairman
Lawrence K. Friedeman
Daniel R. Conway

JSA/mef

Summary: Entry on Rehearing that the Commission denies the application for rehearing filed by the Ohio Cable Telecommunications Association of the Finding and Order issued on May 29, 2019. electronically filed by Docketing  Staff on behalf of Docketing