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**IN THE SUPREME COURT OF OHIO**

| | | |
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| The Office of the Ohio Consumers' Counsel, | ) | Case No. 07-0570 |
| Appellant, | ) | Appeal from the Public Utilities Commission of Ohio |
| v. | ) | |
| The Public Utilities Commission of Ohio, | ) | Public Utilities Commission of Ohio Case No. 06-1002-TP-BLS |
| Appellee | ) | |

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**NOTICE OF APPEAL**
**OF APPELLANT**
**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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FILED
MAR 30 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

**Notice of Appeal of Appellant the Office of the Ohio Consumers' Counsel**

Appellant, the Office of the Ohio Consumers' Counsel, pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal to the Supreme Court of Ohio from Appellee's Opinion and Order entered in its Journal on November 28, 2006 and Entry on Rehearing entered in its Journal on January 31, 2007 in Case No. 06-1002-TP-BLS before the PUCO.

Pursuant to R.C. Chapter 4911, Appellant is the statutory representative of the residential customers of Cincinnati Bell Telephone Company LLC ("CBT" or the "Company"). Appellant is and was a party of record in the case below before the PUCO. On December 28, 2006, pursuant to R.C. 4903.10, Appellant timely filed an Application for Rehearing from the November 28, 2006 Opinion and Order. Appellant's Application for Rehearing was denied in its entirety by an Entry on Rehearing entered in Appellee's Journal on January 31, 2007.[1]

Appellant files this Notice of Appeal, complaining and alleging that Appellee's November 28, 2006 Opinion and Order and January 31, 2007 Entry on Rehearing resulted in a final order that is unlawful, unjust, and unreasonable, and that Appellee erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

I. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone (non-bundled) basic local service based on the existence of alternatives to bundled local service, in violation of R.C. 4927.03(A).

II. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone basic local service throughout a telephone

[1] On January 24, 2007, Appellee issued an Entry on Rehearing "to further consider the matters specified in OCC's Application."

exchange based on alternatives that are available in only part of the exchange, in violation of R.C. 4927.03(A).

III. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone basic local service based on alternative services that are not readily available at rates, terms, and conditions that are competitive with stand-alone basic local service, in violation of R.C. 4927.03(A).

IV. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone basic local service where there has been no demonstration of a lack of barriers to entry for stand-alone basic service, in violation of R.C. 4927.03(A). Rules that allow alternative regulation in the absence of such a demonstration are invalid, and a Commission order that follows such rules must be reversed.

V. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone basic local service without a demonstration that stand-alone basic service is subject to competition or that stand-alone basic service customers have reasonably available alternatives, in violation of R.C. 4927.03(A). Rules that allow alternative regulation in the absence of such a demonstration are invalid, and a Commission order that follows such rules must be reversed.

VI. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone basic service that was not in the public interest, in violation of R.C. 4927.03(A). The public interest requirement is not met when consumers receive no benefit from the alternative regulation.

**WHEREFORE**, Appellant respectfully submits that the Appellee's November 28, 2006 Opinion and Order and January 31, 2007 Entry on Rehearing are unlawful, unjust, and unreasonable and should be reversed or vacated pursuant to R.C. 4903.13. The case should be remanded to the Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

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OHIO CONSUMERS' COUNSEL

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of the proceedings before the Public Utilities Commission and pursuant to section 4903.13 of the Ohio Revised Code by regular U.S. Mail this 30th day of March, 2007.

David C. Bergmann, Counsel of Record
Counsel for Appellant
Office of the Ohio Consumers' Counsel

## PUCO REPRESENTATIVES AND PARTIES OF RECORD

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## CERTIFICATE OF FILING

I hereby certify that this Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code on March 30, 2007.

David C. Bergmann, Counsel of Record
Counsel for Appellant
Office of the Ohio Consumers' Counsel

## APPENDIX E. CASE INFORMATION STATEMENT
## IN THE SUPREME COURT OF OHIO

**Case Information Statement**

| **Case Name:** The Office of the Ohio Consumers' Counsel v. Pub. Util. Comm. | **Case No.:** On Appeal from PUCO Case No. 06-1002-TP-BLS |
|---|---|

**I. Has this case previously been decided or remanded by this Court?** **No** ☑ **Yes** ☐

If so, please provide the Case Name: ______

Case No.: ______

Any Citation: ______

**II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes** ☑ **No** ☐

If so, please provide the Case Name and Citation: See attached

**Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes** ☑ **No** ☐

If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:

**U.S. Constitution**: Article ______, Section ______ **Ohio Revised Code**: See attached

**Ohio Constitution**: Article ______, Section ______ **Court Rule**: ______

**United States Code**: Title ______, Section ______ **Ohio Adm. Code**: See attached

**III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.):**

1) Regulatory law (esp. R.C. Chapter 4927)

**IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes** ☑ **No** ☐

If so, please identify the Case Name: OCC v. PUCO (Appeal from PUCO Case No. 06-1013-TP-BLS)

Case No.: TBD

Court where Currently Pending: N/A

Issue: Same as this Case

**Contact information for appellant or counsel:**

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|---|---|---|---|
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|---|---|---|
| Columbus | Ohio | 43215 |

Signature of appellant or counsel

Counsel for: Office of the Ohio Consumers' Counsel

**Appendix E, Section II**

**Ohio Supreme Court Cases:**

*Discount Cellular v. Pub. Util. Comm'n*, 112 Ohio St.3d 360, 2007-Ohio-53

*Stephens v. Pub. Util. Comm'n*, 102 Ohio St.3d 44, 2004-Ohio-1798.

*Time Warner v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 661 N.E.2d 1097.

**Ohio Revised Code Sections:**
**4927.01**
**4927.02**
**4927.03**

**Ohio Administrative Code Sections:**
**4901:1-4-09**
**4901:1-4-10**

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|---|
| In the Matter of the Application of Cincinnati Bell Telephone Company LLC for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code. | ) ) ) ) ) ) ) | Case No. 06-1002-TP-BLS |

OPINION AND ORDER

The Commission, coming now to consider the submitted application and other evidence and arguments presented in these proceedings, hereby issues its opinion and order.

I. HISTORY OF THE PROCEEDINGS

On August 7, 2006, Cincinnati Bell Telephone Company LLC (CBT) filed an application for approval of an alternative form of regulation of basic local exchange service (BLES) and other Tier 1 services in its Cincinnati and Hamilton exchanges, in accordance with Chapter 4901:1-4, Ohio Administrative Code (O.A.C.).

By attorney examiner entry issued September 29, 2006, the office of the Ohio Consumers' Counsel (OCC) was granted intervention in this proceeding. OCC filed its objections to CBT's application on September 21, 2006, in accordance with Rule 4901:1-4-09, O.A.C. Also under the September 29, 2006 attorney examiner entry, CBT filed its response to OCC's opposition on October 6, 2006. OCC filed its reply to CBT's response on October 13, 2006.

II. APPLICABLE LAW

On August 5, 2005, Governor Bob Taft signed into law House Bill 218 (H.B. 218). This bill, which took effect November 4, 2005, amends various provisions of the Ohio Revised Code for the purpose of revising state telecommunications policy, including Sections 4905.04, 4927.02, 4927.03, and 4927.04, Revised Code.

Section 4927.03, Revised Code

Section 4927.03, Revised Code, now authorizes the Commission to allow for alternative regulation of basic local exchange service (BLES) offered by incumbent local exchange companies (ILECs) in those telephone exchanges where the Commission determines that alternative regulation is in the public interest and certain conditions are met. This statute provides, in pertinent part, as follows:

> (A)(1) The public utilities commission, upon its own initiative or the application of a telephone company . . . may, by order . . . establish

> alternative regulatory requirements to apply to such public telecommunications service . . . provided the commission finds that any such measure is in the public interest and either of the following conditions exists:
>
> (a) The telephone company or companies are subject to competition with respect to such public telecommunications service;
>
> (b) The customers of such public telecommunications service have reasonably available alternatives.
>
> (A)(2) In determining whether the conditions in division (A)(1)(a) or (b) of this section exist, factors the commission shall consider include, but are not limited to:
>
> (a) The number and size of alternative providers of services;
>
> (b) The extent to which services are available from alternative providers in the relevant market;
>
> (c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions;
>
> (d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.
>
> (A)(3) To . . . establish alternative regulatory requirements under division (A)(1) of this section with respect to basic local exchange service, the commission additionally shall find that there are no barriers to entry.
>
> . . .
>
> (D) The public utilities commission shall adopt such rules as it finds necessary to carry out this section.

Adoption of Rules for Alternative Regulation of Basic Local Exchange Service

On March 7 and May 3, 2006, the Commission, under Case No. 05-1305-TP-ORD, *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies* (05-1305), established rules for the alternative regulation of basic local telephone service. These rules were subjected to the legislative rule review process and became effective on August 7, 2006. Consistent with these rules, ILECs with an approved elective alternative regulation plan may apply for pricing flexibility of basic local telephone service and basic Caller ID service. Under Rule 4901:1-4-09(G), O.A.C., an ILEC's application for basic local exchange service alternative regulation will become effective on the one hundred twenty-first day after the filing of the application unless the application is suspended by the Commission. Applications for alternative regulation of basic local exchange service will be approved provided that the applicant satisfies one of the competitive tests identified in Rule 4901:1-4-10, O.A.C.

Rule 4901:1-4-01: Definitions

Definitions for the terms used in Chapter 4901:1-4, O.A.C., (alternative regulation of telecommunications services) are provided by Rule 4901:1-4-01, O.A.C. Four of the more important definitions for this proceeding are "alternative provider," "basic local exchange service," "facilities-based alternative provider," and "Tier one" services. Under Rule 4901:1-4-01(B), O.A.C., "alternative provider" means a provider of competing service(s) to the basic local exchange service offering(s), regardless of the technology and facilities used in the delivery of the services (wireline, wireless, cable, broadband, etc.). The remaining pertinent definitions are:

(C) "Basic local exchange service (BLES)" means end user access to and usage of telephone company-provided services that enable a customer, over the primary line serving the customer's premises, to originate or receive voice communications within a local service area, and that consist of the following:

(1) Local dial tone service.

(2) Touch tone dialing service.

(3) Access to and usage of 9-1-1 services, where such services are available.

(4) Access to operator services and directory assistance.

(5) Provision of a telephone directory and listing in that directory.

(6) Per call, caller identification blocking services.

(7) Access to telecommunications relay service.

(8) Access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies.

BLES also means carrier access to and usage of telephone company-provided facilities that enable end user customers originating or receiving voice grade, data or image communications, over a local exchange telephone company network operated within a local service area, to access interexchange or other networks.

. . .

(G) "Facilities-based alternative provider" means a provider of competing service(s) to the basic local exchange service offering(s) using facilities that it owns, operates, manages or controls to provide such services, regardless of the technology and facilities used in the delivery of the services (wireline, wireless, cable, broadband, etc.).

. . .

(N) "Tier one" services include BLES[1] as defined in section 4927.01 of the Revised Code, as well as those services that are not essential but nevertheless retain such a high level of public interest that these services still require regulatory oversight, as set forth in paragraphs (A)(1)(a) and (A)(1)(b) of rule 4901:1-6-20 of the Administrative Code.

Rule 4901:1-4-10: Competitive Market Tests.

Rule 4901:1-4-10(A), O.A.C., provides that in order to qualify for pricing flexibility for BLES and other tier one services, an ILEC has the burden to demonstrate that, as of the date of the application, the ILEC meets at least one of the competitive tests set forth in paragraph (C), of this rule, in each of the requested telephone exchange area(s). Paragraph (C) states, in pertinent part, as follows:

> (C) If the applicant can demonstrate that at least one of the following competitive market tests is satisfied in a telephone exchange area, the applicant will be deemed to have met the statutory criteria found in division (A) of section 4927.03 of the Revised Code for BLES and other tier one services in that telephone exchange area. These competitive market tests do not preclude an ILEC from proposing to demonstrate the statutory criteria are satisfied through an alternative competitive market test.
>
> . . .
>
> (4) An applicant must demonstrate that in each requested telephone exchange area that at least fifteen per cent of total residential access lines have been lost since 2002 as reflected in the applicant's annual report filed with the commission in 2003, reflecting data for 2002; and the presence of at least five unaffiliated facilities-based alternative providers serving the residential market.
>
> (D) For purposes of demonstrating that a competitive market test is satisfied under this rule, the applicant may, in a competitive market test, count as a CLEC or an alternative provider, any affiliate of an ILEC other than the applicant, serving the residential market in the requested telephone exchange areas.

## III. SUMMARY OF CBT'S APPLICATION

Rule 4901:1-4-08(A), O.A.C., provides that any ILEC with an approved EARP (elective alternative regulation plan) may request alternative regulation of BLES and other Tier 1 services. CBT's existing alternative regulation plan was approved under Case No.

---

1 The Commission notes that the definition for "basic local exchange service" (BLES) adopted under Rule 4901:1-4-01(C), O.A.C., is consistent with the statutory definition provided under Section 4927.01(A), Revised Code.

04-720-TP-ALT, *In the Matter of the Application of Cincinnati Bell for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code*. As noted in Section I above, CBT filed its application on August 7, 2006, for approval of an alternative form of regulation of BLES and other Tier 1 services, in accordance with Chapter 4901:1-4, O.A.C.

The filing requirements for an ILEC's alternative regulation application are addressed under Rule 4901:1-4-09, O.A.C. Under paragraph (B) of this rule, an ILEC is to provide five specific exhibits in support of its application, including a copy of the proposed legal notice notifying the public of the filing of its application and stating that objections can be filed with the Commission in accordance with paragraph (F) of this rule. CBT submitted a copy of its proposed legal notice as Exhibit 5 to its application. (Application, Ex. 5.) CBT represents that it published legal notice in each of the counties corresponding to the two exchanges covered under its application.

In accordance with Rule 4901:1-4-09(B)(1), O.A.C., CBT states that it fully complies with the elective alternative regulation commitments for advanced services and lifeline assistance as required by Rule 4901:1-4-06(A) and (B), O.A.C. (Application, Ex. 1.) Next, as required by Rule 4901:1-4-09(B)(2), O.A.C., CBT identifies its Cincinnati and Hamilton exchanges in its Ohio service territory for which it asserts that it satisfies at least one of the competitive tests identified in Rule 4901:1-4-10, O.A.C. CBT relies on the competitive test set forth in Rule 4901:1-4-10(C)(4), O.A.C (Test 4), as the competitive test that it applies in those two exchanges. (Application, Ex. 2.) In accordance with Rule 4901:1-4-09(B)(3), O.A.C., CBT provides supporting information and detailed analysis to demonstrate compliance with competitive market Test 4. (Application, Ex. 3.) Next, as required by Rule 4901:1-4-09(B)(4), O.A.C., CBT filed proposed tariff amendments for the purpose of identifying those exchanges included as part of its application. CBT also filed a replacement proposed tariff on September 29, 2006, in response to discussions with Commission staff. While the tariff amendments denote that the identified exchanges would be subject to pricing flexibility, the tariff amendments do not reflect the company has actually exercised this pricing flexibility at this time. (Application, Ex. 4.)

CBT represents that, in collecting information on alternative provider activity in its exchanges, it first reviewed and documented publicly available data, such as websites, carrier tariff filings, information on wireless licenses, and Commission certification cases and interconnection agreement filings (Application, Ex. 3). To review the information available from publicly available sources, CBT states that it reviewed internal data from billing and E9-1-1 records, white pages listings, and ported telephone number information. (*Id.*) Specific to Test 4, CBT explains that it examined its own line loss since 2002, relying on the annual report information for that year and the data that was contained in CBT's annual report filed with the Commission in 2006. (*Id.*, Ex. 3, at 2.)

Test 4 requires that an applicant demonstrate that in each requested telephone exchange area that at least fifteen percent of the total residential access lines have been lost since 2002 as reflected in the applicant's annual report filed with the Commission in 2003, reflecting data for 2002; and demonstrating the presence of at least five unaffiliated facilities-based alternative providers serving the residential market. (Rule 4901:1-4-

10(C)(4), O.A.C.) CBT represents that the following two exchanges satisfy the criteria of Test 4: Cincinnati and Hamilton. (Application, Ex. 3, at 2, 13.)

Based on a review of CBT's application, the Commission finds that this application satisfies the filing requirements of Rule 4901:1-4-09, O.A.C.

## IV. POSITIONS OF THE PARTIES AND THE COMMISSION'S DETERMINATION REGARDING CBT'S APPLICATION FOR BLES ALTERNATIVE REGULATION

### A. General Discussion

OCC's Position

On September 21, 2006, OCC filed its Opposition to CBT's application. In its opposition, OCC argues that the Commission, in adopting the BLES alternative regulation rules, has fallen short of requirements outlined in Section 4927.03, Revised Code. In support of its position, OCC maintains that the Commission has misinterpreted the "no barriers to entry" provision added to Section 4927.03(A), Revised Code, by H.B. 218. (Opposition at 9-10.) OCC also contends that competitive Test 4 does not meet either of the statutory requirements. For instance, OCC submits that neither prong of competitive Test 4, as adopted by the Commission, addresses market power and neither the residential access line loss test nor the unaffiliated facilities-based alternative providers test effectively measures the lack of barriers to entry. (Opposition at 13.)

OCC contends that, as a result of the Commission's BLES alternative regulation rules and the inherent flaws contained within such rules, there will be CBT customers who will experience BLES increases while not having alternatives to CBT's BLES. (Opposition at 5.) OCC contends that, even if the Commission's competitive tests are treated as valid, CBT fails to meet those tests. (Opposition at 26.) OCC argues that CBT's failure to meet Test 4, together with all the other issues that OCC raised concerning this application, means that granting CBT's application cannot be in the public interest. Based on these arguments, OCC contends that CBT's application fails the public interest test also required by Section 4927.03(A), Revised Code. Last, OCC notes that Rule 4901:1-4-10(C)(4), O.A.C., requires that an applicant for BLES alternative regulation show both line loss and the presence of five alternative providers, and a failure of either requirement is a failure to meet the test. OCC contends that it has demonstrated, keeping the statutory requirements in mind, that the information provided by CBT is insufficient to meet the statute or rule. (*Id.*) OCC's various arguments in support of its position will be discussed in more detail in the following sections.

CBT's Position

CBT asserts that OCC is making the same policy and legal arguments in this case that OCC made in 05-1305, despite the Commission's rejection of them in 05-1305. (Response at 2.) CBT notes that both Dr. Roycroft and Mr. Williams submitted lengthy affidavits in 05-1305 in support of OCC's position, as they have in the present case. CBT argues that OCC's opposition rests primarily on its claims that the rules established under 05-1305 do not satisfy the statutory requirements. CBT asserts that this proceeding is not an opportunity for OCC to reargue the substance of the BLES alternative regulation rules. Rather, the purpose of this proceeding is to determine whether CBT has met the requirements under the established rules in the Cincinnati and Hamilton exchanges, for which it has made application. (Response at 2-3.) CBT further asserts that OCC had a full and fair opportunity to voice its legal and policy views in 05-1305, in which OCC fully participated. CBT argues that nothing new can be raised in this proceeding as a collateral attack on the rules. CBT asserts that OCC has had the opportunity to say what the rules ought to be, and the Commission addressed those issues in 05-1305. CBT opines that OCC cannot now invent rules to its liking and then criticize CBT for not complying with those non-existent rules. (Response at 3.)

Next, CBT asserts that the Commission considered all of the required factors in Section 4927.03(A), Revised Code, when it established the BLES alternative regulation rules in 05-1305. In that case, the Commission determined that compliance with one of the four competitive tests would be a sufficient showing that the conditions in Section 4927.03(A)(1)(a) or (b), Revised Code, existed. CBT contends that it is unnecessary to repeat that same exercise in individual alternative regulation cases. (Response at 4.)

With respect to rulemaking, CBT asserts that the Commission met the statutory requirement in Section 4927.03(A)(2), Revised Code, that it consider various factors in establishing the alternative regulatory rules, by the Commission's soliciting and receiving comments from interested parties, including OCC, in 05-1305. (Response at 5.) As to OCC's contention that the Commission must reconsider each of the statutory criteria in ruling on a specific BLES alternative regulation application, CBT asserts that this would ignore the substantial work done in 05-1305 to develop the four competitive market tests, in which all of the statutory factors were considered. CBT further asserts that the four competitive market tests provide objective criteria by which to judge BLES alternative regulation applications so that the Commission does not have to revisit all of the statutory criteria that it has already considered. *(Id.)* CBT submits that the question for the Commission to answer in an individual ILEC's case is whether the application satisfies one of the competitive tests. Further, CBT submits that only if an ILEC presents a customized competitive test, must the ILEC show that the proposed test satisfies the statutory criteria. (Response at 6.)

With respect to Test 4, CBT asserts that Test 4 was adopted to address various concerns raised by commenting parties regarding technology advancements and their impact on the competitiveness of the local telecommunications service market that was not reflected in the Commission staff's original three proposed predefined tests. (Response at 6; 05-1305, Entry on Rehearing at 13, ¶24.) CBT further asserts that Test 4 captures the changing market characteristics identified by data and affidavits submitted by various parties of record in 05-1305. *(Id.)*

<u>Commission Conclusion</u>

The Commission does recognize that OCC is making the very same arguments to challenge CBT's application in this case as OCC made in challenging the rules approved in 05-1305. While we will address some of the issues raised as to competitive market Test 4 in the following sections, we believe that the Commission's orders in 05-1305 fully address the OCC's arguments raised on both proceedings and there is no reason for the Commission to fully repeat the same analyses and conclusions set forth in those orders. Likewise, there is no reason to discuss and reevaluate the evidence submitted in the record in 05-1305 for the purpose of addressing OCC's same arguments. Accordingly, the Commission hereby incorporates into the record in this case the entire record from Case No. 05-1305, including but not limited to all of the Commission's orders as well as the evidence submitted by the parties in that case. The record from that case should be considered as part of the record in this case and that record supports the Commission's orders in 05-1305 and the resulting rules adopted in Chapter 4901:1-4, O.A.C.

B. Competitive Market Test 4

OCC contends that, for the reasons discussed below, the competitive market test adopted by the Commission in Rule 4901:1-4-10(C)(4), O.A.C., does not meet the statutory provisions of Section 4927.03(A), Revised Code. CBT asserts that the documentation submitted in support of its application meets all of the requirements of Test 4. CBT further asserts that because its application is fully compliant with competitive Test 4, each and every element of the statute has been satisfied and its application should be approved. (Response at 14.)

1. Barriers to Entry

OCC's Position

OCC asserts that, in addition to the two requirements under Section 4927.03(A)(1), Revised Code, the Commission is required by Section 4927.03(A)(3), Revised Code, to also find that there are "no barriers to entry" before it can approve an ILEC's application for BLES alternative regulatory treatment. (Opposition at 13, n. 40.) OCC further asserts that the statutory context of Section 4927.03(A)(3), Revised Code, requires the Commission to find that there are no barriers to entry for providers of BLES. (*Id.*; Section 1.47, Revised Code.) OCC opines that under Test 4, as written, the alternative providers need not explicitly be providing BLES. (Opposition at 13.) OCC argues that neither the line loss test nor the alternative providers test effectively measures the lack of barriers to entry. OCC contends that this is particularly true if the analysis focuses on barriers to entry for the provision of BLES. (*Id.*; Roycroft Affidavit, ¶11.)

With respect to the Commission's rationale in adopting Rule 4901:1-4-10(C)(4), O.A.C., OCC asserts that the Commission has interpreted "no barriers to entry" to mean "no barriers to entry sufficient to prevent market entry." (Opposition at 10.) OCC also asserts that the Commission interprets an entry barrier as a condition that precludes entry into the market. OCC contends that this interpretation of entry barriers is too restrictive and is not supported by the economic literature. (Opposition at 14; Roycroft Affidavit, ¶37.) OCC further contends that the Commission's interpretation of entry barriers is not consistent with the statute. OCC asserts that the statute recognizes that the issue of entry barriers for BLES is to be considered in addition to the existence of competition. OCC further asserts that this recognition also correctly suggests that entry barriers may be present where there is some evidence of competitive entry. (*Id.*)

Next, OCC asserts that the Commission's rationale in 05-1305 treats the "no barriers to entry" test under this statute as mere surplusage or irrelevant. (Opposition at 10.) OCC argues that if there were barriers to entry sufficient to prevent market entry for BLES, then BLES could not be subject to competition or have reasonably available alternatives for customers, which is as the General Assembly intended, and the statute requires. (Opposition at 10.) In support of this argument, OCC cites to Section 1.47, Revised Code, and *East Ohio Gas Co. v. Public Utilities Comm'n of Ohio*, 39 Ohio St. 3d 295 (1988), for the propositions that "the General Assembly is presumed to want all parts of a statute to be operative" and "surplusage is not to be found lightly." (*Id.*, n. 27; Section 1.47(B), Revised Code.)

OCC further asserts that the Consumer Group's market test provision on barriers to entry[2] (which was rejected by the Commission in 05-1305) is far more consistent with the policy of the State of Ohio to "Rely on market forces where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market, to maintain just and reasonable rates,"[3] than are the Commission's competitive market tests, including Test 4, which do not require a showing of no barriers to entry. (Opposition at 10-11.) OCC contends that neither prong of Test 4 addresses market power. (Opposition at 13; Roycroft Affidavit, ¶11.)

OCC contends that Test 4 fails to include any criteria that are consistent with the statutory requirement that the Commission make findings regarding the absence of barriers to entry for BLES. (Opposition at 14, Roycroft Affidavit, ¶41.) OCC further contends that if the Commission were to follow the statute, in conjunction with Test 4, the Commission would find that CBT has not met its burden under the statute. (Opposition at 13, n. 41.)

Last, OCC contends that the documentation submitted by CBT in support of its application does not meet the requirements of Section 4927.03(A), Revised Code. OCC further contends that none of CBT's documentation addresses the fundamental issues under the Commission's Test 4: whether barriers to entry for BLES exist in CBT's territory and whether CBT's candidate alternative providers are providing competing services to CBT's BLES. (Opposition 16-17, Roycroft Affidavit, ¶7.)

CBT's Position

As to OCC's arguments that CBT is required to prove (1) that there are no barriers to entry in the Cincinnati and Hamilton exchanges, and (2) that CBT's BLES is subject to competition (or) that CBT's BLES customers have reasonably available alternatives to BLES, CBT argues that OCC completely ignores the rules established in 05-1305. (Response at 4.) CBT asserts that the rules established objective tests that, if satisfied, would demonstrate compliance with the underlying statutory provisions. In other words, the four tests established under Rule 4901:1-4-10(C), O.A.C., were designed in a manner that an ILEC demonstrating compliance with one of the tests would be deemed to have established compliance with the provisions of Section 4927.03(A), Revised Code. *(Id.)*

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2 The Consumer Group's proposed competitive market test in 05-1305 stated:

> The applicant must demonstrate that there are no barriers to entry associated with the provision of BLES. The applicant must provide evidence of the absence of factors which would inhibit timely, significant, and sustainable market entry. The applicant must present evidence, including market share evidence that market entry in each exchange is resulting in the provision of BLES throughout the exchange, outside of packages or bundles, by unaffiliated CLECs, and facilities-based CLECs.

OCC asserts that its definition of CLEC was broad enough to include any firm providing BLES, regardless of technology. (Roycroft Affidavit, ¶10.)

3 Section 4927.02, Revised Code, addresses the State telecommunications policy. OCC's quote noted above references part of the text in division (A)(2) of this statute.

CBT rejects OCC's arguments concerning the General Assembly's intent regarding "no barriers to entry" prior to approval of alternative regulation for BLES. (Response at 11.) CBT notes that the Commission previously rejected OCC's position that any condition that makes entry more difficult constitutes a barrier to entry. (*Id.*, 05-1305, Opinion and Order at 19-22.) CBT contends that the factors identified by Dr. Roycroft are inherent in almost any market, so the General Assembly could not have meant for them to be impediments to alternative regulation of BLES because that would make alternative regulation of BLES impossible to achieve. (Response at 11.) CBT asserts that in attempting to discern the intentions of the General Assembly, a strong presumption exists against any construction which produces unreasonable or absurd consequences.[4] (Response at 11-12.)

CBT argues that OCC's interpretation of "no barriers to entry" would preclude the Commission from ever making that finding, thereby making implementation of the statute impossible, with the consequence that the statute was a nullity from the time that it was passed. (Response at 12.) CBT further asserts that the challenges which face a new entrant are not the same as barriers that prevent a carrier from being able to compete in a market. CBT submits that the Commission expressly determined that the competitive tests were designed to establish that there are no barriers to entry. (*Id.*, 05-1305, Opinion and Order at 22.) CBT argues that OCC made the same arguments on rehearing, and that those arguments were rejected by the Commission. (*Id.*, 05-1305, Entry on Rehearing at 17-18, ¶30.) CBT contends that OCC's interpretation of H.B. 218 would "create an insurmountable burden of proof for an ILEC to satisfy." (Response at 13; 05-1305, Entry on Rehearing at 18.) CBT asserts that if an ILEC can demonstrate that it has lost a "real" percentage of its residential customer base and that there are competitive alternatives to BLES for residential customers, the Commission was satisfied that barriers to entry are not restricting the ability of competitors to compete. (*Id.*, 05-1305, Entry on Rehearing at 19.) CBT submits that it is self-evident from Test 4 that there are no barriers to entry; otherwise those providers would not be in business. Last, CBT submits there is no requirement that the Commission investigate the market further, once Test 4 has been satisfied.

Commission Conclusion

We agree with CBT that OCC devotes the majority of its Opposition to reiterating their previous arguments raised in 05-1305. OCC contends that, consistent with Section 4927.03(A)(3), Revised Code, the presence of competition does not eliminate the Commission's consideration of the issues of barriers to entry. With respect to this argument, the Commission finds that OCC has failed to raise any new arguments from those previously considered and rejected in 05-1305, and, therefore, OCC's arguments relative to this issue should be denied.

As discussed above, OCC asserts that, rather than focusing on the presence or absence of competitors, a barriers-to-entry analysis should include all aspects of entry, including technical, economic, and geographic factors. In rejecting OCC's arguments pertaining to this issue, the Commission believes that its BLES alternative regulation rules incorporate the elements of the barriers-to-entry analysis in accordance with Section 4927.03(A)(3), Revised Code. As the Commission previously noted,

4 *State ex. rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181-182 (1985); Section 1.47(C), Revised Code.

> [A]ll companies are confronted with at least some conditions that make entry difficult. Therefore, the primary issue becomes an analysis of whether these difficulties can be overcome by some competitors or whether market conditions involve true barriers to entry that prevent or significantly impede entry beyond those risks and costs normally associated with market entry. If H.B. 218 stands for the proposition that all conditions that make entry difficult have to be eliminated for all potential competitors, such an interpretation will create an insurmountable burden of proof for an ILEC to satisfy.

(05-1305, Entry on Rehearing at 18.)

In establishing the criteria to be incorporated in its BLES alternative regulation rules, the Commission identified those factors that it believes are significant for the purpose of complying with the intent of H.B. 218, while at the same time not making the thresholds so onerous that few, if any, ILECs should avail themselves of the BLES alternative regulation benefits contemplated by H.B. 218. Further, the Commission highlights the fact that, although the legislature provided general guidance to the Commission regarding the establishment of alterative BLES regulation, the ultimate decision-making authority regarding that implementation was left to the Commission.

With respect to Rule 4901:1-4-10(C)(4), O.A.C., the Commission disagrees with OCC's contention that the Commission's rule fails to properly address the absence of barriers to entry. The Commission finds significance in the facts that an ILEC experiences a threshold loss of at least 15 percent of the total residential access lines and that the relevant market (at the exchange level) has the presence of at least five unaffiliated facilities-based alternative providers serving residential customers. The criteria set forth for Rule 4901:1-4-10(C)(4), O.A.C., allows for the conclusion that if this criteria is satisfied there are a reasonable number of providers offering competing services in the relevant market and that a significant number of residential subscribers in an exchange now perceive those service offerings as a reasonably available substitute offering that competes with the ILEC's BLES. The required presence of unaffiliated alternative providers combined with the requisite ILEC loss of residential access lines adequately establishes that there are no barriers to entry, thus satisfying Section 4927.03(A)(3), Revised Code.

The Commission notes that all the barriers-to-entry factors outlined by Dr. Roycroft in this proceeding, which are identical to the barriers-to entry-factors that OCC identified in 05-1305, were considered by the Commission in 05-1305 where we stated, "Federal and state laws and rules exist to minimize the effect of such challenges and to prohibit ILECs from using such issues as barriers to entry." (05-1305, Opinion and Order at 22.) The Commission does not find evidence in the record of any barriers to entry present in the Cincinnati and Hamilton exchanges that might bar providers from entering these markets in CBT's service territory. The Commission further finds that all of the types of barriers to entry identified by Dr. Roycroft in this proceeding are general, and that he failed to identify a single barrier to entry that applies specifically to CBT's operations in either of the Cincinnati and Hamilton exchanges.

2. Stand-alone BLES

OCC's Position

Next, OCC asserts that because the Commission previously granted alternative regulation to BLES as part of bundles under Rule 4901:1-4-06(C), O.A.C.,[5] the Commission's consideration of CBT's present application is limited to the question of alternative regulation for customers served by stand-alone BLES. OCC contends that the existence of competition for BLES in bundles cannot be used to determine whether there is competition or that customers have alternatives for stand-alone BLES. OCC further contends that the BLES-only service does not itself compete with the alternative providers' bundled service offerings because they are not functionally equivalent nor substitutes. (Opposition at 11-12; Williams Affidavit, ¶30.)

CBT's Position

CBT also rejects OCC's argument that the statute requires that competitors provide stand-alone BLES for an ILEC to obtain BLES alternative regulatory approval. CBT submits that the statute is not that restrictive. CBT further submits that the statute permits BLES alternative regulation if there are *alternatives* to BLES, rather than requiring that the alternatives *be* BLES. (Response at 7.)

Commission Conclusion

As stated above, OCC opines that CBT has failed to meet its burden of proof required by Section 4927.03, Revised Code, because it did not establish that alternative providers have stand-alone BLES offerings that are available at competitive rates, terms and conditions. The Commission notes that OCC has reiterated the same arguments that it previously raised and that were considered in 05-1305 relative to this issue. Consistent with our prior determinations in 05-1305, the Commission finds that OCC's argument with respect to this position should be denied. Specifically, the Commission previously found that:

> The law does not restrict the "analysis of competition" and "reasonably available alternatives" to the competitive products that are exactly like BLES. Indeed, the law provides that the Commission consider the ability of providers to make functionally equivalent <u>or</u> substitute services readily available to consumers (Emphasis in original). Whether a product substitutes for another product does not turn on whether the product is exactly the same. Clearly, customers that leave an ILEC's BLES offering to subscribe to another alternative provider's bundled services offering view such bundled services offerings as a reasonable alternative service, and a substitute to the ILEC's BLES. Additionally, customers who subscribe to these bundled offerings are by definition BLES customers.

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5 *See, In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies,* Case No. 00-1532-TP-COI.

(05-1305, Opinion and Order at 25.)

Further, we have already concluded that:

> More customers are substituting their traditional BLES with competitive services offered by alternative service providers such as wireline CLECs, wireless, VoIP and cable telephony providers. Although the products offered by those alternative providers may not be exactly the same as the ILEC's BLES offerings, those customers view them as substitutes for the ILEC's BLES.
>
> . . .
>
> Accordingly, we find that, with technology advancements, alternative providers such as wireline CLECs, wireless, VoIP and cable telephone providers are relevant to our consideration in determining whether an ILEC is subject to competition or customers have reasonably available alternatives to the ILEC's BLES offering at competitive rates, terms and conditions.

(*Id.*)

The Commission also rejects OCC's position that, in order to justify the granting of BLES alternative regulation, the functionally equivalent services must be similarly priced to CBT's stand-alone BLES and have terms and conditions similar to CBT's ubiquitous availability of service across the exchange. Although alternative BLES services may not be currently offered under identical terms and conditions, Section 4927.03(A)(2)(c), Revised Code, only requires that the functionally equivalent or substitute services be readily available at competitive rates, terms, and conditions. With respect to this requirement, the Commission determines that, consistent with the criteria set forth in Rule 4901:1-4-10(C), O.A.C., to the extent that CBT is losing BLES customers and the requisite number of alternative providers are present, it is evident that functionally equivalent or substitute services are readily available. The customers CBT loses must find the other providers' rates, terms, and conditions to be competitive to what they received from CBT's BLES service. Otherwise, it is reasonable to assume that they would not have switched from CBT's BLES service.

3. <u>Residential Access Line Loss</u>

<u>OCC's Position</u>

OCC rejects the Commission's rationale for adopting the minimum 15 percent line loss criteria under Rule 4901:1-4-10(C)(4), O.A.C. OCC disagrees with the Commission's position in 05-1305 that the "test components measuring access line losses do measure BLES competition because each access line customer previously purchased BLES from the ILEC." (Opposition at 11; *Id.*, Entry on Rehearing at 18.) OCC contends that the Commission's rationale ignores the fact that neither the Commission nor CBT has any idea what portion of the "line loss" is attributable to competition from providers of "functionally equivalent or substitute services." (Opposition at 11-12.) OCC also contends that a simple comparison of total residential lines at two points in time only shows the percent change in total residential lines, without demonstrating that this change is associated with "lost lines," as Test 4 requires. (Opposition at 14, Williams Affidavit, ¶11.) OCC asserts that a decrease in the count of residential access lines does not automatically translate into access lines that have been "lost" by the ILEC to an alternative provider's BLES. (*Id.*) OCC argues that the line loss test does not account for line losses that can be caused by a wide variety of factors that have nothing to do with the statutory criteria, such as CBT's customers switching from BLES to digital subscriber line (DSL) service for Internet access, or CBT's own wireless service. (Opposition at 14-15; Roycroft Affidavit, ¶¶26, 29; Williams Affidavit, ¶¶14, 15.) OCC asserts that other factors contribute to line loss that have nothing to do with competitive entry by alternative providers, such as the decline in households in the Cincinnati area. (Opposition at 15, Roycroft Affidavit, ¶33; Williams Affidavit, ¶20.)

OCC also argues that the 2002 line comparison starting point is problematic, as this is when broadband connections began to significantly increase. (*Id.*, Roycroft Affidavit, ¶28.) Next, OCC argues that the line loss test simply ignores the affiliation of the provider to which the lines are lost, or the functional equivalence of the service to which the lines were lost. (*Id.*; Williams Affidavit, ¶¶13, 17-18.) Further, OCC argues that Test 4's line loss criterion is flawed because it provides no basis for the Commission to reach conclusions regarding market power and the other factors that the Commission is required to consider under Section 4927.03(A)(2)(d), Revised Code. (Opposition at 15-16, Roycroft Affidavit, ¶¶34-36.)

OCC notes that CBT has complied with Test 4 by providing its residential access line counts as of 2002 and 2005. (Opposition at 17; Application at 2, Ex. A.) OCC contends that this information does not make CBT eligible for BLES alternative regulation under the statute. OCC argues that in order for the line loss prong of Test 4 to comply with the statute, the calculation of "lost" residential access lines must consider the "affiliations of providers of services" to which some of the ILEC's residential access lines may have migrated. OCC contends that the appropriate calculation of "lost" residential access lines since 2002 must exclude any landlines that migrated from the ILEC to either (a) its affiliated provider of DSL or (b) its affiliated wireless carrier. (Opposition at 17; Williams Affidavit, ¶¶13, 15.) OCC further contends that the question of whether the Cincinnati or Hamilton exchanges pass or fail the first prong of Test 4 can only be answered after revising CBT's calculation to exclude: (1) lines transferred to CBT's DSL and wireless affiliates; (2) lines transferred to other broadband providers; and (3) lines disconnected and not reconnected with an alternative provider within CBT's service area. (Opposition at 17-18; Williams Affidavit, ¶22.)

Last, OCC asserts that if the line loss test addressed only primary residential access lines, as it should, then CBT would not likely meet the line loss part of Test 4. OCC contends that Dr. Roycroft's testimony demonstrates that, as of June 30, 2006, CBT's primary residential access lines had declined only 14.8 percent from year-end 2002. (Opposition at 27; Roycroft Affidavit, ¶26, n.7 citing CBT response to OCC Interrogatory 101.)

<u>CBT's Position</u>

CBT argues that OCC's challenges to the substance of the line loss test have no place in this proceeding. CBT asserts that, in 05-1305, the Commission exercised its expertise and judgment to determine that a 15 percent loss, without further inquiry as to the reason(s) for such loss, was a sufficient decline in access lines to justify alternative regulation. (Response at 15.) CBT further asserts that under Test 4, it is not CBT's duty to demonstrate where lost lines went or why (even if it could). CBT submits that what it must do is demonstrate compliance with the rule, which it has done.

CBT also asserts that the Commission has satisfied the statutory requirement that the Commission consider issues of market power. CBT rejects OCC's arguments that CBT should have to prove the market share of competitors in order to assess its market power, for two reasons. First, CBT contends that such a requirement would make BLES alternative regulation impossible, because CBT does not have access to other carrier's market share data. (Response at 8.) Second, the Commission intentionally designed the competitive market tests to allow ILECs to satisfy the tests using information that is readily available to them. (*Id.*, 05-1305, Opinion and Order at 12.) CBT submits that the Commission determined that the competitive test components measuring access line loss were a sufficient measure of BLES competition because each lost access line customer previously purchased BLES from the ILEC. (Response at 8; 05-1305, Entry on Rehearing at 13, ¶30.) CBT also submits that another measure of market power is built into Test 4 by requiring the presence of five *facilities-based* alternative providers in that exchange, in addition to a certain level of market loss. (Response at 9; 05-1305, Entry on Rehearing at 15, ¶26.)

CBT submits that it complied with the line loss component of Test 4, by presenting its residential access line counts as of year-end 2002 and year-end 2005. (Response at 14; Application at 2, and Ex. 3-A.) CBT asserts that the 15 percent line loss calculation is very specific as to how CBT was to show its line losses. CBT rejects OCC's arguments concerning the line loss adjustments discussed above. CBT contends that it has complied with the data required for this prong of Test 4. CBT asserts that there is no dispute that its residential access line counts declined by more than 15 percent for both the Cincinnati and Hamilton exchanges. Further, CBT asserts that OCC has provided no evidence concerning a flaw in CBT's data or its calculations.

Next, CBT asserts that OCC's data, however, does contain flaws. First, contrary to Dr. Roycroft's argument, the data cited indicates an increase in the number of households in Cincinnati from 2002 to 2005, not a decline. (Opposition at 28.) Next, as to Dr. Roycroft's contention that CBT would not satisfy the 15 percent line loss requirement of Test 4 if secondary (i.e., non-primary) residential access lines were excluded from the calculation, CBT asserts that Dr. Roycroft bases this claim on total company (i.e., Ohio, Kentucky and Indiana) access line data provided by CBT in response to Interrogatory 101, and completely ignored the primary residential access line data specifically for the Cincinnati and Hamilton exchanges that CBT provided in response to OCC Interrogatories 162 and 163. (Response at 19 and Ex. A.) CBT further asserts that if Dr. Roycroft had used the Cincinnati and Hamilton primary residential access line data, he would have found that both exchanges have experienced primary residential access line losses in excess of 16 percent over the 30 months from December 31, 2003 to June 30, 2006. (Response at 19-20.) CBT acknowledges that this time frame does not correspond exactly with the 36-month period (year-end 2002 to year-end 2005) used to measure total residential access line losses in CBT's application, but asserts that it nonetheless refutes Dr. Roycroft's contention that second residential access line losses are a major contributing factor to CBT's residential access line loss in the Cincinnati and Hamilton exchanges. CBT notes that it could not provide primary versus non-primary data by exchange for year-end 2002 because its customer database only retains records for three years. Last, CBT submits that if it meets the 15 percent residential access line loss criteria over this 30-month period, the loss in primary residential access lines would likely be even greater if measured over the 36-month period. (Response at 20, n. 36.)

Commission Conclusion

First, we note the Commission selected year-end 2002 as the starting point for the minimum 15 percent total residential access line loss calculation. As we noted in 05-1305, the Commission believes that 2002 recognizes the transition of the loss of residential access lines replaced by DSL and cable modem and excludes any data distortions due to residential access line losses not attributable to the presence of competition for BLES or the availability of reasonable alternatives to BLES. (*Id.*, Entry on Rehearing at 13-14.) We also note that there is no data in the record to support OCC's allegation that all disconnected residential access lines were used for Internet access, not for voice communications, and, therefore, all disconnected residential second lines are due to substitution of those access lines with DSL or cable modem services. We further point out that OCC's analysis of the overall six percent increase in DSL connections, between 2002 and 2005, in the state of Ohio (i.e., state-wide) is irrelevant to the evaluation of CBT's application for BLES alternative regulation which is limited to the Cincinnati Exchange and the Hamilton Exchange. Further, we believe that the 15 percent loss of total residential access lines in an exchange fully recognizes and captures the impact of families moving out of a specific exchange as well as families moving into that exchange. We also note that, contrary to OCC's allegation that there was a decline in the number of households in the Cincinnati area; the data submitted by Dr. Roycroft for the record[6] demonstrates that there was an increase, not a decline, in the number of households between 2002 and 2005 for Hamilton County (where the Cincinnati Exchange is located). Next, we reject OCC's argument that residential access lines lost to CBT's wireless affiliate should be excluded from the 15 percent total residential access line loss calculation. Mr. Williams correctly observes that the Commission recognized the affiliation of the alternate provider is critical in the competitive test analysis. (Williams Affidavit, ¶16.) While the Commission did not specifically require a demonstration that the lines lost were to a particular provider, the rule recognizes the importance of unaffiliated alternative providers by requiring a demonstration of the presence of at least five unaffiliated facilities-based alternative providers serving the residential market.

Next we address OCC's argument that Test 4 does not meet the statutory provisions because it does not include a measure of the market power and the market share. It is clear from the record that it would be impossible for CBT, and equally any ILEC, to identify where the lost residential access lines went and, further, that the ILEC would not have access to other competitors' confidential market share information.

6 Roycroft Affidavit, ¶¶33-34.

(Response at 8 and 20.) We find that an ILEC residential access line could be lost to: an unregulated competitor like a VoIP provider, an affiliate or unaffiliated wireless provider, disconnected due to a move, converted to DSL provided by an ILEC affiliate, converted to DSL provided by a non-affiliated provider, or converted to cable modem service provided by an unregulated entity. The only circumstance under which the ILEC might identify where the lost residential access line went is when it goes to a CLEC that either utilizes the ILEC's unbundled network element (UNE) or ports the telephone number associated with the lost residential access line. Therefore, as the OCC recognizes, the Commission only required a competitor market share demonstration, as it relates to CLECs, in Test 3 of the rules. (Williams, ¶16.) It is important to point out that in setting parameters for the CLECs' market share in Test 3, the Commission also recognizes that, as a market reality, there are residential access lines served by CLECs that were never served by the ILEC, and that are not captured by the 15 percent CLEC market share measure. This type of measure would not be reasonable or practical to require in all exchanges/markets where competitors elect different methods of market entry other than traditional CLECs, and the statute envisioned such situations. As the Commission discussed in 05-1305, the percentage of residential access lines lost, as used in Test 1 and Test 4 of the rules (Rule 4901:1-4-10(C)(1) and (4), O.A.C.), is a different method of measuring the market power and the level of competition that an ILEC faces in a given exchange where the main competitors are not CLECs, as in CBT's case. (05-1305, Opinion and Order at 33-35.)

We emphasize that in developing the competitive market tests in Rule 4901:1-4-10, O.A.C., the Commission considered the statutory factors outlined in Sections 4927.03(A)(2) and (A)(3), Revised Code, and all of the arguments and concerns raised in the rulemaking proceeding, with the goal to have administratively feasible tests using the most objective criteria to comply with the statutory provisions. Finally, we emphasize that the Commission exercised its expertise and judgment based on the information on the record to determine that, in Test 4, a minimum 15 percent residential access line loss in a given exchange, considering all the possible causes for such loss, accompanied by the presence of at least five unaffiliated facilities-based alternative providers serving the residential market in that exchange, is sufficient to justify alternative regulation for BLES in that exchange. Accordingly, based on the data presented by CBT, we find that CBT's application satisfies the first prong of the Test 4 requirements by demonstrating that "at least 15 percent of total residential access lines have been lost since 2002, as reflected in the applicant's annual report filed with the Commission in 2003, reflecting the data for 2002," for both the Cincinnati Exchange and Hamilton Exchange. (Rule 4901:1-4-10(C)(4), O.A.C.)

4. Unaffiliated Facilities-Based Alternative Providers

OCC's Position

The alternative provider criteria of Test 4 requires that the applicant demonstrate "the presence of at least five unaffiliated facilities-based alternative providers serving the residential market" in the requested exchange. (Rule 4901:1-4-10(C)(4), O.A.C.) OCC contends that the criteria for facilities-based alternative providers do not measure whether the carriers in question can act to restrain the ILEC's prices charged to customers. (Opposition at 15.) OCC argues that market share and growth in market share are indicators that competitive carriers could act to restrain an ILEC's prices for the same competitive service. (Opposition at 16, Williams Affidavit, ¶35.) Last, OCC asserts that an alternative provider's longevity in the market is also crucial for that provider to be able to exert competitive market pressure on the ILEC's BLES service offering to customers. (*Id.*, Williams Affidavit, ¶36.) OCC submits that the alternative provider prong of Test 4 can be met if the alternative providers make functionally equivalent or substitute services readily available at competitive rates, terms and conditions. (Opposition at 5; Section 4927.03(A)(2)(c), Revised Code.) OCC contends that CBT has not demonstrated that it meets the statute with the information provided to the Commission. (Opposition at 18.)

OCC asserts that in determining whether an alternative provider's services are functionally equivalent or capable of substituting for another, and are readily available, care should be taken to avoid interpreting the behavior of niche market consumers as being representative of widespread behavior in the marketplace. (Opposition at 19; Roycroft Affidavit, ¶17.) OCC further asserts that the ready availability of functionally equivalent or substitute services, under the statute, indicates that the services in question should be usable by a wide section of the population. (*Id.*) OCC contends that the statutory requirement will not be met if a functionally equivalent service is not readily available to a wide section of the population. (Opposition at 19; Roycroft Affidavit, ¶18.)

Next, OCC opines that the facilities-based providers must be providing services that compete with the applicant ILEC's basic local exchange (BLES) offerings. (Opposition at 20; Roycroft Affidavit, ¶14; Williams Affidavit, ¶¶29-32.) OCC argues that "consumers who disconnect a residential access line in favor of a broadband line are not obtaining BLES from the alternative provider . . . nor are they obtaining a 'functionally equivalent or substitute service' for BLES." (*Id.*, Williams Affidavit, ¶¶18-19.) Further, OCC contends the facilities-based wireless carriers do not offer functionally equivalent services to BLES, as BLES is defined in Section 4927.01(A), Revised Code, and Rule 4901:1-4-01(C), O.A.C. (Opposition at 19-20.) In support of its position, OCC notes that (1) wireless phones do not offer customers a functional equivalent or substitute for dial tone; (2) wireless service does not yet offer customers a functional equivalent or substitute for E-911; (3) wireless carriers do not offer their customers the ability to have a white pages listing or provide a directory. (Opposition at 20-21; Roycroft Affidavit, ¶¶45-52; Williams Affidavit, ¶¶29-32.) OCC further argues that wireless service is a poor substitute for wireline services for the following reasons: (1) service quality problems, such as not getting a network signal to place a call and dropped calls; (2) lack of reasonable means for Internet access and other services; (3) cultural barriers; (4) a family will require multiple wireless telephones to replace the wireline telephone; (5) keeping track of the wireless phones may be a challenge, which makes their use as a replacement more risky; (6) the ergonomic design of the wireless phone, which may be highly significant for portions of the population, such as the elderly, or those with physical disabilities; and (7) wireless plans typically bill usage for incoming and outgoing calls, unlike BLES. Based on the arguments above, OCC contends that it is clear that wireless services do not provide a reasonable and readily available substitute for the overwhelming majority of Ohio consumers. (Opposition at 21-23; Roycroft Affidavit, ¶¶46-67, 84; Williams Affidavit, ¶¶29-32.)

OCC asserts that careful consideration must be given to the rates, terms, and conditions associated with the offerings of the alternative providers that have been identified by CBT. OCC contends that if the alternative provider's rates, terms, and conditions differ significantly from those associated with BLES, then the services cannot be viewed as competing with BLES. (Opposition at 20; Roycroft Affidavit, ¶22, 24; Williams Affidavit, ¶¶33-34.) OCC asserts that competitive rates are rates that allow the consumer's choice to be unhindered by a significant price differential. (Roycroft Affidavit, ¶74.) OCC argues that experiencing a price increase of more than 50 percent does not provide the consumer with a competitively priced service, especially when the service is of substantially lower quality. (Opposition at 24, Roycroft Affidavit, ¶74.) Further, OCC argues that significant price differences do not put much of a price constraint on CBT. (*Id.*) Last, OCC contends that the wireless carriers proposed by CBT cannot be considered alternative providers that satisfy Test 4, because they do not, on the basis of price, provide a competing service with BLES. (Opposition at 20-21, 23-24; Roycroft Affidavit, ¶¶24, 68-71, 74.)

Next, OCC asserts that other characteristics of wireless plans prevent them from offering a competing service to BLES. (Opposition at 24-25; Roycroft Affidavit, ¶78.) OCC argues that most wireless carriers require long-term contracts for service that is similar to CBT's BLES. Further, most of the long-term contracts include early termination fees. Wireless services must also be purchased by customers in a bundle, and customers must purchase a wireless handset in order to use the services. (*Id.*; Roycroft Affidavit, ¶¶79, 80-82.)

OCC further asserts that when considering whether wireless carriers offer a competing service to BLES, it is important to consider whether wireless providers are designing products that are easy to substitute for wireline BLES. OCC contends that wireless providers do not position their product as a competitor to wireline products, but instead compete with other wireless providers. In support of this position, OCC argues that if wireless companies were targeting the wireline market or the market for BLES, they would need to upgrade their networks to increase signal strength and coverage to ensure that coverage would also work indoors. OCC further argues that limitations on a wireless service provider's ability to offer service indoors is a strong indicator that their product is not being positioned to compete with the ILEC's BLES. (Opposition at 25; Roycroft Affidavit, ¶¶84- 87.)

OCC notes that this part of Test 4 requires that customers have the benefit of the "presence of at least five facilities-based alternative providers" in the exchange. (Opposition at 27.) OCC contends that, because the statute requires the Commission to evaluate the extent to which service is available from the provider in the exchange, an alternative provider that is unable to provide service in certain parts of an exchange would not satisfy this portion of the statute. (Opposition at 28; Williams Affidavit, ¶¶28, 31.) OCC asserts that the issue is whether the alternative providers claimed by CBT make their services "readily available" to customers throughout the Cincinnati and Hamilton exchanges. OCC further asserts that, as it will demonstrate, they do not. (Opposition at 28.)

Current Communications

With regard to Current Communications, OCC asserts that Current Communications does not qualify as an alternative provider because the company serves only in the Cincinnati Exchange, and only in a small part of that exchange. *(Id.)* OCC further argues that Current Communications does not qualify as an alternative provider under Test 4 for the following reasons: (1) Current Communications has a limited geographic reach in the Cincinnati Exchange; (2) Current Communications only offers a single bundled service with unlimited long distance and multiple features, which places it in a different product market than CBT's BLES, at a substantially higher price; (3) Current Communication's service quality is an issue; and (4) Current Communication's service reliability in times of power failure is an issue. (Opposition at 30; Williams Affidavit, ¶¶53-59.)

Time Warner Cable

OCC asserts that Time Warner Cable's franchise does not cover the entirety of the Cincinnati and Hamilton exchanges. (Opposition at 28; Williams Affidavit, ¶¶28, 31, 44.) Next, OCC contends that the service provided by Time Warner Cable is neither competition for nor a substitute for CBT's stand-alone BLES. (Opposition at 28-30; Roycroft Affidavit, ¶¶46-49.) OCC further asserts that Time Warner Cable's service lacks power backup which would make "Digital Phone" useless to customers who need to call 9-1-1 during a power failure. (Opposition at 29; Roycroft Affidavit, ¶47.) OCC submits that, consistent with the statute and the definitions established in the BLES alternative regulation rules, Time Warner Cable is not a provider of competing services to CBT's BLES, and therefore, cannot be used to meet this Test 4 requirement. (Opposition at 29-30; Roycroft Affidavit, ¶51.)

Wireless Carriers

OCC asserts that there are substantial questions regarding whether the services provided by the wireless carriers identified in CBT's application are available to consumers throughout the Cincinnati and Hamilton exchanges. OCC contends that the coverage maps provided by CBT offer no evidence that consumers are capable of utilizing wireless services in any specific location, and do not demonstrate that wireless services are capable of reaching consumers indoors at their homes, which would be a reasonable prerequisite for substitution. (Opposition at 30-31; Application, Exs. J-1 through J-5; Roycroft Affidavit, ¶97.) OCC also maintains that the coverage maps do not include any objective standard for signal strength. (Opposition at 31; Roycroft Affidavit, ¶98.) OCC further contends that the disclaimers which accompany the coverage maps are strong indicators of the wireless companies' coverage reliability. (Opposition at 31-33; Roycroft Affidavit, ¶¶99-104, Attachments TRR-4 and 7.) Next, OCC asserts that the wireless coverage maps do not show that all five of the wireless carriers provide service to customers throughout the Cincinnati and Hamilton exchanges, much less provide functionally equivalent or substitute services readily available to customers. Last, OCC contends that CBT's information concerning the location of wireless retail outlets and wireless advertising are not helpful in supporting its application. (Opposition at 33; Roycroft Affidavit, ¶¶105-106.) OCC argues that the presence of retail outlets has no connection to the issue of whether a wireless service is available in a specific area or whether that service is reliable or whether a consumer can reasonably substitute wireless for BLES. OCC also argues that the wireless advertisements provided by CBT demonstrate that the wireless carriers do not actively compete for wireline business, much less BLES. *(Id.)* Based on its arguments, OCC contends that CBT has not met Test 4 for the Cincinnati and Hamilton exchanges, and, therefore, is not eligible for BLES alternative regulation in these two exchanges. (Opposition 33.)

CBT's Position

With respect to the alternative provider criteria under Test 4, CBT asserts that the Commission has already determined that cable telephony, wireless, and broadband over power line service are competitive with ILEC BLES. (Response at 21; 05-1305, Opinion and Order at 25.) CBT submits that the Commission is familiar with the basic features of these services and their capabilities and shortcomings. CBT contends that OCC has shown no reason why the alternative providers identified in CBT's application are qualitatively or quantitatively different from those considered to be competitive by the Commission in 05-1305. (Response at 22.) CBT asserts that the Commission already determined that an alternative provider need not provide service that is identical to BLES for that service to be competitive with BLES.

CBT rejects Dr. Roycroft's application of analogies concerning motorcycles and automobiles to telephone service because they address degrees of luxury, compared to uses of varying technologies to achieve the primary goal of the product. CBT contends that comparing digital versus film photography and VHS recorders versus digital video recorders would be more analogous. With photography, the objective is to record a photograph, yet there are technological differences in how this is achieved between the two types of cameras. (Response at 23.) CBT asserts that these differences doe not mean that the products are not reasonable substitutes for each other. Rather, the customer evaluates the options and makes a competitive choice between "reasonably available alternatives." *(Id.)* CBT also asserts that the basic purpose of the telephone service is so that people can talk with each other, and this can be done with a wireless phone, a VoIP phone, or a traditional phone, all using different technologies. CBT submits that the OCC has not identified anything new that was not known in the course of 05-1305. (Response at 25.)

Next, CBT rejects OCC's argument that the Commission must find that competing services are functionally equivalent in order to allow BLES alternative regulation. CBT argues that the statute requires that the Commission "consider" whether the competing services are equivalent, not that the Commission had to make such a finding. (Response at 7.) CBT further asserts that even if two services are not completely functionally equivalent, they can still compete with one another. CBT submits that the Commission reached that determination with respect to wireless and cable telephone based on the comments and evidence received in 05-1305. *(Id.)*

As to OCC's other arguments regarding alternative providers, first, CBT addresses E-911. E-911 service is not a required component of BLES as is the 9-1-1 service. However, all wireless carriers are required to provide 9-1-1 services. (Response at 26; 47 C.F.R. § 20.18.) Next, as to white page listings and directories, CBT notes that the Commission has already considered the fact that wireless carriers generally do not offer their customers a white pages listing or provide a directory. With respect to long distance, CBT notes that as most wireless carriers now bundle long distance at no extra cost, it is hard to understand why OCC argues that a choice of long distance provider for wireless customers is important. (Response at 26.) CBT submits that customers effectively choose their long distance carrier when they select a wireless provider. (Response at 27.) Concerning the issue of Internet access under wireless service, CBT asserts that Internet access is not a requirement of BLES. CBT argues that it is inconsistent for OCC to rely on features that are not part of BLES, such as Internet access, fax modems, alarm circuits, or digital recorders, in order to distinguish BLES from alternative services. *(Id.)* Last, CBT asserts that the other "differentials" claimed by OCC are not so substantial that they serve to make BLES and wireless services noncompetitive. *(Id.)*

With respect to competitive rates, terms, and conditions, CBT argues that the statute does not require that the rates, terms, and conditions be the same for the competitive products and BLES, only that the Commission consider rates, terms, and conditions in making determinations under Sections 4927.03(A)(1)(a) and (b), Revised Code. CBT asserts that the Commission did that work in 05-1305. (Response at 8.) CBT further asserts that the Commission considered this information when it determined that wireless service, even in higher priced bundles, was competitive with ILEC BLES. CBT submits that the statute does not require the Commission to repeat that exercise in each individual ILEC case. *(Id.)*

Finally, CBT asserts that OCC's opposition is criticism of Rule 4901:1-4-10(C)(4), O.A.C., not CBT's compliance with the rule, which is not a valid challenge to CBT's application. (Response at 15.)

CBT asserts that, in both the Cincinnati and Hamilton exchanges, it has demonstrated that there are at least five unaffiliated facilities-based alternative providers serving the residential market. (Response at 21.) CBT further asserts that OCC's arguments go beyond the requirements of Test 4, ignore the Commission's findings in 05-1305, and ignore the evidence that CBT has presented. (*Id.*, and 31.) As to OCC's argument regarding the statutory meaning of "presence," CBT contends that the Commission need not revisit every statutory factor in order to determine if a competitor has a "presence." CBT submits that "presence" means the carrier is in the market offering its services to customers. (Response at 31.) CBT further submits that all of the alternative providers identified in its application are offering residential service and have residential customers. CBT asserts that OCC has not refuted these facts. (Response at 32.)

Next, CBT argues that nothing in the statute or the Commission's rules require that each and every residential customer within a given exchange have five alternative providers available to them. CBT contends that it has provided the Commission with sufficient information to show that the vast majority of its Cincinnati and Hamilton exchanges are covered by Time Warner Cable's telephone service, that Current Communications offers service in some parts of the Cincinnati Exchange where Time Warner Cable may not provide service, and that five wireless carriers provide coverage throughout the Cincinnati and Hamilton exchanges. *(Id.)* CBT further argues that OCC has not refuted CBT's proof that the services offered by the alternative providers identified in its application are usable by a wide section of the population. CBT submits that Time Warner Cable's franchises encompass nearly all of CBT's Cincinnati and Hamilton exchanges, and all of the wireless carriers' coverage areas include the entirety of both exchanges. (Response at 32.) Last, CBT asserts that there is no requirement that every competitive service be available in 100 percent of the exchange. CBT further asserts that, based on the available information, there is no basis to conclude that the alternative providers' service is not widely available throughout the Cincinnati and Hamilton exchanges. (Response at 33.) CBT also submits that in 05-1305, OCC affiant Mr. Williams noted that, if an ILEC-affiliated wireless carrier were permitted to count as one of the five alternative providers, then CBT would automatically qualify for BLES alternative regulation based on wireless carriers alone, because of the presence of four national wireless carriers (Cingular, Verizon, Sprint, and T-Mobile). (*Id.*, 05-1305, Williams Affidavit, December 6, OCC Comments, *et al.*, at 17, ¶26.) CBT contends that Mr. Williams' statement acknowledges that these national wireless carriers have a ubiquitous presence in CBT's territory. CBT asserts that since those comments were filed, yet another national carrier, Cricket Communications has entered CBT's market. (Response at 33.)

Last, CBT submits that as an ILEC, it has carrier of last resort responsibilities, and must remain prepared to provide landline BLES on short notice to any customer who returns, which is an obligation that no other provider has, including CBT's affiliates. CBT asserts that while an ILEC has lost the BLES line and the associated revenue, that ILEC does not experience a complementary reduction in its network capital investment, maintenance or support costs. (Response at 18.)

Commission Conclusion

As discussed above, OCC asserts that the Commission should rely on market forces and consider as part of the competitive market tests the size of alternative providers and their longevity on the market. The Commission believes that factors like longevity in the competitive market, while somewhat noteworthy, do not have a direct bearing on the state of the competitive market at any given point in time. Rather, the Commission believes that criteria such as the required presence of several unaffiliated facilities-based providers is a more significant factor for supporting a healthy sustainable market, because this criteria demonstrates a greater commitment of a carrier to remain in the market as a competitor. The Commission believes that the more appropriate measure for consideration is the overall state of the competitive market demonstrated by the presence of a significant number of competitive providers in the relevant market and that CBT has lost a considerable share of its access lines. Through such an examination, there will be better assurance that there is a reasonable level of BLES alternatives to warrant the granting of BLES alternative regulation. Further, to the extent that the state of the competitive market were to significantly change in a negative direction, the Commission notes that, under the authority granted by Section 4927.03(C), Revised Code, and by Rule 4901:1-4-12, O.A.C., the Commission may, within five years, modify any order establishing alternative regulation.

Next, the second part of competitive Test 4 requires that the applicant must demonstrate the "presence of at least five unaffiliated facilities-based alternative providers serving the residential market." We address those requirements in the following paragraphs. (Rule 4901:1-4-10(C)(4), O.A.C.)

Time Warner Cable and Current Communications

1. "Alternative Providers"

First, OCC objects to Time Warner Cable and Current Communications as facilities-based alternative providers, arguing that Time Warner Cable and Current Communications do not offer competing service(s) or a substitute to CBT's stand-alone BLES offering(s) in accordance with the "facilities-based alternative provider" definition in Rule 4901:1-4-01(G), O.A.C. As the Commission determined in 05-1305, the public testimony demonstrated that customers disconnected their ILEC's BLES to subscribe to alternative providers such as wireline CLECs, wireless, VoIP, and cable telephony providers. We found that such providers offer services that compete with the ILEC's BLES offerings. (*Id.*, Opinion and Order at 25.) Similarly, we find that the record in the present proceeding demonstrates that customers in the Cincinnati Exchange and Hamilton Exchange substitute their CBT BLES service with Time Warner Cable "Digital Phone" service (Application, Ex. 3 at F-1 and F-2; Response at Confidential Ex. B). Therefore, we find that the services offered by Time Warner Cable are competing with CBT's BLES offerings in the Cincinnati and Hamilton exchanges. Similarly, we find that the record in the present proceeding demonstrates that customers in the Cincinnati Exchange substitute their CBT BLES service with Current Communications "Current Voice" service. Therefore, we also find that the services offered by Current Communications are competing with CBT's BLES offerings in the Cincinnati exchange. (Application, Ex. 3 at F-1; Response at Confidential Ex. B.)

2. "Unaffiliated" and "facilities-based"

The Commission notes that there is no dispute in the record as to whether either Time Warner Cable or Current Communications uses facilities that it owns, operates, manages or controls to provide its services or as to their non-affiliation with CBT. (Williams Affidavit, ¶39.) In accordance with Rule 4901:1-4-10(C)(4), O.A.C., we find that CBT has demonstrated that both Time Warner Cable and Current Communications are unaffiliated with CBT and use the facilities they own, operate, manage or control to provide their services and, therefore, meet the "unaffiliated" and "facilities-based" requirements associated with the alternative providers in the second prong of Test 4.

Next, OCC objects to considering Time Warner Cable, as a facilities-based alternative provider, because its franchise area does not cover the entirety of the Cincinnati and Hamilton exchanges, and because CBT failed to verify that "Digital Phone" service is available at 100 percent of the homes passed by Time Warner Cable's facilities, arguing that Time Warner Cable's service offering is not available in the relevant market as required by the statute. The Commission rejects OCC's narrow interpretation that the facilities-based alternative provider's service has to be available in the entirety of the market area. The Commission, in selecting an "exchange" as the market[7] where competition for an ILEC's BLES can be evaluated under any of the four predefined competitive market tests, clearly stated that an exchange would: a) exhibit similar market

7 One of the few issues OCC supported in the rulemaking phase was the selection of an exchange as the market definition.

conditions within its boundary; b) provide an objective definition that would allow for evaluation of competition on a reasonable granular level; and c) be practical to administer as ILECs collect and report data at the exchange level in their annual reports that are submitted to the Commission. (05-1305, Opinion and Order at 18-19.) To meet OCC's narrow interpretation of the statutory requirement, the market would need to be defined as small as a "city block," which is clearly without merit and impractical to administer, otherwise such a provision cannot be satisfied. The Commission, being mindful of the market realities, and to ensure that an ILEC would only attain BLES pricing flexibility in markets where it faces competition for BLES or where BLES customers have reasonably available alternatives, reasonably selected an exchange as a market definition. The Commission also rejects OCC's requirement for an ILEC to verify that its competitor makes the service available to 100 percent of the customer base to demonstrate that the alternative provider's service offering is available in the relevant market. We find that such information is likely confidential and available only to the alternative provider, not the ILEC, and, more importantly, that information is not required by either the statute or our rules.

The Commission finds that the data in the present record demonstrates that Time Warner Cable's franchise area covers the majority of both the Cincinnati and Hamilton exchanges (Application, Ex.3-B&C). Additionally, we find that the record demonstrates that Time Warner Cable is engaged in direct mail advertising of its "Digital Phone" service and is serving customers located in the Cincinnati and Hamilton exchanges (*Id.*, Exs. 3-D, F-1 and F-2). Accordingly, we find that Time Warner Cable's "Digital Phone" service is readily available to customers of the Cincinnati Exchange and to customers of the Hamilton Exchange for the purpose of satisfying Test 4.

3. "<u>Serving the residential market</u>"

Mr. Williams argues that, in order for Time Warner Cable and Current Communications to be considered as facilities-based alternative providers for purposes of Test 4, CBT needs to make a showing that Time Warner Cable and Current Communications "serve the residential market," which is, according to Mr. Williams, a showing that the carrier is actively marketing its services to residential customers. We find that OCC did not dispute that either Time Warner Cable or Current Communications are providing their services to the residential market. We find that CBT demonstrated that Time Warner Cable and Current Communications provide their services to residential customers. (*Id.*, Ex. 3 at 6; F-1 and F-2.)

As to OCC's argument that Current Communications does not serve the Hamilton Exchange, we note that CBT's application asserted that Current Communications offers its telephone service only in the Cincinnati Exchange. Accordingly, we limit our evaluation of Current Communications' operations and service offerings to the Cincinnati Exchange. We reject OCC's argument that Current Communications' offering is available in "some areas of the Cincinnati Exchange" and not available throughout the exchange, for the same reasons we discussed above with respect to Time Warner Cable's service availability. We find the record demonstrates that Current Communications is engaged in direct mail advertising of its "Current Voice" service and is serving residential customers located in the Cincinnati Exchange (*Id.*, Exs. 3-D & 3-F-1). Accordingly, the Commission finds that

Current Communications' "Current Voice" service is readily available to customers of Cincinnati Exchange for the purpose of satisfying Test 4.

4. "<u>Presence in the market</u>"

The next objection raised by OCC regarding Time Warner Cable, as a facilities-based alternative provider, is that CBT failed to demonstrate Time Warner Cable's "presence in the market" as required by Test 4. We note that OCC did not dispute: a) that the subscribers identified by CBT's survey as Time Warner Cable's "Digital Phone" service subscribers are in fact Time Warner's "Digital Phone" subscribers and not CBT's BLES subscribers; or b) that Time Warner Cable is a viable provider in the Cincinnati and Hamilton exchanges. Similarly, we note that OCC did not dispute: a) that the Current Communications' "Current Voice" service subscribers are in fact Current Communications' subscribers; or b) that Current Communications is a viable provider in the Cincinnati Exchange. Accordingly, we find that Time Warner Cable, in the Cincinnati and Hamilton exchanges, and Current Communications, in the Cincinnati Exchange, meet the Test 4 requirement that the unaffiliated facilities-based alternative provider is present in the market and serving residential customers. We note that Time Warner Cable and Current Communications even meet OCC's own criteria to show the alternative provider's "presence in the market." (Williams Affidavit, ¶33.)

<u>Wireless Providers</u>

CBT submits five wireless providers in its application, namely: Verizon, Cingular, T-Mobile, Cricket, and Sprint, as unaffiliated facilities-based alternative providers for the purpose of satisfying the second prong of Test 4. (Application, Ex. 3, at 8-9.)

1. "<u>Alternative Providers</u>"

We are not persuaded by OCC's argument that wireless providers are not facilities-based alternative providers because wireless service does not provide a reasonable alternative for most customers or compete with CBT's BLES. Nor are we persuaded by OCC's argument that consumers who replace their ILEC's BLES (wireline) with wireless services are a small subset of the population who generally have certain demographic characteristics, such as youth, lower income, and unmarried status; therefore, wireless service providers do not offer a reasonable alternative to an ILEC's BLES. As we noted in 05-1305, customers' substitution of an ILECs' BLES by wireless, VoIP, cable telephony and CLEC wireline services demonstrates that the providers of these services customize their service offerings to be able to meet different customer needs and lifestyles with service offerings which are <u>viewed and used</u> by consumers <u>as substitutes</u> to BLES. (05-1305, Opinion and Order at 25.) Although each substitute service to BLES will not attract (or meet the needs of) the entire customer base, this does not exclude the substitute service as a reasonable alternative to BLES. Each technology platform has its own unique characteristics, and providers using that technology platform utilize such characteristics to customize their service offerings to use as an alternative to BLES. Customers subscribing to services offered by various alternative providers, and not subscribing to the ILEC's BLES service, are testimonial to their view that the alternative providers' services are a reasonable alternative to the ILEC's BLES offerings, after consideration of all the factors (i.e., service quality, technical ability, rates, terms, and conditions, etc.). We also note that OCC does not deny the fact that some people rely on wireless services alone. (Roycroft Affidavit, ¶63.) Yet, OCC still argues, without foundation, that since only some customers, and not the entire population, view wireless service as an alternative or substitute for BLES, wireless must not be accepted by the Commission as an alternative or substitute to BLES. Again, we find that OCC's position ignores the decision made by a specific segment of the population who choose wireless service, among various BLES alternatives, as an alternative to an ILEC's BLES. OCC's argument that wireless customers are just a niche group, identified by certain characteristics, misses the point that former BLES customers are being served by an alternative provider. We find, based on the record, and data provided by CBT, that CBT's customers in the Cincinnati and Hamilton exchanges have reasonably available alternative services offered by the following unaffiliated wireless carriers: Verizon, Cingular, T-Mobile, and Sprint wireless. (Application, Ex. 3, at M; Response, at Confidential Exs. C and D.) We note that Cricket started providing residential service in the Cincinnati and Hamilton exchanges in June 2006. (*Id.*, Ex. 3, at 12.) Given the lack of information in the record, CBT has not demonstrated that CBT's residential customers in the Cincinnati and Hamilton exchanges are served by Cricket at this time.

Similar to its position regarding the wireline alternative providers, OCC objects to wireless providers, as facilities-based alternative providers, arguing that: a) the coverage maps provided in CBT's application do not show that all five of the wireless providers cover the <u>entirety</u> of the Cincinnati and Hamilton exchanges and b) CBT failed to verify that customers are capable of utilizing wireless services in any specific location or reaching consumers indoors at their homes (i.e., available in 100 percent of the homes); therefore, OCC contends that wireless service offerings by these five wireless providers are not available in the relevant market. We reject OCC's narrow interpretation. As we stated previously in the evaluation of service availability by Time Warner Cable and Current Communications, the market would need to be defined as small as a "city block," and, now, for wireless it would need to be even smaller, defined as a "single residence" to guarantee that wireless service is reaching consumers indoors at their homes; otherwise such a provision cannot be satisfied. We find that such requirement is clearly without merit and impractical to administer. The Commission finds that the coverage maps provided by CBT for the five wireless providers demonstrate that the wireless service offerings for four of the five wireless providers (i.e., Verizon, Cingular, T-Mobile, and Sprint) are reasonably available to customers of the Cincinnati and Hamilton exchanges for the purpose of satisfying Test 4. As we noted previously, Cricket started providing residential service in the Cincinnati and Hamilton exchanges in June 2006. (*Id.*, Ex. 3, at 12.) Based on the record, CBT has not demonstrated that Cricket's services are reasonably available to customers of the Cincinnati and Hamilton exchanges for the purpose of satisfying Test 4 and CBT's application at this time. (*Id.*, Exs. 3-H, J-1 through J-5, K and L).

2. "<u>Presence</u>," "<u>unaffiliated</u>," "<u>facilities-based</u>," and "<u>serving the residential market</u>"

Next, we find that CBT's application demonstrated, and OCC does not dispute, that Verizon, T-Mobile, Sprint, and Cingular wireless providers are: a) unaffiliated with CBT; b) using facilities they own, operate, manage or control to provide their wireless services;

and c) viable providers in the Cincinnati and Hamilton exchanges. (Application, Ex. 3, at 9-10, and I; Roycroft Affidavit, ¶¶94-96.) We further find that some of the wireless subscribers surveyed did in fact disconnect CBT's residential BLES service (i.e., cut the cord). (*Id.*, Ex. 3-M; CBT Response at Confidential Exs. C and D.) We note that Cricket started providing residential service in the Cincinnati and Hamilton exchanges in June 2006. (*Id.*, Ex. 3, at 12.) Given the lack of information in the record, we decline to accept Cricket as an unaffiliated facilities-based alternative provider for purpose of Test 4, and CBT's application at this time. Accordingly, we find that these four wireless providers (i.e., Verizon, Cingular, T-Mobile, and Sprint) are unaffiliated facilities-based alternative providers who established their "presence and serve the residential markets" in both of the Cincinnati and Hamilton exchanges.

Accordingly, based on the record, we find that CBT's Application and Response demonstrate that CBT has satisfied Rule 4901:1-4-10(C)(4), O.A.C.

## VI. TARIFF AMENDMENTS

The Commission finds that CBT provided the proposed tariff modifications necessary to implement the pricing flexibility rules set forth in Rule 4901:1-4-11(A), O.A.C. Tariff revisions include modifying the tariff structure to separate the exchanges where BLES and other Tier 1 services have been found to qualify for pricing flexibility from the exchanges where such a showing has not been made. For tracking purposes, the exchanges have been placed in a matrix format. This format includes columns for tier classification, maximum rate, and the effective date of the proposed increase in the maximum rate. In exchanges that are deemed to have met the competitive market test, CBT is proposing to apply a $1.25 increase to the access line portion of the monthly charges. The actual monthly charge to end users for BLES and other Tier 1 services have not been increased in this application. Pricing flexibility rules also allow certain other non-core Tier 1 services to receive Tier 2 pricing flexibility. CBT's proposed tariff reflects these changes. After a thorough review of the information provided by CBT, the Commission believes that CBT's proposed tariff, as revised on September 29, 2006, is in compliance with Chapter 4901:1-4, O.A.C.

## VII. OUTSTANDING PROCEDURAL MATTERS

On October 6, 2006, CBT filed a motion for a protective order seeking confidential treatment of the information designated confidential and/or proprietary information included in its filing made on October 6, 2006. This motion is reasonable and should be granted at this time.

## VIII. CONCLUSION

Upon a thorough review of the record in this proceeding, the Commission determines that CBT has met its burden of proving, as required by Section 4927.03(A), Revised Code, that granting the company's application for BLES and other Tier 1 service flexibility in the Cincinnati and Hamilton exchanges is in the public interest, that CBT's BLES is subject to competition, and that the company's customers have reasonably available alternatives and that there are no barriers to entry with respect to BLES in those exchanges, all in compliance with Section 4927.03(A), Revised Code. Moreover, as discussed in detail above, the Commission determines that CBT's application is complete and meets the filing requirements of Rule 4901:1-4-09, O.A.C. The Commission recognizes that it needs to maintain a balance between ensuring the availability of stand-alone BLES at just and reasonable rates while at the same time recognizing the continuing emergence of a competitive environment through flexible regulatory treatment. Accordingly, as a result of the above findings, the Commission determines that CBT's application for alternative regulation of basic local exchange and other Tier 1 services for the Cincinnati and Hamilton exchanges should be granted in accordance with Chapter 4901:1-4, O.A.C.

FINDINGS OF FACT:

(1) On August 7, 2006, CBT filed an application for approval of an alternative form of regulation of basic local exchange service and other Tier 1 services in two exchanges in its incumbent service territory. CBT's application was filed pursuant to Sections 4927.03 and 4927.04, Revised Code.

(2) Rule 4901:1-4-10(C), O.A.C., sets forth 4 competitive tests. In order to qualify for pricing flexibility for BLES and other Tier 1 services in a particular exchange, the applicant has the burden to demonstrate that it meets at least one of the competitive market tests set forth in the in the rule.

(3) For the two identified exchanges, CBT relies on the competitive test set forth in Rule 4901:1-4-10(C)(4), O.A.C.

(4) Opposition to CBT's application was filed by OCC on September 21, 2006.

(5) CBT filed its response to OCC's Opposition on October 6, 2006.

(6) Reply to the memorandum contra was filed by OCC on October 13, 2006.

CONCLUSIONS OF LAW:

(1) Upon careful review, CBT's application complies with the filing requirements of Rule 4901:1-4-09, O.A.C.

(2) Also, upon careful review, CBT's application complies with the remaining requirements of Chapter 4901:1-4, O.A.C.

(3) Consistent with the criteria set forth in Rule 4901:1-4-10(C), O.A.C., CBT satisfies the applicable test and should be granted alternative regulation of

basic local exchange and other Tier 1 services pursuant to Chapter 4901:1-4, O.A.C., in the Cincinnati and Hamilton exchanges.

ORDER:

It is, therefore,

ORDERED, That CBT's application for alternative regulation of basic local exchange service and other Tier 1 services is granted for the Cincinnati and Hamilton exchanges. It is, further,

ORDERED, That for the Cincinnati and Hamilton exchanges, CBT is granted Tier 2 pricing flexibility for all Tier 1 non-core services, and BLES and basic caller ID will be subject to the pricing flexibility provisions in Rule 4901:1-4-11, O.A.C. It is, further,

ORDERED, That, consistent with Rule 4901:1-4-11, O.A.C., CBT shall provide customer notice to affected customers a minimum of 30 days prior to any increase in rates. It is, further,

ORDERED, That the tariff amendments filed on September 29, 2006, are approved for the Cincinnati and Hamilton exchanges, for which basic local exchange service alternative regulation is granted. It is, further,

ORDERED, That for the Cincinnati and Hamilton exchanges, for which CBT's application is granted, CBT is ordered to file the appropriate tariff amendments in this case, as well as its TRF docket, reflecting the amended rates. It is, further,

ORDERED, That to the extent not addressed in this Opinion and Order, all other arguments raised are denied. It is, further,

ORDERED, That our approval of CBT's application, to the extent set forth in this Opinion and Order, does not constitute state action for the purpose of antitrust laws. It is not our intent to insulate the company from the provisions of any state or federal law which prohibit the restraint of trade. It is, further,

ORDERED, That, except as specifically provided for in this Opinion and Order, nothing shall be binding upon the Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That the docketing division maintain for 18 months from the date of this entry, all documents that were filed under seal in conjunction with CBT's filing on October 6, 2006. It is, further, ORDERED, That a copy of this Opinion and Order be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Valerie A. Lemmie

JKS:ct

Entered in the Journal
NOV 28 2006

Reneè J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Application of Cincinnati Bell Telephone Company LLC for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code. | ) ) ) ) ) ) ) | Case No. 06-1002-TP-BLS |

ENTRY ON REHEARING

The Commission finds:

(1) On November 28, 2006, the Commission issued an Opinion and Order (November 28, 2006 Order) in this case finding, among other things, that based on the record in this proceeding, Cincinnati Bell Telephone Company LLC's (CBT's) application for alternative regulation of basic local exchange service and other Tier 1 Services for the Cincinnati and Hamilton exchanges should be granted, in accordance with Chapter 4901:1-4, Ohio Administrative Code (O.A.C.).

(2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(3) On December 28, 2006, the Office of the Ohio Consumers' Counsel (OCC) filed an Application for Rehearing (Application.) OCC's Application asserts eight general grounds for rehearing and 32 specific allegations of error. In short, OCC contends that the entire November 28, 2006 Order should be rescinded.

(4) On January 8, 2007, CBT filed a memorandum contra OCC's Application. CBT asserts that none of OCC's allegations are valid. CBT submits that the November 28, 2006 Order should be affirmed in its entirety.

(5) The Commission grants rehearing to further consider the matters specified in OCC's Application.

It is, therefore,

ORDERED, That the application for rehearing filed by OCC is granted in accordance with finding 5. It is, further, ORDERED, That a copy of this entry on rehearing be served upon counsel for CBT, counsel for OCC and all other interested parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Valerie A. Lemmie

Donald L. Mason

JRJ/vrm

Entered in the Journal

Reneé J. Jenkins
Secretary

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Application of Cincinnati Bell Telephone Company LLC for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code. | ) | Case No. 06-1002-TP-BLS |

ENTRY ON REHEARING

The Commission finds:

(1) On November 28, 2006, the Commission issued an Opinion and Order (November 28, 2006 Order) in this case finding, among other things, that based on the record in this proceeding, Cincinnati Bell Telephone Company LLC's (CBT's) application for alternative regulation of basic local exchange service (BLES) and other Tier 1 Services for the Cincinnati and Hamilton exchanges should be granted, in accordance with Chapter 4901:1-4, Ohio Administrative Code (O.A.C.).

(2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(3) On December 28, 2006, the Office of the Ohio Consumers' Counsel (OCC) timely filed an Application for Rehearing (Application.) OCC's Application asserts eight general grounds for rehearing and thirty-two specific allegations of error, many of which were advanced by OCC and rejected by the Commission in Case No. 05-1305-TP-ORD (05-1305), the Commission's rulemaking proceeding to implement BLES alternative regulation as required by the Ohio General Assembly through the adoption of House Bill 218 (H.B. 218).[1] In short, OCC contends that the entire November 28, 2006 Order in this case should be rescinded. We disagree, for the reasons that will be discussed in the paragraphs below.

(4) On January 8, 2007, CBT filed a memorandum contra OCC's Application. CBT asserts that none of OCC's allegations are valid.

1 *See In the Matter of the Application of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Opinion and Order dated March 7, 2006 and Entry on Rehearing dated May 3, 2006.

CBT submits that the November 28, 2006 Order should be affirmed in its entirety.

(5) In OCC's first general assignment of error, OCC claims that the BLES rules adopted in 05-1305 did not properly implement the statutory provisions of Section 4927.03(A), Revised Code. (OCC at 9-10.) Further, OCC contends that the Commission erred in adopting Rule 4901:1-4-10(C)(4), O.A.C. (Competitive Test 4). OCC opines that the line loss prong and the alternative provider prong of Competitive Test 4 do not satisfy the statutory provisions of Section 4927.03(A), Revised Code. (*Id.* at 12-13.)

(6) CBT disagrees with OCC's contention. CBT submits that the General Assembly entrusted the Commission to determine the weight assigned to each of the factors identified in Section 4927.03(A)(2), Revised Code. CBT further submits that the statute only required the Commission to consider those factors, as the statutory language did not specify any particular result or threshold criteria that would be necessary to approve BLES alternative regulation. CBT argues that OCC cannot legitimately claim that the Commission did not consider all of the issues identified in the statute, as OCC's comments addressed all of the statutory factors, which were then addressed by the Commission's 05-1305 Order implementing the rules and its 05-1305 Entry on Rehearing. (CBT at 5-6.) CBT states that the Commission has determined that compliance with one of the four competitive tests in Rule 4901:1-4-10(C), O.A.C., would be a sufficient showing that the conditions in Section 4927.03(A)(1)(a) or (b), Revised Code, existed. Next, CBT argues that OCC's position, seeking to require the Commission to revisit each statutory issue in each individual BLES alternative regulation case, is unfounded. (*Id.* at 7-8.) Last, CBT asserts that the rules established in 05-1305 are objective tests that provide a standard means for an incumbent local exchange carrier (ILEC) to demonstrate whether it qualifies for BLES alternative regulation. (*Id.* at 4.)

(7) First, the Commission notes that OCC filed comments in 05-1305 and was an active participant in the development of the rules for BLES alternative regulation. Second, as we stated previously in 05-1305, the intent of the competitive market tests set forth in Rule 4901:1-4-10(C), O.A.C., is to require the applicant ILEC to demonstrate that its BLES is either subject to competition or that reasonably available alternatives exist, and that no barriers to entry exist for BLES. The Commission recognizes that the telecommunications market is continuously evolving. Accordingly, we determined that it would not be appropriate to conduct a competitive market analysis via one specific test. In developing the rules for BLES alternative regulation, the Commission focused on specific factors that would demonstrate for residential BLES customers that the statutory criteria of Section

4927.03(A), Revised Code, was satisfied. Third, we believe that the four competitive market tests adopted in 05-1305 are sufficiently rigorous and granular to support a finding that, consistent with H.B. 218, there are reasonably available alternatives to BLES in the affected exchange(s) or that BLES is subject to competition in the affected exchange(s); those same demanding test criteria also demonstrate that no barriers to entry exist for alternative BLES providers in the affected exchange(s). Fourth, we note that, as an additional protection, Rule 4901:1-4-10(C), O.A.C., requires that an ILEC satisfy both criteria of a single competitive market test, rather than just one of the established criteria or the other. (05-1305 Entry on Rehearing at 15-19.) Last, the Commission fully considered OCC's arguments concerning the adoption of the BLES rules and specifically Rule 4901:1-4-10(C)(4), O.A.C., in 05-1305, and also raised here in opposition to CBT's application for BLES alternative regulation. (November 28, 2006 Order at 7-8; 05-1305 Entry on Rehearing at 15-16.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing on the Commission's adoption of the BLES rules, including Rule 4901:1-4-10, O.A.C., is denied.

(8) Next, OCC raises alleged assignments of error specific to CBT's application in this proceeding. These arguments are intertwined with OCC's repeated contentions related to the unreasonableness of the Commission's BLES alternative regulation rules. The pertinent arguments regarding these assignments of error are organized into the following categories and discussed below: residential access line loss, unaffiliated facilities-based alternative providers, stand-alone BLES and bundles, barriers to entry, public interest, and the November 28, 2006 Opinion and Order.

Residential Access Line Loss

(9) As noted above, OCC claims that the line loss prong of Competitive Test 4 does not incorporate the statutory provisions of Section 4927.03(A), Revised Code. (OCC at 9, 30.) Based on this premise, OCC alleges that the Commission's use of the line loss prong in evaluating CBT's application for alternative regulation of its stand-alone BLES is improper. (OCC at 30.) CBT objects to OCC's arguments concerning the residential access line loss prong. CBT asserts that the Commission thoroughly explained in 05-1305 how and why it developed the line loss test. Next, CBT notes that the line loss test must be coupled with a showing that there are multiple alternative providers serving the residential market before an ILEC can obtain regulatory relief with respect to BLES. Last, CBT submits that all of OCC's criticism of the line loss test goes to the test itself, and that OCC does not dispute CBT's evidence. (CBT at 19-20.)

(10) The Commission notes that the line loss prong of Competitive Test 4 requires that the ILEC applicant must demonstrate that in each requested telephone exchange area that at least 15 percent of its total residential access lines have been lost since 2002 (as reflected in the applicant's annual report filed with the Commission in 2003, reflecting data for 2002). We also note that OCC repeats its arguments, from 05-1305, that the competitive tests should measure the competitors' market power or the market share. As we stated in our November 28, 2006 Order, it is clear from the record that it would be impossible for CBT, and equally any ILEC, to identify where the lost residential lines went and, further, that the ILEC would not have access to other competitors' confidential market share information. The only circumstance under which the ILEC might identify where the lost residential line went is when it goes to a competitive local exchange carrier (CLEC) that either utilizes the ILEC's unbundled network elements (UNEs) or ports the telephone number associated with the lost residential access line. Therefore, as the OCC recognizes, the Commission only required a competitor market share demonstration, as it relates to CLECs, in Competitive Test 3 of the rules. Accordingly, the Commission determined that this type of measure would not be reasonable or practical in exchanges (markets) where competitors elect different methods of market entry, other than those used by CLECs. Further, as we discussed in 05-1305, the percentage of total residential access lines lost, as used in Competitive Test 1 and Competitive Test 4 of the rules, is a different method of measuring the market power and the level of competition that an ILEC faces in a given exchange where the main competitors are not CLECs, as in CBT's case. Last, the Commission fully considered OCC's arguments concerning the line loss prong in 05-1305 and also raised here in opposition to CBT's application for BLES alternative regulation. (Rule 4901:1-4-10(C)(1) and (4), O.A.C.; November 28, 2006 Order at 17-18; 05-1305 Entry on Rehearing at 18-19; 05-1305 Opinion and Order at 33-35.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing on the Commission's use of the line loss prong of Competitive Test 4 is denied.

(11) Next, under allegation of error 17, OCC asserts that the Commission erred in its determination that the 2002 start date avoids any data distortion in residential access line losses resulting from causes other than the presence of competition for BLES or the availability of reasonable alternatives to BLES. (OCC at 33.) As we discussed previously in 05-1305, we believe that 2002 recognizes the substitution of second residential access lines to DSL and cable modem (for Internet access) and that this date excludes any data distortions resulting from causes other than the presence of competition for BLES or the availability of reasonable alternative to BLES. It is important to note that the UNE-P (unbundled network element-platform) did not

become a potential competitive offering to BLES until the January 22, 2001 decision in *Iowa Utilities Board v. FCC*.[2] Next, the Commission did not incorporate the requisite UNE-P offering until its October 4, 2001 decision in Case No. 96-922-TP-UNC.[3] Further, the actual implementation of UNE-P offerings did not occur until 2002. Last, the Commission fully considered OCC's arguments concerning the 2002 start date in 05-1305 and also raised here in opposition to CBT's application for BLES alternative regulation. (November 28, 2006 Order at 17-18; 05-1305 Entry on Rehearing at 13-14.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing on allegation of error 17 is denied.

(12) Under allegation of error 16, OCC also argues that the Commission erred in finding that the line loss prong addresses barriers to entry and rejects the Commission's rationale for its finding. (OCC at 33.) On the other hand, CBT contends that OCC argues about individual elements of the competitive test, when the parts of that competitive test must be considered in total. CBT asserts that it is the line loss test coupled with the presence of five alternative providers that is intended to demonstrate the absence of barriers to entry, not line loss alone. (CBT at 11.)

(13) First, we note that, in establishing the criteria to be incorporated in its BLES alternative regulation rules (including the line loss prong of Competitive Test 4), the Commission identified those factors that it believes are significant for the purpose of complying with the intent of H.B. 218, while at the same time not making the thresholds so onerous that few, if any, ILECs should avail themselves of the BLES alternative regulation benefits contemplated by H.B. 218. Next, the Commission highlights the fact that, although the legislature provided general guidance to the Commission regarding the establishment of alternative BLES regulation, the ultimate decision-making authority regarding that implementation was left to the Commission. (Additional discussion of "barriers to entry" is provided under that heading below.) Last, the Commission fully considered OCC's arguments raised in 05-1305 and also raised here in opposition to CBT's application for BLES alternative regulation. (November 28, 2006 Order at 12; 05-1305 Entry on Rehearing at 18; 05-1305 Opinion and Order at 22.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing on allegation of error 16 is denied.

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2 219 F.3d 744 (8th Cir. 2000), *cert. granted in part*, 531 U.S. 1124 (Jan. 22, 2001).

3 *See* Case No. 96-922-TP-UNC, *In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Opinion and Order, dated October 4, 2001.

Unaffiliated Facilities-Based Alternative Providers

(14) As noted above, OCC claims that the alternative providers prong of Competitive Test 4 does not incorporate the statutory provisions of Section 4927.03(A), Revised Code. (OCC at 9.) Based on this premise, OCC alleges that the Commission's use of the alternative providers prong in evaluating CBT's application for alternative regulation of its stand-alone BLES is improper. (OCC at 34.) CBT asserts that OCC is making the same arguments that it made in 05-1305 and, also here, in opposition to CBT's application. CBT submits that these arguments were already considered and rejected by the Commission. (CBT at 14.)

(15) First, the Commission notes that the alternative providers prong of Competitive Test 4 requires that the ILEC applicant must demonstrate the presence of at least five unaffiliated facilities-based alternative providers serving the residential market. As we noted above, in establishing the criteria to be incorporated in its BLES alternative regulation rules (including the alternative providers prong of Competitive Test 4), the Commission identified those factors that it believes are significant for the purpose of complying with the intent of H.B. 218, while at the same time not making the thresholds so onerous that few, if any, ILECs should avail themselves of the BLES alternative regulation benefits contemplated by H.B. 218. Further, as we discussed in the 05-1305 Opinion and Order, more customers are substituting their traditional BLES with competitive services offered by alternative providers such as wireline CLECs, wireless carriers, VoIP (Voice over Internet Protocol) and cable telephony providers. (*Id.* at 25, citations omitted.) We recognize that, although the products offered by those alternative providers may not be exactly the same as the ILEC's BLES offerings, those former ILEC customers viewed them as substitutes for the ILEC's BLES. Last, the Commission fully considered OCC's arguments concerning the alternative providers prong in 05-1305 and also raised here in opposition to CBT's application for BLES alternative regulation. (Rule 4901:1-4-10(C)(4), O.A.C.; November 28, 2006 Order at 24-29; 05-1305 Entry on Rehearing at 17-19; 05-1305 Opinion and Order at 25.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing on the Commission's use of the alternative providers prong of Competitive Test 4 is denied.

(16) Next, under allegation of error 21, OCC contends that the Commission erred in finding that "the presence of several facilities-based alternate providers is a more significant factor than longevity in the market for supporting a healthy sustainable market." (OCC at 35.) We disagree. As we discussed in our November 28, 2006 Order, we believe that factors like longevity in the competitive market, while

somewhat noteworthy, do not have a direct bearing on the state of the competitive market at any given point in time. (*Id.* at 24.) Rather, the Commission believes that objective criteria, as in the required presence of several facilities-based providers, is a more significant factor in supporting a healthy sustainable market, because the presence of facilities-based providers demonstrates a greater commitment, by those alternative providers, to remain in the market as a competitors. (*Id.*) Next, the Commission believes that the more appropriate measure, for consideration of BLES alternative regulation, is the overall state of the competitive market demonstrated by the presence of a significant number of competitive providers in the relevant market and that the ILEC has lost a considerable share of its access lines, as in CBT's case. Through this type of examination, there will be better assurance that there is a reasonable level of BLES alternatives to warrant the granting of BLES alternative regulation. (*Id.*) Moreover, if the state of the competitive market were to significantly change in a negative direction, the Commission notes that, under the authority granted by Section 4927.03(C), Revised Code, and by Rule 4901:1-4-12, O.A.C., the Commission may, within five years, modify any order establishing alternative regulation. (*Id.*) The Commission fully considered the arguments raised by OCC in its opposition to CBT's application for BLES alternative regulation. We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing under allegation of error 21 is denied.

(17) Under allegation of error 22, OCC also asserts that the Commission erred in finding that the presence of Time Warner Cable and Current Communications in an exchange qualifies CBT for BLES alternative regulation in that exchange, even though Time Warner Cable and Current Communications each serve only part of that exchange. (OCC at 25.) On the other hand, CBT asserts that there is no statutory requirement that an alternative provider must offer ubiquitous service before it may be counted for competitive market test purposes. (CBT at 16.) Further, CBT argues that OCC has invented a requirement that alternative providers must serve 100 percent of the market, so it can reject those competitors that do not. Last, CBT asserts that "presence" does not demand ubiquity, and that CBT is still subject to competition within an exchange even where the alternative service provider does not serve 100 percent of that exchange. (*Id.* at 17.)

(18) In the November 28, 2006 Order, we rejected OCC's narrow interpretation that the facilities-based alternative provider's service has to be available in the entirety of the market area. We also rejected OCC's requirement for an ILEC to demonstrate that the service provider's particular service offering is available in the relevant market by verifying that its competitor makes the service available to 100 percent of the (ILEC's) customer base. We determined that this

information is likely confidential and available only to the alternative provider, not the ILEC. Further, we determined that this information is not required by either the statute or the Commission's rules. Last, the Commission fully considered the arguments raised by OCC concerning Time Warner Cable and Current Communications in its opposition to CBT's application for BLES alternative regulation. (November 28, 2006 Order at 25-27.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing under allegation of error 22 is denied.

(19). Further, under allegations of error 25 and 26, OCC argues that the Commission erred in finding that the wireless carriers provide readily available alternatives to CBT's stand-alone BLES. (OCC at 4, 30.) OCC opines again that the wireless carriers' services have limitations and that the rates are not competitive. (OCC at 4.) CBT asserts that OCC is making the same arguments that it made in 05-1305 and, also here, in opposition to CBT's application. CBT submits that these arguments were already considered and rejected by the Commission. (CBT at 18.)

(20) In the November 28, 2006 Order, we rejected OCC's arguments that wireless carriers are not acceptable facilities-based alternative providers for the provision of BLES alternative services. As we previously stated, each technology platform, like wireless, has its own unique characteristics, and service providers using that technology will utilize those particular characteristics to customize their service offerings for use as an alternative to BLES. Further, although each substitute service to BLES will not attract (or meet the needs of) an entire ILEC customer base, this does not exclude the substitute service as a reasonable alternative to BLES. The Commission fully considered OCC's arguments concerning the wireless carriers in 05-1305 and also raised here in opposition to CBT's application for BLES alternative regulation. (November 28, 2006 Order at 27-29; 05-1305 Entry on Rehearing at 17-19; 05-1305 Opinion and Order at 25.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing under allegation of errors 25 and 26 is denied.

Stand-alone BLES and Bundles

(21) Next, under allegation of error 5, OCC contends that the Commission erred in finding that bundles of service from alternative providers are competition or alternatives to stand-alone BLES, and that the corresponding alternative providers' presence, permits the granting of alternative regulation for stand-alone BLES. (OCC at 14, 17.) OCC further opines, through its allegations of error 6-12, that the Commission erred in its determination that bundles (service packages) offered by the alternative service providers, as identified in

CBT's application, are competition for CBT's stand-alone BLES service. (OCC at 14-24.) On the other hand, CBT asserts that OCC raises all of the same issues here that it previously argued in 05-1305. Next, CBT submits that the Commission determined, in 05-1305, that the law does not restrict the analysis of competition and reasonably available alternatives to the competitive products that are exactly like BLES. (CBT at 15; citations omitted.) Last, CBT asserts that, because customers move from CBT's stand-alone BLES offering to service packages offered by the alternative service providers, the Commission drew the reasonable conclusion that the alternative providers' bundles are competitive to CBT's stand-alone BLES. (*Id.* at 15-16.)

(22) First, we note that Section 4927.03(A), Revised Code, compels the examination of whether customers have reasonably available alternatives to BLES. The law does not restrict, however, the "analysis of competition" and "reasonably available alternatives" to competitive products that are exactly like BLES. Whether a product substitutes for another product does not turn on whether the product is exactly the same. As we discussed previously, customers, who leave an ILEC's BLES offering to subscribe to another alternative provider's bundled service offering that includes BLES, view those bundled service offerings as a reasonable alternative service. Also, we determined that customers who subscribe to these bundled service offerings that include BLES are by definition BLES customers (because BLES is the foundation of that service package or bundle). (05-1305 Opinion and Order at 25.) Further, although alternative BLES services may not currently be offered under identical terms and conditions, Section 4927.03(A)(2)(c), Revised Code, only requires that the functionally equivalent or substitute services be readily available at competitive rates, terms, and conditions. As to this requirement, the Commission determined that, consistent with the criteria set forth in Rule 4901:1-4-10(C), O.A.C., to the extent that CBT is losing customers and the requisite number of alternative providers are present, it is evident that functionally equivalent or substitute services are readily available. (November 28, 2006 Order at 14.) Last, the Commission fully considered OCC's arguments concerning the services offered by the unaffiliated facilities-based alternative providers in 05-1305 and also raised here in opposition to the alternative providers that are present in the Cincinnati and Hamilton exchanges. (November 28, 2006 Order at 13-14; 05-1305 Opinion and Order at 25.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing under allegations of error 5-12 is denied.

(23) The Commission recognizes that there may be customers in the Cincinnati and Hamilton exchanges who do not want or need to purchase anything more than BLES or BLES plus limited vertical features, such as call waiting or caller ID. However, the existence of

these customers does not cancel out the fact that CBT is facing competition for BLES in these markets. Further, we note that CBT's stand-alone BLES offering will continue to be available as an option. Last, for those customers who are "low-income," their basic local exchange service needs are already provided under the Lifeline program, which will not be impacted by the BLES pricing flexibility. (05-1305, Opinion and Order at 25; Entry on Rehearing at 26. *See* Rule 4901:1-4-06(B), O.A.C.)

Barriers to Entry

(24) Next, under allegation of error 27, OCC claims that the Commission erred in finding that Competitive Test 4 shows that there are no barriers to entry for BLES. (OCC at 36.) On the other hand, CBT asserts that the Commission has addressed OCC's "barriers to entry" arguments multiple times now. CBT argues that the Commission determined that market factors that might present difficulties for a new entrant, yet would not prevent the entrant from providing competitive service, were not barriers to entry. (CBT at 8.) Also, CBT asserts that it presented evidence establishing that all of the conditions set forth in Competitive Test 4 exist in the Cincinnati and Hamilton exchanges. (*Id.* at 21.) Last, CBT asserts that, because compliance with any one of the four competitive tests is automatically deemed compliance with the statutory requirements for granting BLES alternative regulation, there are no barriers to entry. (*Id.*)

(25) The Commission previously determined that the required presence of at least five unaffiliated facilities-based alternative providers, in combination with the requisite ILEC residential access line loss, adequately establishes that there are no barriers to entry, thus satisfying Section 4927.03(A), Revised Code. The Commission finds that the Competitive Test 4 criteria, of (1) a minimum loss of at least 15 percent of the total residential access lines (as of 2002) and (2) the presence of a least five unaffiliated facilities-based alternative providers, are significant indicators that there are no barriers to entry for competitive providers in that particular market (exchange) and that a significant number of customers perceive those service offerings as a reasonably available substitute offering that competes with the ILEC's BLES. (November 28, 2006 Order at 12; 05-1305 Entry on Rehearing at 18.) The Commission fully considered OCC's arguments concerning "barriers to entry" in 05-1305 and also asserted here in OCC's opposition to CBT's application for BLES alternative regulation. (November 28, 2006 Order at 11-12; 05-1305 Entry on Rehearing at 17-19; Opinion and Order at 22.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing under allegation of error 27 is denied.

(26) Also, under allegation of error 28, OCC claims that the Commission erred in finding that CBT, in meeting Competitive Test 4, had demonstrated that there are no barriers to entry for BLES in the Cincinnati and Hamilton exchanges. (OCC at 36.) We find that OCC's argument is the same as the preceding argument above. We reject this argument for the reasons discussed immediately above. The Commission fully considered OCC's arguments asserted in its opposition to CBT's application for BLES alternative regulation. (November 28, 2006 Order at 11-12.) We find that OCC has raised no new arguments for the Commission's consideration. Therefore, OCC's application for rehearing under allegation of error 28 is denied.

Public Interest

(27) Next, under allegation of error 31, OCC asserts that the Commission erred in granting alternative regulation to CBT's stand-alone BLES, contrary to the public interest. (OCC at 37.) In 05-1305, the consumer groups, which included OCC, proposed that the Commission require ILECs that seek BLES alternative regulation to make additional commitments, such as ubiquitous deployment of advanced services throughout all of the ILEC's central offices, rather than the commitments required under the Elective Alternative Regulatory Plan (EARP) rule.[4] OCC argues, again, that the lack of additional ILEC commitments is not in the public interest. (05-1305 Opinion and Order at 11; OCC at 38.) CBT rejects OCC's argument that ILECs should be forced to make additional social commitments as part of alternative regulation for BLES. (CBT at 21.) CBT asserts that this issue was thoroughly reviewed in 05-1305 and properly rejected by the Commission. Next, CBT further asserts that the commitments desired by OCC would place the ILECs at a competitive disadvantage, because their competitors are not required to make the same commitments. (*Id.*) Moreover, CBT asserts that one of the prerequisites for alternative regulation of BLES is that the ILEC be in compliance with all EARP commitments. CBT notes that BLES alternative regulation does not reduce the commitments required by EARP. In addition, CBT asserts that the BLES alternative regulation rules require that Lifeline rates be frozen, even if regular BLES rates are increased. (*Id.* at 21-22.) Last, CBT submits that, in 05-1305, the Commission concluded that, if an ILEC satisfied the requirements of one of the competitive market tests, then alternative regulation of that ILEC's BLES would be in the public interest. (*Id.* at 22.)

(28) As we discussed previously in 05-1305, in order to establish alternative regulatory requirements for BLES and other Tier 1 services, the Commission must, under the law, not only find that the services are subject to competition or have reasonably available

[4] *See* Rule 4901:1-4-09(B)(1), O.A.C.

alternatives, but we must also find that the alternative regulatory requirements are in the public interest. To guide us in determining whether alternative regulatory treatments are in the public interest, we look to the policy of the state, as set forth in Section 4927.02(A), Revised Code, to ensure the availability of adequate BLES to citizens throughout the state. The goal of ensuring that the largest number of residents possible has access to high quality telephone service regardless of income or geographic location remains an important policy objective of Ohio. The Commission continues to believe that, at least for the near future, BLES, including basic caller ID, is an essential service for many Ohioans. On the other hand, we are fully aware that ILECs are facing increasing competition from alternative service providers that are not regulated by the Commission and, as AT&T Ohio noted in the 05-1305 proceeding, many of the ILECs have been charging the same rates for BLES since the early 1980s. Therefore, in developing the rules for BLES alternative regulation, we sought to strike a balance between the important public policy of ensuring the availability of stand-alone BLES at just and reasonable rates, while at the same time recognizing the continuing emergence of a competitive environment through flexible regulatory treatment of ILEC services, where appropriate. In reaching our conclusion, we considered the regulatory treatment of competing alternative providers, including wireline CLECs, wireless carriers, VoIP, and cable telephone providers. After serious consideration of the issues raised by the parties, including OCC, we determined that if an ILEC satisfies one of the four adopted competitive market tests in an exchange, the ILEC will be permitted upward pricing flexibility for BLES and other Tier 1 services. (05-1305 Opinion and Order at 40.)

(29) With respect to OCC's arguments concerning additional ILEC commitments under BLES alternative regulation, we previously determined that enhanced or additional ILEC commitments would not be appropriate in a competitive environment. We believe that in a competitive environment an ILEC should have the appropriate incentives to deploy additional advanced services and provide other public benefits to consumers. (05-1305 Entry on Rehearing at 2; 05-1305 Opinion and Order at 11.)

(30) As we determined in our November 28, 2006 Order, after a thorough review of the record in this proceeding, we found that CBT had met its burden of proving, in accordance with Section 4927.03(A), Revised Code, that granting CBT's application for BLES and other Tier 1 service flexibility in the Cincinnati and Hamilton exchanges is in the public interest; that CBT's BLES is subject to competition and that CBT's customers have reasonably available alternatives; and that there are no barriers to entry with respect to BLES in those exchanges. (*Id.* at 30.) We find that OCC has raised no new arguments for the

Commission's consideration. Therefore, OCC's application for rehearing under allegation of error 31 is denied.

November 28, 2006 Opinion and Order

(31) In its eighth general assignment of error, and specific allegation of error 32, OCC contends that the Commission's November 28, 2006 Order violates Section 4903.09, Revised Code. OCC asserts that the Commission failed to adequately explain the reasons for its decision. OCC argues that the Commission's approval of CBT's application for BLES alternative regulation depends on the "lawfulness" of the rules adopted in 05-1305, which OCC challenged both in 05-1305 and here. OCC references *MCI Telecommunications Corp. v. Pub. Util. Comm.* (*MCI*)[5] in support of its position that the Commission erred by incorporating the record from 05-1305 into this case, instead of setting forth in detail the facts from 05-1305 that supported the Commission's actions in this case. (OCC at 39-41.) CBT rejects OCC's position. CBT asserts, first, that OCC selectively quoted from *MCI* to support its position. CBT submits that the actual holding in *MCI* states: "In order to meet the requirements of R.C. 4903.09, therefore, the PUCO order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." (*MCI*, 32 Ohio St. 3d 306, 312; CBT at 23.) CBT further notes that the *MCI* court determined that the Commission's order satisfied the requirements of Section 4903.09, Revised Code, for a reasoned decision based on a factual record. (CBT at 23-24.) Further, CBT asserts that the Ohio Supreme Court has since repeated that strict compliance with the terms of the statute is not required.[6] CBT also asserts that the Commission's order only needs to set forth sufficient factual detail to permit the court to determine the basis of its reasoning.[7] (CBT at 24.) CBT argues that there is no doubt how the BLES rules were developed or why the Commission approved the application in this case. Last, CBT asserts that the Ohio Supreme Court has expressly approved incorporation of the record from one case to another as meeting the requirements of Section 4903.09, Revised Code. (*MCI*, 32 Ohio St. 3d 311-312; CBT at 24.)

(32) We note that Section 4903.09, Revised Code, provides: "In all contested cases . . . the commission shall file, with the record of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Ohio Supreme Court has observed that the purpose of this statute is to inform the interested parties as to the reasons for the Commission's actions and to provide the court with an adequate

5 *See MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St. 3d 306 (1987).

6 *See Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87, 1999-Ohio-206.

7 *See Allnet Communications Serv. Inc. v. Pub. Util. Comm.*, 70 Ohio St. 3d 202, 209 (1994).

record so that it may determine whether the Commission's decision is lawful and reasonable.[8] We believe that, in 05-1305, the Opinion and Order and Entry on Rehearing fully described the bases for adopting the rules for BLES alternative regulation. As noted by CBT, the Ohio Supreme Court has approved incorporation of the record from one case into another. Also, as we noted in our November 28, 2006 Order, the majority of OCC's arguments were a repetition of the arguments that it made in 05-1305, thus, it was reasonable to incorporate that record into this proceeding. Further, we believe that our November 28, 2006 Order fully addressed the Commission's analysis of the facts, under the applicable competitive test, in reaching the conclusion to approve CBT's application for BLES alternative regulation in the Cincinnati and Hamilton exchanges. Therefore, OCC's application for rehearing under allegation of error 32 is denied.

(33) Finally, the Commission notes that any remaining assignments or allegations of error not specifically addressed in this Entry on Rehearing, including any new arguments specific to rules that would have been more appropriate to raise in the rulemaking proceeding rather than in CBT's application proceeding, are denied.

ORDER:

It is, therefore,

ORDERED, That OCC's application for rehearing is denied, as set forth above. It is, further,

ORDERED, That, consistent with our November 28, 2006 Order, the record from Case No. 05-1305-TP-ORD should be considered as part of the record in this case, including but not limited to all of the Commission's orders as well as the evidence submitted by the parties in that case.

8 *See Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St. 3d 451 at ¶ 17, 2004-Ohio-3924.

ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Valerie A. Lemmie

Donald L. Mason

JKS:ct

Entered in the Journal

JAN 3 1 2007

Reneè J. Jenkins
Secretary