

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF
THE OHIO TELECOM ASSOCIATION**

Pursuant to Section 4903.10 of the Ohio Revised Code and Rule 4901-1-35 of the Ohio Administrative Code ("OAC"), the Ohio Telecom Association ("OTA"), on behalf of its member companies, respectfully seeks rehearing of the Finding and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission") on November 30, 2016 for the following reasons:

- 1. The Order is unlawful and unreasonable because the Commission is without authority to define "reasonable and comparatively priced voice service" that varies from R.C. 4927.10(C) and includes a rebuttable presumption concerning competitively priced services.**
- 2. The Order is unlawful and unreasonable because the Commission extended notification and continuation of residential service obligations to telephone companies other than incumbent local exchange carriers including to voice over internet protocol.**

As further discussed in the attached Memorandum in Support, OTA requests that the Commission grant rehearing and modify the Order to comply with Ohio law.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE OHIO TELECOM ASSOCIATION'S
APPLICATION FOR REHEARING**

I. INTRODUCTION

On November 30, 2016, the Public Utilities Commission of Ohio ("Commission") issued its Finding and Order ("Order") in the review of the Telephone Company Procedures and Standards rules contained in Chapter 4901:1-6 of the Ohio Administrative Code ("OAC"). The proposed modifications in this Order, on the whole, reflect the Commission's continued support and understanding of the critical investment and impact that the telecommunications industry has on Ohio's economy. In its Order, however, the Commission erred by establishing an arbitrary percentage not based in statute for determining reasonable and comparatively priced voice service and by extending notice and service requirements to sole providers of voice services. Accordingly, OTA requests that the Commission grant rehearing and conform its rules to Ohio law.

II. ARGUMENT

1. The Order is unlawful and unreasonable because the Commission is without authority to define “reasonable and comparatively priced voice service” that varies from R.C. 4927.10(C) and includes a rebuttable presumption concerning competitively priced services

R.C. 4927.10 provides a procedure by which an incumbent local exchange carrier (“ILEC”) may withdraw from the provision of basic local exchange service (“BLES”). The opportunity to withdraw, however, is conditioned on the identification of a willing provider of “reasonable and comparatively priced voice service to serve a customer” if a customer claims that he is unable to obtain such service in a petition to the Commission. R.C. 4927.10(B)(1). R.C. 4927.10(B)(3) provides the applicable definition as to what constitutes “reasonable and comparatively priced voice service”:

For purposes of this division, the public utilities commission shall define the term “reasonable and comparatively priced voice service” to include service that provides voice grade access to the public switched network or its functional equivalent, access to 9-1-1, and that is competitively priced, when considering all the alternatives in the marketplace and their functionalities. (Emphasis added).

Despite the express legislative direction that the Commission define “reasonable and comparatively priced service” as stated in R.C. 4927.10(B)(3), the Commission has adopted an alternative definition in Rule 4901:1-6-01(BB). In the rule, such service is defined as “a voice service that incorporates the definition set forth in division (B)(3) of section 4927.10 of the Revised Code and *is presumptively deemed competitively priced, subject to rebuttal, if the rate does not exceed either: (1) the ILEC’s BLES rate by more than twenty percent or; (2) the federal communication commission’s (FCC) urban rate floor as defined in 47 C.F.R. 54.318(A).*” Order, Attachment A at 3 (emphasis added).

According to the Commission, this definition is appropriate because it provides the Commission more flexibility and will reduce the potential negative impact to be experienced by ratepayers because of the discontinuation of BLES. Order at 13.

The variation from the statutory definition set out in R.C. 4927.10(B)(3) to include a rebuttable presumption to define what constitutes reasonable and comparatively priced service has no basis in statute and should be removed from the rule.

R.C. 4927.10(B)(3) provides the definition of “reasonable and comparatively priced service” that the Commission is directed to adopt and apply. It does not contain a provision for the introduction of rebuttable presumption based on an arbitrary percentage or the application of a federal standard used to establish the basis for high cost line support for telecommunications companies. Accordingly, the Commission has exceeded its statutory authority when it adopted the definition that varies from that set out in R.C. 4927.10(B)(3).

Not only is there no express statutory basis for the Commission to redefine what constitutes “reasonable and comparatively priced voice service,” the rebuttable presumption the Commission has included in this rule is based on an unreasonable inference. A presumption imposes on the party against whom it is directed the burden of going forward to rebut or meet it. If “reasonable minds must necessarily find the underlying facts and if the consequent presumed fact remains unrebutted, the court [or in this instance, the Commission] should direct that the presumed fact has been established as a matter of law.” *Adamson v. The May Co.*, 8 Ohio App.3d 266, 269 (1982) (discussing the operation of Rule of Evidence 301). Nothing in the comments or the Commission’s discussion of them, however, points to any reasoned basis that justifies the conclusion

that services priced a certain percentage above the incumbent's BLES rate or below the urban rate floor should be presumed to be competitively priced. Yet on such a showing, the burden would fall to the withdrawing ILEC to demonstrate that the customer has alternatives to the existing BLES service. Moreover, the shift in this burden would occur after a federal determination that the carrier can be lawfully relieved of service obligations. Under these circumstances, it is fundamentally unreasonable to create a presumption that competitively-priced services are unavailable.

Moreover, the inference created by the rebuttable presumption based on an arbitrary percentage or reference to the urban rate floor ignores the time-sensitive nature of the determination the Commission is directed to make. Although these references change over time, they are each linked to historic prices. Under R.C. 4927.10(B), however, the Commission is to determine whether a reasonable and comparatively priced voice service "will be available to the affected customer." This determination is prospective and cannot be answered by a reference to an abstract presumption linked to historically based prices. Thus, the creation of a rebuttable presumption that ties the determination to a historically based price is not supported by the plain meaning of the statute and intent of the General Assembly.

R.C. 4927.10(B)(3) defines "reasonable and comparatively priced service" and requires the Commission to use that definition when it addresses withdrawals of BLES by ILECs. The Commission's failure to adopt a rule that complies with the statutory requirement and its imposition of an unreasonable rebuttable presumption are in error. Accordingly, the Commission should grant rehearing and amend the rule to conform it to R.C. 4927.10(B)(3).

2. The Order is unlawful and unreasonable because the Commission extended notification and continuation of residential service obligations to telephone companies other than incumbent local exchange carriers including to voice over internet protocol

The Commission's authority to regulate carriers is limited. RC 4927.03(D) 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. (Emphasis added)

Division (A) of that same section further provides that the Commission, except in narrowly circumscribed circumstances not relevant to this proceeding, has no regulatory authority over VoIP service.

In addition to the limitations on Commission jurisdiction based on the nature of the service, the Commission's regulatory authority to require notification of withdrawal of BLES and the continuation of residential services is specifically limited to withdrawal or abandonment of BLES by an ILEC. R.C. 4927.01(A).¹ Other carriers are granted considerable discretion to withdraw or abandon service. R.C. 4927.07.

Despite the express limitations on its authority, the Commission has asserted that it may impose notice and service requirements on non-incumbent providers, including providers of VoIP, if they are sole providers. Under Rule 4901:1-6-21(F), the Commission has sought to require a sole provider of voice service to notify the Commission thirty days

¹ R.C. 4927.01(A)(5) defines an incumbent local exchange carrier as follows:

"Incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that:

(a) On February 8, 1996, provided telephone exchange service in such area; and

(b)(i) On February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R. 69.601(b) ; or

(ii) Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in division (A)(5)(b)(i) of this section.

prior to withdrawal of service. Under Rule 4901:1-6-21(G), the Commission has extended the application of all provisions of Rule 4901:1-6-21 concerning the withdrawal or abandonment of service to a sole provider of either 9-1-1 service or emergency services to residential customers. The definition of voice service and reference to a sole provider of 9-1-1 and emergency services sweep non-incumbent exchange carriers, including VoIP providers under these rules. Rule 4906:1-6-01(PP).²

In support of this expansion of its authority to require sole providers to provide notice of withdrawal of service and to continue the provision of residential voice service, it relies upon its authority under R.C. 4927.03(A) to provide for the protection, public safety and welfare of residential subscribers. Order at 60.

The Commission's extension of jurisdiction is unlawful and unreasonable in two respects.

First, there is no specific statutory authorization for the Commission to extend its jurisdictional reach concerning the withdrawal of service by any provider other than an ILEC. In fact, R.C. 4927.07(A) already grants the authority to carriers to withdraw or abandon service that the Commission seeks to unlawfully limit. Subject to limited exceptions, a telephone company may withdraw any telecommunications service if it

² Rule 4906:1-6-01(PP), OAC, provides that "voice service" shall have the same meaning as set for in R.C. 4927(A)(18). The statutory definition of "voice service" references "all of the applicable functionalities described in 47 C.F.R. 54.101(a)." Section 54.101(a) of Title 47 of the Code of Federal Regulations provides in part, "Voice telephony services and broadband service shall be supported by federal universal service support mechanisms.

(1) 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."

gives at least thirty days' prior notice to the Commission and to its affected customers. R.C. 4927.07(A). Although R.C. 4927.10 is a listed exception to this statutory provision, it only extends the Commission's authority to the withdrawal of BLES by an ILEC. Because the General Assembly has already provided express authority governing when both incumbent and other carriers may withdraw and abandon service, the Commission has no legal basis for changing those statutory requirements through this rulemaking proceeding. *In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 520 (2011) (the Commission cannot expand relief beyond its statutory authority).

Second, the Commission must make a finding that the exercise of authority is necessary for the protection, welfare, and safety of the public under R.C. 4927.03(A) if it seeks to exercise jurisdiction over VoIP. The Order, however, contains only generalized statements as to the Commission's basis for imposing these notice requirements to sole providers. More is required under R.C. 4927.03(A) than broad statements unsupported by a record that such a requirement is necessary. *Id.* at 519 (the Commission must support its findings with a record).

The Commission may not "rewrite" statutory requirements. *Id.* at 520; *Montgomery County Bd. of Comm'rs v. Pub. Utils. Comm'n of Ohio*, 28 Ohio St.3d 171 (1986). Ohio law does not extend the jurisdictional reach of the Commission over providers so as to require them to provide notice of withdrawal of any service or the continuation of residential service, and the Order does not warrant the extension of new requirements to VoIP services and providers in particular. Accordingly, the Commission should grant rehearing and conform the rule to Ohio law.

III. CONCLUSION

For these reasons, the Commission should grant rehearing and revise its rules to comply with Ohio law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing and Memorandum In Support of the Ohio Telecom Association*, was served upon the following parties of record this 30th day of December 2016, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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