



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Bill Analysis

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### **Sub. H.B. 402**

132nd General Assembly

(As Reported by H. Public Utilities)

**Reps.** Hill, R. Smith, Lang, Seitz, Cera, Becker, Celebrezze, Scherer, Rezabek, Riedel, Koehler, Manning, Kick, Reineke

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## **BILL SUMMARY**

### **Telecommunications services changes**

- Allows most incumbent local exchange carriers (ILECs) to increase rates for basic local exchange service (BLES) by up to \$2 each year, except:
  - Rates may be increased as needed to meet federal eligibility requirements for the Universal Service High-Cost program; and
  - The ILECs may apply to the Public Utilities Commission (PUCO) no earlier than exactly four years after the bill's effective date for full pricing flexibility for BLES in an exchange area, if the General Assembly does not act on the PUCO's report on BLES by then.
- Requires applications for full pricing flexibility to be deemed approved after 30 days unless the PUCO finds that the ILEC has not demonstrated both of the following:
  - The exchange area is competitive, based on tests in continuing law;
  - The ILEC has experienced at least 50% line loss in the exchange area since January 1, 2002.
- Modifies the timeline for applications under continuing law for competitiveness determinations of exchange areas by permitting the PUCO to suspend an application's automatic approval for good cause shown.
- Prohibits most ILECs from decreasing their BLES rates below the "incremental cost."

- Requires PUCO staff to produce and docket a report not later than exactly three years after the bill's effective date on all of the following:
  - The number of customers using BLES in Ohio at the time of the report;
  - The aggregate amount of line loss in Ohio since the bill's effective date;
  - The change in the price of BLES in each exchange area in Ohio over the three years since the bill's effective date.
- Requires PUCO to submit to the Speaker of the House of Representatives, the President of the Senate, and the appropriate House and Senate committees a report of its assessment of the staff's report, following a three-month comment period on the staff's report.
- Requires a telephone company to provide 15 days' advance notice to customers of material changes in the rates, terms, and conditions of the following services, rather than any service, as required under current law:
  - Retail services required to be tariffed by the PUCO or the Federal Communications Commission (FCC);
  - Wholesale services as to which there is no other applicable notice requirement.
- Revises state policy for the provision of telecommunications services.

### **PUCO authority and jurisdiction**

- Repeals the PUCO-approval requirement for an acquisition or merger of a domestic telephone company if there is a pending application with the FCC and the FCC exercises its authority regarding the application.
- Requires a domestic telephone company or a holding company controlling a domestic telephone company to notify PUCO of a merger or transfer-of-control application filed with the FCC.
- Allows PUCO to investigate or inspect any telephone-company plant and facility, to the extent of the PUCO's jurisdiction and only in response to a complaint that implicates the plant or facility and that is made by a consumer concerning BLES or another entity concerning wholesale service.

- Requires PUCO to amend its rules, not later than 120 days following the bill's effective date, to bring them into conformity with the bill and to amend its rules governing Lifeline service to ensure consistency with the federal Lifeline program.

### **Exemption from the treble damages requirement**

- Excludes telephone companies from treble damages liability resulting from a violation of or failure to comply with the Public Utilities Law or PUCO orders.

### **Emergency telephone system**

- Modifies, for purposes of the Emergency Telephone System Law, the definitions of "telephone company" and "enhanced wireline 9-1-1" to expand 9-1-1 providers covered under the law.
- Expands the entities that are not liable for civil-action damages in connection with certain aspects of a 9-1-1 system or the provision of assistance to a public utility, municipal utility, or state or local government in cases of public emergency.

### **Contractual and federal obligations**

- States that nothing in the sections amended or enacted by the bill is to be construed to affect any existing contractual obligation or any right or obligation under federal law or rules.

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## CONTENT AND OPERATION

### Overview

The bill further deregulates certain aspects of telecommunications services, a process that began with S.B. 162 of the 128th General Assembly, with changes to telecommunications service law, especially in regard to the provision of basic local exchange service (BLES) and the Public Utilities Commission's (PUCO's) authority and jurisdiction over certain telecommunications activities. Additionally, the bill expands the law governing the 9-1-1 system to include providers that are not covered by current law.

### Telecommunications services changes

#### BLES rate increases

##### Annual rate increase

The bill modifies the amount by which most incumbent local exchange carriers (ILECs) may increase rates for BLES.<sup>1</sup> An ILEC that is customer-owned-and-operated may, under continuing law, generally alter its BLES rates by any amount at any time.<sup>2</sup> This analysis will refer to all other ILECs as "investor-owned."

The bill allows an investor-owned ILEC to increase its BLES rates in a 12-month period by up to \$2.00. Current law restricts such an ILEC's BLES rate increase to \$1.25 per 12-month period.<sup>3</sup> Continuing law requires that an investor-owned ILEC must either receive a competitiveness determination from the PUCO or have increased its BLES rates in the 12 months prior to September 13, 2010, before the ILEC may take the annual BLES rate increase in an exchange area.<sup>4</sup>

According to the PUCO, there are only three (out of 46) ILECs, whose exchange areas in the state do not yet qualify for an ILEC to take the annual BLES rate increase. Those are the exchanges in the three red areas on the map below. All other exchange

<sup>1</sup> R.C. 4927.12(A) and (B).

<sup>2</sup> R.C. 4927.12(E) in current law; recodified as R.C. 4927.121 under the bill.

<sup>3</sup> R.C. 4927.12(B)(1), (2), and (3) and O.A.C. 4901:1-4-11, as that rule existed on September 13, 2010.

<sup>4</sup> R.C. 4927.12(B)(1), (2), and (3).



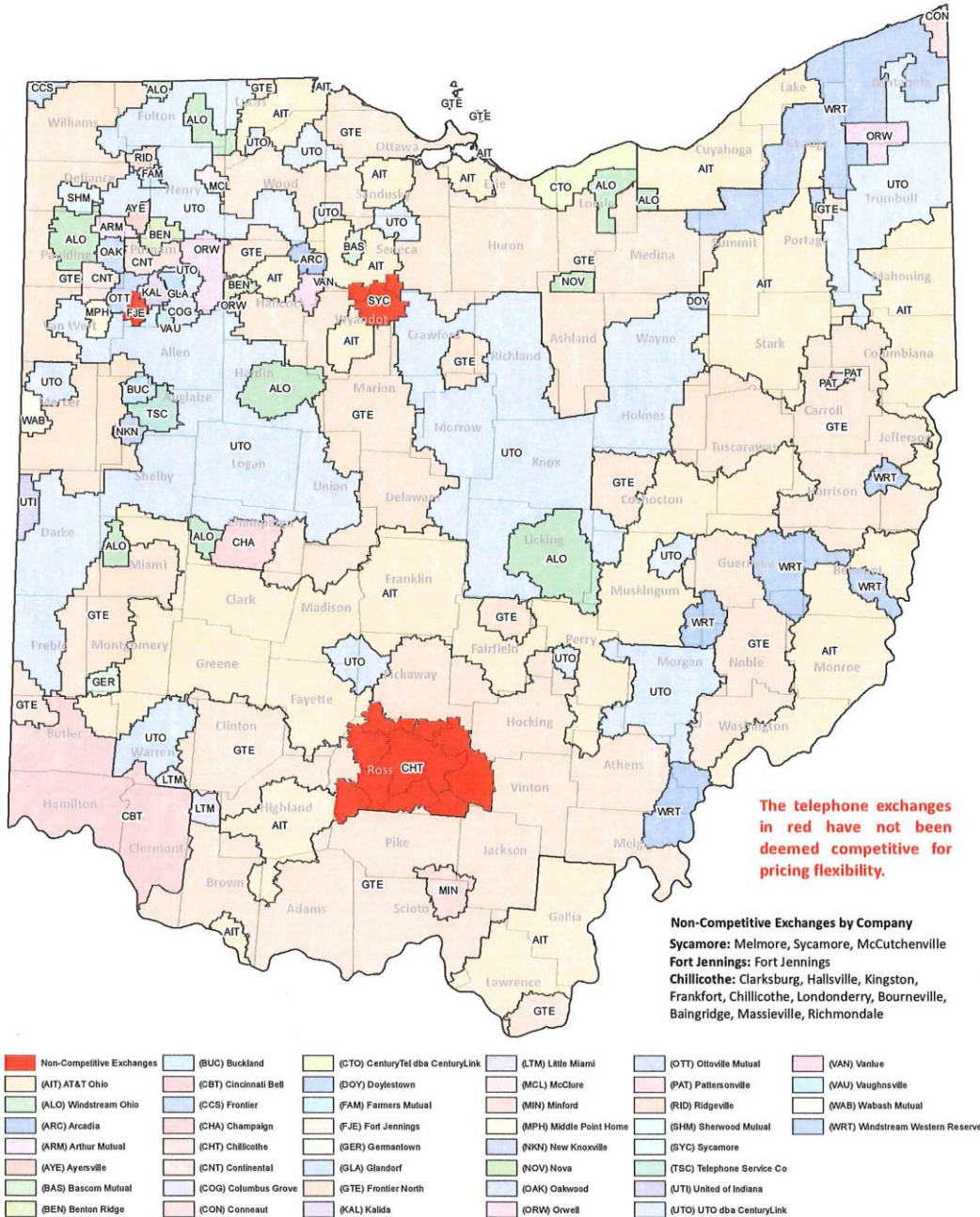
areas are currently subject to the annual BLES rate increase of \$1.25, and would be subject to the \$2 annual increase under the bill.



Public Utilities Commission

### Telephone Service Areas and Non-Competitive Exchanges

As of February 20, 2018



\*Note that when the map refers to "pricing flexibility," this is a reference to annual BLES rate increases allowed under continuing law. It is not the same as the "full pricing flexibility" allowed under the bill.

### **Rate increases to comply with federal eligibility requirements**

Under the bill, PUCO must allow an investor-owned ILEC to increase its BLES rates by any amount necessary to comply with the Federal Communications Commission's (FCC's) eligibility requirements for the federal Universal Service High-Cost program. This would apply to every exchange area—even the three red ones in the map above. The bill allows PUCO to order these rate increases to be phased-in over a period not to exceed three years if PUCO determines the phase-in is necessary to protect the public interest.<sup>5</sup> The ILEC must provide 30 days' notice to the PUCO and affected customers before any rate change.<sup>6</sup>

### **Full pricing flexibility**

The bill also allows an investor-owned ILEC, not earlier than the date that is exactly four years after the bill's effective date, and only if the General Assembly fails to act upon the PUCO report required under the bill (see "**PUCO report**" below) to apply to the PUCO for full pricing flexibility for BLES in an exchange area. The PUCO must approve an application that demonstrates both of the following:

- The exchange area is competitive, either because it was determined to be competitive before the bill is to take effect, or because the ILEC has demonstrated competitiveness in the exchange area under the test in continuing law for annual BLES rate increases (that two or more alternative providers offer, in the exchange area, competing service to the ILEC's BLES<sup>7</sup>); and
- The ILEC has experienced at least 50% line loss in the exchange area since January 1, 2002.

The bill defines "line loss" as the number of accounts, whether residential or commercial, for which an ILEC customer has terminated BLES.

Practically, this means that for the exchanges on the three red areas on the map above, the ILEC must demonstrate *both* that two or more alternative providers offer competing service in the exchange area *and* that the ILEC has experienced 50% line loss

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<sup>5</sup> R.C. 4927.122.

<sup>6</sup> R.C. 4927.124.

<sup>7</sup> R.C. 4927.12(B)(3).



since 2002. For the exchange areas for the other 43 ILECs, the ILECs would need to demonstrate *only* 50% line loss since 2002.

Applications for full pricing flexibility are deemed approved on the 31st day after filing, unless the PUCO issues an order before then that the requirements have not been met (see **COMMENT 1**).<sup>8</sup>

Once an application is approved or deemed approved, the ILEC may increase BLES rates in the exchange area that was the subject of the application by any amount at any time. But the ILEC must provide 30 days' notice to the PUCO and affected customers before any BLES rate change.<sup>9</sup>

### **Timeline for applications for competitiveness determinations**

The bill modifies the timeline for applications under continuing law for competitiveness determinations.<sup>10</sup> Before explaining the bill's specific changes, it is important to note that the changes would have a very limited scope. They would apply only to the exchanges in the three areas on the map above. That is because the other exchange areas have already been determined competitive, so the ILECs in those exchange areas will never need to apply for competitiveness determinations.<sup>11</sup>

Under continuing law, an application for a competitiveness determination is deemed approved unless the PUCO issues an order within 30 days after the application was filed finding that the ILEC has not met the requirements for competitiveness. But under the bill, the PUCO may, within that 30-day period, suspend the automatic approval for good cause shown. The PUCO would then have 90 days after the date of the suspension to approve or deny the application. The bill does not specify what happens if the PUCO fails to approve or deny the application by the 90-day deadline.

The bill also clarifies that if the application is deemed approved, it is deemed approved on the 31st day after the filing of the application.<sup>12</sup>

Again, these timeline changes apply only to the exchange areas of three ILECs in the state. By contrast, the applications for full pricing flexibility, which could be filed for *any* exchange area in the state, are deemed approved on the 31st day after filing. And

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<sup>8</sup> R.C. 4927.123.

<sup>9</sup> R.C. 4927.123(E) and 4927.124.

<sup>10</sup> R.C. 4927.12(B)(3)(b) and (c).

<sup>11</sup> R.C. 4927.123(C)(2)(c).

<sup>12</sup> R.C. 4927.12(B)(3)(b); conforming changes in R.C. 4927.12(B)(3)(c).

the bill does not provide a PUCO-suspension option for those applications (see **COMMENT 1**).

### **BLES rate decreases**

The bill prohibits an investor-owned ILEC from decreasing its BLES rate below the ILEC's incremental cost. The bill defers to the PUCO to define "incremental cost."<sup>13</sup> (See **COMMENT 2**.) Current law permits an investor-owned ILEC to alter its rates for BLES, and imposes limitations on "upward" alterations, but not downward alterations.<sup>14</sup>

### **PUCO report**

The bill requires the PUCO staff to produce and docket a report, not later than a date that is exactly three years after the bill's effective date, that includes all of the following:

- The number of customers using BLES in Ohio at the time of the report;
- The aggregate amount of line loss (see definition above) in Ohio since the bill's effective date;
- The change in the price of BLES in each exchange area in Ohio over the three years since the bill's effective date.

The PUCO must then allow three months for public comment on the report.

Not later than a date that is exactly three months after the reported is docketed, the PUCO must submit a report to the President of the Senate, the Speaker of the House of Representatives, and the appropriate standing committees of the Senate and House. The report must include the PUCO's assessment of the staff's report.

The bill specifies that it does not prevent a party from arguing that information subject to being reported is a trade secret and should be kept confidential.<sup>15</sup>

### **Notice of material changes in rates, terms, and conditions**

The bill narrows the scope of a provision requiring a telephone company to provide at least 15 days' advance notice to its affected customers of material changes in rates, terms, and conditions. Current law requires this notice to be provided for material

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<sup>13</sup> R.C. 4927.12(A) and (B)(1), (2), and (3)(a) and 4927.123(B).

<sup>14</sup> Current R.C. 4927.12(B), (C), and (D).

<sup>15</sup> Section 4.





changes in the rates, terms, and conditions of any service, whereas the bill requires this notice to be provided for material changes in the rates, terms, and conditions of "any retail service required to be tariffed by [PUCO] or [FCC or] any wholesale service as to which there is no other applicable notice requirement."<sup>16</sup> Under current PUCO rules, the following retail telecommunications services are required to be tariffed: 9-1-1 service provided in Ohio, BLES (including BLES installation and reconnection fees and Lifeline service rates or discounts), carrier access, N-1-1 service, pole attachments and conduit occupancy, pay telephone access lines, toll presubscriptions, excess construction charges, inmate operator services, and telecommunications relay service.<sup>17</sup>

### **State policy**

The bill adds the policy objective to allow and encourage competition and market forces to determine the availability, prices, terms, and other conditions of providing telecommunications services.

The bill also changes the policy objective of "ensur[ing] the availability of adequate [BLES] or voice service to citizens throughout the state" to "ensur[ing] the adequacy and reliability of [BLES], where available to citizens in the state, and the adequacy and reliability of voice service throughout the state."<sup>18</sup>

### **PUCO authority and jurisdiction**

#### **Jurisdiction over telephone company acquisitions or mergers**

##### **Domestic telephone or holding company acquisitions or mergers**

The bill removes the requirement for PUCO approval of both of the following, if there is a pending application for the same thing with the FCC:

- Acquiring control, directly or indirectly, of a domestic telephone company or a holding company controlling a domestic telephone company;
- The merger of a domestic telephone company with another domestic telephone company.

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<sup>16</sup> R.C. 4927.17(A).

<sup>17</sup> Ohio Administrative Code (O.A.C.) 4901:1-6-11(A)(1).

<sup>18</sup> R.C. 4927.02(A)(1) and (11).



But if the FCC waives the exercise of its authority regarding the acquisition or merger, or otherwise chooses not to exercise its authority regarding the acquisition or merger, then PUCO approval is still required.<sup>19</sup>

### **Notice of FCC application for merger or transfer of control**

Under the bill, a domestic telephone company or a holding company controlling a domestic telephone company that files an application with the FCC seeking authority for a merger or "transfer of control" must file notice of the application with PUCO. The notice must include an Internet link to the application.<sup>20</sup> PUCO must adopt rules to specify the time and manner in which the company must file the notice.<sup>21</sup>

### **Definition of "control"**

The bill also modifies the definition of "control" to remove reference to domestic telephone companies and holding companies of domestic telephone companies. The effect of this change is that the bill's provisions regarding acquisitions and transfers of control might be interpreted based on the plain meaning of the word "control," rather than a definition. The definition of "control" in current law is "to direct the management and policies of a domestic telephone company or a holding company of a domestic telephone company, or the management and policies of a domestic electric utility . . . ."<sup>22</sup>

### **Investigations of telephone companies**

The bill permits PUCO to investigate or inspect the plant and facility of any telephone company, subject to the following limitations:

- To the extent of PUCO's jurisdiction over the company under state law governing telecommunications;
- Only in response to a complaint that implicates the plant or facility and that is made by a consumer concerning BLES or another entity concerning wholesale service.<sup>23</sup>

Under continuing law, PUCO may: (1) examine the books, records, contracts, documents, and papers of a telephone company for any purpose incidental to PUCO's

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<sup>19</sup> R.C. 4905.402(B), (C), and (H).

<sup>20</sup> R.C. 4927.402(G).

<sup>21</sup> R.C. 4905.402(D).

<sup>22</sup> R.C. 4905.402(A)(1).

<sup>23</sup> R.C. 4927.19(B).

authority, (2) compel the production of the books, records, contracts, documents, and papers, and (3) compel the attendance of witnesses to give evidence.<sup>24</sup>

### **Rulemaking**

The bill requires PUCO to amend its rules, not later than 120 days following the effective date of the bill, to the extent necessary to bring them into conformity with the bill. The bill also requires PUCO to amend its rules governing Lifeline service to ensure consistency with the federal Lifeline program.<sup>25</sup>

### **Exclusion from the treble damages requirement**

The bill exempts telephone companies from the requirement that any public utility or railroad that does, or causes to be done, any act or thing prohibited by certain chapters of the Public Utilities Law,<sup>26</sup> or declared to be unlawful, or omits to do any act or thing required by that law, or by order of PUCO, is liable to the person, firm, or corporation injured for treble damages.<sup>27</sup>

### **Emergency telephone system**

#### **Expanding state law to cover providers of 9-1-1 capabilities**

The bill expands, for the purposes of the Emergency Telephone System Law, the definitions of "telephone company" and "enhanced wireline 9-1-1." These changes have the effect of including entities, not covered under current law, that provide 9-1-1 capabilities.

Under the bill, "telephone company" includes any covered 9-1-1 service provider as defined under federal law.<sup>28</sup> Under federal law, "covered 9-1-1 service provider" means any entity that provides 9-1-1, Enhanced 9-1-1, or Next Generation 9-1-1 capabilities such as call routing, automatic location information, automatic number identification, or the functional equivalent of those capabilities, directly to a public safety answering point (PSAP), statewide default answering point, or appropriate local emergency authority, or operates one or more central offices that directly serve a PSAP. "Covered 9-1-1 service provider" excludes any entity that constitutes a PSAP or

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<sup>24</sup> R.C. 4927.19(A).

<sup>25</sup> Section 3; R.C. 4927.13, not in the bill.

<sup>26</sup> Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code.

<sup>27</sup> R.C. 4905.61.

<sup>28</sup> R.C. 128.01(W).



governmental authority to the extent that it provides 9-1-1 capabilities, or offers the capability to originate 9-1-1 calls where another service provider delivers those calls and associated number or location information to the appropriate PSAP.<sup>29</sup>

The bill expands the definition of "enhanced wireline 9-1-1" to include a 9-1-1 system in which the wireline telephone network, in providing wireline 9-1-1, receives, develops, collects, or processes requests for emergency assistance and relays, transfers, operates, maintains, or provides emergency notification services or system capabilities. Under current law, "enhanced wireline 9-1-1" means only a 9-1-1 system in which the wireline telephone network, in providing 9-1-1, automatically routes the call to emergency service providers that serve the location from which the call is made and immediately provides to personnel answering the 9-1-1 call information on the location and the telephone number from which the call is being made.<sup>30</sup>

### **Civil action immunity expansion**

The bill expands an immunity provision in the Emergency Telephone System Law. Specifically, the bill excludes from liability, for damages in a civil action for injuries, death, or loss to persons or property from (1) activities or omissions in connection with the development, maintenance, or operation of a 9-1-1 system or (2) assisting a public utility, municipal utility, or state or local government in cases of public emergency, both of the following:

- Telephone companies and other installers, maintainers, and providers of services used for or with a 9-1-1 system and their respective officers, directors, employees, agents, suppliers, corporate parents, and affiliates; and
- Corporate parents and affiliates of telephone companies and other installers, maintainers, and providers of telecommunications equipment used on the premises of a PSAP.

Current law grants immunity to telephone companies and other installers, maintainers, and providers of telecommunications equipment used on the premises of a PSAP and their respective officers, directors, employees, agents, and suppliers. Under both current law and the bill, immunity does not apply in cases of willful or wanton misconduct.<sup>31</sup>

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<sup>29</sup> 47 C.F.R. 12.4(a)(4).

<sup>30</sup> R.C. 128.01(D).

<sup>31</sup> R.C. 128.01(Q) and 128.32(C).



## Contractual and federal obligations

The bill states that nothing in the sections amended or enacted by the bill is to be construed to affect any existing contractual obligation or any right or obligation under federal law or rules.<sup>32</sup>

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### COMMENT

1. The bill permits the PUCO to suspend, for good cause shown, the automatic approval of an application for a competitiveness determination of an exchange area. Without the suspension, or a finding that the requirements for competitiveness have not been satisfied, the application is deemed approved on the 31st day after filing.<sup>33</sup>

Applications for full pricing flexibility under the bill are *also* deemed approved on the 31st day after filing. But the bill does not permit the PUCO to suspend the automatic approval of those applications.<sup>34</sup> However, there is a provision in the Ohio Administrative Code that could be interpreted to allow the PUCO to suspend the automatic approval anyway. That provision states:

*Unless otherwise provided in law, the [PUCO], legal director, deputy legal director, or attorney examiner may impose a full or partial suspension of any automatic approval process, notice filing, or tariff approved pursuant to [the chapter of the Ohio Administrative Code governing retail telecommunication services], if such filing is contrary to law or the rules of the [PUCO].<sup>35</sup>*

2. The bill prohibits an investor-owned ILEC from decreasing its BLES rate below the ILEC's incremental cost. But the bill defers to the PUCO to define "incremental cost."<sup>36</sup> Without a definition for the term "incremental cost," the full implications of this provision are unclear.

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<sup>32</sup> R.C. 4905.402(I) and 4927.101(C) .

<sup>33</sup> R.C. 4927.12(B)(3).

<sup>34</sup> R.C. 4927.123(D).

<sup>35</sup> O.A.C. 4901:1-6-06(A).

<sup>36</sup> R.C. 4927.12(A) and (B)(1), (2), and (3)(a) and 4927.123(B).

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## HISTORY

### ACTION

### DATE

Introduced

10-31-17

Reported, H. Public Utilities

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