BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of Chapter 4901:1-6 of the Ohio Administrative Code, Regarding Telephone Company Procedures and Standards.	**)** **)** **)**	**Case No. 14-1554-TP-ORD**

AT&T OHIO'S INITIAL COMMENTS

I. INTRODUCTION

The Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio"), respectfully submits these Initial Comments pursuant to the Entry adopted on August 25, 2021. The long journey to implement Am. Sub. H. B. 64 of the 131st Ohio General Assembly ("H. B. 64") has taken over five years, encompassing five rounds of rehearing applications and a round-trip to the Joint Committee on Agency Rule Review. But the Commission's work is not done. The proposed rule, Section 4901:1-6-21, still suffers several fatal defects, as explained below. The Commission must address those defects in order to faithfully implement the statute.

H. B. 64 added section 4927.10 to the Revised Code and amended certain other statutes. These legislative changes were the result of carefully considered policy changes made by the Legislature after long and vigorous public debate about how to encourage the deployment of new telecommunications technologies, while at the same time ensuring that existing customers continue to have reasonable alternatives for service.

The compromise adopted in H. B. 64 was to lift the prohibition against an incumbent local exchange carrier ("ILEC") withdrawing or abandoning its provision of basic local exchange service ("BLES") in an exchange, so long as the ILEC has the permission of the Federal Communications Commission ("FCC") to withdraw the interstate portion of BLES and so long as the ILEC provides at least 120 days' prior notice of such withdrawal to the Commission and

to affected customers. If any residential customer is unable to obtain "reasonable and comparatively priced voice service," there is a Commission-enforced fail-safe mechanism for ensuring service to that customer. ILECs that withdraw BLES in accordance with the statute are relieved of their duties as carrier of last resort ("COLR") for the particular exchange. H. B. 64 directed the Commission to adopt rules to implement these reforms.

II. GOVERNING LEGAL STANDARD

The Ohio Supreme Court has long recognized that "administrative rules, in general, may not add to or subtract from . . . the legislative enactment." *Central Ohio Joint Voc. Sch. Dist. Bd. of Ed. v. Ohio Bur. of Employment Servs.*, 21 Ohio St.3d 5, 10, 487 N.E.2d 288, 292 (1986) ("a rule is invalid where it clearly is in conflict with any statutory provision"). *Accord, Vargas v. State Bd. of Med. Bd. of Ohio*, 972 N.E.2d 1076, 1080 (Ohio App. 10th Dist. 2012) (summarizing cases). "In order for regulations to be valid, they must be consistent with the statute under which they are promulgated[.] An administrative rule's impermissible addition to or subtraction from a statute is one means of creating a clear conflict between a statute and a rule." 2 Ohio Jur. 3d, Admin. Law § 41 (3d ed. 2015).

As an example of a case in which additional rules were held to be unlawful, in *Franklin Iron & Metal Corp. v. Ohio Petroleum Underground Storage Tank Release Comp. Bd.*, 117 Ohio App.3d 509, 690 N.E.2d 1310 (2d Dist. 1996), the relevant statute provided that the compensation board "shall issue" a certificate of coverage under a state financial assistance fund when the applicant met two conditions: paying the statutory fee and demonstrating financial responsibility. The governing statutes also authorized the compensation board to adopt administrative rules. The compensation board adopted a rule requiring storage tanks to be certified as "assurable" before a certificate of coverage would be issued and providing that failure to take certain steps would result in non-issuance or revocation of a certificate of

coverage. Franklin Iron submitted the required fee and affidavit of financial responsibility but was denied a certificate of coverage because it did not complete a certification of assurability form for its storage tanks. "These additional conditions created a conflict between the statute and the rule, and, therefore, the rule was invalid." *Vargas*, *supra*, 972 N.E.2d at 1081-82. *See also State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm.*, 117 Ohio St.3d 441, 884 N.E.2d 589 (2008) (Ohio Supreme Court found that an administrative rule conflicted with the governing statute because it required a respondent to wait for a complaint to be issued before requesting a subpoena, a condition that was not included in the statute).

III. DISCUSSION

1. Imposition of notice requirement on sole provider of voice service

4901:1-6-21(F): If the sole provider of voice service seeks to withdraw or abandon such voice service, it has to notify the Commission at least thirty days prior to the withdrawal or abandonment through the filing of a withdrawal of voice service (WVS) consistent with the authority granted to the commission in division (A) of section 4927.03 of the Revised Code.

This proposed rule should be removed for several reasons. First, it impermissibly adds to, and does not properly implement, R.C. § 4927.10. The statute imposes no obligation whatsoever on the provider of a reasonable and comparably priced voice service to former customers of the ILEC that withdrew BLES. In other words, that provider does not violate the statute if it withdraws or abandons service, with or without giving notice, regardless of whether it is the sole provider. The Legislature saw fit to regulate the ILEC's withdrawal of BLES by requiring it to give 120 days' notice and by conditioning the withdrawal on the availability of an alternative provider of a reasonable and comparably priced service, and the Legislature also saw fit ***not*** to regulate the subsequent withdrawal of that alternative provider. The Commission cannot properly impose on that alternative provider a regulatory burden when the Legislature

chose to impose none. Accordingly, proposed section 4901:1-6-21(F) unlawfully conflicts with the statute it purports to implement and so must be removed.

Second, the proposed rule not only regulates providers that the Legislature chose not to regulate, but also regulates services that the Legislature chose not to regulate. H. B. 64 governs the withdrawal of BLES, while Rule 4901:1-6-21(F) governs the withdrawal of "voice service," which is far broader than BLES. Proposed rule 4901:1-6-01(PP), the adoption of which is also pending in this case, gives "voice service" the same definition it has in R.C. § 4927.01(A)(18), which states that voice service "includes all of the applicable functionalities described in 47 C.F.R. 54.101(a)."[1] "BLES," which is defined in R.C. § 4927.01,[2] is limited to single-line residential service, without any bundle or package of services. "Voice service" is not subject to either limitation.

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[1] 47 C.F.R. § 54.101 Supported services for rural, insular and high cost areas.
(a) Voice telephony services shall be supported by Federal universal service support mechanisms. Eligible voice telephony services must provide voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation services to qualifying low-income consumers as provided in subpart E of this part. [86 FR 1021, Jan. 7, 2021]

[2] The statute provides: (1) "Basic local exchange service" means residential-end-user access to and usage of telephone-company-provided services over a single line or small-business-end-user access to and usage of telephone-company-provided services over the primary access line of service, which in the case of residential and small-business access and usage is not part of a bundle or package of services, that does both of the following:
(a) Enables a customer to originate or receive voice communications within a local service area as that area exists on September 13, 2010, or as that area is changed with the approval of the public utilities commission;
(b) Consists of all of the following services:
(i) Local dial tone service;
(ii) For residential end users, flat-rate telephone exchange service;
(iii) Touch tone dialing service;
(iv) Access to and usage of 9-1-1 services, where such services are available;
(v) Access to operator services and directory assistance;
(vi) Provision of a telephone directory in any reasonable format for no additional charge and a listing in that directory, with reasonable accommodations made for private listings;
(vii) Per call, caller identification blocking services;
(viii) Access to telecommunications relay service; and
(ix) Access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies.
"Basic local exchange service" excludes any voice service to which customers are transitioned following a withdrawal of basic local exchange service under section 4927.10 of the Revised Code."

By imposing regulation on providers and services that the Legislature chose not to regulate in H. B. 64, Rule 4901:1-06-21(F) impermissibly adds to, and thus conflicts with, H. B. 64. "[A]dministrative rules, in general, may not add to or subtract from . . . the legislative enactment." *Central Ohio Joint Voc. Sch. Dist. Bd. of Ed. v. Ohio Bur. of Employment Servs.*, 21 Ohio St.3d 5, 10, 487 N.E.2d 288, 292 (1986) ("a rule is invalid where it clearly is in conflict with any statutory provision"). *Accord, Vargas v. State Bd. of Med. Bd. of Ohio*, 972 N.E.2d 1076, 1080 (Ohio App. 10th Dist. 2012) (summarizing cases). "In order for regulations to be valid, they must be consistent with the statute under which they are promulgated[.] An administrative rule's impermissible addition to or subtraction from a statute is one means of creating a clear conflict between a statute and a rule." 2 Ohio Jur. 3d, Admin. Law § 41 (3d ed. 2015). Furthermore, proposed rule 4901:1-06-21(F) also violates R.C. § 4927.03(D), which provides, "Except as specifically authorized in sections 4927.01 to 4927.21 of the Revised Code, the commission has no authority over the quality of service and the service rates, terms, and conditions of telecommunications service provided to end users by a telephone company." Plainly, nothing in sections 4927.10 to 4927.21 of the Revised Code specifically authorizes the Commission to require non-ILEC providers of voice services to provide the notice mandated by proposed rule 4910:1-06-21(F).

For all of these reasons, proposed rule 4901:1-6-21(F) should be eliminated.

2. Additional Withdrawal Obligations

4901:1-6-21(G) If the Commission determines that: (1) a residential customer of voice service will not have access to 9-1-1 service if the customer's current provider withdraws or abandons its voice service; or (2) the current provider of voice service is the sole provider of emergency services to residential customers, pursuant to the authority granted to the commission in division (A) of section 4927.03 of the Revised Code, that provider may be subject to all the provisions of this rule, on a case-by-case basis.

This proposed rule, like the one just discussed, impermissibly adds to, and does not properly implement, R.C. § 4927.10. The statute imposes no obligation whatsoever on the provider of a reasonable and comparably priced voice service to former customers of the ILEC that withdrew BLES. In other words, that provider does not under any circumstances violate the statute if it withdraws or abandons service. The statute regulates the ILEC's withdrawal of BLES, but the Legislature chose not to regulate withdrawal by a provider of a reasonable and comparably priced voice service to former customers of the ILEC that withdrew. Again, the Commission cannot properly impose on that alternative provider, or on voice service as opposed to BLES, a regulatory burden when the Legislature chose to impose none. Accordingly, proposed rule 4901:1-6-21(G) unlawfully conflicts with the statute it purports to implement and so must be removed.

As it has before, the Commission attempts to justify proposed rule 4901:1-6-21(G), but without success, relying on R. C. § 4927.03(A). It states that the Commission has "jurisdiction over services that the General Assembly otherwise prohibited us from regulating if the exercise of such Commission authority is necessary for the protection, welfare, and safety of the public and the Commission adopts rules specifying the necessary regulation." Entry, ¶ 10.

That attempted justification fails, for two reasons. First, R.C. § 4927.03 cannot possibly justify the application of proposed rule 4901:1-6-21(G) to any sole provider that is ***not*** what we

here refer to as a “new technology provider,” *i.e.*, a provider of an interconnected voice over internet protocol-enabled service or any telecommunications service that was not commercially available on September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010. Proposed rule 4901:1-6-21(G) would apply to CLECs, "edge-out" ILECs, and perhaps others that are not "new technology providers." This would be clearly unlawful.

Second, R.C. § 4927.03(A) does not legitimize the application to new technology providers of a regulation that is unlawful generally because it is an improper purported implementation of H. B. 64. The main thrust of R.C. § 4927.03(A) is that “the public utilities commission has no authority over any interconnected voice over internet protocol-enabled service or any telecommunications service that is not commercially available on September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010.” The statute identifies three exceptions: (1) “[e]xcept as provided in divisions (A) and (B) of section 4927.04 of the Revised Code” (which concern implementation of the federal Telecommunications Act of 1996); (2) “except to the extent required to exercise authority under federal law”; and (3) unless the commission, upon a finding that the exercise of the commission's authority is necessary for the protection, welfare, and safety of the public, adopts rules specifying the necessary regulation.” Those three exceptions are merely carve-outs from the general prohibition against regulation of new technology providers. They do not authorize regulation of new technology providers that is impermissible with respect to providers in general. As demonstrated above, proposed rule 4901:1-06-21(G) is unlawful because it conflicts with H. B. 64. That conflict pertains to new technology providers just as it pertains to other providers, and the conflict is not somehow cured or excused with respect to new technology providers by R.C. § 4927.03(A).

As a final point, it must be noted that not only are divisions (F) and (G) contrary to the statute, they also apparently go beyond even what the Commission intends. The Entry implies that divisions (F) and (G) would apply only to successor providers of service, *i.e.*, the alternative provider that takes over from the ILEC that was previously providing BLES. Entry, ¶ 10. But – when read plainly – divisions (F) and (G) are not limited to the "successor" situation. They could apply to ***any*** provider of voice service that is the "sole provider" of voice service. So, if a VOIP provider wants to withdraw its service and is the "sole provider" of voice service, it is subject to these proposed withdrawal of service provisions. even if the customer was ***never*** an ILEC BLES customer. That is likely not what the Commission intends, but this underscores the problem that the rule was not carefully drafted to address the narrow situation the Commission apparently intends to address, notwithstanding the limits on its statutory authority discussed above.

IV. CONCLUSION

For the reasons set forth above, AT&T Ohio respectfully urges the Commission to eliminate divisions (F) and (G) from proposed rule 4901:1-6-21.

Respectfully submitted,

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Summary: Comments electronically filed by Jon F Kelly on behalf of AT&T Ohio