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**

THIRD SUPPLEMENTAL FINDING AND ORDER

Entered in the Journal on January 12, 2022

I. SUMMARY

{¶ 1} The Commission finds that the new rule set forth in Ohio Adm.Code 4901:1-6-21 should be adopted.

II. DISCUSSION

A. Procedural History

{¶ 2} On September 4, 2014, the Commission opened Case No. 14-1554-TP-ORD, *In re the Commission's Review of Chapter 4901:1-6 of the Ohio Administrative Code, Regarding Telephone Company Procedures and Standards*, for the purpose of commencing the five-year review of the rules contained in Ohio Adm.Code Chapter 4901:1-6.

{¶ 3} On November 30, 2016, the Commission issued a Finding and Order in this matter. Five rounds of rehearing ensued with the most recent Entry on Rehearing being issued on October 4, 2017. As a result, some of the rules in Ohio Adm.Code Chapter 4901:1-6 have been updated and some have not.

{¶ 4} Pursuant to its Entry of May 2, 2018, the Commission requested comment on additional revisions to Ohio Adm.Code 4901:1-6-36(B) and (C) regarding telecommunications relay service.

{¶ 5} Pursuant to the Supplemental Finding and Order of July 11, 2018, the Commission approved amendments to Ohio Adm.Code 4901:1-6-36.

{¶ 6} Pursuant to the Entry of July 2, 2019, the Commission, among other things, requested comments on proposed revisions to Ohio Adm.Code 4901:1-6-02, 4901:1-6-07, and 4901:1-6-21 (4901:1-6-21 or Rule 21).

{¶ 7} Pursuant to the Second Supplemental Finding and Order of October 21, 2020, the Purpose and Scope rule, Ohio Adm. Code 4901:1-6-02 Paragraph (H), was updated to reflect October 1, 2020 as the date whereby citations to the United States Code and the Code of Federal Regulations (C.F.R.) is incorporated by reference.

{¶ 8} Pursuant to the Entry of August 25, 2021, the Commission sought comments on a new proposed Ohio Adm.Code 4901:1-6-21 regarding the withdrawal or abandonment of basic local exchange service (BLES) or voice service by a provider of telecommunications service. Initial and reply comments were due on September 1 and September 10, 2021, respectively. Initial comments were filed by AT&T Ohio; The Ohio Cable Telecommunications Association (OCTA); The Ohio Telecom Association (OTA); Advocates for Basic Legal Equality, Inc., Legal Aid Society of Columbus, Office of the Ohio Consumers' Counsel, Ohio Poverty Law Center, Pro Seniors, Inc., and Southeastern Ohio Legal Services (collectively, Consumer Groups). Reply comments were filed by these same entities.

B. Summary of the Comments

{¶ 9} In support of the modified, proposed Rule 21, the Commission asserted that the proposed rule adds relevant details to the process that a carrier will utilize in filing for the withdrawal or abandonment of BLES. The modified, proposed rule also includes critical provisions to safeguard the protection, welfare, and safety of the public for purposes of ensuring that Ohioans have access to call emergency service providers and 9-1-1 authorities. See 14-1554-TP-ORD, Entry (Aug. 25, 2021) at 3. In its Entry of August 25, 2021, the Commission stated that in both its November 30, 2016 Finding and Order and its Second Entry on Rehearing issued April 7, 2017, the Commission specifically noted that R.C. 4927.03(A) gives the Commission jurisdiction over services that the General Assembly otherwise prohibited from regulation 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. The Commission asserted that proposed Ohio Adm.Code 4901:1-6-21 is narrowly tailored to achieve that goal and will give meaning to the critical safeguard that the General Assembly recognized when enacting the safety and welfare provisions of R.C. 4927.03(A). See 14-1554-TP-ORD, Entry (Aug. 25, 2021) at 4.

{¶ 10} AT&T Ohio opines that Am. Sub. H.B. 64 of the 131st Ohio General Assembly (H.B. 64) added R.C. 4927.10 to encourage the deployment of new telecommunications technologies, while at the same time ensuring that existing customers continue to have reasonable alternatives for service. Specifically, AT&T Ohio submits that H.B. 64 permits an incumbent local exchange carrier (ILEC) to withdraw or abandon its provision of BLES in an exchange so long as the ILEC has the permission of the Federal Communications Commission (FCC) to withdraw the interstate portions of BLES and so long as the ILEC provides at least 120 days' prior notice of such withdrawal to the Commission and to its affected customers. According to AT&T Ohio, ILECs that withdraw BLES in accordance with the statute are relieved of their duties as carrier of last resort for the particular exchange and that 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. (Initial Comments at 1.)

{¶ 11} Citing to *In re 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), AT&T Ohio states that the Ohio Supreme Court has long recognized that "administrative rules, in general, may not add or subtract from *** the legislative enactment." AT&T Ohio also opines that 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 (citing 2 Ohio Jur. 3d, Admin Law §41 (3d ed. 2015). (Initial Comments at 2.)

{¶ 12} Specific to proposed Rule 21(F), AT&T Ohio believes that the obligations it imposes on providers of reasonable and comparably priced voice service offered to former

customers of an ILEC that withdrew BLES, impermissibly adds to, and does not properly implement R.C. 4927.10. In support of its position, AT&T Ohio focuses on the Legislature's requirements on ILECs relative to the withdrawal of BLES and the fact that the Legislature did not implement any additional regulations regarding the subsequent withdrawal of service by a subsequent alternative provider. Therefore, AT&T Ohio argues that the Commission cannot properly impose a regulatory burden on an alternative provider when the Legislature chose not to implement one. (AT&T Ohio Initial Comments at 3-4.) In addition to regulating providers that the Legislature chose not to regulate, AT&T Ohio contends that the proposed rule also attempts to regulate services that the Legislature chose not to regulate. Specifically, AT&T Ohio points out that proposed Rule 21(F) governs the withdrawal of "voice grade service" which is far broader than BLES. In particular, citing to R.C. 4927.01, AT&T Ohio notes that BLES is limited to single-line residential service without any bundle or package of services, but voice service is not limited to either limitation. Therefore, AT&T Ohio contends that proposed Rule 21(F) impermissibly adds to, and thus conflicts with, H.B. 64. (Initial Comments at 4.)

{¶ 13} Regarding proposed Rule 21(G), AT&T Ohio argues that it adds to, and does not properly implement R.C. 4927.10. In support of its position, AT&T Ohio avers that the statute imposes no obligation on the provider of a reasonable and comparatively priced voice service to former customers of the ILEC that withdrew BLES. Therefore, AT&T Ohio believes that such a provider does not violate the statute if it withdraws or abandons service. (Initial Comments at 6.)

{¶ 14} For both proposed Rules 21(F) and (G), AT&T Ohio rejects the Commission's contention that the proposed rules are appropriate based on the language of R.C. 4927.03(A), which allows for the Commission to exercise authority if it is necessary for the protection, welfare, and safety of the public. Based on the Commission's stated rationale, AT&T Ohio believes that the Commission could wrongly apply its regulation under proposed Rule 21(G) to any sole provider, including competitive local exchange carriers (CLECs), edge-out ILECs, and perhaps other providers that are not "new technology providers." AT&T Ohio

argues that the three exceptions set forth in R.C. 4927.03(A) are merely carve-outs from the general prohibition against regulation of new technology providers and that they do not authorize regulation of new technology providers that is impermissible with respect to providers in general. In support of its position, AT&T Ohio reiterates its claim that proposed Rule 21 is unlawful because its conflicts with the intent of H.B. 64. (Initial Comments at 6-7.)

{¶ 15} AT&T Ohio contends that the intent of proposed Rule 21(F) and (G) improperly extends to the successor providers of service that replaced the ILEC's BLES. AT&T Ohio asserts that those provisions could also be improperly extended to any provider of voice service that is the sole provider of voice service, including in the scenario in which a voice over Internet protocol (VoIP) provider is the sole provider of voice service even if the customer was never an ILEC BLES customer (Initial Comments at 8).

{¶ 16} In response to OCTA's contention, discussed below, that the 9-1-1 requirements set forth in R.C. 4927.15 eliminate the need for proposed Rule 21(F) and (G), AT&T Ohio opines that R.C. 4927.15 does not require the offering of any specific service but, instead, stands for the proposition that if a specified service is offered, it must be tariffed (Reply Comments at 2).

{¶ 17} In response to the protections proposed by Consumer Groups, discussed below, AT&T Ohio submits that the vast majority of Ohioans have wireless service and other services that are more advanced than BLES. In support of its position, AT&T Ohio relies on a 2018 Center for Disease Control, National Center for Health Statistics survey reflecting that statewide, 58 percent of respondents are wireless only and that 4 percent of respondents are landline only. For those Ohioans that continue to rely on BLES, AT&T Ohio opines that this number is small and diminishing and that safeguards are already in place without the need for the additional requirements proposed by Consumer Groups. Additionally, AT&T Ohio submits that federal and state policies are focused on solving the problems of rural coverage for both broadband and wireless coverage. (Reply Comments at 2-3.)

{¶ 18} AT&T Ohio rejects the additional regulation proposed by Consumer Groups discussed below. Regarding Consumer Groups proposed changes to the customer notice requirements, AT&T Ohio believes that Rule 7 and revised Rule 21 thoroughly address all of the various customer notice requirements and that there is no reason for them to be revisited now. (Reply Comments at 3.)

{¶ 19} Citing R.C. 4927.02(A)(1), R.C. 4927.01(A)(1)(b)(iv), and 47 C.F.R. 54.101(a)(1), Consumer Groups assert that Ohioans access to basic telephone service and 9-1-1 emergency services is in the public interest and is protected by Ohio law and federal rules. Additionally, Consumer Groups contend that for nearly one million Ohio consumers, there is no access to broadband or broad-based VoIP service and that many Ohioans in rural areas lack adequate cellular service to use in lieu of basic wired telephone service. Consumer Groups also recommend that when voice service consumers' access to 9-1-1 is being discontinued, the Commission should provide these consumers with notice and the same assistance that basic service consumers receive under R.C. 4927.10(B)(1)(a)(6). (Reply Comments at 1-2.) While Consumer Groups support the Commission's proposals, they recommend further changes to the modified proposed rules to protect consumers.

{¶ 20} Consumer Groups contend that the definition of "reasonable and comparatively" priced voice service in proposed Rule 21(A) is unreasonable because it is vague regarding which threshold would apply for determining that a service is presumptively deemed "comparatively" priced subject to rebuttal. Specifically, Consumer Groups question what would happen in those situations in which the consumers' basic voice service is available at the FCC's rate floor but more than twenty percent above the incumbent provider's rate. Therefore, Consumer Groups believe that the definition of "reasonable and comparatively priced service" should be clarified and strengthened to protect potentially affected residential consumers. (Initial Comments at 4.)

{¶ 21} Specifically, Consumer Groups recommend that proposed Rule 4901:1-6-21(A) should be revised to reflect that a voice service is presumptively deemed

comparatively priced, subject to rebuttal, if the rate does not exceed the lesser of: (a) the ILEC's BLES rate by more than twenty percent or (b) the FCC's urban rate floor as defined in 47 C.F.R. 54.313(a)(2). Consumer Groups believe that this change will remove any ambiguity in the draft rule and will protect residential customers, including low-income customers from possible exorbitant rate increases for alternative voice service. (Initial Comments at 5.)

{¶ 22} Consumer Groups opine that the Commission has authority to regulate some voice services and points out that voice service includes all of the applicable functionalities described in 47 C.F.R. 54.101(a) including (a) voice grade access to the public switched network or its functional equivalent; (b) minutes of use for local service provided at no additional charge to end users; (c) access to the emergency services provided by local government or other public safety organizations, such as 9-1-1 and enhanced 9-1-1, and (d) toll limitation services to qualifying low-income consumers. Consumer Groups believe that the Commission should apply proposed Rule 21(F) to any voice service that was commercially available as of September 13, 2010, or employs technology that was available for commercial use as of September 13, 2010. (Reply Comments at 3-4.)

{¶ 23} Consumer Groups support the adoption of proposed Rule 21(G). Consumer Groups believe that if a voice service provider withdraws or abandons service to a consumer and the consumer would have no access to 9-1-1 service, the Commission should treat the consumer the same as a consumer of withdrawn BLES and attempt to find a willing provider of service to the consumer if the Commission determines that the voice service is the only access to 9-1-1 service for one or more residential customers. Consumer Groups contend that the health and safety of these consumers should not be jeopardized simply because their voice service provider chooses to no longer serve them, resulting in the discontinuance of access to 9-1-1 service. (Reply Comments at 5-6.)

{¶ 24} Consumer Groups advocate that the 120-day advanced customer notice regarding the withdrawal of BLES or discontinuance of voice service required pursuant to

proposed Rule 4901:1-6-21(B)(2) should be mailed to consumers separately from their telephone bills and should be prominently identified as a notice of service withdrawal or discontinuance. Additionally, Consumer Groups believe that consumers should be reminded every 30 days, separately from their monthly bill, that their telephone company is ending service. According to Consumer Groups, this notice should continue until the discontinuance of service is effective. In support of their recommendation, Consumer Groups assert that communications to customers regarding imminent change to basic telephone service and 9-1-1 emergency services must be done via a standalone notice in order to avoid the notice being overlooked. (Consumer Groups Initial Comments at 6-7.)

{¶ 25} Consumer Groups argue that proposed Rule 21(B)(1) unreasonably places customers at risk for unlawful withdrawal of their basic service because the rule does not require submission of a final order from the FCC giving the telephone company the requisite authorization to withdraw basic service under R.C. 4927.10(A). In support of its position, Consumer Groups contend that only a final FCC order authorizing removal of the interstate access component of basic service would provide a telephone company with the requisite statutory authority to begin the process of withdrawing customers' basic service. Consumer Groups note that similar to the Commission, the FCC has a reconsideration process for its initial orders. Therefore, Consumer Groups believe that the 120-day period for basic service withdrawal should not begin until the telephone company provides the Commission with a final FCC order (i.e., an order on reconsideration or one for which no petitions for reconsideration have been filed) authorizing the company to remove the interstate access component of its basic service. Specifically, Consumer Groups assert that consumers would be harmed if a telephone company is allowed to withdraw basic service before the reconsideration process at the FCC is completed due to the fact that the telephone company would not have the requisite authority to withdraw basic service if on rehearing the FCC was to reverse its initial ruling. According to Consumer Groups this could result in consumers wasting both time and expense in seeking out alternative providers. (Initial Comments at 7-8.)

{¶ 26} OCTA contends that proposed Rule 21(F) and (G) is virtually identical to what the Commission adopted in 2016 but was withdrawn for consideration from the Joint Committee on Agency Rule Review (JCARR) in 2018. OCTA also contends that the current rule includes language that was removed from a version of Rule 21 that was issued for comment in 2019. OCTA asserts that proposed Rule 21(F) and (G) exceeds the Commission's authority by improperly regulating all voice service providers, as distinguished from BLES providers. OCTA also asserts that these provisions are flawed because (a) they are not authorized by any language in the enabling statute (R.C. 4927.10), (b) they are not based on a finding that Commission regulation is actually necessary for the protection, welfare, and safety of the public, and (c) they would impermissibly result in state regulation of an interstate information service such as VoIP. OCTA also opines that proposed Rule 21(G) is vague and ambiguous, does not comply with R.C. 121.95(F) and will have an adverse impact on the business community and consumers. Additionally, OCTA avers that proposed Rule 21 is intended to implement R.C. 4927.10, the statute establishing a framework under which ILECs might withdraw or abandon BLES. OCTA states that there have been no changes to R.C. 4927.10 since it was enacted or to any other law that would justify proposed Rule 21(F) and (G). (Initial Comments at 1-2, 4.)

{¶ 27} Specifically, OCTA believes that proposed Rule 21(F) and (G) exceed H.B. 64, which it submits only granted the Commission the authority to adopt rules to oversee the withdrawal or abandonment of BLES by an ILEC. Rather than focusing on the regulation of the ILEC, OCTA argues that the proposed rules will result in the Commission asserting jurisdiction over voice service providers that are not currently subject to its jurisdiction. OCTA points out that proposed Rule 21(F) and (G) do not state that they will only be triggered if an ILEC withdraws its BLES. (Initial Comments at 4-5.)

{¶ 28} OCTA asserts that while the Commission relies on R.C. 4927.03 as the basis for proposed Rule 21(F) and (G), the statute specifically states that the Commission has no authority over VoIP services or any other new telecommunications service unless the Commission specifically finds that the exercise of the Commission's authority is necessary

for the protection, welfare, and safety of the public. Additionally, OCTA believes that proposed Rule 21(F) imposes regulations on providers of voice service that are not necessary for the protection, welfare, and safety of at-risk residential customers. (Initial Comments at 5-6, 11.)

{¶ 29} From OCTA's perspective, R.C. 4927.03(A) is a deregulation statute and does not provide the statutory authority for the Commission to impose filing requirements so that the Commission can review and rule on a withdrawal or abandonment of voice service. OCTA highlights that proposed Rule 21(F) and (G) would impose such obligations and would apply to any sole provider of voice service, including one who would not otherwise qualify as a telephone company or public utility under Ohio law. According to OCTA, these obligations could be extended to include the potential requirement that a voice service provider indefinitely serve as the provider of last resort. OCTA notes that these additional obligations will cause the voice service providers to no longer be able to respond to the market and they will incur regulatory costs not contemplated when the provider elected to operate in the state of Ohio. (Initial Comments at 6, 14.)

{¶ 30} Further, OCTA believes that the proposed rule is contrary to the intent of Section 363.20 of H.B. 64 and the directive that the Commission plan for the Internet-protocol transition which will stimulate network investment and will expand the availability of advanced telecommunications services to all Ohioans. OCTA submits that the proposed rule will have the adverse effect by potentially driving out or discouraging competitive market entrants. (Initial Comments at 14.)

{¶ 31} Further, OCTA states that the Commission cannot extend its regulation over voice service providers that it does not regulate today based on mere assumptions and that the Commission has not put forth any actual evidence or data that supports a contention that these provisions are actually necessary to ensure access to 9-1-1 for any customer. Specifically, OCTA contends that there is no record support for the Commission's underlying assumption that if a non-BLES, non-telephone company was the sole provider

of voice service and it withdraws or abandons its voice service, its customers would be unable to access 9-1-1 emergency service, and/or transmit information related to medical devices. Moreover, OCTA posits that there is no evidence that there is any area in Ohio where a non-BLES, non-telephone company provider is the sole provider of voice service. Similarly, OCTA states that the Commission has failed to indicate that any customers will be losing access to 9-1-1 service. (Initial Comments at 6-9.)

{¶ 32} OCTA also focuses on the fact that there is no evidence that any ILEC BLES withdrawal proposals are forthcoming or what the outcome of such proposals will be. Therefore, OCTA believes that the Commission has not and cannot actually make a finding to demonstrate the need for provisions of proposed Rule 21(F) and (G). OCTA also highlights that R.C. 4927.15 provides that 9-1-1 service should be tariffed as a statutory requirement for an ILEC and that there are no provisions in the statute allowing for the extension of this requirement to voice service providers. Therefore, OCTA contends that there is no need to extend authority over voice service providers for 9-1-1 purposes through the adoption of proposed Rule 21(F) and (G). (Initial Comments at 9.)

{¶ 33} OCTA argues that R.C. 4927.10 states that the withdrawal/abandonment process is limited to ILECs only and did not apply the BLES withdrawal/abandonment process to voice service providers. According to OCTA, if the legislature had intended such an extension of this process to all voice services, it would have stated as such. Similarly, OCTA believes that had the legislature intended to permit the Commission to gain jurisdiction over an alternative voice service provider by allowing an ILEC to withdraw service under R.C. 4927.10, it would have done so. Therefore, OCTA concludes that R.C. 4927.03(A) cannot be interpreted to allow the Commission to simply apply the withdrawal /abandonment process to voice services. (Initial Comments at 10.)

{¶ 34} Regarding proposed Rule 21(G), OCTA states that the rule is vague and ambiguous as to when the Commission will subject a voice service provider to all of the provisions of Ohio Adm.Code 4901:1-6-21, including the withdrawal/abandonment

process. In particular, OCTA believes that pursuant to the proposed rule, the Commission would apply the process to voice service providers on an arbitrary, case-by-case basis and there are no specifics as to how the Commission determinations will be made. (Initial Comments at 11-12.)

{¶ 35} Responding to the proposals of Consumer Groups, OCTA states that Consumer Groups' suggested changes to proposed Rule 21(A) conflict with R.C. 4927.10(B)(3) and would restrict the concept of "competitively priced." OCTA also responds to Consumer Groups' proposal that a voice service be presumed to be comparative only if it is at or below the ILEC BLES rate plus 20 percent or the FCC urban rate floor, whichever is lowest. OCTA submits that it is illogical that a price can only be comparative if it is at or below the lowest price. OCTA also remarks that R.C. 4927.10(B)(3) does not state that comparative prices can only be at or below the lowest price or the national average price. In support of its position, OCTA notes that some of the competitive prices in the FCC's survey are by definition above average. Further, OCTA contends that although the FCC urban rate floor was repealed in 2019, the FCC still calculates the average rate for voice service that was formerly used in determining the urban rate floor. According to OCTA the current version of 47 C.F.R. 54.313(a)(2) sets a ceiling, and not a floor, of no more than two standard deviations above the applicable national average urban rate for voice service as specified in the most recent public notice issued by the Wireline Competition Bureau and Wireless Telecommunications Bureau. According to OCTA, the FCC calculated two standard deviations above the national average rate as $54.75. (Reply Comments at 2-3 citing FCC, WC Docket No. 10-90, DA 20-1409, Nov. 30, 2020.)

{¶ 36} In regard to Consumer Groups' recommendation that proposed Rule 21(B)(1) be revised to state that the ILEC must provide a copy of the final FCC order in order to trigger the 120-day period referenced in R.C. 4927.10(A), OCTA argues that R.C. 4927.10(A) provides otherwise and allows the ILEC to file notice with the state Commission to withdraw its BLES if the FCC adopts an initial order allowing the ILEC to withdraw the interstate access component of its BLES. This filing would then trigger the 120-day period

of R.C. 4927.10(A). In support of its position, OCTA asserts that twice before in this proceeding, the Commission has rejected the same final FCC order request from Consumer Groups. (Reply Comments at 4 citing the Commission's April 5, 2017 Second Entry on Rehearing, ¶66; August 9, 2017, Fourth Entry on Rehearing, ¶36.) AT&T Ohio and OTA raise similar arguments opposing Consumer Groups' proposed revision (Reply Comments at 3-4; OTA Reply Comments at 7-8).

{¶ 37} OCTA also responds to Consumer Groups' request that multiple notices of the withdrawal be given to affected customers and that the notices be provided every 30 days until the withdrawal is final. Specifically, OCTA contends that the request for multiple notices should be denied because they are contrary to R.C. 4927.10 inasmuch as the statute does not require the provisioning of multiple notices. Additionally, OCTA submits that giving notices every 30 days potentially conflicts with the concept in the statute that the affected customers have at least 120 days' notice before the withdrawal because the repeated notices could effectively restart the 120-day clock with each subsequent notice. OCTA also notes that customers will have already received a notice in the context of the ILEC's application submitted to the FCC to withdraw the interstate access component of its BLES. Additionally, OCTA notes that the purpose of the collaborative established by Amended Substitute House Bill 64 is to plan an education campaign for affected customers, and to identify affected residential customers for Commission consideration. Finally, OCTA posits that there is no evidence before the Commission that additional notices would be helpful as opposed to confusing to consumers. (Reply Comments at 5-6.)

{¶ 38} OTA raises similar concerns to those raised by OCTA regarding Consumer Groups' notice proposal, including the numerous safeguards provided under Ohio and federal law. Additionally, OTA states that the additional and separate notices are not required pursuant to R.C. 4927.10. OTA notes that the single notice required by R.C. 4927.10 is distinguishable from the multiple notices required in a rate proceeding pursuant to R.C. 4909.19. Further, OTA submits that what Consumer Groups are proposing is unduly burdensome and expensive. (Reply Comments at 5-7.)

{¶ 39} OCTA argues that proposed Rule 21(F) and (G) are regulatory restrictions since they require or prohibit an action. Based on its belief, OCTA argues that the Commission has failed to comply with the requirements of R.C. 121.95(F) that two existing regulatory restrictions must be removed for each new regulatory restriction. In support of its position, OCTA avers that proposed Rule 21(F) and (G) are identical to the same rule subparts adopted by the Commission in its November 30, 2016 Finding and Order, with the exception of one verb change in provision (F). OCTA notes that proposed Rule 21 has other verb changes, which it believes is an attempt by the Commission to remove words that are identified in R.C. 121.95(B) as restrictive words. (Initial Comments at 12 -13.)

{¶ 40} OTA asserts that, similar to the two previously proposed versions of Rule 21 that never became effective, the new version of the rule attempts to define a reasonable and comparatively priced voice service and extend the application of the abandonment rule to sole providers of voice services. OTA submits that these provisions exceed the Commission's authority and, therefore, they should be removed from the proposed rule. In support of its position, OTA argues that the Commission is without authority to define "reasonable and comparatively priced voice service" in a manner that varies from R.C. 4927.10(C)(3) or to include a rebuttable presumption concerning competitively priced services. Specific to the rebuttable presumption, OTA argues that this provision raises problems for an applicant since, even though the FCC has already determined that competition exists when it relieves the ILEC of its interstate obligations, the burden will fall on the withdrawing ILEC to demonstrate that the customer has an alternative to the existing BLES service. OTA believes that given the federal determination, it is fundamentally unreasonable to shift the burden of proof to the withdrawing ILEC. (Initial Comments at 1-3.)

{¶ 41} Additionally, OTA contends that while the proposed rebuttable presumption is based on an arbitrary percentage and reference to the urban rate floor, which are each linked to historic prices, the analysis required under R.C. 4927.10(B) is prospective in nature and requires a determination of whether a reasonable and comparatively priced voice

service will be available to the affected customer. Therefore, OTA asserts that this prospective determination cannot be answered by a reference to a presumption linked to historically based prices. (Initial Comments at 3-4.)

{¶ 42} OTA also rejects Consumer Groups' proposal to revise the rebuttable presumption so that it applies if competitive service is available at the lesser of 20 percent of the ILEC's price or the urban rate floor. OTA believes that no additional clarifying language is necessary, and that the proposal is neither lawful nor reasonable. OTA questions the legal authority for both proposed Rule 21(A), as well as Consumer Groups' proposed revision, and asserts that both are not supported by the statutory definition of reasonable and comparatively priced voice service set forth in R.C. 4927.10(B)(3). (Reply Comments at 2-5.)

{¶ 43} Additionally, OTA argues that Consumer Groups have not supported their claim that there are customers that will lack reasonable and comparatively priced voice service. OTA believes that concerns about the availability of cell service in some Ohio rural areas are minimal and that if there are concerns about the pricing of alternative service, the Commission can order the ILEC to continue to provide service until a reasonable alternative is found. (Reply Comments at 3-4.)

{¶ 44} Further, OTA highlights that the Commission's proposed language in proposed Rule 21(A) is premised on the desire to encourage the transition from the current public switched network to the Internet protocol network and that a 20 percent markup over BLES is a reasonable approximation of the economic realities of the adoption of a more advanced network. OTA submits that Consumer Groups' attempt to tighten the rebuttable presumption to the lower of 20 percent of the ILEC's BLES price or the urban rate floor will do nothing to encourage a transition toward the stated goal of broadband access and, if anything, would discourage those efforts. (Reply Comments at 4-5.)

{¶ 45} Based on its concerns, OTA recommends that proposed Rule 21(A) should be revised to remove "[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)" (Initial Comments at 4).

{¶ 46} Further, OTA asserts that the proposed rule is unlawful and unreasonable because it extends notification and continuation of residential service obligations to telephone companies including VoIP carriers. OTA submits that the Commission's authority to regulate carriers is limited by R.C. 4927.03(D) which provides that "[e]xcept 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." OTA also states that, per R.C. 4927.03(A), the Commission has no regulatory authority over VoIP service except in narrowly defined circumstances. (Initial Comments 4-5.)

{¶ 47} According to OTA, 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. Citing R.C. 4927.07, OTA avers that other carriers are granted considerable discretion to withdraw or abandon service. Based on its interpretation, OTA believes that the Commission, pursuant to proposed Rule 21(F), has improperly placed requirements on a sole provider of voice service as the sole provider of 9-1-1 service or emergency services. Citing *In re Application of Columbus S. Power,* 128 Ohio St.3d 512, 520 (2011), OTA contends that since 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. (Initial Comments at 5-6.)

{¶ 48} OTA rejects the Commission's contention that the proposed rule is justified due to a need to protect the public welfare consistent with R.C. 4927.03(A). OTA believes

that the Commission's determination is based on generalized statements and references to prior unsupported orders. OTA asserts that consistent with *In re Application of Columbus S. Power* at 519, more is required under R.C. 4927.03(A) than broad and unsupported statements that such a requirement is necessary. Additionally, citing with *In re Application of Columbus S. Power* at 520 and *In re Montgomery County Bd. of Comm'rs v. Pub. Utils. Comm'n of Ohio,* 28 Ohio St.3d 171 (1986), OTA posits that 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. (Initial Comments at 5-7.)

C. Commission Conclusion

{¶ 49} Upon review of the comments, the Commission finds that proposed Rule 21 should be adopted except as discussed below. Specific to proposed Rule 21(A), as discussed above, OTA objects to the determination in proposed Rule 21(A) that a voice service 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 FCC's urban rate floor as defined in 47 C.F.R. 54.313(a)(2). Specific to OTA's contention that the Commission is without authority to define reasonable and comparatively priced voice service in a manner that varies from R.C. 4927.10(C)(3), the Commission notes that the statute authorizes the Commission to define the term reasonable and comparatively priced voice service and identifies that it should **include** (emphasis added) service that provides voice grade access to the public switched network or its functional equivalent, access to 9-1-1, and that it is competitively priced, when considering all the alternatives in the marketplace and their functionality. The Commission points out that nowhere does the statute indicate that the Commission is prohibited from establishing specified benchmarks for the purpose of assessing if a voice service is presumptively deemed competitively priced. To do otherwise, will restrict the Commission's ability to perform the necessary analysis required pursuant to R.C. 4927.10 and could potentially result in inconsistent assessments for the purpose of implementing the directives set forth in R.C. 4927.10.

{¶ 50} In regard to OCTA's questioning of the appropriateness of the reference to the FCC's urban rate floor in proposed Rule 21(A), the Commission finds that proposed Rule 21(A) should be amended to reflect that a voice service is presumptively deemed competitively priced, subject to rebuttal, if the rate does not exceed the higher of either (1) the ILEC's BLES rate by more than twenty percent or; (2) the FCC's reasonable comparability benchmark for voice services, which is defined as two standard deviations above the urban average that is calculated by the FCC on an annual basis. The Commission notes that pursuant to the FCC's December 16, 2021 Public Notice, the reasonable comparability benchmark is $52.65. See FCC Public Notice, WC Docket No. 10-90, DA 21-1588, rel. Dec. 16, 2021). In all other respects proposed Rule 21(A) remains unchanged.

{¶ 51} In regard to Consumer Groups' request that the 120-day statutory time frame set forth in proposed Rule 21(B) not commence until a final order is issued by the FCC, the Commission finds that, consistent with our prior determination, this recommendation should be denied. Specifically, the Commission previously stated that "*** pursuant to R.C. 4927.10(A), the triggering event for commencement of the process for an ILEC's abandonment of BLES is the issuance of an effective FCC order. As noted by AT&T Ohio, unless stayed, an order issued by the FCC is lawful and effective even if a party later files a petition for reconsideration." See 14-1554-TP-ORD, Fourth Entry on Rehearing (Aug. 9, 2017) at 12; Fifth Entry on Rehearing (Oct. 4, 2017) at 6-7.

{¶ 52} Regarding Consumer Groups proposal that the 120-day advanced customer notice set forth in proposed Rule 4901:1-6-21(B)(2) should be mailed to consumers separately from their telephone bills every 30 days until the discontinuance of service is effective, the Commission finds that the proposed revision should be rejected. In reaching this determination, the Commission finds that R.C. 4927.10 does not require the provision of multiple notices. Further, the Commission believes that upon the filing a BLES withdrawal application, both it and its Staff, in conjunction with the collaborative established by H.B. 64, will engage in the appropriate endeavor to ensure that all affected subscribers will be properly identified for the purpose of determining whether they will be able to obtain

reasonable and comparatively priced voice service. In order to be consistent with proposed Rule 4901:1-6-21(C), the Commission determines that proposed Rule 4901:1-6-21(B)(2) should be amended in order to specify that the customer notice must state that the petition has to be filed no later than 30 days from the date set forth in the notice.

{¶ 53} Although the opposition to proposed Rule 21(F) and (G) from AT&T Ohio, OCTA, and OTA focus on the wording of H.B. 64 and R.C. 4927.10, as we have previously ruled, "*** in the context of developing rules for the implementation of R.C. 4927.10, the Commission cannot just consider R.C. 4927.10 or any other statute on a stand-alone basis but must concurrently consider other equally important and applicable statutory concerns, such as the protection, welfare, and safety of the public addressed in R.C. 4927.03(A). See 14-1554-TP-ORD, Entry on Rehearing (Apr. 5, 2017) at 29.

{¶ 54} Having considered the arguments raised by AT&T Ohio, OCTA, and OTA regarding the appropriateness of the intended scope of proposed Rule 21(F) and (G), the Commission determines that these arguments should be rejected. Similar to our prior determinations in this case relative to the earlier proposed version of proposed Rule 21, the potential loss of 9-1-1 emergency services addressed in paragraphs (F) and (G) of adopted Ohio Adm.Code 4901:1-6-21 certainly qualifies as a scenario contemplated by R.C. 4927.03(A) regarding the protection, welfare, and safety of the public that merits our oversight. As a result of this necessary focus, the Commission, in the context of developing its rules, must prospectively ensure that the ILEC's residential subscribers will continue to have access to 9-1-1 service subsequent to the ILEC abandoning the offering of BLES, and even prior to the last voice service provider withdrawing or abandoning voice service.[1] Such an analysis should not wait until after an injury or fatality has occurred but, instead, must be addressed in this rule proceeding and prior to the filing of the first notice seeking the withdrawal or abandonment of voice service.

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1 The Commission believes that its interpretation is consistent with the intent of pending 134th General Assembly H.B. 445 by ensuring that all Ohioans have access to emergency services.

{¶ 55} Consequently, such an analysis results in the Commission having to extend the reach of its rule to include other providers of voice service in order to ensure that these providers properly satisfy the statutory obligation. With respect to the attending obligations resulting from adopted Rules 4901:1-6-21(F) and (G), the Commission has properly balanced the interests of voice service providers with the need to ensure the public safety and welfare. In doing so, the Commission determines that the resulting rules and notice filing obligations are not unduly burdensome on voice service providers, especially when considering that such filings will assist in the protection, welfare, and safety of the public. See 14-1554-TP-ORD, Entry on Rehearing (Apr. 5, 2017) at 29.

{¶ 56} More to the point, if the loss of access to 9-1-1 service does not implicate the need for this Commission to take action to ensure the public safety and welfare, it is difficult to imagine what other scenario would satisfy the intent of R.C. 4927.03. Although AT&T Ohio contends that the Commission cannot assert its jurisdiction over new technology providers in the context of its consideration of a discontinuation of BLES, we interpret R.C. 4927.03 as allowing for the exercise of this jurisdiction if the Commission finds that it is necessary for the protection, welfare, and safety of the public. In its Finding and Order in this matter, the Commission found that, in the scenario in which an entity is the sole provider of voice service in a particular geographic area, the abandonment or withdrawal of such service will result in the inability to access 9-1-1 and emergency services, and to transmit information related to medical devices. See 14-1554-TP-ORD Finding and Order (Nov. 30, 2016, at 60). The same policy concerns would justify the application of proposed Rule 21(F) and (G) to VoIP providers, CLECs and edge-out ILECs that may ultimately be identified as the sole provider of voice service, regardless of whether a customer was previously served by the ILEC. Based on these concerns and consistent with the authority delegated to it pursuant to R.C. 4927.03(A), the Commission has adopted rules specifying the necessary regulation.

{¶ 57} Consistent with the aforementioned determinations, Rule 21 is adopted as reflected in the Attachment to this Third Supplemental Finding and Order.

III. ORDER

{¶ 58} It is, therefore,

{¶ 59} ORDERED, That Ohio Adm.Code 4901:1-6-21 be adopted in accordance with this Third Supplemental Finding and Order. It is, further,

{¶ 60} ORDERED, That Ohio Adm.Code 4901:1-6-21, as reflected in the Attachment to this Third Finding and Order, be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission, in accordance with R.C. 111.15. It is, further,

{¶ 61} ORDERED, That the final rule be effective on the earliest date permitted. Unless otherwise ordered by the Commission, the five-year rule review date for the aforementioned rules shall be in compliance with R.C. 119.032. It is, further,

{¶ 62} ORDERED, That to the extent not addressed in this Third Supplemental Finding and Order, all other arguments raised are denied. It is, further,

{¶ 63} ORDERED, That a copy of this Third Supplemental Finding and Order be served upon the Telephone Industry list-serve, and upon all commenters and interested persons of record in this matter.

COMMISSIONERS:
Approving:
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway

JSA/mef

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NEW

4901:1-6-21 Carrier's withdrawal or abandonment of basic local exchange service (BLES) or voice service.

(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 the higher of either: (1) the incumbent local exchange carriers' (ILEC) BLES rate by more than twenty percent or; (2) the federal communications commission's (FCC) reasonable comparability benchmark for voice services, which is define as two standard deviations above the urban average that is calculated by the FCC on an annual basis as defined in 47 C.F.R. 54.313(a)(2).

(B) An ILEC cannot discontinue offering BLES within an exchange without filing a notice for the withdrawal of BLES (WBL) to withdraw such service from its tariff. Receipt of this notice by the commission, will trigger the one hundred and twenty-day statutory time frame allotted for the commission investigation set forth in division (B) of section 4927.10 of the Revised Code. As part of this notice and investigation process an ILEC has to provide the following:

(1) A copy of the FCC order that allows the ILEC to withdraw the interstate-access component of its BLES under 47 U.S.C. 214 or other evidence that the FCC has automatically approved the ILEC's application to withdraw the interstate access component of its BLES.

(2) A copy of the notice of the withdrawal or abandonment of BLES sent to all affected customers no later than the day the notice for the withdrawal of BLES is filed with the commission to ensure that affected customers have at least one hundred and twenty days notice before the ILEC withdraws or abandons BLES. The notice has to include a provision stating that those affected customers unable to obtain reasonable and comparatively priced voice service have the right to file a petition with the commission and the earliest date upon which the affected customer's BLES will be discontinued. The notice needs to state the petition has to be filed no later than thirty days from the date on the notice and provide the affected customers with the commission's and the office of the Ohio consumers' counsel's (OCC) mailing address, toll-free telephone number, andwebsite address for additional information regarding the notice of the withdrawal or abandonment of BLES and filing of a petition. For purposes of rule 4901:1-6-21 of the

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Administrative Code, "affected customers" means a residential customer receiving BLES that will be discontinued by the withdrawing or abandoning ILEC.

(3) A copy of the notice published concurrent to the WBL filing. The notice has to be published one-time in the non-legal section of a newspaper of general circulation throughout the area subject to the application. The notice needs to provide the affected customers with the commission's and OCC's toll-free telephone number and website address for additional information regarding the application and filing of a petition.

(4) An attachment to the notice will have to either: (1) reference any finding of providers of reasonable and comparatively priced voice service, identified by the collaborative process established under section 749.10 of amended substitute House Bill 64 of the 131st General Assembly, offering that voice service in the exchanges the ILEC is withdrawing or abandoning BLES with this notice; or (2) identify a provider of a reasonable and comparatively priced voice service offering that service, as of the date of the notice filing, to affected customers, regardless of the technology or facilities used by the provider. All affected customers do not have to receive service from the same provider of reasonable and comparatively priced voice service.

(5) A clear and detailed description, including a map, of the geographic boundary of the ILEC's service area to which the requested withdrawal would apply.

(C) If a residential customer to whom notice has been given, pursuant to paragraph (B)(2) of this rule, is unable to obtain reasonable and comparatively priced voice service upon the withdrawal or abandonment of BLES offered by an ILEC, the customer or their authorized representative may file a petition, in the assigned WBL case number, with the commission within thirty-days of receiving the notice. For purposes of this rule, a petition is a written statement in any format from an affected customer claiming that the customer will be unable to obtain reasonable and comparatively priced voice service upon the withdrawal or abandonment of BLES offered by an ILEC. Alternatively, if a residential customer is identified by the collaborative process established under section 749.10 of amended substitute House Bill 64 of the 131st General Assembly as a customer who will be unable to obtain reasonable and comparatively priced voice service upon the withdrawal or abandonment of BLES offered by an ILEC, that customer will be treated as though the customer filed a timely petition.

(D) If no affected residential customers file a petition and no residential customers are identified by the collaborative process set forth in section 749.10 of amended substitute House Bill 64 of the 131st General Assembly, the ILEC's notice to withdraw or abandon will be deemed to have satisfied the requirements to withdraw or abandon BLES pursuant to section 4927.10 of the Revised Code.

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(E) If the commission's investigation determines that no reasonable and comparatively priced voice service is available to the customer, identified in paragraph (C) of this rule, at the customer's residence and the commission cannot identify a willing provider of a reasonable and comparatively priced voice service to serve the customer, the ILEC requesting the withdrawal or abandonment will have to provide a reasonable and comparatively priced voice service, via any technology or service arrangement, to the customer at the customer's residence for not less than twelve months from the date of the order issued by this commission. This order will also address all petitions filed or all customers identified through the collaborative process. For purposes of rule 4901:1-6-21 of the Administrative Code, "willing provider" is any provider, identified by the commission through its investigation process, voluntarily offering a reasonable and comparatively priced voice service at the customer's residence, to any residential customer affected by the withdrawal or abandonment of BLES.

(1) If after the initial twelve-month period, the commission has not identified a willing provider of a reasonable and comparatively priced voice service to serve the customers, identified in paragraph (C) of this rule, the ILEC requesting the withdrawal or abandonment will have to continue to provide a reasonable and comparatively priced voice service, via any technology or service arrangement, to the customer at the customer's residence for an additional twelve-month period.

(2) If after the second twelve-month period, the commission has not identified a willing provider of a reasonable and comparatively priced voice service to serve the customers, identified in paragraph (C) of this rule, the ILEC requesting the withdrawal or abandonment will have to continue to provide a reasonable and comparatively priced voice service, via any technology or service arrangement, to the customer at the customer's residence until otherwise authorized by the commission.

(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.

(G) Pursuant to receiving such notice referenced in paragraph (F), 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 servicesto 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.

Summary: Finding & Order finding that the new rule set forth in Ohio Adm.Code 4901:1-6-21 should be adopted electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio