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

APPLICATION FOR REHEARING
OF
THE OHIO TELECOM ASSOCIATION

Under R.C. 4903.10 and Rule 4901-1-35 of the Ohio Administrative Code, the Ohio Telecom Association submits this Application for Rehearing of the Third Supplemental Finding and Order ("Order") issued by the Public Utilities Commission of Ohio on January 12, 2022, for the following reasons:

1. The Order is unlawful and unreasonable because the Commission is without authority to define "reasonably and comparatively priced voice service" in a way that varies from R.C. 4927.10(B)(3).
2. The Order is unlawful and unreasonable because the Commission extended notification and continuation of service obligations to telephone companies other than incumbent local exchange carriers including those providing voice grade services with voice over internet protocol service that are seeking to withdraw or abandon voice service in violation of R.C. 4927.07 and 4927.03.

Because the Order is unlawful and unreasonable, the Commission should grant this Application for Rehearing and conform Rule 4901:1-6-21 to Ohio law by deleting the last sentence of division (A) and the entirety of divisions (F) and (G).

Respectfully submitted,

/s/ Frank P. Darr

Frank P. Darr (Reg. No. 0025469)
Counsel of Record for Ohio Telecom Association
6800 Linbrook Blvd.
Columbus, Ohio 43235
(willing to accept service via email)
Fdarr2019@gmail.com

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MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING
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I. Introduction

R.C. 4927.07 governs the withdrawal and abandonment of telephone services regulated by the Public Utilities Commission of Ohio ("Commission") with the exception of basic local exchange service offered by an incumbent local exchange carrier. Under R.C. 4927.07(A), "a telephone company may withdraw any communications service if it gives at least thirty days' prior notice to the public utilities commission and its affected customers." Under R.C. 4927.07(B), "a telephone company may abandon entirely telephone service in this state if it gives at least thirty days' prior notice to the commission, to its wholesale and retail customers, and to any telephone company wholesale provider of its services."

R.C. 4927.10 governs the withdrawal of basic local exchange service by an incumbent local exchange carrier. That section permits an incumbent local exchange company to withdraw or abandon the provision of basic local exchange service if the FCC adopts an order that allows the carrier to withdraw the interstate-access component of the service under section 214 of the United States Code and certain notification requirements are met. R.C. 4927.10 also provides for the continuation of service by the incumbent local exchange carrier if a customer is unable to obtain reasonable and comparatively priced voice service upon the carrier's abandonment or withdrawal. For purposes of determining if a customer has access to alternative service, the 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, provides access to 9-1-1, and is competitively priced, when considering all the alternatives in the marketplace and their functionalities. R.C. 4927.10(B)(3).

Prior to the issuance of the Third Finding and Order, the Commission had twice sought to issue a rule to implement the requirements of R.C. 4927.10, but it had not completed the process for adoption of a final rule. To complete that process, it issued an Entry seeking comment on a new proposed Rule 4901:1-6-21. Entry (Aug. 25, 2021) ("Entry"). Following the receipt of comments, the Commission issued the Order adopting its proposed rule.

Despite the express legislative provisions that define and limit the scope of the Commission's authority over the withdrawal or abandonment of telephone services, the new version of Rule 4901:1-06-21 contains a rebuttable presumption that alternative voice grade service is competitively priced if the rate does not exceed the higher of either the basic local exchange rate of the incumbent local exchange carrier by 20% or the FCC's reasonable comparability benchmark for voice services.[1] Order, Attachment A at 1 (Rule 4901:1-6-21(A)). The rule also extends Commission review of a withdrawal or abandonment to a sole provider of voice service and applies the requirements of R.C. 4927.10 to a sole provider if the Commission determines that a residential customer will not have access to 9-1-1 service or if the current provider of voice service is the sole provider of emergency services to residential customers. Id., Attachment A at 3 (Rule 4901:1-6-21(F) and (G)).

Because the rule's provisions concerning competitive prices of service alternatives and the extension of withdrawal obligations applicable only to incumbent local exchange companies

[1] The proposed rule used a benchmark of the urban rate floor as part of a proposed rebuttable presumption that an alternative service was competitively priced. Because the FCC no longer publishes an urban rate floor value, the Commission substituted the FCC's the reasonable comparability benchmark. Order ¶ 50.

to any sole provider of voice service exceed the Commission's authority, the Commission should grant rehearing of its Order and revise the rule so that it complies with Ohio law.

II. Argument

1. The Order is unlawful and unreasonable because the Commission is without authority to define "reasonably and comparatively priced voice service" in a way that varies from R.C. 4927.10(B)(3)

As noted previously, R.C. 4927.10 provides a procedure by which an incumbent local exchange carrier may withdraw or abandon the provision of basic local exchange service. The opportunity to withdraw or abandon, 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.

(Emphasis added.)

Despite the legislative directive that the Commission "shall define the term 'reasonable and comparatively priced voice service to include'" the items listed in R.C. 4927.10(B)(3), the Commission elected to include a rebuttable presumption that a service is competitively priced "if the rate does not exceed the higher of either (1) the incumbent local exchange carriers' [sic] (ILEC) BLES rate by more than twenty percent or; (sic) (2) the federal communications commission's (FCC) reasonable comparability benchmark for voice services, which is define (sic) as two standard deviations above the urban average that is calculated by the FCC on an

annual basis as defined in 47 CFR 54.313(a)(2)."[2] According to the Commission, this definition is permitted because "the statute authorizes the Commission to define the term reasonable and comparatively priced voice service and identifies that it should *include* service that provides voice grade access to the public switch 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 functionality." Order ¶ 17 (emphasis in original). The Order also states that the statute does not prohibit the Commission from establishing specified benchmarks for the purpose of assessing if a voice service is presumptively deemed competitively priced. Id. The Commission concludes, "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." Id.

Initially, the suggestion that the Commission can add a rebuttable presumption to the definition of reasonable and comparatively priced voice service for the one provided in R.C. 4927.10(B)(3) ignores that the Commission has only the authority provided by the General Assembly. R.C. 4927.10(B)(3) directs the Commission to adopt a specific definition of "reasonable and comparatively priced voice service." That directive does not leave room for the Commission to add other terms such as the rebuttable presumption of what is a competitively priced alternative. 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).

To avoid the directive of R.C. 4927.10(B)(3), the Order asserts that the use of the term "include" permits the Commission to expand on the statutory definition, but the Order's reliance

[2] As indicated by the notations in the quoted portion of the rule, there appear to be three typographical errors in this part of the rule.

is mistaken. In this regard, the Ohio Supreme Court rejected a similar effort by the Commission to insert additional categories when the General Assembly had specified the provisions that were permitted as terms of an electric security plan under R.C. 4928.143(B)(2). That subdivision provides that "the plan may provide for or include, without limitation, any of the following," and then lists nine provisions describing additional elements that may be included. Under this subdivision, the Commission authorized a provision for the recovery of carrying costs for environmental investments, an item not included in one of the nine listed items. On appeal, the Commission argued that it was permitted to authorize the additional recovery because the statute provided that a plan may include without limitation additional items. The Court rejected that argument, stating, "The list limits the type of categories a plan may include, while the phrase 'without limitation' allows *as many or as much* of the listed categories as the commission finds reasonable—subject to any other applicable limits, which we do not consider here." In re Columbus S. Power Co., 128 Ohio St. 3d 512 ¶ 33 (2011) (emphasis in original). The Court continued, "The plain language of the statute controls, and this interpretation leads to a reasonable result. However, the appellees' interpretation would remove any substantive limit to what an electric security plan may contain, a result we do not believe the General Assembly intended." Id., ¶ 34.

By inserting a rebuttable presumption, the Commission commits the same error that led to the reversal in *Columbus Southern Power*. The General Assembly has provided specifically what is to be included in the definition of reasonable and comparatively priced voice service. Such a service is one "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." R.C. 4927.10(B)(3). Having defined the

service specifically, the statute does not permit the Commission to "include" additional terms such as the rebuttal presumption as it has done here.

Finally, the Commission's suggestion that removal of the rebuttable presumption will somehow restrict the Commission's ability to perform necessary analysis and result in potentially inconsistent assessments is not legally sufficient to overcome the legislative directive and is unwarranted as a policy prediction.

First, the Commission cannot legally vary the terms of a statutory requirement regardless of the administrative convenience that might afford it. In a similar vein, the Ohio Supreme Court has rejected an attempt to limit Commission jurisdiction through the application of a presumption because it amounted to a policy judgment. Wingo v. Nationwide Energy Partners, LLC, 2020 Ohio 5583, ¶¶ 23-25 (Ohio Sup. Ct. 2020). Similarly, the Commission's attempt to determine whether a price is competitive through the addition of a presumption not provided by law is a policy election beyond the Commission's authority.

Second, the Commission's suggestion that its short-hand method of determining whether a service is competitively priced because it will free up the Commission's analysis and the consistency of its assessments is inconsistent with the express statutory language. The statute directs the Commission to consider all alternatives. Thus, the determination of whether a service is competitively priced when considering all the alternatives in the marketplace and their functionalities cannot be presumed, rebuttably or otherwise.

In summary, the Commission's inclusion in the rule that a voice service is presumptively deemed competitive if it is not greater than either 120% of the incumbent's basic local exchange price or the FCC's reasonable comparability bench market is unlawful. Accordingly, the Commission should grant rehearing and revise Rule 4901:1-6-21(A) as follows:

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) 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 as defined in 47 C.F.R. 54.313(a)(2).~~

2. The Order is unlawful and unreasonable because the Commission extended notification and continuation of service obligations to telephone companies other than incumbent local exchange carriers including those providing voice grade services with voice over internet protocol service that are seeking to withdraw or abandon voice service in violation of R.C. 4927.07 and 4927.03

Despite the express limitations on its authority concerning the withdrawal or abandonment of telephone services, the Commission adopted Rule 4901:1-6-21(F) and (G) extending the application of all provisions of Rule 4901:1-6-21 to a sole provider of voice service. Division (F) provides that a telephone company that is the sole provider of voice service is required to notify the Commission of the company's intention to withdraw or abandon service.[3] Division (G) subjects a sole provider of voice service to the same notification, review,

[3] To the extent that division (F) is applied to telephone services that were commercially available before September 13, 2010 or are not voice over internet protocol service, it does not require anything more than what is required by R.C. 4927.07 and is not objectionable, but the division is redundant with other notification provisions contained in Chapter 4901:1-6 of the Commission's rules. However, to the extent that it is applied to services that did not become commercially available until September 13, 2010 and voice over internet protocol service, the rule is unlawful, as discussed below.

and continuation of service obligations as an incumbent local exchange carrier that is withdrawing basic local exchange service if an affected customer is a residential customer of voice service that will not have access to 9-1-1 service or the current provider of voice service is the sole provider of emergency services to residential customers. In an apparent attempt to justify this assertion of authority, the Order makes a finding that the proposed rule is narrowly tailored to address the public welfare and safety under R.C. 4927.03(A). Order ¶ 54-56. Despite the attempt to invoke its authority under R.C. 4927.03(A), the Commission's extension of jurisdiction in Rule 4901:1-6-21(F) and (G) is unlawful and unreasonable because it exceeds the specific grants of authority the General Assembly has provided to the Commission to regulate the withdrawal and abandonment of telephone services.

The services of a telephone company that the Commission may regulate are limited. Under R.C. 4927.03(D), "[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." Other provisions additionally narrow the Commission's authority. For example, while wireless service providers remain subject to the Commission's authority as telephone companies, R.C. 4927.03(B) restricts the authority of the Commission over wireless services and carriers to several narrowly defined areas unrelated to withdrawal or abandonment of service.

Additionally, the General Assembly has constrained the Commission's authority to regulate new services and voice over internet protocol service. Division (A) of R.C. 4927.03 provides, in part:

> Except as provided in divisions (A) and (B) of section 4927.04 of the Revised Code and except to the extent required to exercise authority under federal law, the public utilities commission has no authority over any interconnected voice over

> internet protocol-enabled service or any telecommunications service that is not commercially available on September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010, unless the commission, upon a finding that the exercise of the commission's authority is necessary for the protection, welfare, and safety of the public, adopts rules specifying the necessary regulation.

Regarding the withdrawal or abandonment of telephone services, Ohio law specifically limits the Commission's authority. Under R.C. 4927.07(A) and (B), *any* telephone company may withdraw or abandon *any* telecommunications service if it gives at least thirty days' prior notice to the Commission, its affected customers, and (in the case of an abandonment) any wholesale provider of its services. Although the discontinuation of basic local exchange service is a listed exception to R.C. 4927.07(A) and (B), R.C. 4927.10 extends the Commission's authority to only the withdrawal or abandonment of basic local exchange service by an incumbent local exchange carrier.

Under this limited statutory structure, division (F) rule 4901:1-6-21 sweeps too broadly. To the extent that this provision is applied to a traditional wireline service (other than basic local exchange service), the Commission has authority to impose a 30-day notification requirement, but has already adopted rules requiring notification.[4] The Commission's legal authority to require such notification, however, does not extend to services that became commercially available after September 2010 or voice over internet protocol service unless it properly adopts a rule based on a finding that the rule is necessary for the protection, welfare, and safety of the public. (The authority under the exception is discussed below separately.) Because division (F) sweeps in any voice service, including both newer services and voice over internet protocol service, the scope of the division is too broad and unlawful.

[4] This section also cannot apply to the withdrawal or abandonment of basic local exchange service since that service is addressed elsewhere. R.C. 4927.10 and Rule 4901:1-6-21(A)-(E).

The adoption of division (G) is also in error. As noted previously, division (G) extends the notification, review, and continuation of service obligations to any sole provider if a residential customer will not have access to 9-1-1 service or the current provider is the sole provider of emergency services to residential customers. However, the Commission's authority over withdrawal or abandonment of services by a telephone company is specifically set out in R.C. 4927.07(A) and (B). Those divisions do not provide any authority for the Commission to impose anything more than a 30-day notification requirement to affected customers and wholesale providers. More specifically, they do not permit the Commission to impose a duty to provide continuing access to voice service. Accordingly, Rule 4901:1-6-21(G) applies duties to voice providers beyond what the Commission can lawfully order a telephone company to undertake.

The imposition of requirements that otherwise exceed the Commission's authority is not rectified by the Order's reliance on a finding that the rules advance the public welfare. Regarding that finding, the Order contains three legal errors.

First, the Commission does not have authority to apply its emergency authority in a way that results in the Commission's rewriting of statutory requirements, as the Ohio Supreme Court held in *Montgomery County Bd. of Comm'rs v. Pub. Utils. Comm'n of Ohio*, 28 Ohio St.3d 171 (1986). In that case, the Commission invoked its emergency authority to authorize recovery of costs of a low-income program in a fuel rider. The Court concluded that the order allowing recovery of the program costs was unlawful because it exceeded the statutory provision defining the costs recoverable under the rider. Similarly, the Commission cannot use the authority provided under R.C. 4927.03(A) to expand its authority to impose requirements that contradict other statutory limits on the Commission's authority. Regarding withdrawal or abandonment of

any service other than basic local exchange service by an incumbent local exchange company, the only requirement that the Commission can impose is notification of the withdrawal or abandonment of the service under R.C. 4927.07(A) and (B). In particular, there is no authority on which the Commission direct a provider to continue voice service indefinitely as it purports to do with the adoption of Rule 4901:1-6-21(G).

Second, the Commission has not provided a reasonable basis for a finding that the public welfare requires the application of the requirements of R.C. 4927.10 to voice over internet protocol service and new commercial services under R.C. 4927.03(A). The apparent paucity of support for the finding is evident in the Commission's discussion of the supposed injury to the public welfare on which it bases its decision. The Commission posits that loss of 9-1-1 service supports the need to take action. Order ¶ 56. However, the record, to the extent there is one, shows that telephone services are nearly ubiquitous and becoming more so. See Reply Comments of Ohio Telecom Association at 4 (Sept. 10, 2021) and AT&T Ohio's Reply Comments at 2-3 (Sept. 10, 2021). Further, the Commission has had years since it first advanced the theory that an emergency justified adoption of some version of Rule 4901:1-6-21(F) or (G), yet the Commission does not cite a single instance in which a customer is or will likely be at risk. Order ¶¶ 54-57. More is required under R.C. 4927.03(A) than broad and unsupported statements that the injury to the public welfare requires the Commission's adoption of a rule. Columbus Southern Power, 128 Ohio St. 3d 512, ¶¶ 29-30 (the Commission must support its findings with a record).

Third, Rule 4901:1-6-21(F) and (G) are unlawfully overbroad. The divisions apply to any sole provider of voice service. Under R.C. 4927.03(A), however, the authority to adopt a rule based on public welfare findings applies to only services that became available after September

13, 2010 and voice over internet protocol service. Thus, the public welfare finding relied upon by the Order cannot legally justify the extension of notification, review, and continuation of service obligations to providers of services that became commercially available prior to September 13, 2010 or are not voice over internet protocol services.

Because Rule 4901:1-6-21 (F) and (G) do not comport with Ohio law, the Commission should delete them.[5]

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. To conform Rule 4901:1-6-21 to Ohio law, the Commission should grant rehearing and delete the last sentence of division (A) and the entirety of divisions (F) and (G).

Respectfully submitted,

/s/ Frank P. Darr
Frank P. Darr (Reg. No. 0025469)
Counsel of Record for Ohio Telecom Association
6800 Linbrook Blvd.
Columbus, Ohio 43235
(willing to accept service via email)
Fdarr2019@gmail.com

[5] To the extent there is a lawful basis to impose a notification provision, the Commission already has rules that require such notification. See Rule 4901:1-6-25 and 4901:1-6-26. Any additional notification provision would be redundant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Application for Rehearing of the Ohio Telecom Association* will be served on February 11, 2022, pursuant to the procedures established by the Document Information System under Rule 4901-1-05. A copy was also served by email to the following persons.

/s/ Frank P. Darr
Frank P. Darr

Dt1329@att.com
glpetrucci@vorys.com
Patrick.crotty@cinbell.com
ejacobs@ablelaw.org
nmorgan@lascinti.org
msmalz@ohiopovertylaw.org
mwalters@proseniors.org
plee@oslsa.org
William.haas@t-mobile.com
David.vehslage@verizon.com
Glenn.richards@pillsburylaw.com
Jeffrey.jones@puc.state.oh.us
Jay.agranoff@puc.state.oh.us
Karen.wolf@motorolasolutions.com
Ambrosia.wilson@occ.ohio.gov
Jamie.williams@occ.ohio.gov
Michele.noble@squirepb.com
Mo2753@att.com
Joseph.cohen@pillsburylaw.com
dhart@douglasehart.com
Deborah.kuhn@verizon.com
Jk2961@att.com
Matthew.myers@upnfiber.com
Kathy.l.buckley@verizon.com
stnours@aep.com
sjagers@ohiopovertylaw.org
mlinville@columbuslegalaid.org
aasanyal@vorys.com
jonfkelly@sbcglobal.net

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