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

COMMENTS OF
THE OHIO TELECOM ASSOCIATION

I. INTRODUCTION

R.C. 4927.10 permits an incumbent local exchange company ("ILEC") to withdraw or abandon the provision of basic local exchange service ("BLES") if the FCC adopts an order that allows the ILEC to withdraw the interstate-access component of its BLES under section 214 of the United States Code. On August 25, 2021, the Public Utilities Commission of Ohio ("Commission") issued an Entry seeking comment on proposed Rule 4901:1-6-21, which is intended to implement R.C. 4927.10. Entry (Aug. 25, 2021) ("Entry").

The proposed rule incorporates language from two previously proposed rules that never became effective. As in the prior rules, the new version of Rule 4901:1-06-21 attempts to define a reasonable and comparatively priced voice service and extend the application of the abandonment rule to sole providers of voice services.[1] Because these provisions exceed the Commission's authority, they should be removed from the proposed rule.

II. ARGUMENT

[1] Both provisions were challenged as unlawful and unreasonable in a prior rulemaking cycle in this proceeding. See Application for Rehearing of the Ohio Telecom Association (Dec. 30, 2016).

1. The proposed rule 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) or to include a rebuttable presumption concerning competitively priced services

R.C. 4927.10 provides a procedure by which an ILEC may withdraw from the provision of 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 of "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.

Assuming that there was a need for additional definition, the Commission in the initial rulemaking proceeding expanded the definition of "reasonable and comparatively priced voice service." Second Entry on Rehearing ¶ 25 (Apr. 5, 2017). The proposed definition provided that "reasonable and comparatively priced voice service" was "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)."* Finding and Order ¶ 42 (Nov. 30, 2016); Second Entry on Rehearing ¶ 25 (Apr. 5, 2017).[2] The prior definition was challenged as both unlawful and unreasonable, but the Commission denied rehearing of the assignments of error. See

[2] The Commission adopted the expanded definition including the presumption in the Finding and Order issued on November 16, 2016 and then made a linguistic change to the proposed rule in the Second Entry on Rehearing to address an assignment of error raised by AT&T Ohio. Second Entry on Rehearing ¶ 24.

Application for Rehearing of the Ohio Telecom Association at 4-6 (Dec. 30, 2016) and Second Entry on Rehearing ¶ 25. The definition never became effective, but in the recent Entry, the Commission incorporates this definition in division (A) of proposed rule 4901:1-6-21. Entry, Attachment A at 1.

The incorporation of this expanded definition of reasonable and comparatively priced service remains both unlawful and unreasonable.

R.C. 4927.10(B)(3) prescribes the applicable definition of "reasonable and comparatively priced voice service." Despite this express legislative direction, the Commission has proposed an alternative definition in Rule 4901:1-6-21(A) that includes a rebuttable presumption of what is reasonable and comparatively priced voice service. Because there is no legal basis for the expanded definition, the Commission has exceeded its statutory authority, rendering the proposed rule unlawful. *Office of Consumers' Counsel v. Pub. Utils. Comm'n of Ohio,* 67 Ohio St. 2d 153, 166 (1981).

Not only is there no express statutory basis for the Commission to redefine what constitutes "reasonable and comparatively priced voice service," the rebuttable presumption raises new problems for an applicant. The burden to show that no reasonable alternative service rests with the customer. Yet the FCC will have already determined that competition exists when it relieves the ILEC of its interstate obligations. If the competitive service does not meet definition found in the proposed rule, however, the burden falls to the withdrawing ILEC to demonstrate that the customer has alternatives to the existing BLES service. Given the federal determination, it is fundamentally unreasonable to shift the burden of proof to the withdrawing ILEC.

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." (Emphasis added.) This determination is prospective and cannot be answered by a reference to a presumption linked to historically based prices. Thus, the creation of a rebuttable presumption that ties the determination to a historically based price is both unreasonable and not supported by the plain meaning of the statute and intent of the General Assembly.

Because the definition included to division (A) is both unlawful and unreasonable, the Commission should revise the division as follows:

> (A) The collaborative process established under section 749.10 of amended substitute House Bill 64 of the 131st General Assembly will review the number and characteristics of basic local exchange service customers, evaluate what alternative reasonable and comparatively priced voice services are available to residential BLES customers and the prospect of the availability of a reasonable and comparatively priced voice service where none exist. This will be done for the purpose of identifying any exchanges or residential BLES customers with the potential to not have access to a reasonable and comparatively priced voice service. For purposes of rule 4901:1-6-21 of the Administrative Code, "reasonable and comparatively priced voice service" is a voice service that satisfies the definition set forth in division (B)(3) of section 4927.10 of the Revised Code. ~~A voice service is presumptively deemed competitively priced, subject to rebuttal, if the rate does not exceed either: (1) the incumbent local exchange carriers' (ILEC) BLES rate by more than twenty percent or; (2) the federal communications commission's (FCC) urban rate floor as defined in 47 C.F.R. 54.313(a)(2).~~

2. The proposed rule is unlawful and unreasonable because it extends notification and continuation of residential service obligations to telephone companies including voice over internet protocol carriers

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 defined circumstances, has no regulatory authority over VoIP service.

Because ILECs are the only telephone companies required to provide BLES, 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 by an ILEC. R.C. 4927.10(A).[3] Other carriers, however, are granted considerable discretion to withdraw or abandon service. R.C. 4927.07.

Despite the express limitations on its authority, the Commission has sought to require a sole provider of voice service to notify the Commission thirty days prior to withdrawal of service under Rule 4901:1-6-21(F). Additionally, the Commission has proposed to extend 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 under Rule 4901:1-6-21(G).

In an apparent attempt to justify this sweeping assertion of authority, the Entry makes a finding that the proposed rule is narrowly tailored to address the public welfare and safety. Entry ¶ 10 and Attachment A at 3.

The Commission's extension of jurisdiction is unlawful and unreasonable.[4]

[3] 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)(a) of this section.

[4] Apart from the reference to R.C. 4927.03, proposed Rule 4901:1-06-21(F) requiring notification does nothing more than is required under R.C. 4927.07. Thus, the division is redundant and can be removed for that reason as well.

Initially, 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 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, the former 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 specific 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).

To rectify the express limits on its authority, the Commission makes a finding that the proposed rule addresses a concern for the public welfare in an apparent attempt to invoke provisions of R.C. 4927.03(A). Under that division, the Commission must make a finding that the exercise of authority is necessary for the protection, welfare, and safety of the public if it seeks to exercise jurisdiction over VoIP. As in the past, however, the Entry contains only generalized statements and references to its prior unsupported orders as the Commission's basis for imposing these requirements on withdrawal of service. More is required under R.C. 4927.03(A) than broad and unsupported statements that such a requirement is necessary. *Id.* at 519 (the Commission must support its findings with a record).

Finally, it is not within the authority of the Commission to anticipate problems in a manner that results in the Commission's rewriting of statutory requirements. *Id.* at 520; *Montgomery*

County Bd. of Comm'rs v. Pub. Utils. Comm'n of Ohio, 28 Ohio St.3d 171 (1986). Accordingly, the Commission should delete divisions (F) and (G) from the proposed rule.

III. CONCLUSION

The adoption of a rule to implement R.C 4927.10 is overdue, but the rule that is adopted must conform to Ohio law. The proposed rule does not. To conform the rule to Ohio law, the Commission should delete the last sentence of division (A) and delete divisions (F) and (G) in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Comments of the Ohio Telecom Association* will be served by the first day of September 2021, pursuant to the procedures established by the Document Information System under Rule 4901-1-05. The copy was also served by email to the following persons.

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Summary: Comments Comments of Ohio Telecom Association electronically filed by Frank P. Darr on behalf of Ohio Telecom Association