

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
REVIEW OF OHIO ADM.CODE 4901:1-6
REGARDING TELEPHONE COMPANY
PROCEDURES AND STANDARDS.

CASE NO. 14-1554-TP-ORD

ENTRY ON REHEARING

Entered in the Journal May 18, 2022

I. SUMMARY

{¶ 1} In this Entry on Rehearing, the Commission denies the application for rehearing filed by the Ohio Telecom Association and grants, in part, and denies, in part, the application for rehearing filed by the Ohio Cable Telecommunications Association.

II. DISCUSSION

{¶ 2} On September 5, 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.

{¶ 4} Pursuant to its Entry of May 2, 2018, the Commission requested comments 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 (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 is incorporated by reference.

{¶ 8} Pursuant to the Entry of August 25, 2021, the Commission sought comments on a new proposed Rule 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.

{¶ 9} On January 12, 2022, the Commission issued its Third Supplemental Finding and Order adopting Rule 21.

{¶ 10} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 11} Applications for rehearing were filed on February 11, 2022, by both OCTA and OTA alleging, based on numerous grounds, that it was unjust and unreasonable for the Commission to adopt Rule 21.

{¶ 12} Memorandum contra the applications for rehearing were jointly filed by Consumer Groups on February 22, 2022.

{¶ 13} Pursuant to its March 9, 2022 Entry on Rehearing, the Commission granted the applications for rehearing filed by OCTA and OTA for further consideration of the matters specified in the applications for rehearing.

{¶ 14} In its first assignment of error, OCTA asserts that it was unjust and unreasonable for the Commission to adopt Rule 21 in violation of R.C. 121.95(F). In its second assignment of error, OCTA contends that it was unjust and unreasonable for the Commission to fail to address how adopting the rule complies with R.C. 121.95(F). According to OCTA, R.C. 121.95(F) prohibits the adoption of new regulatory restrictions unless the Commission simultaneously removes two or more other regulatory restrictions. OCTA submits that the Commission made no attempt to remove two existing regulatory restrictions for each of the restrictions it adopted in Rule 21.

{¶ 15} OCTA asserts that the substantive effect of Ohio Adm.Code 4901:1-6-21 is to impose regulatory restrictions on various entities, including unlawfully on voice service providers. According to OCTA, Rule 21 incorporates 15 regulatory restrictions that either require or prohibit an action. Specifically, OCTA identifies the following restrictions:

A. Subsection A

- “The collaborative * * * will review the * * *”
- “This will be done for the purpose * * *”

B. Subsection B

- “An [incumbent local exchange carrier (LEC)] cannot discontinue * * *”
- “Receipt of this notice by the Commission will trigger * * *”
- “As part of this notice and investigation process an ILEC has to provide * * *”

- “The notice has to include * * *”
- “The notice needs to state the petition * * *”
- “The notice has to be published * * *”
- “An attachment to the notice will have to either * * *”

C. Subsection C

- “* * *[T]hat customer will be treated as * * *”

D. Subsection D

- “[T]he ILEC’s notice to withdraw or abandon will be deemed * * * ”

E. Subsection E

- “* * * [T]he ILEC requesting the withdrawal or abandonment will have to provide * * *”
- “This order will also address * * *”
- “* * * [T]he ILEC requesting the withdrawal or abandonment will have to continue * * *”

F. Subsection F

- “* * *[I]t has to notify the Commission * * *”

{¶ 16} In its third assignment of error, OCTA argues that it was unjust and unreasonable for the Commission to extend the reach of its BLES withdrawal rule and regulate voice services, including voice over internet protocol (VoIP) services.

{¶ 17} In its fourth assignment of error, OCTA states that it was unjust and unreasonable for the Commission to conclude in this rule proceeding that it has to address access to 9-1-1 service and that it has to 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.

{¶ 18} In its fifth assignment of error, OCTA argues that it was unjust and unreasonable for the Commission to conclude that abandonment or withdrawal of voice service by a sole provider of service will result in the inability of an end user to access 9-1-1 service and emergency services, and to transmit information related to medical devices.

{¶ 19} In its sixth assignment of error, OCTA submits that it was unjust and unreasonable for the Commission to adopt Rules 21(F) and (G) because OCTA believes that it would conflict with the Commission's previously stated intent to exempt VoIP and advanced service providers from the rules in Ohio Adm.Code Chapter 4901:1-6.

{¶ 20} Specific to its third through sixth assignments of error, OCTA avers that the Commission impermissibly expanded the scope and reach of its regulatory authority under Rule 21 to cover all voice service providers operating in Ohio, including deregulated VoIP service providers. In particular, OCTA opines that the Commission unlawfully concluded that it has the authority to address access to 9-1-1 service offered by otherwise non-regulated providers and that the Commission lacked sufficient evidence to support its conclusion that abandonment or withdrawal of voice service by a sole provider of service would result in the inability to access 9-1-1 and emergency services, or to transmit information related to medical devices. According to OCTA, the Commission's justification in the Third Supplemental Finding and Order are unlawful because: (a) nothing in Amended Substitute House Bill 64 (H.B. 64), the legislation that permits ILECs to withdraw from the provision of BLES, authorized new Commission regulations over voice services and providers, including VoIP; (b) the Commission's reliance on R.C. 4927.03(A) is misplaced and lacks the

necessary support of record-based facts; and (c) the extended reach contradicts the Commission's recent stated intent to exempt such providers and services from the Commission's regulation.

{¶ 21} In support of its position, OCTA describes H.B. 64 as amending certain portions of R.C. Chapter 4927 by establishing a process through which ILECs may withdraw their BLES services in certain circumstances. OCTA argues that the Legislature expressly distinguished BLES from other voice services for the purpose of establishing withdrawal rules pursuant to H.B. 64 and R.C. 4927.10 and nothing in H.B. 64 authorizes the Commission to impose new regulations on voice service providers. According to OCTA, if the Legislature had intended to direct the Commission to impose new regulations on other voice services and providers, including VoIP, it would have included language to that effect. Therefore, OCTA asserts that the Commission cannot improperly impose on such providers and services, a regulatory burden when the Legislature did not see fit to impose one.

{¶ 22} OCTA also argues that the Commission improperly relies on R.C. 4927.03(A) to expand its regulatory authority to include voice services and providers, including VoIP. According to OCTA, R.C. 4927.03 was established in 2012 to deregulate new communication services, including VoIP. Referencing the statutory language of R.C. 4927.03, OCTA argues that the Commission has no authority over any VoIP service or any telecommunications service that was not commercially available on September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010. Additionally, OCTA states that the Commission relies upon statements from the November 30, 2016 Finding and Order to support its adoption of Rules 21(F) and (G). Therefore, OCTA avers that the Commission has made a serious error in relying on R.C. 4927.03(A) to justify and impose new regulations on deregulated services.

{¶ 23} As further support for its application for rehearing, OCTA argues that the Commission's justification for adopting Rule 21(F) and (G) is not based on any actual facts or any actual or reasonably possible scenario to constitute a finding under R.C. 4927.03(A).

OCTA argues that rather than responding to a known grievance or injury, the Commission adopted Rules 21(F) and (G) to prospectively ensure that an ILEC's residential subscribers will continue to have access to 9-1-1 service. OCTA highlights that the Commission does not cite to any evidence where residential subscribers have been left without access to 9-1-1 service. Therefore, OCTA believes that the loss of all but one non-BLES voice service is a hypothetical situation and is not a record-based finding of the need for adopted Rules 21(F) and (G).

{¶ 24} OCTA argues that under the adopted rule, only the last provider to withdraw voice service is subject to Rules 21(F) and (G). Therefore, OCTA contends that the rules will create a hypothetical "race to the Commission" for providers to withdraw service, creating a perverse incentive for non-BLES voice providers to withdraw service and actually endangering access to 9-1-1 service. OCTA also asserts that there are extensive activities at the federal and state level pursuant to which providers are deploying new broadband infrastructure across Ohio to reach residential customers with Tier 2 broadband service. OCTA submits that this development contradicts the Commission's conclusions regarding the risk of loss of access to 9-1-1 emergency services. OCTA also posits that Rules 21(F) and (G) could apply to any provider of voice service that is the sole provider of voice service and could even apply if the customer was never an ILEC BLES customer.

{¶ 25} OCTA argues that Rules 21(F) and (G) are inconsistent with the Commission's other rules in Ohio Adm.Code Chapter 4906:1-6. OCTA references Ohio Adm.Code 4901:1-6-02 and specifically focuses on the rule language in Rules 2(B) and (C) that exempted the application of the rules in Ohio Adm.Code Chapter 4901:1-6 for wireless service providers and VoIP service providers except where specifically stated otherwise. OCTA also references Ohio Adm.Code 4901:1-6-02(D), which states that a provider of any telecommunications service that is not commercially available as of September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010, is exempt from all rules set forth in Ohio Adm.Code Chapter 4901:1-6, except for Ohio

Adm.Code 4901:1-6-36. Therefore, OCTA avers that it is improper to for the Commission to extend its reach as it has done with Rules 21(F) and (G).

{¶ 26} In its seventh assignment of error, OCTA states that it was unjust and unreasonable for the Commission to conclude that the obligations of Rule 21 as adopted are not unduly burdensome on voice service providers. OCTA believes that applying these obligations will be burdensome. According to OCTA, these burdens include being singled out and given an unfunded mandate to provide voice service. OCTA also believes that the rule requirements will discourage companies from being a voluntary willing provider, will create a significant barrier for company investment, and will create a potential conflict between state and federal law.

{¶ 27} In its eighth assignment of error, OCTA believes that it was unjust and unreasonable for the Commission to fail to evaluate Rule 21 against the Business Impact Analysis (BIA) and to fail to transmit the rule to the Common Sense Initiative Office (CSI), as required by R.C. 121.82. Specifically, OCTA states that the Commission's Entry of August 2021 calling for comments on Rule 21 did not include a directive that the draft rule be sent to CSI and the Third Supplemental Finding and Order did not reflect that this had occurred.

{¶ 28} In its first assignment of error, OTA argues that the Commission's Third Supplemental Finding and Order is unlawful and unreasonable because the Commission is without authority to define reasonable and comparatively priced voice service in a way that varies from R.C. 4927.10(B)(3). According to OTA, despite the legislative directive definition, the Commission elected to expand the definition to include a rebuttable presumption that a service is competitively priced if the rate does not exceed the higher of either (1) the ILEC's BLES rate by more than twenty percent or (2) the Federal Communications Commission's (FCC) reasonable comparability benchmark for voice service, 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).

{¶ 29} OTA rejects the Commission's inclusion of a rebuttable presumption into the definition of reasonable and comparatively priced voice service due to its belief that the Commission only has the authority provided by the General Assembly and cannot exceed the authority granted under R.C. 4927.10 by adding terms such as a rebuttable presumption. Relying upon *In re Columbus Southern Power Co.*, 128 Ohio St. 3d 512, ¶33 (2011), OTA argues that the Court rejected any argument that the Commission may consider additional items beyond those specifically delineated in a statute. OTA argues that, similar to the Court's decision in *Columbus Southern Power Co.*, the Commission has exceeded what can be included in the definition of reasonable and comparatively priced voice service as defined in R.C. 4927.10(B)(3). Additionally, OTA dismisses any contention that a rebuttable presumption is necessary for the Commission's ability to perform the necessary analysis as to whether a service is competitively priced. Rather, OTA contends that the Commission must consider all alternatives in the marketplace and their functionalities. Further, citing *In re Wingo v. Nationwide Energy Partners*, 2020 Ohio 5583, ¶¶23-25 (Ohio Sup. Ct. 2020), OTA submits that 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.

{¶ 30} In its second assignment of error, OTA argues that the Third Supplemental Finding and Order's adoption of Rules 21(F) and (G) is unlawful and unreasonable because the Commission extended notification and continuation of service obligations to telephone companies other than ILECs, including those providing voice grade services through VoIP, that are seeking to withdraw or abandon voice service. According to OTA, these provisions are in violation of R.C. 4927.07 and 4927.03. While recognizing that the discontinuation of BLES is a listed exception to R.C. 4927.07(A) and (B), OTA states that R.C. 4927.10 extends the Commission's authority to only the withdrawal or abandonment of BLES by an ILEC. Concerning the Commission's authority to impose a 30-day notification requirement, OTA argues that, consistent with R.C. 4927.03, the Commission's authority to require such a notification does not extend to services that became commercially available after September

13, 2010 or VoIP unless it properly adopts a rule based on a finding that the rule is necessary for the protection, welfare, and safety of the public.

{¶ 31} OTA believes that Rule 21(F) is in error because it includes any voice service, including both newer services and VoIP. OTA avers that the adoption of Rule 21(G) is also in error because the Commission's authority over withdrawal or abandonment of services by a telephone company is specifically delineated in R.C. 4927.07(A) and (B) and 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 and they do not permit the Commission to impose a duty to provide continuing access to voice service.

{¶ 32} Relative to the Commission's reliance on R.C. 4927.03 to support the adoption of Rules 21(F) and (G), OTA argues that the Commission does not have authority to apply its emergency authority in a way that results in the Commission's rewriting of statutory requirements. Citing *Montgomery County Bd. of Comm'rs v. Pub. Utils. Comm'm of Ohio*, 28 Ohio St.3d 171 (1986), OTA specifically asserts that 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 the withdrawal or abandonment of any service other than BLES, OTA believes that the only requirement that the Commission can impose is notification of the withdrawal or abandonment of service under R.C. 4927.07(A) and (B). Additionally, OTA posits that there is no authority upon which the Commission may direct a provider to continue voice service indefinitely as required by the adoption of Rule 21(G).

{¶ 33} OTA argues that 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 VoIP and new commercial services under R.C. 4927.03(A). OTA submits that there is no evidence of the loss of 9-1-1 service and that telephone services are nearly ubiquitous and becoming more so. Additionally, OTA asserts that the Commission does not cite to a single

instance in which a customer is or will likely be at risk. Citing *In re Columbus Southern Power Co.*, ¶¶ 29-30, OTA believes that more is required under R.C. 4927.03(A) than broad, unsupported statements.

{¶ 34} Finally, OTA submits that Rules 21(F) and (G) are unlawfully broad and cannot be extended to providers of services that became commercially available prior to September 13, 2010, or are not VoIP. OTA contends that under R.C. 4927.03(A), the authority to adopt a rule based on public welfare findings apply only to services that became available after September 13, 2010, and VoIP services. Therefore, OTA asserts that the public welfare finding relied upon in the Third Supplemental Finding and 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 VoIP services.

{¶ 35} Consumer Groups contend that OCTA and OTA rehash the same anti-consumer arguments that they made in their comments and reply comments in this case. According to Consumer Groups, the Commission correctly rejected these arguments in its Third Supplemental Finding and Order and should similarly do so on rehearing.

{¶ 36} Specific to OTA's request that the Commission modify Rule 21(A) and delete Rules 21(F) and (G), Consumer Groups reject OTA's contention that the Commission has no authority to define "reasonable and comparatively priced voice service" in a way that varies from R.C. 4927.10(B)(3). Instead, Consumer Groups believe that the Commission has the authority to define "reasonable and comparatively priced voice service." In support, Consumer Groups highlight that R.C. 4927.10 provides the Commission with authority to define "reasonable and comparatively priced voice service" and that the statute states that the Commission shall define the term to include "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 functionalities." Therefore, Consumer Groups assert that the Commission correctly found

that R.C. 4927.10 does not prohibit it from establishing specified benchmarks for the purpose of assessing if a voice service is presumptively deemed competitively priced.

{¶ 37} Consumer Groups believe that OCTA's assignments of error 3-6 and OTA's second assignment of error should be denied because the Commission's adoption of Rules 21(F) and (G) is lawful and furthers consumer protection by extending notification and continuation of service obligations to non-incumbent telephone companies seeking to withdraw or abandon voice service. In support of their position, Consumer Groups assert that the Commission lawfully determined that it should not wait to act until after an injury or fatality to a consumer has occurred for lack of telephone service. Instead, Consumer Groups believe that this consumer concern regarding protecting against the loss of access to 9-1-1 service must be addressed in this rule proceeding and prior to the filing of the first notice seeking the withdrawal or abandonment of voice service. Specifically, Consumer Groups opine that when the only access to 9-1-1 service is via a voice service that is being discontinued, regardless of whether it is voice service or basic service, the Commission should assist consumers in finding a willing provider of service to their homes.

{¶ 38} Upon a review of the arguments raised, the Commission finds that the applications for rehearing filed by OTA be denied and that the application for rehearing filed by OCTA be granted, in part, and denied, in part, as discussed below.

{¶ 39} In regard to the OCTA's first two assignments of error pertaining to the failure to comply with R.C. 121.95(F) and the failure to remove two existing regulatory restrictions for each of the restrictions it adopted in Rule 21 (2 for 1 requirements), the Commission finds that its adoption of Rule 21 does not violate R.C. 121.95(F) inasmuch as the 2 for 1 requirements of the statute do not apply. Specifically, none of the subsections identified in Paragraph 15 above contain any of the prohibited regulatory restriction words set forth in R.C. 121.95(B). Therefore, in our view, R.C. 121.95(F) does not apply.

{¶ 40} In regard to OCTA's third through sixth assignments of error, the Commission finds that we did not impermissibly expand the scope and reach of our

regulatory authority in approving Ohio Adm.Code 4901:1-6-21. As thoroughly addressed in the Commission's Third Supplemental Finding and Order, Ohio Adm.Code 4901:1-6-21 undoubtedly qualifies as a scenario contemplated by R.C. 4927.03(A) regarding need to provide for the protection, welfare, and safety of the public that merits our oversight. R.C. 4927.03.(A) clearly authorizes the Commission to exercise its authority over interconnected VoIP or any service that employs technology that became available for commercial use only after September 13, 2010, upon a finding that the exercise of the Commission's authority is necessary for the protection, welfare, and safety of the public and adopts rules specifying the necessary regulation. This is exactly what the Commission did in this proceeding pursuant to its adoption of Ohio Adm.Code 4901:1-6-21(F) and (G) and nothing in H.B. 64 negates this conclusion.

{¶ 41} Responding to OCTA's contention that the Commission's reliance on R.C. 4927.03(A) is misplaced and lacks the necessary support of record-based facts, the Commission determines that, unlike a complaint case, this is a rule proceeding. A rule proceeding is a quasi-legislative function that is not subject to the same fact-based determinations as a quasi-judicial proceeding. Therefore, a reduced threshold applies in a quasi-legislative proceeding such as this rulemaking. Nevertheless, the Commission reiterates that the primary concern relied upon by the Commission in the Third Supplemental Finding and Order is the recognition that in the absence of Rules 21(F) and (G), a scenario could occur in which Ohio ILEC residential subscribers will be unable to access 9-1-1 service subsequent to an ILEC abandoning the offering of BLES service. Although OCTA is correct that presently there are no known current residential customers without access to 9-1-1 service and that providers are deploying new broadband infrastructure to provide residential customers with Tier 2 broadband service, this does not negate the concern that a scenario may arise in which a customer will be unable to access 9-1-1 service subsequent to an ILEC abandoning the offering of BLES service. This concern is not hypothetical in nature and must be prospectively addressed at the time of this rulemaking rather than waiting until after the occurrence of an injury or fatality.

Responsible regulators are charged to protect the public by identifying potential scenarios that may threaten the protection of the public safety and welfare. The true purpose of protection is to prospectively take the necessary steps to reduce the likelihood of the harm occurring rather than waiting for the harm to occur and then respond. This is exactly what the Commission has done in this case through its determinations and adoption of Rule 21. To do otherwise, would be regulatory negligence and a dereliction of duty. In reaching this determination, the Commission notes that the proposed remedy set forth in Rule 21 is narrowly tailored and does not place an undue burden on voice providers. Rather, it is only applicable in the limited scenario in which a customer will be unable to access 9-1-1 service.

{¶ 42} The Commission agrees with OCTA that rehearing should be granted regarding the argument that Rules 21(F) and (G) are inconsistent with the Commission's current Rule 4901:1-6-02 that took effect on December 27, 2021. Specifically, OCTA is correct that the approved language in the most recently adopted Ohio Adm.Code 4901:1-6-02 provides that VoIP and wireless providers are exempt from all rules in Chapter 4901:1-6, unless where specifically noted otherwise. Rule 21, which was not approved by the Commission until the issuance of the Third Supplemental Finding and Order on January 12, 2022, did not exist at the time of the adoption of current Ohio Adm.Code 4901:1-6-02. Therefore, the Commission finds that consistent with the granting of rehearing, the Commission shall commence a proceeding to amend Ohio Adm.Code 4901:1-6-02(B), (C), and (D) to include Ohio Adm.Code 4901:1-6-21(F) and (G) as rules for which the provided exemptions do not apply.

{¶ 43} The Commission finds that OCTA's seventh assignment of error should be denied inasmuch as OCTA has failed to raise any new arguments for the Commission's consideration. Additionally, the Commission determines that the obligations of Rule 21 are not unduly burdensome and are narrowly tailored to specifically address the limited scenario in which a sole provider of voice service seeks to withdraw or abandon service.

{¶ 44} With respect OCTA's eighth assignment of error, the Commission finds that rehearing should be granted regarding OCTA's contention that the Commission failed to evaluate Rule 21 against the BIA and failed to transmit the rule to CSI. Appendix A to this Entry on Rehearing reflects the BIA, which will be submitted to CSI. While making this determination, the Commission notes that a BIA for a similar version of Rule 21 was issued pursuant to the Commission's Entry of September 23, 2015, issued in this case.

{¶ 45} Relative to OTA's first assignment of error asserting that the Commission is without authority to define reasonable and comparatively priced voice service in a way that varies from R.C. 4927.10(B)(3), the Commission finds that OTA's application for rehearing should be denied inasmuch as it has failed to raise any new arguments for the Commission's consideration. The Commission pointed 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. Responding to OTA's reliance on *In re Columbus Southern Power Co.*, in support of its position that the Commission cannot consider additional items beyond those specifically delineated in a statute, the Commission finds that it did not violate R.C. 4927.10(B)(3) by including additional criteria to the definition of reasonable and comparatively priced voice service. Instead, pursuant to Ohio Adm.Code 4901:1-6-21, the Commission adopted the definition of reasonable and comparatively priced voice service set forth in R.C. 4927.10(B)(3), and then added context to what constitutes competitively priced service. As discussed in its Third Supplemental Finding and Order, nowhere in R.C. 4927.10 does the statute define "competitively priced" or indicate that the Commission is prohibited from establishing specified benchmarks for the purpose of assessing if a voice service is presumptively deemed competitively priced.

{¶ 46} With respect to OTA's second assignment of error alleging that the Commission's adoption of Ohio Adm.Code 4901:1-6-21(F) and (G) is unlawful and unreasonable because the Commission improperly extended notification and continuation obligations to providers other than ILECs, the Commission finds that the application for

rehearing should be denied for the same reason discussed above in response to the jurisdictional arguments raised by OCTA.

{¶ 47} Finally, OTA identified three grammatical errors within the language incorporated in Rule 21(A). These have been addressed in the attached Appendix B rule language.

III. ORDER

{¶ 48} It is, therefore,

{¶ 49} ORDERED, That the application for rehearing of OCTA be granted, in part, and denied, in part, as set forth above. It is, further,

{¶ 50} ORDERED, That the application for rehearing of OTA be denied. It is, further,

{¶ 51} ORDERED, That, to the extent not specifically addressed herein, all other arguments raised in the applications for rehearing are denied. It is, further,

{¶ 52} ORDERED, That a copy of this Entry on Rehearing be served upon each party and interested person of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

JSA/mef



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Carrie Kuruc, Director

Business Impact Analysis

Agency, Board, or Commission Name: Public Utilities Commission of Ohio (PUCO)

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Regulation/Package Title (a general description of the rules' substantive content):

Ohio Adm.Code Chapter 4901:1-6 Telephone Company Procedures and Standards

Rule Number(s): 4901:1-6-21

Date of Submission for CSI Review: _____

Public Comment Period End Date:

Rule Type/Number of Rules:

- ☒ **New/___1___ rules**
☐ **No Change/_____ rules (FYR? ____)**
☐ **Amended/_____ rules (FYR? ____)**
☐ **Rescinded/_____ rules (FYR? ____)**

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing

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regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Reason for Submission

1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rules for CSI review.

Which adverse impact(s) to businesses has the agency determined the rule(s) create?

The rule:

- ☐ a. Requires a license, permit, or any other prior authorization to engage in or operate a line of business.
- ☐ b. Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.
- ☒ c. Requires specific expenditures or the report of information as a condition of compliance.
- ☐ d. Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.

Regulatory Intent

On September 5, 2014, the Commission opened docket *In re Review of Chapter 4901:1-6 of the Ohio Adm.Code Case No. 14-1554-TP-ORD*, in which a five-year review of its retail telecommunications rules, including the withdrawal and abandonment of telecommunications services, is being considered. A workshop was held, a Business Impact Analysis was submitted and comments were received relative to the review of Ohio Adm.Code 4901:1-6.

Subsequent to the holding of the workshop and the receipt of comments, the 131st Ohio General Assembly adopted Am. Sub. House Bill 64 (H.B. 64) that, among other things, directed the Commission to adopt rules to implement R.C. 4927.10 and 4927.101, as well as the amendments on August 26, 2015. Pursuant to the Entry of September 16, 2015,

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comments were sought regarding Commission Staff proposed rules implementing R.C. 4927.10 and 4927.101, as well as amendments to R.C. 4927.01, 4927.02, 4927.07, and 4927.11.

On November 30, 2016, the Commission issued a Finding and Order. As a result, some of the rules in Ohio Adm.Code Chapter 4901:1-6 were updated.

Pursuant to the Entry of July 2, 2019, the Commission requested comments on proposed revisions to Ohio Adm.Code 4901:1-6-02, 07 and 21. 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 (U.S.C) and the Code of Feral Regulations (C.F.R.) is incorporated by reference.

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. The rule was adopted on January 12, 2022, pursuant to the Third Supplemental Finding and Order, as amended by the Entry on Rehearing of May 18, 2022.

2. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

Ohio Adm.Code Chapter 4901:1-6 establishes the procedures and standards for telephones companies in the state of Ohio. The proposed rule amendments include:

- a) The addition of new Ohio Adm.Code 4901:1-6-21 regarding applicable process and obligations related to the withdrawal of BLES or voice service by an incumbent local exchange carrier (ILEC) or willing provider deemed to be the sole provider of voice service and the establishment of the obligations of a sole provider to the extent that it seeks to withdraw or abandon such voice service;

3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

4901.13, 4927.03, 4927.10, 4927.11

4. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

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Pursuant to Ohio Adm.Code 4901:1-6-21(A) A voice service is presumptively deemed competitively priced subject to rebuttal, if the rates do not exceed the higher of either: (1) the ILEC 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 annual basis as defined in 47 C.F.R. 54.313(a)(2).

Pursuant to Ohio Adm.Code 4901:1-6-21(B)(1), as part of the process to withdraw BLES by an ILEC, a copy of the FCC's order under 47 U.S.C 214 that allows the carrier to withdraw the interstate-access component of its BLES must be provided.

- 5. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

The areas of certification and operation of telephone providers relative to their intrastate offerings is under the jurisdiction of the PUCO, and not the FCC. Therefore relative to proposed Ohio Adm.Code 4901:1-6-21, the regulation neither exceeds nor is inconsistent with any federal requirements.

- 6. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The public purpose of Ohio Adm.Code 4901:1-6-21 is to implement the statutory authority regarding the withdrawal or abandonment of BLES as set forth in R.C. 4927 and at the same time exercising the Commission's authority pursuant to R.C. 4927.03 for the protection, welfare and safety of the public.

- 7. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

Among other things, the PUCO will be able to monitor the number of subscribers to whom notice is given pursuant to paragraph (B)(2) of proposed Ohio Adm.Code 4901:1-6-21 and the number of subscribers who file a petition pursuant to paragraph (C) of the proposed rule or who are identified by the collaborative process referenced in the rule.

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8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?

If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.

Development of the Regulation

9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

On August 25, 2021, in Case No. 14-1554-TP-ORD, the PUCO issued an entry by electronic service and/or U.S. mail calling for comments relative to proposed Ohio Adm.Code 4901:1-6-21. The entry was served upon all prior commentors and interested persons of record in the docket.

10. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

Initial comments were filed on September 1, 2021, 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. Reply comments were filed on September 10, 2021, by these same entities

11. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

No scientific data was used to develop the rules.

12. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

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No alternative regulations were proposed to address the Commission's concerns regarding protecting the public welfare and safety through the required continuance of 9-1-1 service.

13. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

No. This chapter by its very nature is largely process driven since it implements procedures and standards that track R.C. Chapter 4927.

14. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The PUCO has reviewed other Ohio regulations and found no duplication.

15. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

A notice of withdrawal or abandonment will be sent to all affected customers providing for a 120-day notice period during which petitions can be filed by affected individuals or their representatives alleging that the customer will be unable to obtain reasonable and comparatively priced voice service upon the withdrawal or abandonment of BLES offered by the ILEC. Alternatively, if a residential customer is identified by the collaborative process established under amended Substitute H.B. 64 as a customer who will be unable to obtain reasonable and comparatively priced voice service upon the withdrawal or abandonment of BLES offered by the ILEC, that customer may be treated as though they timely filed a petition.

Adverse Impact to Business

16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community; and

All ILECs and all willing providers of reasonable and comparatively priced voice service, including these sole providers of voice service.

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- b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and
ILECs and willing providers who are the sole providers of voice service must comply with the requirements of Rule 21, including the notification obligations and potential continued obligation to provide access to 9-1-1 service.

- c. Quantify the expected adverse impact from the regulation.
The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

The notification and potential access to 9-1-1 service obligations will have an unknown time and financial cost associated with them.

17. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The obligations set forth in adopted Ohio Adm.Code 4901:1-6-21 are justified in order to ensure the continued provision of access to 9-1-1 service if a customer’s current provider seeks to withdraw or abandon its voice service.

Regulatory Flexibility

18. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

The rule does not provide an impacted entity with the opportunity to see a waiver of a provision of these rules.

19. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

The rules in Ohio Adm.Code 4901:1-6 do not impose specific fines or penalties for failure to comply. Fines or penalties for violation of this chapter may only be ordered by the PUCO after notice and hearing. The PUCO will fully comply with R.C. 119.14 and it is not the PUCO’s intent to seek to recover administrative fines or civil penalties on any small business for a first-time paperwork violation.

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20. What resources are available to assist small businesses with compliance of the regulation?

Commission Staff works with all affected entities, including small businesses, to assist such companies with compliance.

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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 carrier's (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).
- (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, and website 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.

**This foregoing document was electronically filed with the Public Utilities
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in

Case No(s). 14-1554-TP-ORD

Summary: Entry on Rehearing denying the application for rehearing filed by the Ohio Telecom Association and granting, in part, and denying, in part, the application for rehearing filed by the Ohio Cable Telecommunications Association electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio