

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of :  
: WC Docket No. 20-71  
Eliminating *Ex Ante* Pricing Regulation :  
and Tariffing of Telephone Access :  
Charges. :  
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**REPLY COMMENTS  
SUBMITTED ON BEHALF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**INTRODUCTION**

On April 1, 2020, the Federal Communications Commission (FCC) issued a notice of proposed rulemaking (NPRM) in the above-captioned docket seeking comment from various stakeholders, including state public utility commissions, on various FCC proposals to deregulate and detariff end-user telephone access charges (TACs) associated with interstate access service offered by incumbent local exchange carriers (ILEC).<sup>1</sup> If adopted, the proposals in the FCC’s NPRM would, among other things, prohibit the inclusion of the federally approved TACs by companies on their bills. Such a change would necessitate a fundamental restructuring of the manner in which carriers recover the expenses covered by these charges. Comments addressing the NPRM were due on July 6, 2020.

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<sup>1</sup> *In the Matter of Eliminating Ex Ante Pricing Regulation and Tariffing of Telephone Access Charges*, WC Docket 20-71, Notice of Proposed Rulemaking (rel. April 1, 2020). (NPRM)

Comments were filed by numerous parties expressing a variety of concerns with the proposals set forth in the FCC's NPRM. While the Public Utilities Commission of Ohio (PUCO or Ohio Commission) appreciates the FCC's efforts toward creating greater transparency in customer bills, it nonetheless agrees with many of the commenters that the elimination of these TACs is problematic and presents a variety of challenges for both carriers and state regulators alike. In states like Ohio that have statutorily established caps on increases in basic service rates, ILECs may not be able to fully recover through an increase in local service rates the lost revenue resulting from the elimination of the TACs. Additionally, any plan to eliminate TACs that is not jurisdictionally specific and phased-in over time will likely prove disruptive to the business of carriers affected by the FCC's action. Further, shifting the interstate TAC revenue to intrastate basic local service rates encroaches upon the intrastate regulatory and rate making authority of the states. Finally, given the current economic climate caused by the Covid-19 pandemic, the proposals set forth in the FCC's NPRM will likely prove unduly burdensome to carriers. Accordingly, the Ohio Commission appreciates the opportunity to provide its reply comments to the FCC for its studied consideration.

## DISCUSSION

Presently, the FCC regulates various end user charges associated with interstate access service offered by ILECs.<sup>2</sup> In its NRPM, the FCC states that *ex ante* pricing

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<sup>2</sup> *Id.* at 1, para. 3. These charges include the subscriber line charge, the access recovery charge, the presubscribed interexchange carrier charge, the line port charge, and the special access surcharge.

regulation and tariffing of these charges has historically been necessary to ensure that prices, especially those of the ILECs, remained just and reasonable as required by the Communications Act.<sup>3</sup> With the proliferation of competition in the telecommunications marketplace, the FCC states that these protections may no longer be necessary as competition provides the necessary safeguards to ensure that the ILECs' rates for voice service remain just and reasonable.<sup>4</sup> Further, the FCC asserts that the costs of imposing such pricing regulation and tariffing requirements on the ILECs in a competitive environment outweigh any benefits achieved.<sup>5</sup> While recognizing that a small percentage of consumers may not necessarily have competitive options, the FCC states that these customers live in areas served by an eligible telecommunications carrier (ETC) that is subject to the reasonable comparability benchmark.<sup>6</sup> In the FCC's view, these factors justify, and perhaps necessitate, the elimination of *ex ante* pricing regulation and tariffing of TACs.<sup>7</sup>

### **Uniform TAC Detariffing and Deregulation Will Create Regulatory Uncertainty**

The Ohio Commission recognizes that the landscape of the telecommunications industry has changed dramatically since the passage of the Telecommunications Act of 1996 (Act). Technological advancements have led to competition among service

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<sup>3</sup> *Id.* at 1, para.1.

<sup>4</sup> *See Id.* at 18-19, paras. 2-4.

<sup>5</sup> *Id.* at 10, para. 38.

<sup>6</sup> *Id.* at 12, para. 43.

<sup>7</sup> *See Id.* at 13, para. 45.

providers that use a variety of platforms to serve customers. The technologies and services that compete with ILECs today were not only unavailable at the time of the Act's passage, they were not even contemplated by it. This same sentiment is echoed by the Ohio Telecom Association (OTA) in its initial comments.<sup>8</sup> OTA points out that the competition cited by the FCC is a fact of life for Ohio ILECs.<sup>9</sup> Nonetheless, OTA takes issue with the FCC's assumption that state regulation can accommodate the effects of the NPRM's proposals on ILEC revenue.<sup>10</sup> The Ohio Commission agrees with OTA in this regard.

While the FCC recognizes that there may be differences in state rate flexibility, it nonetheless assumes that carriers have sufficient pricing flexibility to allow recovery of lost TAC revenue through an adjustment in basic local service intrastate rates.<sup>11</sup> This broad assumption does not allow for the wide variance among states in how they approach intrastate regulation and ratemaking.<sup>12</sup> In Ohio, increases in basic local service rates by an ILEC are subject to a cap of \$2.00 per year once an ILEC has demonstrated

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<sup>8</sup> See *In the Matter of Eliminating Ex Ante Pricing Regulation and Tariffing of Telephone Access Charges*, WC Docket No. 20-71, Initial Comments of the Ohio Telecom Association, (filed July 6, 2020) at 2-3 (OTA Comments).

<sup>9</sup> *Id.* at 3.

<sup>10</sup> See *Id.* at 3-5.

<sup>11</sup> See NPRM at 13, para. 46.

<sup>12</sup> See, e.g., *In the Matter of Eliminating Ex Ante Pricing Regulation and Tariffing of Telephone Access Charges*, WC Docket No. 20-71, Comments of the California Public Utilities Commission (filed July 6, 2020); Comments of the State Corporation Commission of the State of Kansas (filed June 30, 2020); Comments of the Nebraska Public Service Commission (filed July 6, 2020) (Nebraska Comments); Comments of the New York Public Service Commission (filed July 6, 2020); Comments of the Pennsylvania Public Utility Commission (filed July 6, 2020) (Pennsylvania Comments) (collectively State Comments).

that there is sufficient competition within its service area.<sup>13</sup> Consequently, in Ohio, ILECs do not have *carte blanche* pricing flexibility to adjust their basic local service rates to offset lost TAC revenue that would result from the FCC's proposal. In fact, ILECs relying on basic local service rate increases will only recover a fraction of their lost TAC revenue. For instance, with the subscriber line charge (SLC) presently being \$6.50 for primary residential and single-line business lines<sup>14</sup>, it would take an Ohio ILEC four years with a \$2 per year increase in its basic local service rate to fully recover the revenue lost by the elimination of the \$6.50 SLC alone. This does not account for the higher SLCs for non-primary residential and multi-line business lines or any of the other TACs for which elimination is proposed.<sup>15</sup>

OTA is correct in stating that the Ohio Commission's authority is limited to administering price caps.<sup>16</sup> The \$2.00 annual limit on increases in basic local service rates is set by statute rather than by the Ohio Commission. As OTA correctly points out, Ohio law does not authorize the Ohio Commission to increase the rate cap for basic local service.<sup>17</sup> The proposal, then, to recover lost TAC revenue through an increase in basic local service rates is beyond the authority of the Ohio Commission to address through state regulatory processes as suggested in the NPRM.

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<sup>13</sup> Ohio Revised Code (RC) §4927.12(B).

<sup>14</sup> NPRM at 3, para. 7.

<sup>15</sup> *See Id.*

<sup>16</sup> OTA Comments at 5. *See also, In the Matter of Eliminating Ex Ante Pricing Regulation and Tariffing of Telephone Access Charges*, WC Docket No. 20-71, Comments of Windstream Services, LLC at 5 (Windstream Comments).

<sup>17</sup> See OTA Comments at 5.

The initial comments demonstrate that the FCC's proposal has differing, and perhaps unique, impacts among states.<sup>18</sup> Furthermore, as Windstream rightly points out, a one-size-fits-all approach will likely cause additional confusion and regulatory uncertainty.<sup>19</sup> The impact of eliminating TACs may be different in Ohio than in another state, but would be no less severe. For companies operating across multiple state jurisdictions, the degree and extent to which lost TAC revenue may be recovered will vary from state to state. As noted, Ohio is subject to a rate cap. Other states may have similar limitations; others may be entirely different. For this reason, the Ohio Commission agrees with Windstream in supporting an approach to detariffing and deregulating TACs that is uniquely tailored to each jurisdiction and urges the FCC to consider such an approach.<sup>20</sup> In any event, the Ohio Commission encourages the FCC to avoid a flash cut regardless of the approach it takes. In the Ohio Commission's view, a flash cut would be disruptive to carriers as they would have to immediately absorb the lost TAC revenue. Instead, the Ohio Commission recommends phasing in the deregulation and detariffing of TACs, should the FCC proceed in doing so, over a period that affords carriers a sufficient opportunity to adjust and react to the loss of TAC revenue. The Ohio Commission believes this would be the least disruptive method for the FCC to accomplish its objectives.

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<sup>18</sup> *See* State Comments.

<sup>19</sup> *See* Windstream Comments at 6.

<sup>20</sup> *See Id.*

## The FCC's Proposal Infringes Upon State Regulatory and Rate Making Jurisdiction

Regulation of intrastate services is the purview of state government.<sup>21</sup> Section 152 of the Communications Act clearly states that, with few exceptions, the FCC has no jurisdiction with respect to “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.”<sup>22</sup> The Ohio Commission agrees with the Pennsylvania and Nebraska commissions that the FCC’s proposal crosses this line and infringes upon the intrastate regulatory and rate making authority of the states.<sup>23</sup>

In furtherance of its objective of detariffing and deregulating TACs, the FCC proposes preempting state laws pertaining to the identification of charges on customer bills.<sup>24</sup> Specifically, the FCC asks if it should preempt state laws and regulations that prevent carriers from combining charges for the intrastate and interstate portion of their local service on their customer bills.<sup>25</sup> This is effectively the situation in Ohio. While the \$2.00 basic local service rate cap established by the Ohio General Assembly allows limited flexibility to recover a small part of the lost TAC revenue through an increase in local service rates, it certainly does not allow for the full recovery of this revenue. In fact, the rate cap essentially prevents combining most of the intrastate and interstate portions of a carrier’s local service in Ohio.

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<sup>21</sup> See *Mozilla Corp. v. FCC*, 940 F.3d 1, 77-78 (D.C. Cir. 2019)

<sup>22</sup> 47 U.S.C. §152(b).

<sup>23</sup> See Pennsylvania Comments at 4-8; Nebraska Comments at 11-12.

<sup>24</sup> NPRM at 18, para. 66.

<sup>25</sup> *Id.*

In discussing whether the interstate and intrastate portions may be combined, it is easy to lose sight of the intent of the Ohio General Assembly in establishing the \$2.00 basic local service rate cap. It was *never* the intent of the General Assembly to establish a mechanism for the recovery of lost interstate revenue. Rather, the Ohio General Assembly's intent was to offer the ILECs a means of periodically increasing their basic local service rates while, at the same time, providing customers with a certain level of rate certainty and protection for basic local service. Providing for both basic local service rate increases and consumer protection mechanisms clearly falls within Ohio's section 152(b) intrastate regulatory and rate making authority.

The Ohio Commission agrees with the Nebraska Commission's assertion that preemption of state law such as that passed by the Ohio General Assembly must be conferred by Congress.<sup>26</sup> While the FCC offers the impossibility exception as the basis for preemption, the Ohio Commission agrees with the Nebraska Commission that the FCC does not have the requisite statutory authority over intrastate regulation and rate making to invoke this exception.<sup>27</sup> additionally, as pointed out by the Pennsylvania Commission, the FCC lacks the requisite legal authority to arbitrarily and unilaterally "reclassify" or "redefine" the TACs and "attach" or "move" them to the local service rates.<sup>28</sup> Such action by the FCC would amount to intrastate rate making for intrastate local service and would result in such for Ohio.

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<sup>26</sup> See Nebraska Comments at 12.

<sup>27</sup> See *Id.*

<sup>28</sup> Pennsylvania Comments at 6-7.



Often, customers subscribing to basic local service in Ohio come from vulnerable populations such as the elderly, the economically disadvantaged, or those living in rural areas. As previously noted, one purpose of Ohio's \$2.00 basic local service rate cap is to provide rate certainty and protection for these customers. Under the FCC's proposal, TAC revenue would be shifted to be included in intrastate basic local service rates without regard to the intentions or policy objectives of the Ohio General Assembly. Additionally, the Ohio General Assembly believed it appropriate to allow ILECs up to a \$2.00 annual increase in basic local service rates. If this increase must be used to recover TAC revenue, ILECs completely lose the benefit that the Ohio General Assembly intended for them. The Ohio Commission believes that these results completely subvert section 152(b) intrastate regulatory and rate making authority.

### **The FCC Should Not Impose Additional Burdens on Carriers During the Covid-19 Pandemic**

It would be an understatement to say that 2020 has been a difficult year. This year has brought the worldwide COVID-19 pandemic and the resulting economic fallout that has been felt by millions. Ohio's telephone companies are not insulated from this impact. As noted in the comments of Incompas, carriers are operating with fewer staff, including regulatory staff, while facing significant revenue losses during the COVID-19 pandemic.<sup>29</sup> Many carriers voluntarily took the Keep Americans Connected Pledge to not

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<sup>29</sup> *In the Matter of Eliminating Ex Ante Pricing Regulation and Tariffing of Telephone Access Charges*, WC Docket No. 20-71, Comments of Incompas (filed July 6, 2020) at 13. (Incompas Comments).

disconnect any residential or small business customers nor charge any late fees to these customers as a result of the pandemic.<sup>30</sup> In short, carriers have stepped up to ensure that customers stay connected and service remains available during very uncertain economic times.

The Ohio Commission agrees with Incompas that the FCC's proposal will unnecessarily burden carriers during the pandemic.<sup>31</sup> Even after the pandemic officially ends, its effects will likely continue to be felt for some time. If the FCC's proposals are adopted, it is quite possible that carriers will have to bear the administrative burden of implementing the FCC's mandates before they have had any opportunity to significantly recover from the pandemic's impact. Further, carriers subject to a rate cap would face an additional loss of revenue through the elimination of the TACs, while continuing to absorb the declines in revenue that have resulted from the pandemic. Any rate increase will only help offset these lost revenues with carriers left to absorb the full brunt of the lost TAC revenue. Accordingly, the Ohio Commission urges the FCC to judiciously weigh the full impact of its proposals on carriers considering the COVID-19 pandemic and the ongoing effects on carriers as they continue to navigate through the pandemic's impact.

## CONCLUSION

Once again, the Ohio Commission recognizes and appreciates the FCC's efforts to

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<sup>30</sup> Incompas Comments at 16.

<sup>31</sup> *See Id.* at 14-16.

simplify and create greater transparency in customer bills. Nonetheless, the proposal set forth in the NPRM to eliminate TACs and shift the recovery of the resulting lost interstate revenue to intrastate local service rates fails to consider varying intrastate regulations and rate making processes among the states. In states like Ohio with a cap on basic local service rate increases, carriers are not able to simply adjust their basic local service rates to recover their lost TAC revenue. In fact, in Ohio it would take several years for carriers to fully recover their lost interstate revenue while, at the same time, losing out on the benefit of their statutorily approved rate increases. Further, unilaterally shifting interstate revenue to the intrastate local service rates encroaches upon the intrastate jurisdiction of the states by subverting their section 152(b) regulatory and rate making authority. In Ohio, the intent of the Ohio General Assembly in establishing the \$2.00 rate cap on basic local service rate increases would be completely overridden as this increase would have to be used to offset some of the lost interstate revenue or, perhaps, be eliminated altogether. Finally, the COVID-19 pandemic has created economic uncertainty and difficulty for many, including our telecommunications service providers. Accordingly, the current economic climate warrants that the FCC consider the economic impacts and burdens that would be placed upon carriers as a result of eliminating the TACs. The Ohio Commission appreciates the opportunity to provide its reply comments to the FCC for its consideration in this proceeding.

Respectfully submitted,

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Summary: Reply Comments Submitted On Behalf Of The Public Utilities Commission Of Ohio (WC Docket No. 20-71) electronically filed by Mrs. Kimberly M Naeder on behalf of PUCO