

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Commission's
Review of Ohio Administrative Code
Chapter 4901:1-6**

Case No. 23-817-TP-ORD

COMMENTS OF THE OHIO TELECOM ASSOCIATION

I. Introduction

R.C. 111.15(B) requires the Public Utilities Commission of Ohio (“Commission”) to conduct a review of its rules every five-years. In the review, the Commission must determine whether an existing rule “exceeds or conflicts with the purpose, scope, or intent of a statute under which the rule was adopted.” R.C. 106.03(A)(1) The Commission also must consider the usefulness of a rule. R.C. 106.03(A)(4). “If the existing rule needs to be amended or rescinded, the agency, on or before the review date of the existing rule, shall commence the process of amending or rescinding the existing rule in accordance with its review of the rule.” R.C. 106.03(B)(1).

In this proceeding, the Commission is conducting a five-year review of Chapter 4901:1-6, its retail telecommunications services rules, and has sought comments on the current rules. Entry at 1 and 3 (Nov. 1, 2023).¹ In rules identified below, the Commission has asserted authority beyond that provided by Chapter 4927 of the Revised Code. Further, the rules identified below are potentially counterproductive in Ohio’s highly competitive retail telecommunications market.

¹ The Commission staff has proposed some minor changes to the chapter that are set out in Attachment A of the Entry. The Ohio Telecom Association takes no position regarding the Staff’s proposed amendments.

Because these rules “exceed or conflict with the purpose, scope, or intent” of provisions of Chapter 4927 and are inconsistent with the rapidly changing competitive retail telecommunications market, the Commission should amend them as part of this review.

II. The asserted authority to review charges and fees in Rules 4901:1-6-11, -14(J), -14(K) and -33 exceeds the scope of the statutes governing the Commission

The Commission has asserted authority over the review of certain charges in Rules 4901:1-6-11, -14(J), -14(K) and -33. Rules 4901:1-6-11(A)(1)(g) and 4901:1-6-33(C) require Commission approval of charges for special construction where a telephone company needs to build facilities in certain circumstances to fulfill a customer’s request for service. Rules 4901:1-6-14(J) and (K) provide for the review of the reasonableness of late payment charges and installation and reconnection fees for basic local exchange service. The authority asserted to review rates exceeds what is provided to the Commission by Chapter 4927 of the Revised Code.

Under division (D) of R.C. 4927.03, “[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.” The exceptions authorizing the Commission’s review of rates, terms, and conditions are limited. R.C. 4927.12 authorizes the Commission to monitor rates for basic local exchange service,² and R.C. 4927.15 provides for additional approval authority over rates concerning seven other services, none of which concerns special construction, late payment charges, or installation and reconnection fees.

Tariffing requirements applicable to telephone companies also do not authorize the Commission to review the charge or fees for excess construction, reconnection, or installation.

² Basic local exchange service is a defined set of services that does not include reconnection and interconnection services. R.C. 4927.01(A)(1).

Under R.C. 4927.125, rates, terms, and conditions for reconnection and installation services must be tarified, but that section does not contain any authorization for the Commission to review the fees for reasonableness.³ There is no provision in Chapter 4927 that requires a telephone company to file a tariff for excess construction charges or provides the Commission authority to review the charge for reasonableness. Thus, the rules that assert rate review authority over excess construction charges, late payment charges, or installation fees, and reconnection fees lack an express statutory basis.

Because the rules authorizing rate review of these services exceed the scope of the Commission's authority, they should be amended as follows:

Rule 4901:1-6-11

(A) Services required to be tarified

(1) The rates, terms, and conditions for 9-1-1 service provided in this state by a telephone company or a telecommunications carrier, and for each of the following provided by a telephone company, shall be approved and tarified by the commission and be subject to all applicable laws, including rules or regulations adopted and orders issued by the commission or the federal communications commission:

- (a) Basic local exchange service (BLES), including BLES installation and reconnection fees and lifeline service rates or discounts.
 - (b) Carrier access.
 - (c) N-1-1 service.
 - (d) Pole attachments and conduit occupancy under section 4905.71 of the Revised Code.
 - (e) Pay telephone access lines.
 - (f) Toll presubscription.
 - (g) ~~Excess construction charges.~~
 - ~~(h)~~ Inmate operator services.
 - ~~(ih)~~ Telecommunications relay service.
- [remainder of rule unchanged]

³ The differences in language adopted in R.C. 4927.15 and R.C. 4927.125 support the distinction between a requirement to file a tariff and an authorization for Commission review of a rate or fee. R.C. 4927.15 requires that the services be tarified and that the rates, terms, and conditions be approved by the Commission. In contrast, R.C. 4927.125 requires that the charges for basic local exchange service and reconnection and late payment fees be tarified (i.e., that a telephone company submit a tariff sheet concerning these services to the Commission). The review of the rates for basic local exchange service are separately and expressly laid out in R.C. 4927.12. There is no similar provision for determining the reasonableness of late payment charges or installation and reconnection fees. Thus, R.C. 4927.125 cannot serve as the basis for Commission authorization for the review of the reasonableness of late payment charges or installation and reconections fees.

Rule 4901:1-6-14

...

(J) BLES late payment charges

Late payment charges for BLES may be introduced or increased through a thirty-day ATA filing. ~~A standard of reasonableness will be applied to late payment charges including, but not limited to, a comparison with similar charges previously approved by the commission and similar charges assessed by non-regulated providers.~~ Such application requires a customer notice to be filed in accordance with rule 4901:1-6-07 of the Administrative Code.

(K) BLES installation and reconnection fees

Any ILEC nonrecurring service charges for installation and reconnection of a single residential or primary business BLES line are to be included in the BLES tariff and may be increased through a thirty-day application for tariff amendment (ATA) filing. ~~A standard of reasonableness will be applied to nonrecurring service charges for installation and reconnection.~~ Applications for increases to nonrecurring reconnection charges require a customer notice to be filed in accordance with rule 4901:1-6-07 of the Administrative Code.

...

Rule 4901:1-6-33

(A) An incumbent local exchange carrier (ILEC) shall provide basic local exchange service (BLES) in its traditional service area to all persons or entities in its service area requesting that service except as otherwise provided in section 4927.11 of the Revised Code.

(B) Where no facilities are available and where an ILEC must construct permanent facilities on public rights-of-way in order to furnish service to an applicant or applicants for service in its traditional service area, the ILEC may require the applicant to pay excess construction charges ~~in accordance with commission-approved tariffs.~~ A credit against the cost of excess construction charges may be given where an applicant performs the labor of digging holes, or trimming or removing trees in the right-of-way in accordance with the ILEC's specifications. Where more than one applicant is to be furnished service along the same route, the applicants as a group may be required to share proportionately the excess construction charges.

~~(C) An ILEC may not charge an applicant for any excess construction charges for BLES unless provisions for such charges are set forth in the company's tariff and approved by the commission.~~

III. The asserted authority to condition withdrawal of services under Rule 4901:1-6-25(D) exceeds the scope of the statutes governing the Commission

R.C. 4927.07(A) provides that a telephone company may withdraw any service other than basic local exchange service if it gives at least thirty days' notice to the Commission and affected customers.⁴ Additionally, division (E) of R.C. 4927.07 requires Commission approval of an application seeking the withdrawal of any tariff for pole attachments or conduit occupancy.

Rule 4901:1-6-25(D) does not conform to the limits on Commission review of withdrawals of services. Under that rule, a telephone company may cease offering any services required to be tarified under paragraphs (A)(1)(b) to (A)(1)(i) of Rule 4901:1-6-11 by filing an application to withdraw such service(s) from its tariff, using the most up-to-date telecommunications filing form, and obtaining prior commission approval. The rule goes on to state that the case purpose code is the designated type of application which is not subject to an automatic approval process.

The unlawful extension of Commission authority arises because the services covered by Rule 4901:1-6-11(A)(1)(b) through (i) include (in addition to pole attachments) carrier access, N11, payphone access lines, toll subscription, excess construction charges, inmate operator services, and telephone relay service. As a result, the approval process required by the rule exceeds the express terms of R.C. 4927.07, which permits a telephone company to withdraw *on thirty days' notice* any tariff provision for any service other than basic local exchange service and pole and conduit access.

To conform Rule 4901:1-6-25(D) to Ohio law, the Commission should amend it as follows:

(D) Withdrawal of tarified services other than BLES

A telephone company may cease offering any services required to be tarified pursuant to paragraphs (A)(1)(b) to (A)(1)(i) of rule 4901:1-6-11 of the Administrative Code, by ~~first~~

⁴ Regarding basic local exchange service, Ohio law provides for a notice and approval process for the withdrawal of basic local exchange service. R.C. 4927.10.

filing an application to withdraw such service(s) from its tariff, using the most up-to-date telecommunications filing form, ~~and obtaining~~ An application seeking withdrawal of a service required to be tariffed by paragraph (A)(1)(d) of Rule 4901:1-6-11 of the Administrative Code is subject to prior commission approval. ~~The TP-UNC case purpose code is the designated type of application which is not subject to an automatic approval process.~~

IV. Rule 4901:1-6-21(B) should conform to the express terms of R.C. 4927.10

Under RC 4927.10, carrier of last resort relief is triggered by FCC action on the interstate component of basic local exchange service. Relief is effective “beginning when the (FCC) order is adopted,” provided that the carrier gives at least 120 days’ prior notice to the Commission and affected customers. R.C. 4927.10(A).

In important respects, division (B) of Rule 4901:1-6-21 is inconsistent with R.C. 4927.10. First, it does not recognize the statutory provision that carrier of last resort relief is effective when the relevant FCC order is adopted if the required notice is given. Second, in two provisions, the rule suggests that the incumbent local exchange company must “apply” to the Commission for relief, and not simply notify the Commission (and affected customers) of the FCC action and related matters. To conform the rule to the text of R.C. 4927.10, the Commission should adopt the following changes:

~~(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.~~ An ILEC seeking to withdraw BLES shall file notice of the relevant action of the FCC on the most up-to-date telecommunications filing form for the withdrawal of the service. Receipt of this notice by the commission will trigger the one hundred 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 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~~ notice. 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~~ notice 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.

V. The proposed amendments conform to the changing marketplace

Besides considering the statutory scope of an existing rule, the provisions governing a review of the Commission's rules also direct the Commission to consider if a rule is "useful or beneficial." R.C. 106.03(A)(4). The rules providing for price reviews and limits on withdrawal are neither.

Regulations authorizing the review of prices and restrictions on withdrawal of services were a response to the ability of monopolies to extract excess profits or otherwise injure

consumers through unfair practices. See, e.g., Stephen Breyer, Regulation and its Reform 15-20 (1982) (historic rationales for regulation of natural monopolies designed to address monopoly pricing and unfair practices such as price discrimination). The monopoly provision of retail communications services, however, is a relic. Ohio Telecom Association, Telecom in Ohio 3 (2017) (competitive wire and wireless services have displaced monopoly basic local exchange service).⁵ Thus, the economic market structure justifying price, entry, and exit regulations designed to check monopoly power no longer exists.⁶ The General Assembly has recognized as much: it has declared a state telecommunications policy that is intended to rely on competitive market forces to maintain reasonable service levels and narrowed the Commission's authority to set the rates, terms, and conditions of retail telephone services. R.C. 4927.02⁷; R.C. 4927.03(C)⁸ and (D).⁹

⁵ http://www.ohiotelecom.com/aws/OTIA/asset_manager/get_file/169746?ver=28623

⁶ To the extent there are concerns about loss of service to at-risk populations, Lifeline services are available to meet the universal service goals that are a part of national and state telecommunications policy.

⁷ R.C. 4927.02 provides:

(A) It is the policy of this state to:

...

(3) Rely primarily on market forces, where they exist, to maintain reasonable service levels for telecommunications services at reasonable rates;

...

(B) The public utilities commission shall consider the policy set forth in this section in carrying out this chapter.

⁸ R.C. 4927.03(C) provides:

For purposes of sections 4927.01 to 4927.21 of the Revised Code, sections 4903.02, 4903.03, 4903.24, 4903.25, 4905.04, 4905.05, 4905.06, 4905.13, 4905.15, 4905.16, 4905.17, 4905.22, 4905.26, 4905.27, 4905.28, 4905.29, 4905.31, 4905.32, 4905.33, 4905.35, 4905.37, 4905.38, 4905.39, 4905.48, 4905.54, 4905.55, 4905.56, and 4905.60 of the Revised Code do not apply to a telephone company or, as applicable, to an officer, employee, or agent of such company or provider, except to the extent necessary for the commission to carry out sections 4927.01 to 4927.21 of the Revised Code.

⁹ R.C. 4927.03(D) provides, "Except as specifically authorized in sections 4927.01 to 4927.21 of the Revised Code, the commission has no authority over the quality of service and the service rates, terms, and conditions of telecommunications service provided to end users by a telephone company."

Thus, regulations to check monopoly power that no longer exists make no sense.

The retention of these detailed regulations that were at the core of traditional monopoly regulation, moreover, presents a deeper problem because outdated rules can be counterproductive, injuring consumers by slowing investment in new facilities and services. *Id.* at 4; Breyer, *supra* at 194.

Additionally, rules requiring review of late payment and installation and reconnection charges are unreasonably discriminatory. When a service is provided by a monopoly, price gouging and price discrimination are legitimate regulatory concerns. Price regulation to prevent price discrimination, however, lacks a reasoned basis when there is competition among providers for that service. Breyer, *supra* at 20.¹⁰

Differential treatment also will unfairly discriminate if some, but not all, remain subject to price regulation. In keeping with that understanding, the state telecommunications policy directs the Commission to “[c]onsider the regulatory treatment of competing and functionally equivalent services and, to the extent practicable, provide for *equivalent regulation* of all telephone companies and services.” R.C. 4927.02(A)(8) (emphasis added). The current rules on pricing do not provide for equivalent regulation. They direct that *only* incumbent local exchange carriers’ late payment, reconnection, and installation fees are subject to a review for reasonableness. Rule 4901:1-6-14(A), (J), and (K). Because the telecommunications market is so competitive, there is no sound reason for continuing that discrimination.

¹⁰ In the example offered by Breyer addressing price fairness, he compared the ability of a consumer to respond to poor customer service by a grocery store, which exists in a competitive market, and an unregulated monopoly telephone company. The behavior of the former will be checked by competition because the consumer can shop elsewhere for groceries; the behavior of the monopoly may not be checked by consumer choice since the monopoly is the only game in town. To check monopoly behavior, regulation is imposed on the telephone company. Breyer, *supra* at 20. With the introduction of competition in retail local exchanges, the distinction justifying regulation of the local exchange company no longer exists and thus warrants a change in regulatory approach.

VI. Conclusion

In this proceeding, the Commission is to consider both the legal scope and the need for its rules concerning retail telecommunications services and amend its rules to conform them to Ohio law and sound administration. The amendments recommended in these comments are both legally required and consistent with the state telecommunications policy and public welfare. For these reasons, the Commission should adopt the proposed amendments to its retail telecommunications rules.

Respectfully submitted,

/s/ Frank P. Darr

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the Comments of the Ohio Telecom Association upon the interested parties, on December 1, 2023. The following were provided by electronic mail a copy of this document.

/s/ Frank P. Darr _____

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Summary: Comments Comments of the Ohio Telecom Association electronically
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