IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	)	
	)	Case No. 07-570
Appellant,	)	
	)	Appeal from the Public Utilities Commission
v.	)	of Ohio
	)	
The Public Utilities Commission of Ohio,	)	Public Utilities Commission of Ohio
	)	Case No. 06-1002-TP-BLS
Appellee.	)	

APPENDIX OF APPELLANT,
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Janine L. Migden-Ostrander
(Reg. No. 0002310)
Consumers' Counsel

David C. Bergmann, Counsel of Record
(Reg. No. 0009991)
Terry L. Etter
(Reg. No. 0067445)
Assistant Consumers' Counsel
bergmann@occ.state.oh.us
etter@occ.state.oh.us

Office of the Ohio Consumers' Counsel
10 West Broad Street, 18th Floor
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
(614) 466-9475 (Facsimile)

Attorneys for Appellant,
Office of the Ohio Consumers' Counsel

Marc Dann
(Reg. No. 0039425)
Attorney General of Ohio

Stephen A. Reilly, Counsel of Record
(Reg. No. 0019267)
William L. Wright
(Reg. No. 0018010)
Assistant Attorneys General
stephen.reilly@puc.state.oh.us
bill.wright@puc.state.oh.us

Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793
(614) 466-4397 (Telephone)
(614) 644-8764 (Facsimile)

Attorneys for Appellee,
Public Utilities Commission of Ohio

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JUL 02 2007
CLERK OF COURT
SUPREME COURT OF OHIO

Douglas E. Hart, Counsel of Record
(Reg. No. 0005600)

441 Vine Street, Suite 1722
Cincinnati, Ohio 45202
(513) 621-6709
(513) 621-6981 -fax
dhart@douglasehart.com

Attorney for Intervening Appellee,
Cincinnati Bell Telephone Company LLC

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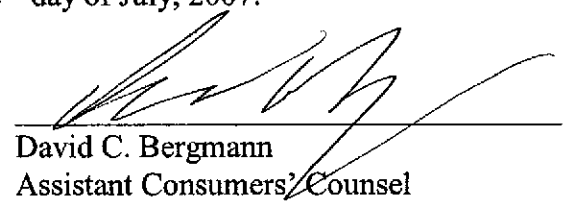
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appendix submitted on behalf of Appellant, the Office of the Ohio Consumers' Counsel was served by regular U.S. mail, postage prepaid upon the counsel listed below this 2nd day of July, 2007.



David C. Bergmann
Assistant Consumers' Counsel

SERVICE NOTICE

STEPHEN A. REILLY
WILLIAM L. WRIGHT
Attorney General Section
Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793

DOUGLAS E. HART
441 Vine Street, Suite 1722
Cincinnati, Ohio 45202

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IN THE SUPREME COURT OF OHIO

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	)	

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

Janine L. Migden-Ostrander
(Reg. No. 0002310)
Consumers' Counsel

David C. Bergmann, Counsel of Record
(Reg. No. 0009991)
Terry L. Etter
(Reg. No. 0067445)
Assistant Consumers' Counsel
bergmann@occ.state.oh.us
etter@occ.state.oh.us

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
(614) 466-9475 (Facsimile)

Attorneys for Appellant,
Office of the Ohio Consumers' Counsel

Marc Dann
(Reg. No. 0039425)
Attorney General of Ohio

Duane W. Luckey
(Reg. No. 0023557)
Senior Deputy Attorney General
duane.luckey@puc.state.oh.us

Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793
(614) 644-8698 (Telephone)
(614) 752-8351 (Facsimile)

Attorneys for Appellee,
Public Utilities Commission of Ohio

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.

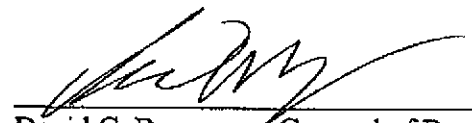
Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
(Reg. No. 0002310)
OHIO CONSUMERS' COUNSEL

David C. Bergmann, Counsel of Record
(Reg. No. 0009991)
Terry L. Etter
(Reg. No. 0067445)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
(614) 466-9475 (Facsimile)

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

DUANE W. LUCKEY
Attorney General Section
Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793

DOUGLAS E. HART
441 Vine Street, Suite 3108
Cincinnati, Ohio 45202

ALAN R. SCHRIBER
Chairman
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, Ohio 43215-3793

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:	**Case No.:**
The Office of the Ohio Consumers' Counsel v. Pub. Util. Comm.	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:

David C. Bergmann	0009991	614-466-8574	614-466-9475
Name	Atty.Reg. #	Telephone #	Fax #

10 West Broad Street, Suite 1800

Address

Signature of appellant or counsel

Columbus	Ohio	43215
City	State	Zip Code

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

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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.)*

Commission Conclusion

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,

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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 or 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. Residential Access Line Loss

OCC's Position

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. "Serving the residential market"

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. "Presence in the market"

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.)

Wireless Providers

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. "Alternative Providers"

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 viewed and used by consumers as substitutes 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 entirety 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. "Presence," "unaffiliated," "facilities-based," and "serving the residential market"

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

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,

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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

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.

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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.

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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

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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.

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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 31 2007

Renee J. Jenkins
Secretary

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

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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.

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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.)*

Commission Conclusion

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,

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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 or 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. Residential Access Line Loss

OCC's Position

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. "Serving the residential market"

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. "Presence in the market"

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.)

Wireless Providers

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. "Alternative Providers"

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 viewed and used by consumers as substitutes 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 entirety 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. "Presence," "unaffiliated," "facilities-based," and "serving the residential market"

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

FILE

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

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.

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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.

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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

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Secretary

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the 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

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

PUBLIC VERSION

REDACTED

*** INFORMATION ASSERTED TO BE

PROPRIETARY HAS BEEN REDACTED***

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

David C. Bergmann, Trial Attorney
Terry L. Etter
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
(614) 466-9475 (Facsimile)

December 28, 2006

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the 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

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

On November 28, 2006, the Public Utilities Commission of Ohio ("Commission" or "PUCO") issued its Opinion and Order ("O&O") in this proceeding. The Commission granted alternative regulation ("alt. reg.") under Ohio Adm. Code 4901:1-4-09 for the basic local exchange service ("BLES") of Cincinnati Bell Telephone Company LLC ("CBT" or "the Company") in CBT's Cincinnati and Hamilton exchanges, thereby subjecting BLES-only customers in those exchanges to annual rate increases of up to $1.25 per month, at CBT's discretion.

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901:1-35, the Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing from the O&O, on behalf of residential utility customers.[1] The O&O is unjust, unreasonable and unlawful in the following particulars.

[1] OCC's intervention in this proceeding was granted on September 29, 2006. See O&O at 1.

1. The Commission erred in finding that compliance with Competitive Test 4, Ohio Adm. Code 4901:1-4-10(C)(4) ("Test 4"), which incorporates a line loss prong and an alternative providers prong, permits alt. reg. for BLES under R.C. 4927.03(A).

2. Especially in light of CBT's information and OCC's evidence, the Commission erred in finding that compliance with Test 4 demonstrates that there are no barriers to entry for BLES in the Cincinnati and Hamilton exchanges.

3. Especially in light of CBT's information and OCC's evidence, the Commission erred in finding that compliance with Test 4 demonstrates that CBT's BLES is subject to competition or that CBT BLES customers have reasonably available alternatives in the Cincinnati and Hamilton exchanges.

4. The Commission erred in adopting rules for BLES alt. reg. that do not meet the requirements of R.C. 4927.03(A).

BLES AND BUNDLES:

5. The Commission erred in finding that bundles of service from alternate providers are competition or alternatives to stand-alone BLES, and that their presence allows granting alt. reg. to stand-alone BLES.

6. The Commission erred in granting alt. reg. to CBT's stand-alone BLES when the bundles of services available from alternative

providers are not functionally equivalent or substitute services available at competitive rates, terms and conditions.

7. The Commission erred in relying on the lack of a statutory requirement that services be exactly the same to allow bundles to qualify as competition or alternatives to stand-alone BLES.

8. The Commission erred in relying on customers that leave an incumbent local exchange carrier's ("ILEC's") stand-alone BLES offering to subscribe to an alternative provider's bundled service offering viewing such bundled service offerings as a reasonable alternative service, and a substitute to, the ILEC's stand-alone BLES.

9. The Commission erred in relying on the supposed lack of a statutory requirement that services be similarly priced and have similar terms and conditions to allow bundles to qualify as competition or alternatives to stand-alone BLES.

10. The Commission erred in finding that Time Warner Cable's ("Time Warner's) Digital Phone and Current Communication's ("Current's") Current Voice services are competitive with or provide reasonably available alternatives to CBT's stand-alone BLES.

11. The Commission erred in finding that wireless service is competitive with or provides a reasonably available alternative to CBT's stand-alone BLES.

12. The Commission erred in granting alt. reg. for CBT's stand-alone BLES when the services of alternative providers will not act to restrain CBT's prices for stand-alone BLES.

LINE LOSS PRONG

13. The Commission erred in finding that the line loss prong of Test 4 satisfies the requirements of R.C. 4927.03(A).

14. The Commission further erred in finding that the line loss prong satisfies the requirements of R.C. 4927.03(A), having decided based on the record that it would be impossible for CBT, and equally any ILEC, to identify where the lost access lines went.

15. The Commission erred in finding that the line loss prong satisfies the requirements of R.C. 4927.03(A), having acknowledged non-competitive reasons for line loss.

16. The Commission erred in finding that the line loss prong addresses barriers to entry because it allegedly shows a reasonable number of providers offering competing services and that a significant number of residential subscribers perceive those service offerings as a reasonably available substitute offering that competes with the ILEC's BLES, without any basis in the record.

17. The Commission erred in finding that the 2002 start date for the line loss prong excludes any data distortion due to residential line losses not attributable to competition for BLES.

18. The Commission erred in asserting that OCC argued that all line losses were due to Internet switching.

19. The Commission erred in finding that statewide digital subscriber line ("DSL") substitution numbers were irrelevant, given that its ruling was based on statewide numbers.

20. The Commission erred in finding that line losses to CBT's wireless affiliate are relevant to a finding that CBT's standalone BLES has competition or reasonably available alternatives.

ALTERNATIVE PROVIDERS PRONG

21. The Commission erred in finding that the presence of several facilities-based providers is a more significant factor than longevity in the market for supporting a healthy sustainable market.

22. The Commission erred in finding that the presence of Time Warner and Current in an exchange qualify CBT for BLES alt. reg. throughout the entire exchange even though they serve only part of the exchange.

23. The Commission especially erred in finding that Current's presence in the Cincinnati exchange was sufficient to justify BLES alt. reg. throughout the exchange.

24. The Commission erred in finding that the supposed failure of OCC to dispute that an alternate provider has subscribers and is a viable provider, means that said carrier has a "presence" in the market.

25. The Commission erred in finding that each of the wireless carriers provides readily available alternatives to CBT's stand-alone BLES, given the limitations of the wireless carriers' services.

26. The Commission erred in finding that each of the wireless carriers provides readily available alternatives to CBT's stand-alone BLES, given the rates for the wireless carriers' services.

BARRIERS TO ENTRY

27. The Commission erred in finding that meeting Test 4 shows that there are no barriers to entry for BLES.

28. The Commission erred in finding that CBT, in meeting Test 4, had shown that there are no barriers to entry for BLES in the Cincinnati and Hamilton exchanges.

29. The Commission erred in finding that all of the barriers to entry asserted by OCC's witness Dr. Roycroft are cured by federal and state laws and rules.

30. The Commission erred in finding that Dr. Roycroft failed to identify any Cincinnati exchange- and Hamilton exchange-specific barriers to entry, when the Commission's findings were not Cincinnati exchange- and Hamilton exchange-specific.

ADDITIONAL ERRORS

31. The Commission erred in granting alt. reg. to CBT's stand-alone BLES, contrary to the public interest.

32. The Commission erred in failing to adequately explain the reasons for its decision.

As a result of these many errors, the O&O should be abrogated in its entirety.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

David C. Bergmann, Trial Attorney
Terry L. Etter
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
(614) 466-9475 (Facsimile)

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the 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

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Based on the Commission's decision in the O&O, CBT will now be able to increase the BLES rates for the *** BEGIN CONFIDENTIAL *** END CONFIDENTIAL customers of stand-alone BLES in the Cincinnati and Hamilton exchanges[2] by $1.25 a month.[3] This represents *** BEGIN CONFIDENTIAL *** END CONFIDENTIAL of CBT's customers in these two exchanges. According to news reports, CBT intends to take advantage of its new capabilities.[4] CBT will also be able to increase its basic CallerID rates by 50¢ per month.

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[2] Response to OCC Interrogatory 1.a. An additional *** BEGIN CONFIDENTIAL *** END CONFIDENTIAL customers subscribe to BLES and basic CallerID only. Response to OCC Interrogatory 1.b. It is ludicrous that the number of customers that will be affected by this case is a confidential number.

[3] Ohio Adm. Code 4901:1-4-11(A) allows a $1.25 increase in the per-month charge for BLES. CBT's BLES rate in Rate Band 1 is $16.95 and in Rate Band 2 is $17.95. The Cincinnati and Hamilton exchanges have wire centers that fall into both rate bands.

[4] "Cincinnati Bell won't need state OK to raise phone rates," Dayton Daily News (November 30, 2006) ("'Cincinnati Bell will notify those residential customers in December that it will raise their rates for basic local exchange service by $1.25 a month,' a CBT spokesman said.").

In a Commission news release issued with the O&O, Chairman Schriber was quoted as stating:

> Cincinnati Bell demonstrated to the Commission that it faces significant competition in the Cincinnati and Hamilton exchanges from a variety of service providers whose rates are not regulated. ... The pricing flexibility granted today permits the company to face the challenges of this competition....[5]

It is illogical to grant CBT the ability to **raise** consumers' rates in order to meet competition.[6] Moreover, the Commission's decision is flawed because it allows CBT to raise rates for services for which -- and in areas where -- the Company faces no competition. The "pricing flexibility" granted CBT is the ability to raise rates for stand-alone BLES. Yet the record shows that the competition CBT faces is **not** competition for stand-alone BLES. Instead the "significant competition" is competition for bundles that include BLES. **CBT has had total pricing flexibility for such bundles since June 30, 2004.**[7] In granting alt. reg. to CBT's stand-alone BLES, the Commission has allowed the Company to raise rates for its "bare minimum" service that consumers can choose to obtain a more affordable rate, for which there is no competition that would meet the standards of R.C. 4927.03(A).

As part of its application for BLES alt. reg., CBT submitted that it lost more than 18% of its residential access lines in the Cincinnati and Hamilton exchanges between 2002 and 2005. The Commission found that this circumstance justified granting BLES

---

[5] See http://www.puco.ohio.gov/PUCO/MediaRoom/MediaRelease.cfm?id=7134.

[6] As Congress noted in the preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, that legislation was meant "[t]o promote competition and reduce regulation in order to secure *lower* prices ... for American telecommunications consumers...." (Emphasis added.)

[7] *In the Matter of the Application of Cincinnati Bell Telephone Company For Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 04-720-TP-ALT, Opinion and Order (June 30, 2004).

alt. reg. despite the fact that this line loss includes losses to CBT's DSL service and other broadband services, to CBT's wireless affiliate, and to other providers' broadband and wireless service. None of these losses demonstrate anything about competition or alternatives to CBT's BLES, or about barriers to entry for BLES, as required by the law.[8] CBT has no idea, and neither does the Commission, about how much of the line loss in 2005 was due to competition or alternatives to BLES.

CBT also asserted that there are five unaffiliated facilities-based alternative providers in the two exchanges. The application purports to demonstrate this as follows:

Exchange	**Non-wireless providers**	**Wireless providers**	**Total unaffiliated facilities-based providers serving the residential market**
Cincinnati	Current; Time Warner	Cingular, Verizon, T-Mobile, Sprint and Cricket	7
Hamilton	Time Warner	Cingular, Verizon, T-Mobile, Sprint and Cricket	6

The Commission's rule requires there to be **five** unaffiliated facilities-based providers serving the residential market in each exchange. The Commission disqualified Cricket,[9] so that leaves six providers in the Cincinnati exchange and five in the Hamilton exchange.

The Commission allowed Current and Time Warner to qualify, despite the fact that neither provider has a service that is competitive to CBT's BLES. The Commission

[8] R.C. 4927.03(A).

[9] E.g., O&O at 28.

also allowed Time Warner and Current both to qualify in the Cincinnati exchange, despite the fact that neither provider serves the entirety of the Cincinnati exchange.

And the Commission allowed the four wireless providers to qualify, despite the fact that they do not offer service that is functionally equivalent to BLES. The Commission focuses on the question of whether wireless service is exactly like BLES; in reality, wireless services are substantially different enough from stand-alone BLES that it is wrong under the statute to treat them as substitutes. The rates for wireless services are up to 260% higher than CBT's BLES rates.[10] And not one of the wireless providers is willing to guarantee that its service is readily available in any specific portion of a CBT exchange. This means that for CBT BLES customers, there is nothing in the record of this proceeding to show that functionally equivalent or substitute wireless services are "readily available at competitive rates, terms and conditions" as required by the statute.[11]

R.C. 4927.03(A) allows alt. reg. for BLES provided to residential consumers if it is found to be in the "public interest" and two conditions are met: 1) there are no barriers to entry[12]; **and** 2) BLES is subject to competition or BLES customers have reasonably available alternatives to BLES.[13] Pursuant to R.C. 4927.03(D), the Commission adopted rules for the processing of ILEC applications for BLES alt. reg.[14]

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[10] Roycroft Affidavit, ¶ 74.

[11] Id., ¶ 100.

[12] R.C. 4927.03(A)(3).

[13] R.C. 4927.03(A)(1)(a) and (b).

[14] *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Case No. 05-1305-TP-ORD ("05-1305"), Opinion and Order (March 6, 2006) ("05-1305 O&O"), adopting revised Ohio Adm. Code Chapter 4901:1-4.

Those rules contain so-called "competitive tests" which, although purporting to address the tests in R.C. 4927.03(A),[15] do not really meet them. Thus meeting the tests as written in the rules cannot justify BLES alt. reg. under R.C. 4927.03.

On August 6, 2006, CBT filed its application for BLES alt. reg. for the Cincinnati and Hamilton exchanges. In its application, CBT claimed that the fourth of the Commission's four "competitive tests" ("Test 4") is met in the Cincinnati and Hamilton exchanges.[16] As noted above, under that test an ILEC is eligible for BLES alt. reg. in an exchange if it has lost 15% of its residential access lines in that exchange since 2002, **and** there is the presence of at least five unaffiliated facilities-based alternative providers serving the residential market in the exchange.

This Memorandum is organized as follows: First, the pertinent statutes are described. Second, some of the more fundamental errors in the Commission's implementation of the statute -- through Test 4 -- are demonstrated. Third, the focus turns to what is perhaps the most pervasive error in the O&O: the treatment of bundles that contain BLES as competition for or alternatives to CBT's stand-alone BLES. Fourth, another grievous error: Allowing BLES alt. reg. for CBT despite the fact that two of the candidate alternative providers do not serve the entirety of a CBT exchange. Fifth and sixth, the specific errors of the line loss prong and the alternative providers prong are demonstrated. Seventh, the fundamental flaw of the BLES alt. reg. rules' divorcement from the statutory requirement to show a lack of barriers to entry is discussed. Eighth, the failure of the public interest in granting BLES alt. reg. to CBT for these two

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[15] Id. at 22, 25.

[16] Application, Exhibit 3 at 1; see Ohio Adm. Code 4901:1-4-10(C)(4).

exchanges is shown. And the memorandum concludes with questions about the Commission's blanket incorporation of the 05-1305 record into this proceeding. Each of the allegation of error is tied -- in footnotes -- to specific portions of the memorandum.

OCC showed in its submissions in this docket that CBT had not met Test 4 or the statute for its stand-alone BLES in the Cincinnati and Hamilton exchanges. The Commission erred in granting CBT's application.

II. THE LAW

In 2005, the General Assembly amended R.C. 4927.03 to allow alt. reg. for BLES.[17] The statute now reads, in pertinent part:

> (A) (1) The public utilities commission ... may, by order, exempt any such telephone company or companies, as to any public telecommunications service, **including** basic local exchange service, from any provision of Chapter 4905. or 4909., or sections 4931.01 to 4931.35 of the Revised Code or any rule or order adopted or issued under those provisions, or establish alternative regulatory requirements to apply to such public telecommunications service and company or companies; 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.

(Emphasis added.) The General Assembly imposed a specific additional condition on BLES alt. reg.:

> (A)(3) To authorize an exemption or establish alternative regulatory requirements under division (A)(1) of this section with

[17] H.B. 218.

> respect to basic local exchange service, the commission additionally shall find that there are **no barriers to entry**.

(Emphasis added.)

The General Assembly did not alter the specific factors that the Commission must consider in granting alt. reg., found in R.C. 4927.03(A)(2):

> (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.

(Emphasis added.) The General Assembly also did not alter the requirement that the Commission must find any alt. reg. measure to be in the public interest.[18]

The General Assembly did, however, amend the state policy which the Commission must consider in implementing R.C. 4927.03(A):

It is the policy of this state to:

> (2) 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, rentals, tolls, and charges for public telecommunications service; ....[19]

---

[18] R.C. 4927.03(A)(1).

[19] R.C. 4927.02(A). The emphasized language was added by H.B. 218.

In adopting the BLES alt. reg. rules, the Commission fell short of its duty under R.C. Chapter 4927. Likewise, the Commission fell short of its duty in granting alt. reg. to CBT under those rules.

III. THE COMMISSION'S INTERPRETATION OF THE STATUTE, AS REPRESENTED BY THE BLES ALT. REG. RULES, IS ERRONEOUS.[20]

CBT argued that OCC, in its filings in this docket, was merely reiterating the same arguments that were made in 05-1305, despite the Commission's rejection of those arguments in 05-1305.[21] The O&O states that OCC's arguments "are the very same arguments ... as OCC made in challenging the rules approved in 05-1305,"[22] but does not express an understanding of the reason for OCC's arguments. By contrast, in the contemporaneous AT&T Ohio BLES alt. reg. proceeding, the Commission recognized the necessity of OCC's reiteration:

> [T]he Ohio Supreme Court has held that the validity of the Commission's rules can only be determined when a question arises in a matter that is justiciable. Because this proceeding is one of the first cases since the adoption of the BLES alt. reg. rules, this is OCC's first opportunity to raise, in a case where the rules are being applied, the validity of the BLES alt. reg. rules.[23]

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[20] This section addresses Allegations of Error 1-4.

[21] See O&O at 6.

[22] Id. at 7.

[23] *In the Matter of the Application of AT&T Ohio 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. 06-1013-TP-BLS, Entry (September 27, 2006) at 3, citing *Craun v. Pub. Util. Comm'n*, 162 Ohio St. 9. The Entry came about as a result of OCC's interlocutory appeal from an Attorney Examiner's order purporting to bar reargument of the 05-1305 issues in the AT&T Ohio BLES alt. reg. case. No such order was issued in the instant proceeding.

The instant proceeding is in fact the first proceeding in which the Commission has applied the BLES alt. reg. rules and reached a decision.[24] Therefore, OCC's arguments against those rules--and in favor of rules that would give Ohio consumers the protections against rate increases intended by the General Assembly– are particularly important. Further, the Commission incorporated the entire record from 05-1305 into the record of this case.[25]

"The commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly."[26] H.B. 218 required the Commission to adopt rules implementing its amendments within 120 days after the effective date of the amendments.[27] The BLES alt. reg. rules do not, in fact, implement the H.B. 218 amendments.[28] Further, a rule issued "pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute...."[29] The rules -- and therefore their application in the instant case -- are unreasonable and do not follow the statute, and thus do not allow alt. reg. to be granted to CBT's stand-alone BLES in the Cincinnati and Hamilton exchanges.

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[24] The Commission issued a decision on AT&T Ohio's BLES alt. reg. application on December 20, 2006.

[25] *O&O at 8. See Section X., below.*

[26] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88 (1999).

[27] R.C. 4927.03(D).

[28] R.C. 119.01(C) defines a "rule" as "any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency *under the authority of the laws governing such agency....*" (Emphasis added.) Given their conflict with R.C. 4927.03(A), the BLES alt. reg. rules were not issued "under the authority of the laws." See also R.C. 111.15(A)(1).

[29] *State, ex rel. Celebrezze, v. National Lime & Stone Company*, 68 Ohio St.3d 377, 383 (1994).

As discussed above, the law requires a finding that a proposal meet the "public interest" and that there be two separate findings before a company can be granted alt. reg. for its BLES: first, that the company's BLES is subject to competition or that customers of the company's BLES have reasonably available alternatives to BLES; and second, that there are no barriers to entry for the provision of BLES. The Commission attempted to implement those requirements in the BLES alt. reg. rules by adopting four competitive market tests, including Test 4 under which CBT made its application in this case.

With regard to barriers to entry, in the 05-1305 Entry on Rehearing, the Commission justified the competitive market tests as follows:

> Consumer Groups' arguments appear to be premised on the belief that in order for an ILEC to satisfy H.B. 218, any condition that makes entry more difficult must be removed for all potential competitors. The Commission finds such an interpretation to be unreasonable and impractical. Realistically, all 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.[30]

The Commission also stated, "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."[31]

The Commission thus interpreted "no barriers to entry" as "no barriers to entry sufficient to prevent or significantly impede market entry." In fact, if R.C. 4927.03(A)(3) is interpreted as the Commission would have it, then the "additional" test from H.B. 218

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[30] 05-1305 Entry on Rehearing (May 3, 2006) ("05-1305 Entry on Rehearing") at 17-18.

[31] Id. at 18.

is mere surplusage and the General Assembly's intention for an additional protection for consumers is written out of the law by Commission fiat.[32] If there were barriers to entry sufficient to prevent or significantly impede market entry for BLES, then BLES could not be subject to competition or have reasonably available alternatives, as the test from R.C. 4927.03(A)(1) requires.[33] That test did not change in H.B. 218.

As a matter of fact, the market test proposed by OCC and the other Consumer Groups did not take the extreme position alleged by the Commission. The Consumer Groups' market tests provision on barriers to entry was that:

> [t]he 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 [competitive local exchange carriers] CLECs and facilities-based CLECs.[34]

This application of the statute is far more consistent with the policy of the State to "[r]ely on market forces, where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market, to maintain just and reasonable rates" than is Test 4, which does not require any such showing.

As previously noted, Test 4 requires two separate prongs to be met. With regard to the line loss prong, the Commission stated:

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[32] See *Canton Storage and Transfer Co., v. Public Util. Comm.*, 72 Ohio St.3d 1, 17 (1995).

[33] The General Assembly is presumed to want all parts of a statute to be operative. R.C. 1.47. Surplusage is not to be found lightly. *East Ohio Gas v. Pub. Util. Comm'n.*, 39 Ohio St.3d 295, 299 (1988).

[34] See 05-1305 Entry on Rehearing at 20, n.2.

> [T]he Commission, in its rules, focused on specific factors demonstrating for residential BLES customers that all of the statutory criteria found in Section 4927.03(A), Revised Code, have been satisfied. For example, to the extent that an ILEC can demonstrate that it has lost a "real" percentage of its residential customer base and that there are competitive alternatives available to BLES customers, the Commission is satisfied that barriers to entry are not restricting the ability of competitors to compete.[35]

Also as to the line loss criterion, the Commission stated that "the test components measuring access line losses do measure BLES competition because each access line customer previously purchased BLES from the ILEC."[36] Both of these reasons ignore the fact that neither the Commission nor CBT has any idea what portion -- if any -- of the "line loss" is attributable to competition from providers of "functionally equivalent or substitute services" that is directed in the statute.[37]

In and of itself, this shows the Commission's error in adopting the line loss prong as a substitute for a showing of no barriers to entry for stand-alone BLES. If the Commission is unable to determine what portion of an ILEC's lost lines is due to competition for customers and what portion is due to other reasons, such as migration of customers' second lines to DSL (even the ILEC's DSL), then the Commission cannot reasonably determine that there are no barriers to entry for firms seeking to enter the BLES market in the ILEC's territory. The Commission's line loss test is a stab in the dark, ultimately at the expense of the ILEC's stand-alone BLES customers who are denied the intended statutory protections.

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[35] Id. at 18.

[36] Id.

[37] See Section VI., infra.

Likewise, the PUCO's alternative providers prong, because it merely requires the "presence of at least five unaffiliated facilities-based providers serving the residential market,"[38] and because it merely requires the alternative providers to be "serving" the residential market, does not require those providers to be serving the market with the statutorily-required "functionally equivalent or substitute services [that are] readily available at competitive rates, terms and conditions" to stand-alone BLES.[39] Indeed, as shown below, the alternative providers "nominated" by CBT do not serve the market with services for customers that are equivalents or substitutes for stand-alone BLES at competitive rates, terms or conditions, as required by law. Further, the services are not readily available to customers throughout the CBT exchanges under examination. This also shows the Commission's error in relying on the mere "presence" of an arbitrary number of alternative providers in a market as a substitute for the statutorily-mandated showing of no entry barriers.

Regardless of how one looks at the competitive tests -- as independent gauges of whether the statute is met, or as factors that must be reviewed in conjunction with the statutory criteria -- one thing is clear: The burden is on CBT to show that the tests and the statute are met before the PUCO can grant alternative regulation and allow potential annual rate increases for customers.[40] CBT did not meet that burden in this proceeding.

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[38] Ohio Adm. Code 4901:1-4-10(C)(4).

[39] R.C. 4927.03(A)(2)(c).

[40] Ohio Adm. Code 4901:1-4-10(A).

IV. BLES AND BUNDLES: THE COMMISSION ERRED BY TREATING COMPETITION FOR BUNDLES THAT INCLUDE BLES AS COMPETITION FOR STAND-ALONE BLES.[41]

In 2001, the Commission found that bundles of services that include BLES -- along with almost all services other than stand-alone BLES -- met the requirements of R.C. 4927.03(A), and were subject to alternative regulation.[42] This decision was upheld by the Ohio Supreme Court in 2004.[43] The General Assembly must have been aware of the Commission's rulings when it addressed H.B. 218 in 2005.[44]

After the Commission's 00-1532 ruling, the only service not subject to alt. reg. was stand-alone BLES. That service, therefore, was the focus of the General Assembly's actions in H.B. 218. That should have been the focus of the Commission's rulemaking in 05-1305; unfortunately, the Commission missed that point in adopting the BLES alt. reg. rules and also in applying those rules to CBT.

It should be clear that CBT has not shown that there are no barriers to entry for stand-alone BLES.[45] Other than CBT, there are no providers of stand-alone BLES for customers in the Cincinnati and Hamilton exchanges, a sure sign of barriers to entry.

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[41] Allegations of Error 4-11.

[42] *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, Opinion and Order (December 6, 2001).

[43] *Stephens v. Pub. Util. Comm'n* (2004), 102 Ohio St.3d 44.

[44] See testimony of Commissioner Ronda Hartman Fergus to House Public Utilities and Energy Committee (May 18, 2005) at 3 ("Under [the elective alt. reg.] plan, a local telephone company can price its service offerings, except for stand-alone basic local telephone service and basic caller ID, as whatever rates the company thinks the market will bear, and the company can also change those rates on a 0-day notice with no approval from the Commission.").

[45] See Section VIII., below.

Further, as discussed here, CBT's stand-alone BLES is not "subject to competition" from the bundled services of the alternative providers identified by CBT.[46] Neither do CBT's stand-alone BLES customers have "reasonably available alternatives" to their BLES in the bundles offered by the alternative providers.[47]

A. BECAUSE THE COMMISSION HAD ALREADY GRANTED ALT. REG. FOR BLES IN BUNDLES, THE ALT. REG. PLAN ALLOWED BY H.B. 218 IS LIMITED TO CBT'S STAND-ALONE BLES THAT IS OFFERED TO CONSUMERS.

R.C. 4927.01(A) defines BLES as:

> (1) 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:
>
> (a) Local dial tone service;
>
> (b) Touch tone dialing service;
>
> (c) Access to and usage of 9-1-1 services, where such services are available;
>
> (d) Access to operator services and directory assistance;
>
> (e) Provision of a telephone directory and a listing in that directory;
>
> (f) Per call, caller identification blocking services;
>
> (g) Access to telecommunications relay service; and
>
> (h) Access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies.
>
> (2) 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

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[46] R.C. 4927.03(A)(1)(a).

[47] R.C. 4927.03(A)(1)(b).

> telephone company network operated within a local service area, to access interexchange or other networks.

Further, the analysis for alt. reg. for customers' BLES is limited to that service, i.e., stand-alone BLES. In order for the Commission to authorize alt. reg. for stand-alone BLES, the Commission must find that one or both of the following conditions exist:

> 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.[48]

In an application for alt. reg. for stand-alone BLES, "such public telecommunications service" refers to stand-alone BLES. It does not refer to BLES as part of bundles.

In addition, the Commission stated that "[p]rior to enactment of H.B. 218, BLES was beyond the scope of alternative regulation under Section 4927.03, Revised Code."[49] Therefore, based on the Commission's previous finding, the consideration of CBT's application must be limited to the question of alt. reg. for serving customers with **stand-alone BLES** (given that bundled BLES has already been "alt. reg'd"). Thus the existence of competition for BLES in bundles cannot be used to determine whether there is competition or customers have alternatives for stand-alone BLES.[50]

According to the Commission, however, it "previously noted that every customer subscribing to a bundled service which includes BLES is, by definition, also a BLES customer."[51] But competition and alternatives for bundles that include BLES do not

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[48] R.C. 4927.03(A)(2) (emphasis added).

[49] 05-1305 Entry on Rehearing at 19.

[50] See Williams Affidavit, ¶ 30

[51] Entry on Rehearing at 18.

represent competition for consumers who subscribe only to stand-alone BLES, either in terms of functional equivalents or substitutes, or in terms of competitive rates, terms and conditions.[52] This confusion apparently allowed the Commission, in this case, to grant alt. reg. for CBT's stand-alone BLES based on the existence of competition for, and alternatives to, CBT's service bundles.

B. NONE OF THE ALTERNATIVE PROVIDERS OFFER STAND-ALONE BLES TO CUSTOMERS.

In attempting to meet its burden under the statute of showing competition or alternatives for its BLES, CBT submitted information regarding five wireless carriers and two "wired" carriers: Cingular, Cricket, Sprint, T-Mobile and Verizon on the wireless side[53]; and Current and Time Warner on the "non-wireless" side. Yet none of these carriers offer stand-alone BLES to customers. To the extent that they offer BLES or a BLES-like service[54] it is offered **only** as part of a bundle that includes vertical services and toll.

C. THE ALTERNATIVE PROVIDERS' BUNDLES ARE NOT FUNCTIONAL EQUIVALENTS FOR, AND ARE NOT OFFERED TO CUSTOMERS AT RATES COMPETITIVE TO, CBT'S STAND-ALONE BLES.

In order for an ILEC to receive alt. reg. for its stand-alone BLES, the law requires the Commission to determine that functionally equivalent services are available for customers at competitive rates, terms and conditions. Wireless providers do not supply a service that is competitive with CBT's BLES throughout the Cincinnati and Hamilton exchanges. Dr. Roycroft presented an extensive review of the differences between the

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[52] R.C. 4927.03(A)(2)(c).

[53] The Commission eventually eliminated Cricket, because it had not been operating in CBT territory long enough. O&O at 28.

[54] The wireless carriers do not offer BLES. See Roycroft Affidavit at ¶¶ 46, 49-50.

services offered by CBT's candidate wireless providers and CBT's BLES, cumulatively showing that the services offered to customers are not functionally equivalent.[55]

Neither are the wireless carriers' rates competitive to CBT's stand-alone BLES rates. CBT's residential BLES rates in the Cincinnati and Hamilton exchanges are $16.95 per month and $17.95 per month, depending on the rate band. When the non-bypassable subscriber line charge is included, CBT's wireline BLES rates are $22.19 and $23.19 per month for customers.[56]

OCC presented evidence that showed the disparity for customers between the wireless carriers' and CBT's stand-alone BLES rates. Dr. Roycroft stated that:

> [f]or a CBT Rate Band 1 BLES customers, the price *increase* associated with substituting wireless for CBT's BLES ranges from ... $37.80 to $57.80 (representing percentage increase amounts ranging from ... 170%, to 260%). Similarly, for a CBT Rate Band 2 BLES customer, substituting wireless for wireline would result in rate *increases* of ... $36.80, or $56.80 (representing percentage increase amounts ranging from ... 159%, to 245%). ... Competitive rates are rates which allow the consumer's choice to be unhindered by a significant price differential. Experiencing a price increase of more than 50% does not present the consumer with a "competitively priced" service. Such a price differential also does not provide much of a pricing constraint on CBT. Thus CBT's candidate wireless alternative providers do not, on the basis of price, provide a competing service with BLES.[57]

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[55] Summarized in Office of the Ohio Consumer's Counsel's Opposition to Application by Cincinnati Bell Telephone Company for Basic Local Service Alternative Regulation; Demonstration Why the Application Should Not Be Granted (September 21, 2006) ("OCC Opposition") at 19-26.

[56] Roycroft Affidavit, ¶ 71.

[57] Id., ¶ 74 (emphasis in original). Dr. Roycroft included Cricket in his analysis; because the Commission disqualified Cricket, it has been omitted from this discussion.

In fact, Dr. Roycroft's analysis showed that "CBT's BLES rates and the prices of services offered by CBT's candidate wireless alternative providers are not comparable, even if the consumer already subscribes to wireless."[58]

Neither is Time Warner's or Current's service functionally equivalent to or competitively priced to CBT's stand-alone BLES. Time Warner's service includes flat-rate local calling **and** unlimited long-distance calling in the United States and Canada **and** more than ten vertical features, at a price 72% higher than CBT's. Likewise, Current has a single all-you-can-eat bundle that includes a dozen features at a price 51% higher than CBT's BLES.[59]

The Commission, however, ignored this information concerning the significant price differentials between CBT's stand-alone BLES and other providers' bundled offerings. Instead, the Commission appears to believe that the mere presence of these bundled offerings -- at whatever price -- meets the statute. The Commission did say that the services need not be identical,[60] but these differences between CBT's BLES and the alternative providers' bundles are so substantial as to make the services not functionally equivalent and not offered to customers at competitive rates. The differences are not "minor," as CBT would have it.[61]

In light of CBT's claim and the Commission's acceptance that CBT's designated alternative providers supply a readily available and functional equivalent to CBT's stand-

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[58] Id., ¶ 77.

[59] OCC Objections at 30 and Williams Affidavit, ¶ 59.

[60] 05-1305 O&O at 25.

[61] CBT Response at 22.

alone BLES, it is unreasonable for the Commission to have ignored Dr. Roycroft's crucial analogy: Some individuals are observed to drive automobiles, and other are observed to ride motorcycles. This does not mean, however, that consumers find motorcycles are necessarily functional equivalents or substitutes for automobiles.[62] There may be a few individuals who use only a motorcycle, but for the vast majority of consumers who ride motorcycles, a motorcycle is a complement to, not a substitute for, an automobile. The relevance here is that "while it might be the case that we observe that a small number of individuals have 'cut the cord' and gone wireless, it does not follow that wireless telephony is a readily available functional equivalent to, or a substitute for, BLES."[63]

Likewise, it is observed that both the Ford Focus and the BMW 760Li are automobiles. This does not mean that customers find the BMW 760Li is a competing and reasonably available alternative for a Ford Focus, given that the starting price for the BMW 760Li is $119,000 and the Focus is $14,000.[64] The relevance here is 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. If these differ significantly from the rates, terms and conditions associated with BLES, then the services cannot be viewed as competing with BLES, and the wireless carriers cannot be considered alternative providers that satisfy the Commission's Test 4.[65]

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[62] Roycroft Affidavit, ¶ 19-20.

[63] Id., ¶ 21.

[64] Id, ¶ 23.

[65] Id., ¶ 24.

CBT argued that Dr. Roycroft's analogies "do not reasonably apply to telephone service because they address degrees of luxury, as opposed to the use of variant technologies to achieve the primary goal of the product."[66] It is not the use of "variant technologies" that is really at issue here. The issue is that the different technologies, e.g., wireless, come with all of the services included in the wireless bundles. By contrast, the stand-alone BLES for which CBT is seeking alt. reg. is a "stripped-down" means of telecommunications. Further, that bundling comes at a substantially higher price; not an "insignificant difference," as CBT would have it.[67] Two products need not be as different as motorcycles and automobiles to be minimally substitutable; further, two products need not be as different in price as the Focus and the 760Li to be not competitively priced.[68] Such is the situation with CBT's stand-alone BLES and the wireless and wireline bundles of the alternative providers that CBT has nominated.

D. THE COMMISSION'S SUPPORT FOR TREATING BUNDLES AS COMPETITION FOR OR ALTERNATIVES TO STAND-ALONE BLES FOR CUSTOMERS IS NON-EXISTENT.

Despite the fact that the statute refers to competition and alternatives to "such service," referring to the service(s) for which alt. reg. is sought, and despite the fact that "such service" here is stand-alone BLES, the Commission allowed the bundled services offered by the alternative providers to be used to qualify CBT's stand-alone BLES for alt.

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[66] Id. at 23.

[67] Id. at 46.

[68] It is ludicrous to suggest, as CBT does, that BLES and bundles are competitively priced because consumers often obtain other services, like toll and vertical services, with their BLES. CBT Response at 22. The claimed competition being reviewed here is between standalone BLES and the multiple service bundles.

reg.[69] This is a crucial part of the Commission's ruling; yet neither the O&O nor the rulings in 05-1305 provide support for the finding.

In the O&O here, the Commission cites to its determination in the 05-1305 O&O that the law does not restrict the analysis of competition and reasonably available alternatives "to the competitive products that are *exactly like* BLES."[70] As shown above and in OCC's pleadings in this docket, the bundles offered to customers by the alternative providers are so different from stand-alone BLES -- in price, terms and conditions -- that they cannot be seen to be competition for CBT's stand-alone BLES. Nor can they be seen as reasonably available alternatives to CBT's stand-alone BLES. These bundles are not functional equivalents or substitutes, and they are not provided to customers at competitive rates, terms and conditions, to CBT's stand-alone BLES.[71]

The Commission also quotes the 05-1305 O&O to the effect that "customers that leave an ILEC's BLES offering to subscribe to another alternative provider's bundled service offering view such bundled service offerings as a reasonable alternative service, and a substitute to the ILEC's BLES."[72] In the 05-1305 O&O, the Commission made the irrelevant (for purposes of that and this proceeding) and inaccurate statement that

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[69] To the extent that the line loss prong of Test 4 discussed below "counts" losses of CBT's bundled service lines to alternative providers' bundled services as a basis for allowing alt. reg. for CBT's stand-alone BLES, the error discussed here is repeated in the Commission's line loss prong discussion.

[70] O&O at 13, quoting 05-1305 O&O at 25 (emphasis added).

[71] 05-1305, Consumer Groups Comments, Williams Affidavit at 23-59; Consumer Groups Reply Comments, Williams Affidavit at 19-20.

[72] O&O at 13, quoting 05-1305 O&O at 25; see also id. at 14.

"consumers' perception of BLES is changing."[73] The statement is irrelevant because BLES is defined by statute.[74]

The statement was inaccurate -- and unsupported by the 05-1305 record -- as shown by the Commission's citations to the record in the 05-1305 O&O:

> More customers are substituting their traditional BLES with competitive service offered by wireline CLECs, wireless, VoIP and cable telephony providers (Columbus Tr. at 27, 39; Cincinnati Tr. at 20, 33, 37, 39, 48; AT&T Initial Comments at 15-17).[75]

None of the cited material discusses customers substituting other providers' services for stand-alone BLES -- that is, BLES *not* offered as part of a package bundled with other services. Indeed, as discussed in OCC's summary of the local public hearings held throughout the state, the public testimony was exactly the opposite: Customers throughout the state who want only stand-alone BLES have few or no alternatives to the ILECs' BLES.[76]

The Commission states that it rejected "OCC's position that ... the functionally equivalent services must be similarly priced to CBT's stand-alone BLES and have terms and conditions similar to" CBT's stand-alone BLES.[77] Yet the Commission also notes that "Section 4927.03(A)(2)(c), Revised Code only requires that the **functionally equivalent** or

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[73] 05-1305 O&O at 25. Notably, the Commission's quotation in the O&O here omits those citations.

[74] R.C. 4927.01(A).

[75] 05-1305 O&O at 25. The citation to "AT&T" is to comments that were actually filed under the name of SBC Ohio.

[76] See 05-1305, Corrected Comments of the Office of the Ohio Consumers' Counsel on Local Public Hearings (February 23, 2006) at 2.

[77] O&O at 14.

substitute services be readily available at **competitive** rates, terms and conditions."[78] OCC's point was and is (as detailed above[79]) that the CBT candidate alternative providers' services are so substantially different in price and in terms and conditions as to **not** be functionally equivalent and to **not** be competitively priced for customers.

The Commission states:

> [T]o 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.[80]

Just as customers move from CBT's stand-alone BLES service to CBT's bundles, customers may move from CBT's stand-alone BLES to alternative providers' bundles.[81] Yet this does not make the bundles -- whether CBT's, or an alternative provider's -- competitive to stand-alone BLES. Again, the bundles are not functionally equivalent to stand-alone BLES. And again, prices that are 51%, 72%, 159%, 170%, 245% or 260% higher than CBT's stand-alone BLES rates[82] cannot reasonably be viewed as competitive to CBT's stand-alone BLES rates.

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[78] Id. (emphasis added).

[79] See Section IV.C.

[80] O&O at 14.

[81] The Commission does not cite any evidence in the record that this movement actually occurs.

[82] See Section IV.C.

V. THE COMMISSION'S MISAPPLICATION OF THE STATUTE ALLOWS ALT. REG. FOR CUSTOMERS WHO HAVE NO COMPETITION OR ALTERNATIVES.[83]

A. TIME WARNER AND CURRENT DO NOT SERVE THROUGHOUT THE CINCINNATI EXCHANGE.

In adopting the competitive market tests, the Commission rejected ILEC proposals to gauge competition by Metropolitan Statistical Area or by the entire ILEC service area, in favor of applying the Competitive Tests by exchange, in order to analyze at a granular level whether competition exists for customers in specific areas.[84] To ignore the fact that alternative providers like Current and Time Warner do not serve the entirety of the exchange renders moot the Commission's decision to analyze competition at the exchange level in the first place. This is particularly true for Current and Time Warner, because they offer service over their own facilities that are limited in extent, and they will not be offering service where those facilities do not exist.

There will therefore be CBT stand-alone BLES customers in the Cincinnati exchange for which Time Warner is not a competitive option.[85] There will also be other customers in the Cincinnati exchange for whom Current will not be a competitive option. This is contrary to both prongs of the R.C. 4927.03(A)(1) tests. CBT is not "subject to competition" from Time Warner in part of the Cincinnati exchange, and is not "subject to competition" from Current in part of the Cincinnati exchange.[86] Likewise, in part of the

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[83] Allegations of Error 21, 22. 24.

[84] The Commission rejected the ILECs' applications for rehearing of the exchange-level assessment of competition. 05-1305 Entry on Rehearing at 12-13, 15.

[85] Putting aside the fact that Time Warner does not offer a service that is functionally equivalent to, or competitively priced with, CBT's standalone BLES. See Section IV., infra.

[86] R.C. 4927.03(A)(1)(a).

Cincinnati exchange the customers do not have a readily available alternative from Time Warner, and in part of the Cincinnati exchange the customers do not have a readily available alternative from Current.[87]

It was the Commission that chose the exchange as the unit of analysis here. And the Commission now states:

> The Commission, in selecting an "exchange" as the market where competition for an ILEC's BLES can be evaluated ... clearly stated that a exchange would a) exhibit similar market conditions within its boundary; b) provide an objective definition that would allow for examination 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.[88]

Clearly, however, the Cincinnati exchange does not exhibit similar market conditions within its boundary, because Time Warner and Current serve only parts of the exchange.

The Commission asserts that under its interpretation of OCC's view, the market would have to be defined as small as a city block.[89] This is essentially a straw man argument, because the question is actually a simple one: Given the geographic market as the Commission has defined it, does the alternative provider serve the entirety of that market? And the answer, for both Time Warner and Current, is no.

What the **Commission** has done is to redefine the geographic market that will be evaluated in the Competitive Tests, specifically Test 4. The rule adopted by the Commission -- Ohio Adm. Code 4901:1-4-10(A) -- states that:

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[87] R.C. 4927.03(A)(1)(b).

[88] O&O at 26, citing 05-1305 O&O at 18-19 (footnote omitted).

[89] O&O at 28.

> In order to qualify for pricing flexibility for BLES and other tier one services, the applicant has the burden to demonstrate that as of the date of the application, the ILEC meets at least one of the competitive market tests set forth in paragraph (C) of this rule **in each of the requested telephone exchange area(s)**. Thus, an application for alternative regulation of BLES and other tier one services may contain more than one telephone exchange area, but the test(s) must be applied to **each telephone exchange area individually** within that application.

(Emphasis added.) Likewise, Test 4 requires that:

> 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.[90]

As the Commission has implemented the rule, however, an ILEC is merely required to meet the competitive test **in some portion** of an exchange. Indeed, under the Commission's logic, if a company had facilities that could serve only one customer in an exchange, that would be sufficient to allow the ILEC to raise stand-alone BLES rates for all the other customers in that exchange. The Commission's implementation of the rule is counter to the public interest.

For Time Warner, the Commission accepts its candidacy because "the data in the present record demonstrates that Time Warner's cable franchise area covers **the majority** of both the Cincinnati and Hamilton exchanges...."[91] This stands as an admission that there are portions of the Cincinnati and Hamilton exchanges where Time Warner's services are not available at all, much less "readily available" as directed by the statute.

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[90] Ohio Adm. Code 4901:1-4-10(C)(4) (emphasis added).

[91] O&O at 26 (emphasis added).

To make matters worse, the Commission's approach to Current abrogates even this low standard. The Commission states, "We reject OCC's argument that Current Communications' offering is available in 'some areas of the Cincinnati exchange' and is not available throughout the exchange, **for the same reasons we discussed above with respect to Time Warner Cable's service availability.**"[92] Yet the record here does not contain any information showing that Current's service is available anywhere but in "some areas of the Cincinnati exchange," much less in a majority of the exchange or throughout the exchange. In fact, **CBT's application itself** stated that Current "offers broadband over power line service **in some areas of the Cincinnati exchange.**"[93] Indeed, it appears that Current's main base is "one of the **small** areas not currently served by Time Warner...."[94]

The Commission's acceptance of Current's candidacy thus means that the rule is reduced to requiring the presence of an alternative provider in some portion of, or a small area of, a particular exchange. This is obviously contrary to the Commission's own description, quoted above, of its "clear description" of the purpose of selecting an exchange as the unit of measurement.

OCC had argued that, because of the limitations of Current's and Time Warner's service areas, they could not be found to have a "presence" throughout the Cincinnati and Hamilton exchanges.[95] The Commission's finding on this issue creates another straw man:

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[92] Id. (emphasis added).

[93] Application, Exhibit 3 at 7 (emphasis added).

[94] Id. at 8 (emphasis added).

[95] See OCC Opposition at 27-28.

The Commission asserts that OCC's supposed failure to dispute that an alternate provider has subscribers and is a viable provider means that said carrier has a presence in the market.[96] Not only does this erroneously place the burden on OCC to disprove the basis for BLES alt. reg., but it would allow (as it has done here), a supposedly "viable" provider[97] that provides service in only a small part of the market (i.e., the exchange) to be deemed to have a "presence" throughout the exchange.[98]

CBT had asserted that "it would be unreasonable to require CBT to prove that each and every one of its competitors offers service to each and every CBT customer; the standard must be interpreted in a reasonable manner based on the information that would be available to a competitor."[99] As OCC stated, and reiterates, the information on Time Warner's and Current's service areas would be available to CBT; that information shows that there are significant parts of CBT's exchanges where neither provider offers service, meaning that CBT customers in those areas will not have the Time Warner or Current alternatives to CBT's BLES service. This is not a flaw in OCC's argument,[100] and not a flaw in the alternative providers prong of Test 4, but rather a demonstration that CBT cannot meet the test, and thus should not be allowed to subject its customers to BLES alt. reg., in the exchanges that CBT has proposed.

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[96] O&O at 26.

[97] It must be noted that there is nothing in this record to show that Current is "viable." See OCC Opposition at 16, n. 55.

[98] The Commission asserts that Time Warner and Current meet Mr. Williams' criteria for presence in the market. Mr. Williams' focus was on the fact that neither carrier made their service "readily available" throughout the CBT exchange in question. Williams Affidavit, ¶¶ 33, 53. Clearly, a service that is not readily available does not show the carrier's presence throughout the market.

[99] CBT Response at 32; see O&O at 26.

[100] See O&O at 28.

B. THE WIRELESS SERVICES OF SPECIFIC CARRIERS ARE NOT "READILY AVAILABLE" THROUGHOUT THE CBT EXCHANGES.

The Commission relies on the carriers' coverage maps submitted by CBT for its finding that the offerings of four wireless providers (Cingular, Sprint, T-Mobile and Verizon) are "reasonably available to customers of the Cincinnati and Hamilton exchanges...."[101] This is in error. First, the statute requires the Commission to consider whether services are "readily" available, not just "reasonably" available. Equally importantly, the Commission is completely ignoring OCC's extensive demonstration, based on the carriers' own disclaimers, that the wireless carriers themselves cannot guarantee that their service will work for customers at any particular location, much less indoors at any particular location.[102]

VI. THE LINE LOSS PRONG, AND THE COMMISSION'S USE OF IT TO GRANT ALT. REG. FOR THE STAND-ALONE BLES THAT CBT PROVIDES TO CUSTOMERS, VIOLATE R.C. 4927.03(A).[103]

The line loss prong does not show that CBT's stand-alone BLES is subject to competition, or that CBT's stand-alone BLES customers have reasonably available alternatives to their service. It also does not show that there are no barriers to entry for stand-alone BLES. The line loss test says nothing about the "number and size of alternative providers of services."[104] The line loss test says nothing about the "extent to

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[101] Id.

[102] Roycroft Affidavit, ¶¶ 100-104.

[103] Allegations of Error 12-19.

[104] R.C. 4927.03(A)(2)(a).

which services are available from alternative providers in the relevant market."[105] The line loss test says nothing about the "ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions."[106] The line loss test also says nothing about "[o]ther indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services."[107] Those are the factors that the statute requires the Commission to consider in granting alt. reg. for CBT's stand-alone BLES.

The Commission's defense of its finding points out the line loss prong's major flaw. The Commission states, "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...."[108] That is true, given the unrefined nature of the global line loss test.[109] Neither can the Commission identify where the lost residential access lines went, whether to CBT's own DSL, or to CBT's affiliate wireless carrier, as the Commission acknowledged OCC asserted.[110] The inability to determine where the lost residential access lines went undermines the use of the line loss test for meeting R.C. 4927.03(A), which requires the lines to have gone to competition for stand-alone BLES or to alternatives to stand-alone BLES.

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[105] R.C. 4927.03(A)(2)(b).

[106] R.C. 4927.03(A)(2)(c).

[107] R.C. 4927.03(A)(2)(d).

[108] O&O at 17.

[109] In Competitive Test 3, the Commission included a prong that calls for the ILEC to calculate the CLEC's market share. Clearly, the Commission thinks that ILECs would be able to identify what portion of the market CLECs have captured.

[110] Id. at 15.

It is indeed curious that, having identified two of the specific non-competitive or non-alternative reasons cited by OCC for access line loss, the Commission then asserts "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...."[111] The Commission is correct that, if OCC had so alleged, there would be no data in the record to support the proposition. **But there is also no data in the record to show what portion of that line loss went to competition for, or alternatives to, CBT's stand-alone BLES.**

Likewise, the Commission asserts that OCC's argument is that "residential access lines lost to CBT's wireless affiliate should be excluded from the 15 percent total residential line loss calculation."[112] This ignores most of OCC's argument, which was that, as the Commission itself noted:

> [A]n 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 an unaffiliated provider, or converted to cable modem service provided by an unregulated entity.[113]

Clearly, most of those losses have nothing to do with the statutory standard of whether customers have competition or alternatives for stand-alone BLES, or whether there are barriers to entry for BLES. Lines lost to a wireless affiliate are not a measure of whether the statute has been met for stand-alone BLES. Neither are lines lost to others of the identified categories, and the line loss prong does not give the Commission any reliable

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[111] Id. at 17 (emphasis added).

[112] Id. at 17.

[113] Id. at 18.

information regarding competition for customers or customers' alternatives to stand-alone BLES.

With regard to this last point, the Commission alleged that the line loss test addresses barriers to entry because it shows a "reasonable number of providers offering competing services" and that "a significant number of residential subscribers ... now perceive those service offerings as a reasonably available substitute offering that competes with the ILEC's BLES."[114] Clearly, the line loss test shows nothing of the sort; the Commission's statement lacks any basis in the record.

Likewise, the Commission's statement that the 2002 start date for the line loss test "excludes any data distortion due to residential line losses not attributable to competition for BLES"[115] lacks support in the record. The Commission has never specified how it is that the use of 2002 as a starting point "excludes" residential line losses not attributable to competition for BLES when 2002 was the starting point for "the loss of residential access lines replaced by DSL and cable modem."[116]

In what is another great irony of the O&O,[117] the Commission complains that the statewide DSL substitution numbers adduced by Dr. Roycroft are irrelevant, because this application is limited to the Cincinnati and Hamilton exchanges.[118] Yet the Commission has no idea of the level of DSL substitution by customers in those exchanges; CBT did not

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[114] Id. at 12.

[115] Id. at 17; see also 05-1305 Entry on Rehearing at 13.

[116] O&O at 17; see id. at 15, citing Roycroft Affidavit, ¶ 28.

[117] Like the one where the Commission complains that a requirement for alternative providers to be serving throughout the geographic market area picked by the Commission would require the use of a smaller market area. See Section V., supra.

[118] O&O at 17.

submit any such information. Yet the Commission determined on a generic statewide basis that a line loss prong that ignores DSL substitution met the requirements of R.C. 4927.03(A).

The Commission's rationale and support for the line loss prong in the rule fails to show that the prong meets the statute. The Commission's application of the prong to the specific situation in the Cincinnati and Hamilton exchanges also fails to show that CBT's stand-alone BLES in those two exchanges meets the terms of R.C. 4927.03(A).

VII. THE ALTERNATIVE PROVIDERS PRONG, AND THE COMMISSION'S USE OF IT TO GRANT ALT. REG. FOR THE STAND-ALONE BLES THAT CBT PROVIDES TO CUSTOMERS, VIOLATE R.C. 4927.03(A).[119]

As demonstrated in Section IV., supra, the Commission has allowed alternative providers that do not offer functionally equivalent or substitute services at competitive rates, terms, and conditions to purportedly show that CBT's stand-alone BLES is subject to competition or has reasonably available alternatives for customers. Further, as demonstrated in Section V., supra, the Commission has allowed alternative providers that do not offer functionally equivalent or substitute services at competitive rates, terms, and conditions **throughout an exchange** to purportedly show that CBT's stand-alone BLES is subject to competition or has reasonably available alternatives for customers. These fundamental errors infect the entirety of the alternative providers prong, and make it non-compliant with the statute. The Commission has also committed other errors in developing and applying the alternative providers prong.

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[119] Allegations of Error 20-25.

For example, the alternative provider prong, by requiring only a "presence" in the market, does not include any consideration of the size of alternative providers,[120] or other indicators of market power such as market share or growth in market share.[121] Neither does the "presence" of alternative providers show that market forces are capable of supporting a healthy and sustainable, competitive telecommunications market.[122] Despite these statements in the law, the Commission dismissed OCC's concerns, stating 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 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 [sic] demonstrates a greater commitment of a carrier to remain in the market as a competitor.[123]

This total non sequitur shows the determination of the Commission to grant alt. reg. for the stand-alone BLES that CBT offers to customers, regardless of the record. The fact that there are "several"[124] providers in the market says nothing about the ability of any one of those providers to contribute to a **healthy, sustainable** competitive market.

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[120] R.C. 4927.03(A)(2)(a).

[121] R.C. 4927.03(A)(2)(d).

[122] R.C. 4927.02(A)(1).

[123] O&O at 24.

[124] Per Ohio Adm. Code 4901:1-4-10(c)(4), the arbitrary number that the Commission has chosen is five.

VIII. THE COMMISSION ERRED IN FINDING THAT THERE ARE NO BARRIERS TO ENTRY FOR STAND-ALONE BLES IN THE CINCINNATI AND HAMILTON EXCHANGES.[125]

As discussed throughout the arguments above, neither the line loss prong nor the alternative providers prong of Test 4 meets the statutory requirement that the Commission find no barriers to entry before granting alt. reg. to stand-alone BLES.[126] As also noted above, the Commission's decision on barriers to entry inaccurately and improperly characterized OCC's and the Consumer Group's position as being that any factor that makes entry more difficult is a barrier to entry. That characterization impacted the Commission's statement in the 05-1305 O&O that "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."[127] In this case, as in 05-1305, the Commission's finding does not equate to the requirement of R.C. 4927.03(A)(3) that there are "no barriers to entry" for the provision of stand-alone BLES to customers. (Emphasis added.)

The Commission also stated 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."[128] This is another tremendous irony, because neither the Commission nor CBT did any CBT-specific or Cincinnati/Hamilton-specific review of barriers to entry; rather, the Commission and CBT depended entirely on the Commission's generic, yet incorrect,

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[125] Allegations of Error 26-29.

[126] R.C. 4927.03(A)(3).

[127] 05-1305 O&O at 22, quoted by the O&O here at 12.

[128] O&O at 12.

determination in 05-1305 that Test 4 adequately meets the requirements of R.C. 4927.03(A)(3).[129]

IX. THE COMMISSION ERRED IN GRANTING ALT. REG. FOR CBT'S STAND-ALONE BLES OFFERING TO CUSTOMERS, WHICH IS NOT IN THE PUBLIC INTEREST.[130]

R.C. 4927.03 has contained, since its first enactment in 1989, a requirement that the Commission find any alt. reg. plan to be in the public interest. In what have come to be known nostalgically as the "traditional" alt. reg. rules, the Commission required ILECs to include commitments as part of their submitted alt. reg. plans,[131] in order to ensure that the public interest was met. Commitments were made, and largely kept, for each of the three companies that applied for "traditional" alt. reg., including CBT.[132]

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[129] The Commission's view on this point puts the burden on OCC to show that CBT does not meet the statute, where the Commission's rules put the burden of meeting the statute squarely on CBT. Ohio Adm. Code 4901:1-4-10(A).

[130] Allegation of Error 30.

[131] *In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Companies*, Case No. 92-1149-TP-COI, Finding and Order (January 7, 1993), Appendix 1 at 7.

[132] E.g., *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates*, Case No. 93-432-TP-ALT, Opinion and Order (May 5, 1994).

Likewise, in the so-called elective alt. reg. rules, the Commission required commitments of ILECs applying for alt. reg.[133] Companies applying for elective. alt. reg. -- like CBT -- made and met those commitments.[134]

In the BLES alt. reg. proceeding, the Consumer Groups (which included OCC) proposed that the Commission require ILECs seeking BLES alt. reg. to make additional commitments to enhance the public interest.[135] The Commission rejected that proposal, stating that:

> additional commitments would not be appropriate in a competitive environment. In such an environment, an ILEC should have the appropriate incentives to deploy additional advanced services and provide other public benefits to consumers.[136]

The Commission again rejected the proposal on rehearing.[137]

This proceeding reinforces the error in the Commission's decision. Here, the Commission has granted alt. reg. for CBT's stand-alone BLES in the Cincinnati and Hamilton exchanges based on 1) a "line-loss" test that says little or nothing about whether the lines were lost as a result of the existence of competition or alternatives to stand-alone BLES; 2) the presence of wireless carriers that offer services substantially different from CBT's stand-alone BLES, and cannot commit to offering their service at any particular

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[133] Ohio Adm. Code 4901:1-4-06. Although OCC has argued about the sufficiency of those commitments, it has never been questioned that these were benefits the companies had to provide to their customers as a condition of receiving the elective alt. reg. regulatory flexibility that included the ability to raise most rates.

[134] E.g., *In the Matter of the Applications of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4 Ohio Administrative Code*, Case No. 04-720-TP-ALT, Finding and Order (June 30, 2004).

[135] 05-1305, Consumer Groups Comments (December 6, 2005) at 37-38; id., Consumer Groups Reply Comments (December 22, 2005) at 22.

[136] 05-1305 O&O at 11.

[137] 05-1305 Entry on Rehearing at 2.

location in the exchanges ; and 3) the existence of other providers, that also offer services substantially different from CBT's stand-alone BLES, but cannot offer their services in the entirety of the exchanges.

In this case, the Commission dismisses OCC's public interest arguments without any discussion.[138] The Commission asserts that CBT has met its burden of proving that granting alt. reg. for its stand-alone BLES is in the public interest.[139] Yet CBT's customers get **nothing** in exchange for the anticipated CBT rate increases.[140]

And despite Chairman Schriber's statement that "[t]he pricing flexibility granted today permits the company to face the challenges of this competition,"[141] the competition in question -- which is not competition for stand-alone BLES -- will not discipline CBT's stand-alone BLES prices. Therefore, beyond peradventure, CBT's application and the Commission's O&O granting the application do not meet the public interest test required by the statute.

X. THE COMMISSION ERRED IN FAILING TO ADEQUATELY EXPLAIN THE REASONS FOR ITS DECISION.

R.C. 4903.09 requires the Commission, in all contested cases, to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." In order to meet the requirements of this statute, the Commission's order must show, in sufficient detail, the facts

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[138] O&O at 7-8.

[139] Id. at 30.

[140] See footnote 4, supra.

[141] See http://www.puco.ohio.gov/PUCO/MediaRoom/MediaRelease.cfm?id=7134.

in the record upon which the order is based, and the reasoning followed in reaching the conclusion.[142] In *MCI*, the Ohio Supreme Court quoted *Commercial Motor Freight, Inc. v. Pub. Util. Comm.*, 156 Ohio St. 360, 364 (1951), as follows:

> The General Assembly never intended this court to perform the same functions and duties as the Public Utilities Commission but it did intend that this court should determine whether the facts found by the commission lawfully and reasonably justified the conclusions reached by the commission in its order and whether the evidence presented to the commission as found in the record supported the essential findings of fact so made by the commission.

(Emphasis omitted.)[143]

In the instant case, the Commission failed in this responsibility. Clearly, the Commission's approval of CBT's application for BLES alt. reg. depends on the lawfulness of the rules adopted in 05-1305, rules that OCC challenged in detail in 05-1305 and here.[144] In response to these challenges, however, the Commission did not show the facts in the 05-1305 O&O on which its decisions were based.

Instead, the Commission "incorporate[d] 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."[145] Rather than set forth the detail of the facts in 05-1305 that supported its actions here, the Commission merely stated that the 05-1305 "record supports the Commission's orders in 05-1305 and the resulting rules

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[142] *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306 (1987) ("*MCI*").

[143] See also, *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 307 (2006).

[144] See O&O at 7; see also Section III., supra.

[145] O&O at 8.

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adopted in Chapter 4901:1-4, O.A.C."[146] This global approach cannot meet the requirements of R.C. 4903.09.

XI. CONCLUSION

For the reasons set forth herein, the Commission's grant of alt. reg. for CBT's stand-alone BLES, which will impact tens of thousands of customers in the Cincinnati and Hamilton exchanges, is unjust, unreasonable and unlawful. A company meeting Test 4 of the Commission's rules has not shown that its stand-alone BLES is subject to competition or that its stand-alone BLES customers have reasonably available alternatives to that service. Neither has a company meeting Test 4 shown that there are no barriers to entry for BLES in its territory. The O&O should be reversed, and CBT should be denied the opportunity to annually increase rates for its stand-alone BLES customers who have no options other than CBT's service.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

David C. Bergmann, Trial Attorney
Terry L. Etter
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
(614) 466-9475 (Facsimile)

[146] Id.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing and Memorandum in Support of the Office of the Ohio Consumers' Counsel was provided to the persons listed below via e-mail and first class U.S. Mail, postage prepaid, this 28th day of December 2006.

David C. Bergmann
Assistant Consumers' Counsel

Duane Luckey
Ohio Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, OH 43215-3793

Douglas E. Hart
441 Vine Street, Suite 3108
Cincinnati, OH 45202

Mark Romito
Pat Rupich
Cincinnati Bell Telephone Company
221 E. Fourth St., P.O. Box 2301
Cincinnati, OH 45201

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*1994 Ohio PUC LEXIS 348, *; 151 P.U.R.4th 487*

In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates; Office of the Consumers' Counsel, Complainant, v. Cincinnati Bell Telephone Company, Respondent

Case No. **93-432**-TP-ALT; Case No. 93-551-TP-CSS

PUBLIC UTILITIES COMMISSION OF OHIO

1994 Ohio PUC LEXIS 348; 151 P.U.R.4th 487

May 5, 1994

CORE TERMS: customer, cell, tariff, regulation, reduction, telecommunication, carrier, network, notice, toll, staff, input, intervenor, competitive, earnings, methodology, annual, public interest, monitoring, technology, provider, telephone, rate of return, provisioning, pricing, segment, conditional, nonresidence, interstate, formula

APPEARANCES:

Frost & Jacobs, by Thomas E. Taylor, David C. Olson, and Mark H. Longenecker, Jr., 2500 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202, on behalf of Cincinnati Bell Telephone Company.

Lee I. Fisher, Attorney General of the State of Ohio, James B. Gainer, Section Chief, by Anne L. Hammerstein, Ann E. Henkener, and Paul T. Colbert, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43266-0550, on behalf of the staff of the Public Utilities Commission of Ohio.

Robert S. Tongren, Consumers' Counsel, by Andrea M. Kelsey, David C. Bergmann, and Yvonne T. Ranft, Associate Consumers' Counsel, 77 South High Street, 15th Floor, Columbus, Ohio 43266-0550, on behalf of the residential customers of Cincinnati Bell Telephone Company.

Vorys, Sater, Seymour & Pease, by Sheldon A. Taft, 52 East Gay Street, 43216-1008, on behalf of the Ohio Cable Television Association.

Bell, Royer, & Sanders Co., LPA, by Judith B. Sanders and Barth E. Royer, 33 South Grant Street, Columbus, Ohio 43215-3927, on behalf of Allnet Communications Services, Inc.

Jones, **[*2]** Day, Reavis & Pogue, by Helen L. Liebman, 1900 Huntington Center, 41 South High Street, Columbus, Ohio 43215, on behalf of LiTel Telecommunications Corporation dba LCI International.

Douglas W. Trabaris, 205 North Michigan Avenue, Chicago, Illinois 60601, on behalf of MCI Telecommunications Corporation.

Robin P. Charleston, 227 West Monroe, Floor 6N, Chicago, Illinois 60606, on behalf of AT&T Communications of Ohio, Inc.

Bricker & Eckler, by Mary W. Christensen, 100 South Third Street, Columbus, Ohio 43215-4291, on behalf of Southern Ohio Telephone Company.

Vorys, Sater, Seymour & Pease, by Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Answering Exchange, Inc.

Hahn Loeser & Parks, by Randy J. Hart, 3300 BP America Building, 200 Public Square, Cleveland, Ohio 44114, and Janine L. Migden, 431 East Broad Street, Suite 200, Columbus, Ohio 43215.

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behalf of Greg Hart Communications, Inc., Coin Phones Inc., and the Ohio Public Communications Association.

Fay D. Dupuis, City Solicitor, and Richard Ganulin, Assistant City Solicitor, Room 214, City Hall, Cincinnati, Ohio 45202, on behalf of the City of Cincinnati.

Emens, Kegler, Brown, Hill & Ritter, **[*3]** by Samuel C. Randazzo and J. Richard Emens, 65 East State Street, Suite 1800, Columbus, Ohio 43215, on behalf of Time Warner AxS.

Mary A. Hull, 8140 Ward Parkway, 5E, Kansas City, Missouri 64114, on behalf of Sprint Communications Company L.P.

Bricker & Eckler, by Sally W. Bloomfield, 100 South Third Street, Columbus, Ohio 43215-4291, on behalf of SportsChannel Cincinnati Associates.

Arter & Hadden, by William A. Adams, 10 West Broad Street, Columbus, Ohio 43215, on behalf of Bell Communications Research, Inc.

Lee I. Fisher, Attorney General of the State of Ohio, by Karin W. Rilley, Assistant Attorney General, 30 East Broad Street, 15th Floor, Columbus, Ohio 43266-0410, on behalf of the Ohio Department of Education.

Blooston, Mordkofsky, Jackson & Dickens, by Benjamin H. Dickens, Jr. and Susan J. Bahr, 2120 L Street, N.W., Washington, D.C. 20037, on behalf of ADT Security Systems, CinData, Honeywell Protection Services, Security One/Habitech, and Wells Fargo (Alarm Intervenors).

PANEL: [*1]

Craig A. Glazer, Chairman; J. Michael Diddison; Jolynn Barry Butler; Richard M. Fanelly; David W. Johnson

OPINIONBY: Cincinnati Bell Telephone Company (Cincinnati Bell) provides telephone service to 672,800 access lines and 534,500 customers in its local service area in Ohio. This opinion and order involves an application **[*4]** by Cincinnati Bell for approval of an alternative form of regulation and for a threshold increase in rates, as well as a complaint filed by the Office of the Consumers' Counsel (OCC) against Cincinnati Bell.

In this opinion and order, the Commission accepts an unopposed stipulation and recommendation signed by all parties in this proceeding to resolve all issues raised in these cases. The signatory parties include Cincinnati Bell, the Commission's staff, OCC, the Ohio Cable Television Association, Allnet Communications, LCI International, MCI Telecommunications, Time Warner AxS, Southern Ohio Telephone Company, Bell Communications Research, Answering Exchange, AT&T Communications of Ohio, the Ohio Department of Education, the Ohio Public Communications Association, Greg Hart Communications, Coin Phones, Inc., the City of Cincinnati, Sprint Communications Company, SportsChannel Cincinnati Associates, and a group of alarm company intervenors.

The Commission accepted the recommendation of the parties that Cincinnati Bell be granted an overall revenue increase of 3.75 percent which, for an average residential customer amounts to an approximately $.90 per month increase. The increase **[*5]** is based on an authorized rate of return of 11.18 percent. The alternative regulation plan negotiated by the parties also includes a rate retargeting formula whereby, as determined during an annual monitoring period, earnings in excess of 11.93 percent would be shared by ratepayers and shareholders and earnings exceeding 16.18 percent would be returned to ratepayers. During the three-year term of the alternative regulation plan, Cincinnati Bell may not seek additional rate relief unless its earnings fall below 10.43 percent.

Under the stipulation, Cincinnati Bell agrees to: Continue flat-rate residence service during the term of the plan; Reduce Touch-Tone rates for residence and small business customers; and Reduce rates for Call Trace and Per Line Number Privacy services. The stipulated plan also includes commitments

by Cincinnati Bell to: Make advanced network services (such as Custom Calling PLUS and ISDN-BRI) available to a greater number of customers; Establish a Consumer Board with OCC to address concerns of senior citizens, the disabled, and low income customers regarding the continued affordability of telephone service; and Expand its commitment to public education through **[*6]** the use of telecommunications technology (including a $100,000 per year commitment to the Cincinnati Public School System).

This summary was prepared to provide a brief statement of the Commission's action. It is not a part of the Commission's decision and does not supersede the full text of the Commission's opinion and order.

OPINION: OPINION AND ORDER

The Commission, having considered the stipulation and recommendation submitted by all parties in this proceeding, as well as testimony presented at the public hearings, and relevant provisions of the Ohio Revised Code and Ohio Administrative Code, hereby issues its opinion and order.

HISTORY OF THE PROCEEDINGS:

Cincinnati Bell Telephone Company (Cincinnati Bell or company) is an Ohio corporation engaged in the business of providing telecommunications service in Ohio and is, therefore, a public utility and telephone company within the definitions set forth in Sections 4905.02 and 4905.03(A)(2), Revised Code. The company is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code. Cincinnati Bell is a local exchange telephone company providing service to 672,800 access lines **[*7]** and 534,500 customers in its local service area in Ohio. Cincinnati Bell is a wholly-owned subsidiary of Cincinnati Bell, Inc., a holding company. The company's present rates were established by order of this Commission in Cincinnati Bell Telephone Co., Case No. 84-1272-TP-AIR et al. (October 29, 1985).

On March 12, 1993, Cincinnati Bell filed a notice of intent to file an application for an alternative form of regulation in accordance with Sections 4927.03 and 4927.04(A), Revised Code. Section 4927.03, Revised Code, enables the Commission to exempt from Chapters 4905 or 4909, Revised Code, or establish alternative regulatory requirements for any telephone service (except basic local exchange service) provided the Commission finds such measure is in the public interest, and that the telephone company is subject to competition with respect to the public telecommunications service, or the customers of the service have reasonably available alternatives. Section 4927.04(A), Revised Code, grants the Commission authority to consider alternatives to the traditional form of ratemaking contained in Section 4909.15, Revised Code. In accordance with these sections, the Commission instituted **[*8]** an investigation of alternative regulation and, as a result of its investigation, adopted rules for the establishment of alternative regulation for large local exchange telephone companies (alternative regulation rules). Alternative Regulation for Large Local Exchange Telephone Companies, Case No. 92-1149-TP-COI (January 7, 1993) and Entry on Rehearing (March 10, 1993).

On April 1, 1993, the Office of the Consumers' Counsel (OCC) filed a complaint against Cincinnati Bell, Case No. 93-551-TP-CSS, pursuant to Section 4905.26, Revised Code, alleging that the company's rates and charges were excessive under the ratemaking formula set forth in Section 4909.15, Revised Code. OCC requested that the Commission find that Cincinnati Bell's base rates should be reduced. On April 26, 1993, Cincinnati Bell filed an answer denying the substance of the allegations contained in the complaint, as well as a response to the complaint. OCC replied on May 14, 1993.

Cincinnati Bell filed its application for approval of an alternative form of regulation and for a threshold increase in rates, Case No. **93-432**-TP-ALT, on May 4, 1993. The application is governed by the rules for alternative regulation **[*9]** of large local telephone companies. By entry dated July 22, 1993, the Commission accepted the application for filing as of May 4, 1993. By this same entry, the Commission established a test period of April 1, 1992 to March 31, 1993, consolidated for hearing the complaint case and the alternative regulation case, and approved the company's proposed customer notice.

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On November 12, 1993, Cincinnati Bell filed a motion requesting permission to submit modifications to its alternative regulation plan. The proposed modifications were filed on November 29, 1993 and, by entry issued December 9, 1993, the Commission granted the company's motion and ordered publication of a revised customer notice.

In accordance with the provisions of the alternative regulation rules, the staff of the Commission conducted an investigation of the matters set forth in the company's alternative regulation application. An executive summary of the staff's report was filed on January 7, 1994. On January 31, 1994, the staff's full written report was issued and served as provided by law. Objections to the staff report were timely filed on March 2, 1994 by Cincinnati Bell, OCC, the Ohio Cable Television Association **[*10]** (OCTVA), Allnet Communications, LCI International, MCI Telecommunications, Time Warner AxS, Southern Ohio Telephone Company, Bell Communications Research (Bellcore), Answering Exchange, AT&T Communications of Ohio, the Ohio Department of Education, the Ohio Public Communications Association, Greg Hart Communications, Coin Phones, the City of Cincinnati, Sprint Communications Company, and the Alarm Intervenors. Responses to various objections were filed on March 8, 1994 by Bellcore and on March 14, 1994 by OCTVA and Cincinnati Bell.

The evidentiary hearing was scheduled to commence on March 16, 1994 but, at the request of all parties, the hearing was called and continued to permit additional time for settlement discussions. Local public hearings were conducted by Commissioners on March 30, 1994, in Fairfield, Ohio; on March 31, 1994, in Cincinnati; and on April 5, 1994, in Batavia, Ohio, in order to afford members of the public the opportunity to testify on the proposed alternative regulation plan and OCC's complaint. Notices of the complaint, the application, and the local public hearings were published in accordance with Sections 4905.26, 4909.19, and 4903.083, Revised Code. **[*11]**

On April 11, 1994, a stipulation and recommendation resolving all issues in both proceedings was filed by all parties except SportsChannel and the City of Cincinnati. n1 On April 13, 1994, SportsChannel submitted a letter indicating that it had signed the stipulation as a non-objecting intervenor. The City of Cincinnati submitted an executed signature page on April 13, 1994, indicating its assent to the stipulation. The hearing was called on April 19, 1994, at which time the stipulation was offered into the record without objection. The unanimous stipulation and recommendation is now before the Commission for final disposition.

n1 The full stipulation, including the company's final modified alternative regulation plan, is attached to the opinion and order.

COMMISSION REVIEW AND DISCUSSION:

Section 4927.02, Revised Code, provides as follows:

A) It is the policy of this state to:

1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;

2) Maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications service;

3) Encourage innovation in the telecommunications industry;

4) Promote diversity **[*12]** and options in the supply of public telecommunications services and equipment throughout the state; and

5) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of public telecommunications services where appropriate.

In addition, Section X(B)(2) of the Commission's alternative regulation rules provides that, in

determining whether an alternative regulation plan should be adopted, the Commission shall consider the following:

a) Whether the commitments are of sufficient value to the public to warrant the provision of regulatory opportunities for superior company performance outcomes linked to these commitments;

b) The probable impact of the plan on the financial status of the company;

c) The probable impact of the plan on customer bills;

d) The probable impact of the plan on telecommunications competition;

e) The probable impact of the plan on the goal of universal service;

f) Whether the commitments conform to the guidelines of Section IV(B) of these rules;

g) Whether the commitments promote efficient development of the public switched network;

h) The quality of the evidence of public support for the appropriateness **[*13]** of the commitments;

i) Whether the reporting and oversight provisions are sufficient to reasonably monitor the plan and assure its objectives are properly pursued;

j) Whether the plan satisfies each of the public policy goals set forth in Section 4927.02, Revised Code; and

k) Any other factor which the Commission may deem relevant in determining whether the plan is in the public interest.

As indicated above, a stipulation was submitted which resolves all issues raised in this proceeding. Rule 4901-1-30, Ohio Administrative Code (O.A.C.), and the Commission's alternative regulation rules provide for the filing of stipulations such as the one submitted in this case. Because the stipulation in this case is unopposed, the alternative regulation rules permit the agreement to automatically go into effect 31 days after it is filed with the Commission, unless the Commission acts otherwise. Alternative Regulation Rule IX(G)(1). Notwithstanding the automatic approval clause in the rules, we believe it is important for the stipulation to be reviewed through this opinion and order in order to consider the reasonableness of the agreement and to ensure that it is in the public interest. **[*14]**

THE STIPULATION

The Commission begins its consideration with an overview of the main elements of the stipulation. The settlement is comprehensive and contains a number of terms. The stipulation is intended to apply, in a nonseverable manner, to both the complaint proceeding and Cincinnati Bell's alternative regulation proceeding. Thus, the stipulation in the complaint case (Case No. 93-551-TP-CSS) is dependent upon approval of the stipulation in the alternative regulation case (Case No. **93-432**-TP-ALT), and vice-versa. The stipulating parties agree and recommend that Cincinnati Bell is entitled to an overall 3.75 percent revenue increase, i.e., an additional revenue amount of $11.961 million. They further agree that Cincinnati Bell's authorized rate of return should be established at 11.18 percent. Cincinnati Bell had originally requested, in May 1993, an increase of $17 million, or 5.5 percent, and a rate of return of 11.83 percent.

Under the stipulation, Cincinnati Bell commits to participation in an earnings sharing plan. Under the plan, the company's earnings would be monitored on an annual basis. Each year, the company and the ratepayers would share, according to **[*15]** a specific and agreed-upon rate retargeting formula, in any earnings which cause the company's rate of return to exceed 11.93 percent during the annual monitoring period. Under the formula, the company would be required to refund all earnings which would cause its rate of return to exceed 16.18 percent during any annual monitoring period. The company cannot file for an increase in rates unless its rate of return falls below 10.43

percent.

Cincinnati Bell has agreed to continue offering residential flat-rate service for the three-year duration of its alternative regulation plan. The stipulation calls for Cincinnati Bell's residential basic service rates to increase by 5.97 percent and for Cincinnati Bell's business basic service rates to increase by 3.7 percent. Nevertheless, it guarantees immediate rate reductions for some services and creates the potential for further reductions in rates for these services in the future. The current rate for residential touch-tone service would be immediately reduced, by 20 percent, to $0.92 per month. Beyond this initial reduction, Cincinnati Bell has agreed to reduce its touch-tone revenues by at least $900,000 per year in 1995 and 1996. **[*16]** Even greater reductions could result in each of those years, depending upon Cincinnati Bell's earnings. In the event that touch-tone charges would be reduced to zero, any remaining rate reduction commitment which would otherwise be applied to touch-tone would, instead, be applied to reductions in basic local exchange rates. The stipulation calls for an immediate rate reduction for Call Trace service, from the current $5.00 per activation to $1.50 per activation. The stipulation also calls for a reduction of per line number blocking from the current rate of $1.60 per month to $1.10 per month. The stipulation would result in an immediate $7.6 million reduction to the intrastate Carrier Common Line Charge (CCLC), for purposes of bringing it into parity with the interstate CCLC. Beyond this, under the stipulation, Cincinnati Bell is committed to further reducing the CCLC by a minimum of $500,000 per year in 1995 and 1996. Even greater CCLC reductions could result in each of those years, depending upon Cincinnati Bell's earnings. However, to the extent parity is achieved between the interstate and intrastate CCLC, remaining revenues which would otherwise be earmarked for CCLC reductions **[*17]** would, instead, be applied to reduction of touch-tone rates.

Not all rate changes contemplated by the stipulation will be reductions. The local Directory Assistance (DA) charge would increase under the stipulation by four cents to 44 cents per call. The monthly call allowance for DA service would be eliminated. However, Cincinnati Bell would maintain its current policy under which physically challenged and special needs customers, nursing homes, coin calls, hotels and motels, and hospitals may use DA service without charge. The stipulating parties have agreed to a 33 percent rate increase for private line services, except alarm services, and to a 15 percent rate increase for alarm services. As regards operator-assisted calls, under the stipulation, a $1.00 charge would apply whenever a Cincinnati Bell operator completes a call to a local telephone number or to an intrastate intraLATA location at the request of a customer. This charge will not apply on operator-assisted calls made in emergency situations, on calls placed for customers with special needs, or on calls made for purposes of correcting telephone service problems. Under the stipulation, the current two-tier rate **[*18]** structure for Integrated Services Digital Network-Basic Rate Interface (ISDN-BRI n2) will be replaced, on a going-forward basis, by a single rate of $55.00. This rate represents a substantial reduction for ISDN-BRI customers in the current higher-rated tier, while customers in the lower-rated tier will be grandfathered at their current rate of $38.50. The stipulation calls for Cincinnati Bell to expand the message rate options which would be available to its Customer Owned Coin Operated (COCOT) customers on a per-line basis. It is expected that these expanded message rate options would afford COCOT owners a better opportunity to compete in Cincinnati Bell's service territory.

n2 ISDN-BRI is a technology, for use in both the residential and business sectors, which allows for the simultaneous transmission of voice and data on a single telephone line.

Under the stipulation, Cincinnati Bell has committed to certain infrastructure and service deployment schedules. The stipulation would require Cincinnati Bell, over the three-year period of its plan, to steadily increase the availability of its advanced network services. By the end of 1996, Custom Calling PLUS n3 would be available **[*19]** to 98 percent of Cincinnati Bell's Ohio access lines and ISDN-BRI would be available to 83 percent of them. Additionally, the stipulation would require Cincinnati Bell to invest in the software and technology which will allow customers to exercise choice among carriers in the 1+ intraLATA toll market. The stipulation requires Cincinnati Bell to implement such intraLATA 1+ technology in at least one Ohio central office by December 31, 1994 and in all but one of its Ohio central offices by the end of 1995.

n3 Custom Calling PLUS is a trade name used by Cincinnati Bell to market various services including Call Trace, Per Call and Per Line Number Privacy, Call Block, Call Return, Caller ID, Priority Call, Priority Forward, and Repeat Dialing.

The stipulation requires Cincinnati Bell to make an expanded commitment to public education. Cincinnati Bell must work with school systems in its operating territory to find ways in which the public switched network can be utilized to improve education. Towards this end, the stipulating parties have agreed that, during the three-year term of Cincinnati Bell's alternative regulation plan, the company should provide a credit to the Cincinnati **[*20]** Public School System so as to reduce charges for telecommunication services in the amount of $100,000 per year. In the meantime, the company will work to help define and determine the telecommunications technology needs of the Cincinnati Public School System and to address its unique and specific needs. The company is further required to develop a detailed long-range telecommunications plan for education, which includes affordability issues, with input from the Ohio Department of Education, the City of Cincinnati, and representatives from various schools and school districts.

In recognition of the need to preserve the goal of universal service, the stipulating parties have agreed, among other things, to the establishment of a consumer board designed to address lifeline issues. The board would be comprised of representatives from the company, OCC, social service agencies, consumer and disability advocacy groups, and the Commission's staff. Cincinnati Bell would contribute $100,000, per year, over the three-year life of its alternative regulatory plan, to fund this consumer board.

The stipulating parties have also agreed to the formal implementation of a "Public Input Model", **[*21]** as recommended by the Commission's staff in its January 31, 1994 Staff Report, the purpose of which would be to formalize the process of dialogue which must continue between the company and the public it serves. The Public Input Model encompass a formalized research process designed to ensure that ongoing public input is obtained for use in evaluating the public impact of company plans and initiatives.

REVIEW OF THE STIPULATION

The stipulation and recommendation submitted by the signatory parties on April 11, 1994 is unopposed and resolves all issues raised by Cincinnati Bell's application and by OCC's complaint. As indicated above, Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into stipulations. The Commission's alternative regulation rules [Rule IX(G)] also provide a framework for the submission of stipulations. Although not binding on the Commission, the terms of a stipulation are accorded substantial weight. Consumers' Counsel v. Pub. Util. Comm. (1992), 64 Ohio St.3d 123, at 125 (citing Akron v. Pub. Util. Comm. (1978), 55 Ohio St.2d 155). This concept is particularly valid where the stipulation is unopposed by any party and **[*22]** resolves all issues presented in the proceeding in which it is offered. In a number of cases, the Commission has commended the parties to a negotiated agreement for simplifying the consideration of contested issues and for reducing the hearing time required. See, e.g., Ohio Edison Co., Case No. 82-1025-EL-AIR (September 14, 1983); Cincinnati Gas & Electric Co., Case No. 83-1528-EL-AIR, et al. (November 20, 1984). In reviewing a settlement agreement, however, our primary concern is that the stipulation is in the public interest.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, Cincinnati Gas & Electric Co., Case No. 91-410-EL-AIR (April 14, 1994); Western Reserve Telephone Co., Case No. 93-230-TP-ALT (March 30, 1994); Ohio Edison Co., Case No. 91-698-EL-FOR, et al. (December 30, 1993); Cincinnati Gas & Electric Co., Case No. 92-1463-EL-AIR, et al. (August 26, 1993); Ohio Edison Co., Case No. 89-1001-EL-AIR (August 19, 1993); Cleveland Electric Illuminating Co., Case No. 88-170-EL-AIR (January 31, 1989); Restatement of Accounts and Records **[*23]** (Zimmer Plant), Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following

criteria:

1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2) Does the settlement, as a package, benefit ratepayers and the public interest?

3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a method economical to ratepayers and public utilities. Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm. (1994), 68 Ohio St.3d 547 (citing Consumers' Counsel, supra, at 126). The court stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. Id.

Based on our three-prong standard of review, we find that the first criterion, that the process involved serious bargaining by **[*24]** knowledgeable, capable parties, is clearly met. Counsel for the signatory parties have been involved in many cases before the Commission, including a number of prior cases involving rate and telephone issues. Moreover, the level of detail contained in the stipulation, as well as the breadth of issues encompassed by the agreement, leaves little doubt that the parties engaged in serious negotiations prior to signing the settlement.

The stipulation also meets the second criterion. As a package, it advances the public interest by resolving all issues raised in this proceeding without the incurrence of the time and expense of extensive litigation. Although the stipulation includes a small rate increase for most customers (approximately $.90 per month for average residential customers), it provides some amount of rate stability during the three-year term of the plan. The agreement also includes a number of other terms which should benefit both ratepayers and shareholders. For example, the settlement, among other things, guarantees residential flat-rate service for the term of the plan; reduces touch-tone rates for both residential and business customers; reduces rates for Call Trace **[*25]** and Per Line Number Privacy services; provides for additional future rate reductions depending on Cincinnati Bell's level of earnings; commits the company to expanding availability of advanced network services; establishes a consumer board to work with OCC and other groups to address the needs of senior citizens, disabled, and low-income customers; expands a commitment by Cincinnati Bell to develop distance learning programs for public schools, including a $100,000 per year commitment to Cincinnati Public Schools; and requires Cincinnati Bell to invest in software and technology to allow customers to use their long distance carrier for "local" toll calls. Considered as a package, the stipulation clearly benefits both ratepayers and the public interest.

Finally, the stipulation meets the third criterion because it does not violate any important regulatory principle or practice. Indeed, approval of the agreement enhances rate stability while providing the company with incentives to operate more efficiently. The settlement agreement protects ratepayers by returning to customers a portion of earnings exceeding a set level of return realized by Cincinnati Bell. At the same time, shareholders **[*26]** are protected by permitting the company to file additional rate applications should earnings fall below a specified return during the monitoring period. Both of these conditions further the important regulatory principle of rate stability and provide a framework for future cooperation between the company and its customers.

Our review of the stipulation and recommendation indicates that it is in the public interest and represents a reasonable disposition of this proceeding. We will, therefore, adopt the stipulation to the extent and for the reasons set forth above.

We would be remiss if we did not take the opportunity to commend Cincinnati Bell, the staff, and the other signatory parties to the stipulation for their diligent efforts in crafting a comprehensive agreement which was acceptable to all. This stipulation is especially impressive given the number and diversity of interests represented by the intervenors. The ability to reach an unopposed compromise in this case is obviously due, in no small part, to the willingness of Cincinnati Bell to address each of the intervenor interests seriously and to make concessions to achieve a fully stipulated case. We congratulate each **[*27]** of the parties for their hard work in creating a fair and reasonable settlement regarding a number of difficult issues.

LOCAL PUBLIC HEARINGS

As indicated above, local public hearings presided over by Commissioners were held in Fairfield, Cincinnati, and Batavia. We note that a number of witnesses at these hearings testified about the company's positive role in the community. (Fairfield Tr. 22-26, 29-30; Cincinnati Tr. 23, 30, 32, 43, 45, 56, 85-86, 97; Batavia Tr. 30-36, 44-48). At the Batavia hearing, the Clermont County distance learning project was cited as a positive example of cooperation between local school districts and Cincinnati Bell (Batavia Tr. 23-27, 44-45, 53). We note that the stipulation in this case enhances the opportunity for additional distance learning projects by requiring the company to develop a long-range plan for education and to develop ways of using telecommunications for furthering improvements in education (Cincinnati Bell Alternative Regulation Plan, Para. 4.A.).

Several witnesses expressed their concern with ongoing availability of basic telephone service (Cincinnati Tr. 42, 52, 83, 86). We believe that the stipulation addresses these concerns **[*28]** in several ways. The settlement agreement provides that: flat-rate service will be continued for the term of the plan; Cincinnati Bell will attempt to increase the level of participation in the basic Telephone Service Assistance program; the company will heighten awareness of telephone services for persons with communications impairments; the company will study restriction of toll access in lieu of disconnection for non-payment of local service; and Cincinnati Bell will establish a consumer board (including a $100,000 per year contribution) to develop expanded lifeline programs (Jt. Ex. 1, Para. 22).

One witness at the Fairfield hearing mentioned the need for extended area service in Butler County (Fairfield Tr. 29). Since that time, a number of letters have been submitted supporting this need. Although this is not the appropriate case to decide individual EAS requests, nothing in the stipulation precludes or prejudges any EAS petitions which may subsequently be filed.

MISCELLANEOUS

Although the overall settlement agreement appears to be reasonable for purposes of settling this case, we would like to point out several observations and concerns about certain items contained **[*29]** in the stipulation. First, the inclusion of local non-residence directory assistance in Cell 2 is of concern because of the lack of any real competition for that service. Given the fact that this term was a part of the overall settlement, we are willing to approve it in this case. This should not, however, be perceived as an indication of what may be approved in future cases.

We will continue to monitor the company's pricing of directory assistance for nonresidential customers and we reserve the right to review such pricing if competitive circumstances do not materialize as expected. With regard to cell classification in general, in future cases we expect a greater showing by alternative regulation applicants of actual competitive threats. These competitive threats should be justified by the applicants through empirical data specific to the service territory, as contemplated in the alternative regulation rules.

We also have some concern with issues in the stipulation pertaining to LRSIC costing methodology. We wish to emphasize that we are approving these sections of the stipulation as part of the overall agreement but that we intend to look at these issues in future alternative **[*30]** regulation cases, and/or when the LRSIC studies are submitted for our review pursuant to proposed price changes. Approval of the stipulation in this case should not, however, be construed as an endorsement of any particular costing methodology for allocating joint costs.

As part of an agreement between Cincinnati Bell and Time Warner AxS, the parties agree to form a task force to identify and resolve issues related to: operation, interconnection and functioning of multiple communications networks; physical collocation and network interconnection arrangements; and reasonable mutual compensation arrangements for network access (Paragraph 41). We expect the task force created pursuant to this agreement to work closely with the Commission and the staff to ensure that the solutions determined by the task force are in the public interest and are fair to all stakeholders in the process.

As a final matter, we wish to emphasize that nothing in this stipulation should be construed as limiting our ability to make changes in the minimum telephone service standards. Nor does the agreement affect any other generic proceeding which is now pending or subsequently opened by the Commission.

[*31] PROPOSED TARIFFS, CUSTOMER NOTICE, AND EFFECTIVE DATE

In accordance with the stipulation, the company filed on April 21, 1994 its proposed new or revised tariff pages necessary to implement the terms of the stipulation. Further revised tariffs were filed on May 2, 1994. The Commission finds that the tariffs conform to this opinion and order and should be approved. The new tariffs shall be effective on and after the date the company files four complete printed copies of its tariffs. The plan should be implemented in accordance with the schedule set forth in the stipulation.

On April 21, 1994, as amended on May 2, 1994, the company filed, for Commission review, a proposed customer notice advising its customers in sufficient detail about its new rates, its alternative regulation plan, and the implications of the plan for customers. After careful review of this proposed customer notice, we find it to be reasonable and the notice shall, therefore, be approved. We authorize the company to use this approved customer notice in order to inform its customers of the rate increase and alternative regulation plan, by means of a bill insert in the normal cycle of billing.

FINDINGS **[*32]** OF FACT:

1) On May 4, 1993, Cincinnati Bell filed its application for approval of an alternative regulation plan and for a threshold increase in rates.

2) On April 1, 1993, OCC filed a complaint against Cincinnati Bell alleging that the company's rates and charges were excessive under the ratemaking formula set forth in in Section 4909.15, Revised Code. OCC requested the Commission to make a finding that Cincinnati Bell's base rates should be reduced.

3) By entry dated July 22, 1993, the Commission consolidated for hearing the complaint and alternative regulation cases.

4) On April 11, 1994, a stipulation resolving the issues raised in both cases was submitted by all but two parties. The remaining parties, SportsChannel and the City of Cincinnati, filed signature pages on April 13, 1994 endorsing approval of the agreement.

5) Local public hearings were held on March 30, 1994 in Fairfield, Ohio; on March 31, 1994 in Cincinnati; and on April 5, 1994 in Batavia, Ohio. The evidentiary hearing was initially called and continued on March 16, 1994 and called for the final time on April 19, 1994, at which time the stipulation was accepted into the record without objection.

6) The **[*33]** stipulation is the product of serious bargaining among knowledgeable parties, benefits ratepayers and advances the public interest, and does not violate any important regulatory principles or practices.

7) The rates, terms, and conditions set forth in the tariffs filed pursuant to the stipulation are consistent with this opinion and order.

CONCLUSIONS OF LAW:

1) Cincinnati Bell's alternative regulation application was filed pursuant to Section 4927.04(A), Revised Code. OCC's complaint case was filed pursuant to Section 4905.26, Revised Code. The company is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.

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2) A staff investigation was conducted and a report was duly filed and mailed. Public hearings have

been held. Notices of the complaint, application, and hearing were published in accordance with Sections 4905.26, 4909.19, and 4903.083, Revised Code.

3) The stipulated alternative regulation plan submitted by the parties comports with the policy of this state, as set forth in Section 4927.02, Revised Code.

4) The stipulation submitted by the parties is reasonable and, as indicated herein, should be adopted **[*34]** in its entirety.

5) The company is authorized to withdraw its current tariffs and to file in final form four complete printed copies of its tariffs which the Commission has approved herein.

ORDER:

It is, therefore,

ORDERED, That the joint stipulation and recommendation filed on April 11, 1994, with additional signatures submitted on April 13, 1994, is approved and adopted in its entirety. It is, further,

ORDERED, That Cincinnati Bell's application for approval of an alternative form of regulation and for a threshold increase in rates is granted, to the extent provided in this opinion and order. It is, further,

ORDERED, That Cincinnati Bell's proposed customer notice advising its customers of the approved alternative regulation plan, as well as the increase in rates approved herein, is approved. The company shall provide the approved notification to its customers by means of a bill insert in its regular billing cycle. It is, further,

ORDERED, That the proposed revised tariffs are approved, and Cincinnati Bell is authorized to cancel and withdraw its present tariffs governing service to customers affected by this application. The effective date of the new tariffs shall **[*35]** be the date on which the company files, in final form, four complete printed copies of its revised tariffs. One copy of the tariff should be filed in the company's TRF docket. The new rates should be implemented in accordance with the schedule set forth in the stipulation. It is, further,

ORDERED, That these cases be closed as a matter of record. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

STIPULATION AND RECOMMENDATION

The parties hereto, being Cincinnati Bell Telephone Company ("CBT" or the "Company"), the Staff of the Public Utilities Commission of Ohio (the "Staff"), n1 the Office of the Consumers' Counsel (the "OCC") and such of the intervening parties in either or both of Case Nos. **93-432**-TP-ALT (the "Alt Reg Proceeding") and 93-551-TP-CSS (the "Complaint Proceeding") as have evidenced their agreement by subscribing hereto (collectively, the "Stipulating Parties"), hereby recommend to the Public Utilities Commission of Ohio (the "Commission") the Stipulation described herein.

n1 Pursuant to Rule 4901-1-10(C), Ohio Admin. Code, the Staff of the Commission is considered a party for the purpose of entering into a stipulation under Rule 4901-1-30, Ohio Admin. Code. **[*36]**

Procedural Background

A. The Alt Reg Proceeding was initiated on March 12, 1993, when CBT filed its notice of intent to file an application for an alternative form of regulation in accordance with Sections 4927.03 and 000167

4927.04(A), Revised Code, and the alternative regulation procedures adopted by the Commission in Case No. 92-1149-TP-COI.

B. CBT's Application for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates (the "Application") was filed on May 4, 1993.

C. The Complaint Proceeding was initiated on April 1, 1993, when the OCC filed a complaint against CBT, pursuant to Section 4905.26, Revised Code, alleging that the Company's rates and charges are excessive under the ratemaking formula set forth in Section 4909.15, Revised Code. The OCC also filed, on April 1, 1993, a motion to consolidate the Alt Reg Proceeding with the Complaint Proceeding.

D. By Entry dated July 22, 1993, the Commission accepted CBT's Application for filing as of May 4, 1993, and consolidated the two proceedings for purposes of hearing.

E. On August 23, 1993, pursuant to the Commission's July 22 Entry and Section VI(D) of the Commission's alternative regulation **[*37]** procedures, the OCC, and several other parties which had been granted intervention in the Alt Reg Proceeding, filed their preliminary objections with respect to CBT's Application. CBT filed its responses to these preliminary objections on September 7, 1993.

F. As contemplated by the Commission, the preliminary objections and CBT's responses thereto were instrumental in framing the issues for the Alt Reg Proceeding.

G. After reviewing the preliminary objections, CBT began contacting parties which had been granted intervention in the Alt Reg Proceeding. CBT thereafter formulated a group of proposed modifications to its Application which were designed to remove as many issues from the Alt Reg Proceeding as possible.

H. On November 12, 1993, CBT filed a motion asking the Commission to issue an Order accepting the above-mentioned modifications to its Application and to reflect consideration of such modifications in the Staff Report issued in the Alt Reg Proceeding.

I. On November 29, 1993, CBT refiled its Application reflecting the modifications described in its November 12 motion, along with supporting modified schedules and supplemental testimony.

J. By Entry dated December **[*38]** 9, 1993, the Commission accepted the proposed modifications, stating that the Company had set forth sufficient justification for permitting their consideration.

K. On January 31, 1994, the Staff issued its Report of Investigation (the "Staff Report") in the Alt Reg Proceeding, which analyzed CBT's Application as modified on November 29, 1993.

L. On March 2, 1994, CBT, the OCC and various other parties filed their objections to the Staff Report as well as testimony in support thereof. On March 14, 1994, CBT and other parties filed responses to objections.

M. Evidentiary hearings in the Alt Reg Proceeding and the Complaint Proceeding, which have been consolidated for purposes of hearing, and scheduled to begin March 16, 1994, were rescheduled to permit the parties an opportunity to seek a resolution of the issues presented which would eliminate the need, assuming Commission approval, for such hearings.

N. After extensive negotiations, the Stipulating Parties, represented by experienced counsel and other experts reflecting widely varying interests and being knowledgeable of the circumstances, having before them the Application as modified on November 29, 1993, and the Staff **[*39]** Report, having conducted extensive discovery, and otherwise being fully advised, have agreed upon the terms of a Stipulation, set forth herein, and recommend its adoption by the Commission.

O. The Stipulation is a compromise which balances competing positions. It does not necessarily reflect the position which any one or more of the Stipulating Parties would have taken if these cases

had been litigated to conclusion or may take if litigation should go forward. Except for enforcement purposes, this Stipulation shall not be cited as precedent for or against any signatory or the Commission itself, if it gives its approval. However, all parties hereto reserve the right to continue arguing their respective positions, as set forth in their objections to the Staff Report, for purposes of defending the reasonableness of this Stipulation and to demonstrate that it is, in fact, a compromise.

P. The Stipulation is intended to apply to both of the above-identified cases and is not severable between them. The stipulation of Case No. **93-432**-TP-ALT is dependent on approval of the stipulation in Case No. 93-551-TP-CSS and vice versa.

Q. It is contemplated by all parties hereto that if the **[*40]** Commission should adopt this Stipulation, it may treat the Stipulating Parties' objections to the Staff Report as satisfied and withdrawn and need not rule upon them individually or collectively. It is also contemplated that this Stipulation will serve as a motion to dismiss the Complaint Proceeding with prejudice, and that all parties hereto will withdraw from that proceeding.

R. Attached hereto as Attachment 1 is the Company's Alternative Regulation Plan incorporating changes as a result of this Stipulation and various recommendations made in the Staff Report. The Stipulating Parties agree that the Company's Alternative Regulation Plan as set forth in Attachment 1 meets the requirements of Rule X.B.2. of the Alternative Regulation Rules adopted by the Commission in Case No. 92-1149-TP-COI and will be administered by those Rules unless otherwise waived.

S. The Stipulating Parties recognize that the Commission is not bound by the terms of this Stipulation and Recommendation, but submit that it is entitled to careful consideration, meets the standards set forth by the Commission in numerous cases dealing with rate case settlements, and violates no regulatory principle or precedent. **[*41]**

T. CBT reserves the right to withhold its consent with respect to an Alternative Regulation Plan ultimately approved by Commission Order in this proceeding which varies significantly from the terms and conditions set forth in this Stipulation.

WHEREFORE, the Stipulating Parties hereby stipulate and recommend as follows:

Revenue Requirements

1) The Stipulating Parties agree that amended Schedule A-1, attached to this Stipulation as Attachment 2, accurately reflects the operating income, rate base, rate of return, and revenue requirements agreed to by the Stipulating Parties for purposes of this Stipulation.

2) The Stipulating Parties agree that Attachment 2 accurately incorporates the impact of the adjustments listed in Attachment 3.

3) The Stipulating Parties agree that the rate of return of 11.18% on Attachment 2 should be established as the Company's authorized rate of return.

4) The Stipulating Parties agree that the revenue increase recommended and agreed to is $11.961 million as reflected on Attachment 2.

Rates and Tariffs

5) The Stipulating Parties agree to the cell classifications in the Staff Report with the following changes in cell placement for the services **[*42]** as hereafter indicated: n2

a) Directory Assistance (Intrastate IntraLATA MTS - Non-Residence and Local Non-Residence) will be classified as Cell 2 services.

b) Pole Attachments and Conduit Occupancy Services will be classified as Cell 1, with the rate

increasing from the current level of $2.66 per year per pole to $3.50 per year per pole in three annual increments of $0.28 each.

c) Private Line Services will be placed in Cell 2 and be grandfathered. See Stipulation No. 14 for further detail.

n2 For a complete list of current cell classifications, see Section 7 of Attachment 1.

6) The Stipulating Parties agree to the following changes in rate structure for ISDN-BRI. The existing two-tier rate structure will be replaced with a single rate. The current access line rates of $38.25 for access lines served via qualified copper facilities and $230.00 for access lines served via electronic facilities will be replaced by a single access line rate of $55.00.

Existing access lines being charged $38.25 will continue to be charged $38.25 for the three years of the Company's Plan. Existing access lines being charged $230.00 will be charged $55.00. All additional access lines will **[*43]** be charged $55.00.

7) The Stipulating Parties agree that the Company will adhere to federal guidelines and tariffs on collocation. To the extent that this Commission lawfully supersedes the federal guidelines, this Commission's rulings will apply.

8) The Stipulating Parties agree that upon implementation of collocation, the Company may file for reclassification of switched access service from Cell 1 to Cell 2, or special access service from Cell 2 to Cell 4 in accordance with the Commission's rules adopted in Case No. 92-1149-TP-COI (hereinafter, the "Alternative Regulation Rules"). Such reclassification will be effective upon Commission approval subject to the Company making a showing that the requested reclassification satisfies the Alternative Regulation Rules. Reclassification will be requested on a wire center-specific basis.

9) The Stipulating Parties agree that, with regard to LRSIC Costing Methodology, the Company's cost studies for each service that uses facilities shared with Cell 1 services will include, in addition to LRSIC, an assignment based upon measures of use, including but not limited to minutes of use, number of circuits and bandwidth, of the joint costs **[*44]** of any shared facilities. The Company reserves the right to propose a particular assignment methodology to the Commission.

10) The Stipulating Parties agree that with regard to LRSIC Costing Methodology, the Company's services that rely on Cell 1 and/or Cell 2 services that are essential inputs for the provisioning of other firms' competitive services will be charged the tariffed rates for such services on the same terms and conditions as the inputs may be purchased by the Company's competitors.

The inputs will include but will not be limited to, the following services [at the premium tariffed rate]: Local Switching, Carrier Common Line Charge, Local Transport (i.e., direct trunk transport charge, tandem switched transport charge and residual interconnection charge) and the tariffed elements of Billing and Collection services. Also, such an adjustment will be made at the service level for al new services, including services provided under contract, that rely on Cell 1 and/or Cell 2 services as essential inputs to the provisioning of other firms' competitive services and are alternatives to the Company's service. Existing services may be aggregated where subscribership is minimal. **[*45]** The appropriate elements will be included in the price floor for Company services at the tariffed rate, to the extent that the Company utilizes them in provisioning its own service, in the same manner as the Company would charge other service providers for utilizing those same elements (i.e., CBT is entitled to the same choices in provisioning its services as other service providers have in provisioning their services).

The Stipulating Parties agree that the Company can make a filing with the Commission to demonstrate out of pocket cost differences in provisioning an essential service to itself as compared to the out of pocket costs of provisioning to other service providers. Tariffed rates would be adjusted by this difference. The Company agrees to provide notice of such filing to the Stipulating Parties

(ten) 10 days in advance of the filing date, and further agrees to waive the application of Rule XIV (F) of the Commission's Alternative Regulation Rules to allow parties up to twenty (20) days to file objections to such filing. The Company will have ten (10) days to respond to such objections. In all other respects, the Commission's Alternative Regulation Rules for tariff revisions, **[*46]** price list changes, and new service applications will apply as appropriate.

A sample worksheet for a service specific test follows:

MTS Revenues

Access Charges (per tariff)

B&C Charges (per tariff)

Access Paid Others

LRSIC

Joint Costs

Total Costs

Contribution (revenue less cost)

The Stipulating Parties agree that the Company can file with the Commission to exclude the charging of tariffed rates for essential inputs from its cost studies, and instead use LRSIC, when the input services have been classified by the Commission as Cell 4 services.

11) The Stipulating Parties agree that a waiver from Section XIII "Contractual Arrangements" Subsection (E) of the Alternative Regulation Rules is appropriate and should be granted upon a showing that the contract is made in response to competitive or other unique circumstances.

12) The Stipulating Parties agree that the Commission may approve unbundling of services classified in any cell of the Company's Plan upon a showing that the unbundling being proposed is technically feasible, fully compensatory, and i the public interest.

The Company will comply with Section XII (A)(3) of the Commission's Alternative Regulation Rules relative **[*47]** to deaveraging of services.

13) The Company clarifies that Section 16 of the Plan (See Attachment 1) is its policy for resellers and sharers of local exchange service such as Shared Tenant Service (STS) providers.

The Company has no restrictions on resale or sharing of its services by other common carriers as long as the Company is adequately compensated for usage of its network. n3

n3 The IXC Coalition and Time Warner AxS do not consider this paragraph to be a part of the stipulation to which they are signatory parties. Rather, the IXC Coalition regards this paragraph as merely an expression of the Company's position on resale and sharing and neither objects to, nor endorses, this expression of the Company's policy.

14) The Stipulating Parties agree that private line services, other than alarm services, will be increased by 33%. Series 901, 3001, and other services used by Alarm Companies for alarm purposes will be increased 15%. The private line tariff will be grandfathered and eliminated three years from the effective date of the Order in this proceeding.

15) The Stipulating Parties agree that the originating carrier common line charge will initially be set at $.0077 **[*48]** per minute; this charge will mirror the interstate charge thereafter. The terminating carrier common line charge will initially be set at $0.0190 per minute; this charge will be adjusted annually in accordance with Stipulation 26.

16) The Stipulating Parties agree that the charge for each Directory Assistance call will be $0.44.

17) The Stipulating Parties agree that, with respect to Operator Service Assistance, the Company will apply a charge of $1.00 whenever an operator completes a call to a local telephone number or to an intrastate intraLATA telephone number at the request of the customer. The charge will be billed either to the originating party or to a third number, to a credit card or collect.

The only exemptions to this charge will be for operator-assisted sent paid calls from coin telephones and those situations involving emergencies, telephone company problems, such as a problem on the line which prevents the customer from completing the call, or calls placed for customers with special needs. For instance, calls to the Company's repair office or calls from blind or disabled customers will not be charged.

18) The Company agrees to reduce the Call Trace rate from $5.00 **[*49]** to $1.50 per activation. The Stipulating Parties agree that the proposed rate is responsive to concerns about use of the network for harassment purposes, is in the public interest and its associated costs are properly included in the Company's revenue requirements. In addition, the Company agrees to reduce the Per Line Number Privacy rate from $1.60 to $1.00 per month.

19) The Stipulating Parties agree that the following chart sets forth the agreed upon revenue distribution to recover the $11.961 million revenue increase addressed in Stipulation 4 above:

	Additional Revenues (000)	
Residence	$5,564	5.97% increase
Touch Tone	(2,100)	20% decrease
Repeat Dialing, Priority Call, Priority Forward	(20)	6% decrease
Per Line Number Privacy	(9)	
Call Trace	(17)	
Business, Centrex, PBX and DID	3,700	3.7% increase
Schools	(100)	
MTS, Listings, Special Assembly	792	9% increase
Private Line	1,850	15% increase-Alarm 33% increase-Private Line
Operator		
Dir. Asst.	5,450	
Local "0"	1,672	
Pole Attachments *	14	
COCOT Usage	(31)	
CCLC Reduction	(7,615)	
Removal of 35 Cent Credit	2,810	
Universal Service Rates	(100)	
Total	11,860	

* The Pole Attachment Rate will be $2.94 per year per pole in Year 1, $3.22 per year per pole in Year 2, and $3.50 per year per pole in Year 3. **[*50]**

20) While the Company does not agree that the mirroring requirements of the CWIP statute, Section 4909.15(A)(1) Revised Code, apply to the projects included in its rate base as CWIP in Case No. 84-1272-TP-AIR, the Company is willing to agree to the imposition of a sur-credit rider. The Company agrees to implement a sur-credit rider of $0.13 per billable access line until a total amount of $2,159,436 has been returned to customers. The Company will accrue carrying charges on the

dollar value of the projects included as CWIP in Case No. 84-1272-TP-AIR during the period while the $0.13 sur-credit rider is being applied. The sur-credit rider and accrual of carrying charges will cease after $2,159,436 has been returned.

Commitments

21) The Stipulating Parties agree that the following education commitment serves the public interest:

a) Distance Learning

The Company will hold customers harmless from any losses that may be incurred only as a result of the Clermont County distance learning project.

The Company will work with schools and school systems in an effort to find ways in which the switched public network could be utilized to foster improvements in education. During **[*51]** the Plan, the Company will develop and implement a program to promote telecommunications-based educational applications.

b) The Company will develop a detailed long-range telecommunications plan for education that considers the telecommunications needs of the state-chartered public and private primary, secondary, and post-secondary schools in the Company's Ohio operating territory. This plan will also address the affordability of telecommunications services for schools, the participation of schools constrained by financial limitations, and applications development. The Company will develop this plan with input from the Ohio Department of Education, the City of Cincinnati, and representatives from various schools and school districts.

c) At the request of the Ohio Department of Education, CBT commits to working with the Cincinnati Public School System to expand the use of telecommunications technology.

-- CBT will work with the Cincinnati Public School System over the three year term of the Plan to help define and determine the telecommunications technology needs of the Cincinnati Public School System and to address its unique and specific needs.

-- CBT commits to the delivery **[*52]** of a proposal addressing the needs of the Cincinnati Public School System to the Department of Education for review within 180 days of the Commission's approval of this Stipulation.

-- Telecommunications services that will be jointly explored by CBT and the Cincinnati Public School System shall include, but not necessarily be limited to, ISDN, the expansion of Centrex, data networking, and distance learning applications.

-- The Company further agrees that it will provide a credit to reduce charges for telecommunications services in the amount of $100,000 per year of the Plan ($8,333 per month) for the Cincinnati Public School System to help expand its use of telecommunications technology. [See Conditional Commitments, Stipulation para. 28(b)].

-- CBT will submit an annual progress report to the Ohio Department of Education and the Commission Staff by April 1 following each calendar year of CBT's Alternative Regulation Plan.

22) The Company agrees to adopt the following commitment to universal service:

a) To attempt to increase the level of participation in the Basic Telephone Service Assistance Program. This goal will be measured by the Company's efforts to increase the number **[*53]** of TSA and SCA participants.

b) To make efforts to improve awareness as to the availability of telephone services which assist persons with communications impairments.

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c) To study the restriction of toll access in lieu of disconnection for non-payment.

d) To establish a Consumer Board within 90 days of the Commission Order approving the Alternative Regulation Plan that will be comprised of representatives from the Company, the Ohio Consumers' Counsel, social service agencies, consumer and disability advocacy groups, and the Commission Staff in an advisory role. The primary objective of the board will be to develop an expanded lifeline program which will be implemented by the Company via specifically targeted credits in the amount of at least $100,000 for each year of the plan. The Company will accrue any balance not distributed in each year. The Board will develop the eligibility criteria required to determine the distribution of the $100,000 minimum per year credits. (See Conditional Commitments, Stipulation para. 28(f)).

23) The Stipulating Parties agree that the following Commitment serves the public interest:

a) CBT will implement a Model for Public Input to formalize **[*54]** the dialogue process historically carried out by CBT's Community Relations Department, in order to ensure that public input is obtained to evaluate future customer initiatives of CBT. CBT's Public Input Model will be an additional effort above and beyond the Company's current customer communication, education and dialogue. It will represent a formalized research process with a quantifiable report card.

b) CBT's Public Input Model will provide a source of public input to ensure that CBT is serving the public interest and needs in an effective manner.

c) CBT's Model for Public Input will consist of the following steps:

1. In-depth interviews will be conducted with representatives of various customer segments. The following constituencies would be included:

a. residential customers

b. large, medium, and small businesses

c. primary and secondary schools

d. colleges and universities

e. libraries

f. police, fire, and public safety officials

g. hospitals

h. city, county, and township governments

i. community-based organizations

j. community councils

k. non-profit organizations

l. social service agencies

m. religious organizations

n. business groups

o. **[*55]** consumer groups

p. other service providers

2. If it is determined during the developmental stages of the Public Input Model that the total universe of any customer segment will not be sampled in the in-depth interview process, then the methodology utilized to select representatives of those segments will be based upon a statistically valid cross-section of that segment. The optimum interviewing level for this research will be selected to ensure an adequate and unbiased representation in each customer segment being interviewed through the survey.

3. CBT will analyze the results of this qualitative research to prioritize the needs expressed in the interviews by representatives of customer segments.

4. CBT will return to representatives of customer segments to engage in dialogue to:

a. validate that CBT has clearly defined and expressed their issues, concerns, and needs;

b. validate that CBT has prioritized the issues, concerns, and needs accurately; and

c. design a plan of action or agenda that is mutually agreeable to CBT and the customer segments regarding telephone services, technology, and resources.

5. CBT will implement action plans to address these customer-prioritized **[*56]** initiatives, with a time line, a plan for continued input and feedback, and a structure for customer participation as needed by CBT.

6. CBT will evaluate the results of the in-depth interviews in a quantifiable way through a survey to determine:

a. if needs were met as expected (by customer segment)

b. if modifications to the process are needed

c. whether internal and external communications are required on a going-forward basis

d. the next set of issues and initiatives to be developed.

e. if the education efforts have sufficiently informed customers of CBT's communications opportunities and capabilities.

d) CBT agrees to continue the customer education processes and programs provided by the Company's customer contact organizations. CBT's extensive customer education programs will continue to educate its customers as to specific technologies, services, and applications relevant to their needs. This will assure the Commission that information received from customer groups in the dialogue process is based on informed input.

e) The Model for Public Input will be used by the Company to develop future commitments for subsequent alternative regulation plans filed pursuant **[*57]** to the Commission's Rules established in Case No. 92-1149-TP-COI.

24) The Stipulating Parties agree that the following commitment is in the public interest and should be incorporated into CBT's Plan:

The Company commits to the following infrastructure and service deployment schedule. This commitment is in the public interest because it makes the network more valuable by providing an infrastructure for the development of new services desired by CBT's customers, thereby meeting their expanding telecommunications needs, providing a stimulation of usage of the network and enlarging the base of services providing contributions to the joint and common costs of the network.

CBT will deploy the technology necessary for the expansion of ISDN-BRI and Custom Calling PLUS" services available for customers in Ohio, as follows:

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PERCENTAGE ACCESS LINE AVAILABILITY

	12/31/93	12/31/94	12/31/95	12/31/96
Custom Calling PLUS"	69%	85%	91%	98%
ISDN-BRI	49%	71%	79%	83%

25) The Company commits to reducing Touch Tone charges by a minimum of $900,000 on June 1, 1995, and by an additional minimum of $900,000 on June 1, 1996. These reductions will be implemented upon approval **[*58]** by the Commission and are guarantees for minimum levels of reductions for the conditional commitments "b" and "e" described in the Company's Proposed Conditional Commitments Stipulation 28, and will be offsets to revenues designated for Touch Tone reduction purposes provided by the Company's formula for retargeting rates.

If Touch Tone charges have been reduced to zero, any remaining commitment which would otherwise be applied to Touch Tone reductions will be applied to reductions of basic local exchange rates.

26) The Company commits to reducing terminating carrier common line charges (CCLC) by a minimum of $500,000 on June 1, 1995, and an additional minimum of $500,000 on June 1, 1996. These reductions will be implemented upon approval by the Commission and are guarantees for minimum levels of reductions for the conditional commitments "a" and "d" described in the Company's Proposed Conditional Commitments (Stipulation 28) and will be offsets to the revenues designated for CCLC reduction purposes provided by the Company's formula for retargeting rates.

If the terminating carrier common line charge is reduced to parity with interstate CCLCs, any remaining commitment which would **[*59]** otherwise be applied to CCLC reductions will be applied to reductions of Touch Tone Charges as set forth in Stipulation 28(b).

27) The Stipulating Parties agree that the following additional commitment relating to implementation of Dial 1 is in the public interest and should be included in CBT's Plan. The Company will provide its Ohio customers the option of choosing their interLATA toll carrier to carry their intraLATA toll calls on a 1+ basis ("IntraLATA 1+"). For purposes of this provision, "toll calls" means MTS calls terminating outside the "local calling area" as defined by O.A.C. 4901:1-7-01. The Company will deploy the technology necessary to implement IntraLATA 1+ and will implement IntraLATA 1+ upon the terms and conditions set forth herein.

a) Implementation Schedule

The Company will implement IntraLATA 1+ in at least one Ohio central office by December 31, 1994. All other Ohio central offices will have IntraLATA 1+ available by the end of 1995, except for one 2BESS office, which will be converted when memory is available. Implementation schedules will be shared with all interLATA toll carriers operating within the Cincinnati LATA.

b) IntraLATA 1+ Methodology **[*60]**

The Company will deploy the IntraLATA 1+ methodology known as "modified 2 PIC" to implement IntraLATA 1+ capability. For purposes of this provision, the modified 2 PIC methodology means the programming of a software program-controlled switch to create an additional class of service for each existing class of service, thereby permitting an additional routing table for each existing class. The modified 2 PIC methodology permits customers to select their presubscribed interLATA toll carrier to handle all their toll calls on a 1+ basis or to allow the Company to carry their intraLATA calls. The Company will continue to handle all local, 0-, 411, 611, and 911 calls.

c) IntraLATA 1+ Implementation Cost Recovery

The Company will recover its IntraLATA 1+ implementation costs, in an amount of $200,000

through a one-time nonrecurring intrastate access charge (the "Charge"). The costs to be recovered include reasonable billing system changes, employee labor costs associated with switch programming, initial PIC changes, and a reasonable allocation of overheads. The Charge will be assessed as follows:

1. On or about January 1, 1997, the Company will conduct a study to identify all carriers **[*61]** then presubscribed to provide IntraLATA 1+ service and the pro-rata portion of the total originating intraLATA MTS minutes of use attributable to each such carrier authorized to provide interLATA service to customers of the Company during the prior month (the "IXC Percentage").

2. As soon as practicable thereafter, the Company will assess each carrier authorized to provide interLATA service to customers of the Company as of January 1, 1997, a charge equal to the product of the $200,000 and such carrier's IXC Percentage.

d) Customer Notification

The Company will provide notice to affected customers via bill insert of the option to choose their interLATA carrier to handle all their toll calls at least 90 days prior to the date intraLATA 1+ becomes available to such customers. There will be no customer balloting. Toll carriers may provide such information to customers regarding the availability of IntraLATA 1+ as they deem appropriate; provided, however, that customer marketing by toll carriers will commence no sooner than 90 days prior to the date IntraLATA 1+ is to become available to affected customers and except that nothing herein shall authorize any otherwise unauthorized **[*62]** or unlawful use of the Company's name, marks, logo, trademarks, or tradenames by the toll carriers.

e) PIC Changes

The Company's procedures and charges applicable to customers' selection of an interLATA carrier (PIC changes) will be applicable to the selection of an intraLATA toll carrier. This includes an allowance for ninety (90) days before the date IntraLATA 1+ becomes available, for customers to select their interLATA toll carrier to carry their intraLATA toll calls without the customer incurring a PIC change charge. Federal anti-slamming rules shall also apply.

f) Residual Carrier

The Company shall remain the carrier for intraLATA service to customers who, as of the implementation date of IntraLATA 1+, do not affirmatively select their presubscribed interLATA carrier for intraLATA calling.

g) Obligations for Signatory Interexchange Carriers

The signatory interexchange carriers agree that this Stipulation cannot be used as an admission or evidence that the Company provided or provides inadequate service.

Conditional Commitments

28) The Stipulating Parties agree that the specifics of the retargeting formula will be as follows:

CBT commits to a specific formula for **[*63]** retargeting rates or refunds of earnings if earnings exceed an 11.93% rate of return for its regulated Ohio intrastate operations at the end of any monitoring period. The monitoring periods for the alternative regulation plan will be the years 1994, 1995, and 1996. CBT may file a traditional rate case requesting rate increases for all services if its earnings are less than a 10.43% rate of return for its regulated Ohio intrastate operations at the end of any monitoring period.

The formula would consist of the following conditional commitments for any monitoring period where the rate of return is above 11.93% and at or below 13.43%:

a) The terminating CCLC will be reduced by an amount equal to 30% of revenues above 11.93%

less for 1995 and 1996 the $500,000 minimum commitment described in CBT's Commitment to Reprice Carrier Common Line Charges (Stipulation para. 26). The CCLC will be reduced only to parity with interstate CCLCs. To the extent parity is achieved and there remain revenues earmarked for CCLC reductions, then those revenues shall be applied to conditional commitment (b).

b) Touch Tone rates will be reduced by an amount equal to 30% of revenues above 11.93%, less **[*64]** for 1995 and 1996 the $900,000 minimum commitment described in CBT's Commitment to Reduce Touch Tone Charges (Stipulation para. 25) and less for 1995, 1996, and 1997 the $100,000 minimum commitment described in CBT's Commitment to Schools (Stipulation para. 21). When Touch-Tone rates are reduced to zero, remaining revenues earmarked for Touch-Tone reductions shall be applied to reduction of basic local exchange rates by lowering all rates by the same percentage.

c) CBT will retain the remaining 40% of earnings above 11.93% and at or below 13.43%.

The following conditional commitments would apply when the rate of return is above 13.43% and at or below 16.18% for any monitoring period:

d) The terminating CCLC will be reduced by an amount equal to 25% of revenues above 13.43%. The CCLC will be reduced only to parity with interstate CCLCs. To the extent parity is achieved and there remain revenues earmarked for CCLC reductions, then those revenues shall be applied to conditional commitment (e).

e) Touch-Tone rates will be reduced by an amount equal to 25% of revenues above 13.43%. When Touch-Tone rates are reduced to zero, remaining revenues earmarked for Touch Tone shall be applied **[*65]** to reduction of basic local exchange rates by lowering all rates by the same percentage.

f) 25% of revenues above 13.43% less the $100,000 minimum commitment described in CBT's Commitment to Universal Service (Stipulation para. 22) will be earmarked for the Expanded Lifeline program described in CBT's Commitment to Universal Service.

g) CBT will retain the remaining 25% of earnings above 13.43%.

The following conditional commitment would apply for rates of return above 16.18% for any monitoring period:

h) CBT will refund an amount equal to the revenues above 16.18% to basic local exchange access lines then being billed on the refund date, on a per access line basis.

All rate reductions and refunds will be effective on June 1 of the year following the monitoring period, upon approval of the Commission.

29) The Company agrees that adjustments to earnings for the effect of exogenous factors will consist of cost changes that originate from or are due to external causes, including, but not limited to, tax law changes, depreciation represcription, and changes to separations and accounting rules. CBT will report its proposed exogenous adjustments on its earnings monitoring report. **[*66]** The Commission will consider the appropriateness of proposed exogenous adjustments when the Company files its annual application pursuant to Section 14 of the Company's Alternative Regulation Plan.

30) The Stipulating Parties agree that applicant will be required to provide only two columns of data in its monitoring report (See Attachment 1, Appendix A). One column will report total company data at Class A prime account level and the second column will report regulated Ohio intrastate data at Class B account level since separations factors are only available at Class B level.

The regulated Ohio intrastate data will not be adjusted for conditional commitments implemented in the review year. The effect of the conditional commitments will have already been reflected by the lower revenues booked by the Company.

31) The Stipulating Parties agree that the Company's obligation to follow any applicable Commission directives affecting rates or tariffs that may result from a future industry-wide generic proceeding or investigation initiated by the Commission shall not be affected by this Stipulation. However, such changed circumstances may be the basis for seeking an amendment or withdrawal **[*67]** from the Plan.

Agreements with Individual Parties

32) The Company agrees to amend its practices and written policies regarding Rule 4901:1-5-32(A), Ohio Admin. Code n4 to reflect the Staff's position that service shall not be denied to an applicant for service for a delinquency incurred by a previous customer, unless the applicant for service resided at the same address with the previous customer at the time the delinquency occurred and the previous customer continues to reside at the same premises.

n4 This reflects the version of Rule 4901:1-5-32(A) in effect as of the signing of this Stipulation.

33) The Company agrees to inform any customer inquiring about BTSA that, other than a few specific services, TSA participants are not permitted to avail themselves of optional services. Further, CBT agrees to inform such customers that there is an informal process by which special exceptions can be made for customers with handicaps or medical conditions or customers in life-threatening situations who could benefit from optional services.

34) Embedded Direct Analysis (EDA) Cost of Service Study

The Company agrees that it will provide the OCC with the results of an embedded **[*68]** direct analysis (EDA) for each monitoring period (calendar years 1994, 1995, and 1996) of its alternative regulation plan. Results will be provided to the OCC within 120 days following the end of each monitoring period.

The EDA will include at least the following service and cost categories:

Common

Access Line

Local Exchange Usage

Switched Access Services

Special Access and Private Line

State Toll Usage

Interstate Services

Other Services

All Company services will be included in the EDA. The study will be done on a total Company basis. The analysis methodology will not require costly or labor-intensive special studies. The OCC will be provided with a description of the methodology for any special studies substituted for more costly methods. The EDA methodology may be modified from year to year to increase efficiency, to incorporate more appropriate data sources, to reflect accounting rule changes, or to otherwise improve the model.

Preparation of an EDA does not constitute Company endorsement of EDA concepts. The Company may present alternative analyses in opposition to EDA for the Commission's consideration should the

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Commission address the issue. The OCC agrees **[*69]** to keep EDA data confidential. The OCC agrees not to use EDA results to request modifications of the Company's Alternative Regulation Plan during its three year term. The Company and OCC will negotiate the appropriate confidentiality agreements to allow the OCC to use EDA results in alternative regulation or ratemaking proceedings following this initial three year term.

35) Answering Exchange

The signatories agree, acknowledge, and recommend that the objections to the Staff Report raised by Answering Exchange, Inc. be addressed and satisfied by the granting of a waiver in the Alt Reg Proceeding pursuant to Stipulation 11, and the approval by the Commission of an agreement between Cincinnati Bell Telephone Company ("CBT") and Answering Exchange, Inc. ("AEX") to be submitted pursuant to Section 4905.31, Revised Code, in a separate "AEC" proceeding. Such an agreement provides that CBT will provide Call Forwarding Busy Line, Call Forwarding Don't Answer, Call Forwarding Variable, Direct Inward Dialing, Remote Call Forward, and Private Line services to AEX and/or its customers in conjunction with telephone answering services during the duration of the Plan.

The rates for Private **[*70]** Line services provided to AEX will be the rates authorized by the Commission in these cases. This rate for Private Line services will remain in effect during the entire term of the Plan.

During the term of the Plan, the rates for Direct Inward Dialing and Remote Call Forwarding services provided by CBT to AEX would be the lesser of the rate charged to CBT's general body of customers or the initial rate authorized by the Commission for that particular category in these cases.

During the term of the Plan, the rates for services invoiced by CBT to customers of AEX used in conjunction with telephone answering services will be the lesser of the rates charged to CBT's general body of customers or the initial rate established by the Commission for that particular category as a result of these cases.

The Stipulating Parties agree that the existence of unique circumstances involved with the services provided by CBT to AEX and by CBT to AEX's customers has been demonstrated sufficient to warrant a waiver of Section XIII "Contractual Arrangements" of the Commission's Alternative Regulation Rules, consistent with the reasoning of paragraph 11 of this Stipulation and Recommendation.

36) **[*71]** Southern Ohio Telephone Company

In furtherance of the explicit competitive goals in Chapter 4927 and in the Commission's orders and policy statements consistent with that statute, the Company and Southern Ohio Telephone Company ("SOTCo") agree that, during the course of the Company's Plan and any extensions, the Company will provide advance notice and expeditious availability and pricing of the Company's telecommunications services and network functions to SOTCo, without unreasonable restrictions on such services and, in any event, without restrictions on resale and sharing (consistent with paragraph 13 of this Stipulation), so that SOTCo may consider such services and functions in its network planning and may order and deploy such services as contemporaneously as practicable with the Company's making such services available to its customers and employing such functions. In addition, the Company agrees to make available expeditiously to SOTCo services and network functions that SOTCo requests from the Company that are technically and economically feasible. The Company agrees that, in furtherance of this goal and in keeping with the Company's policies on notice to Commission **[*72]** authorized service providers, it will provide notice to SOTCo of receipt of an order for service from SOTCo and information about the service's availability and the schedule for provisioning no later than thirty (30) days after the Company's receipt of the order. The Company further agrees to make its best efforts to provision a reasonable request for a network function or service within 120 days of the Company's receipt of the order.

The Stipulating Parties agree that the existence of unique circumstances involved with the interconnection agreement between CBT and SOTCo has been demonstrated sufficient to warrant a waiver of Section XIII "Contractual Arrangements" of the Commission's Alternative Regulation Rules,

consistent with the reasoning of paragraph 11 of this Stipulation and Recommendation.

37) Alarm Intervenors

Services including but not limited to Series 901 and 3001 Services used by Alarm Companies for alarm purposes will be increased 15%; all other private line services purchased by Alarm Companies will be increased by 33%. The Company will waive non-recurring charges to convert existing alarm customers to a data or voice 3001 service. This waiver will include **[*73]** installation of an RJ31X jack or Standard Network Interface (SNI), as appropriate, at the alarm patron's business location if the patron chooses to install a dial-up service instead of converting to 3001 service.

Existing Customer Operating Center Service (COCS) customers may increase their COCS service to the limits of their current contract, but may not increase their complement to a higher level.

The Company must provide at least a year's written notice to each Alarm Company using COCS prior to eliminating COCS. The termination date will not occur during the three year term of this Plan.

The Company will file 3001 alarm service in its Special Access tariff at rates agreed to in this Stipulation. Current private line tariff terms and conditions will apply, and the Company will move existing customers to the new tariff. The Company will not increase Alarm rates in the new tariff beyond the initial 15% during the three years of its Plan.

38) OCTVA

The Company agrees that, if or when it makes a filing for any video service, or filing for price flexibility for any video service or to adjust any rate for any video service which is subject to the Commission's jurisdiction, **[*74]** CBT will provide OCTVA with thirty (30) days advance written notice of such filing with the Commission. (Any offering of a service not subject to this Commission's jurisdiction will be subject to the rules and regulations (including separations rules) of the applicable regulatory authority). CBT agrees to include in its cost study for each such service not only Long Run Service Incremental costs ("LRSIC") but also an assignment based upon measures of use, including but not limited to minutes of use, number of circuits and bandwidth, to each such service of joint costs used in providing such service. CBT reserves the right to recommend to the Commission the particular cost methodology that it proposes to utilize. At the time of any such notice of filing with the Commission, CBT agrees to provide to OCTVA or a member company, under appropriate confidentiality agreements, a detailed description of CBT's joint cost assignment methods and joint cost data. CBT agrees that other parties may provide different assignments of joint costs for the Commission's consideration in opposition to CBT's proposal. CBT agrees to run a reasonable number of models and provide the results to OCTVA, **[*75]** or a designated member company, of such different assignments, using data input provided by OCTVA, or a designated member company. Such data shall be comprised of annual charge factors and joint cost allocation factors.

CBT acknowledges that the Commission may, upon its own motion or upon a showing of good cause by any interested party, suspend and initiate an investigation of CBT's filing(s) for video service(s), price flexibility for video service(s) or rate adjustment for video service(s). The parties acknowledge that the Commission may, pursuant to Section XIV(G) of its alternative regulation rules, order a partial suspension whereby automatic approval may be suspended, but the service in question may be permitted to be introduced or offered on an interim basis under the terms and conditions approved by the Commission.

OCTVA agrees that, if or when it or any of its member companies makes a filing for the provision of any telecommunications service which is subject to the Commission's jurisdiction, OCTVA or the member company will provide CBT with thirty (30) days advance written notice of such filing with the Commission. For any such filing, OCTVA or its member company will **[*76]** abide by all applicable Commission rules and regulations, including those applicable to intervention.

39) Ohio Public Communications Association

The Company agrees that it shall file a COCOT tariff which creates a separate and new classification for COCOT customers, distinct from any other service classifications. This COCOT tariff shall reflect the following:

a) The Company shall make available to its COCOT customers, the following message rate options to be selected by the COCOT customers on a per line basis:

Option A: The monthly recurring customer charge shall be $58.00 per line per month and shall include: the base rate, Touch Tone, 650 free calls, operator assisted calls, call screening, and billed number screening. Additional calls over the 650 free calls will be charged at the rate of 10 cents per call. No other charges shall be applied to the COCOT customer except those approved by the Public Utilities Commission of Ohio or by the Federal Communications Commission.

Option B: The monthly recurring customer charge shall be $31.30 per month and shall include: the base rate, Touch Tone, 70 free calls, operator assisted calls, call screening and billed number **[*77]** screening. Additional calls over the 70 free calls will be charged at the rate of 8 cents per call. No other charges shall be applied to the COCOT customer except those approved by the Public Utilities Commission of Ohio or by the Federal Communications Commission.

b) For new COCOT lines, the COCOT customer shall specify to the Company which option it is choosing at the time of the placement of the initial order.

c) If any COCOT customer desires to change from one option to the other option after having made an election and received service from the Company, the COCOT customer may do so free of charge; however, for any subsequent change thereafter, the Company may charge the COCOT customer a nonrecurring charge of $20 per line for that change.

No later than thirty (30) days after approval of this Stipulation and Recommendation by Commission Order, the Company shall notify each COCOT customer in its service territory of its right to select either Option A or B. In the absence of an election by a COCOT customer, the Company shall charge the COCOT customer under Option B.

With respect to the OPCA's pending complaint case on directory assistance charges, PUCO Case No. 92-1953-TP-CSS, **[*78]** in which the Company is one of the named respondents, the Company agrees as follows:

i) Subject to the conditions and limitations set forth below, the Company will suspend its practice of charging COCOT customers for directory assistance, effective upon the date of the execution of this document by the Company and the OPCA. To reflect this, the following language should be included in the Company's tariff: The Company temporarily suspends this charge, pursuant to the Commission's Order in Case No. **93-432**-TP-ALT, pending resolution of Case No. 92-1953-TP-CSS. The Company agrees to abide by the Commission's final decision including any appeals taken thereunder. The OPCA agrees to withdraw CBT as a named party in Case No. 92-1953-TP-CSS; however, in the event of a settlement in PUCO Case No. 92-1953-TP-CSS, the OPCA and the Company agree to include the Company in that settlement agreement, based upon mutual agreement to do so.

ii) In the event that the remaining Respondents prevail in PUCO Case No. 92-1953-TP-CSS, such that the PUCO adopts a final order permitting Respondents to continue the practice of charging Complainants for directory assistance calls placed from their COCOT **[*79]** locations, the Company reserves the right to avail itself of such decision and to resume charging Complainants for directory assistance calls.

iii) In the event that the Complainants prevail in PUCO Case No. 92-1953-TP-CSS, the Company agrees to abide by that decision and will continue not to charge COCOT customers for directory assistance and will not initiate any proceeding to do so.

The Stipulating Parties further agree that should the Company avail itself of the right to resume charging for directory assistance, consistent with item (ii) above, the rate for directory assistance

service will be the lesser of either the rate established by the PUCO for that service in this case or the rate to the general body of ratepayers or a similarly situated customer group, during the term of the Plan.

40) Bellcore

The Stipulating Parties recognize that the terms of this plan may require the Company to file with the Commission information which the Company believes to be competitively sensitive or a trade secret. The Company reserves the right to request a determination that such information warrants standardized protective treatment under Ohio Adm. Code § 4901-1-24.

The Stipulating **[*80]** Parties also recognize that fulfillment of the terms of this Plan may require the use of Switching Cost Information System ("SCIS") user manuals and related materials and Network Cost Analysis Tool ("NCAT") user manuals and related materials (collectively referred to as "Bellcore Information") provided by Bell Communications Research, Inc. ("Bellcore") which Bellcore believes to be competitively sensitive or a trade secret. The Company and Bellcore will work with the Staff so that the Bellcore Information asserted to be proprietary to Bellcore, and necessary to the Staff's investigation, will be available to the Staff. The Staff will fully comply with the terms of Ohio Rev. Code § 4901.16. Further, the Commission shall not divulge or provide access to the Bellcore Information for three business days following notice to Bellcore and counsel for Bellcore. The Commission shall provide such notice by facsimile to both of the following individuals:

William A. Adams, Esq., Arter & Hadden, 10 West Broad Street, Columbus, Ohio 43215, Telephone: (614) 221-3155, Facsimile: (614) 221-0479

James Britt, Bell Communications Research, Inc., 290 West Mount Pleasant Ave., Livingston, New Jersey **[*81]** 07039-0486, Telephone: (201) 740-4810, Facsimile: (201) 740-6897

Bellcore and Counsel for Bellcore shall be responsible for docketing in these cases any changes to recipients of notice.

Except to OCC which has executed a nondisclosure agreement with Bellcore, the confidential information provided by CBT to the Intervenors pursuant to the Stipulated Protective Agreement referenced in Section 13 (A) of the Alternative Regulation Plan shall not include Bellcore Information. The sample worksheet information contemplated in Section 11 (G) of the Alternative Regulation Plan and Stipulation No. 10 does not include Bellcore Information and its availability would not be affected by this paragraph. Bellcore will make Bellcore Information available to the Intervenors in a redacted form on an expedited basis, subject to a nondisclosure agreement with Bellcore. The Intervenors agree n5 that they will not seek access to Bellcore Information filed by CBT with the Commission through a public records request or otherwise without first making a good faith effort to satisfy their legitimate discovery needs related to CBT's filing with Bellcore. If the good faith efforts do not satisfy legitimate **[*82]** discovery needs, Intervenors reserve their rights to seek access to the Bellcore Information.

n5 The IXC Coalition does not agree with this paragraph, nor does it agree that any of the Bellcore information is entitled to protective treatment. The IXC Coalition reserves the right to seek any and all Bellcore information.

41) Time Warner AxS n6

n6 Without affecting any of the provisions set forth in this Stipulation, Time Warner neither endorses nor objects to the specific commitments set forth in the Plan and whether they are in the public interest or satisfy the alternative regulation rules.

During the term of its alternation regulation plan (including any extensions or renewals) and in

recognition of the policy set forth in Section 4927.02(A), Revised Code, CBT will work toward:

Ensuring the availability of adequate basic local exchange service at just and reasonable rates and charges;

Encouraging innovation in the telecommunications industry; and,

Promoting diversity and options in the supply of public telecommunications services and equipment.

Without waiving any legal position that any of the Signatory Parties may have with regard to supply of basic local **[*83]** exchange service, the Signatory Parties recognize that alternative providers of basic local exchange service may, during the term of CBT's alternative plan, be certified by the PUCO to provide service to customers in areas also served by CBT. Accordingly, and in such circumstances, the Signatory Parties agree to:

Form a task force of all affected stakeholders to identify, prioritize, and resolve issues. Issues addressed by this task force will not duplicate other industry efforts and should support the objective that national and statewide issues should have standard solutions. Recommendations which meet the approval of this multi-stakeholder task force may be submitted to the Commission. The task force will:

Use its best efforts to identify and resolve issues related to operation, interconnection and functioning of multiple communications networks;

Use its best efforts to resolve issues related to physical collocation and network interconnection arrangements;

Use its best efforts to establish reasonable mutual compensation arrangements for network access;

Use its best efforts to establish operational parameters and functional capabilities that will allow customers to seamlessly **[*84]** access and utilize communications networks and network resources (including, but not limited to, number resources, data resources and directory resources) regardless of the identity of the primary supplier of the customer's communication services.

Recognizing that CBT did not contemplate the presence of an alternate provider of basic local exchange service in designing its plan, the task force will use its best efforts to identify appropriate regulatory reform (e.g., possible restructuring and repricing of rates) needed to address this fundamental change.

It is agreed that direct access to network and other data bases impacts all providers' customers with respect to service performance, reliability, security and privacy. Therefore, the parties agree that all affected stakeholders should identify and address issues such as mediated access, error prevention, procedures for handling customer inquiries and complaints, reasonable compensation, and others, as they relate to these data bases.

It is understood that the term "best efforts" shall not be construed to require any party to undertake action that would impose an undue financial hardship on that party. It is also understood **[*85]** that the term "best efforts" shall not preclude reliance upon standards, parameters or guidelines mandated by a regulatory authority or developed by state or federal organizations, trade groups or regulatory authorities.

CBT, on behalf of itself, successors, assigns and affiliated companies, promises that it shall neither: (1) Contest or challenge, directly or indirectly, TWAxS's right and entitlement to exercise the authority granted by the Commission's Finding and Order issued December 9, 1993 in Case No. 93-1289-TP-ACE (the "Order"); (2) Contest, challenge or seek to modify or alter the Order or Entry on Rehearing; or (3) Contest, challenge or otherwise protest TWAxS's efforts to obtain and exercise additional authority to provide non-switched communications services that are not equivalent to basic local exchange service, authorized by the Commission to other service providers in the territory in which CBT currently provides basic local exchange service.

Miscellaneous

42) The Stipulating Parties agree that the monitoring report procedures set forth in Sections 6 and 12 of the Plan (See Attachment 1) will apply, are in compliance with the Commission's Alternative Regulation **[*86]** Rules, and provide adequate procedures to monitor the Company's compliance with the Plan.

43) The Stipulating Parties agree that no witnesses will need to be called to sponsor the written testimony previously filed herein, except as may be necessary to make witnesses available for cross examination by parties to these proceedings who are not Stipulating Parties, and that no Stipulating Party has objection to such testimony being offered and admitted into evidence. The Stipulating Parties may file supplemental testimony supporting this Stipulation.

44) The Stipulating Parties agree that this Stipulation is submitted for purposes of full and final settlement of these cases and all issues related thereto, and is not to be deemed binding upon the Stipulating Parties in any other proceeding nor to be offered or relied upon in any other proceeding involving the Company or any other utility. All offers of settlement and discussion related thereto are and shall be privileged and shall not be used in any manner, nor be admissible for any other purpose in connection with this proceeding or any other proceeding. All the matters set forth in this Stipulation are presented only in connection **[*87]** with this Stipulation, and are presented without prejudice to any position any of the signatories may have advanced in other proceedings and any positions that they may take in any future proceedings. Except for filings made under the terms of the Plan, this Stipulation shall not be used by any party to demonstrate or assert that the form or content of the Plan is in any respect applicable to any other case, involving the Company or otherwise, filed or arising under Revised Code Chapter 4927.

45) The Stipulating Parties agree that if the Commission does not adopt this Stipulation without modification as the basis for its decision in these proceedings, to be evidenced by incorporation of this Stipulation within the Commission's Order in this proceeding by reference, restatement, and/or attachment, that this Stipulation may be withdrawn by notice of any Stipulating Party to all other Stipulating Parties, all withdrawn objections shall thereupon be reinstated, and this Stipulation shall thereupon not constitute any part of the record in this proceeding, nor shall it be used for any purpose whatsoever by any party to this or any other proceeding; and the Stipulating Parties further **[*88]** agree that in such event, additional hearing time should be provided to fully litigate the issues in this proceeding.

46) The Stipulating Parties represent that, in the interest of expediting this proceeding, they will not file an application for rehearing or appeal from a decision of the Commission granting relief in accordance with the Stipulation.

47) The Company shall file all proposed new or revised tariff pages necessary to implement the terms of the Stipulation within 15 days following the signing of the Stipulation.

48) The term of this Stipulation coincides with the initial three year term of the Company's Alternative Regulation Plan.

49) Without waiving any right to seek formal relief from the Commission, all Signatory Parties will use their best efforts to resolve any disputes regarding the meaning of this Stipulation or CBT's Alternative Regulation Plan.

The undersigned respectfully join in requesting the Commission to issue its Opinion and Order approving and adopting this Stipulation, in accordance with the terms set forth above, and making this Stipulation a part of the record herein. The undersigned hereby stipulate and agree and each further represents that it **[*89]** is authorized to enter into this Stipulation this 11th day of April, 1994.

CINCINNATI BELL TELEPHONE COMPANY

By: [Illegible Word]

STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

By: [Illegible Word]

THE OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO

By: [Illegible Word]

ADT SECURITY SYSTEMS, CIN/DATA PROTECTION CORP., HABITECH/SECURITY ONE, HONEYWELL PROTECTION SERVICES, AND WELLS FARGO ALARM SERVICES (COLLECTIVELY, THE "ALARM INTERVENORS")

By:

ALLNET COMMUNICATIONS SERVICES, INC., LCI INTERNATIONAL TELECOM CORPORATION, AND MCI TELECOMMUNICATIONS CORPORATION (COLLECTIVELY, THE "IXC COALITION")

By: [Illegible Word]

ANSWERING EXCHANGE, INC.

By: [Illegible Word]

AT&T COMMUNICATIONS OF OHIO, INC.

By:

BELL COMMUNICATIONS RESEARCH, INC.

By: [Illegible Word]

THE CITY OF CINCINNATI

By:

GREG HART COMMUNICATIONS, INC., COIN PHONES, INC., AND THE OHIO PUBLIC COMMUNICATIONS ASSOCIATION

By: [Illegible Word]

OHIO CABLE TELEVISION ASSOCIATION

By: [Illegible Word]

OHIO DEPARTMENT OF EDUCATION

By:

SOUTHERN OHIO TELEPHONE COMPANY

By: [Illegible Word]

SPORTSCHANNEL CINCINNATI ASSOCIATES

By:

SPRINT COMMUNICATIONS COMPANY L.P.

By:

TIME WARNER AxS OF GREATER CINCINNATI, **[*90]** L.P.

By: [Illegible Word]

[PAGE OMITTED 52-53]

By:

ALLNET COMMUNICATIONS SERVICES, INC., LCI INTERNATIONAL TELECOM CORPORATION, AND MCI TELECOMMUNICATIONS CORPORATION (COLLECTIVELY, THE "IXC COALITION")

By:

ANSWERING EXCHANGE, INC.

By:

AT&T COMMUNICATIONS OF OHIO, INC.

By: [Illegible Word]

BELL COMMUNICATIONS RESEARCH, INC.

By:

THE CITY OF CINCINNATI

The undersigned respectfully join in requesting the Commission to issue its Opinion and Order approving and adopting this Stipulation, in accordance with the terms set forth above, and making this Stipulation a part of the record herein. The undersigned hereby stipulate and agree and each further represents that it is authorized to enter into this Stipulation this 8th day of April, 1994.

CINCINNATI BELL TELEPHONE COMPANY

By:

STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

By:

THE OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO

By:

ADT SECURITY SYSTEMS, CIN/DATA PROTECTION CORP., HABITECH/SECURITY ONE, HONEYWELL PROTECTION SERVICES, AND WELLS FARGO ALARM SERVICES (COLLECTIVELY, THE "ALARM INTERVENORS")

By: Benjamin H. Dickens, Jr., Counsel for The Alarm Intervenors

OHIO CABLE TELEVISION ASSOCIATION

By:

OHIO DEPARTMENT **[*91]** OF EDUCATION

By:

SOUTHERN OHIO TELEPHONE COMPANY

By:

SPORTSCHANNEL CINCINNATI ASSOCIATES

By:

SPRINT COMMUNICATIONS COMPANY L.P.

By: [Illegible Word]

TIME WARNER AxS OF CINCINNATI, L.P.

By:

OHIO CABLE TELEVISION ASSOCIATION

By:

OHIO DEPARTMENT OF EDUCATION

By: Kain W. Rilley, Assistant Attorney General

SOUTHERN OHIO TELEPHONE COMPANY

By:

SPORTSCHANNEL CINCINNATI ASSOCIATES

By:

SPRING COMMUNICATIONS COMPANY L.P.

By:

TIME WARNER AxS OF CINCINNATI, L.P.

By:

ATTACHMENT 1

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates

Case No. **93-432**-TP-ALT

CINCINNATI BELL TELEPHONE COMPANY ALTERNATIVE REGULATION PLAN

1. INTRODUCTION

This Alternative Regulation Plan (the "Plan") is hereby submitted by Cincinnati Bell Telephone Company ("CBT" or the "Company") to the Public Utilities Commission of Ohio (the "Commission"), pursuant to Chapter 4927 of the Ohio Revised Code. The Plan, as set forth herein, is a modified version of CBT's original alternative regulation plan, which was filed on May 4, 1993 and

subsequently amended **[*92]** on November 29, 1993. The Plan has been modified consistent with the Staff Report in Case No. **93-432**-TP-ALT, unless otherwise stated in the Stipulation and Recommendation signed by various parties to Case Nos. **93-432**-TP-ALT and 93-551-TP-CSS (the "Stipulation"), or otherwise set forth herein. Based on all record evidence in both of the above-mentioned proceedings, all of which is incorporated herein by reference, CBT submits that the Plan will serve the public interest and meet the policy goals set forth in Chapter 4927 of the Ohio Revised Code. During the term of its Alternation Regulation Plan (including any extensions or renewals) and in recognition of the policy set forth in Section 4927.02(A), Revised Code, CBT will work toward (1) ensuring the availability of adequate basic local exchange service at just and reasonable rates and charges; (2) encouraging innovation in the telecommunications industry; and (3) promoting diversity and options in the supply of public telecommunications services and equipment. Accordingly, CBT respectfully requests that the Plan be approved in its entirety as set forth below.

2. DEFINITIONS

A. "Alternative regulation plan" means a plan that **[*93]** is proposed and/or approved pursuant to Section 4927.04(A) Revised Code. An alternative regulation plan may combine a request for exemption and/or alternative regulatory treatment of non-basic services pursuant to Section 4927.03, Revised Code, with a request for alternative ratemaking for basic services under Section 4927.04(A), Revised Code.

B. "Assignment" means the allocation to each service sharing facilities with Cell 1 services of a portion of the joint costs of the shared facilities.

C. "Authorized rate of return" means 11.18%.

D. "Basic local exchange service" has the same meaning as set forth in Section 4927.01(A), Revised Code. There are three categories of basic local exchange service:

1) "Cell 1" means a basic local exchange service that provides monopoly access including any bundled basic local exchange service that includes a monopoly access component, or such service as is deemed essential by the Commission for the provision of public safety or the protection of privacy, all service installation or maintenance services not available from competitive sources and all local usage.

2) "Cell 2" means a basic local exchange service, or any other public telecommunication **[*94]** service, for which an adequate alternative, not necessarily similar in nature and function, is available from at least one other provider in the relevant market, but which is deemed not to be fully competitive by the Commission and includes installation charges for such services.

3) "Cell 3" means a basic local exchange service, or any other public telecommunication service, not appropriately classified in Cell 1 or Cell 2.

E. "CBT" or "Company" refers to Cincinnati Bell Telephone Company.

F. "Commitment" means the Company's obligations as described in Section 4.

G. "Commission" refers to The Public Utilities Commission of Ohio (PUCO).

H. "Conditional Commitment" means the Company's obligations as described in Section 5.

I. "Detariffed" means the status of a public telecommunications service(s), as to all rates, rules, and regulations affecting the service(s), which has been granted exemption from the filing requirements of Section 4905.30, Revised Code, and other provisions of Chapters 4905 and 4909, Revised Code, except Section 4905.26, Revised Code, and except to the extent the Commission asserts jurisdiction through the exercise of oversight authority.

J. "Earnings" **[*95]** means net operating income from all regulated intrastate Ohio operations of the Company.

K. "Exogenous" means cost changes that originate from or are due to external causes including, but not limited to, tax law changes, depreciation represcription, and changes to separations and accounting rules.

L. "Long-run service incremental cost" (LRSIC) means the cost for a new or existing product that is equal to the cost of increasing the volume of production from zero to a specified level, while holding all other product and service volumes constant, and includes an imputation adjustment, where warranted, and is reported on a per unit basis.

M. "Neutral Zone" refers to the range where the actual rate of return falls between 10.43% and 11.93%.

N. "Non-basic" (Cell 4) means a service which meets the criteria of Section 4927.03(A)(1)(a) or (b), Revised Code, is available from unaffiliated alternative providers in the relevant market, and is based on a demonstration that the service is competitive. Upon meeting the criteria set forth above, a non-basic service for which exemption or alternative regulatory treatment is sought under Section 4927.03, Revised Code, within the context of **[*96]** an alternative regulation plan, will be deemed by the Commission to be fully competitive and will be classified in Cell 4.

3. TERM OF THE PLAN

CBT's Plan is for a three year period. The Plan is proposed to take effect on the date approved by the Commission in this proceeding and remain in effect for 36 months, unless the Plan is extended, withdrawn, or revoked as provided for herein.

4. COMMITMENTS

A. Enhance Education

1) Distance Learning

The Company will hold customers harmless from any losses that may be incurred only as a result of the Clermont County distance learning project.

The Company will work with schools and school systems in an effort to find ways in which the switched public network could be utilized to foster improvements in education. During the Plan, the Company will develop and implement a program to promote telecommunications-based educational applications.

2) The Company will develop a detailed long-range telecommunications plan for education that considers the telecommunications needs of the state-chartered public and private primary, secondary, and post-secondary schools in the Company's Ohio operating territory. This plan will also address **[*97]** the affordability of telecommunications services for schools, the participation of schools constrained by financial limitations, and applications development. The Company will develop this plan with input from the Ohio Department of Education, the City of Cincinnati and representatives from various schools and school districts.

3) At the request of the Ohio Department of Education, CBT commits to working with the Cincinnati Public School System to expand the use of telecommunications technology.

-- CBT will work with the Cincinnati Public School System over the three year term of the Plan to help define and determine the telecommunications technology needs of the Cincinnati Public School System and to address its unique and specific needs.

-- CBT commits to the delivery of a proposal addressing the needs of the Cincinnati Public School System to the Department of Education for review within 180 days of the approval of the Plan.

-- Telecommunications services that will be jointly explored by CBT and the Cincinnati Public School

System shall include, but not necessarily be limited to, ISDN, the expansion of Centrex, data networking, and distance learning applications.

-- The Company **[*98]** further agrees that it will provide a credit to reduce charges for telecommunications services in the amount of $100,000 per year of the Plan ($8,333 per month) for the Cincinnati Public School System to help expand its use of telecommunications technology.

-- CBT will submit an annual progress report to the Ohio Department of Education and the Commission Staff by April 1 following each calendar year of CBT's Alternative Regulation Plan.

B. Support Universal Service for the Economically Disadvantaged

The Company agrees to adopt the following commitments to universal service:

1) To attempt to increase the level of participation in the Basic Telephone Service Assistance Program. This goal will be measured by the Company's efforts to increase the number of TSA and SCA participants.

2) To make efforts to improve awareness as to the availability of telephone services which assist persons with communications impairments.

3) To study the restriction of toll access in lieu of disconnection for non-payment.

4) To establish a Consumer Board within 90 days of Commission approval of the Plan that will be comprised of representatives from the Company, the Ohio Consumers' Counsel, social **[*99]** service agencies, consumer and disability advocacy groups, and the Commission Staff in an advisory role. The primary objective of the board will be to develop an expanded lifeline program which will be implemented by the Company via specifically targeted credits in the amount of at least $100,000 per year of the plan. The Company will accrue any balance not distributed in each year. The Board will develop the eligibility criteria required to determine the distribution of the $100,000 minimum per year credits.

C. Model for Public Input

1) CBT will implement a Model for Public Input to formalize the dialogue process historically carried out by CBT's Community Relations Department, in order to ensure that public input is obtained to evaluate future customer initiatives of CBT. CBT's Public Input Model will be an additional effort above and beyond the Company's current customer communication, education and dialogue. It will represent a formalized research process with a quantifiable report card. The public input process will be conducted on an annual basis.

2) CBT's Public Input Model will provide a source of public input to ensure that CBT is serving the public interest and **[*100]** needs in an effective manner.

3) CBT's Model for Public Input will consist of the following steps:

a) In-depth interviews will be conducted with representatives of various customer segments. The following constituencies would be included:

1. residential customers

2. large, medium, and small businesses

3. primary and secondary schools

4. colleges and universities

5. libraries

6. police, fire, and public safety officials

7. hospitals

8. city, county, and township governments

9. community-based organizations

10. community councils

11. non-profit organizations

12. social service agencies

13. religious organizations

14. business groups

15. consumer groups

16. other service providers

b) If it is determined during the developmental stages of the Public Input Model that the total universe of any customer segment will not be sampled in the in-depth interview process, then the methodology utilized to select representatives of those segments will be based upon a statistically valid cross-section of that segment. The optimum interviewing level for this research will be selected to ensure an adequate and unbiased representation in each customer segment being **[*101]** interviewed through the survey.

c) CBT will analyze the results of this qualitative research to prioritize the needs expressed in the interviews by representatives of customer segments.

d) CBT will return to representatives of customer segments to engage in dialogue to:

1. validate that CBT has clearly defined and expressed their issues, concerns, and needs;

2. validate that CBT has prioritized the issues, concerns, and needs accurately; and

3. design a plan of action or agenda that is mutually agreeable to CBT and the customer segments regarding telephone services, technology, and resources.

e) CBT will implement action plans to address these customer-prioritized initiatives, with a time line, a plan for continued input and feedback, and a structure for customer participation as needed by CBT.

f) CBT will evaluate the results of the in-depth interviews in a quantifiable way through a survey to determine:

1. if needs were met as expected (by customer segment);

2. if modifications to the process are needed;

3. whether internal and external communications are required on a going-forward basis;

4. the next set of issues and initiatives to be developed; and

5. if the **[*102]** education efforts have sufficiently informed customers of CBT's communications opportunities and capabilities.

4) CBT agrees to continue the customer education processes and programs provided by the Company's customer contact organizations. CBT's extensive customer education programs will continue to educate its customers as to specific technologies, services, and applications relevant to their needs. This will assure the Commission that information received from customer groups in the dialogue process is based on informed input.

5) The Model for Public Input will be used by the Company to develop future commitments for subsequent alternative regulation plans filed pursuant to the Commission's Rules established in Case No. 92-1149-TP-COI.

D. Infrastructure and Service Deployment

The Company commits to the following infrastructure and service deployment schedule. This commitment is in the public interest because it makes the network more valuable by providing an infrastructure for the development of new services desired by CBT's customers, thereby meeting their expanding telecommunications needs, providing a stimulation of usage of the network and enlarging the base of services **[*103]** providing contributions to the joint and common costs of the network.

CBT will deploy the technology necessary for the expansion of ISDN-BRI and Custom Calling PLUS<SM> services available for customers in Ohio, as follows:

PERCENTAGE ACCESS LINE AVAILABILITY

	12/31/93	12/31/94	12/31/95	12/31/96
Custom Calling PLUS<SM>	69%	85%	91%	98%
ISDN-BRI	49%	71%	79%	83%

E. Touch Tone

The Company commits to reducing Touch Tone charges by a minimum of $900,000 on June 1, 1995, and by an additional minimum of $900,000 on June 1, 1996. These reductions will be implemented upon approval by the Commission and are guarantees for minimum levels of reductions for the conditional commitments "5C.2" and "5D.2" described in the Company's Proposed Conditional Commitments, and will be offsets to revenues designated for Touch Tone reduction purposes provided by the Company's formula for retargeting rates.

If Touch Tone charges have been reduced to zero, any remaining commitment which would otherwise be applied to Touch Tone reductions will be applied to reductions of basic local exchange rates.

F. Residential Flat Rate Service

CBT commits to continue offering residential **[*104]** flat rate service as an option during the term of the Alternative Regulation Plan.

G. Reprice Carrier Common Line Charges

The Company commits to reducing terminating carrier common line charges (CCLC) by a minimum of $500,000 on June 1, 1995, and an additional minimum of $500,000 on June 1, 1996. These reductions will be implemented upon approval by the Commission and are guarantees for minimum levels of reductions for the conditional commitments "5C.1" and "5D.1" described in the Company's Proposed Conditional Commitments and will be offsets to the revenues designated for CCLC reduction purposes provided by the Company's formula for retargeting rates.

If the terminating CCLC is reduced to parity with interstate CCLCs, any remaining commitment which would otherwise be applied to CCLC reductions will be applied to reductions of Touch Tone

charges.

H. Dial 1

1) The Company will provide its Ohio customers the option of choosing their interLATA toll carrier to carry their intraLATA toll calls on a 1+ basis ("IntraLATA 1+"). For purposes of this provision, "toll calls" means MTS calls terminating outside the "local calling area" as defined by O.A.C. 4901:1-7-01. The Company will **[*105]** deploy the technology necessary to implement IntraLATA 1+ and will implement IntraLATA 1+ upon the terms and conditions set forth herein.

2) Implementation Schedule

The Company will implement IntraLATA 1+ in at least one Ohio central office by December 31, 1994. All other Ohio central offices will have IntraLATA 1+ available by the end of 1995, except for one 2BESS office, which will be converted when memory is available. Implementation schedules will be shared with all interLATA toll carriers operating within the Cincinnati LATA.

a) IntraLATA 1+ Methodology

The Company will deploy the IntraLATA 1+ methodology known as "modified 2 PIC" to implement IntraLATA 1+ capability. For purposes of this provision, the modified 2 PIC methodology means the programming of a software program-controlled switch to create an additional class of service for each existing class of service, thereby permitting an additional routing table for each existing class. The modified 2 PIC methodology permits customers to select their presubscribed interLATA toll carrier to handle all their toll calls on a 1+ basis or to allow the Company to carry their intraLATA calls. The Company will continue **[*106]** to handle all local, 0-, 411, 611, and 911 calls.

b) IntraLATA 1+ Implementation Cost Recovery

The Company will recover its IntraLATA 1+ implementation costs, in an amount of $200,000, through a one-time non-recurring intrastate access charge (the "Charge"). The costs to be recovered include reasonable billing system changes, employee labor costs associated with switch programming, initial PIC changes, and a reasonable allocation of overheads.

The Charge will be assessed as follows:

1. On or about January 1, 1997, the Company will conduct a study to identify all carriers then presubscribed to provide IntraLATA 1+ service and the pro-rata portion of the total originating intraLATA MTS minutes of use attributable to each such carrier authorized to provide interLATA service to the customers of the Company during the prior month (the "IXC Percentage").

2. As soon as practicable thereafter, the Company will assess each carrier authorized to provide interLATA service to customers of the Company as of January 1, 1997, a Charge equal to the product of the $200,000 and such carrier's IXC Percentage.

c) Customer Notification

The Company will provide notice to affected customers **[*107]** via bill insert of the option to choose their interLATA carrier to handle all their toll calls at least 90 days prior to the date IntraLATA 1+ becomes available to such customers. There will be no customer balloting. Toll carriers may provide such information to customers regarding the availability of IntraLATA 1+ as they deem appropriate; provided, however, that customer marketing by toll carriers will commence no sooner than 90 days prior to the date IntraLATA 1+ is to become available to affected customers and except that nothing herein shall authorize any otherwise unauthorized or unlawful use of the Company's name, marks, logo, trademarks, or tradenames by the toll carriers.

d) PIC Changes

The Company's procedures and charges applicable to customers' selection of an interLATA carrier

(PIC changes) will be applicable to the selection of an intraLATA toll carrier, including allowance, for ninety (90) days before the date IntraLATA 1+ becomes available, for customers to select their interLATA toll carrier to carry their intraLATA toll calls without the customer incurring a PIC charge. Federal anti-slamming rules shall also apply.

e) Residual Carrier

The Company shall **[*108]** remain the carrier for intraLATA service to customers who, as of the implementation date of IntraLATA 1+, do not affirmatively select their presubscribed interLATA carrier for intraLATA calling.

5. CONDITIONAL COMMITMENTS

A. CBT commits to a specific formula for retargeting rates or refunds of earnings if earnings exceed a 11.93% rate of return for its regulated Ohio intrastate operations at the end of any monitoring period. The monitoring periods for the Alternative Regulation Plan will be the years 1994, 1995, and 1996.

B. CBT may file a traditional rate case requesting rate relief if its earnings are less than a 10.43% rate of return for its regulated Ohio intrastate operations at the end of any monitoring period.

C. The formula would consist of the following conditional commitments for any monitoring period where the rate of return is above 11.93% and at or below 13.43%:

1) The terminating CCLC will be reduced by an amount equal to 30% of revenues above 11.93%, less for 1995 and 1996 the $500,000 minimum commitment described in CBT's Commitment to Reprice Carrier Common Line Charges. The CCLC will be reduced only to parity with interstate CCLCs. To the extent parity **[*109]** is achieved and there remain revenues earmarked for CCLC reductions, then those revenues shall be applied to conditional commitment C(2).

2) Touch Tone rates will be reduced by an amount equal to 30% of revenues above 11.93%, less for 1995 and 1996 the $900,000 minimum commitment described in CBT's Commitment to Reduce Touch Tone Charges and less for 1995, 1996, and 1997 the $100,000 minimum commitment described in CBT's Commitment to Schools. When Touch Tone rates are reduced to zero, remaining revenues earmarked for Touch Tone reductions shall be applied to reduction of basic local exchange rates by lowering all rates by the same percentage.

3) CBT will retain the remaining 40% of earnings above 11.93% and at or below 13.43%.

D. The following conditional commitments would apply when the rate of return is above 13.43% and at or below 16.18% for any monitoring period:

1) The terminating CCLC will be reduced by an amount equal to 25% of revenues above 13.43%. The CCLC will be reduced only to parity with interstate CCLC. To the extent parity is achieved and there remain revenues earmarked for CCLC reductions, then those revenues shall be applied to conditional commitment D(2). **[*110]**

2) Touch Tone rates will be reduced by an amount equal to 25% of revenues above 13.43%. When Touch Tone rates are reduced to zero, remaining revenues earmarked for Touch Tone shall be applied to reduction of basic local exchange rates by lowering all rates by the same percentage.

3) 25% of revenues above 13.43%, less the $100,000 minimum commitment described in CBT's Commitment to Universal Service, will be earmarked for the Expanded Lifeline program described in CBT's Commitment to Universal Service.

4) CBT will retain the remaining 25% of earnings above 13.43%.

E. The following conditional commitment would apply for rates of return above 16.18% for any monitoring period:

1) CBT would refund an amount equal to the revenues above 16.18% to basic local exchange access lines then being billed, on the refund date on a per access line basis.

F. All rate reductions and refunds will be effective on June 1 of the year following the monitoring period, upon approval of the Commission pursuant to Section 14 of the Alternative Regulation Plan.

6. ANNUAL PROGRESS REPORTS

The Company shall provide an annual progress report for its earnings and each commitment and conditional commitment, **[*111]** contained in its Alternative Regulation Plan at Sections 4 and 5. These reports shall be provided to the Commission and all parties in Case No. **93-432**-TP-ALT in accordance with Section IV(B)(4) of the Commission's Alternative Regulation Rules and Section 12 of the Plan. All such reports shall be provided no later than April 1 of 1995, 1996, and 1997. The Company shall provide each report in conformance with Appendix A.

7. SERVICE CELL CLASSIFICATIONS

A. Cell Matrix

The following cell matrix sets forth the Company's cell classifications:

Cell 1

Cell 1 contains basic local exchange services that provide access to CBT's network; installation charges for these services; maintenance of these services that is not available from a competitive source; services essential for public safety or the protection of privacy; and all local usage.

Basic Monthly Exchange Service

Flat Rate Lines (Residential and Nonresidential)

Flat Rate Trunks (Nonresidential)

Message Rate Lines (Nonresidential)

Message Rate Trunks (Nonresidential)

Message Rate Hotel Lines (Nonresidential)

Measured Rate Lines (Res and Nonresidential)

Measured Rate Trunks (Nonresidential)

Measured Rate Hotel Lines **[*112]** (Nonresidential)

Semi-Public Lines (Nonresidential)

Billing Name and Address

Carrier Common Line Charges

Centrex I and II Exchange Access

Centrex 90 Exchange Access

Centrex 90 Plus Exchange Access

Centrex 2000 Exchange Access

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COCOT Access Line Service

COCOT Usage Charge - Message Rate

Coinless Telephone Access Line Service

Common Line - Special Access Surcharge

Construction (at cost)

Custom Calling PLUS<SM>

Call Tracing - Residence and Nonresidence

Per Call Number Privacy

Per Line Number Privacy

Directory Assistance

Intrastate IntraLATA MTS - Residence

Local - Residence

Directory Listings

Non-Published Listings

Non-Address Listings

E911

ESSX Network Access Registers

Initial Charges to Establish or Change Basic Service

Establish a Basic Exchange Access Line

Change Grade of Exchange Access

Change Class of Exchange Access

Change Telephone Number

Establish or Change Billing Arrangements

ISDN BRI Access and Bearer Services

Measured Service Usage Rates

Message Rate Service Usage Rate - Non-COCOT

Operator Interrupt

Operator Verification

Pole Attachment and Conduit Occupancy

Restoration Charge

Returned Check Charge

Switched Access

Local Transport

Local **[*113]** Switching

Telecommunications Service Priority System

Telephone Service Assistance

TouchTone

Cell 2

Cell 2 contains basic local exchange services, or any other public telecommunications services, for which at least one adequate alternative, not necessarily similar in nature and function, is available (or will be available by the effective date of this plan) to the Company's customers but which is not considered to be fully competitive; and installation charges for these services.

Directory Assistance

Intrastate IntraLATA MTS - Non Residence

Local - Non Residence

Directory Assistance Service - Intrastate Access

Message Telecommunications Service (MTS)

Per Minute Rates

Off-Peak Toll

On Line Listing Information (OLLI)

Operator Surcharges for Toll and Assistance

Collect

Customer Dialed Credit Card

Operator Assisted Credit Card

Third Number Billed

Person-to-Person

Private Line Services and Channel Services

Public Service Local Message Charge

Semi-Public Usage Rate

Special Access

Mercury Family of Digital Services

Metallic

Program Audio

Telegraph Grade

Video

Voice Grade

Wideband Analog

Wideband Data

Cell 3

Cell 3 contains basic local exchange services, or **[*114]** any other telecommunications services, that are not appropriately classified as Cell 1 or Cell 2 and that are not fully competitive. Cell 3 services include discretionary or optional services that are not required to access CBT's network.

Alternate Listings

Billed Number Screening

Custom Calling

Call Forwarding Busy Line - Residence

Call Forwarding Don't Answer - Residence

Call Forwarding Variable - Residence

Call Waiting - Residence and Nonresidence

Distinctive Ringing - Residence and Nonresidence

Custom Calling PLUS<SM>

Call Block - Residence and Nonresidence

Call Return - Residence and Nonresidence

Caller ID - Residence and Nonresidence

Priority Call - Residence and Nonresidence

Priority Forward - Residence and Nonresidence

Directory Assistance Call Completion

Directory Listings

Additional Listings

Changes to Primary Listing

Secretarial Listings

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Foreign Central Office/Exchange

Joint User Service

Maintenance of Service Charge

Optional Payment Plans

Originating Line Screening

Private Branch Exchange - DID

Public Announcement - Network Surcharge

Remote Call Forwarding - Residence

Selective Class of Call Screening

Simplified Message Desk Interface

Suspension **[*115]** of Service

Temporary Interception of Calls

Cell 4

Cell 4 contains non-basic services that are considered to be fully competitive and readily available from unaffiliated providers of service.

Add-On Wats and Add-On 800 Service

Autotas Answering System

Call Blocking - Customer Requested and Toll Restriction

Call Blocking - Sponsor Requested

Centrex and ESSX Features

CO Features and Services

Automatic Route Selection

Station Message Detail Recording

Outgoing Trunk Queuing WATS

Key Equivalent Features

Speed Calling

Customer Traffic Recording Feature

Busy-Verification of Trunks

Uniform Call Distribution

Selected Customer Control of Facilities

Electronic Tandem Switching Features

Conference Service

Custom Calling

Call Forwarding Busy Line - Nonresidence

Call Forwarding Don't Answer - Nonresidence

Call Forwarding Variable - Nonresidence

Speed Calling - Residence and Nonresidence

Three-Way Calling - Residence and Nonresidence

Custom Calling PLUS<SM>

Repeat Dialing - Residence and Nonresidence

ISDN BRI Features

Additional Voice Telephone Number

Six Party Conference Service

Shared Telephone Number

Hunt Group

Call Pick-Up Group

Intercom Group

Closed User Group **[*116]**

Make Busy or Break Hunt

Message Waiting Indicator

Mobile Service

Network Interface Jacks

Paging Service (Dial Personal Signalling)

Private Branch Exchange Service - IOD

Protective Access Security System

Pulsenet Packet Switching

Remote Call Forwarding - Nonresidence

Secretarial Switchboards

Special Reversed Charge Toll Service

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8. PRICING FLEXIBILITY

A. Pricing and Tariffing Rules

This section describes the Company's pricing rules under its Alternative Regulation Plan. The pricing rules are reviewed cell by cell. Contract rules are explained in Paragraph F below.

The initial rates for all services will be established as approved by the Commission in this proceeding.

Services that mirror interstate rates, such as switched and special access n1, will continue to mirror the interstate rates and rate structure. In other words, prices for mirrored services will change in accordance with corresponding changes in CBT's interstate rates.

n1 Terminating Carrier Common Line Charges will be reduced under this plan as described in Section 5, and thus do not follow the mirroring provisions until parity with the interstate rate is achieved.

These pricing rules do not impact **[*117]** other portions of CBT's tariffs. For example, the proposed pricing rules under the plan do not apply to promotional offerings, special assemblies, and liability clauses. These services cannot be easily classified into any one cell. Rather, flexibility is needed to respond to individual customer requests and other service needs. This flexibility is part of current tariff regulations, and none of the proposed pricing rules under this plan should be construed as changing the rates and regulations for these or similar services. Only those tariffed services identified in Section 7 are impacted by the pricing rules of the Plan.

Under this Plan, price flexibility for services in Cells 2, 3, or 4 is obtained by filing a long run service incremental cost (LRSIC) study (including an assignment of joint costs for facilities shared with Cell 1 services). A LRSIC study shall be submitted at the initial time a Cell 2, 3, or 4 service price change is made. This includes services currently priced under rules adopted in either PUCO Case No. 84-944-TP-COI or PUCO Case No. 86-1144-TP-COI. Upon approval of a LRSIC study for a Cell 2, 3, or 4 service, the pricing rules for that service will follow **[*118]** the rules described in the remainder of this section.

B. Cell 1 Pricing Rules

1) Switched Access, the Telecommunications Service Priority System and other services which mirror interstate rates will continue to mirror the interstate rates and rate structure;

2) Construction charges will not change initially;

3) E911 service charges will not change;

4) Measured Service Initial and Additional Minutes rates will not change;

5) The Directory Assistance call allowance will be eliminated. The exemptions for handicapped customers, nursing homes, coin calls, hotel motels and hospitals will be retained.

6) Telephone Service Assistance (TSA) rates will not change.

7) Pole attachment rates will be $2.94 per year per pole in Year 1, $3.22 per year per pole in Year 2, and $3.50 per year per pole in Year 3.

During the term of the plan, Cell 1 rates, except for construction charges, pole attachments, and mirrored rates, may be adjusted pursuant to a request for general rate relief, pursuant to the procedures set forth in Section 14, or by other Commission directive. CBT reserves the right to file for general rate relief should earnings fall below 10.43%. Certain rates will change in **[*119]** accordance with the pricing methodologies in Sections 4 and 5. Rates for mirrored services in Cell 1

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will change in accordance with changes in the corresponding interstate rates and construction charges will be rated at cost.

C. Cell 2 Pricing Rules

Special access rates, as well as any other rates that mirror interstate rates, will continue to mirror CBT's interstate rates and rate structure during the term of this plan.

The initial rate for a Cell 2 service will not change until the Company submits a LRSIC study for that service to the Commission. The minimum price will be at or above the LRSIC, while the maximum will be set at 50% above the initial rate.

Any objections to the filing must be filed with the Commission within 14 days of docketing. The Company will have seven days to respond to any objection. The Commission shall have 30 days from docketing to review the filing and supporting information. The proposed tariff will automatically go into effect on the 31st day unless the Commission issues an entry suspending the filing.

Once a LRSIC study is approved for a service, the Company can change the rate for that service within the established price range by filing **[*120]** three copies of the revised price list with the Commission on or before the effective date of such change. Any filing to change the minimum or maximum price will follow the same procedure used to file the initial LRSIC study.

D. Cell 3 Pricing Rules

The Company will maintain the initial rate for a Cell 3 service until a LRSIC study for that service is submitted to and approved by the Commission. The LRSIC filing will include the minimum rate for the service, which will be at or above LRSIC. Cell 3 services will not have maximum rates. Any objections to the filing must be filed with the Commission within 14 days of docketing. The Company will have seven days to respond to any objection. The Commission shall have 30 days from docketing to review the filing and supporting information. The proposed tariff will automatically go into effect on the 31st day unless the Commission issues an entry suspending the filing.

Once a LRSIC study is approved for a service, the Company can change the rate for that service to any price greater than or equal to the minimum price by filing three copies of the revised price list on or before the effective date of such change. Any filing to change **[*121]** the minimum price will follow the same procedure used to file the initial LRSIC study.

E. Cell 4 Pricing Rules

The Company will maintain the initial rate for a Cell 4 service until a LRSIC study is submitted to and approved by the Commission. Any objections to the filing must be filed with the Commission within 14 days of docketing. The Company will have seven days to respond to any objection. The Commission shall have 30 days from docketing to review the filing and supporting information. The proposed service will automatically go into effect on the 31st day unless the Commission issues an entry suspending the filing.

Upon approval of a LRSIC filing for a Cell 4 service, that service will be detariffed, and the Company can change the price of that service without notifying the Commission.

The Company will file a notice with the Commission should it intend to withdraw a Cell 4 service. Such notice will be filed on or before the effective date of withdrawal, and will be considered approved upon filing. The notice will include a copy of the notice that the Company will send to current customers of the service to notify them of the withdrawal.

F. Contracts

The Company may **[*122]** enter into individual contracts with its customers for any of its services in response to competitive or other unique circumstances. Contracts containing only detariffed services will not be submitted to the Commission.

For tariffed services, the Company will demonstrate a competitive challenge for the provision of such services or that loss of a particular customer can adversely impact the Company's returns or lead to general price instability or other unique circumstances. If the contract includes a Cell 1 service that is priced lower than it would be provisioned under tariff, a LRSIC study will be provided.

The Commission shall have 30 days to review a proposed contract containing tariffed services and the supporting information. The proposed contract will automatically go into effect on the 31st day unless the Commission issues an entry suspending the application.

The Company may seek pre-approval of contractual arrangements for services with minimum level pricing. Once approved by the Commission, individual customer contracts that meet the parameters of the pre-approved contract will be effective immediately upon their filing with the Commission.

G. Unbundling

The Commission **[*123]** may approve unbundling of the Company's services during the term of the plan upon a showing that the unbundling is technically feasible, fully compensatory and in the public interest. The object of unbundling is to separate local network access, local usage, and less competitive services from discretionary, and more competitive services. Unbundling may also be needed to deaverage rates as discussed in Section 8, Paragraph I. For example, the Company may evaluate unbundling Centrex services after approval of this plan. Unbundling will separate a Cell 1 rate into its various components, but will not result in an overall rate increase or decrease for the service. Once unbundled, the competitive or discretionary portions of a service can be reclassified so as to respond to competition and to maximize pricing flexibility. As discussed previously, pricing flexibility is imperative for the Company to be able to compete against other service providers that are largely unregulated.

Any filing to unbundle a service will include a LRSIC study for the service(s) to be unbundled. Objections to the filing must be filed with the Commission within 14 days of docketing. CBT will have seven **[*124]** days to respond to any objection. The Commission shall have 30 days from docketing to review the filing and supporting information. The proposed tariff will automatically go into effect on the 31st day unless the Commission issues an entry suspending the filing. The Company may unbundle a detariffed Cell 4 service without notifying the Commission.

Although CBT is not subject to the Open Network Architecture Rules (ONA), applicable to the Bell Operating Companies (BOC), n2 CBT is committed to the spirit of ONA. CBT will consider each request for unbundling on a case-by-case basis. CBT will unbundle a special offering based on the following criteria: expected demand; usefulness to enhanced service providers (ESP) technically feasible; and fully compensatory. CBT will offer services to ESP competitors under the same terms and conditions as CBT provides to itself and its affiliates.

n2 Amendment of Sections 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Report and Order, released May 22, 1987, at paragraphs 199-207.

H. Movement Between Cells During Term of Plan

CBT may file to change product and service cell classifications after implementation **[*125]** of the Plan.

In accordance with the requirements of Section XIV (H) and (I) of the Commission's Alternative Regulation Rules, CBT will file an application and supporting documentation with the Commission to change an existing service's cell classification, which could be part of a filing to unbundle a service. Upon application to change an existing service's classification, CBT shall serve notice upon each party to the proceeding in which the Alternative Regulation Plan was approved and anyone, not otherwise represented, who requests such notice, on the same day that the filing is docketed with the Commission. Any objections to the filing must be filed with the Commission within 14 days of

docketing. The Company shall have seven days to respond to any objection. The Commission shall have 30 days from docketing to review the filing and supporting documentation. The proposed change will automatically go into effect on the 31st day, unless the Commission issues an entry suspending the filing.

Upon implementation of collocation, the Company may file for reclassification of switched access service from Cell 1 to Cell 2 or special access service from Cell 2 to Cell 4, in accordance **[*126]** with the Commission's rules adopted in Case No. 92-1149-TP-COI. Such reclassification will be effective upon Commission approval subject to the Company making a showing that the requested reclassification satisfies the Alternative Regulation Rules. Reclassification will be requested on a wire center specific basis.

I. Deaveraging

The Company will comply with Section XII(A)(3) of the Commission's Alternative Regulation Rules relative to deaveraging of services.

J. Waivers

CBT reserves the right to seek a waiver of any section of the pricing rules, or other rules included in its Plan, based upon demonstration of need and that such a waiver would serve the public interest.

9. FILING PROCEDURES DURING TERM OF PLAN

A. In addition to the filing of 10 copies with the Commission's docketing division, all filings regarding any new service or changes, other than price list revisions, for Cell 1, 2, and 3 services shall be served on the Office of The Consumers' Counsel (the "OCC") and the parties granted intervention in Case No. **93-432**-TP-ALT (the "Intervenors") on the same day that they are docketed with the Commission.

B. The Company shall file tariffs for all Cell 1 service **[*127]** price changes made subsequent to the implementation of the Plan. These price changes shall be consistent with the pricing parameters as defined in the Plan. Except for service price changes made pursuant to Section 14 of the Plan, the Commission shall review the proposed tariff and a supporting cost study, if required pursuant to these rules, within 30 days after the application is filed, and unless an entry suspending the tariff is issued, the proposed tariff will go into effect automatically on the 31st day.

C. The Company will maintain up-to-date lists at all times for Cell 2 and Cell 3 services. If the Company changes a price within a pre-approved range, it will file three copies of its new price list on or before the effective date of such change and serve the filing on the OCC and the Intervenors. A cost study may be required, as specified in the pricing rules.

D. Proposed changes of price floors or ceilings during the course of the Company's Alternative Regulation Plan will constitute a proposed amendment of its Plan. When such an amendment is proposed, a LRSIC study must be provided for a service(s) in Cell 2, Cell 3, or Cell 4. If an amendment is proposed for a service(s) **[*128]** in Cell 1, cost studies deemed necessary by the Commission will be provided.

E. In accordance with the Company's Plan, the Commission may initiate or the applicant may propose to change or restructure rates reflecting revenue neutral changes to the Company. In considering such changes, the Commission shall determine the scope of the proceeding and the procedures it deems appropriate.

F. The OCC, the Intervenors and other interested persons shall have the right to file objections to applications for tariff revisions, including new service applications, as well as applications for contractual arrangements, within 14 days after the filing of the application. The Company shall have seven days to file a response to any objection.

G. The automatic approval of a tariff filing under the Company's Alternative Regulation Plan may be

suspended for further Commission review. Under full suspension, the service introduction or change in conditions or terms of service may not occur until the Commission takes further action. Under partial suspension, the automatic approval may be suspended, but the service may be permitted to be introduced or offered under the proposed terms and conditions **[*129]** of service. However, such terms and conditions of service may be modified by the Commission subsequent to its further review.

H. The Company shall file and serve applications to reclassify services in alternative cells during the term of the Plan in conformance with procedures specified in Section 8, Paragraph H. An objection to an application to reclassify a service shall be filed within 14 days after the filing of the application.

I. Applications to move an existing service into Cell 2 or Cell 4 shall be served by the Company upon the Intervenors, and anyone not otherwise represented who requests such notice, on the same day that it is docketed with the Commission. The Commission shall review the proposed service filing, cost study, and information supporting a fully competitive showing within 30 days and, unless an entry suspending the tariff is issued, the proposed service will go into effect automatically on the 31st day.

J. The Company shall file and serve an application including its proposed customer notice and its proposed date of withdrawal, which may be no sooner than 31 days after the filing of the application, when it intends to withdraw any service. The notice **[*130]** of withdrawal shall be received by customers of the service no later than ten days from the filing of the application. For other than Cell 4 services, the Commission shall review the application and customer notice within 30 days after the application is filed and, unless an entry suspending the application is issued, the service will be withdrawn automatically on the 31st day. Any objection to the application to withdraw a service other than a Cell 4 service shall be filed within 14 days after the filing of an application.

K. The Company will provide the Ohio Cable Television Association ("OCTVA") with thirty (30) days advance written notice of all filings for any video service, filings for price flexibility for any video service, or filings to adjust any rate for any video service which is subject to the Commission's jurisdiction. At the time of any such notice of filing, the Company will provide to OCTVA or a member company of OCTVA, under appropriate confidentiality agreements, a detailed description of the Company's joint cost assignment methods and joint cost data. Other parties may provide different assignments of joint costs for the Commission's consideration in opposition **[*131]** to the Company's proposal. The Company will run a reasonable number of models and provide the results to OCTVA, or a designated member company of OCTVA, of such different assignments, using data input provided by OCTVA, or a designated member company of OCTVA. Such data shall be comprised of annual charge factors and joint cost allocation factors.

The Commission may, upon its own motion or upon a showing of good cause by any interested party, suspend and initiate an investigation of the Company'(s) filings for video service(s), price flexibility for video service(s) or rate adjustment for video service(s). The Commission may, pursuant to Section XIV(G) of its Alternative Regulation Rules, order a partial suspension whereby automatic approval may be suspended, but the service in question may be permitted to be introduced or offered on an interim basis under the terms and conditions approved by the Commission.

10. NEW SERVICES PROPOSED DURING THE TERM OF THE PLAN

A. Unless the Company seeks classification in another cell, all new services introduced during the term of the Plan may be classified in Cell 3, unless upon complaint, or upon its own motion, the Commission finds that **[*132]** a new service as being offered is unjust, unreasonable, or in violation of law. If it so finds, the Commission may order that the subject service be reclassified, or may order that it be offered only on specific terms and conditions, or both.

B. The Company may propose to classify a new service in Cell 2 or Cell 4 if such service meets the appropriate competitive standard pursuant to the Commission's Alternative Regulation Rules.

C. The Commission shall review a proposed tariff for a new Cell 2 service and information supporting

a limited competitive showing within 30 days after the application is filed, and, unless an entry suspending the tariff is issued, the proposed tariff will go into effect automatically on the 31st day.

D. The Commission shall review a proposed tariff for a new Cell 3 or Cell 1 service within 30 days after the application is filed and, unless an entry suspending the tariff is issued, the proposed tariff will go into effect automatically on the 31st day.

E. For new services proposed to be classified in Cell 4, the Commission shall review the proposed service filing, cost study, and information supporting a fully competitive showing within 30 days, unless **[*133]** an entry suspending the tariff is issued, the proposed service will go into effect automatically on the 31st day.

F. A notice of filing of an application for a new service proposed to be classified in Cell 4 shall be served by the Company upon the Intervenors, and anyone not otherwise represented who requests such notice, on the same day that it is docketed with the Commission.

G. For all new services, The Company shall submit a proposed customer notice to be approved by the Commission, or the Company shall explain why it believes such notice is not necessary.

With any application for a new service, CBT will include its proposed efforts to educate customers concerning the service and any functionally equivalent options available from the Company's existing services. The form or type of customer education will depend on the service and may include, but is not limited to, bill inserts, bill notes, press releases, brochures, and advertising. In all cases, business office personnel and account representatives will be trained regarding the new service and the available options so that they will be able to advise customers appropriately.

11. LRSIC METHODOLOGY

A. Cost Methodology **[*134]** Framework

Every cost is developed in relation to a particular service. The specific assumptions defining the cost study will vary depending on the unique characteristics of the service under study.

The following is a description of each element within the proposed cost method framework. These elements include determining the length of run, determining cost causality attributable to a service, investigating technology and resource costs associated with a service, developing annual costs, and applying the LRSIC test for price floors. Given this framework, a description of the typical cost study procedures and an overview of the major cost study models is provided.

B. Establishing Length of Run

While performing the LRSIC study, CBT will establish a length of run (the cost studies time horizon) of not less than three and no more than five years. This time horizon of from three to five years will be called the Relevant Run or Relevant Time Horizon. CBT will use the longest time horizon available.

C. How Costs Are Attributed

The total costs for a service under study will include the direct volume sensitive and direct non-volume sensitive costs of provisioning the entire service. **[*135]** In other words, a LRSIC study will determine what costs are directly caused by provisioning of a service (for zero to "n" customers).

The LRSIC cost study will review all the resources the service utilizes and determine if offering the service will contribute towards the exhaustion of any resources used in the provisioning of the service. Contribution towards exhausting a resource means that by offering the entire service (over the Relative Run), the Company will need to add additional resources or enhance/upgrade existing resources sooner than it would have if it did not offer the service being studied. The costs caused by exhausting resources are calculated using Capacity Cost methodology. Capacity costs are calculated

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by developing the total cost for a resource (*e.g.,* transmission equipment, billing and collection, or sales office) and dividing this cost by its useable capacity. The useable capacity is the level at which the addition of a single unit of capacity causes the Company to have to add to or upgrade a resource. The costs generated by this analysis are the direct volume sensitive costs. If the amount of a resource used by a service is unaffected by the demand **[*136]** for that service, the costs are non-volume sensitive. If the non-volume sensitive resource is related to only one service, then the costs are classified as direct non-volume sensitive. The LRSIC then adds the direct volume sensitive costs n3 caused by offering the entire service to the direct non-volume sensitive costs incurred by offering the service.

n3 Common costs will not be included in a LRSIC study.

D. Establishing Resource Costs

The resources that are used in a LRSIC study are analyzed using forward looking costs. Forward looking costs imply that a resource's cost (direct volume and non-volume sensitive costs) is developed using the expected cost of adding or upgrading that resource over the Relevant Run. The current cost of the resource will be used if information about the technology, cost, or timing of the upgrade or addition is unavailable. These resource costs include both capital and expense related costs. The investments are used to develop the annual recurring capital costs, while the annual expenses will be developed either from a special study or from factors applied to the investments. If the resource will be upgraded using the "next generation" of **[*137]** technology, then the LRSIC will be developed using that cost.

E. Developing Annual Costs

CBT will develop costs utilizing the Service Costs resources it currently has available. These resources include Bellcore cost systems (e.g., SCIS, NCAT) and CBT developed systems and studies (e.g., PC LAP), which use annual charge factors and other in house developed rates and factors.

The capital cost portion of the annual charge factor (which includes depreciation, return on investment, and income taxes) is applied to the appropriate investment to develop an annual capital cost. The depreciation rate, income taxes, and return on investment used in this annual charge factor will reflect expected economic lives and costs. The expense portion of the annual charge factor (consisting of property tax, administrative costs, uncollectibles, Gross Receipts Tax, and maintenance ratios) may also be applied to the investment. However, based on the specific type of service being provided, expenses will be developed through special studies to better reflect expected incurred costs. The total annual cost is the summation of capital costs and expenses, and reflects the expected level of costs caused **[*138]** by the provisioning of a service.

F. Determination of Detail

The Company will simplify its cost studies for Cell 3 services that are small in size (revenue), are highly discretionary, and/or have high margins. In these cases, cost study factors and ratios would be used as surrogates for time consuming special studies.

In addition, the Company utilizes standard factors and systems to develop its costs for many different services. Detailed documentation of these standards may not be included in every cost study. The Company will include a brief description of the factors and/or systems and cost methodology used in each study. As always, if the PUCO seeks greater detailed information, the Company will provide all the appropriate information about the factor and/or system to the PUCO and make personnel available for questions.

G. Imputation

With regard to LRSIC Costing Methodology, the Company's services that rely on Cell 1 and/or Cell 2 services that are essential inputs for the provisioning of other firms' competitive services will be

charged the tariffed rates for such services on the same terms and conditions as the inputs may be purchased by the Company's competitors. **[*139]**

The inputs will include but will not be limited to, the following services [at the premium tariffed rate]: Local Switching, Carrier Common Line Charge, Local Transport (i.e., direct trunk transport charge, tandem switched transport charge and residual interconnection charge) and the tariffed elements of Billing and Collection services. Also, such an adjustment will be made at the service level for all new services, including services provided under contract, that rely on Cell 1 and/or Cell 2 services as essential inputs to the provisioning of other firms' competitive services and are alternatives to the Company's service. Existing services may be aggregated where subscribership is minimal. The appropriate elements will be included in the price floor for Company services at the tariffed rate, to the extent that the Company utilizes them in provisioning its own service, in the same manner as the Company would charge other service providers for utilizing those same elements (i.e., CBT is entitled to the same choices in provisioning its services as other service providers have in provisioning their services).

The Company can make a filing with the Commission to demonstrate out of **[*140]** pocket cost differences in provisioning an essential service to itself as compared to the out of pocket costs of provisioning to other service providers. Tariffed rates would be adjusted by this difference. The Company agrees to provide notice of such filing to the parties 10 days in advance of the filing date, and further agrees to waive the application of Rule XIV(F) of the Commission's Alternative Regulation Rules to allow parties up to 20 days to file objections to such filing. The Company will have 10 days to respond to such objections. In all other respects, the Commission's Alternative Regulation Rules for tariff revisions, price list changes and new service applications will apply as appropriate.

A sample worksheet for a service specific test follows:

MTS Revenues

Access Charges (per tariff)

B&C Charges (per tariff)

Access Paid Others

LRSIC

Joint Costs

Total Costs

Contribution (revenue less cost)

The Company can file with the Commission to exclude the charging of tariffed rates for essential inputs from its cost studies, and instead use LRSIC, when the input services have been classified by the Commission as Cell 4 services.

H. Joint Costs

CBT's costs studies **[*141]** for each video service or other service that uses plant facilities shared with Cell 1 services will include, in addition to LRSIC, an assignment of the joint costs of any shared facilities based on measures of relative use, including but not limited to, minutes of use, number of circuits and bandwidth. CBT will propose an appropriate assignment of joint costs to the Commission. CBT agrees that other parties may provide different assignments of joint costs for the Commission's consideration in opposition to CBT's proposal.

A description of typical cost study procedures, major network cost systems, typical LRSIC study output, and an explanation of cost elements is set forth in Appendix B.

12. PROCEDURES FOR HANDLING REPORTS TO MONITOR PROGRESS OF CBT'S COMPLIANCE WITH COMMITMENTS

The following procedures will apply to the filing of reports to monitor the progress of CBT's compliance with the commitments set forth in the Plan:

A. The reports to be filed by the Company in this proceeding are set forth in Appendix A.

B. All of the reports set forth in Appendix A will be filed with the Commission and served upon all Intervenors on April 1.

C. All of the reports set forth in **[*142]** Appendix A will contain public information only.

D. The underlying data and/or workpapers which may be requested by the Staff to facilitate its ongoing analysis of the reports set forth in Appendix A, which encompass the Company's transactions, property, and business, shall be deemed Confidential Data, and shall be protected pursuant to Section 4901.16, Revised Code.

E. Pursuant to the terms of the Stipulated Protective Agreement executed by the Company and the Intervenors, the underlying data and/or workpapers may be requested from the Company to facilitate analysis of the reports filed with the Commission.

13. TREATMENT OF CONFIDENTIAL MATERIALS

A. Some of the information developed to measure progress in compliance with the terms of the Company's Alternative Regulation Plan may, if publicly disclosed, create the likelihood of competitive injury to CBT and/or some of its customers. Some of the data that may be provided is of a type which is not customarily disclosed to the public. Such Confidential Data will only be made available to the Intervenors and other requesting entities, upon execution of a Stipulated Protective Agreement which would set forth in full the terms **[*143]** under which the Confidential Data would be provided.

The terms of the Stipulated Protective Agreement would generally be as follows:

1. All Confidential Data would only be used to review progress made by CBT in compliance with the terms of the Alternative Regulation Plan in Case No. **93-432**-TP-ALT or to make comments in tariff filings made by CBT to implement rate adjustments resulting from the Alternative Regulation Plan in Case No. **93-432**-TP-ALT.

2. Confidential Data would only be made available to the Qualified Persons, who acknowledge their responsibility under the terms of the Stipulated Protective Agreement.

3. Upon termination of the Company's Alternative Regulation Plan, the Confidential Data, and any notes, copies, memoranda or any other information containing or derived from such Confidential Data will be returned to the Company.

4. The Qualified Persons eligible to review Confidential Data will be identified to the Company, and the Company will have an opportunity to approve any individual designated as eligible to review Confidential Data. Such approval of a proposed Qualified Person will not be unreasonably withheld by the Company.

5. A recipient of Confidential **[*144]** Data will have an opportunity to object to the Company's designation of any particular document as Confidential Data.

6. Any filings made by an Intervenor with the Commission or other regulatory or judicial body which includes or makes reference to Confidential Data will be filed under seal with the Commission or other regulatory or judicial body and treated as confidential.

7. The terms and restrictions imposed by the Stipulated Protective Agreement will survive termination or expiration of the Company's Alternative Regulation Plan.

8. Confidential Data will not be available to the public or to persons or entities who have not

executed the Stipulated Protective Agreement, unless it is made available by an order of a court or the Commission. The precise details of the Stipulated Protective Agreement will be set forth in that document which will be executed by the Company, the Intervenors, and other requesting entities.

B. The Company maintains that LRSIC data is so confidential and proprietary that it should be available only to Staff. However, consistent with the Staff Report, access by others to LRSIC data should be addressed on a case-by-case basis when each LRSIC study **[*145]** is presented to the Staff.

C. In the event that an entity other than an Intervenor, or an Intervenor which does not sign a Stipulated Protective Agreement, requests access to the underlying data and/or workpapers requested by the Staff to facilitate its analysis of the reports, the Staff will notify CBT and its counsel by facsimile to the following individuals:

Thomas E. Taylor. Esq., David C. Olson, Esq., Frost & Jacobs, 2500 PNC Center, Cincinnati, Ohio 45202, Telephone: (513) 651-6800, Facsimile: (513) 651-6981

Barbara J. Stonebraker, Senior Vice President, Cincinnati Bell Telephone Company, 201 East Fourth Street, Cincinnati, Ohio 45202, Telephone: (513) 397-1280, Facsimile: (513) 241-9115

The Commission Staff will not divulge the underlying data and/or workpapers to the requesting entity or Intervenor which does not sign a Stipulated Protective Agreement for a period of three business days following notice to CBT and its counsel. During such period, CBT will make its best efforts to negotiate a Stipulated Protective Agreement with the requesting entity or Intervenor which does not sign a Stipulated Protective Agreement to facilitate access.

D. Except to OCC which has **[*146]** executed a nondisclosure agreement with Bellcore, the confidential information provided by CBT to the Intervenors pursuant to the Stipulated Protective Agreement referenced in Section 13(A) of the Alternative Regulation Plan shall not include Bellcore Information. The sample worksheet information contemplated in Section 11(G) of the Alternative Regulation Plan and Stipulation No. 10 does not include Bellcore Information and its availability would not be affected by this paragraph. Bellcore will make Bellcore Information available to the Intervenors in a redacted form on an expedited basis, subject to a nondisclosure agreement with Bellcore. The Intervenors agree n4 that they will not seek access to Bellcore Information filed by CBT with the Commission through a public records request or otherwise without first making a good faith effort to satisfy their legitimate discovery needs related to CBT's filing with Bellcore. If the good faith efforts do not satisfy legitimate discovery needs, Intervenors reserve their rights to seek access to the Bellcore Information.

n4 The IXC Coalition does not agree with this paragraph.

14. PROCEDURES FOR IMPLEMENTING ANNUAL ADJUSTMENTS TO **[*147]** RATES

On April 1 of each year of the Plan, the Company will file an application not for an increase in rates pursuant to Section 4909.18, Revised Code. This filing will adjust the Company's Touch Tone and Carrier Common Line ("CCL") rates to reflect the annual reductions provided for in Sections 4(E) and 4(G) of the Plan. In that filing, CBT will also file the reports set forth in Appendix C of the Plan, and, to the extent further adjustments to the Company's rate levels are appropriate for purposes of satisfying the conditional commitments set forth in Section 5 of the Plan, the Company will propose such further adjustments.

Staff will file its comments and recommendations to the Commission on the Company's proposed tariff revisions within thirty (30) days of the filing. Any interested person may file comments on the Company's proposed tariff revisions and Staff's comments within fourteen (14) days of the Staff's filing. In the event comments are filed which include analysis based on confidential data and/or workpapers, provided to Intervenors or other requesting entities to Case No. **93-432**-TP-ALT pursuant to the Stipulated Protective Agreement described in Section 13 of the **[*148]** Plan, the

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portion of such comments based on such confidential information must be filed under seal. The Company may file its responses to any comments within seven (7) days of the last date comments are filed. On June 1, the application shall take effect automatically unless an entry suspending the application is issued. Should the proposed application be suspended, the Commission shall order such procedures as it deems necessary.

15. SAFEGUARDS AGAINST CROSS SUBSIDIZATION

CBT's Plan provides that CBT will submit LRSIC studies for its services before they are afforded the pricing flexibility associated with the designated service cells. The Commission has recognized that for Cells 2, 3, and 4 the LRSIC should establish a price floor. Since all services in Cells 2, 3, and 4 are covering their incremental costs, they are not subsidized.

In accordance with the Stipulation in this proceeding, CBT cost studies for each video service or service that uses facilities shared with Cell 1 services will, in addition to LRSIC, include an assignment of the joint costs of any shared facilities.

In addition, CBT will maintain its accounting records in accordance with the Uniform Systems **[*149]** of Accounts (Part 32) and will separate its accounts according to separations rules (Parts 36 and 64).

16. POLICIES AND PRACTICES REGARDING RESALE AND SHARING

Local Exchange Service may be shared or resold subject to the following regulations which are currently filed with the PUCO:

A. Resale and sharing is permitted on measured rate nonresidence lines and trunks.

B. A reseller or sharer may provide service only within a single building, or a contiguous complex of buildings under common ownership or management.

1) A contiguous complex of buildings may be intersected by public thoroughfares provided that the property segments created would be continuous in the absence of the thoroughfare.

2) Where separate buildings are involved, they must have a related business purpose (i.e., industrial park, shopping center, or university).

C. Participation in reselling or sharing systems shall be limited to occupants of a building or contiguous complex of buildings which compose a resale or sharing system.

D. CBT will not be responsible for the manner in which the use of service or charges are allocated to others by a customer which resells or shares service. All applicable rates **[*150]** and charges for such service will be billed to the customer.

E. Service orders will be accepted by CBT only from the customer; however, CBT will respond to repair and maintenance requests from others provided that the customer is responsible for any maintenance of service charges that may be billed by CBT.

F. Directory listings for residential and nonresidential patrons of customers who resell or share Local Exchange Service will be provided at the rates for nonresidence additional listings.

G. Discounts provided to government agencies or schools do not apply for resale or sharing applications.

H. Rules regarding reselling and sharing of Local Exchange Service do not apply to hotels, hospitals, and skilled nursing homes.

The above policy applies for resellers and sharers of local exchange service, such as Shared Tenant Service (STS) providers. STS providers offer telecommunications services to multi-tenant complexes

by interpositioning a PBX between the tenants and CBT. CBT's local Private Line tariff allows for the sharing of private line services with a surcharge for shared facilities but does not allow for resale. CBT has no restrictions on resale or sharing of its services **[*151]** by other common carriers as long as CBT is adequately compensated for usage of its network. The standard method for charging interconnecting carriers is the Switched Access tariff for usage sensitive services and the Special Access tariff for private-line like dedicated services.

17. EXTENSION OF PLAN/NEW PLAN

By no later than three months prior to the expiration of this plan, CBT may request an extension of the term of that plan by filing a written request with the Commission and serving such written request upon the Intervenors, and any person who requests to be served with such notice. Such notice shall set forth the specifics of CBT's proposed extension. The Commission shall order such procedures as it deems necessary in its consideration of such a request.

In the event that the Company files an application for approval of a new plan, the Company will comply with Rule XI(F).

In the event of an extension of the present plan, or a new plan is not effective on the termination date of this three year plan, the rates then in effect shall remain. Further, the specific formula for retargeting rates or refunds of earnings shall remain in effect. All other commitments will terminate **[*152]** with the expiration of this Plan.

18. AMENDMENTS TO PLAN

At any time during the term of the Plan, CBT may request that the Plan be amended by filing with the Commission a notice of amendment setting forth the specific elements of the Plan that are affected by the amendment and explaining the effect such amendment would have on the Plan. Such notice shall also be served upon the Intervenors, and any person not otherwise represented who requests to be served with such notice. The Commission shall order such procedures as it deems necessary in its consideration of such a request.

19. COMMISSION MODIFICATION AND/OR REVOCATION OF PLAN

The Commission may not modify on its own motion or revoke any order approving the Plan, unless it determines, after notice to CBT and hearing, that CBT has failed to comply with the terms of the Plan. Prior to any such ruling, the Commission shall take into consideration consequences of such action on CBT and its financial status as well as the impact on its customers and shall provide CBT an opportunity to cure its noncompliance. Should the Plan be revoked for any reason, all rates for services in Cells 1, 2, 3 and 4 shall be fixed at the levels **[*153]** in effect as of the date of the Commission order revoking the Plan, and shall remain at such levels unless and until the Commission rules otherwise. The Commission shall order such procedures as it deems necessary in its consideration of such a request.

20. WITHDRAWAL FROM PLAN

At any time during the term of the Plan, CBT may request that such Plan be withdrawn by filing a notice of withdrawal with the Commission setting forth the reasons for withdrawal. Such notice shall also be served upon the Intervenors, or any person, not otherwise represented, who requests notice of such withdrawal.

Potential reasons for the Company filing for withdrawal may include, but would not be limited to:

1) any change to the current provisions of Chapter 4927, or to current Commission procedures implementing Chapter 4927, whether the result of legislative action, judicial interpretation or Commission initiative;

2) any modification of the Plan, except to the extent provided for herein;

3) any material change in circumstances that renders CBT unable to achieve a reasonable rate of return under the terms of the Plan;

4) any change in ownership of the Company; or

5) competitive pressures not **[*154]** contemplated at the time the Plan took effect.

In the event that the Company requests to withdraw this Plan, the Commission shall order such procedures as it deems necessary in its consideration of such a request.

21. CONSENT

If the Commission issues a final order in Case No. **93-432**-TP-ALT which establishes rates and charges by a method different from that proposed herein, or significantly modifies the Plan as set forth herein in any other manner, then CBT shall have 30 days from the date of that final order to consent to the different method or modification.

APPENDIX A

Monitoring Report
Income Statement for the Monitoring
Year Ended December 31, 199
Rate Base As of December 31, 199

	Total Company	**Ohio Intrastate n(1)**
	(a)	(b)
INCOME STATEMENT		
Operating Revenues		
Operating Expenses		
Other Oper. Inc. & Exp.		
Net Operating Income		
Net Income		XXXX
RATE BASE		
Plant-In-Service		
Accum. Dep. & Amort.		
Net Plant-In-Service		
Other Rate Base Items		
Rate Base	XXXX	
Rate of Return	XXXX	
Average Common Equity		XXXX

n(1) Exogenous Adjustments Included In Column (b) are:

Monitoring Report Instructions

Column (a) represents Total Company Operations. **[*155]** This column will be reported at FCC Part 32 Class A operating account detail. Net Income will appear in Column (a) only.

Column (b) represents regulated Ohio Intrastate Net Operating Income Operations. This column will be reported at FCC Part 32 Class B operating account detail which is in accordance with the FCC's

Jurisdictional Separations Rules (Part 36).

Plant-In-Service and Accumulated Depreciation and Amortization will be reported at the following level of detail (Accounts 2001 and 3100):

Land and Support

Central Office Equipment

Info. Orig./Term. Equipment

Cable & Wire Facilities

Tangible Assets

Intangible Assets

Total

Other Rate Base Items will be reported at their Part 32 Class A and Class B account level in accordance with column (a) and (b) guidelines.

Jurisdictional Differences will be reported on a separate summary line in the following sections of the Income Statement and Balance Sheet:

Operating Expenses

Plant-in-Service

Accumulated Depreciation

Other Rate Base Items

All data will be reported as booked by the Company, with no further adjustments to net operating income other than the directory advertising revenue adjustment and exogenous adjustments, **[*156]** if any.

Directory Advertising Revenues will appear in Column (b) only, and will be reported for monitoring purposes at the Staff recommended $3.80 per Ohio residential access line.

Average Common Equity will equal the sum of the beginning of year balance and the end of year balance divided by two [(BOY + EOY)/2]. Common Equity will appear in column (a) only.

Deferred Taxes will reflect two lines of detail. Deferred Taxes included for ratemaking and Deferred Taxes Excluded.

The Company will provide the Staff with a list of any prior period non-recurring revenue or expense entries made during the monitoring period that are greater than $2,000,000 on an Ohio intrastate jurisdictional basis.

Monitoring Report Ratio Calculation

JURISDICTIONAL RETURN ON RATE BASE (From Data in Column (b)):

Ohio Intrastate Net Operating Income/Ohio Intrastate Rate Base = $ XXX,XXX,XXX/$ XXX,XXX,XXX = XX.XX%

where Ohio Intrastate Rate Base is:

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Plant-in-Service (2001)	$ XXX,XXX,XXX
Depreciation Reserve (3100, 3400, 3500)	(XXX,XXX,XXX)
Net Plant	XXX,XXX,XXX
Other Rate Base Items:	
Unamortized ITC-3% (4320)	(XXX,XXX,XXX)
Deferred Taxes (Included)	(XXX,XXX,XXX)
Customer Deposits (4040)	(XXX,XXX,XXX)
Total Other Rate Base Items	(XXX,XXX,XXX)
Total Rate Base	$ XXX,XXX,XXX

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PUCO ANNUAL COMMITMENT PROGRESS REPORT

Cincinnati Bell Telephone Co.

93-432-TP-ALT

Date:

NAME OF COMMITMENT: Universal Service

Contact:

1. List the activities implemented during the past calendar year to increase the level of participation in the Basic Telephone Assistance Program. Provide the number of TSA and SCA participants and the level of increase from the prior year.

2. List the activities implemented during the past calendar year to improve awareness as to the availability of telephone services that assist persons with communications impairments.

3. List the activities implemented during the past calendar year to study the restriction of toll access in lieu of disconnection for nonpayment and share any pertinent findings.

4. Provide an update on the activities associated with the Consumer Board and the expanded lifeline program.

5. List projects and associated activities planned for the next year with regard to each of the above.

PUCO ANNUAL COMMITMENT PROGRESS REPORT

Cincinnati Bell Telephone Co.

93-432-TP-ALT

Date:

NAME OF COMMITMENT: Flat Rate Service

Contact:

1. Does the Company continue to offer flat rate residential service?

PUCO ANNUAL COMMITMENT **[*158]** PROGRESS REPORT

Cincinnati Bell Telephone Co.

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93-432-TP-ALT

Date:

NAME OF COMMITMENT: CCLC and Touch Tone Reductions

Contact:

These commitments have been satisfied by the Company's Tariff filing of April 1, 199 , in Case No.

PUCO ANNUAL COMMITMENT PROGRESS REPORT

Cincinnati Bell Telephone Co.

93-432-TP-ALT

Date:

NAME OF COMMITMENT: Infrastructure and Service Deployment

Contact:

1. Provide the actual percent of access line availability achieved by category in the past calendar year.

2. If the actual percent availability is below the percentages provided in Section 4 of the Company's Plan, describe and explain the deviation.

PUCO ANNUAL COMMITMENT PROGRESS REPORT

Cincinnati Bell Telephone Co.

93-432-TP-ALT

Date:

NAME OF COMMITMENT: Dial 1

Contact:

1. For the progress report on 1994 activities, did the Company implement IntraLATA 1+ in any Ohio central offices on or before December 31, 1994? If so, indicate the number of offices converted, and the respective dates of conversion. If IntraLATA 1+ is not available in the one agreed upon office by December 31, 1994, provide an explanation for the Company's lack of progress in meeting this commitment.

2. For **[*159]** the progress report on 1995 activities, has IntraLATA 1+ not been implemented in any Ohio central office? If so, indicate the number of offices not so converted. If IntraLATA 1+ is not available in all offices (except for the Company's one 2BESS office) by December 31, 1995, provide an explanation for the Company's lack of progress in meeting this commitment.

3. Has the Company consistently notified affected customers of the opportunity to choose their interLATA carrier to carry intraLATA calls at least 90 days in advance of implementation of IntraLATA 1+? If not, indicate the timing of such notification and explain why notice was not timely provided. Provide a sample copy of the bill insert(s) used to inform customers.

PUCO ANNUAL COMMITMENT PROGRESS REPORT

000217

Cincinnati Bell Telephone Co.

93-432-TP-ALT

Date:

NAME OF COMMITMENT: Public Input Model

Contact:

1. Provide a list of the specific customer groups included in the model for public input process.

2. Provide the number of potential contacts from each of the specific customer groups listed in (1) above and include the number of contacts chosen for the interview process.

3. If the number of contacts chosen for the **[*160]** interview process does not include the entire universe for each specific customer group, provide the methodology used in selecting the representative sample chosen for the interview process.

4. Provide a status report of the Company's efforts associated with this commitment.

PUCO ANNUAL COMMITMENT PROGRESS REPORT

Cincinnati Bell Telephone Co.

93-432-TP-ALT

Date:

NAME OF COMMITMENT: Enhance Education

Contact:

A. Distance Learning

1. Provide a statement regarding the status of the Clermont County project. If the Clermont County distance learning project is terminated, report the financial treatment of this project.

2. List projects and associated activities implemented during the past calendar year to promote telecommunications based educational applications.

3. Provide the number of schools contacted and the month.

B. List projects and associated activities implemented during the past calendar year to develop a telecommunications plan for education.

C. Cincinnati Public School System

1. Has the Company provided an annual progress report to the Ohio Department of Education regarding the Company's activities associated with the Cincinnati Public School System? **[*161]**

2. Has the Company applied credits to reduce charges for telecommunications services in an amount totaling $100,000 for the Cincinnati Public School System in the prior calendar year?

PUCO ANNUAL COMMITMENT PROGRESS REPORT

Cincinnati Bell Telephone Co.

93-432-TP-ALT

000218

Date:

NAME OF COMMITMENT: Conditional Commitments

Contact:

1. If earnings exceed specified levels, the Company will submit tariff filings to the Commission to effectuate rate reductions in accordance with Section 5 of the Company's Alternative Regulation Plan.

2. If earnings exceed 13.43%, 25% of revenues above 13.43% less $100,000 will fund the Consumer Board's expanded lifeline program, which will be reported as part of CBT's Commitment to Universal Service.

APPENDIX B

A. Typical Cost Study Procedure

The Company will follow the general procedures specified below when performing LRSIC studies. However, since cost studies are performed for a multitude of distinct services with unique characteristics, the process may vary from study to study.

1. Once a cost study has been requested, the following information will be assembled:

a. a description of the product, service or feature;

b. the rate element **[*162]** structure;

c. the type of technology required to provide the product, service, or feature;

d. a forecast of the demand for the product, service, or feature;

e. the location and type of equipment or facilities being placed or used;

f. whether the equipment or facilities are reusable or non-reusable;

g. whether the equipment or facilities are dedicated or shared;

h. the engineered, furnished, and installed costs of the equipment or plant being placed or used;

i. the engineered capacity of the equipment or plant; and

j. any additional costs (eg., additional training or maintenance, removal costs, RTU fees, etc.).

2. The cost analyst will then:

a. determine the incremental investment and expenses associated with the product, service, or feature using the capacity cost methodology;

b. determine the annual costs; and

c. document the study.

An example of the annual cost output of a typical study and an explanation of each cost element is in Paragraphs C and D below.

B. Major Network Cost Systems

The Company utilizes three computer based systems to assist in developing interoffice network, switch, and loop costs. The general costing methodology of each system **[*163]** is explained below.

The loop cost system determines costs by developing model loops derived from a network survey of loop types and configurations relevant to the specific service being analyzed (i.e., residence, business, etc.). The configuration's components are matched to their engineered, furnished, and installed (E, F, & I) investments based on capacity cost methodology. The system calculates the E, F, & I investments of the loop configuration. These investments are turned into annual costs using the method described earlier in this exhibit.

The interoffice network cost model develops costs for switched traffic for various services. The model includes the service usage, network design, and investment of switches and transport facilities. The system constructs all the possible pairs of originating and terminating points within the network and all the possible routes between these points. A composite investment is generated by weighing each route's investment with the probability of that route being used to complete traffic. The model simulates traffic and determines the incremental investments needed to accommodate the added traffic utilizing capacity cost methodology. **[*164]** These incremental investments are developed on a per message and per minute basis by time of day, distance, and type of service and are converted into annual costs using the methods described earlier in this exhibit.

The switch cost model develops costs for various switched based services. The model uses vendor supplied engineering information, material costs, and E, F, & I investments to calculate unit cost data. The system develops incremental investments based upon vendor prices, engineering rules, and user defined network configurations. The system develops incremental investments based on capacity cost methodology. Data used as input to the system includes (among others) switch type, busy hour traffic data, line and trunk capacity and type, and service sensitive traffic data. The incremental investments generated by the system are converted into annual costs using the methods described earlier in this exhibit.

CBT will submit for Staff review, user inputs for each cost model run used to develop LRSIC for a specific service along with the associated outputs of that run. Loop samples submitted for Staff review will include only loops of that distinct service being analyzed. **[*165]**

C. Typical LRSIC Study Output

The following is a typical LRSIC study output with an accompanying explanation of the cost elements.

Service XYZ's Annual LRSIC	
Capital Cost	
Depreciation	$ XX.XX
Post tax income	$ XX.XX
Income taxes	$ XX.XX
Total Capital Costs	$ XX.XX
Expenses	
Maintenance	$ XX.XX
Property taxes	$ XX.XX
Administration	$ XX.XX
Total Expenses	$ XX.XX
Misc. Expenses	
Gross receipts tax	$ XX.XX
Uncollectibles	$ XX.XX
Total Misc. Expenses	$ XX.XX

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Total Annual Costs $ XX.XX

D. Explanation of Cost Elements

1. Depreciation

Depreciation is the periodic recognition of investment cost. Depreciation costs are computed based upon the projected life of the plant.

2. Total Cost of Capital

The cost of money associated with an investment is the weighted average cost of debt and equity applied to the net investment. The weighing will be the relative percentages of debt and equity existing in the Company's capital structure.

Debt Capital/Total Capital * Interest on Debt + Equity Capital/Total Capital * Cost of Equity = Total Cost of Capital

3. Income Taxes

Income tax expenses are based on rates which are expected to be in effect **[*166]** during the study period.

Composite Tax Rate = (Federal tax rate * (1-state tax rate)) + State tax rate

4. Maintenance

Maintenance costs are incurred to keep equipment resources in serviceable condition. Included are such items as required maintenance, labor, replacement parts, ongoing testing, trouble clearing, rearrangements and repair shop costs. Specific maintenance cost estimates or an investment related maintenance factor may be applied to determine annual maintenance costs.

5. Property Taxes

Property taxes are based on rates which are expected to be in effect during the study period. This estimate is developed either through the direct application of the tax rate or through the development of an appropriate factor.

6. Administration

Administrative expenses are estimated for support activities including commercial, sales, advertising and other activities which are directly attributable to the service. The cost of promotions for a particular service will be included in the LRSIC for that service. These costs are based on projections over the applicable study period or through development of factors.

7. Gross Receipts Tax

Gross receipts tax is estimated **[*167]** using the tax rate anticipated to be in effect during the study period. This estimate may be through direct application of the tax rate or through development of an appropriate factor.

8. Uncollectibles

Uncollectible revenues expense is the revenues that are unable to be collected. This is estimated based on prior years information and is generally applied through a factor on the expected billed revenues.

APPENDIX C

For Revenues Between 11.93% and 13.43%

		Regulated Ohio Intrastate
		a
1	Difference of ROR above 11.93%, but at or below 13.43% n(1)	
2	Net Operating Income (NOI) between 11.93% and 13.43% (L1 * Rate Base (Col B of Monitoring Report))	
3	Gross Revenue Conversion Factor	
4	Revenue Difference (L2 * L3)	
5a	Term. CCLC Rate Reduction n(2) [(30% * L4) - $500,000]	
5b	Is Term. CCLC > Interstate Term. CCLC (Yes or No)	
5c	(If Yes) Revenue Reduction to Term. CCLC	
5d	Remaining Revenue = L5a - L5c	
6a	Touch - Tone Rate Reduction n(2) [(30% * L4) - $1,000,000] n(3)	
6b	If Rev. Excess from CCLC, then TT revenue = L5d + L6a	
6c	If Touch - Tone Revenue = 0, then difference to Basic Rates	
7	CBT Retention (40% * L4)	

n(1) Exogenous Adjustments Included in RoR are:

n(2) The $500,000 CCLC reduction and the $900,000 Touch Tone reduction are applicable only in 1995 and 1996.

n(3) $900,000 for Touch Tone and $100,000 for Education **[*168]**

For Revenues Between 13.43% and 16.18%

		Regulated Ohio Intrastate
		a
1	Difference of ROR above 13.43%, but at or below 16.18%	
2	Net Operating Income (NOI) between 13.43% and 16.18% (L1 * Rate Base (Col B of Monitoring Report))	
3	Gross Revenue Conversion Factor	
4	Revenue Difference (L2 * L3)	
5a	Term. CCLC Rate Reduction (25% * L4)	
5b	Is Term. CCLC > Interstate Term. CCLC (Yes or No)	
5c	(If Yes) Revenue Reduction to Term. CCLC	
5d	Remaining Revenue = L5a - L5c	

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6a Touch - Tone Rate Reduction
(25% * L4)
6b If Rev. Excess from CCLC, then TT revenue = L5d + L6a
6c If Touch - Tone Revenue = 0, then difference to Basic Rates
7 Expanded Lifeline Program
(25% * L4) - $100,000
8 CBT Retention
(25% * L4)

For Revenues Above 16.18%

		Regulated Ohio Intrastate
		a
1	Difference of ROR above 16.18%	
2	Net Operating Income (NOI) above 16.18% (L1 * Rate Base (Col B of Monitoring Report))	
3	Gross Revenue Conversion Factor	
4	Revenue Difference (L2 * L3)	
5	Refunds to Basic Local Exchange Access Lines (100% * L4)	

ATTACHMENT 2

SCHEDULE A-1

CINCINNATI BELL TELEPHONE COMPANY
Case No. 93-432-TP-ALT
Revenue Requirements
(000's Omitted)

	Applicant (a)	**Staff**
(1) Rate Base (b)	$441,979	$440,806
(2) Adjusted Operating Income (c)	34,740	42,116
(3) Rate of Return Earned (2) / (1)	7.86%	9.55%
(4) Rate of Return Recommended (d)	11.83%	11.18%
(5) Required Operating Income (1) x (4)	52,286	49,282
(6) Income Deficiency (5) - (2)	17,546	7,166
(7) Gross Revenue Conversion Factor (e)	1.617306	1.669102
(8) Revenue Increase Required (6) x (7)	28,377	11,961
(9) SPF/DEM Adjustment	(142)	0
(10) Adjusted Revenue Increase Required (8) + (9)	28,235	11,961
(11) Revenue Increase Recommended	17,138	11,961
(12) Adjusted Gross Operating Revenue (c)	311,427	322,048
(13) Revenue Requirements (11) + (12)	$328,565	$334,009

[*169]

(a) Applicant's Schedule A-1

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(b) Staff's Schedule B-1

(c) Staff's Schedule C-2

(d) Refer to Rate of Return Section

(e) Staff's Schedule A-1.1

ATTACHMENT 3

Cincinnati Bell Telephone Company Case No. **93-432**-TP-ALT & Case No. 93-531-TP-CSS Revenue Requirement Revisions

1. Eliminated reserve deficiency allocation factor which increased depreciation expense by $1,542,301.

2. Unclaimed funds added as a rate base deduction in the amount of $282,000.

3. Bellcore adjustment reduced operating expenses by $100,000.

4. Lobbying expense adjustment reduced operating expense by $151,000.

5. Advertising expense adjustment reduced operating expenses by $18,403.

6. External relations expense adjustment reduced operating expenses by $735,000.

7. USTA dues expense adjustment reduced operating expenses by $25,000.

8. Sales expense adjustment reduced operating expenses by $28,000.

9. Pioneer payments reduced operating expenses by $7,000.

10. Charitable contributions revised to eliminate double exclusion, effect $5,000 increase to operating expenses.

11. Revised labor adjustment, effect is a $2,842,000 increase in operating expenses. Also, revised payroll tax adjustment, effect **[*170]** is a $52,000 increase in operating expenses.

12. Taxes other than income increased by $318,628 as a result of increases to both miscellaneous taxes and gross receipts tax.

13. FIT decreases by $289,000 as a result of all revisions.

14. Eliminated network access revenue adjustment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications Law > Telephone Services > Cellular Services
Communications Law > U.S. Federal Communications Commission > General Overview
Energy & Utilities Law > Utility Companies > General Overview

Source: **Combined Source Set 1** - **OH Cases, Administrative Decisions & Attorney General Opinions, Combined**
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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code.	)))))	Case No. 04-720-TP-ALT
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

FINDING AND ORDER

The Commission finds:

(1) On May 14, 2004, Cincinnati Bell Telephone Company (CBT) filed an application for approval of an elective alternative regulation plan. CBT filed its application pursuant to Chapter 4901:1-4, Ohio Administrative Code (O.A.C.).[1] Along with its application, CBT filed an application for waiver pursuant to Rule 4901:1-4-05(B), O.A.C., seeking permission to continue one of its Lifeline assistance programs. The effective date of CBT's alternative regulation plan, unless suspended, will be July 1, 2004.

(2) Under the elective alternative regulation rules adopted by the Commission, an electing incumbent local exchange carrier (ILEC) has pricing flexibility for services other than basic local exchange service. In exchange for this, a company adopting an elective alternative regulation plan would be required to fulfill a number of important commitments to benefit its customers. Most importantly, the electing company would not be permitted to increase its existing basic local telephone rates and basic Caller ID rates for as long as the company is in the plan. The company also must provide, on demand, high speed internet access within one and two years of adopting the plan

1 For a summary discussion of the legislative and regulatory background of alternative regulation, see the Commission's Finding and Order issued on October 3, 2002, in *In the Matter of the Application of United Telephone Company of Ohio dba Sprint for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 02-2117-TP-ALT.

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in areas across the state that would otherwise not likely receive this service. Additionally, the company must offer an enhanced Lifeline assistance program to assist customers at or below 150 percent of the poverty level in maintaining and establishing service.

Pricing for services other than basic local exchange service have varying levels of flexibility under the plan, depending upon the level of public interest in the services. Prices for Call Waiting, second and third local exchange service access lines, Call Trace, Centrex, PBX trunks, per line identification blocking, non-published number service, N-1-1 codes, and payphone access lines would be capped for two years with limited pricing flexibility thereafter. All other regulated, non-basic local exchange services, like toll services and some custom calling services, would not be subject to any rate caps and would be priced by the electing company at marked-based rates. While an electing company would have more pricing flexibility, it would remain subject to all of the Commission's rules protecting customers from unfair, inadequate and unsafe company practices. Finally, the company is not permitted to end its alternative regulation plan until all commitments are fulfilled.

(3) Chapter 4901:1-4, O.A.C., establishes the process by which ILECs can opt into the elective alternative regulation plan. Specifically, pursuant to Rule 4901:1-4-02, O.A.C., an ILEC can opt into an elective alternative regulation plan at anytime by making an appropriate filing. As set forth in the rules, an appropriate filing is one that includes: a completed application form; a proposal to cap basic local exchange service rates at existing levels pursuant to Section 4927.04, Revised Code, and price all other telephone services pursuant to Rule 4901:1-4-05(D), O.A.C., and Section 4927.03, Revised Code; a 30-day prefiling of all necessary tariff modifications; and a plan as to how the company will meet all of the commitments set forth in Rule 4901:1-4-05, O.A.C. An application filed under Chapter 4901:1-4, O.A.C., will be automatically approved on the 46th day after filing, unless the Commission suspends the application.

Rule 4901:1-4-02(D), O.A.C., allows any person to file a request for hearing on an application within 20 days of the filing of an elective alternative regulation plan. The rule further provides

that "absent extraordinary circumstances established through clear and convincing evidence that reasonable grounds for a hearing exist, a hearing will not be held."

(4) CBT's application for an elective alternative regulation plan was filed pursuant to Chapter 4901:1-4, O.A.C. Along with this application, CBT filed a request for waiver of Rule 4901:1-4-05(B), O.A.C., regarding Lifeline commitments.

(5) CBT notes in its application that, in accordance with Rule 4901:1-4-02(A)(3), O.A.C., it prefiled all necessary tariff modifications with the Commission's staff on April 15, 2004. With the exception of CBT's request to maintain an alternative Lifeline assistance program, CBT states that CBT and staff have agreed on all tariff modifications. CBT's request to maintain the Federal Plan is the subject of CBT's separately filed waiver request.

(6) CBT agrees to fulfill the advanced services requirement by complying with Rule 4901:1-4-05, O.A.C. CBT has listed the Class 5 central offices in its traditional operating area which serve census tracks with a population density of 500 or more people per square mile, as defined by the 2000 census.

Within its tariff, CBT has included the provisions for a Lifeline assistance program in accordance with the specifications of Rule 4901:1-4-05(B), O.A.C. In addition to the Lifeline plan conforming to its alternative regulation plan, CBT also seeks to offer, as an alternative Lifeline program for eligible customers, its Federal Plan. CBT will continue to provide automatic enrollment to customers who participate in a qualifying program and to provide for self-certification to enroll customers who qualify on the basis of household income.

(7) CBT intends to establish an annual marketing budget of $0.10 per residential access line and will continue to coordinate Lifeline assistance program activities, including outreach and promotion, through the advisory board established in *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan Which May Result in Future Rate Increases and for a New Alternative Regulation Plan*, Case No. 96-899-TP-ALT. Any marketing budget that remains at the conclusion of CBT's current alternative regulation plan will be added to the budget created under the new plan. Going

forward, budget surpluses will be carried forward from year-to-year. The advisory board will maintain the schedule of meetings established for 2004.

(8) CBT will adhere to the retail rate commitments contained in Rule 4901:1-4-05(C), O.A.C., for all Tier 1 core and non-core services and Tier 2 services. Furthermore, CBT will use the process and registration form adopted in Case Nos. 99-998-TP-COI and 99-563-TP-COI as found in the Competitive Retail Service Rules 4901:1-6-01 through 4901:1-1-6-24, O.A.C.

(9) As for CBT's Lifeline waiver request, CBT's alternative regulation plan would require the termination of its Federal Plan, which is one of CBT's Lifeline assistance programs offered through its general exchange tariff. The Federal Plan has been in existence since January 1, 1998. Under the plan, eligible residential customers are given a waiver of the federally-tariffed end-user common line charge (EUCL), a discount of $1.75 off their monthly line rate for basic local exchange service, and the ability to purchase any optional feature. The other Lifeline plan offered by CBT is the CBT Plan. By comparison, the CBT Plan provides a $7.00 discount off the monthly rate for basic local exchange service, waives the EUCL, but prohibits the purchase of optional features. The CBT Plan became effective November 13, 1998. Presently, customers can choose between the two plans. According to CBT, customers have preferred the Federal Plan by two to one.

(10) In its waiver request, CBT seeks authority to continue to offer the Federal Plan. In the alternative, CBT requests that it be allowed to grandfather the Federal Plan, allowing customers to keep their optional services until they make changes to their local exchange service.

(11) CBT contends that maintaining the Federal Plan is in the public interest. CBT believes that eligible Lifeline customers should be treated no differently than other customers insofar as the ability to select options and packages that suit their needs.

(12) On June 3, 2004, the Ohio Consumers' Counsel (OCC) moved to intervene in this proceeding. The OCC moves to intervene as the representative of residential customers and under the statutory authority of Chapter 4911, Revised Code. In asserting

its right to intervene, the OCC claims that it meets the criteria for intervention set forth in Rule 4901-1-11(A), O.A.C., and Section 4903.221(B), Revised Code. The Commission has granted intervention to the OCC in elective alternative regulation cases involving United Telephone Company of Ohio dba Sprint (Sprint), SBC Ohio, and CenturyTel of Ohio, Inc. (CenturyTel), Case Nos. 02-2117-TP-ALT, 02-3069-TP-ALT, and 04-62-TP-ALT, respectively.

The OCC has stated sufficient grounds for intervention. Accordingly, the OCC's motion to intervene shall be granted.

(13) On June 3, 2004, concurrently with its motion to intervene, the OCC filed a request for hearing. In its supporting memorandum, the OCC alleges that, pursuant to Rule 4901:1-4-02(D), O.A.C., extraordinary circumstances exist that warrant a hearing. As evidence of extraordinary circumstances, the OCC points to CBT's level of earnings. Highlighting CBT's return on equity, the OCC finds unacceptable excess revenue generated by the company. The OCC accuses CBT's parent company of using CBT's regulated excess revenues to subsidize debt and losses sustained from unregulated broadband operations. To determine whether CBT's application is in the public interest, given CBT's level of earnings and without a commitment to reduce rates, the OCC urges the Commission to conduct a hearing.

(14) The OCC also questions whether CBT meets the standards of Section 4927.03(A), Revised Code, concerning the existence of competition or reasonably available alternatives. The OCC claims that the record in Case No. 00-1532-TP-COI was devoid of such evidence. Pointing to the absence of CLECs serving residential customers and the absence of ubiquitous wireless service in CBT's service territory, the OCC questions whether CBT meets the standards of Section 4927.03(A), Revised Code.

(15) According to the OCC, an alternative regulation plan must be in the public interest. In exchange for pricing flexibility, the ILEC must agree to certain commitments that benefit ratepayers. Moreover, there must be an incremental benefit to ratepayers. In examining CBT's gains under the alternative regulation plan, the OCC finds the plan to be out of balance in comparison to the benefits offered to ratepayers.

With regard to the advanced services commitment, CBT does not state whether it is currently providing advanced services in the required areas of its service territory. If the advanced services were already deployed under traditional regulation, there would be no incremental benefit to ratepayers from alternative regulation. Examining the rate cap commitment, the OCC finds no benefit to ratepayers given CBT's level of earnings. Finally, the OCC objects to CBT's refusal to provide a 30-day notice of rate increases. In all, the OCC finds no balance or *quid pro quo* in the commitments offered by CBT. The OCC urges the Commission to conduct a hearing to determine whether CBT's commitments provide a sufficient incremental benefit to make the plan in the public interest.

(16) Turning to CBT's Lifeline waiver, the OCC advocates for its denial. The OCC contends that the waiver would significantly reduce the benefits available to customers. Moreover, the OCC calculates that the reduction in benefits would amount to $1.3 million. As an additional reason for denying the waiver, the OCC asserts that granting the waiver would fundamentally modify the elective alternative regulation plan. Granting the waiver would convert the plan into a company-specific plan, not an off-the-shelf plan as intended by alternative regulation. The OCC regards a change in the Lifeline commitment to be a major modification to an alternative regulation plan. Where there is a proposed major reduction in a significant benefit, the OCC finds grounds for rejection of the proposal.

(17) On June 4, 2004, Communities United for Action (CUFA) filed a pleading alternatively raising objections or requesting a hearing. CUFA objects to CBT's waiver request. Noting that Rule 4901:1-4-2(D), O.A.C., does not contemplate anything less than a formal hearing, CUFA wishes to raise its objection and, if necessary, request a hearing.[2] CUFA notes that CBT is the first company to seek a modification of its alternative regulation plan. CUFA is concerned that granting the waiver will lead to additional requests for waivers.

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[2] In its entry on rehearing issued March 6, 2003, in *In the Matter of the Application of SBC Ohio for Approval of an Alternative Form of Regulation*, Case No. 02-3069-TP-ALT, the Commission clarified that under Chapter 4901:1-4, O.A.C., parties may file comments or concerns within 20 days after an application for alternative regulation is filed.

(18) CUFA describes itself as a nonprofit corporation based in Cincinnati, Ohio. It is a multi-issue community organization that brings together organizations and communities representing a variety of cultural and ethnic backgrounds and economic levels. It has a particular interest in working-class neighborhoods. CUFA was an active party to CBT's current alternative regulation plan. It is a member of CBT's consumer advisory board and has assisted in the development of CBT's Lifeline service. CUFA also participated in the Commission's alternative regulation rule making proceeding.

(19) CUFA describes CBT's Lifeline services as having two tiers: Federal Lifeline and CBT Lifeline. Customers who purchase CBT Lifeline receive a monthly discount of $12.34 and are not allowed to purchase vertical services. As of April 2004, CBT reported that 16,077 customers were receiving CBT Lifeline. Federal Lifeline customers receive a discount of $7.09 and are unrestricted in their choice of vertical services. As of April 2004, CBT reported that 31,152 customers were receiving Federal Lifeline. The difference in discounts is funded by CBT.

CBT's alternative regulation plan allows a Lifeline plan that resembles the CBT Lifeline plan, with the exception that customers may order one vertical service—Call Waiting. The Lifeline customer may only obtain other vertical services by self-certifying based on health or safety. The alternative regulation rules would "grandfather" CBT Lifeline customers, allowing them to retain their vertical services until or unless they make a change in their service.

(20) CUFA suspects that CBT is seeking an opportunity to market high-priced, vertical services to Lifeline customers. Of concern also is that customers who opt for vertical services may unwittingly remove themselves from the Lifeline program. CUFA is not persuaded by CBT's arguments concerning the loss of choice. Nor is CUFA convinced by CBT's allusions to discriminatory treatment resulting in a subclass of low-income customers. CUFA acknowledges that some customers may be disappointed by vertical service purchase restrictions. Nevertheless, CUFA believes that customers will be pleased at the doubling of their Lifeline discount.

(21) If the Commission is receptive to changes in CBT's alternative regulation plan, CUFA suggests that Caller ID be placed equally with Call Waiting as a permissible Lifeline vertical service. According to CUFA, Caller ID rivals Call Waiting in popularity among consumers. Moreover, CUFA recommends that Lifeline customers be allowed to purchase Caller ID without self-certification. CUFA explains that Caller ID has been marketed and accepted in the market as a security device. Even low-end telephone devices incorporate the Caller ID window.

(22) CBT's arguments in support of its waiver request do not convince CUFA. CUFA believes that CBT's true motivation is based upon economics, not customer choice. CUFA points out that the difference in the Federal and CBT discounts is $5.25. CBT funds $3.50 of the difference. CUFA calculates that it would cost approximately $109,469 per month or $1.313 million per year to migrate 31,277 customers. Conversely, CUFA computes that Lifeline customers would save $1.313 million on their telephone bills.

(23) On June 11, 2004, CBT filed a memorandum contra the pleadings filed by the OCC and CUFA. In response to the OCC's request for hearing, CBT contends that the OCC has failed to make a showing of extraordinary circumstances. Acknowledging that the Commission did not define extraordinary circumstances, CBT argues that the Commission did provide guidance by referring to Section 4905.381, Revised Code, which alludes to the requirement that an ILEC provide adequate service. Taking into account that elective alternative regulation proceedings are intended to avoid the protracted hearings and settlement negotiations often attendant to company-specific applications, CBT argues that the OCC must show that CBT provides inadequate service. In this vein, CBT points out that neither the OCC nor any customer has lodged a complaint against CBT for inadequate service pursuant to Section 4905.381, Revised Code. In addition, CBT claims that it has exceeded the standards of the service quality benchmark objectives of its alternative regulation plan. Moreover, CBT declares that it has exceeded its service quality benchmark objectives for each reporting period for the last six years. CBT also lauds itself for having won awards from J.D. Power and

Associates for the years 2001 and 2002, years in which CBT won the Local Residential Telephone Consumer Satisfaction Award.

(24) CBT concludes that the OCC's request for hearing on the basis of CBT's level of earnings should be rejected. According to CBT, the Commission specifically rejected earnings review in the context of alternative regulation. CBT points out that the Commission rejected similar level-of-earnings arguments posited by the OCC in Sprint's and CenturyTel's applications for alternative regulation. Consequently, CBT urges the Commission to reject the OCC's request for a hearing to investigate CBT's level of earnings. CBT asks the Commission to take into consideration that CBT's current alternative regulation plan is the result of negotiations with several parties, including the OCC. CBT reminds the Commission that OCC, by stipulation, agreed to limit its right to initiate earnings related proceedings against CBT.

Equally, CBT urges the Commission to reject the OCC's suggestion that CBT demonstrate financial need as a prerequisite to increase its Tier 2 services or its Tier 1 non-core services prior to adopting the alternative regulation plan. Citing the alternative regulation rules, CBT declares that a company's financial need to raise rates for non-basic services is irrelevant.

To CBT, it is of no import what CBT does with earnings realized from the sale of either regulated or non-regulated services. CBT reasons that the Commission must refuse the OCC's request to hold a hearing on CBT's payment of dividends to its parent company. CBT contends that it is free to pay dividends to its parent company. Only on the condition that CBT's payments were to result in an inability to meet its service obligations would regulatory interference be justified.

Taking issue with the OCC's suggestion that CBT reduce its rates as a condition precedent to the adoption of an alternative regulation plan, CBT responds that the Commission has already considered and rejected such a notion. Such a requirement is not contemplated by the Commission's rules. Moreover, the Commission reasoned that a detailed financial analysis would defeat the purpose of alternative regulation.

(25) Contrary to the recommendation of the OCC, CBT declares that it is not required to show the existence of competition or reasonably available alternatives in order to adopt alternative regulation. CBT finds no support for such a recommendation in the record of Case No. 00-1532-TP-COI. CBT reminds the Commission that it has rejected the OCC's position in previous applications for rehearing. CBT states that the Commission, in its opinion and order issued in Case No. 00-1532-TP-COI, established as a matter of record that all non-basic services for all ILECs in Ohio are subject to competition or have reasonably available alternatives. Moreover, the Ohio Supreme Court supported the Commission in this finding. Since the issue has been decided, CBT finds the OCC's argument to be without merit.

(26) CBT rejects the OCC's argument that it is required to make a company-specific showing that its application is in the public interest. Specifically, CBT rejects OCC's assertion that CBT must show that its commitments provide an incremental benefit to customers as a condition to approval of its application. Relying on the record in Case No. 00-1532-TP-COI, CBT highlights that the Commission found that alternative regulation meets the public interest criteria of Section 4927.03, Revised Code. It was the Commission's view that the capping of local exchange service rates was in the public interest because the caps would ensure reasonable rates for basic local exchange service. On the other hand, flexibility for non-basic services was deemed to be in the public interest because it would encourage ILECs toward innovative products and services. Market forces would restrict rates for non-basic services. A company's earnings, according to CBT, are immaterial to the aforementioned public interests.

CBT disagrees with OCC's argument that CBT's commitment to advanced services is of no incremental benefit if CBT already offers advanced services or if the facilities for their provision were deployed under traditional regulation. CBT states that it voluntarily deployed its facilities for advanced services while it was under alternative regulation, not traditional regulation. Moreover, CBT dismisses as irrelevant whether it currently provides advanced services. CBT avers that the Commission was aware that some ILECs were already offering advanced services when it created the advanced services commitment.

The Commission found that the advanced services commitment was in the public interest for all ILECs, including CBT. According to CBT, one reason the Commission adopted the alternative regulation rules was to avoid a company-by-company evaluation of each commitment. CBT notes that the Commission rejected a similar argument lodged by the OCC against CenturyTel's application for alternative regulation.

CBT describes as misplaced OCC's recommendation that CBT provide 30-days notice of rate increases. CBT states that it will abide by the customer notice requirements set forth in the Commission's Local Service Guidelines.

(27) Notwithstanding the objections raised by OCC and CUFA over its waiver request, CBT believes that it should be allowed to continue its Federal Plan. CBT rejects the contention that granting its waiver would make CBT's application for alternative regulation company-specific. CBT believes that it has shown good cause for waiver pursuant to Rule 4901:1-4-01(D), O.A.C. Moreover, by promoting customer choice and avoiding customer confusion, CBT believes that its waiver promotes a public interest that outweighs the objections raised by the OCC and CUFA.

In further support of its position, CBT points to a recent decision by the Federal Communications Commission (FCC). The FCC decided against adopting rules that would prohibit Lifeline customers from purchasing vertical services. The FCC reasoned that a restriction on the purchase of vertical services may discourage qualified customers from enrolling in Lifeline.

CBT believes that it has shown good cause given that it would incur a disproportionate burden if it were required to migrate customers. Other ILECs have not engaged in Lifeline outreach efforts or have not had as much success as CBT in enrolling customers into a Lifeline program like CBT's Federal Plan.

(28) The OCC filed a reply on June 17, 2004. Confronting CBT's argument that inadequate service is required for a showing of extraordinary circumstances, the OCC accuses CBT of misinterpreting the alternative regulation rule. Reviewing Rule 4901:1-4-02(D), O.A.C., the OCC does not see that extraordinary circumstances are necessarily related to service quality.

Inadequate service is merely an example of extraordinary circumstances. Relying on the affidavits filed with its request for hearing, the OCC declares that it has shown extraordinary circumstances. Refocusing on its allegation that CBT is subsidizing the non-regulated operations of its parent, the OCC points to *In the Matter of the Commission Investigation of the Financial Condition of the Dayton Power and Light Company*, Case No. 04-486-EL-COI (DP&L Investigation) as a basis for investigating CBT's financial condition.

(29) The OCC disagrees with CBT's position that there are no restrictions on what it can do with its earnings. The OCC admits that Chapter 4927, Revised Code, does not specifically bar an ILEC from conveying earnings from its regulated operations to its non-regulated operations. Nevertheless, the OCC argues that the telecommunications policy underlying Chapter 4927, Revised Code, does not countenance subsidization amounting to billions of dollars. The OCC relies on the DP&L Investigation as grounds for maintaining a separation of regulated and non-regulated operations.

(30) The OCC is not persuaded by CBT's claim that it would suffer a disproportionate burden if required to migrate Lifeline customers from the Federal Plan to its alternative regulation plan. Underlying alternative regulation, according to the OCC, is an exchange of commitments. To reap the benefits of flexible pricing an ILEC must subject itself to certain commitments. CBT, the OCC believes, is attempting to renege on one of the commitments. If CBT believes that $1.3 million is too great a cost to migrate customers, the OCC suggests that CBT file a company-specific alternative regulation plan instead of an elective alternative regulation plan.

(31) The Commission is aware that the Federal Communications Commission (FCC) has issued a recent decision that affects not only the federal default Lifeline program, but also Lifeline plans that states have adopted under their own authority to provide additional support to low-income consumers. To give the Commission an opportunity to determine what impact, if any, the FCC's decision may have on the enhanced Lifeline program required by the off-the-shelf alternative regulation plan, the Commission shall hold in abeyance its decision on whether to grant CBT a waiver to continue its Federal Plan.

(32) CBT's application for alternative regulation should be approved. Upon review of the objections raised by OCC and CBT's responses, the Commission finds that OCC has raised issues which have been decided in previous alternative regulation proceedings. The Commission's order in Case No. 00-1532-TP-COI fully addressed OCC's arguments raised in both Case No. 00-1532-TP-COI and this proceeding and there is no reason for the Commission to repeat the same analyses and conclusions set forth in that order. There is also no reason to restate and reevaluate the evidence submitted in the record in Case No. 00-1532-TP-COI for the purpose of addressing the OCC's same arguments. Accordingly, the Commission hereby incorporates into the record in this case the entire record from Case No. 00-1532-TP-COI, 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 Case No. 00-1532-TP-COI and the resulting rules adopted in Chapter 4901:1-4, O.A.C. For example, OCC wishes to conduct a hearing on CBT's level of earnings, on whether competition and reasonably available alternatives exist, and on whether CBT's alternative regulation plan is in the public interest. Based on the arguments underlying these issues, the OCC believes that it has shown extraordinary circumstances sufficient to justify a hearing.

Reiterating our finding in Case No. 00-1532-TP-COI, it should be emphasized that alternative regulation is an alternative to rate base/rate-of-return, revenue requirements regulation. In exchange for more flexible regulation, a utility must cap basic local exchange rates. By opting for alternative regulation and foregoing its opportunity to earn the authorized return on investments, the utility takes on additional risk while maintaining its obligations to the public. In Case No. 00-1532-TP-COI, we found that, under such circumstances, a company should be relieved from the filing requirements of Section 4909.18, Revised Code, and earnings review during the term of the off-the-shelf alternative regulation plan. The Commission still has the authority to investigate the reasonableness of service terms, conditions, and rates during the term of the alternative regulation plan.

Similarly, the OCC's argument that the DP&L Investigation should serve as a basis for investigating CBT lacks merit. The Commission opened an investigation of DP&L based upon concerns that the unregulated activiites of DP&L's parent could negatively affect the financial condition or service quality of DP&L. If the Commission were likewise concerned that the financial activities of CBT's parent might impair the financial condition of the company or cause an unacceptable diminution in service quality, the Commission would not hesitate to investigate CBT's activities. In this proceeding, the OCC does not allege that CBT has rendered inadequate service or is financially at risk. Furthermore, unlike DP&L, CBT is not a rate-of-return regulated company, and its customers will benefit from a cap on basic local exchange service rates during the alternative regulation plan. Thus, the Commission finds no basis for initiating a similar investigation against CBT in the context of this case.

The OCC would also have the Commission conduct a hearing to determine whether CBT's non-basic services are subject to competition or whether reasonably available alternatives exist. Again, the OCC has raised an issue that the Commission has decided. In Case No. 00-1532-TP-COI, the Commission issued record-based findings and conclusions that all non-basic services for all ILECs in Ohio are subject to competition or have reasonably available alternatives. Making such a finding, the Commission concluded that ILECs were entitled to regulatory relief under Section 4927.03, Revised Code. The Commission's findings and conclusions would apply to CBT. Therefore, the Commission must reject the OCC's basis for hearing.

Equally, the Commission must reject the OCC's desire to question whether CBT's alternative regulation plan is in the public interest. In Case No. 00-1532-TP-COI, the Commission concluded that elective alternative regulation satisfies the public interest test of Section 4927.03, Revised Code, and satisfies the state's policy goals outlined in Section 4927.02, Revised Code. Capping basic local exchange rates ensures that reasonable rates for basic local exchange service is maintained. Market forces will keep non-basic rates in check. It was also determined in Case No. 00-1532-TP-COI that elective alternative regulation will encourage companies to develop innovative products, services, and service packages.

Encouraging ILECs to innovate will, in turn, motivate competitors to innovate and diversify the offerings they provide in Ohio. Alternative regulation is consistent with the policy of the state to embrace more flexible regulatory treatment for the competitive telecommunications environment.

Rule 4901:1-4-02(D), O.A.C., states that, "absent extraordinary circumstances established through clear and convincing evidence that reasonable grounds for a hearing exist, a hearing will not be held." Upon review of the OCC's request for hearing, we find that it does not meet the test established by the rule. We must note, however, in disagreement with CBT, that "extraordinary circumstances" is not confined to inadequacy of service. With respect to CBT's application, we find that it contains all the requisite information. We further find that CBT intends to adhere to the commitments set forth in Chapter 4901:1-4, O.A.C. Accordingly, CBT's application is approved and shall be effective July 1, 2004. In light of this conclusion and approval, the OCC's motion for hearing is denied.

(33) It should be noted that CBT currently provides local exchange service outside of its territory. On November 17, 1999, in *In the Matter of the Joint Application of Cincinnati Bell Telephone Company and Cincinnati Bell Long Distance for a Waiver of Certain of the Commission's Local Service Guidelines*, Case No. 99-1496-TP-UNC, CBT and Cincinnati Bell Long Distance (CBLD) filed a joint application for a waiver to provide service beyond the ILEC territory. Specifically, CBT and CBLD sought a permanent waiver of Guideline II(A)(4) of the guidelines issued in *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI. By such waiver, CBT sought to compete as a new entrant carrier (NEC) outside of its existing local service area without creating a separate affiliate that would be subject to the Commission's affiliate transaction guidelines. CBLD sought a permanent waiver that would effectively allow it to compete as a NEC throughout Ohio, including CBT's territory.

Guideline II(A)(4) prohibited CBT or any affiliate of CBT from providing NEC or competitive local service inside of CBT's existing local service territory. CBT and CBLD are affiliated

companies. The guideline also required that CBT establish a separate affiliate to provide NEC competitive local service outside of CBT's ILEC local service territory.

After receiving comments and objections from ILECs, interexchange carriers, and the OCC, the Commission issued a finding and order on March 2, 2000, granting the waiver requested by CBT and CBLD. Instead of granting a permanent waiver, the Commission opted to grant the waiver on a trial or pilot basis, pending review of local competition guidelines in *In the Matter of the Commission Ordered Investigation of the Existing Local Exchange Competition Guidelines*, Case No. 99-998-TP-COI. To use the results of the trial in its review of local competition guidelines, the Commission ordered CBT and CBLD to submit quarterly reports. The Commission also imposed several conditions on CBT and CBLD.

Several parties filed applications for rehearing, seeking to reverse the Commission's grant of the waiver. The Commission denied the applications for rehearing in an entry on rehearing issued April 27, 2000. In its entry on rehearing, the Commission emphasized that the waivers were granted on a trial basis and are subject to review. Moreover, CBT could operate out of territory only pursuant to the protections of its existing alternative regulation plan, which gave CBT more limited pricing flexibility than that provided to NECs under the then existing Local Service Guidelines. Even granting the waiver, the Commission instructed CBT and CBLD to continue to abide by the affiliate transaction requirements set forth in *United Telephone Long Distance*, Case No. 86-2173-TP-ACE.

(34) Rule 4901:1-6-08, O.A.C., superseded Guideline II (A)(4) and now governs competitive operations of ILECs. To continue its out-of-territory local exchange service under its new alternative regulation plan, CBT must comply with Rule 4901:1-6-08, O.A.C. Among other things, CBT must establish a separate affiliate to provide services outside of its ILEC local service area. Within 90 days of this order, CBT shall make certification and tariff filings to bring it into compliance with Rule 4901:1-6-08, O.A.C., pertaining to the competitive operations of ILECs. In addition, until CBT obtains CLEC certification, CBT must also revise its out-of-territory service tariffs to comply with the same pricing rules and procedures pertaining to CBT's in-

territory operations. CBT shall file such tariff as soon as possible but no later than within 30 days of this order under a ZTA purpose code.

It is, therefore,

ORDERED, That CBT's application for alternative regulation pursuant to Chapter 4901:1-4, O.A.C., is approved. The effective date of this new alternative regulation plan is July 1, 2004. It is, further,

ORDERED, That the Commission shall hold in abeyance the objections to CBT's Lifeline waiver filed by CUFA and the OCC, as well as our decision on whether to grant CBT's request for waiver of Rule 4901:1-4-05(B), O.A.C. It is, further,

ORDERED, That the OCC's motion to intervene is granted. It is, further

ORDERED, That the OCC's and CUFA's motions for hearing are denied. It is, further,

ORDERED, That CBT file tariffs and applications consistent with Finding (34). It is, further,

ORDERED, That a copy of this finding and order be served upon all parties, their respective counsel, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

LDJ/vrm

Entered in the Journal
JUN 30 2004

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of AT&T Ohio 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. 06-1013-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. BACKGROUND

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. Among other things, Section 4927.03(A)(1), 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 competition exists and there are no barriers to entry.

On March 7, 2006, the Commission, pursuant to Case No. 05-1305-TP-ORD (05-1305), *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, established rules for the alternative regulation of basic local exchange 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 can apply for pricing flexibility of BLES and other Tier 1 services. Applications for alternative regulation of BLES and basic caller ID will be approved provided the applicant satisfies one of the competitive market tests identified in Rule 4901-1-4-10, Ohio Administrative Code (O.A.C.). Pursuant to Rule 4901:1-4-09(G), O.A.C., an ILEC's application for BLES alternative regulation will become effective on the one hundred and twenty-first day after the filing of the application unless the application is suspended by the Commission. Pursuant to the Attorney Examiner Entry of December 4, 2006, this matter was suspended until December 29, 2006.

On August 11, 2006, as amended on September 8 and 13, 2006, AT&T Ohio filed an application for approval of an alternative form of regulation of BLES and other Tier 1 service. The company represents that it published legal notice in each of the counties corre-

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sponding to the 145 exchanges covered under its application. The following entities have been granted intervention in this proceeding:

Office of the Ohio Consumer's Counsel (OCC)
Appalachian People's Action Coalition (APAC)
City of Cleveland (Cleveland)
Northwest Ohio Aggregation Coalition (NOAC)
Edgemont Neighborhood Coalition (Edgemont)

Consistent with Rule 4901:1-6-09(F), O.A.C., any party who can show why such an application should not be granted must file a written statement detailing the reasons within forty-five calendar days after the application is docketed. Pursuant to the attorney examiner's Entry of September 21, 2006, the deadline for the filing of oppositions to AT&T Ohio's application was extended to October 16, 2006. AT&T Ohio's memorandum contra oppositions were to be filed within ten days of an opposition and any objecting party could file a reply within five days of AT&T Ohio's memorandum contra.

On October 16, 2006, an opposition to AT&T Ohio's application was jointly filed by OCC, Edgemont, APAC, Cleveland, the cities of Toledo, Holland, Maumee, Northwood, Sylvania, and Lucas County (collectively, Consumer Groups). On October 26, 2006, AT&T Ohio filed a Memorandum Contra Consumer Groups' Opposition. On October 31, 2006, Consumer Groups filed a reply to AT&T Ohio's Memorandum Contra.

II. SUMMARY OF THE APPLICATION

AT&T Ohio states that it fully complies with the elective alternative regulation commitments set forth in Rule 4901:1-4-06, O.A.C., consistent with the company's approved existing alternative regulation plan pursuant to Case No. 02-3069-TP-ALT, *In the Matter of the Application of Ameritech for Approval of an Alternative Form of Regulation* (Application at 1).

In its application, AT&T Ohio identifies 145 exchanges throughout 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. For 26 of the identified exchanges, AT&T Ohio relies on the competitive test set forth in Rule 4901:1-4-10(C)(3), O.A.C (Test 3). For 119 of the identified exchanges, AT&T Ohio relies on the competitive test set forth in Rule 4901:1-4-10(C)(4), O.A.C. (Test 4).

As part of its application, AT&T Ohio filed proposed tariff amendments for the purpose of identifying those exchanges included as part of its application. 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.

AT&T Ohio represents that in collecting information on competitive local exchange company (CLEC) and 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 at 3). To confirm the information available from publicly available sources, AT&T Ohio states that it reviewed internal data from billing and E9-1-1 records, white pages listings, and ported telephone number information (*Id.* at 4). AT&T Ohio states that in some cases it has identified more competitors than the minimum required by the Commission rules.

Specific to Test 4, AT&T Ohio explains that it examined its own line loss since 2002, relying on the annual report information for that year and performing a comparison on an exchange-specific basis to comparable data for June 30, 2006 (*Id.* at 3).

A. Test 3

Pursuant to Rule 4901:1-4-10(C)(3), O.A.C., this test requires the applicant to demonstrate in each requested telephone exchange area: (1) that at least fifteen percent of the total residential access lines are provided by unaffiliated CLECs; (2) the presence of at least 2 unaffiliated facilities-based CLECs providing BLES to residential customers; and (3) the presence of at least five alternative providers serving the residential market.

A CLEC is defined as any facilities-based and nonfacilities-based local exchange carrier that was not an ILEC on the date of the enactment of the Telecommunications Act of 1996 (1996 Act) or is not an entity that, on or after such date of enactment, became a successor, assign, or affiliate of an ILEC. Alternative providers are defined as providers of competing services to BLES offerings regardless of the technology and facilities used in the delivery of the services (wireline, wireless, cable, broadband, etc.).

AT&T Ohio represents that the following exchanges satisfy the criteria of Test 3:

Beallsville	Belfast	Bethesda
Canal Winchester	Conesville	Danville
Glenford	Graysville	Groveport
Guyan	Leetonia	Lewisville
Marshall	Murray City	New Albany
Newcomerstown	Rainsboro	Rio Grande
Salineville	Shawnee	Somerset
Somerton	Vinton	Walnut
Wellsville	Winchester	

B. Test 4

Pursuant to Rule 4901:1-4-10(C)(4), O.A.C., this test 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, based on data for 2002; and demonstrate the presence of at least five unaffiliated facilities-based alternative providers serving the residential market. AT&T Ohio represents that the following exchanges satisfy the criteria of Test 4:

Akron	Alliance	Alton
Atwater	Barnesville	Beavercreek
Bellaire	Bellbrook	Belpre
Berea	Bloomingville	Burton
Canal Fulton	Canfield	Canton
Carroll	Castalia	Cedarville
Centerville	Chesire	Chesterland
Cleveland	Columbus	Coshocton
Dalton	Dayton	Donnelsville
Dublin	East Palestine	Enon
Fairborn	Findlay	Fletcher-Lena
Fostoria	Franklin	Fremont
Gahanna	Gates Mills	Girard
Greensberg	Grove City	Hartville
Hilliard	Hillsboro	Holland
Hubbard	Ironton	Jamestown
Jeffersonville	Kent	Kirtland
Lancaster	Lindsey	Lisbon
Lockbourne	London	Louisville
Lowellville	Magnolia-Waynesburg	Manchester
Marietta	Marlboro	Martins Ferry-Bridgeport
Massillon	Maumee	Medway
Mentor	Miamisburg-West Carrollton	Middletown
Milledgeville	Mingo Junction	Mogadore
Monroe	Montrose	Navarre
Nelsonville	New Carlisle	New Lexington
New Waterford	Niles	North Canton
North Hampton	North Lima	North Royalton
Perrysburg	Piqua	Ravenna
Reynoldsburg	Ripley	Rogers
Rootstown	Salem	Sandusky
Sebring	Sharon	South Charleston
South Vienna	Spring Valley	Springfield
Steubenville	Strongsville	Terrace

Thornville	Tiffin	Toledo
Toronto	Trenton	Trinity
Uniontown	Upper Sandusky	Vandalia
West Jefferson	Westerville	Wickliffe
Worthington	Xenia	Yellow Springs-Clifton
Youngstown	Zanesville	

III. SUMMARY OF CONSUMER GROUPS' OPPOSITION AND AT&T OHIO'S RESPONSE TO THE FILED CONSUMER GROUPS' OPPOSITION

A. Generic Issues Regarding BLES Alternative Regulation Rules

1. General Discussion

Consumer Groups' Position

While recognizing that they reiterate arguments previously raised in 05-1305, Consumer Groups aver that a party must address a rulemaking in the particular case in which the rules are applied. Consumer Groups observe that, although the arguments now being raised are consistent with the arguments made in 05-1305, the positions that they are now taking are based on the real-world situation presented by AT&T Ohio's application.

Consumer Groups assert that as a result of the Commission's BLES alternative regulation rules and the alleged inherent flaws contained within such rules (as described in more detail in the subsections below), to the extent that AT&T Ohio's application is granted, some AT&T Ohio customers will experience BLES rate increases while not having alternatives to AT&T Ohio's BLES.

AT&T Ohio's Position

AT&T Ohio considers the arguments raised by Consumer Groups to be nothing more than an effort to undo the intent of the General Assembly's H.B. 218 and the Commission's efforts to implement the legislation (AT&T Ohio's Memorandum Contra at 3). In particular, AT&T Ohio submits that Consumer Groups' narrow view of BLES and their extreme interpretations of H.B. 218 and the Commission's rules would frustrate the goals of the General Assembly and the Commission in reforming the regulation of BLES to meet drastically changed market conditions. AT&T Ohio views Consumer Groups' arguments to be merely a rehashing of issues that were already considered and rejected in 05-1305 (*Id.* at 5).

Commission Conclusion

The Commission recognizes that Consumer Groups are raising many of the same arguments to challenge AT&T Ohio's application in this case as were raised by Consumer

Groups in challenging the rules approved in 05-1305. While we will again address some of these issues in the following sections, we believe that the Commission's order in 05-1305 fully addresses the arguments being reiterated in this proceeding and, therefore, there is no reason for the Commission to fully repeat the same analysis and conclusions set forth in those orders. Likewise, there is no reason to discuss and reevaluate the evidence submitted on the record in 05-1305 for the purpose of addressing Consumer Groups' same arguments raised here.

Accordingly, the Commission hereby incorporates into the record in this case the entire record from 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. Therefore, the record from that case should be considered as part of the record in this case and the Commission reiterates its prior determination that the record in 05-1305 supports its prior orders in that proceeding and the resulting rules adopted in Chapter 4901:1-4, O.A.C.

2. Barriers to entry

Consumer Groups' Position

Consumer Groups assert that the Commission's rationale for adopting Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., does not comply with the Section 4927.03(A)(3), Revised Code, provision that there be no barriers to entry for stand-alone BLES. Consumer Groups contend that, consistent with Section 4927.03(A)(3), Revised Code, the presence of competition does not obviate the Commission's consideration of the issue of entry barriers (Consumer Groups' Opposition at 16, 17; Roycroft Affidavit at ¶¶37-44). Additionally, Consumer Groups aver that the presence of an arbitrary number of alternative providers in an exchange does not equate to the absence of entry barriers to providing stand-alone residential BLES in the exchange (Consumer Groups' Opposition at 8; Consumer Groups' Reply at 8). Similarly, Consumer Groups opine that simply because one or more CLECs serve an arbitrary percentage of residential access lines in an exchange does not signify that there are no barriers to entry to providing residential stand-alone BLES in that exchange.

Consumer Groups believe that the Commission's interpretation regarding the significance of the reference to barriers to entry in Section 4927.03(A)(3), Revised Code, is too narrow in scope (Consumer Groups' Opposition at 13). Consumer Groups submit that a barriers to entry analysis should include all aspects of entry, including technical, economic, and geographic (Consumer Groups' Reply at 21, 22). Consumer Groups advocate that the Commission should rely more on market forces, where they are present and capable of supporting a healthy and sustainable competitive telecommunications market, rather than the competitive market tests found in Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C. (Consumer Groups' Opposition at 18, 41, 42; Williams Affidavit at ¶¶ 43, 68).

AT&T Ohio's Position

Relative to the Consumer Group's contention that AT&T Ohio is required to establish that there are no barriers to entry for carriers to provide stand-alone BLES in the selected exchanges, AT&T Ohio first asserts that the competitive tests established by the Commission have already been scrutinized by the legislative rule review process. To the extent that one of the tests is satisfied, AT&T Ohio submits that such a showing demonstrates compliance with the underlying statutory provisions. Therefore, AT&T Ohio insists that it is not necessary for it to have to demonstrate compliance with each aspect of the statutory criteria (AT&T Ohio Memorandum Contra at 6). Specific to the arguments presented by Consumer Groups related to barriers to entry, AT&T Ohio claims that the Commission, in 05-1305, already considered and rejected the arguments raised by the Consumer Groups (*Id.* at 13-15 citing to 05-1305, Entry on Rehearing at 17-19). While acknowledging that there is no independent requirement in the BLES alternative regulation rules that an applicant establish that there are "no barriers to entry," AT&T Ohio posits that the Commission has determined that the presence of multiple competitors in a market is sufficient evidence that there are no such barriers (*Id.* at 16).

As support for its contention that there are no barriers to entry, AT&T Ohio focuses on the fact that, in the context of its application for relief pursuant to Section 271 of the Telecommunications Act of 1996 (1996 Act), the Commission and the Federal Communications Commission (FCC) both found that there were no barriers to entry in AT&T Ohio's local exchanges (*Id.* at 19 citing to *In the Matter of the Investigation Into SBC Ohio's Entry Into In-Region InterLATA Services Under Section 271 of the Telecommunications Act of 1996*, Case No. 00-942-TP-COI, Order, June 26, 2003, p. 6; *In the Matter of the Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167, Memorandum Opinion and Order, FCC 03-243, rel. October 15, 2003). As further support for its contention that there are no barriers to entry, AT&T Ohio believes that the FCC, in its *Triennial Review Remand Order*, determined that there are no barriers to entry for BLES (*Id.* at 21 citing to *In the Matter of Unbundled Access to Network Elements*, Order on Remand, FCC 04-290, rel. February 4, 2005, ¶204).

Commission Conclusion

As discussed above, Consumer Groups reiterate their prior contentions from 05-1305, that, consistent with Section 4927.03(A)(3), Revised Code, the presence of competition does not obviate the Commission's consideration of the issue of barriers to entry. In raising this argument, Consumer Groups' focus is generic in nature and fails to specifically focus on any of the exchanges identified by AT&T Ohio in this proceeding. Therefore, Consumer Groups' argument relative to this issue should be denied inasmuch as Consumer Groups have failed to raise any new arguments from those previously considered and rejected in

05-1305 relative to the issue of barriers to entry. Further, the Commission does not find evidence in the record of any barriers to entry present in any of the exchanges in which the Commission grants AT&T Ohio's application as delineated in Attachments A and B of this opinion and order.

As stated above, Consumer Groups assert that, rather than focusing on the presence or absence of competitors, a barrier to entry analysis should include all aspects of entry barriers including technical, economic, and geographic factors. In rejecting Consumer Groups' arguments pertaining to this issue, the Commission believes that its BLES alternative regulation rules already address the element of barriers to entry consistent with the Section 4927.03(A)(3), Revised Code. The Commission also recognized that:

> All 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 could avail themselves of the BLES alternative regulation benefits contemplated by H.B. 218. Additionally, 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 the implementation of this authority was left to the Commission.

With respect to Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., the Commission disagrees with Consumer Groups' contention that the Commission's rules fail to properly address the absence of barriers to entry. Relative to Rule 4901:1-4-10(C)(3), O.A.C., the Commission finds significance in the required demonstration that: (1) at least 15 percent of the total number of residential access lines in an exchange must be provided by unaffiliated CLECs; (2) there are two unaffiliated facilities-based CLECs providing BLES to residential customers; and (3) there are at least five alternative providers serving the residential market. The Commission notes that all of the barriers to entry factors outlined by Consumer Groups in this case are identical to those raised in 05-1305. These factors were fully considered in that

case. Specifically, the Commission stated that "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).

Similarly, with respect to Rule 4901:1-4-10(C)(4), O.A.C., the Commission finds significance in the required threshold loss of at least 15 percent of the total residential access lines tied with the presence of at least five unaffiliated facilities-based alternative providers serving the residential customers in the relevant market. Satisfying the criteria outlined in Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., allows for the conclusion that 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 such offerings as a reasonably available substitute offering that competes with the ILEC's BLES. The required presence of unaffiliated facilities-based 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.

3. Functionally Equivalent or Substitute Services

Consumer Groups' Position

Consumer Groups contend that the Commission's rationale for adoption of Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., does not comply with the specific provisions of Section 4927.03(A)(1)(a) and (b), Revised Code, which require a finding that either the telephone company is subject to competition with respect to stand-alone BLES or that AT&T Ohio's BLES customers have reasonably available alternatives. Consumer Groups believe that AT&T Ohio's application fails to establish the ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions in accordance with Section 4927.03(A)(2)(c), Revised Code. Specifically, Consumer Groups opine that the requisite showing in this proceeding should be a comparison of alternative providers' stand-alone BLES offerings to AT&T Ohio's stand-alone BLES in order to ensure that functionally equivalent or substitute services are readily available at competitive rates, terms, and conditions (Consumer Groups' Opposition at 14, 15).

Consumer Groups submit that if functionally equivalent or substitute services are not readily available at competitive rates, terms, and conditions, then consumers will not be able to make choices in the marketplace which are capable of constraining AT&T Ohio's market power (Roycroft Affidavit at ¶101). Consumer Groups contend that if the rates, terms, and conditions associated with the alternative providers' services differ significantly from those of BLES, then the alternative providers should not be relied upon for the purpose of satisfying Rule 4901:1-4-10(C), O.A.C. (Consumer Groups' Opposition at 35; Roycroft Affidavit at ¶25).

In order for services to be considered functionally equivalent, Consumer Groups argue that the services should be substitutable for a wide section of the residential population (Consumer Groups' Opposition at 26; Roycroft Affidavit at ¶18). While Consumer Groups do not believe that there has to be the existence of the "perfect substitute" in order to warrant the granting of BLES alternative regulation, they do believe that the services should be similarly priced to AT&T Ohio's stand-alone BLES and have terms and conditions similar to the company's BLES, including the ubiquitous availability of service across the exchange (Consumer Groups' Reply at 16, 17).

Specific to wireless service being a reasonable substitute to BLES, Consumer Groups posit that, while a small number of subscribers have "cut the cord and gone wireless," it does not follow that wireless telephony is a readily available functional equivalent to, or a substitute for BLES (Consumer Groups' Opposition at 35; Roycroft Affidavit at ¶22). Consumer Groups distinguish wireless from BLES providers for numerous reasons, including the fact that wireless providers do not offer a functional substitute to dial tone service quality, E9-1-1, a directory listing, or a reasonable means for Internet access. Additionally, Consumer Groups aver that wireless service would require multiple wireless telephones to replace a wireline phone for a family (Consumer Groups' Opposition at 36, 37; Roycroft Affidavit ¶¶57-59, 60, 63-65, 67-70; Consumer Groups' Reply at 17, 18).

Consumer Groups also distinguish AT&T Ohio's BLES service from wireless alternative service by pointing out that wireless service is not available at rates, terms, and conditions that are comparable to AT&T Ohio's BLES rate (Consumer Groups' Opposition at 38-41; Roycroft Affidavit at ¶¶ 77-80. 100; Consumer Groups' Reply at 17-19). Additionally, to the extent that AT&T Ohio has presented data regarding the porting of wireline numbers to wireless carriers, Consumer Groups argue that the low levels of telephone number porting from wireline to wireless carriers support their contention that wireless carriers should not be considered as an alternative provider to BLES (Consumer Groups' Opposition at 38; Roycroft Affidavit at ¶117). Consumer Groups also contend that AT&T Ohio has not established that consumers can receive the identified wireless services in their homes or whether the wireless carriers' services are available throughout the exchanges identified in AT&T Ohio's application (Consumer Groups' Opposition at 41-45).

Consumer Groups dismiss voice over Internet protocol (VoIP) as an alternative for BLES due to the added expense for obtaining a broadband connection, concerns regarding the availability of VoIP during power outages, and concerns regarding the availability of 9-1-1 service (Consumer Groups' Reply at 18; Williams Affidavit at ¶67).

Consumer Groups also dispute AT&T Ohio's inclusion of companies offering service bundles, which include BLES, as an alternative to BLES. In support of their argument, Consumer Groups argue that inasmuch as the Commission, in Case No. 00-1532-TP-COI, *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies,* previously granted alternative regulation to bun-

dles containing BLES, the Commission's BLES alternative regulation rules should be limited to consideration and alternatives for stand-alone BLES (Consumer Groups' Opposition at 15, Consumer Groups' Reply at 4, 5). In support of their position, Consumer Groups argue that BLES-only service does not compete with the alternative providers' bundled service offerings because they are neither functionally equivalent nor substitutes for such service (Williams Affidavit at ¶67). Consumer Groups also raise the issue that local/long distance bundles cost considerably more than the stand-alone BLES rate (Consumer Groups' Reply at 19). Consumer Groups believe that if a competitor does not offer a service equivalent in scope to AT&T Ohio's BLES at a price that is competitive with BLES, then AT&T Ohio has no reason to need pricing flexibility for stand-alone BLES (*Id.* at 5).

AT&T Ohio's Position

In response to Consumer Groups' contentions regarding "functionally equivalent or substitute services" for BLES, AT&T Ohio points out that the Commission has previously rejected such arguments in 05-1305. Specific to the arguments raised by Consumer Groups, AT&T Ohio reiterates its contention that services do not have to be perfect substitutes in order for competition to flourish (AT&T Ohio's Memorandum Contra at 4 citing AT&T Ohio's Reply Comments in 05-1305, December 22, 2005, at 7). AT&T Ohio highlights the fact that the Commission agreed with its position and found that:

> Although the products offered by those alternative providers may not be exactly the same as the ILECs' BLES offerings, those customers view them as substitutes for the ILECs' BLES. Thus, the alternative providers compete against the ILECs' provision of BLES.

(*Id.* at 5 citing 05-1305, Opinion and Order, March 7, 2006, at 25).

In regard to Consumer Groups' contention that stand-alone BLES is the only appropriate comparison for the purpose of obtaining relief pursuant to H.B. 218, AT&T Ohio calls attention to the fact that H.B. 218 neither defines stand-alone BLES nor requires that stand-alone BLES be offered by any carrier. Rather, AT&T Ohio points out that the statute simply requires that the commission consider "the ability of alternative providers to make functionally equivalent or substitute services available at competitive rates, terms, and conditions [*Id.* at 9 citing Section 4927.03(A)(2)]. AT&T Ohio identifies the fact that, while the statute allows for alternative regulation of BLES based on the demonstration of functionally equivalent or substitute services, only ILECs are required to provide stand-alone BLES. Further, AT&T Ohio notes that, although few CLECs or intermodal carriers provide stand-alone BLES, their BLES offerings are purchased in lieu of and compete with, the ILECs' BLES offerings. Therefore, AT&T Ohio submits that to adopt Consumer Groups' narrow interpretation would be contrary to the legislative intent. AT&T Ohio submits that the services offered by CLECs and the various alternative providers are functionally equivalent to and a substitute for BLES (*Id.* at 10).

In response to Consumer Groups' stated concern that the Commission should consider the number of stand-alone customers for the purpose of assessing the impact of BLES alternative regulation in the context of an individual application, AT&T Ohio responds that the only relevant issue is whether an applicant has satisfied one of the competitive market tests (*Id.* at 11). While Consumer Groups advocate that resellers should be excluded from a Test 3 (Rule 4901:10-4-10(C)(3), O.A.C.) analysis, AT&T Ohio recognizes that the term "alternative provider" (Rule 4901:1-4-01(B), O.A.C.) includes resellers (*Id.*).

Commission Conclusion

We first address Consumer Groups' argument that AT&T Ohio has failed to meet its burden of proof required by Section 4927.03, Revised Code, due to the fact that, 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 Consumer Groups have reiterated the same arguments that they previously raised and the Commission considered in 05-1305 relative to this issue. Consistent with our prior determinations in 05-1305, the Commission finds that Consumer Groups' argument with respect to this contention should be denied. Specifically, the Commission previously found that:

> The law does not restrict the "analysis of competition" and "reasonably available alternatives" to competitive products that are exactly like BLES. Indeed, the law provides that the Commission consider the ability of providers to make functionally equivalent or 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 service offering view such bundled service offering as a reasonable alternative service, and a substitute to the ILECs' BLES. Additionally, customers who subscribe to these bundled offerings are by definition BLES customers.

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

Further, we have already concluded that:

> More customers are substituting their traditional BLES with competitive service offered by alternative 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 ILECs' BLES offerings, those customers view them as substitutes for the ILECs' BLES.

. . .

> Accordingly, we find that, with technology advancements, alternative providers such as wireline CLECs, wireless, VoIP, and cable telephony providers are relevant to our consideration in determining whether an ILEC is subject to competition or customers have reasonably available alternatives to the ILECs' BLES offering at competitive rates, terms, and conditions.

(*Id.*).

Based on the record, we find that the substitution by end users of AT&T Ohio's BLES with wireless, VoIP, cable and CLEC wireline services demonstrates that these providers customize their service offerings in order to be able to meet different customers' needs and lifestyles. As a result, these service offerings are viewed by consumers as substitutes for BLES (AT&T Ohio Application, Ex. 3; AT&T Ohio Supplement to Application; AT&T Ohio's Memorandum Contra, Attachments 3 through 5). Although not each of the substitute services for BLES will meet the needs of AT&T Ohio's BLES customer base, this does not negate the consideration of a particular service as being a reasonable alternative to BLES. Each technology platform has its own unique characteristics that competitive providers utilize for the purpose of customizing their service offerings in order to be considered as an alternative to BLES. Customers subscribing to services offered by various alternative providers, and not subscribing to AT&T Ohio's BLES, demonstrate that end users perceive the alternative providers' services to be a reasonable alternative and substitute for the ILECs' BLES offerings when considering factors such as service quality, rates, terms, and conditions. Otherwise it is reasonable to conclude that they would not have switched from AT&T Ohio's BLES.

Consistent with this determination, we reject the Consumer Groups' argument that wireless providers should not be considered as alternative providers for BLES based on the contention that only a small subset of the population actually replaces their BLES service with wireless providers. The Commission recognizes that a specific segment of the population does select wireless service in lieu of BLES and, therefore, such service should be included amongst the acceptable alternatives for BLES. The Commission notes that this point was not disputed by Consumer Groups (Roycroft Affidavit at 12, 43). We find that the record in this instant proceeding demonstrates that customers in the exchanges listed in Attachments A and B substitute their AT&T Ohio service with various services offered by the wireless providers identified in the relevant exchanges (AT&T Ohio Application, Ex. 3, AT&T Ohio Supplement to Application, AT&T Ohio's Memorandum Contra at Attachments 1-6).

In reaching the aforementioned decision, the Commission rejects Consumer Groups' position that in order to justify the granting of BLES alternative regulation, the functionally equivalent services must be similarly priced to AT&T Ohio's stand-alone BLES and have terms and conditions similar to AT&T Ohio's BLES, including the ubiquitous availability of service across the exchange. Although alternative services may not be offered pursuant to identical terms and conditions as AT&T Ohio's BLES, Section 4927.03(A)(2)(c), Revised Code, requires only that the functionally equivalent or substitute services be readily available at competitive rates, terms, and conditions. Consistent with the criteria set forth in Rule 4901:1-4-10, O.A.C., to the extent that AT&T Ohio 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.

4. Market Share

Consumer Groups' Position

Consumer Groups assert that "a carrier providing service to only a handful of customers does not have a presence in the market sufficient to conclude that the carrier would be capable of disciplining the ILEC's BLES prices if alternative regulation is granted (Consumer Groups' Opposition at 28; Williams Affidavit at ¶92). Consumer Groups assert that to the extent that alternative providers have customers, but are not active market participants, they should be excluded from a competitive market test since they are not making functionally equivalent or substitute services to the ILEC's BLES readily available at competitive rates, terms, and conditions (Consumer Groups' Opposition at 28; Williams Affidavit at ¶75; Consumer Groups' Reply at 14). Consumer Groups further elaborate this point by stating that consumers cannot consider a particular provider as an option if the company has ceased marketing the service. Consumer Groups aver that many of the providers identified by AT&T Ohio do not have the provision of stand-alone BLES in their business plans and do not market the availability of the service (*Id.* at 15, 16).

AT&T Ohio's Position

In response to Consumer Groups' assertion that, in order for an alternative provider to have a presence, it must be serving a minimum number of the customers and must be actively marketing in the specific exchange, AT&T Ohio simply focuses on whether an alternative provider is actually providing service in the exchange. The company rejects any belief that each and every residential customer within a given exchange must have five alternative providers available to them in order to satisfy the competitive market tests (*Id.* at 12). Notwithstanding its position on this issue, AT&T Ohio notes that resellers and all collocated CLECs have access to each residential subscriber in an exchange and that VoIP and wireless carriers are not constrained by exchange boundaries.

Commission Conclusion

The Commission rejects Consumer Groups' contention that an alternative provider must be serving a minimum number of customers in an exchange in order to be considered for the purpose of a competitive market test. In establishing the specific criteria for the competitive market tests in 05-1305, the Commission properly considered all relevant factors and attempted to establish a balanced approach for determining if the statutory intent of Section 4927.03, Revised Code, has been satisfied.

The Commission also rejects the Consumer Groups' requirement that AT&T Ohio verify that an identified alternative provider makes the service available to the entirety of a market in order to demonstrate that the alternative provider's service offering is available within the relevant market. We find that such requirement would be extremely difficult to enforce inasmuch as the relevant information is available only to the alternative provider, and not the ILEC. The fact that an alternative provider may not be directly marketing its service is not relevant to the Commission's evaluation. Rather, the important factor for consideration is whether the alternative provider's service is available to residential customers pursuant to its tariff and whether it is currently serving residential customers.

As discussed above, Consumer Groups assert that the Commission should rely on market forces and consider as part of the competitive market tests the size of alternative providers, their market shares, and their longevity in market. First, the Commission points out that, pursuant to Section 4927.03(A)(2)(d), Revised Code, consideration of criteria such as market share is permissive, but is not mandatory. Additionally, the Commission agrees with AT&T Ohio's contentions that an ILEC is not always able to identify where the lost lines have migrated and that an ILEC does not have access to other competitors' market data in order to calculate the competitor's market share. The Commission recognizes that an access line can be lost to an unregulated competitor (such as a VoIP provider), lost to an affiliated or unaffiliated wireless provider, disconnected due to a move, converted to digital subscriber loop (DSL) provided by an ILEC affiliate or an unaffiliated provider, or converted to cable modem service provided by an unregulated entity. The only scenarios under which an ILEC would be able to identify where the lost residential access line migrated is when it is transferred to a CLEC that either utilizes the ILECs unbundled network element (UNE) or when it ports the telephone number associated with the lost residential access line.

As a result of this identified difficulty, the Commission requires a demonstration of a competitor's market share as a measure of market power only with respect to Test 3. The Commission also finds that a market share criteria would not be appropriate in those exchanges/markets where competitors have elected different technologies for their market entry strategies. Therefore, the percentage of residential access lines lost incorporated as a requirement in Rule 4901:1-4-10(C)(1) and (C)(4), O.A.C., is a more reasonable method of assessing market power and the level of competition that an ILEC faces in a given exchange

when the main competitors are not CLECs. This is due to the fact that the ILEC does not have to rely on customer-specific migration information under these tests.

B. Actual Competitive Market Test Analysis

1. Test 4

a. Access Line Loss

Consumer Groups' Position

Specific to Rule 4901:1-4-10(C)(4), O.A.C., Consumer Groups focus on the requirement that an applicant must demonstrate that for each requested telephone exchange, there has been a loss of more than fifteen percent of the residential access lines. Consumer Groups question the significance of the fifteen percent threshold. Consumer Groups believe that the criteria such as size of the alternative providers, market shares and longevity provide a better measure of whether a provider can truly exert competitive pressure on the ILEC's service offering. Consumer Groups believe that such factors assist in determining the carrier's presence in an exchange and its ability to serve customers throughout the exchange (Consumer Groups' Opposition at 18, 41, 42; Williams Affidavit at ¶¶43, 68).

Consumer Groups also assert that this prong of the test does not satisfy Section 4927.03(A)(1), Revised Code, because AT&T Ohio has not demonstrated that stand-alone BLES lines were lost to unaffiliated providers of BLES as a result of competitive reasons (Consumer Groups' Opposition at 14, 17; Consumer Groups' Reply at 27, 28). Instead, Consumer Groups submit that AT&T Ohio's data includes customers who have switched second lines to AT&T Ohio's DSL service, customers that migrated to AT&T Ohio's own wireless affiliate, as well as customers who have moved from AT&T Ohio's service territory (Consumer Groups' Opposition at 15, 17, 23). Consumer Groups also attribute some of the alleged loss of access lines to the decline in population and income in certain portions of AT&T Ohio's service territory (*Id.* at 23, 24). Consumer Groups consider these reasons to have nothing to do with the issue of competitive entry for BLES (*Id.* at 17, 23, 24; Roycroft Affidavit at ¶34 ; Williams Affidavit at ¶148). Rather than focusing on lost access lines in the aggregate, Consumer Groups opine that, in order to truly comply with Section 4927.03, Revised Code, the Commission should have adopted a competitive market test that was limited to only those access lines lost to stand-alone BLES competition (Consumer Groups' Opposition at 1-6, 15).

AT&T Ohio's Position

In response to Consumer Groups' claim that the competitive market test set forth in the Rule 4901:1-4-10(C)(4), O.A.C., does not satisfy the statutory criteria for the purpose of granting alternative regulation. AT&T Ohio opines that, consistent with Rule 4901:1-4-

10(C), O.A.C., the satisfaction of the competitive market tests properly demonstrates compliance with the statutory criteria. In support of its contention, AT&T Ohio states that its application depicts the following:

(1) Many CLECs have approved interconnection agreements with AT&T Ohio,

(2) Many CLECs have Commission approved tariffs for BLES,

(3) Many CLECs are serving residential customers with their own facilities or via resale,

(4) Many customers have ported their numbers to CLECs, wireless, or VoIP providers.

(5) The number of AT&T Ohio residential access lines have significantly decreased while the alternative provider residential market share has increased.

In response to Consumer Groups' assertion that AT&T Ohio's application reflects obfuscation and intentional vagueness, the applicant states that it filed an extensive application, supplemented it with additional information, responded to two Commission staff data requests and numerous discovery requests. AT&T Ohio considers Consumer Groups' dissatisfaction to be more related to their unhappiness with what the application demonstrates rather than with the level of detail of information provided in this case (AT&T Ohio Memorandum Contra at 17).

Commission Conclusion

As noted above, Consumer Groups argue that the Commission's adopted competitive market test in Rule 4901:1-4-10(C)(4), O.A.C., does not comport with Section 4927.03(A)(2), Revised Code, as the residential access line loss criteria under that test can result from a wide variety of factors; some of which have nothing to do with the statutory criteria set forth in Section 4927.03(A), Revised Code. These include: customers switching to DSL or cable modem and disconnecting the second line; customers switching to AT&T Ohio's wireless affiliate service; or decline in a number of households in the market test area.

First, the Commission notes that this same argument was raised by Consumer Groups in the rehearing phase of the 05-1305 rulemaking proceeding. The Commission was mindful of the concerns now raised again by Consumer Groups and fully considered them in adopting the requirements of Rule 4901:1-4-10(C)(4), O.A.C.

Specifically, the Commission purposely established the 15 percent residential access line loss criteria in conjunction with the year 2002 residential access line count of the ILEC. The Commission utilized this time frame as the starting point of the calculation in order to exclude the data distortion concerns expressed by Consumer Groups (05-1305, Entry on Rehearing at 13, 14). The Commission also finds that the record in this case is void of any data to support the allegation that all disconnected residential second lines were being used for Internet access and not for voice communications. We further point out that witness William's generic analysis of the overall increase in DSL connections in the state of Ohio between 2002 and 2005 (Williams Affidavit at ¶142), is not dispositive of the evaluation of AT&T Ohio's application for BLES alternative regulation specific to the individual exchanges identified by AT&T Ohio in its application in this proceeding.

While Consumer Groups argue that the Commission erred by selecting the year 2002 as the starting point for measuring the residential access line loss for an ILEC under Rule 4901:1-4-10(C)(4), O.A.C., the Commission believes that the data contained in Table 1 of witness Roycroft's filed affidavit supports the Commission's adoption of 2002 as the starting point for measuring the residential access line loss for an ILEC in Test 4. Specifically, Table 1 demonstrates that between the years 2002-2005, on a statewide-basis there was a:

(1) Significant decline in the number of ILECs' switched access lines.

(2) Significant increase in the number of CLECs' switched access lines.

(3) Significant decline in the growth rates of DSL line in Ohio.

(Roycroft Affidavit at Table 1, Rows 1, 2, and 5).

As discussed above, Consumer Groups also argue that the competitive market test in Rule 4901:1-4-10(C)(4), O.A.C., does not account for the possibility that there are a declining number of households in the identified AT&T Ohio exchanges and that this reduction may be distorting AT&T Ohio's analysis of the competitive market test. In dismissing this argument, the Commission highlights the fact that Consumer Groups have failed to recognize that the Commission's requirement of at least a 15 percent total residential access line loss in an exchange fully captures the impact of families moving out of a specific exchange as well as families moving into that exchange.

With respect to Consumer Groups' argument that lines lost to AT&T Ohio's wireless affiliate should be excluded for the purposes of the 15 percent line loss calculation, the Commission notes that, while the Commission did not specifically require a demonstration that the access lines were lost to a particular provider, the rule recognizes the importance of unaffiliated alternative providers by requiring the presence of at least five unaffiliated facilities-based alternative providers serving the residential market. The Commission emphasizes that, in developing the competitive market tests in Rule 4901:1-4-10, O.A.C., we

considered the statutory factors outlined in Section 4927.03(A)(2) and(A)(3), Revised Code, and all of the arguments and concerns raised in the rulemaking proceeding and raised here again. The goal of the Commission is to have administratively practicable tests using the most objective criteria to comply with the statute. The Commission exercised its expertise and judgment based on the information on the record in 05-1305 and considered all possible causes for access line loss. In doing so, the Commission determined that for Rule 4901:1-4-10(C)(4), O.A.C., a minimum of 15 percent residential access line loss in a given exchange is appropriate, provided that it is accompanied with the presence of at least five unaffiliated facilities-based alternative providers serving residential market in that exchange. Accordingly, the Commission finds that the arguments and data presented by Consumer Groups fail to demonstrate that the Test 4 requirement of a minimum of 15 percent of total residential access line loss since year 2002, in a given exchange does not satisfy the statutory criteria of Section 4927.03, Revised Code.

Based on the data presented by AT&T Ohio (Application, Ex. 3; AT&T Ohio Memorandum Contra, Attachment 5), for all of the 119 exchanges specific to Test 4, we find that AT&T Ohio's application satisfies the criteria 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 data for 2002."

b. Facilities-based Alternative Provider

Consumer Groups' Position

With respect to Test 4, Consumer Groups assert that AT&T Ohio has failed to demonstrate that the companies relied upon for the purpose establishing the presence of facilities-based providers actually own, operate, manage, or control the facilities utilized for the provision of service (Consumer Groups' Opposition at 25, 47-68).

In regard to the facilities-based, alternative provider prong for Test 4, Consumer Groups believe that AT&T Ohio has not shown that there are five unaffiliated facilities-based alternative providers serving the residential market in any of the exchanges identified for Rule 4901:1-4-10(C)(4), O.A.C. (*Id.* at 66). In particular, Consumer Groups do not consider ACN Communications Services (ACN), Budget Phone, Bullseye Communications (Bullseye), Cinergy Communications (Cinergy), Comcast, Insight, MCI, New Access Communications (New Access), Revolution Communications, Sage Telecom (Sage), Talk America, Time Warner Cable (Time Warner), Trinsic Communications (Trinsic), and VarTec Telecom (VarTec) to be facilities-based providers (*Id.*; Williams Affidavit at ¶196, Table 2; Consumer Groups' Reply at 30-34). Consumer Groups also exclude Cincinnati Bell Extended Territories (CBET) in six exchanges and First Communications in 111 exchanges due to the fact that they do not own, operate, manage, or control network facilities in those exchanges (Consumer Groups' Opposition at 55, Williams Affidavit at ¶198).

Additionally, in an effort to disqualify some of the 17 wireline providers identified in AT&T Ohio's application, Consumer Groups argue that any CLEC providing residential service via "Local Wholesale Complete" (LWC) or the unbundled network element platform (UNE-P) does not satisfy the Rule 4901:1-4-01(G), O.A.C., definition of facilities-based provider and, therefore, should be excluded from the analysis in Test 4. Specifically, Consumer Groups allege that AT&T Ohio, and not the identified carriers, owns, operates, manages, or controls the network facilities used by the carrier providing residential service via LWC or UNE-P (Consumer Groups' Opposition at 25, 26, Williams Affidavit at ¶¶ 39-42).

Based on these concerns, Consumer Groups argue that UNE-P and LWC fail to satisfy the intent of the state's telecommunications policy as delineated in Section 4927.02(A)(2), Revised Code (Consumer Groups' Opposition at 24, 25). Therefore, Consumer Groups assert that all of the CLECs that utilize UNE-P and LWC arrangements, and are relied upon by AT&T Ohio in its application, are not actually facilities-based CLECs as defined by Rule 4901:1-4-01(H), O.A.C. (Consumer Groups' Opposition at 7; Consume Groups' Reply at 23; Williams Affidavit at ¶152).

AT&T Ohio Position

Regarding Consumer Groups' contention that certain providers should not be considered for the purposes of the competitive market tests due to the fact that they are not facilities-based, AT&T Ohio contends that Consumer Groups have failed to recognize that, in accordance with Rule 4901:1-4-01(H), O.A.C., only resellers of the ILEC's local exchange services are not to be included in the classification of a facilities-based provider (AT&T Ohio Memorandum Contra at 22 citing Rule 4901:1-4-01(H), O.A.C.). Therefore, inasmuch as providers of BLES provision service pursuant to LWC and UNE-P, AT&T Ohio asserts that they should be considered as facilities-based carriers (*Id.*).

Regarding Consumer Groups' criticism that AT&T Ohio has relied on alternative providers in Test 4 that are not offering perfect substitute services, the company agrees with the Commission's prior determination that the law does not restrict the analysis of competition and reasonably available alternatives for BLES (*Id.* at 27 citing 05-1305, Opinion and Order at 25). AT&T Ohio considers wireless and VoIP providers to be alternatives to wireline BLES service (*Id.* at 28). AT&T Ohio opines that the important factor for determining whether a service is a competitive substitute for BLES is whether the service has the potential to take significant amounts of business away from BLES (*Id.* at 29).

Commission Conclusion

As discussed below, we find that, based on the data in the record, 13 of the 17 wireline providers identified by AT&T Ohio satisfy the facilities-based criteria of Test 4 (AT&T Ohio Application, Ex. 3; AT&T Ohio Supplement to Application). These carriers are deline-

ated on Attachment A of this opinion and order. Specific to Consumer Groups objections to the consideration of providers utilizing UNE-P and LWC facilities, the Commission has long recognized that UNE-P and LWC facilities are jointly managed and controlled by the CLEC and the ILEC. In support of this position, the Commission considers the fact that CLECs offering service pursuant to LWC or UNE-P are able to control the specific services that are offered over these facilities, the specific features that are activated, and the timing of when a service is commenced and terminated. On the other hand, a carrier providing service solely by resale of the ILEC's local exchange service does not qualify as a facilities-based CLEC.

Recognizing such distinctions, the Commission has defined a facilities-based CLEC as:

> Any local exchange carrier that uses facilities it owns, operates, manages or controls to provide service(s) subject to the commission evaluation; and that was not an incumbent local exchange carrier in that exchange on the date of the enactment of the 1996 Act. Such carrier may partially or totally own, operate, manage <u>or</u> control such facilities. Carriers not included in such classification are carriers providing service(s) solely by resale of the incumbent local exchange carrier's local exchange services (Emphasis added).

(Rule 4901:1-01(G), O.A.C.).

As to the Consumer Groups' contention that AT&T Ohio has acknowledged that CLECs do not own, operate, manage, or control the facilities that they lease from AT&T Ohio under UNE-P and LWC arrangements, we conclude that Consumer Groups' claim is unsupported inasmuch as Consumer Groups failed to inquire as to whether the CLECs leasing facilities from AT&T Ohio under UNE-P and LWC arrangements also manage and control these facilities as contemplated in the definition of facilities-based CLECs pursuant to Rule 4901:1-4-01(G), O.A.C. Therefore, the Commission finds that CLECs leasing facilities in a given exchange from AT&T Ohio pursuant to UNE-P and LWC arrangements, partially manage and control such facilities and are, therefore, facilities-based alternative providers, as well as facilities-based CLECs, pursuant to the definitions in Rule 4901:1-4-01(G) and (H), O.A.C., respectively.

Accordingly, for the purposes of satisfying the requirements of the second prong of Test 4, we determine that the following carriers are facilities-based, alternative providers: ACN, Budget Phone, CBET, First Communications, MCI, New Access, Revolution, Sage, Talk America, and Trinsic.

Although we note that Buckeye Telesystems, Comcast and Insight do not lease UNE-P or LWC arrangements from AT&T Ohio, the record demonstrates that they use their own

switching facilities and has ported telephone numbers in specific exchanges identified in Attachment A to this opinion and order (AT&T Ohio Supplement to Application). Accordingly, we find that Buckeye Telesystems, Comcast, and Insight are facilities-based, alternative providers for the purposes of satisfying the requirements of the second prong of Test 4.

With respect to the issue of unaffiliated providers and the identification of unaffiliated, facilities-based alternative providers, the Commission notes that AT&T Ohio has not identified any affiliated provider in its application. Therefore, we find that the identified alternative providers listed in Attachment A of this opinion and order satisfies the requisite "unaffiliated" criteria of Test 4.

With respect to the remaining four wireline providers (Bullseye, Cinergy, Time Warner, and VarTec), we find that, based on the data on the record, for all of the exchanges for which these carriers were identified, the wireline providers meet some, but not all, of the requirements of the second prong of Test 4. Therefore, these carriers should not be considered for the purpose of satisfying Test 4 (*Id.*).

With respect to Alltel Wireless, Cincinnati Bell Wireless, Verizon Wireless, and Sprint/Nextel, we find these wireless providers are facilities-based providers that satisfy the second prong of Test 4 as discussed in detail elsewhere in this opinion and order. The Commission notes that Consumer Groups do not dispute this determination.

c. Market Presence

Consumer Groups' Position

As discussed above, Consumer Groups reject all of the wireless carriers proposed by AT&T Ohio, partially due to the contention that they do not serve all of the identified exchanges in their entirety. With respect to cable-based providers, Consumer Groups did not include entities for those exchanges in which they do not serve the entire exchange (Consumer Groups' Opposition at 66). Although Consumer Groups acknowledge that both Insight and Comcast utilize their own facilities to provide services, they posit that Insight and Comcast should be disqualified as facilities-based alternative providers because their service offerings are not readily available in the relevant market (Williams Affidavit at ¶¶ 95, 96, 164). Specifically, Consumer Groups argue that there is no evidence to demonstrate that Insight and Comcast provide service or have cable facilities throughout the entire exchanges where they have been identified as facilities-based alternative providers (*Id.*).

AT&T Ohio's Position

AT&T Ohio opines that for the purpose of satisfying the criteria of market presence, the essential issue to be determined is whether a carrier is present or absent in an exchange. With respect to the alternative providers identified in its application, AT&T Ohio asserts

that they are all present, providing service, and have residential customers (AT&T Ohio's Memorandum Contra at 12).

Commission Conclusion

We reject the Consumer Groups' narrow interpretation of Section 4927.03, Revised Code, inasmuch as it is overly restrictive in scope. In previously selecting an exchange as the market[1] for which competition for an ILEC's BLES can be evaluated, the Commission articulated that an exchange would:

(1) Exhibit similar market conditions within its boundary.

(2) Provide an objective definition that would allow for evaluation of competition on a reasonable granular level.

(3) Be practical to administer as ILECs collect and report data at the exchange level.

(05-1305 Opinion and Order at 18, 19).

Additionally, 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, the Commission selected an exchange as a market definition.

The Commission finds that in order to satisfy Consumer Groups' narrow interpretation of the statutory provisions, a market would have to be as small as a "city block" for wireline providers, or even as small as a "single residence" in order to guarantee that wireless service is reaching consumers indoors at their homes. Such an interpretation is contrary to the statutory intent of Section 4927.03, Revised Code, and would be impractical, and extremely difficult to administer. The Commission finds that the coverage maps and data provided by AT&T Ohio for the four aforementioned wireless providers demonstrate that their wireless service offerings are readily available to customers of the exchanges identified in Attachment A of this opinion and order, and, therefore, satisfy the second prong of Rule 4901:1-4-10(C)(4), O.A.C.

Specifically, the Commission finds that in the relevant exchanges listed in Attachment A of this opinion and order, AT&T Ohio's application demonstrates, that Alltel Wireless, Cincinnati Bell Wireless, Sprint/Nextel, and Verizon Wireless advertise the availability and coverage of their service offerings in the relevant exchanges on their websites. The

1 One of the few issues that Consumer Groups supported in 05-1305 was the selection of an exchange as the market definition.

Commission notes that Consumer Groups do not dispute this determination. Therefore, we find that these four wireless providers meet the "presence in the market" requirement of the second prong of Test 4 and Test 3 in the relevant exchanges identified in Attachments A an B of this opinion and order. Similarly, the Commission finds that the coverage areas of Insight and Comcast satisfy the market presence criteria for the purpose of being considered as alternative providers.

We also note, and Consumer Groups do not dispute, that:

(1) Subscribers of CLECs utilizing LWC arrangements are in fact customers of those CLECs, and not customers of AT&T Ohio BLES.

(2) CLECs providing residential service via LWC arrangements are in fact offering their services via their current tariffs.

We find that the residential white pages listing, LWC access line data, and 9-1-1 data provided in the record demonstrates that the identified CLECs offer service to residential customers in the relevant exchanges, as denoted in Attachment A to this opinion and order. Also, the record demonstrates that those CLECs maintain current tariffs on record with the Commission in which they make residential services available to current and prospective customers, with no grandfathering provisions in the relevant exchanges. Additionally, the record demonstrates that most of the CLECs providing residential service via LWC arrangements are in fact advertising their offerings on their respective websites in the relevant exchanges. Accordingly, we find that the following facilities-based CLECs offering service to residential subscribers satisfy the market presence requirement of the second prong of Test 4 in the relevant exchanges identified in Attachment A to this opinion and order: ACN, Budget Phone, CBET, Comcast, First Communications, Insight, MCI, New Access, Revolution, Sage, Talk America, and Trinsic.

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 an analysis of whether AT&T Ohio has lost a considerable share of its access lines in a specific exchange. 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.

e. Serving the Residential Market

Consumer Groups' Position

Consumer Groups argue that in order for carriers to be considered as facilities-based alternative providers for the purpose of Test 4, AT&T Ohio needs to make a showing that they serve the residential market by actively marketing service to residential customers (Williams Affidavit at ¶ 75).

AT&T Ohio Position

AT&T Ohio asserts that for the purpose of identifying those alternative providers that are serving the residential market, it relied on criteria identified on the exchange summary sheet for each exchange (AT&T Ohio Application, Ex. 3). As an example, AT&T Ohio represents that for each CLEC listed on the summary sheet, the CLEC's tariff was reviewed to be sure that a tariff for residential BLES was on file with the Commission (AT&T Ohio's Memorandum Contra, Attachment 1, at 5, 7, 8).

Commission Conclusion

As to Consumer Groups' argument that in order for carriers to be considered as facilities-based alternative providers under Test 4, AT&T Ohio needs to make a showing that they serve the residential market, we find that Consumer Groups do not dispute that, with the exception of Buckeye Telesystem, the 13 identified carriers addressed herein, provide services to the residential market pursuant to tariffs on file with the Commission, have residential listings in the white pages, and maintain a website that advertises the residential service offering in the relevant exchange (AT&T Ohio Application, Ex. 3; AT&T Ohio Supplement to Application). With respect to Buckeye Telesystem, we find that the company provides local residential service as demonstrated by its tariffs and residential white page directory listings (*Id.*).

With respect to Consumer Groups' contention that there is no evidence that CBET serves residential lines in the Middletown and Monroe exchanges, we find that the data in the record (including residential white page listings) demonstrates that, in those two exchanges, CBET provides local residential service as described in CBET's tariffs (AT&T Ohio Supplement to Application; AT&T Ohio Memorandum Contra at Attachments 1 and 2). Therefore, we find that CBET serves residential lines in the Middletown and Monroe exchanges.

Accordingly, we determine that the following facilities-based alternative providers provide their services to residential customers in the relevant exchanges as identified in Attachment A of this opinion and order: ACN, Buckeye Telesystem, Budget Phone, CBET, First Communications, MCI, New Access, Revolution, Sage, Talk America, and Trinsic.

Relative to wireless providers identified in AT&T Ohio's application, we find that Alltel Wireless, Cincinnati Bell, Verizon Wireless, and Sprint-Nextel advertise the availability and coverage of their service offerings in the relevant exchanges and have residential customers who did in fact disconnect AT&T Ohio's BLES service in exchanges identified in Attachment A to this opinion and order (Roycroft Affidavit at ¶116). We also dismiss Consumer Groups' argument that the wireline-to-wireless number porting data provided by AT&T Ohio reflects that residential cord-cutting behavior in AT&T Ohio's service area is very limited[2] and, therefore, does not support AT&T Ohio's use of wireless carriers as alternative providers (*Id.* at ¶¶73-76). Accordingly, we find that Alltel Wireless, Cincinnati Bell Wireless, Sprint/Nextel, and Verizon Wireless are unaffiliated, facilities-based, providers which have established their presence and serve residential customers in the exchanges identified in Attachment A of this opinion and order for the purpose of satisfying the second prong of Test 4.

g. Exchanges Requiring Special Consideration Due to Unique Circumstances

Consumer Groups' Position

Consumer Groups allege that inadequacies exist with respect to the data associated with those AT&T Ohio exchanges in which two exchanges share one switch.[3] Due to this sharing arrangement, AT&T Ohio is unable to separately identify the competitive lines served by wireline carriers in each exchange. As a result, Consumer Groups submit that AT&T Ohio cannot separately identify the competitive lines served by the wireline carriers in the affected exchanges, thus, adversely impacting the ability to effectively apply the competitive market tests in accordance with Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C. (Consumer Groups' Opposition at 21, 22; Williams Affidavit at ¶¶79, 159).

Specifically, Consumer Groups recommend that the Commission reject AT&T Ohio's application for BLES alternative regulation for the following four exchanges: Gates

2 Dr. Roycroft, in conducting his analysis, recognized that while the ported numbers data includes both residential and business lines, wireless substitution for wireline is not a widespread occurrence for medium or large businesses.

3 The Gates Mills/Chesterland and Cleveland/Wickliffe exchanges relate to Rule 4901:1-4-10(C)(4), O.A.C. The Canal Winchester/Groveport exchanges relate to Rule 4901:1-4-10(C)(3), O.A.C., and are discussed *infra*. The Barnesville/Somerton exchanges relate to Rule 4901:1-4-10(C)(4) and 4901:1-4-10(C)(3), O.A.C., respectively, and are discussed *infra*.

Mills/Chesterland and Cleveland/Wickliffe. Consumer Groups identify specific problems related to the fact that each pair of exchanges is served by one switch (*Id.* at 122).

First, Consumer Groups assert that inasmuch as each pair of exchanges is only served by one switch, the requirement that the competitive market test be performed on a telephone exchange area basis cannot be satisfied. Second, Consumer Groups point out that the identified facilities-based CLEC or alternative provider may serve one exchange but not the other, which may present a "false positive" for meeting the competitive market test (*Id.* at 67, 122).

AT&T Ohio's Position

AT&T Ohio discusses Consumer Groups' objections related to the scenarios described *supra*, in which a paired analysis was performed for those exchanges in which a single central office serves two different exchanges. AT&T Ohio believes that, rather than dismissing these exchanges, the Commission should recognize that AT&T Ohio used the most precise information available. Additionally, AT&T Ohio states that this combined analysis was only performed for the purpose of calculating CLEC market share pursuant to Rule 4901:1-4-10(C)(3), O.A.C., and for attempting to demonstrate the presence of individual CLECs using line and ported number information (AT&T Ohio Memorandum Contra at 29). AT&T Ohio notes that the CLEC line and ported number information represents only a portion of the competitive information presented for each exchange (*Id.* at 30).

Commission's Conclusion

Notwithstanding the fact that one switch served two exchanges, the Commission finds that AT&T Ohio has submitted data on an individual exchange basis demonstrating that the first prong of Rule 4901:1-4-10(C)(4), O.A.C., has been satisfied for the Gates Mills, Chesterland, Cleveland, and Wickliffe exchanges (AT&T Ohio Application, Ex. 3; AT&T Ohio Memorandum Contra, Attachment 5). As a result, AT&T Ohio has demonstrated that at least 15 percent of total residential access lines have been lost since 2002 for each of the four exchanges on an individual exchange basis.

The sharing of a switch between two exchanges only impacts the second prong of Rule 4901:1-4-10(C)(4), O.A.C., which requires "the presence of at least five unaffiliated facilities-based alternative providers serving the residential market." Examining the data filed in this proceeding, we find that Wickliffe is a small exchange, adjacent to the Cleveland Exchange, and is served by a switch located in the Cleveland Exchange. Similarly, Gates Mills is a small exchange, adjacent to the Chesterland Exchange, and is served by a switch located in the Chesterland Exchange (AT&T Ohio Supplement to Application 4; AT&T Ohio Memorandum Contra at Attachment 2).

Once a CLEC establishes interconnection at a specific ILEC's switch, the CLEC can serve any ILEC-customer served by that switch using a UNE-P or LWC arrangement, regardless of where the customer is located. The Commission recognizes that the CLEC information (i.e. UNE-P lines, LWC lines, ported telephone numbers, residential white pages listings and residential E911 listings) used to demonstrate the CLEC's nature of operation is only available on the switch level and, therefore, AT&T Ohio is unable to separate such data to an individual exchange.

Accordingly, we find on our own motion that, inasmuch as these four exchanges individually satisfy the first prong of Rule 4901:1-4-10(C)(4), O.A.C., the demonstration of significantly more than five unaffiliated facilities-based alternative providers serving the residential market on a combined basis for Gates Mills/Chesterland exchanges and for Cleveland/Wickliffe exchanges satisfies the spirit of Section 4927.03, Revised Code. As discussed above, the Commission recognizes that once a CLEC establishes interconnection at a specific ILEC switch, the CLEC can serve any ILEC customer served by that switch. In reaching this determination, the Commission also notes that the data filed in this case with respect to these shared switch exchange pairings significantly exceeds the minimum required threshold of five alternative providers and, therefore, provides additional assurance that this criteria is satisfied for both exchanges in the pairing. Therefore, based on the record in this proceeding, we find that AT&T Ohio has satisfied Test 4 in the specified exchanges and shall be granted alternative regulation treatment for its Tier 1 core and noncore services pursuant to Rule 4901:1-4-11, O.A.C., in the exchanges identified in Attachment A to this opinion and order.

2. Test 3

a. CLECs' Market Share

Consumer Groups' Position

Consumer Groups assert that Test 3 does not satisfy the statutory requirements of Section 4927.03(A), Revised Code, inasmuch as it allows for a calculation of total residential lines served by unaffiliated CLECs rather than limiting the focus to the total residential stand-alone BLES lines provided by unaffiliated CLECs (Consumer Group Consumer Groups' Opposition at 70; Williams Affidavit at ¶11). Specifically, Consumer Groups argue that evidence of CLECs serving 15 percent of the residential market via local/toll packages does not demonstrate the competitive impact on the market for BLES-only services inasmuch as the services are not functionally equivalent or substitutes (Consumer Groups' Opposition at 69-71). Additionally, Consumer Groups contend that some of the identified CLECs do not serve residential customers (Consumer Groups' Opposition at 7, 72). Further, Consumer Groups reference the fact that, rather than specifically identifying those CLECs operating pursuant to resale, AT&T Ohio provided CLEC data in the aggregate for each

exchange; thus, preventing the ability to verify the appropriateness of including specific unaffiliated providers in the 15 percent market share analysis (Williams Affidavit at ¶33).

AT&T Ohio

AT&T Ohio contends that its application satisfies the requirement that at least 15 percent of the total residential lines are provided by unaffiliated CLECs (AT&T Ohio's Memorandum Contra at 22; Application, Attachment 3).

Commission Conclusion

The first prong of Test 3 requires that, for each requested telephone exchange, an applicant must demonstrate that at least fifteen percent of total residential access lines are provided by unaffiliated CLECs. In regard to Consumer Groups' argument that evidence of CLECs serving 15 percent of the entire residential market with local/toll packages fails to demonstrate any competitive impact on the market for BLES-only services, we find that the alternative providers set forth on Attachment B identify those CLECs that are competing with AT&T Ohio's BLES offerings and have succeeded to win at least 15 percent of the residential customers who otherwise would subscribe to AT&T Ohio's BLES.

With respect to Consumer Groups' contention that two of the identified alternative providers[4] do not serve residential customers, the Commission finds that a review of the specific carriers' tariffs reflect that neither CLEC provides residential services. Accordingly, we shall exclude the access lines attributed to each of the two carriers from the relevant exchanges to calculate the percentage of residential access lines served by unaffiliated CLECs. This determination impacted only one exchange (New Albany Exchange) resulting in the percentage of residential access lines served by unaffiliated CLECs to be less than the 15 percent threshold required by Test 3. Accordingly, the New Albany Exchange is not eligible for BLES alternative regulation treatment as it does not meet one of the Test 3 requirements.

As to the Consumer Groups' argument that AT&T Ohio overstated the CLECs' residential market share by relying upon carriers that are not actively marketing residential service, similar to our discussion regarding Test 4 *supra*, we reject this argument. We find it unreasonable to exclude the market share of a given CLEC based on its marketing activity, which may change from time-to-time. The fact that a CLEC is successful in winning and keeping customers is a clear signal of the competitive pressure the ILEC faces and to which it must respond. We also find that none of the CLECs identified by Consumer Groups (namely, MCI, New Access, and VarTec) has grandfathered their tariff offering(s). Rather, the record demonstrates that these companies continue to make their residential service(s) available to prospective customers. Finally, we are not convinced by Consumer Groups'

4 Due to proprietary concerns, the specific identity of these carriers will remain confidential in the context of their respective access line counts.

argument that we should exclude the market share of CLECs engaged in resale solely because AT&T Ohio provided aggregated data for CLECs providing services on resale basis. Specifically, the Commission notes that Consumer Groups' witness Williams recognizes that resold lines account for less than one-half of one percent of total residential access lines reported by AT&T Ohio (Williams Affidavit at ¶34).

b. Facilities-based Providers

Consumer Groups' Position

In regard to the requirement that there be a presence of at least two unaffiliated, facilities-based CLECs serving residential customers, Consumer Groups contend that AT&T Ohio does not satisfy this prong of Test 3. Specifically, Consumer Groups assert that the two unaffiliated facilities-based CLECs (MCI and Sage) that AT&T Ohio identified as providing BLES in each of the 26 exchanges relative to Test 3 are not actually facilities-based CLECs and are not providing BLES to residential customers (Consumer Groups' Opposition at 7, 74).

AT&T Ohio's Position

In response to Consumer Groups' contention that MCI and Sage are not facilities-based providers, AT&T Ohio submits that these entities provision residential service pursuant to LWC or UNE-P and, as such, are still considered facilities-based CLECs (AT&T Ohio's Memorandum Contra at 22).

Commission Conclusion

The second prong of Test 3 requires that the applicant demonstrate that there are at *least two unaffiliated, facilities-based CLECs providing BLES to residential customers* in each requested exchange. Similar to our discussion regarding Test 4 *supra*, we find that those CLECs leasing facilities from AT&T Ohio under UNE-P and LWC arrangements are facilities-based providers. Specifically, MCI and Sage are leasing facilities in this manner and, therefore, are facilities-based CLECs for the purpose of Test 3. Pursuant to our discussion regarding Test 4, we also conclude that MCI and Sage are unaffiliated, facilities-based CLECs providing BLES services to residential customers in the relevant exchanges as listed in Attachment B of this opinion and order for the purposes of meeting Test 3.

c. Presence of Alternative Providers Serving the Residential Market

Consumer Groups' Position

The third prong of Test 3 requires that the applicant demonstrate that in each requested exchange, there is the presence of at least five alternative providers serving the residential market. Consumer Groups analyzed the operations of 13 wireline and 3 wireless providers in the 26 exchanges identified specific to Test 3 (Consumer Groups' Opposition at 74-80). Upon their review, Consumer Groups conclude that First Communications is the only provider that satisfies the third prong of Test 3 (*Id.* at 77, 78, 80).

Consumer Groups opine that, as discussed *supra*, most of the identified wireline carriers do not qualify as alternative providers under the Commission's definition applicable to the second prong of Test 4 and should, therefore, be disqualified from this prong of Test 3 as well. These include: ACN, Budget, Comcast, Insight, MCI, New Access, Revolution, Sage, Talk America, Trinsic, and VarTec (*Id.* at 77, 78).

With respect to LDMI, Consumer Groups assert that the company's website describes its services as being limited to business customers. While acknowledging that LDMI does have a residential tariff, Consumer Groups contend that it relates to a tariffed package that is neither functionally equivalent to BLES, nor provided at competitive rates, terms, and conditions (*Id.* at 78, 79). With respect to PNG and Telecom Ventures, Consumer Groups do not consider these companies' presence in the market as resellers of the ILEC's retail services to be sufficient enough to constrain AT&T Ohio's BLES prices (*Id.* at 79, 80).

AT&T Ohio's Position

AT&T Ohio dismisses Consumer Groups' arguments relative to this prong of the test and considers the positions advocated by Consumer Groups to reflect a strained and unreasonable interpretation of the statute and the Commission's rules (AT&T Ohio AT&T Ohio's Memorandum Contra at 24).

Commission Conclusion

We note that the majority of wireline and wireless alternative providers identified by AT&T Ohio relative to the third prong of Test 3, have already been discussed in our evaluation of the presence of at least five unaffiliated facilities-based alternative providers serving the residential market under the second prong of Test 4. Therefore, we find that the following alternative providers meet the third prong of Test 3 (the presence of at least five alterna-

tive providers serving the residential market): ACN, Budget Phone, Comcast, First Communications, New Acces, Revolution, Talk America, and Trinsic.

Specific to PNG, we find that, based on the data in the record, the company meets all of the requirements of the third prong of Test 3. Specifically, we evaluated PNG's operations in the three exchanges for which it was identified in AT&T Ohio's application. The record demonstrates that through resale of AT&T Ohio's residential services, PNG provides residential services that compete with AT&T Ohio's BLES in the Beallsville, Lewisville, and Walnut exchanges (AT&T Ohio's Supplement to Application). Therefore, we find that, based on the record, PNG should be considered for the purpose of satisfying the criteria outlined in the third prong of Test 3 in these three exchanges.

In regard to the wireless providers identified relative to Test 3 (Alltel Wireless, Sprint/Nextel, and Verizon Wireless), for the same reasons as stated in our discussion of Test 4 *supra*, we find that these wireless companies are facilities-based providers that satisfy the third prong of Test 3 regarding the presence of alternative providers in the applicable exchanges denoted on Attachment B.

We also determine that, based on the data in the record, the remaining exchanges identified by AT&T Ohio's application specific to Test 3 meet some, but not all, of the requirements of the third prong of Test 3 in the relevant exchanges, which requires a demonstration that at least five alternative providers serve the residential market. These exchanges and the corresponding data are summarized on Attachment C. The Commission notes that some of the rejected exchanges identified in Attachment C are addressed in the section below. The remaining Test 3 exchanges identified on Attachment C are addressed herein.

Specific to the Belfast Exchange, the Commission determines that, although AT&T Ohio identified ACN and Verizon Wireless as alternative providers, the record does not support the allegation that the carriers are providing residential service within the exchange (i.e., no evidence of white pages listings or ported numbers). Specific to the Lewisville and Murray City exchanges, the Commission determines that, although AT&T Ohio identified Alltel Wireless and Sprint/Nextel as alternative providers, the record does not support the allegation that the carriers are providing residential service within the exchanges (i.e., no evidence of ported numbers). Specific to the Salineville Exchange, the Commission determines that, although AT&T Ohio identified Alltel Wireless, Sprint/Nextel, and New Access as alternative providers, the record does not support the allegation that the carriers are providing residential services within the exchange (i.e., no evidence of white pages listings or ported numbers, respectively).

d. Exchanges Requiring Special Consideration Due to Unique Circumstances

Consumer Groups' Position

Consumer Groups urge the Commission to reject AT&T Ohio's application for BLES alternative regulation for the following four exchanges: Canal Winchester, Groveport, Barnesville, and Somerton. With respect to these exchanges, Consumer Groups identify three specific problems due to the fact that the Canal Winchester and Groveport exchanges share a switch and the Barnesville and Somerton exchanges share a switch. First, Consumer Groups argue that the sharing of a switch does not meet the requirement that the competitive market test has to be satisfied in a telephone exchange area. Second, the sharing of a switch may result in an overstating of the CLEC residential market share as required in the first prong of Test 3. Third, the identified facilities-based CLEC or alternative provider may serve one exchange but not the other, resulting in a "false positive" relative to the test.

AT&T Ohio's Position

AT&T Ohio explains that the paired analysis was only performed for the purpose of calculating CLEC market share in those exchanges that shared a switch. AT&T Ohio rejects Consumer Groups' request to dismiss all of the paired exchanges outright, despite the fact that the information does not precisely identify how many CLEC lines there are in each exchange. In support of its position, AT&T Ohio notes that it did not rely on Test 3 for many exchanges and where Test 3 was relied upon, the company used the most precise information available (AT&T Ohio Memorandum Contra at 29, 30).

Commission Conclusion

As stated in our discussion of Test 4 *supra*, we find that the scenario of two exchanges sharing one switch and the resulting limitation on data availability was never contemplated by Rule 4901:1-4-10, O.A.C., regardless of the competitive market test chosen by an ILEC (including self-defined alternative competitive market tests contemplated by Rule 4901:1-4-10(C), O.A.C.). However, unlike the scenario discussed with respect to Test 4, we recognize that all three of the prongs of Test 3 require CLEC information (to the extent that AT&T Ohio relies on CLECs for the third prong of Test 3), which is only available to AT&T Ohio at the switch level, and that AT&T Ohio is unable on its own to allocate the data to the individual exchange level.

Due to the significant reliance on CLEC-related data in Test 3, we are not convinced that the data on the record supports AT&T Ohio's claim that the Winchester and Groveport exchanges satisfy the Test 3 requirements on an individual exchange basis. Therefore, we

find that based on the record, AT&T Ohio's data does not satisfy the requirements of Rule 4901:1-4-10(C)(3), O.A.C., in the Winchester and Groveport exchanges.

With respect to the Barnesville and Somerton exchanges, we note that AT&T Ohio has relied on two different tests for the purpose of demonstrating the presence of competition in these exchanges (Test 4 for Barnesville and Test 3 for Somerton). While the sharing of a switch is by itself unique for the purpose of applying the "off the shelf" competitive market tests, the reliance on two different tests further impacts the Commission's confidence for the purpose of allocating the shared switch data between the two exchanges. Therefore, the Commission is unable to conclude that either of these exchanges satisfactorily meets the criteria of their respective competitive market tests. Notwithstanding this determination, the Commission notes that the unique circumstances of these exchanges may be more appropriately addressed in a specific company-defined test that may be filed in the future for the Commission's consideration.

IV. TARIFF AMENDMENTS

AT&T Ohio filed the proposed tariff modifications necessary to implement the pricing flexibility rules set forth in Rule 4901:1-4-09(A), O.A.C. The necessary tariff revisions include modifying the tariff structure to separate the competitive exchanges from the noncompetitive exchanges. 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 AT&T Ohio is requesting competitive treatment, the company is proposing to apply any allowable BLES increase to the access line portion of the monthly charge. The actual monthly charge has not been increased in this application. Pricing flexibility rules also allow certain other noncore Tier 1 services to receive Tier 2 pricing flexibility. AT&T Ohio's proposed tariff reflects these changes as well.

After a thorough review of the information provided by the applicant, the Commission believes that the tariff, as revised on September 8, 2006, is just and reasonable specific to those exchanges approved pursuant to this opinion and order.

V. OUTSTANDING PROCEDURAL MATTERS

In conjunction with their October 16, 2006, Consumer Groups' opposition to AT&T Ohio's application, Consumer Groups state that extraordinary circumstances exist that necessitate a hearing on AT&T Ohio's application before AT&T Ohio should be granted BLES alternative regulation for any exchange included in the application (Consumer Groups' Opposition at 8). In support of their request for a hearing, Consumer Groups state that the application raises serious questions regarding the validity of the rules, as well as whether the application should be granted pursuant to the rules (Consumer Groups' Reply at 14).

AT&T Ohio believes that Consumer Groups' request for a hearing should be denied inasmuch Rule 4901:1-4-09(G), O.A.C., has not been satisfied and because a hearing would only add unnecessary delay to a process that was intended to be expedited and automatic (AT&T Ohio's Memorandum Contra at 7).

Based on the discussion and determinations incorporated within this opinion and order, the Commission concludes that Consumer Groups' have not demonstrated through clear and convincing evidence that a hearing is needed. Therefore, we find that Consumer Groups' request for a hearing is denied.

On October 30, 2006, AT&T Ohio filed a motion for a protective order seeking confidential treatment of information designated as confidential and/or proprietary information included in its filing made on October 26, 2006. We find that the motion is reasonable and should be granted at this time.

VI. CONCLUSION

Upon a thorough review of the record in this proceeding, the Commission determines that, pursuant to Section 4927.03(A), Revised Code, AT&T Ohio has met its burden of proof for those exchanges identified in Attachments A and B of this opinion and order. Specifically, AT&T Ohio has demonstrated that the granting of the company's application for BLES and other Tier 1 service flexibility in the designated exchanges is in the public interest, that AT&T Ohio's BLES is subject to competition, that the company's customers have reasonably available alternatives, and that there are no barriers to entry with respect to BLES in those exchanges.

Moreover, as discussed in detail above, the Commission determines that AT&T Ohio'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, based on the record in this proceeding, the Commission finds that the customers in exchanges listed in Attachments A and B of this opinion and order have readily available alternative services to AT&T Ohio's BLES which are offered by the alternative providers listed for the relevant exchange.

In accordance with Chapter 4901:1-4, O.A.C., the Commission determines that AT&T Ohio's application for alternative regulation of basic local exchange and other Tier 1 services should be approved consistent with the terms of this opinion and order, for those exchanges designated in Attachments A and B of this opinion and order. With respect to the

exchanges designated in Attachment C, the application is denied inasmuch as it does not meet all of the criteria set forth in the relevant competitive market tests.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On August 11, 2006, as amended on September 8, 2006, AT&T Ohio filed an application for approval of an alternative form of regulation of BLES and other Tier 1 service in 145 exchanges in its incumbent service territory. AT&T Ohio'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 rule.

(3) For 26 of the identified exchanges, AT&T Ohio relies on the competitive test set forth in Rule 4901:1-4-10(C)(3), O.A.C. For 119 of the identified exchanges , AT&T Ohio relies on the competitive test set forth in Rule 4901:1-4-10(C)(4), O.A.C.

(4) Consumer Groups' Opposition to AT&T Ohio's application was filed on October 16, 2006.

(5) AT&T Ohio's Memorandum Contra Consumer Groups' Opposition was filed by AT&T Ohio on October 26, 2006.

(6) Consumer Groups filed a reply to AT&T Ohio's Memorandum Contra on October 31, 2006.

(7) AT&T Ohio's application complies with the filing requirements of Rule 4901:1-4-09, O.A.C.

(8) Consistent with the criteria set forth in Rule 4901:1-4-10(C)(4), O.A.C., AT&T Ohio satisfies the applicable test and is granted alternative regulation of basic local exchange and other Tier 1 services pursuant to Chapter 4901:1-4, O.A.C., for those exchanges identified in Attachment A of this opinion and order.

(9) Consistent with the criteria set forth in Rule 4901:1-4-10(C)(3), O.A.C., AT&T Ohio satisfies the applicable test and is granted alternative regulation of basic local exchange and other Tier 1 ser-

vices pursuant to Chapter 4901:1-4, O.A.C., for those exchanges identified in Attachment B of this opinion and order.

It is, therefore,

ORDERED, That AT&T Ohio's application for alternative regulation of BLES and other Tier 1 services is granted in part and denied in part, as discussed above. It is, further,

ORDERED, That for those exchanges identified in Attachments A and B of this opinion and order, AT&T Ohio is granted Tier 2 pricing flexibility for all Tier 1 noncore services and BLES and basic caller ID will be subject to the pricing flexibility provided for pursuant to Rule 4901:1-4-11, O.A.C. It is, further,

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

ORDERED, That the tariff amendments filed on September 8, 2006, are approved relative to the exchanges for which BLES alternative regulation is granted. It is, further,

ORDERED, That, for those exchanges for which AT&T Ohio's application is granted, AT&T Ohio is ordered to file, within ten calendar days of this opinion and order, the appropriate final tariff amendments. The tariff amendments are to be filed in this case, as well as AT&T Ohio's TRF docket. The effective date of the tariff sheets shall be a date no sooner than the date that the final tariff pages are filed with the Commission. It is, further,

ORDERED, That Consumer Groups' request for a hearing is denied. 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 AT&T Ohio'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 AT&T Ohio's Memorandum Contra of October 26, 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

Valerie A. Lemmie

Donald L. Mason

JSA;geb

Entered in the Journal
DEC 20 2006

Reneé J. Jenkins
Secretary

AT&T Ohio
Case No. 06-1013-TP-BLS
Test 4 Results

	Exchange Name	Test Used	% Access Lines Lost	# of Unaflt. F.B. Alt. Providers	Names of Unaffiliated F.B. alt. providers	Test #4 Result
1	Akron	4	23.89%	9	ACN Com. Svc. First Com. MCI/WorldCom Revolution Com. Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
2	Alliance	4	22.44%	8	ACN Com. Svc. First Com. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
3	Alton	4	29.04%	7	ACN Com. Svc. First Com. MCI/WorldCom Sage Telecom Talk America Sprint /Nextel Verizon Wireless	Approved
4	Atwater	4	32.73%	6	ACN Com. Svc. First Com. MCI/WorldCom Sage telecom Talk America Verizon Wireless	Approved

5	Beavercreek	4	26.38%	7	ACN Com. Svc. CBET MCI/WorldCom Sage Telecom. Cin. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
6	Bellaire	4	17.89%	7	ACN Comm. Comcast Phone First Comm. New Access Sage Telecom. Talk America Alltel Wireless	Approved
7	Bellbrook	4	27.50%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
8	Belpre	4	17.97%	8	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Alltel Wireless Sprint/Nextel	Approved
9	Berea	4	21.65%	9	ACN Comm. First Comm. Sage telecom. MCI/WorldCom Talk America Trinsic Comm. Alltel Wireless Sprint /Nextel Verizon Wireless	Approved

10	Bloomingville	4	27.11%	6	ACN Comm. Buckeye Tele. First Comm. Sage Telecom MCI/WorldCom Sprint/Nextel	Approved
11	Burton	4	18.32%	8	ACN Comm. First Comm. Sage telecom. New Access Com. MCI/WorldCom Talk America Alltel Wireless Verizon Wireless	Approved
12	Canal Fulton	4	25.55%	7	ACN Comm. Sage telecom. MCI/WorldCom Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
13	Canfield	4	21.55%	8	ACN Comm. First Comm. New Access Sage telecom. MCI/WorldCom Talk America Alltel Wireless Sprint/Nextel	Approved
14	Canton	4	23.55%	8	ACN Comm. First Comm. Sage Telecom. MCI/WorldCom Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved

15	Carroll	4	15.69%	7	ACN Comm. First Comm. Sage Telecom. MCI/WorldCom Talk America Trinsic Comm. Sprint /Nextel	Approved
16	Castalia	4	27.35%	7	ACN Comm. Buckeye Tele. First Comm. Sage Telecom. MCI/WorldCom Talk America Verizon Wireless	Approved
17	Cedarville	4	18.61%	7	ACN Comm. First Comm. New Access Sage Telecom. MCI/WorldCom Talk America Verizon Wireless	Approved
18	Centerville	4	23.46%	8	ACN Comm. CBET First Comm. Sage Telecom. MCI/WorldCom Cin. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
19	Cheshire	4	18.81%	7	ACN Comm. First Comm. New Access Sage Telecom. MCI/WorldCom Talk America Trinsic Comm.	Approved

20	Chesterland	4	18.20%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
21	Cleveland	4	18.33%	9	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
22	Columbus	4	34.01%	7	ACN Comm. First Comm. Sage Telecom. MCI/WorldCom Talk America Trinsic Comm. Sprint/Nextel	Approved
23	Coshocton	4	16.21%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
24	Dalton	4	30.08%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Trinsic Comm.	Approved

25	Dayton	4	29.26%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cin. Bell Wireless Sprint /Nextel Verizon Wireless	Approved
26	Donnelsville	4	24.62%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Trinsic Comm.	Approved
27	Dublin	4	29.66%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint /Nextel Verizon Wireless	Approved
28	East Palestine	4	17.02%	8	ACN Comm. Comcast First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel	Approved
29	Enon	4	25.57%	8	ACN Comm. First comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint /Nextel	Approved

30	Fairborn	4		34.69%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint /Nextel Verizon Wireless	Approved
31	Findlay	4		31.40%	7	ACN Comm. First Comm. Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
32	Fletcher-Lena	4		18.37%	8	ACN Comm. First comm. MCI/WorldCom New Access Sage Telecom. Talk America Trinsic Comm. Verizon Wireless	Approved
33	Fostoria	4		31.43%	8	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Alltel Wireless Verizon Wireless	Approved
34	Franklin	4	0	33.46%	8	ACN Comm. CBET First comm. MCI/WorldCom Sage Telecom. Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved

35	Fremont	4	4	23.63%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
36	Gahanna	4		27.77%	8	ACN Comm. First Comm. Insight MCI/WorldCom Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
37	Gates Mills	4		21.66%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Alltel Wireless Verizon Wireless	Approved
38	Girard	4		24.08%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel	Approved
39	Greensberg	4		24.19%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved

40	Grove City	4	22.43%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved
41	Hartville	4	19.68%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
42	Hilliard	4	26.43%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved
43	Hillsboro	4	21.35%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved
44	Holland	4	21.60%	9	ACN Comm. Bukeye Telesys. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved

45	Hubbard	4	21.92%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel	Approved
46	Ironton	4	15.42%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel	Approved
47	Jamestown	4	23.81%	8	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
48	Jeffersonville	4	18.76%	6	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved
49	Kent	4	29.04%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved

50	Kirtland	4	18.51%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
51	Lancaster	4	26.56%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved
52	Lindsey	4	17.61%	5	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America	Approved
53	Lisbon	4	18.34%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel	Approved
54	Lockbourne	4	22.19%	8	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved

55	London	4	22.04%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved
56	Louisville	4	16.23%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved
57	Lowellville	4	16.12%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel	Approved
58	Magnolia-Wayn	4	18.81%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic comm. Sprint/Nextel	Approved
59	Manchester-Summit	4	22.88%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Verizon Wireless	Approved

60	Marietta	4	15.41%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic comm. Alltel Wireless Sprint/Nextel	Approved
61	Marlboro	4	24.87%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic comm. Verizon Wireless	Approved
62	Martins Ferry	4	19.94%	8	ACN Comm. Comcast Phone First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Alltel Wireless	Approved
63	Massillon	4	19.39%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
64	Maumee	4	28.00%	9	ACN Comm. Buckeye Teles. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved

65	Medway	4	23.98%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
66	Mentor	4	15.87%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
67	Miamisburg-W. Carrollton	4	30.20%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cin. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
68	Middletown	4	39.10%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cin. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
69	Milledgeville	4	16.01%	6	First Comm. Budget Phone MCI/WorldCom Sage Telecom Talk America Revolution Com.	Approved

70	Mingo Junction	4	28.37%	7	ACN Comm. Comcast First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved
71	Mogadore	4	20.54%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Verizon Wireless	Approved
72	Monroe	4	29.17%	7	ACN Comm. CBET First Comm. MCI/WorldCom New Access Sage Telecom. Verizon Wireless	Approved
73	Montrose	4	15.86%	9	ACN Comm. First Comm. MCI/WorldCom Revolution Comm. Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
74	Navarre	4	20.97%	6	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved

75	Nelsonville	4	19.12%	6	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved
76	New Carlisle	4	24.31%	8	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
77	New Lexington	4	20.45%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Sprint/Nextel	Approved
78	New Waterford	4	21.76%	6	ACN Comm. Comcast Phone First Comm. MCI/WorldCom Sage Telecom. Talk America	Approved
79	Niles	4	28.05%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
80	North Canton	4	23.85%	6	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved

81	North Hampton	4	24.01%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Sprint/Nextel	Approved
82	North Lima	4	15.88%	8	ACN Comm. Comcast Phone First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel	Approved
83	North Royalton	4	16.59%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
84	Perrysburg	4	20.79%	9	ACN Comm. Buckeye Teles. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
85	Piqua	4	32.79%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved

86	Ravenna	4	26.00%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
87	Reynoldsburg	4	24.78%	8	ACN Comm. First Comm. Insight MCI/WorldCom Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
88	Ripley	4	22.21%	6	First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Trinsic Comm.	Approved
89	Rogers	4	16.06%	6	ACN Comm. Comcast Phone First Comm. MCI/WorldCom Sage Telecom. Talk America	Approved
90	Rootstown	4	23.67%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved

91	Salem	4	17.74%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel	Approved
92	Sandusky	4	28.78%	8	ACN Comm. Buceye teles. First Comm. Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
93	Sebring	4	15.25%	6	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved
94	Sharon	4	22.73%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Verizon Wireless	Approved
95	South Charleston	4	24.22%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel	Approved
96	South Vienna	4	22.56%	6	First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Verizon Wireless	Approved

97	Spring Valley	4	20.17%	7	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Verizon Wireless	Approved
98	Springfield	4	27.66%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
99	Steubenville	4	24.60%	8	ACN Comm. Comcast First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel	Approved
100	Strongsville	4	18.83%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
101	Terrace	4	15.09%	9	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel Verizon Wireless	Approved

102	Thornville	4	17.32%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Verizon Wireless	Approved
103	Tiffin	4	25.66%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
104	Toledo	4	24.50%	9	ACN Comm. Buckeye Teles First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
105	Toronto	4	16.27%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel	Approved
106	Trenton	4	30.56%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved

107	Trinity	4	19.44%	9	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
108	Uniontown	4	21.02%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
109	Upper Sandusky	4	16.49%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
110	Vandalia	4	33.60%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
111	West Jefferson	4	16.11%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved

112	Westerville	4	27.57%	8	ACN Comm. Comcast Phone First Comm. MCI/WorldCom Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
113	Wickliffe	4	15.71%	9	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
114	Worthington	4	31.09%	8	ACN Comm. First Comm. Insight MCI/WorldCom Sage Telecom. Talk America Sprint /Nextel Verizon Wireless	Approved
115	Xenia	4	25.52%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint /Nextel Verizon Wireless	Approved
116	Yellow Springs-Clifton	4	21.03%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint /Nextel Verizon Wireless	Approved

117	Youngstown	4	25.14%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
118	Zanesville	4	24.59%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Sprint /Nextel Verizon Wireless	Approved

AT&T Ohio
Case No. 06-1013-TP-BLS
Test 3 Results

	Exchange Name	Test Used	% CLEC Market Share	# of Unaflt. F.B. CLECs	Name(s) of Unaffiliated F.B. CLECs	# of alt. provid-ers	Names of alt. providers	Test #3 Result
1	Beallsville	3	16.86%	2	MCI/WorldCom Sage Telecom	5	ACN Comm. First Com. New Access Talk America PNG telecom.	Approved
2	Bethesda	3	20.07%	2	MCI/WorldCom Sage Telecom	6	ACN Comm. Comcast First Comm. New Access Talk America Trinsic Comm.	Approved
3	Conesville	3	15.49%	2	MCI/WorldCom Sage Telecom	5	ACN Comm. First Comm. Talk America Revolution Com. Verizon Wireless	Approved
4	Danville-Highland	3	17.02%	2	MCI/WorldCom Sage Telecom	5	Budget Phone First Comm. New Access Talk America Trinsic Comm.	Approved
5	Glenford	3	17.77%	2	MCI/WorldCom Sage Telecom.	6	First Comm. New Access Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved

6	Graysville	3	17.09%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
7	Guyan	3	17.29%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
8	Leetonia	3	27.24%	2	MCI/WorldCom Sage Telecom.	5	Alltel Wireless Comcast First Comm. Talk America Trinsic Comm.	Approved
9	Marshall	3	17.67%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
10	Newcomerstown	3	16.50%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
11	Rainsboro	3	16.79%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. Revolution Comm. Talk America Trinsic Comm.	Approved
12	Rio Grande	3	15.96%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved

13	Shawnee	3	18.37%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
14	Somerset	3	16.05%	2	MCI/WorldCom Sage Telecom.	6	ACN Comm. First Comm. New Access Talk America Trinsic Comm. Sprint/Nextel	Approved
15	Vinton	3	17.95%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
16	Walnut	3	18.79%	2	MCI/WorldCom Sage Telecom.	5	First Comm. New Access PNG Telecom Talk America Trinsic Comm.	Approved
17	Wellsville	3	23.49%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. Comcast Phone First Comm. Talk America Trinsic Comm.	Approved
18	Winchester	3	17.84%	2	MCI/WorldCom Sage Telecom.	6	First Comm. New Access Revolution Comm Talk America Trinsic Comm. Verizon Wireless	Approved

AT&T Ohio
Case No. 06-1013-TP-BLS

Test 4 Results

	Exchange Name	Test Used	% Access Lines Lost	# of Unaflt. F.B. Alt. Providers	Names of Unaffiliated F.B. alt. providers	Test #4 Result
1	Barnesville	4			(note 1)	Denied

Test 3 Results

	Exchange Name	Test Used	% CLEC Market Share	# of Unaflt. F.B. CLECs	Name(s) of Unaffiliated F.B. CLECs	# of alt. provid-ers	Names of alt. providers	Test #3 Result
1	Belfast	3	17.29%	2	MCI/WorldCom Sage Telecom	4	First Com. New Access Talk America Trinsic Comm.	Denied
2	Canal Winchester	3			(note 1)		(note 1)	Denied
3	Groveport	3			(note 1)		(note 1)	Denied
4	Lewisville	3	17.16%	2	MCI/WorldCom Sage Telecom.	4	ACN Comm. First comm. Talk America PNG Telecom	Denied
5	Murray City	3	17.01%	2	MCI/WorldCom Sage Telecom.	3	First Comm. Revolution Com. Talk America	Denied
6	New Albany	3	less than 15%	2	MCI/WorldCom Sage Telecom.	6	ACN Comm. First comm. New Access Talk America Trinsic Comm. Verizon Wireless	Denied
7	Salineville	3	19.12%	2	MCI/WorldCom Sage Telecom.	4	ACN Comm. First Comm. Talk America Trinsic Comm.	Denied
8	Somerton	3			(note 1)		(note 1)	Denied

note 1 : See Commission discussion on exchange pairs served by a single switch.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Ohio Bell Telephone Company dba AT&T Ohio 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. 07-259-TP-BLS

OPINION AND ORDER

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

I. BACKGROUND

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. Among other things, Section 4927.03(A)(1), Revised Code, now authorizes the Commission to allow 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. To qualify for alternative regulation, the ILEC must be subject to competition or customers must have reasonably available alternatives. In addition, the Commission must establish that there are no barriers to market entry. The Commission was authorized by Section 4927.03(D), Revised Code, to adopt rules to carry out the statutory intent.

On March 7, 2006, the Commission, pursuant to Case No. 05-1305-TP-ORD (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*, established rules for the alternative regulation of basic local exchange 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 can apply for pricing flexibility of BLES and other Tier 1 services. Applications for alternative regulation of BLES and basic Caller ID will be approved provided the applicant satisfies one of the competitive market tests identified in Rule 4901-1-4-10, Ohio Administrative Code (O.A.C.), in a given exchange. Pursuant to Rule 4901:1-4-09(G), O.A.C., an ILEC's application for BLES alternative regulation will become effective on the

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one hundred and twenty-first day after the filing of the application unless the application is suspended by the Commission.

Rule 4901:1-4-01(C), O.A.C., defines BLES as:

> 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 origination 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.

Essentially, the Commission may allow alternative regulation of BLES if it finds that the ILEC is subject to competition with respect to BLES in a particular exchange or customers in a particular exchange have reasonably available alternatives. To do so, the Commission must determine whether the applicant passes at least one of the market tests that appear in Rule 4901:1-4-10(C), O.A.C. Rule 4901:1-4-10 (C), O.A.C., states that "[i]f 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." The four market tests are as follows:

(1) An applicant must demonstrate in each requested telephone exchange area that at least twenty-five per cent of total residential access lines are provided by unaffiliated [competitive local exchange carriers] CLECs, and at least twenty per cent of total company access lines have been lost since 1996 as reflected in the applicant's annual report filed with the Commission for 1996.

(2) An applicant must demonstrate in each requested telephone exchange area that at least twenty per cent of total residential access lines are provided by unaffiliated CLECs, and the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers.

(3) An applicant must demonstrate in each requested telephone exchange area that at least fifteen per cent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five alternative providers serving the residential market.

(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.

AT&T seeks alternative regulation in 11 exchanges. For the following six exchanges, AT&T contends that it meets the criteria set forth in Test 3 (Rule 4901:1-4-10(C)(3), O.A.C.): Belfast, Canal Winchester, Groveport, Lewisville, New Albany, and Salineville. For the remaining five exchanges--Barnesville, Dresden, East Liverpool, Harrisburg, and St. Clairsville--AT&T asserts that it meets the criteria set forth in competitive market Test 4 (Rule 4901:1-4-10(C)(4), O.A.C.)

II. HISTORY OF THE PROCEEDINGS

On March 9, 2007, The Ohio Bell Telephone Company dba AT&T Ohio (AT&T) filed an application for approval of an alternative form of regulation of BLES and other Tier 1 services in the following 11 exchanges: Barnesville, Belfast, Canal Winchester,

Dresden, East Liverpool, Groveport, Harrisburg, Lewisville, New Albany, Salineville, and St. Clairsville. AT&T filed its application under the provisions of Chapter 4901:1-4, O.A.C.

On March 19, 2007, the Office of the Ohio Consumers' Counsel (OCC) timely filed a motion to intervene. By entry issued April 11, 2007, the attorney examiner granted OCC's motion to intervene.

Rule 4901:1-4-09(F), O.A.C., provides that any party who can show why such an application should not be granted must file a written statement detailing the reasons within forty-five calendar days after the application is docketed. On April 23, 2007, OCC filed a written statement opposing AT&T's application.

III. SUMMARY OF THE APPLICATION

AT&T submits its application pursuant to Section 4927.03, Revised Code, and Chapter 4901:1-4, O.A.C., for approval of an alternative form of regulation for BLES and other Tier 1 Services. In the memorandum in support of its application, AT&T states that its application includes the forms, affidavits, supporting information, detailed analysis, proposed tariff revisions, and the proposed legal notice required by the rules.

Summarizing the exhibits that accompany its application, AT&T states that Exhibit 1 purports to show that AT&T is in compliance with its elective alternative regulation commitments. Exhibit 1 contains the affidavit of Ms. Connie Browning, President of AT&T. The affidavit complies with Rule 4901:1-4-09(B)(1), O.A.C., and verifies that the company is in full compliance with elective alternative regulation commitments.

Exhibit 2 of the application contains a matrix that identifies the exchanges and corresponding counties that are affected by the application.

In Exhibit 3, AT&T identifies the telephone exchange areas for which it seeks alternative regulation for BLES and other Tier 1 services. Moreover, the exhibit presents supporting information and detailed analysis to prove that AT&T meets at least one of the competitive market tests for each of the exchanges.

In demonstrating its compliance with the competitive market tests, AT&T discloses the publicly available sources of alternative providers' information, e.g., websites, tariff filings, information on wireless licenses, Commission certifications, and interconnection agreement filings. To confirm publicly available sources, AT&T reviewed internal billing data, E9-1-1 records, White Pages listings, and ported telephone number information.

Exhibit 4 contains AT&T's proposed tariff modifications. AT&T states that it has already restructured its tariff to implement the pricing flexibility that it sought in its first

BLS case.[1] Given that AT&T has already restructured its tariff, the tariff modifications proposed in this application merely add the additional 11 exchanges to the 136 exchanges approved by the Commission in 06-1013-TP-BLS.

Exhibit 5 contains AT&T's proposed legal notice, which notifies the public of the filing of its application. AT&T's legal notice is intended to comply with Rule 4901:1-4-09(B)(5), O.A.C. Consistent with the rule, the application states that AT&T will publish legal notice within seven days of the filing of the application in the legal notice section of a newspaper of general circulation in each county corresponding to the exchanges for which BLES alternative regulation is being requested.

Overall, AT&T proclaims that it has complied with all aspects of the Commission's rules pertaining to an application for BLES alternative regulation. Under Section 4927.03, Revised Code, the Commission must find that the granting of the company's application for BLES and other Tier 1 service flexibility in the designated exchanges is in the public interest, that AT&T's BLES is subject to competition, that the company's customers have reasonably available alternatives, and that there are no barriers to entry with respect to BLES in those exchanges. AT&T believes that is has carried its burden and, therefore, urges the Commission to grant its application on an automatic basis in accordance with the applicable rule.

IV. SUMMARY OF THE PARTIES' POSITIONS

A. Generic Issues Regarding BLES Alternative Regulation Rules

1. General Discussion

OCC's Position

On April 23, 2007, OCC filed a pleading opposing AT&T's application for alternative regulation of BLES. In opposing AT&T's application, OCC seeks to avert an expected 8.8 percent increase in BLES rates and an 8.3 percent increase in Caller ID rates. OCC contends that the Commission's rules are flawed because they do not accurately express the intent of Section 4927.03, Revised Code. Moreover, OCC claims that AT&T fails to meet the criteria in the rules for alternative regulation.

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1 *In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange and Other Tier 1 Services Pursuant to Chapter 4901:1-4, O.A.C.*, Case No. 06-1013-TP-BLS (06-1013-TP-BLS).

AT&T's Position

AT&T notes that OCC repeats the same arguments that it asserted against AT&T's application in 06-1013-TP-BLS. AT&T urges the Commission to reject OCC's arguments as it did in 06-1013-TP-BLS. It is AT&T's contention that OCC is yet again attempting to undo the legislation pertaining to the alternative regulation of BLES and the Commission's pertinent rules. Noting that the rules have been subjected to local public hearings and the legislative rule review process, AT&T urges the Commission to reject OCC's efforts to subvert the BLES rules.

Commission Conclusion

The Commission recognizes that OCC raises the same arguments as it did in *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Case No. 05-1305-TP-ORD (05-1305-TP-ORD). In 05-1305-TP-ORD, the Commission established the rules for the alternative regulation of BLES. In 06-1013-TP-BLS, OCC not only challenged the rules but also challenged their application. OCC again challenged the Commission's rules in *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. In opposing AT&T's current application, OCC again attempts to show that the Commission's rules do not comply with Section 4927.03, Revised Code. Having fully addressed OCC's arguments concerning alleged flaws in the rules on three occasions, it is not necessary to revisit the same arguments again. Instead, the Commission shall incorporate into the record in this case the entire record in 05-1305-TP-ORD, 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 in that case shall be considered as part of the record in this case and the Commission reiterates its prior determination that the record in 05-1305-TP-ORD supports its prior orders in that proceeding and the resulting rules adopted in Chapter 4901:1-4, O.A.C.

Although the Commission will not reiterate a full review of OCC's arguments insofar as they relate to flaws in the rules themselves, the Commission shall consider OCC's assertions that AT&T's application does not comply with the BLES rules or meet the criteria of the competitive market tests.

2. Barriers to Entry

OCC's Position

OCC asserts that the Commission's rationale for adopting Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., does not comply with the Section 4927.03(A)(3), Revised Code, provision that there be no barriers to entry for stand-alone BLES. Consumer Groups contend that, consistent with Section 4927.03(A)(3), Revised Code, the presence of competition does not obviate the Commission's consideration of the issue of entry barriers (OCC Opposition at 17; Hardie Affidavit at ¶¶37-44). Additionally, OCC avers that the presence of an arbitrary number of alternative providers in an exchange does not equate to the absence of entry barriers to providing stand-alone residential BLES in the exchange (OCC Opposition at 8; OCC Reply at 8). Similarly, OCC believes that simply because one or more CLECs serve an arbitrary percentage of residential access lines in an exchange does not signify that there are no barriers to entry to providing residential stand-alone BLES in that exchange.

OCC believes that the Commission's interpretation regarding the significance of the reference to barriers to entry in Section 4927.03(A)(3), Revised Code, is too narrow in scope (OCC Opposition at 13). OCC submits that a barriers to entry analysis should include all aspects of entry, including technical, economic, and geographic (OCC Reply at 18-19). OCC advocates that the Commission should rely more on market forces, whether they are present and capable of supporting a healthy and sustainable competitive telecommunications market, rather than the competitive market tests found in Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C. (OCC Opposition at 18-19, 36-37; Hagans Affidavit at ¶¶28, 45).

AT&T's Position

Relative to OCC's contention that AT&T is required to establish that there are no barriers to entry for carriers to provide stand-alone BLES in the selected exchanges, AT&T first asserts that the competitive tests established by the Commission have already been scrutinized by the legislative rule review process. To the extent that one of the tests is satisfied, AT&T submits that such a showing demonstrates compliance with the underlying statutory provisions. Therefore, AT&T insists that it is not necessary for it to demonstrate compliance with each aspect of the statutory criteria (AT&T Memorandum Contra at 16). Specific to the arguments presented by OCC relating to barriers to entry, AT&T claims that the Commission, in 05-1305-TP-ORD, already considered and rejected the arguments raised by OCC (*Id.* at 17 citing 05-1305-TP-ORD Entry on Rehearing). While acknowledging that there is no independent requirement in the BLES alternative regulation rules that an applicant establish that there are no "barriers to entry," AT&T

posits that the Commission has determined that the presence of multiple competitors in a market is sufficient evidence that there are no such barriers (*Id.* at 17).

As support for its contention that there are no barriers to entry, AT&T focuses on the fact that, in the context of its application for relief pursuant to Section 271 of the Telecommunications Act of 1996 (1996 Act), the Commission and the Federal Communications Commission (FCC) both found that there were no barriers to entry in AT&T's local exchanges (*Id.* at 20 citing *In the Matter of the Investigation Into SBC Ohio's Entry Into In-Region InterLATA Services Under Section 271 of the Telecommunications Act of 1996*, Case No. 00-942-TP-COI, Order, June 26, 2003, p. 6; *In the Matter of the Joint Application by SBC Communications, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167, Memorandum Opinion and Order, FCC 03-243, rel. October 15, 2003.). As further support for its contention that there are no barriers to entry, AT&T believes that the FCC, in its *Triennial Review Remand Order*, determined that there are no barriers to entry for BLES (*Id.* at 21 citing *In the Matter of Unbundled Access to Network Elements*, Order on Remand, FCC 04-290, rel. February 4, 2005, ¶204).

Commission Conclusion

As discussed above, OCC reiterates its prior contentions from 05-1305-TP-ORD, that, consistent with Section 4927.03(A)(3), Revised Code, the presence of competition does not obviate the Commission's consideration of the issue of barriers to entry. In raising this argument, OCC's focus continues to be generic in nature and fails to focus specifically on any of the exchanges identified by AT&T in this proceeding. Therefore, OCC's argument relative to this issue should be denied inasmuch as OCC has failed to raise any new arguments from those previously considered and rejected in 05-1305-TP-ORD. Further, the Commission does not find evidence in the record of any specific barriers to entry present in any of the exchanges in which the Commission grants AT&T's application as delineated in Attachments A and B of this opinion and order.

As stated above, OCC asserts that, rather than focusing on the presence or absence of competitors, a barrier to entry analysis should include all aspects of entry barriers including technical, economic, and geographic factors. In rejecting OCC's arguments pertaining to this issue, the Commission believes that its BLES alternative regulation rules already address the element of barriers to entry consistent with Section 4927.03(A)(3), Revised Code. The Commission has previously recognized that:

> All 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-TP-ORD, 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 could avail themselves of the BLES alternative regulation benefits contemplated by H.B. 218. Additionally, the Commission highlights that, although the legislature provided general guidance to the Commission regarding the establishment of alternative BLES regulation, the ultimate decision-making authority regarding the implementation of this authority was left to the Commission.

With respect to Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., the Commission disagrees with OCC's contention that the Commission's rules fail to address properly the absence of barriers to entry. Relative to Rule 4901:1-4-10(C)(3), O.A.C., the Commission finds significance in the required demonstration that: (1) at least 15 percent of the total number of residential access lines in an exchange must be provided by unaffiliated CLECS; (2) there are two unaffiliated facilities-based CLECs providing BLES to residential customers; and (3) there are at least five alternative providers serving the residential market. Relative to Rule 4901:1-4-10(C)(4), O.A.C., the Commission finds significance in the required threshold loss of at least 15 percent of the total residential access lines tied with the presence of at least five unaffiliated facilities-based alternative providers serving the residential customers in the relevant market. The Commission notes that all of the barriers to entry factors outlined by OCC in this case are identical to those raised in 05-1305-TP-ORD and 06-1013-TP-BLS. These factors were fully considered in those cases.

3. Functionally Equivalent or Substitute Services

<u>OCC's Position</u>

OCC contends that the Commission's rationale for adoption of Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., does not comply with the specific provisions of Section 4927.03(A)(1)(a) and (b), Revised Code, which require a finding that either the telephone company is subject to competition with respect to stand-alone BLES or that AT&T's BLES

customers have reasonably available alternatives. OCC believes that AT&T's application fails to establish the ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions in accordance with Section 4927.03(A)(2)(c), Revised, Code. Specifically, OCC opines that the requisite showing in this proceeding should be a comparison of alternative providers' stand-alone BLES offerings to AT&T's stand-alone BLES in order to ensure that functionally equivalent or substitute services are readily available at competitive rates, terms, and conditions (OCC Opposition at 14-15).

OCC submits that if functionally equivalent or substitute services are not readily available at competitive rates, terms, and conditions, then consumers will not be able to make choices in the marketplace which are capable of constraining AT&T's market power (Hardie Affidavit at ¶91). OCC contends that if the rates, terms, and conditions associated with the alternative providers' services differ significantly from those of BLES, then the alternative providers should not be relied upon for the purpose of satisfying Rule 4901:1-4-10(C), O.A.C. (OCC Opposition at 29-30; Hardie Affidavit at ¶28).

In order for services to be considered functionally equivalent, OCC argues that the services should be substitutable for a broad portion of the residential population (OCC Opposition at 24; Hardie Affidavit at ¶21). While OCC does not believe that there has to be the existence of a "perfect substitute" in order to warrant the granting of BLES alternative regulation, it does believe that the services should be similarly priced to AT&T's stand-alone BLES and have terms and conditions similar to the company's BLES, including the ubiquitous availability of service across the exchange (OCC Reply at 16-17).

Specific to wireless service being a reasonable substitute to BLES, OCC posits that, while a small number of subscribes have "cut the cord and gone wireless," it does not follow that wireless telephony is a readily available functional equivalent to, or a substitute for BLES (OCC Opposition at 29-30; Hardie Affidavit at ¶25). OCC distinguishes wireless from BLES providers for numerous reasons, including that wireless providers do not offer a functional substitute to dial tone, service quality, E9-1-1, a directory listing, or a reasonable means for Internet access. Additionally, OCC avers that wireless services would require multiple wireless telephones to replace a wireline phone for a family (OCC Opposition at 31-32; Hardie Affidavit at ¶¶56-72).

OCC also distinguishes AT&T's BLES service from wireless alternative service by pointing out that wireless service is not available at rates, terms, and conditions that are comparable to AT&T's BLES rate (OCC Opposition at 34-36). Additionally, to the extent that AT&T has presented data regarding the porting of wireline numbers to wireless carriers, OCC argues that the low levels of telephone number porting from wireline to wireless carriers support its contention that wireless carriers should not be considered as an alternative provider to BLES (OCC Opposition at 33; Hardie Affidavit at 106). OCC

also contends that AT&T has not established that consumers can receive the identified wireless services in their homes or whether the wireless carriers' services are available throughout the exchanges identified in AT&T's application (OCC Opposition at 36-40).

OCC dismisses voice over Internet protocol (VoIP) as an alternative for BLES due to the added expense of obtaining a broadband connection, concerns regarding the availability of VoIP during power outages, and concerns regarding the availability of 9-1-1 service (Hagans Affidavit at 44).

OCC disputes AT&T's inclusion of companies offering service bundles, which include BLES, as an alternative to BLES. In support of their argument, OCC argues that inasmuch as the Commission, in Case No. 00-1532-TP-COI, *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*, previously granted alternative regulation to bundles containing BLES, the Commission's BLES alternative regulation rules should be limited to consideration and alternatives for stand-alone BLES (OCC Opposition at 15-16; OCC Reply at 4-5). In support of its position, OCC argues that BLES-only service does not compete with the alternative providers' bundled service offerings because they are neither functionally equivalent nor substitutes for such service (Hagans Affidavit at 44). OCC also raises the issue that local/long distance bundles cost considerably more than AT&T's stand-alone BLES rate (OCC opposition at 34-36, 41-48; Hardie Affidavit at 14-15). OCC believes that if a competitor does not offer a service equivalent in scope to AT&T's BLES at a price that is competitive with BLES, then AT&T has no reason to need pricing flexibility for stand-alone BLES (OCC Reply at 5-6).

AT&T's Position

In response to OCC's contentions regarding "functionally equivalent or substitute services" for BLES, AT&T points out that the Commission has previously rejected such arguments in 05-1305-TP-ORD. Specific to the arguments raised by OCC, AT&T reiterates its contention that services do not have to be perfect substitutes in order for competition to flourish (AT&T Memorandum Contra at 4-5 citing AT&T's Reply Comments in 05-1305-TP-ORD, December 22, 2005, at 7). AT&T highlights that the Commission agreed with its position and found that:

> Although the products offered by those alternative providers may not be exactly the same as the ILECs' BLES offerings, those customers view them as substitutes for the ILECs' BLES. Thus, the alternative providers compete against the ILECs' provision of BLES.

Id. at 5 citing 05-1305-TP-ORD, Opinion and Order, March 7, 2006, at 25).

In regard to OCC's contention that stand-alone BLES is the only appropriate comparison for the purpose of obtaining relief pursuant to H.B. 218, AT&T calls attention to the fact that H.B. 218 neither defines stand-alone BLES nor requires that stand-alone BLES be offered by any carrier. Rather, AT&T points out that the statute simply requires that the Commission consider "the ability of alternative providers to make functionally equivalent or substitute services available at competitive rates, terms, and conditions (*Id.* at 9 citing Section 4927.03(A)(2), Revised Code). AT&T emphasizes that, while the statute allows for alternative regulation of BLES based on the demonstration of functionally equivalent or substitute services, only ILECs are required to provide stand-alone BLES. Further, AT&T notes that, although few CLECs or intermodal carriers provide stand-alone BLES, their BLES offerings are purchased in lieu of and compete with, the ILECs' BLES offerings. Therefore, AT&T submits that to adopt OCC's narrow interpretation would be contrary to the legislative intent. AT&T submits that the services offered by CLECs and the various alternative providers are functionally equivalent to and a substitute for BLES (*Id.* at 10).

In response to OCC's concern that the Commission should consider the number of stand-alone customers for the purpose of assessing the impact of BLES alternative regulation in the context of an individual application, AT&T responds that the only relevant issue is whether an applicant has satisfied one of the competitive market tests (*Id.* at 12). While OCC advocates that resellers should be excluded from a Test 3 (Rule 4901:10-4-10(C)(3), O.A.C.) analysis, AT&T recognizes that the term "alternative provider" (Rule 4901:1-4-01(B), O.A.C.) includes resellers (*Id.*).

Commission Conclusion

We first address OCC's argument that AT&T 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 the Commission considered in 05-1305-TP-ORD and 06-1013-TP-BLS. Consistent with our prior determinations in 05-1305-TP-ORD, the Commission finds that OCC's argument with respect to this contention should be denied. Specifically, the Commission previously found that:

> The law does not restrict the "analysis of competition" and "reasonably available alternatives" to competitive products that are exactly like BLES. Indeed, the law provides that the Commission consider the ability of providers to make functionally equivalent or 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 service offering view such bundled service offering 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.

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

Further, we have already concluded that:

> More customers are substituting their traditional BLES with competitive service offered by alternative 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 ILECs' BLES offerings, those customers view them as substitutes for the ILECs' BLES....
>
> Accordingly, we find that, with technology advancements, alternative providers such as wireline CLECs, wireless, VoIP, and cable telephony 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.*).

Based on the record, we find that the actual substitution by end users of AT&T's BLES with wireless, VoIP, cable, and CLEC wireline services demonstrates that these providers customize their service offerings in order to be able to meet different customers' needs and lifestyles. As a result, these service offerings are viewed by many consumers as substitutes for BLES (AT&T Application at 19). Although not each of the substitute services for BLES will meet the needs of AT&T's BLES customer base, this does not negate the consideration of a particular service as being a reasonable alternative to BLES. Each technology platform has its own unique characteristics that competitive providers utilize for the purpose of customizing their service offerings in order to be considered as an alternative to BLES. Customers subscribing to services offered by various alternative providers, and not subscribing to AT&T's BLES, demonstrate that end users perceive the alternative providers' services to be a reasonable alternative and substitute for the ILECs' BLES offerings when considering factors such as service quality, rates, terms, and conditions. Otherwise it is reasonable to conclude that they would not have switched from AT&T's BLES.

Consistent with this determination, we reject the OCC's argument that wireless providers should not be considered as alternative providers for BLES based on the contention that only a small subset of the population actually replaces their BLES service with wireless providers. The Commission recognizes that a specific segment of the population does select wireless service in lieu of BLES and, therefore, such service should be included amongst the acceptable alternatives for BLES. The Commission notes that this point was not disputed by OCC (Hardie Affidavit at 12). We find that the record in this instant proceeding demonstrates that customers in the exchanges listed in Attachments A and B substitute their AT&T service with various services offered by the wireless providers identified in the relevant exchanges (AT&T Application Ex. 3).

In reaching the aforementioned decision, the Commission rejects OCC's position that in order to justify the granting of BLES alternative regulation, the functionally equivalent services must be similarly priced to AT&T's stand-alone BLES and have terms and conditions similar to AT&T's BLES, including the ubiquitous availability of service across the exchange. Although alternative services may not be offered pursuant to identical terms and condition as AT&T's BLES, Section 4927.03(A)(2)(c), Revised Code, requires only that the functionally equivalent or substitute services be readily available at *competitive* rates, terms, and conditions. Consistent with the criteria set forth in Rule 4901:1-4-10, O.A.C., to the extent that AT&T 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.

4. Market Share

OCC's Position

OCC asserts that "a carrier providing service to only a handful of customers does not have a presence in the market sufficient to conclude that the carrier would be capable of disciplining the ILEC's BLES prices if alternative regulation is granted" (OCC Opposition at 26-27; Hagan Affidavit at ¶51). OCC asserts that, to the extent that alternative providers have customers, but are not active market participants, they should be excluded from a competitive market test since they are not making functionally equivalent or substitute services to the ILEC's BLES readily available at competitive rates, terms, and conditions (OCC Opposition at 27; Hagan Affidavit at ¶52; OCC Reply at 14-17). OCC further elaborates this point by stating that consumers cannot consider a particular provider as an option if the company has ceased marketing the service. OCC avers that many of the providers identified by AT&T do not have the provision of stand-alone BLES in their business plans and do not market the availability of the services (OCC Reply at 15-16).

AT&T's Position

In response to OCC's assertion that, in order for an alternative provider to have a presence, it must be serving a minimum number of customers and must be actively marketing in the specific exchange, AT&T simply focuses on whether an alternative provider is actually providing service in the exchange. The company rejects any belief that each and every residential customer within a given exchange must have five alternative providers available to them in order to satisfy the competitive market tests. To AT&T, in assessing competitive substitutes, it is enough that alternative providers have the ability--actual or potential--to take significant amounts of business away from each other (AT&T Memorandum Contra at 26 citing *SmithKline Corp. v. Eli Lilly & Co.*, 575 F. 2d 1056, 1063 (3rd Cir.), cert. denied, 439 U.S. 838 (1978). Notwithstanding its position on this issue, AT&T notes that resellers and all collocated CLECs have access to each residential subscriber in an exchange and that VoIP and wireless carriers are not constrained by exchange boundaries.

Commission Conclusion

As in 06-1013-TP-BLS, the Commission rejects OCC's contention that an alternative provider must be serving a minimum number of customers in an exchange in order to be considered for the purpose of a competitive market test. In establishing the specific criteria for the competitive market tests in 05-1305-TP-ORD, the Commission properly considered all relevant factors and attempted to establish a balanced approach for determining if the statutory intent of Section 4927.03, Revised Code, was satisfied.

The Commission also rejects OCC's requirement that AT&T verify that an identified alternative provider makes the service available to the entirety of a market in order to demonstrate that the alternative provider's service offering is available within the relevant market. We find that such requirement would be extremely difficult to enforce inasmuch as the relevant information is available only to the alternative provider, and not the ILEC. The fact that an alternative provider may not be directly marketing its service is not relevant to the Commission's evaluation. Rather, the important factor for consideration is whether the alternative provider's service is available to residential customers pursuant to its tariff and whether it is currently serving residential customers.

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, their market shares, and their longevity in the market. First, the Commission points out that, pursuant to Section 4927.03(A)(2)(d), Revised Code, consideration of criteria such as market share is permissive, but is not mandatory. Additionally, the Commission agrees with AT&T's contentions that an ILEC is not always able to identify where the lost lines have migrated and that an ILEC does not have access to other competitors' market data in

order to calculate a competitor's market share. The Commission recognizes that an access line can be lost to an unregulated competitor (such as a VoIP provider), lost to an affiliated or unaffiliated wireless provider, disconnected due to a move, converted to digital subscriber loop (DSL) provided by an ILEC affiliate or an unaffiliated provider, or converted to cable modem service provided by an unregulated entity. The only scenarios under which an ILEC would be able to identify where the lost residential access line migrated is when it is transferred to a CLEC that either utilizes the ILECs unbundled network element (UNE) or when it ports the telephone number associated with the lost residential access line.

As a result of this identified difficulty, the Commission requires a demonstration of a competitor's market share as a measure of market power only with respect to Test 3. The Commission also finds that a market share criteria would not be appropriate in those exchanges/markets where competitors have elected different technologies for their market entry strategies. Therefore, the percentage of residential access lines lost incorporated as a requirement in Rule 4901:1-4-10(C)(1) and (C)(4), O.A.C., is a more reasonable method of assessing market power and the level of competition that an ILEC faces in a given exchange when the main competitors are not CLECs. This is because the ILEC does not have to rely on customer-specific migration information under these tests.

B. Competitive Market Test 4

1. Access Line Loss

OCC's Position

OCC's first line argument is that the line loss provision in Rule 4901:1-4-10(C)(4), O.A.C., has nothing to do with the requirements in Section 4927.03(A), Revised Code. OCC rejects the assumption that there is a necessary correlation between lines lost and competition. Market share, according to OCC, would be a more accurate measurement of market power than line loss. OCC points out that access lines could be lost through migration of lines to another AT&T service offering. Moreover, OCC claims that AT&T has not excluded from "lines lost" those lines lost to AT&T's own DSL, an affiliated wireless carrier, or through total abandonment without migration of the customer to another service or carrier (OCC Opposition at 22). As pointed out by OCC, the Commission addressed this issue in 06-1013-TP-BLS.[2] To OCC, it is insufficient for the Commission to support the lines lost test with an alternative providers test. Such a test, contends OCC, only allows alternative regulation in an exchange where lines have been lost for any reason. OCC rejects such a test because alternative providers do not necessarily provide functionally equivalent services at competitive rates, terms, and

[2] Opinion and Order issued December 20, 2006, at 17-19.

conditions. To pass a line loss test, OCC recommends that AT&T exclude 1) lines transferred to AT&T's DSL service and wireless affiliates, 2) lines transferred to other broadband providers, and 3) lines disconnected without migration to other competitors within the service area (OCC Opposition at 23; Hardie Affidavit at ¶36). Because lines could be lost for any reason, OCC concludes that there is no nexus between lines lost and competition (*Id.* at 23). Ultimately, because AT&T has failed to show a correlation between competition and lines lost, OCC concludes that AT&T has not satisfied Test 4 (*Id.*).

AT&T's Position

In its Memorandum Contra, AT&T reminds the Commission that it has already considered and rejected OCC's argument that Test 4 does not meet statutory requirements. As proof that the Commission has already considered these arguments, AT&T refers the Commission to the entries on rehearing issued in 06-1013-TP-BLS[3] and 05-1305-TP-ORD.[4]

AT&T rejects OCC's contention that AT&T has failed to comply with the rule. OCC suggests that AT&T's line loss could be attributable to customers switching to DSL or to an affiliated wireless carrier. In addition, OCC claims that line loss could arise from abandonment of service altogether (AT&T Memorandum Contra at 22). Despite OCC's criticism, AT&T points out that the test does not require disclosure of the reasons for lost lines. Citing language from 06-1013-TP-BLS, AT&T responds that such information would require access to competitors' confidential and market share information, a goal that AT&T regards as either unachievable or impractical (*Id.* at 22-23). AT&T explains that the line loss rule achieves the Commission's goal of having a measurement that is attainable and verifiable (*Id.* at 23).

Putting aside OCC's criticism of the line loss test, AT&T proclaims that it meets the test's criteria. To meet the test, AT&T presented its residential access line counts for year-end 2002 and December 31, 2006. AT&T further asserts that it properly counted its residential access lines for the period to reveal a 15 percent decrease. AT&T points out that OCC does not challenge AT&T's calculations. The test only requires that the ILEC provide the number of residential lines reported for an exchange on its 2002 annual report. The ILEC is then required to count in the same way the number of lines for a subsequent date. If the line loss is 15 percent or greater, the test is satisfied. AT&T claims that it has satisfied the test in each exchange where the test was applied (AT&T Memorandum Contra at 24). Moreover, AT&T points out that OCC did not challenge AT&T's calculations of line loss (*Id.*).

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3 Entry on Rehearing issued February 14, 2007, at 17-18.

4 Entry on Rehearing issued May 3, 2006, at 17-19.

Commission Conclusion

As noted above, OCC argues that the Commission's competitive market test in Rule 4901:1-4-10(C)(4), O.A.C, does not comport with Section 4927.03(A)(2), Revised Code. OCC emphasizes that line loss can result from a wide variety of factors. Some factors, argues OCC, have nothing to do with the criteria in Section 4927.03(A), Revised Code. Customers can switch to an affiliated or non-affiliated DSL provider. Customers can switch to a cable modem provider. Customers can switch to AT&T's wireless affiliate service. Customers may even abandon service entirely. It should also be noted that OCC believes that line loss may be attributable to a decline in the number of households in the market area.

The Commission recognizes that OCC raised these same arguments in the rehearing of 05-1305-TP-ORD, in 06-1002-TP-BLS, and in 06-1013-TP-BLS. The Commission was aware of OCC's concerns and fully considered them before adopting the requirements of Rule 4901:1-4-10(C)(4), O.A.C., and in evaluating data submitted in the 06-1002-TP-BLS and 06-1013-TP-BLS proceedings. After considering a number of factors, the Commission established the 15 percent line loss criterion, using the year 2002 as a baseline to assess line loss. The Commission used 2002 as the starting point of the line loss calculation in order to exclude the data distortion concerns expressed by OCC (05-1305-TP-ORD, Entry on Rehearing at 13, 14). The Commission also finds that the record in this case is void of any data that would support an allegation that residential second lines were being disconnected and subsequently used for Internet access and not for voice communications.

As noted above, OCC believes that the competitive market test in Rule 4901:1-4-10(C)(4), O.A.C., does not account for the possibility that there are a declining number of households in the identified AT&T exchanges and that this reduction may be distorting AT&T's analysis of the competitive market test. In dismissing this argument, the Commission highlights the fact that OCC has failed to recognize that the Commission's requirement of at least 15 percent total residential access line loss in an exchange fully captures the impact of families moving out of a specific exchange as well as families moving into that exchange.

OCC recommends that lines lost to AT&T's wireless affiliate should be excluded from the 15 percent line loss calculation. The rule does not require a demonstration that access lines are lost to a particular provider. Instead, another provision of the rule recognizes the importance of unaffiliated alternative providers by requiring the presence of at least five unaffiliated, facilities-based, alternative providers serving the residential market.

As the Commission noted in 06-1013-TP-BLS,[5] and as AT&T asserts in its Memorandum Contra,[6] ILECs do not necessarily know why lines are lost. Nor is it possible to ascertain where the lost residential lines have gone. ILECs would not have access to competitors' confidential market share information. In spite of these limitations, and the Commission's repeated explanations of its rationale for adopting the requirements of Rule 4901:1-4-10(C)(4), O.A.C, OCC has not addressed these concerns.

The Commission emphasizes that, in developing the competitive market tests in Rule 4901:1-4-10, O.A.C., the Commission considered the statutory factors outlined in Section 4927.03(A)(2) and(A)(3), Revised Code, and all of the arguments and concerns raised in the rulemaking proceeding. The goal of the Commission is to have administratively practicable tests using the most objective criteria to comply with the statute. The Commission relied upon its expertise and judgment. Moreover, the Commission not only based its decision on the record in 05-1305-TP-ORD but also considered all possible causes for access line loss. Ultimately, the Commission determined that for Rule 4901:1-4-10(C)(4), O.A.C, a minimum of 15 percent residential access line loss in a given exchange is appropriate, provided that it is accompanied by the presence of at least five unaffiliated facilities-based alternative providers serving the residential market in that exchange. The Commission is not persuaded by OCC's arguments that attempt to demonstrate that the Test 4 requirement of a minimum of 15 percent of total residential access line loss since year 2002 in a given exchange does not satisfy the statutory criteria of Section 4927.03, Revised Code.

Based on the data presented by AT&T (AT&T Application, Ex. 3) for the 5 exchanges that purportedly comply with Test 4, we find that AT&T's application satisfies the criteria. In so finding, we also find 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 data for 2002.

2. Facilities-Based Alternative Provider

OCC's Position

With respect to Test 4, OCC asserts that AT&T has failed to demonstrate that the companies relied upon for the purpose of establishing the presence of facilities-based providers actually own, operate, manage, or control the facilities utilized for the provision of service (OCC Opposition 24, 41-52).

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5 Opinion and Order issued December 20, 2006 at 15-16 and Entry on Rehearing issued February 14, 2007, at 6-7.

6 AT&T Memorandum at 22

In regard to the facilities-based, alternative provider prong for Test 4, OCC believes that AT&T has not shown that there are five unaffiliated facilities-based alternative providers serving the residential market in any of the exchanges identified for Rule 4901:1-4-10(C)(4), O.A.C. (*Id. at 51*). *In particular, OCC does not consider ACN Communications* Services (ACN), Budget Phone (Budget), Comcast Phone (Comcast/Insight), First Communications (First Comm), MCI/WorldCom, New Access Communications (New Access), Revolution Communications (Revolution), Sage, Talk America/Cavalier, Trinsic Communications (Trinsic) or Verizon Wireless to be alternative providers. OCC challenges them on the grounds that some do not have sufficient market share to establish "presence" in the market, some do not offer service throughout the exchange, and some only offer prepaid services. Other alternative providers offer bundled services instead of stand-alone BLES, price their service higher than AT&T's stand-alone BLES, or resell AT&T's service. Citing these and other examples, OCC contends that the Commission should disregard the listed carriers as alternative providers (*OCC Reply at 22-27*).

AT&T Position

AT&T warns the Commission that OCC raises the same arguments that it asserted in 05-1305-TP-ORD and in 06-1013-TP-BLS. AT&T characterizes OCC's position as a desire for "perfect substitutes." According to AT&T the Commission has already decided that alternative providers such as wireline CLECs, wireless providers, VoIP, and cable telephone providers are relevant to whether an ILEC is subject to competition and whether customers have reasonably available alternatives to the ILEC's BLES offering at competitive rates, terms, and conditions. To AT&T, what is significant is not whether the services are interchangeable but whether the service has the potential to take significant amounts of business (AT&T Memorandum Contra at 26).

AT&T notes that OCC finds the same faults with the CLECs in this proceeding as it did with the CLECs in 06-1013-TP-BLS. In 06-1013-TP-BLS, AT&T claims that the Commission determined that all nine providers met the requirements of the Commission's rules. Seeing no evidence that would justify different findings, AT&T urges the Commission to reach the same conclusions (AT&T Memorandum Contra at 26).

Commission Conclusion

As discussed below, we find that, based on the data in the record, the ten wireline providers identified by AT&T satisfy the facilities-based criteria of Test 4 (AT&T Application, Ex. 3). These carriers are delineated in Attachment A of this opinion and order.

We note that OCC did not dispute that any of the alternative providers identified in AT&T's application for the purposes of meeting the second prong of Test 4 are in fact

facilities-based. Accordingly, for the purposes of satisfying the requirements of the second prong of Test 4, we determine that the following carriers are facilities-based, alternative providers: ACN, Budget Phone, Comcast/Insight, First Communications, MCI/WorldCom, New Access, Revolution, Sage, Talk America/Cavalier, and Trinsic.

With respect to the issue of unaffiliated providers and the identification of unaffiliated, facilities-based alternative providers, the Commission notes that AT&T has not identified any affiliated provider in its application. Therefore, we find that the identified alternative providers listed in Attachment A of this opinion and order satisfy the requisite "unaffiliated" criterion of Test 4.

With respect to Alltel Wireless, Verizon Wireless, and Sprint/Nextel, we find that these wireless providers are unaffiliated, facilities-based providers for the purpose of satisfying the second prong of Test 4 as discussed in detail elsewhere in this opinion and order. The Commission notes that OCC does not challenge whether these wireless carriers are unaffiliated, facilities-based providers.

3. Market Presence

OCC's Position

OCC contends that AT&T has not shown that there are five unaffiliated facilities-based alternative providers serving the residential market in any of its Test 4 exchanges, when the rule is interpreted consistent with the statute. OCC rejects the wireless carriers proposed by AT&T, in part because they do not serve all of the identified exchanges in their entirety. With respect to the cable-based provider Comcast, OCC states that it too must be excluded for failure to cover the entire exchange. OCC believes that ACN, Budget, Comcast, MCI/WorldCom, New Access, Revolution, Sage, Talk America, and Trinsic should be excluded because their services are not competitively priced to AT&T's BLES (OCC Opposition 51). OCC points out that there will be customers in certain exchanges that will not have alternatives to AT&T's BLES. For this reason, OCC concludes that the Commission should not grant alternative regulation of BLES.

AT&T's Position

AT&T opines that for the purpose of satisfying the criterion of market presence, the essential issue is whether a carrier is present or absent in an exchange. With respect to the alternative providers identified in its application, AT&T asserts that they are all present, providing service, and have residential customers (AT&T Memorandum Contra at 12-13).

Commission Conclusion

We reject the OCC's narrow interpretation of Section 4927.03, Revised Code, inasmuch as it is overly restrictive in scope. In previously selecting an exchange as the market for which competition for an ILEC's BLES can be evaluated, the Commission articulated that an exchange would:

(1) Exhibit similar market conditions within its boundary.
(2) Provide an objective definition that would allow for evaluation of competition on a reasonable granular level.
(3) Be practical to administer as ILECs collect and report data at the exchange level.

(05-1305-TP-ORD Opinion and Order at 18,19).

Additionally, 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, the Commission selected an exchange as a market definition.[7] The Commission finds that in order to satisfy OCC's narrow interpretation of the statutory provisions that the alternative provider has to serve the entirety of an exchange, a market would have to be as small as a "city block" for wireline providers, or even as small as a "single residence" in order to guarantee that wireless service is reaching consumers indoors at their homes. Such an interpretation is contrary to the statutory intent of Section 4927.03, Revised Code, and would be impractical and extremely difficult to administer.

The Commission finds that the coverage maps and data provided by AT&T for Alltel Wireless, Sprint/Nextel, and Verizon Wireless demonstrate that their wireless service offerings are readily available to customers of the exchanges identified in Attachments A and B of this opinion and order, and, therefore, satisfy the second prong of Rule 4901:1-4-10(C)(4),O.A.C., and the third prong of Rule 4901:1-4-10(C)(3),O.A.C. Specifically, the Commission finds that, in the relevant exchanges listed in Attachments A and B of this opinion and order, AT&T's application demonstrates that Alltel Wireless, Sprint/Nextel, and Verizon Wireless advertise the availability and coverage of their service offerings in the relevant exchanges on their websites. The Commission notes that OCC does not dispute this determination. Therefore, we find that these three wireless providers meet the "presence in the market" requirement of Test 4 and Test 3 in the relevant exchanges identified in Attachments A and B of this opinion and order. Similarly, the Commission finds that the coverage areas of Comcast/Insight satisfy the

7 One of the few issues that OCC supported in 05-1305-TP-ORD was the selection of an exchange as the market definition.

"market presence" criteria for the purpose of being considered as an alternative provider in the relevant exchanges identified in Attachments A and B of this opinion and order.

We also note, and OCC does not dispute, that:

(1) AT&T can distinguish its BLES customers from CLECs' customers.
(2) CLECs providing residential service are in fact offering their services via their current tariffs.

We find that the residential White Pages listing, Local Wholesale Complete (LWC) access line data, and 9-1-1 data provided in the record demonstrates that the identified CLECs offer service to residential customers in the relevant exchanges, as denoted in Attachment A to this opinion and order. Also, the record demonstrates that those CLECs maintain current tariffs on record with the Commission in which they make residential services available to current and prospective customers, with no grandfathering provisions in the relevant exchanges (except Comcast/Insight). As to Comcast/Insight, we note that although it filed an application to grandfather its tariffed residential offerings "Comcast Digital Phone," Comcast/Insight continues to offer local residential service "Comcast Digital Phone" to its existing customers via tariffs and offers local residential service "Comcast Digital Voice," which is a VoIP-based service, to prospective customers.[8] Additionally, the record demonstrates that most of the CLECs providing residential service via LWC arrangements are in fact advertising their offerings on their respective websites in the relevant exchanges. Accordingly, we find that the following unaffiliated, facilities-based CLECs offering service to residential subscribers satisfy the market presence requirement of the second prong of Test 4 in the relevant exchanges identified in Attachment A to this opinion and order: ACN, Budget Phone, Comcast/ Insight, First Communications, MCI/WorldCom, New Access, Revolution, Sage, Talk America/Cavalier, and Trinsic.

The Commission believes that factors like longevity in the competitive market, while somewhat noteworthy, does not have a direct bearing on the state of the competitive market at any given point in time. Rather, the Commission believes that the presence of several unaffiliated, facilities-based providers is a more significant factor evidencing a healthy sustainable market, because this demonstrates a greater commitment to remain in the market as a competitor. Thus, 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 an analysis of whether AT&T has lost a considerable share of its access lines in a specific

8 On March 30, 2007, Comcast filed an application in Case No. 07-335-TP-ATA to grandfather its local service offerings.

exchange. 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, if the state of the competitive market changes significantly in a negative direction, 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.

4. Serving the Residential Market

OCC's Position

OCC argues that in order for carriers to be considered as facilities-based alternative providers for the purpose of Test 4, AT&T needs to make a showing that they serve the residential market by actively marketing service to residential customers (Hagans Affidavit at ¶52).

AT&T's Position

To identify those alternative providers that are serving the residential market, AT&T relied on criteria identified on the exchange summary sheet for each exchange (AT&T Application, Ex. 3). To collect information on CLEC and alternative provider activity in AT&T's exchanges, AT&T states that it reviewed publicly available sources such as websites, tariff filings, wireless licenses, certification cases, and interconnection agreements. Moreover, to confirm publicly available information, AT&T reviewed internal data from billing, E9-1-1 records, White Pages listings, and ported telephone number information (AT&T Application at 3).

Commission Conclusion

OCC argues that Test 4 compels AT&T to show that there are facilities-based carriers serving the residential market. However, we find that OCC does not dispute that the ten carriers identified by AT&T are providing services to the residential market. The carriers have tariffs on file with the Commission, residential listings in the White Pages directory, and maintain websites that advertise residential service offerings in the relevant exchange (AT&T Application, Ex. 3). Accordingly, we conclude that the ten unaffiliated, facilities-based alternative providers listed above provide their services to residential customers in the relevant exchanges as identified in Attachment A of this opinion and order.

Relative to the wireless providers identified in AT&T's application, we find that Alltel Wireless, Verizon Wireless, and Sprint-Nextel advertise the availability and coverage of their service offerings in the relevant exchanges. In addition, there are

residential customers who did in fact disconnect AT&T's BLES service in exchanges identified in Attachments A and B of this opinion and order (Hardie Affidavit at 57-58).

OCC argues that the wireline-to-wireless number porting data provided by AT&T reflects that residential cord-cutting behavior in AT&T's service area is very limited and, therefore, does not support AT&T's use of wireless carriers as alternative providers (*Id.*). We disagree. To the contrary, we find that Alltel Wireless, Sprint/Nextel, and Verizon Wireless are unaffiliated, facilities-based, alternative providers that have established their presence and serve residential customers in the exchanges identified in Attachment A and B of this opinion and order. Because they have a presence and serve residential customers they satisfy the second prong of Test 4.

5. Exchanges Requiring Special Consideration Due to Unique Circumstances

In 06-1013-TP-BLS, OCC pointed out that the Barnesville and Somerton exchanges shared the same switch. Because of the sharing arrangement, OCC claimed that AT&T could not identify the competitive lines served by wireline carriers in each exchange. Moreover, OCC concluded that AT&T could not apply the competitive market tests. A CLEC or alternative provider serving one exchange but not the other may present a "false positive" (06-1013-TP-BLS, Opinion and Order issued December 20, 2006, at 26-27). In agreement with OCC, and based on the data presented in 06-1013-TP-BLS, the Commission denied alternative regulation for the Barnesville and Somerton exchanges (*Id.* at Ex. A). In this application, AT&T renews its request for alternative regulation in the Barnesville Exchange.

Although the Barnesville and Somerton exchanges are served by the same switch, we note that AT&T did not include the Somerton Exchange in its application. As for the Barnesville Exchange, AT&T relies on Test 4 to demonstrate the presence of competition (AT&T Application Ex. 1 at 9). Notwithstanding that one switch serves two exchanges, the Commission finds that AT&T has submitted data on an individual exchange basis demonstrating that the first prong of Rule 4901:1-4-10(C)(4), O.A.C, has been satisfied for the Barnesville Exchange (AT&T Application, Ex. 3). As a result, AT&T has demonstrated that at least 15 percent of total residential access lines have been lost since 2002 for the Barnesville Exchange. The sharing of a switch between two exchanges only impacts the second prong of Rule 4901:1-4-10(C)(4), O.A.C., which requires "the presence of at least five unaffiliated facilities-based alternative providers serving the residential market."

Once a CLEC establishes interconnection at a specific ILEC's switch, the CLEC can serve any ILEC customer served by that switch using a UNE-P or LWC arrangement, regardless of where the customer is located. The Commission recognizes that the CLEC information (i.e., UNE-P lines, LWC lines, ported telephone numbers, residential White

Pages listings, and residential E9-1-1 listings) used to distinguish the CLECs' operations is generally available on the switch level (Common Language Location Identification (CLLI) code assigned to the switch). AT&T, therefore, needed to isolate the data to an individual exchange. Examining the data filed in this proceeding, we find that AT&T has extracted data using both the switch's CLLI code and the first 6 digits of the telephone numbers (NPA-NXX), which are uniquely assigned to the individual exchange by the North American Numbering Plan Administrator (NANPA) (AT&T Application at 9 and Ex. 3). Accordingly, the data provided in AT&T's application for the Barnesville Exchange (i.e., CLECs' lines leased from AT&T, CLECs' lines served over the CLECs' own switches, and ported telephone numbers sheets) represents the various CLECs providing residential service in the Barnesville Exchange only, regardless of whether they also serve customers in the Somerton Exchange or not. Therefore, based on the record in this proceeding, we find that AT&T has satisfied the second prong of Test 4 in the Barnesville Exchange and shall be granted alternative regulation treatment for its Tier 1 core and non-core services pursuant to Rule 4901:1-4-11, O.A.C, in the Barnesville Exchange as outlined in Attachment A of this opinion and order.

C. Competitive Market Test 3

1. CLECs' Market Share

OCC's Position

OCC again argues that the Commission's rule is inconsistent with the statute. For example, OCC contends that, by excluding ILEC affiliates from the test, only the first prong of Test 3 adequately addresses the factors in Section 4927.03(A)(2), Revised Code, i.e., "the affiliation of providers of services" (OCC Opposition at 54). The rule excludes ILEC affiliates from the test. Furthermore, OCC argues that the statute requires that the Commission find that an ILEC's stand-alone BLES is subject to competition or has reasonably available alternatives (*Id.*) OCC urges the Commission to focus upon stand-alone BLES, not packages that include BLES. Referring to the rule, OCC contends that a calculation of total residential lines provided by 15 percent of the unaffiliated CLECs does not provide useful information. Such information does not reveal whether stand-alone BLES is subject to competition or whether it has reasonably available alternatives (*Id.* at 55). In OCC's opinion, local/toll packages do not impose a competitive impact on BLES-only services; they are not functionally equivalent or substitutes, as required by Section 4927.03(A)(2)(c), Revised Code (*Id.*).

In addition to challenging the rule, OCC challenges its application. Reviewing AT&T's calculations, OCC concludes that AT&T has overstated the CLEC residential market share. OCC reveals that AT&T calculated CLEC residential market share by aggregating total AT&T residential lines and CLEC residential lines based upon counts of

E9-1-1 listings and lines and then dividing that number into the total of alleged CLEC residential lines (OCC Opposition at 56; Hagans Affidavit at ¶16). OCC also believes that AT&T has overstated the CLECs' residential market share by relying upon carriers that are not actively marketing residential services (OCC Opposition at 53). For three Test 3 exchanges–Canal Winchester, Groveport, and New Albany–OCC points out that AT&T overstates the CLEC market share by relying upon E9-1-1 listings for carriers that do not provide residential service. OCC reminds the Commission that it excluded carriers on this basis in 06-1013-TP-BLS (*Id.* at 56).

AT&T's Position

AT&T proclaims that its application meets the requirements of Test 3, where applied. In addressing the first prong of Test 3, AT&T rejects OCC's claim that AT&T has included three carriers that do not provide residential service. AT&T contends that OCC bases its conclusions on faulty assumptions and interpretations. AT&T remains confident in its calculations of CLEC market share (AT&T Memorandum Contra at 27).

With regard to OCC's criticisms of the carriers listed by AT&T in support of Test 3, AT&T reminds the Commission that it rejected OCC's arguments in 05-1305-TP-ORD and 06-1013-TP-BLS. In 06-1013-TP-BLS, the Commission approved AT&T's list of carriers. Finding that OCC has raised nothing new or persuasive, AT&T encourages the Commission to reach the same conclusion in this proceeding that it did in 06-1013-TP-BLS (AT&T Memorandum Contra at 28).

AT&T disagrees with OCC's request to exclude three carriers that have placed residential E9-1-1 listings. OCC contends the three carriers do not provide residential service. In response, AT&T points out that 9-1-1 service demands extreme accuracy for all database entries. Consequently, AT&T recommends that the Commission should be skeptical of claims that the lines do not exist. Aside from the possibility that the lines may be for business customers, AT&T suggests other explanations (AT&T Memorandum Contra 29). For example, CLECs could be acting on behalf of other carriers. Another possibility is that the CLECs could have failed to update their tariffs. Because, in such cases, the lines are legitimate, AT&T concludes that they must be included in the residential market share calculation.

Commission Conclusion

The first prong of Test 3 requires that, for each requested telephone exchange, an applicant must demonstrate that at least 15 percent of total residential access lines are provided by unaffiliated CLECs. In regard to OCC's argument that evidence of CLECs serving 15 percent of the entire residential market with local/toll packages fails to demonstrate any competitive impact on the market for BLES-only services, we find that

the alternative providers set forth in Attachment B identify those CLECs that are competing with AT&T's BLES offerings and have succeeded to win at least 15 percent of the residential customers who otherwise would subscribe to AT&T's BLES.

With respect to OCC's contention that three of the identified alternative providers[9] do not serve residential customers in the Canal Winchester, Groveport, and New Albany exchanges, the Commission finds that the review of the specific CLECs' tariffs reflects that the three CLECs do not provide residential services. Although we find merit in AT&T's argument that 9-1-1 service demands extreme accuracy for all database entries, the record does not provide sufficient evidence to support the claim that 9-1-1 listings for these three CLECs are in fact for residential lines. AT&T offers some *possible explanations* as to why these three CLECs might have placed valid residential listings, but failed to provide any evidence to support the accuracy or validity of these *possible explanations*. With regard to two CLECs, OCC argues that they formerly provided residential services but no longer offer residential services. In response, AT&T claims that the 9-1-1 listings *could be* valid listings placed at that time and have not been remarked to reflect the succeeding carrier. The Commission notes that based on the record (e.g., Hagan Affidavit at 16-17), at least for one of the two CLECs, the residential customers that transitioned to a succeeding carrier were residential customers served via a UNE-P arrangement. This means that these residential customers were served over AT&T's switch and their line count would be part of the UNE-P or LWC lines and not the 9-1-1 lines in dispute. The 9-1-1 listings data are used to provide CLEC line counts that are served by the CLEC-owned switch. Also, AT&T claims that *another possible explanation* is that these three CLECs are acting on behalf of other carriers, such as other CLECs or VoIP providers. Although, it can be a valid possibility, AT&T did not provide any evidence to support the claim. The Commission notes that this is not the first appearance of this issue. The Consumer Groups opposing AT&T's prior application raised the issue (*See*, 06-1013-TP-BLS, Opinion and Order issued December 20, 2006, at 29). AT&T should have known that it needed to support its data by evidence in the current proceeding when it decided to use the same type of data. Rules 4901:1-4-09(B)(3) and 4901:1-4-10(A), O.A.C., impose upon AT&T the burden of demonstrating that as of the date of the application, it meets at least one of the competitive market tests in each exchange area by providing the supporting information and detailed analysis in the exhibits of its application. We find that AT&T failed to carry its burden of proof regarding the residential 9-1-1 listings for these three CLECs.

Accordingly, we shall exclude from the calculation of the percentage of residential access lines served by unaffiliated CLECs in the Canal Winchester, Groveport, and New Albany exchanges the access lines included in the residential 9-1-1 listings sheet which are attributed to each of the three CLECs. This determination impacted all of the three exchanges resulting in the percentage of residential access lines served by unaffiliated

9 Due to proprietary concerns, the specific identity of these carriers will remain confidential.

CLECs to be less than the 15 percent threshold required by Test 3. Accordingly, the Canal Winchester, Groveport, and New Albany exchanges are not eligible for BLES alternative regulation treatment because they do not meet one of the Test 3 requirements.

As to the OCC's argument that AT&T overstated the CLECs' residential market share by relying upon carriers that are not actively marketing residential services, we reject this argument. We find it unreasonable to exclude the market share of a given CLEC based upon its marketing activity, which may change from time-to-time. The fact that a CLEC is successful in winning and keeping customers is a clear signal of the competitive pressure the ILEC faces and to which it must respond. Finally, we are not convinced by OCC's argument that we should exclude the market share of CLECs engaged in resale, UNE-P, or LWC because these CLECs do not actively market to residential customers or do not serve residential customers (Hagan Affidavit at ¶17). Specifically, the Commission notes that OCC's witness Hagan recognizes that such lines represent a very small percentage of total residential access lines reported by AT&T (*Id.*; Hagan Affidavit, Att. KLH2).

2. Facilities-based Providers

OCC's Position

Challenging AT&T's compliance with the second prong of Test 3, OCC notes that the second prong requires the presence of at least two unaffiliated, facilities-based CLECs providing BLES to residential customers. AT&T's application identifies MCI and Sage as unaffiliated facilities-based CLECs that provide BLES to residential customers in each of the six Test 3 exchanges. Because neither MCI/WorldCom nor Sage provides stand-alone BLES to residential customers, OCC concludes that AT&T has failed to meet the second prong of Test 3 for all six exchanges (OCC Opposition at 57).

AT&T's Position

Contrary to OCC's assertion, AT&T declares that MCI/WorldCom and Sage are two unaffiliated facilities-based CLECs that are present and provide service to residential customers (AT&T Memorandum Contra at 27). AT&T rejects as faulty OCC's argument that MCI/WorldCom and Sage should be disqualified for failure to provide stand-alone BLES to residential customers.

Commission Conclusion

The second prong of Test 3 requires that the applicant demonstrate that there are at least two unaffiliated, facilities-based CLECs providing BLES to residential customers in each requested exchange. Similar to our discussion regarding Test 4 above, we find that

MCI/WorldCom and Sage are unaffiliated facilities-based CLECs for the purpose of Test 3. Pursuant to our discussion regarding Test 4, we also conclude that MCI/WorldCom and Sage are unaffiliated, facilities-based CLECs providing BLES services to residential customers in the relevant exchanges as listed in Attachment B of this opinion and order for the purposes of meeting the second prong of Test 3.

3. Presence of Alternative Providers Serving the Residential Market

OCC's Position

Referring to the third prong of Test 3, OCC states that the rule requires the presence of at least five alternative providers serving the residential market (OCC Opposition at 57). Unlike Test 4, CLECs under Test 3 do not have to be facilities-based or unaffiliated. Consequently, CLECs that are disqualified under Test 4 may pass under Test 3 (*Id.*). With the exception of First Comm in the Salineville Exchange, OCC declares that none of the Test 4 candidates qualify even if the facilities-based criterion is removed (*Id.* at 58-63). In summary, OCC concludes that AT&T has failed to carry its burden regarding Test 3 and that AT&T should be denied BLES alternative regulation for the Belfast, Canal Winchester, Groveport, Lewisville, New Albany, and Salineville exchanges.

AT&T's Position

In disagreement with OCC, AT&T asserts that there are at least five alternative providers that are present and serving residential customers in the Test 3 exchanges. In response to OCC's claim that none of the providers, with the exception of First Comm in the Salineville Exchange, comply with the third prong of Test 3, AT&T defines competition differently. To AT&T, it is not necessary that customers view differing services as interchangeable. What is critical is that competitors have the ability--actual or potential--to take significant amounts of business away from each other (AT&T Memorandum Contra at 27-28).

Commission Conclusion

We note that the majority of wireline and wireless alternative providers identified by AT&T to satisfy the third prong of Test 3, have already been discussed in our evaluation of the presence of at least five unaffiliated facilities-based alternative providers serving the residential market under the second prong of Test 4. Therefore, we find that the following alternative providers meet the third prong of Test 3: ACN, Comcast/Insight, First Comm, New Access, Revolution, Talk America/Cavalier, and Trinsic.

Specific to PNG, we find that, based on the data in the record, the company meets all of the requirements of the third prong of Test 3. Specifically, we evaluated PNG's operations in the four exchanges for which it was identified in AT&T's application. The record demonstrates that through resale of AT&T's residential services, PNG provides residential services that compete with AT&T's BLES. PNG maintains residential tariffed offerings and has residential White Pages listings in the Canal Winchester, Lewisville, New Albany, and Salineville exchanges (AT&T Application at Ex. 3). Therefore, we find that, based on the record, PNG should be considered for the purpose of satisfying the criteria outlined in the third prong of Test 3 in these four exchanges. Similarly, we evaluated Global Connection, Inc.'s operations in the Canal Winchester Exchange. The record shows that Global Connection, Inc. provides residential services that compete with AT&T's BLES. Global Connection, Inc. maintains residential tariffed offerings and has residential White Pages listings in the Canal Winchester Exchange. Therefore, we find that, based on the record, Global Connection, Inc. should be considered for the purpose of satisfying the criteria outlined in the third prong of Test 3 in Canal Winchester Exchange.

In regard to the wireless providers identified to satisfy Test 3—Alltel Wireless, Sprint/Nextel, and Verizon Wireless--for the same reasons as stated in our discussion of Test 4, we find that these wireless companies are alternative providers that satisfy the third prong of Test 3 for those exchanges listed in Attachment B.

4. Exchanges Requiring Special Consideration Due to Unique Circumstances

As in 06-1013-TP-BLS, the request for alternative regulation of BLS in the Canal Winchester, Groveport, and New Albany exchanges raises the unique situation of one switch serving two exchanges. Unlike the scenario discussed with respect to Test 4, we recognize that all three prongs of Test 3 require CLEC information, to the extent that AT&T relies on CLECs to satisfy the third prong of Test 3. Examining the data filed in this proceeding, we find that the data extracted by AT&T uses both the switch's CLLI code and the first six digits of the telephone numbers (NPA-NXX), which are uniquely assigned to the individual exchange by the North American Numbering Plan Administrator (NANPA). Accordingly, the data provided in AT&T's application for the Canal Winchester and Groveport exchanges (i.e., CLECs lines leased from AT&T, CLECs lines served over the CLEC's own switch, and ported telephone numbers sheet) represent the various CLECs providing residential service in the individual exchange separately, regardless of whether the CLEC also serves customers in the other exchange served by the same switch or not. Therefore, based on the record in this proceeding, we find that AT&T has satisfied the second and third prongs of Test 3 in the Canal Winchester and Groveport exchanges as outlined in Attachment C to this opinion and order.

As we determined earlier, based on the data in the record, the Canal Winchester, Groveport, and New Albany exchanges identified by AT&T's application specific to Test 3 meet some, but not all, of the requirements of the Test 3. Accordingly, the Canal Winchester, Groveport, and New Albany exchanges are not eligible for BLES alternative regulation treatment because they do not meet one of the Test 3 requirements. These exchanges and the corresponding data are summarized in Attachment C.

V. TARIFF AMENDMENTS

AT&T filed the proposed tariff modifications necessary to implement the pricing flexibility rules set forth in Rule 4901:1-4-09(A), O.A.C. The necessary tariff revisions include modifying the tariff structure to separate the competitive exchanges from the noncompetitive exchanges. For tracking purposes, the exchanges appear 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 AT&T is requesting competitive treatment, the company is proposing to apply any allowable BLES increase to the access line portion of the monthly charge. The actual monthly charge has not been increased in this application. Pricing flexibility rules also allow certain other non-core Tier 1 services to receive Tier 2 pricing flexibility. AT&T's proposed tariff reflects these changes as well. After a thorough review of the information provided by the applicant, the Commission believes that the tariff, as revised on May 25, 2007, and on June 6, 2007, is just and reasonable specific to those exchanges approved pursuant to this opinion and order.

VI. OUTSTANDING PROCEDURAL MATTERS

OCC, after considering its challenges to the Commission's BLES alternative regulation rules and the rules as applied, concludes that there is clear and convincing evidence that extraordinary circumstances exist that necessitate a hearing on AT&T's application (OCC Opposition at 8).

AT&T believes that OCC's request for a hearing should be denied inasmuch as Rule 4901:1-4-09(G), O.A.C., has not been satisfied and because a hearing would only add unnecessary delay to a process that was intended to be expedited and automatic (AT&T Memorandum Contra at 7).

Based on the discussion and determinations incorporated within this opinion and order, the Commission does not believe that a hearing is necessary. Therefore, we find that OCC's request for a hearing should be denied.

On March 9, 2007, AT&T filed a motion for a protective order seeking confidential treatment of CLEC-specific information concerning presence and services in specific

telephone exchanges. AT&T contends that this kind of information is generally regarded as confidential and/or proprietary. In a May 3, 2007, supplement to its motion for protective order, AT&T sought to extend protective treatment to CLEC-specific market data which AT&T cited in its memorandum opposing OCC's opposition to AT&T's application. We find both motions to be reasonable and consistent with practice. The motions shall, therefore, be granted.

On May 8, 2007, OCC filed a motion for protective order. Concurrently with its motion for protective order, OCC filed a reply to AT&T's memorandum contra. OCC states that its reply contains information that AT&T regards as confidential. While not necessarily agreeing that all the information is confidential, OCC, nevertheless, seeks protective treatment in accordance with a protective agreement entered into with AT&T. The Commission finds OCC's motion to be reasonable and, therefore, it shall be granted.

VII. CONCLUSION

Upon a thorough review of the record in this proceeding, the Commission determines that, pursuant to Section 4927.03(A), Revised Code, AT&T has met its burden of proof for those exchanges identified in Attachments A and B of this opinion and order. Specifically, AT&T has demonstrated that the granting of the company's application for BLES and other Tier 1 service flexibility in the designated exchanges is in the public interest, that AT&T's BLES is subject to competition, that the company's customers have reasonably available alternatives, and that there are no barriers to entry with respect to BLES in those exchanges.

Moreover, as discussed in detail above, the Commission determines that AT&T's application is complete and meets the filing requirements of Rule 4901:1-4-09, O.A.C. The Commission recognizes its statutory charge 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, based on the record in this proceeding, the Commission finds that the customers in exchanges listed in Attachments A and B of this opinion and order have readily available alternative services to AT&T's BLES which are offered by the alternative providers listed for the relevant exchange.

In accordance with Chapter 4901:1-4, O.A.C., the Commission determines that AT&T's application for alternative regulation of basic local exchange and other Tier 1 services should be approved consistent with the terms of this opinion and order, for those exchanges designated in Attachments A and B of this opinion and order. With respect to

the exchanges designated in Attachment C, the application is denied inasmuch as it does not meet all of the criteria set forth in the relevant competitive market tests.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On March 9, 2007, AT&T filed an application for approval of an alternative form of regulation of BLES and other Tier 1 services in 11 exchanges in its incumbent service territory. AT&T filed its application pursuant to Section 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 rule.

(3) For the Belfast, Canal Winchester, Groveport, Lewisville, New Albany, and Salineville exchanges, AT&T relies on the competitive test set forth in Rule 4901:1-4-10(C)(3), O.A.C. For the Barnesville, Dresden, East Liverpool, Harrisburg, and St. Clairsville exchanges, AT&T relies on the competitive test set forth in Rule 4901:1-4-10(C)(4), O.A.C.

(4) On April 23, 2007, OCC filed a pleading opposing AT&T's application.

(5) On May 3, 2007, AT&T filed a memorandum opposing OCC's April 23, 2007, pleading.

(6) OCC filed a reply to AT&T's memorandum on May 8, 2007.

(7) AT&T's application complies with the filing requirements of Rule 4901:1-4-09, O.A.C.

(8) Consistent with the criteria set forth in Rule 4901:1-4-10(C)(4), O.A.C., AT&T satisfies the applicable test and is granted alternative regulation of basic local exchange and other Tier 1 services pursuant to Chapter 4901:1-4, O.A.C., for those exchanges identified in Attachment A of this opinion and order.

(9) Consistent with the criteria set forth in Rule 4901:1-4-10(C)(3), O.A.C., AT&T satisfies the applicable test and is granted alternative

regulation of basic local exchange and other Tier 1 services pursuant to Chapter 4901:1-4, O.A.C., for those exchanges identified in Attachment B of this opinion and order.

It is, therefore,

ORDERED, That AT&T's application for alternative regulation of BLES and other Tier 1 services is granted in part and denied in part, as discussed above. It is, further,

ORDERED, That for those exchanges identified in Attachments A and B of this opinion and order, AT&T 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 provided for pursuant to Rule 4901:1-4-11, O.A.C. It is, further,

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

ORDERED, That the tariff revisions and amendments filed on May 25, 2007, and June 6, 2007, are approved relative to the exchanges for which BLES alternative regulation is granted. It is, further,

ORDERED, That AT&T is authorized to file complete copies of tariffs in final form consistent with this opinion and order. AT&T shall file one copy in its TRF docket (or may make such filing electronically as directed in Case No. 06-900-AU-WVR), and one copy in this case docket. It is, further,

ORDERED, That OCC's request for a hearing is denied. It is, further,

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

ORDERED, That our approval of AT&T'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 prohibits 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 opinion and order, all documents that were filed under seal in conjunction with AT&T's motion for protective order filed March 9, 2007, its supplement to motion for protective order filed May 3, 2007, and OCC's motion for protective order filed May 8, 2007. 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

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Donald L. Mason

LDJ:ct

Entered in the Journal
JUN 27 2007

Reneé J. Jenkins
Secretary

AT&T Ohio
Case No. 07-259-TP-BLS
Test 4 Results

	Exchange Name	Test Used	% Access Lines Lost	# of Unaflt. F.B. Alt. Providers	Names of Unaffiliated F.B. alt. providers	Test #4 Result
1	Barnesville	4	21.18%	8	ACN Comm. Comcast/Insight Phone First Comm. MCI/WorldCom New Access Sage Telecom. Talk America/Cavalier Trinsic Comm.	Approved
2	Dresden	4	15.01%	8	ACN Comm. First Comm. MCI/WorldCom New Access Revolution Comm. Sage Telecom. Talk America/Cavalier Trinsic Comm.	Approved
3	East Liverpool	4	16.52%	7	ACN Comm. Budget Phone First Comm. MCI/WorldCom Sage Telecom. Talk America/Cavalier Trinsic Comm.	Approved
4	Harrisburg	4	16.48%	8	ACN Comm. First Comm. MCI/WorldCom New Access Revolution Comm. Sage Telecom. Talk America/Cavalier Verizon Wireless	Approved
5	St. Clairsville	4	16.19%	8	ACN Comm. Comcast/Insight Phone First Comm. MCI/WorldCom New Access Sage Telecom. Talk America/Cavalier Trinsic Comm.	Approved

AT&T Ohio
Case No. 07-259-TP-BLS
Test 3 Results

	Exchange Name	Test Used	% CLEC Market Share	# of Unaflt. F.B. CLECs	Name(s) of Unaffiliated F.B. CLECs	# of alt. provid-ers	Names of alt. providers	Test #3 Result
1	Belfast	3	16.44%	2	MCI/WorldCom Sage Telecom	5	First Comm. New Access Revolution Comm. Talk America/Cavalier Trinsic Comm.	Approved
2	Lewisville	3	16.53%	2	MCI/WorldCom Sage Telecom	5	ACN Comm. First Comm. PNG Telecom Revolution Comm. Talk America/Cavalier	Approved
3	Salineville	3	17.97%	2	MCI/WorldCom Sage Telecom	5	ACN Comm. First Comm. PNG Telecom Revolution Comm. Talk America/Cavalier	Approved

AT&T Ohio
Case No. 07-259-TP-BLS

	Exchange Name	Test Used	% CLEC Market Share	# of Unaflt. F.B. CLECs	Name(s) of Unaffiliated F.B. CLECs	# of alt. provid-ers	Names of alt. providers	Test #3 Result
1	Canal Winchester	3	less than 15%	2	MCI/WorldCom Sage Telecom	10	ACN Comm. Comcast/Insight Phone First Comm. Global Connection New Access PNG Telecom Revolution Comm. Sprint/Nextel Talk America/Cavalier Trinsic Comm.	Denied
2	Groveport	3	less than 15%	2	MCI/WorldCom Sage Telecom	9	ACN Comm. Comcast/Insight Phone First Comm. New Access Revolution Comm. Sprint/Nextel Talk America/Cavalier Trinsic Comm. Verizon Wireless	Denied
3	New Albany	3	less than 15%	2	MCI/WorldCom Sage Telecom	10	ACN Comm. Comcast/Insight Phone First Comm. New Access PNG Telecom Revolution Comm. Sprint/Nextel Talk America/Cavalier Trinsic Comm. Verizon Wireless	Denied

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

The Commission, considering the staff proposal, exhibits, the comments and letters of record, the applicable law, the testimony from the local public hearings, and being otherwise fully advised, hereby issues its Opinion and Order.

OPINION:

I. BACKGROUND

Historically, the rate-setting framework under which incumbent local exchange carriers (ILECs) operated in Ohio was set forth in Chapter 4909, Revised Code. This rate-setting framework became known as rate base, rate of return regulation and was used by the Commission to establish ILEC telephone rates for more than 75 years. In 1988, due in part to technological and regulatory changes previously taking place in the telecommunications environment, the then-chairman of the Commission proposed to a House Subcommittee a legislative proposal that eventually became Amended Substitute House Bill Number 563 (H.B. 563). On December 15, 1988, then-Governor Richard F. Celeste signed into law H.B. 563 which enacted Sections 4905.402 and 4927.01 through 4927.05, Revised Code.

Among other things, Chapter 4927, Revised Code, authorized the Commission to adopt alternative regulatory frameworks for large and small telephone companies in Ohio. The Commission utilized this authority to adopt an alternative regulatory framework for those telephone companies serving fewer than 15,000 lines (otherwise known as small local exchange companies) in Case No. 89-564-TP-COI (89-564), *In the Matter of the Commission Investigation into the Implementation of Sections 4927.01 to 4927.05, Revised Code, as They Relate to Regulation of Small Local Exchange Telephone Companies,* Supplemental Finding and Order (August 15, 1991). Similarly, the Commission adopted an alternative regulatory framework for large local exchange companies (those companies serving 15,000 or more access lines) in Case No. 92-1149-TP-COI (92-1149), *In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Telephone Companies,* Finding and Order (January 7, 1993).

Since the adoption of 92-1149, only three ILECs have chosen to propose an alternative regulation plan.[1] The most often cited reason why more companies have not chosen to propose their own alternative regulation plans under the 92-1149 framework is

1 Those companies are The Western Reserve Telephone Company, Ameritech Ohio (formerly known as The Ohio Bell Telephone Company), and Cincinnati Bell Telephone Company.

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the time and cost involved in such cases. Further, many companies note that their proposals end up in lengthy negotiations and that the end product of those negotiations often results in an approved regulatory plan that is significantly different from the plan originally proposed. Recognizing that only three ILECs had chosen to propose an alternative regulation plan, the Commission instructed its Staff to consider whether it is possible to eliminate many of the process concerns expressed by the ILECs by promulgating an "off the shelf" alternative regulation plan framework that could be opted into by an ILEC and still satisfy the public policy goals enumerated in Chapter 4927, Revised Code. Staff responded with a proposal for an elective alternative regulation plan that could be opted into by the electing ILEC. The Commission issued the Staff-proposed rules for comment by entry issued March 1, 2001. Several rounds of comments and seven local public hearings have been held to elicit views from interested stakeholders on the Staff proposal for an elective alternative regulation plan. Additionally, numerous letters have been filed in the Commission's docket expressing various views on the Staff proposal. After reviewing all of the various comments and after reviewing the applicable law and policy of Ohio, the Commission today adopts rules by which an incumbent local exchange carrier can opt into an elective alternative regulation plan.

The alternative regulation plan proposed in this document is intended for any ILEC that is seeking to have alternative regulatory requirements, but that is not interested in pursuing an individual, company-specific application for alternative regulatory treatment pursuant to 92-1149 and 89-564. Further, adoption of the elective alternative regulation plan by the ILEC would enable the ILEC to operate under the retail service requirements being considered in combined Case Nos. 99-998-TP-COI and 99-563-TP-COI (563/998) as opposed to the existing non-alternative regulation requirements. This elective alternative regulation plan would in no way limit an ILEC from proposing a company-specific plan under the existing 92-1149 or 89-564 alternative regulation procedures that could also qualify the ILEC for the proposed retail service requirements.

In the 563/998 companion investigation involving a revision to the rules by which telephone companies interact with consumers and with each other, the Commission is considering a set of proposed new requirements for retail services. The proposed rules in 563/998 include two tiers of regulated retail services. Each tier has increasing levels of regulatory and market flexibilities. Competitive local exchange carriers (CLECs) and interexchange carriers (IXCs) will operate under the new rules automatically. However, the Commission concludes that ILECs may operate under the new rules through adoption of the elective alternative regulation plan being adopted today or through the development and adoption of a company-specific alternative regulation plan pursuant to Chapter 4927, Revised Code, and the Commission's requirements in 92-1149 and 89-564.

II. STATUTORY AUTHORITY

A. Commission Authority to Adopt Elective Alternative Regulation

The Consumer Parties[2] claim that the Staff-proposed rules lack the procedural requirements necessary to protect consumers and to meet the statutory requirements of Ohio's ratemaking process (Consumer Parties comments, 10-17; AARP comments, 2-3). Specifically, the Consumer Parties maintain that the elective alternative regulation proposal permits increases for noncompetitive services without any of the process and safeguards found in Sections 4909.18 and 4909.19, Revised Code. Hence, elective alternative regulation is unlawful, as proposed, the Consumer Parties aver *(Id.)*. Moreover, according to the Consumer Parties, the lack of adequate market-opening commitments aggravates the fact that the proposed alternative regulation fails to require the Commission to make a finding that competition exists for the services and that the services would face unlimited rate increases. This lack of required Commission action is contrary to Ohio law, the Consumer Parties allege (*Id.*). To support this argument, the Consumer Parties claim that a finding of current competition and a showing of available alternatives is required for an exemption or alternative regulatory treatment under Section 4927.03, Revised Code. Absent that finding of competition and showing of available alternatives, the Consumer Parties, citing Section 4927.04(A)(2), Revised Code, claim that increases for noncompetitive services are deemed a request for an increase in rates invoking the attendant procedures set forth in Section 4909.18, Revised Code. The General Assembly was willing to encourage alternative regulatory requirements for the telecommunications industry in Ohio, the Consumer Parties acknowledge, but only if actual competition was robust enough to provide consumers with protection from monopoly abuses (*Id.*). The Consumer Parties also aver that, even if an ILEC were to make and to follow through on significant market-opening commitments, the fulfillment of a market-opening commitment, absent actual effective competition, does not meet the statutory requirements of Section 4927.03(A), Revised Code (*Id.*).

The Commission's actions in this docket are also unlawful, the Consumer Parties claim, because the Staff has provided no reason, rationale, or explanation for its departure from the methodology and structure used in 92-1149 (*Id.* at 18). Consumer Parties speculate that this explanation might be viewed as limiting the Commission's ability to enact any process that the Commission wants. This is clearly not the case, the Consumer Parties aver. However, they maintain that if Staff were to issue some process as part of the draft rules, then the Commission would have to explain why it was taking whatever action it ultimately does. The Consumer Parties observe that this explanation or rationale is an important part of the regulatory process (*Id.* at 19). Citing to *Cleveland Electric Illuminating Company v. Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403, the Consumer Parties maintain that the Ohio Supreme Court has held that while "the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error, it should also respect its own precedents in decisions to assure the predictability which is essential in all areas of the law, including administrative law." The Court concluded that

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2 Commenters supporting this position include: Ohio Consumers' Counsel, American Association of Retired Persons (AARP), Appalachian People's Action Coalition, Communities United For Action, Edgemont Neighborhood Coalition, Empowerment Center of Greater Cleveland, City of Columbus, City of Cleveland, and the City of Toledo.

the Commission's change in policy was improper because the Commission had failed to articulate adequately the justification for change in policy, the Consumer Parties submit (*Id.*).

The Consumer Parties also argue that elective alternative regulation will not further Ohio telecommunications policy as set forth in Section 4927.02, Revised Code. While acknowledging that Staff's proposed rules cap rates for basic local exchange service and that this helps ensure affordability, the Consumer Parties claim that this provision provides no more value than has been accomplished through either traditional regulation or company-specific alternative regulation (*Id.* at 26-27). In addition, the Consumer Parties maintain, the packaging of basic local exchange services with deregulated services and the lack of marketing rules and consequences for their violation make rate caps for basic local exchange service less meaningful (*Id.*). The Staff-proposed elective alternative regulation plan also does little to maintain just and reasonable rates due to the lack of constraints on price increases for nonbasic tier 1 and tier 2 services, according to the Consumer Parties (*Id.* at 28). This problem, they say, is exacerbated because the electing ILEC is freed from rate-of-return regulation under the Staff proposal (*Id.*). The Consumer Parties next claim that the Staff-proposed rules do little to encourage innovation and to promote diversity and options for the benefit of consumers (*Id.* at 29). Finally, on the issue of recognizing the emergence of a competitive environment through flexible regulatory treatment, the Consumer Parties aver that, as discussed elsewhere in their comments, the Staff's proposal actually contradicts the state's telecommunications policy (*Id.* at 30).

Contrary to the aforementioned arguments, the ILECs maintain that elective alternative regulation is consistent with, and does not violate, Ohio law. In support of this argument, several ILEC commenters discuss the requirements of Sections 4927.03 and 4927.04, Revised Code. Cincinnati Bell Telephone Company (CBT) argues that Section 4927.03, Revised Code, authorizes the Commission to establish alternative regulatory requirements if the Commission finds that such measure is in the public interest and that either the telephone company or companies are subject to competition with respect to such public telecommunications service or the customers of such public telecommunications service have reasonably available alternatives (CBT reply comments, 6). According to CBT and United Telephone Company of Ohio and Sprint Communications Company, L.P. (collectively, Sprint), the proposed rules satisfy the competition determination of Section 4927.03, Revised Code, by requiring implementation of the market-opening measures of §251 of the Telecommunications Act of 1996 (1996 Act). To determine whether competitive conditions exist, CBT and Sprint note that the Commission need look no farther than Section 4927.03, Revised Code. Those factors include the ability of alternative providers to make substitute services available and the ease of entry for other providers (CBT reply comments, 7; Sprint reply comments, 12). Pointing to the market-opening commitment for rural ILECs and the obligations of nonrural ILECs under §251 of the 1996 Act, CBT and Sprint assert that the Commission is justified in determining that no barriers to competitive entry exist and, therefore, that an ILEC opting into elective alternative regulation is subject to competition (*Id.*). Sprint further notes that the Staff has proposed, in the 563/998 companion docket, to require ILECs to provide operational support system performance measurements to connecting CLECs and the Commission staff (Sprint reply comments, 12). CBT also posits that an ILEC should not be denied alternative regulatory treatment simply because other carriers have not availed themselves of the opportunity to

enter the ILEC's market. Moreover, any suggestion by the Consumer Parties that the finding under Section 4927.03, Revised Code, be raised to some higher standard, such as actual competition or a demonstration of market share loss, is unfounded, CBT claims (*Id.*). Furthermore, CBT observes, even if the phrase "subject to competition" means a finding of actual competition, Section 4927.03(A)(1)(b), Revised Code, clearly permits the Commission to make its determination without a finding regarding the level of competition because the applicable statute is worded in the alternative (*Id.* at 8).

Because Section 4927.03, Revised Code, explicitly permits the Commission to determine that any public telecommunications service, other than basic local exchange service, should be exempted from any provision of Chapter 4905 or 4909, the Consumer Parties' discussion concerning the applicability of Sections 4909.18, 4909.19, and 4927.04, Revised Code, should be rejected by the Commission, according to CBT and the Ohio Telecommunications Industry Association (OTIA) (CBT reply comments, 8; OTIA reply comments, 3). CBT next challenges the argument that there is no rationale for implementing the proposed elective alternative regulation plan. CBT avers that rate-of-return regulation may be effective in controlling prices, but it provides no incentive for carriers to control costs or to develop innovative services, since there is no reward for the carriers in doing so (*Id.* at 9). Alternative regulation, as the name suggests, is an alternative to the traditional manner of regulation and instead of controlling prices by limiting a carrier's earnings, alternative regulatory models control prices by setting parameters on the prices a carrier may charge. Such alternative regulatory regimes more closely replicate the workings of a competitive market according to CBT (*Id.*). For example, if a company's prices are too high, other companies will be enticed into the market. In order to maintain its place in the market, a company operating under elective alternative regulation will be forced to lower its prices and, in order to maintain earnings, will be forced to produce the service or product more efficiently. Moreover, CBT claims that this incentive to maximize earnings also encourages innovation as companies seek ways to distinguish their products from those of their competitors (*Id.* at 9-10).

CBT, Sprint, and OTIA next maintain that the Staff-proposed elective alternative regulation plan fulfills the stated policy objectives of the General Assembly for alternative regulation, contrary to the Consumer Parties' comments otherwise (CBT reply comments, 10; Sprint reply comments, 10-11; OTIA reply comments, 4). As a final matter, CBT and ALLTEL note that the Consumer Parties incorrectly characterize alternative regulation as deregulation. According to CBT, alternative regulation is simply a different means of regulating a carrier's rates, while deregulation is the removal of regulations. CBT notes that one need only look to the Staff-proposed local competition rules in the 563/998 companion docket to realize that all telecommunications carriers are still being held subject to the Commission's regulation (CBT reply comments, 11). ALLTEL Ohio, Inc. and The Western Reserve Telephone Company (collectively ALLTEL) echo CBT's comments concerning the continued applicability of the Commission's service quality standards and consumer complaint procedures (ALLTEL reply comments, 2-5).

1. Subsequent Arguments Concerning Commission's Legal Authority

By entry issued May 31, 2001, interested persons were afforded an opportunity to submit legal arguments on the process, if any, the Commission should use to consider an

application for elective alternative regulation. Additionally, interested persons were also invited to submit comments on a Staff proposal, appended as Attachment A, setting forth a process by which the Commission would consider an ILEC application for elective alternative regulation. Legal briefs and reply briefs were filed on June 22 and July 6, 2001. Consumer Parties again argued that, since there is no actual residential competition nor reasonably available residential alternatives for nonbasic local services, there can be no exemption or alternative regulatory requirements available to ILECs pursuant to Section 4927.03, Revised Code. Thus, since there can be no exemption from the provisions of Section 4927.03, Revised Code, the provisions of Section 4927.04(A)(2), Revised Code, are applicable which require the procedural requirements of Sections 4909.18 and 4909.19, Revised Code, to be applied (Consumer Parties process comments, 6-7). According to the Consumer Parties, the procedural safeguards of Sections 4909.18 and 4909.19, Revised Code, include: public notice of the application, Staff report of investigation mailed to all mayors of municipalities affected by the application, docketing of a Staff report, and public hearings (*Id.* at 8). Furthermore, the Consumer Parties claim that there is no statutory nor otherwise reasonable basis to permit a process designed for use by small ILECs to be used by large ILECs as proposed in the May 31, 2001 attachment (*Id.* at 10-11). The Consumer Parties next turn to presenting detailed comments on the individual proposals set forth in the May 31, 2001 attachment generally arguing that the proposal fails to provide consumers with basic due process rights to ensure that any rates resulting from an elective alternative regulation plan are just and reasonable (*Id.* at 12-29). Regarding the ILEC assertions of competition and reasonably available alternatives, the Consumer Parties maintain that such assertions are too general, inadequate, and flawed (Consumer Parties reply process comments, 11). The Consumer Parties also submit that the ILECs, in their June 22, 2001 comments regarding the process, are attempting to reduce the already inadequate process proposed by the Staff to an even more minimal level (Consumer Parties reply process comments, 30).

The Ohio Cable Telecommunications Association (OCTA) commented that the Commission should modify the Staff proposal to permit the Commission to retain an independent consultant to perform a detailed financial analysis and to allow the Staff or an independent consultant to make recommendations as to reducing, capping, or freezing certain rates for certain services. Additionally, OCTA recommended inserting the intermediate step of investigating and analyzing whether there is any unsatisfied demand for advanced telecommunications services and, if there is no unsatisfied demand, require an additional commitment or commitments that would benefit customers with disabilities, special needs, or customers utilizing lifeline services (OCTA process comments, 2-4; reply process comments, 2). AT&T Communications of Ohio, Inc., TCG Ohio, and AT&T Wireless Services (hereafter AT&T) observed that, to the extent the Commission were to adopt an elective alternative regulation plan, it is essential that the Commission provide a detailed process for ILECs to follow, and that Staff's proposal provides a good initial draft of such a process (AT&T process comments, 1). However, AT&T believes the proposal can be greatly improved upon and, as currently drafted, does not satisfy the relevant statutory requirements (*Id.*). Those areas necessary to ensure that the application satisfies the statutory requirements include that the information in the application must meet the requirements of Sections 4909.18, 4927.03, and 4927.04, Revised Code; that the Commission cannot rely on an automatic approval process in any contested application; that the Commission must form a record and file findings of fact and a written opinion; and that

the Commission must make clear that the parties proposing a stipulation bear the burden of proving the stipulation meets the relevant legal requirements (*Id.* at 4-6). In addition, AT&T recommended certain other modifications to the Staff proposal to ensure that all parties are afforded a fair opportunity to be heard on the substance of the ILEC application. Specifically, AT&T noted that all interested persons, not just OCC and the Staff, be provided a prefiling notice of the application via regular mail. Additionally, Staff's analysis of the application must be in writing and docketed publicly or made part of the ILECs initial public filing (*Id.*). AT&T also maintained that Staff's analysis must contain an assessment of competition and include more significant competitive commitments than proposed in the Staff rules (*Id.*). With these modifications, AT&T observed that the Commission can be assured of developing a full record on which to make a well-reasoned decision. In its July 6, 2001 comments, AT&T repeated the claim that there is not a sufficient record on which the Commission can establish, in this docket, an elective alternative regulation plan available to all ILECs in Ohio. However, if the Commission is intent on approving a generic alternative regulation plan, AT&T submitted that the generic plan must be modified by certain procompetitive commitments that would assure CLECs better "ease of entry" and the "ability to make functionally equivalent or substitute services readily available" (AT&T reply process comments, 6-7).

Numerous ILECs claim that the Commission has the necessary authority to adopt rules prescribing an elective form of alternative regulation (See generally process comments of Ameritech Ohio, CBT, Verizon North Inc., ALLTEL, OTIA). Citing the changes in the definition of basic local exchange services, as revised by S.B. 235, Ameritech Ohio (Ameritech) noted that the changes to this definition substantially narrow the scope of the term while, at the same time, expanding the services subject to alternative regulatory treatment under Section 4927.03, Revised Code (Ameritech process comments, 2-4). Ameritech, Verizon North Inc. (Verizon), and OTIA maintain that the Commission should adopt alternative regulation for nonbasic services under Section 4927.03, Revised Code, in this case because, absent the necessary findings in this case, there will be no streamlined elective plan and the General Assembly and the Commission will have spent months on a fruitless exercise (Ameritech process comments, 6-7; Verizon process comments, 5-6; OTIA process comments, 2-4). The Commission already has the information available to it in order to make the statutorily required determinations that either the ILECs are subject to competition or that reasonably available alternatives exist and that such a grant is in the public interest (Ameritech process comments, 10-16). To silence any procedural questions, however, Ameritech and OTIA noted that the Commission could solicit comments on the level of competition, the reasonably available alternatives, and the public interest through an additional comment cycle (Ameritech process comments, 10-16; OTIA process comments at 5). As a final matter, Ameritech argued that the Staff proposal released for comment by the Commission as an attachment to the May 31, 2001 entry should not be adopted, as these procedures far exceed any reasonable need for a process applicable to alternative regulation for nonbasic services (Ameritech process comments, 17). Ameritech reiterated in it July 6, 2001 comments that the Commission has the necessary authority to adopt rules prescribing an elective form of alternative regulation and, in fact, should adopt alternative regulation for nonbasic services under Section 4927.03, Revised Code, in this case (Ameritech process reply comments, 2-10).

CBT too argued that alternative regulation of telecommunications services other than basic local exchange service is authorized by Section 4927.03, Revised Code (CBT process comments, 2). CBT further averred that, once the Commission creates a standing exemption or alternative regulation requirements for services other than basic local exchange service, unless an ILEC proposes a rate increase for basic local exchange service, none of the rate case procedures specified in Sections 4909.18 and 4909.19, Revised Code, apply to the adoption of elective alternative regulation by an ILEC (*Id.*). This rulemaking has satisfied the public notice and comment requirements of Section 4927.03, Revised Code, and there is no requirement under that statute to hold a hearing CBT observed (*Id.* at 4). Citing to *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St. 3d 244, CBT stated that there is no requirement that the Commission afford ratepayers a hearing on the alternative regulation plan when the statute does not explicitly require a hearing (*Id.*). CBT, joined by the Small ILECs[3], concludes that, although some reasonable due process procedures are appropriate (such as a pre-filing review of an elective alternative regulation plan by the Commission to ensure that the plan complies with the Commission's rules before it goes into effect), the rate case-type procedures set forth in the May 31, 2001 attachment are unnecessary and unwarranted (*Id.* at 6-12; Small ILEC process comments, 1-3). The ICORE Companies[4] register serious concerns with the proposed prefiling notification provisions of the May 31, 2001 attachment. The ICORE Companies recommend instead a simple notification procedure (ICORE process comments, 1-2). The ICORE Companies also object to proposed provisions regarding public forums, a conference, and Commission consideration of the application (*Id.* at 3). Chillicothe Telephone Company (CTC) expressed deep disappointment with the process proposal appended to the May 31, 2001 entry as subjecting ILECs wishing to opt into elective alternative regulation with significant costs, time delays, and personnel, resource, and managerial obstacles that will do nothing more than doom the entire concept of elective alternative regulation (CTC process comments, 2-5).

Verizon submitted that the lengthy application process and the attendant uncertainty associated with the process will keep most ILECs from seeking alternative regulation (Verizon process comments, 3). Verizon also submitted that, pursuant to Section 4927.03, Revised Code, there are two methods whereby the Commission can establish alternative regulatory requirements for ILECs: 1) through an application and approval initiated by the ILEC, or 2) by the Commission on its own initiative after notice and comment. The May 31, 2001 proposal has the effect, according to Verizon, of

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3 The Small ILECs include: Arcadia Telephone Company, Arthur Mutual Telephone Company, Ayersville Telephone Company, Bascom Mutual Telephone Company, Benton Ridge Telephone Company, Buckland Telephone Company, Champaign Telephone Company, Columbus Grove Telephone Company, Continental Telephone Company, Conneaut Telephone Company, Doylestown Telephone Company (Doylestown), Farmers Mutual Telephone Company, Fort Jennings Telephone Company, Frontier Communications of Michigan, Inc., Germantown Independent Telephone Company, Glandorf Telephone Company, Inc., Kalida Telephone Company, Inc., Little Miami Communications Corporation, McClure Telephone Company (McClure), Middle Point Home Telephone Company, Minford Telephone Company, New Knoxville Telephone Company, Nova Telephone Company (Nova), Oakwood Telephone Company, Orwell Telephone Company, The Ottoville Telephone Company, Pattersonville Telephone Company, Ridgeville Telephone Company (Ridgeville), Sherwood Mutual Telephone Association, Inc., Sycamore Telephone Company (Sycamore), Telephone Service Company, Vanlue Telephone Company, Vaughnsville Telephone Company, and Wabash Telephone Company.

4 The ICORE Companies include: Doylestown, McClure, Nova, Ridgeville, and Sycamore.

converting the second option into an individualized process which is contrary to the statute (*Id.* at 4). ALLTEL posits that the alternative regulation application procedures set forth in the May 31, 2001 attachment are counterproductive to their statutory authority and are so burdensome that ILECs are not likely to adopt such an alternative regulation plan. As a result, the network benefits expected by the Commission and contemplated under the statute will simply fail to materialize according to ALLTEL (ALLTEL process comments, 8). OTIA asserted that ILECs should have two options available when deciding whether to opt into elective alternative regulation. The first option would be the Staff-proposed cap on basic local exchange service. Should an ILEC elect this option, the OTIA submitted that no process is warranted and the only inquiry should be whether the electing carrier has provided or will provide proper notice. The second option involves an allowable increase in basic local exchange service to match the annual rate of inflation once the 36-month cap expires. Under this second option, the OTIA submitted that some procedural due process, as modified in the OTIA's comments, would be necessary (OTIA process comments, 6).

2. Comments in Response to a July 20, 2001 Entry

By entry issued on July 20, 2001, the Commission offered interested persons a further opportunity to comment on the extent to which there are competitive and reasonably available alternatives to the nonbasic services being considered for alternative regulatory requirements as a result of this case and the staff proposed rules in 563/998. As part of the comments submitted in response to this invitation, interested persons were also invited to opine on whether a grant of alternative regulation for nonbasic services is in the public interest, provided an ILEC opting into the staff-proposed alternative regulation plan agreed to fulfill the commitments of the proposed plan. Comments and reply comments filed in response to this invitation were filed on August 17 and September 7, 2001, respectively. The Consumer Parties conclude that, after reviewing the testimony from the local public hearings and the myriad of letters docketed by consumers in opposition, the Staff-proposed elective alternative regulation plan does not satisfy the public interest as identified by Section 4927.02, Revised Code. The Consumer Parties also claim that no ILEC has demonstrated that its nonbasic telecommunications services are either subject to competition or that reasonably available alternatives exist in order to grant flexible regulatory treatment under Section 4927.03, Revised Code.

Also filing comments in response to the Commission's July 20, 2001 entry were Time Warner Telecom of Ohio, L.P., Nuvox Communications Ohio, Inc., Association of Communications Enterprises, LDMI Telecommunications, and CoreComm Newco, Inc. (hereafter "CLECs"). Essentially, the CLECs agree with the Consumer Parties that the Commission lacks the authority to make a generic determination of adequate competition and/or reasonable alternatives for nonbasic services in this proceeding (CLEC comments, 1-2). The CLECs also agree with the Consumer Parties' proposition that company-specific and exchange-specific determinations of the existence of reasonable alternatives for the services in question are necessary (*Id.*). AT&T and WorldCom, Inc. (collectively "AT&T/WorldCom") separately concur with this argument (AT&T/WorldCom comments, 2). Moreover, the CLECs assert that there is no credible evidence that meaningful competition exists for small business and residential customers anywhere in this state, while the evidence indicating the failure of competition to develop is

overwhelming (*Id.*). For these reasons, the CLECs assert that the Commission must, at a minimum, reject the suggestion that a blanket finding of competitive alternatives is appropriate in this proceeding. Further, to the extent the Commission adopts Staff's proposal, the CLECs claim that the Commission must modify the proposal to incorporate the market opening commitments advocated by AT&T in its June 22, 2001 comments (*Id.* at 3). AT&T/WorldCom concur with the concept that certain market opening commitments are necessary. AT&T/WorldCom propose that significant market-opening commitments include: an unrestricted unbundled network element platform (UNE-P) offering; a nonrecurring migration charge in the range that was proposed by AT&T and WorldCom separately in Ameritech's TELRIC proceeding (Case No. 96-922-TP-UNC); and compliance with Staff's proposed most favored nations rule in the 998 proceeding, as well as a commitment not to contest the legality of that rule (AT&T/WorldCom comments, 3-4). In their reply comments filed on September 7, 2001, AT&T/WorldCom reiterated earlier comments that, for the most part, the ILECs have failed to present any evidence in this record concerning the level of actual, like-kind competition in their territories (AT&T/WorldCom reply comments, 1). Thereafter, AT&T/WorldCom addressed the arguments offered by individual ILECs offered to support a Commission determination that an elective alternative regulation proposal can be initiated generically in this case (AT&T/WorldCom reply comments, 7-20).

Representing interests of internet service providers (ISPs) were the American ISP Association, the Ohio ISP Association, Frognet, Inc., Clover Computer Corporation, the ISP Group, ECR Internet Services, Inc., eNET Inc., MetaLINK Technologies Inc., ONE Communication Services Inc., and MidOhio.Net (hereafter "Joint ISPs"). In their view, the Joint ISPs claim that the proposed alternative regulation rules will have a detrimental impact on the Joint ISPs that could potentially eliminate any competition for digital subscriber line (DSL) high speed internet service, and consequently eliminate Ohio consumers' access to high speed internet services. Specifically, the Joint ISPs aver that if the Commission is considering the deployment of advanced services to be a public benefit being provided by ILECs in exchange for flexible retail pricing, then the Commission must take appropriate measures to ensure that the ILECs do not become monopoly ISPs who are the sole source of a DSL or other high speed connection to the internet (Joint ISP comments, 2). To rectify this concern, the Joint ISPs maintain that the adopted alternative regulation rules must contain a commitment that the advanced service connections being deployed (e.g., DSL loops) must be provided on a wholesale basis to nonaffiliated ISPs at a price approximating the long run incremental cost for the service, and on the same basis that the service is provided to an ILEC's affiliated ISP (*Id.*). Additionally, the Joint ISPs submit that the adopted alternative regulation rules should contain a requirement that each ILEC opting into a generic plan develop a process for DSL deployment that involves information sharing and other involvement with the affected ISPs in each service area (*Id.* at 7).

Ameritech claimed that the Consumer Parties' test whereby the Commission must find under Section 4927.03, Revised Code, that competition or alternatives exist for each service for each ILEC for each customer class for each market is utter nonsense (Ameritech comments, 4). This assertion also reflects a misunderstanding of the relevant economic principles, Ameritech concluded (*Id.*). Quoting from a report entitled *Measuring Competition in a Changing Telecommunications Market* by Stephen B. Pocdiask, Ameritech

claims that the information sector, which includes wireline telecommunications, wireless telecommunications, cable networks and distribution, internet, paging, satellite, and other industries, is converging. Ameritech encouraged the Commission to recognize this convergence in the communications industry and to consider all technologies and alternatives to nonbasic services, including wireless alternatives, in making the statutory determinations under Section 4927.03, Revised Code (*Id.* at 5-6). Ameritech continued by addressing specific examples of evidence of competition and of reasonably available alternatives (*Id.* at 7-15). Ameritech concluded by urging the Commission to find that alternative regulation under Section 4927.03, Revised Code, is in the public interest for nonbasic services and that the Commission should also establish procedures for companies to follow under Section 4927.04, Revised Code, for basic local services in this case (Ameritech comments, 24-26).

CBT also argued that CLECs are not the only providers of alternative or substitute services available. Like Ameritech, CBT encouraged the Commission to consider the convergence in technology that is taking place and that was recognized by Michael Powell, Chairman of the Federal Communications Commission (FCC), earlier this year (CBT comments, 10). Alternative providers include wireless, cable, and internet protocol (IP) telephony according to CBT (*Id.* at 11-16). CBT also noted that there are four primary reasons why elective alternative regulation is in the public interest. Those four reasons include: consumers receive complete rate protection for basic local exchange service; companies adopting an elective alternative regulation plan make certain commitments that would not otherwise be required; the elective alternative regulation plan promotes innovation and diversity of options in telecommunication services; and the availability of an elective alternative regulation plan conserves resources that would be consumed in a rate case (*Id.*). Verizon, ALLTEL, CenturyTel of Ohio, Inc. (CenturyTel), and the OTIA all filed comments and/or reply comments in support of the concept of adopting an elective alternative regulation mechanism in this docket and for making a determination that either competition or reasonably available alternatives exist for all ILEC nonbasic services.

Lastly, Sprint concluded that, utilizing classic contestable market theory, the company's nonbasic services are "subject to competition" within the meaning of Section 4927.03, Revised Code (Sprint comments, 2). Specifically, Sprint argued that, as a result of the 1996 Act and the actions of the FCC, the telecommunications market is open to both entry and exit of potential competitors, thereby creating a contestable market for nonbasic telecommunications services. Because the market for nonbasic telecommunications services in its territory is contestable, Sprint asserts that it is not able to exercise monopoly power with respect to such services. Absent that power, Sprint avers, traditional regulation is not required and alternative regulation is appropriate (*Id.* at 3). In addition to being subject to competition, Sprint also maintains that its customers have reasonably available alternatives to the company's nonbasic services (*Id.*).

3. Commission Conclusion on Statutory Arguments

After thoroughly reviewing the relevant arguments, citations to case law, and statutes, the Commission determines that we have the necessary legal authority pursuant to Section 4927.03, Revised Code, to adopt, in this case, elective alternative regulatory requirements for those services other than basic local exchange services offered by

incumbent local exchange carriers. In so doing, we stress that the regulatory and pricing flexibility being adopted today that an ILEC can opt into is limited to nonbasic services that are subject to competition or have reasonably available alternatives. Basic local exchange service, as defined in Section 4927.01, Revised Code, is not subject to this pricing flexibility and, in fact, in the rules being adopted today, basic local exchange service rates would be capped for the period that an ILEC is operating subject to this the elective alternative regulation plan. In making the determination to afford incumbent LECs pricing and regulatory flexibility for nonbasic services, we turn first to a discussion of the relevant statutory standard. Specifically, Section 4927.03, Revised Code, states, in relevant part:

> ...the public utilities commission, upon its own initiative or the application of a telephone company or companies, after notice, after affording the public and any affected telephone company a period for comment, and after a hearing if it considers one necessary, may, by order, exempt any telephone company or companies, as to any public telecommunications service except basic local exchange service, from any provision of Chapter 4905. or 4909. of the Revised Code or any rule or order issued under those chapters, or establish alternative regulatory requirements to apply to such public telecommunications service and company or companies; 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.

At the outset, we note that Section 4927.03, Revised Code, specifically authorizes the Commission to establish alternative regulatory requirements on our own initiative. Before initiating this proceeding, the Commission instructed its Staff to report back to us why so few of the eligible ILECs had taken advantage of the alternative regulation provisions contained in Chapter 4927, Revised Code. In response, our Staff concluded that, based on anecdotal information and discussions with the three companies that had filed for alternative regulation under 92-1149, one of the most significant reasons more companies have not chosen to propose an alternative regulation plan is the process that is required to obtain approval for a plan. Staff also found that all three alternative regulation plan proposals resulted in lengthy multi-party negotiations and further that all approved plans differed significantly from the plans initially proposed. Staff concluded that an "off-the-shelf" alternative regulation plan that ILECs could adopt without a lengthy process would eliminate some of the concerns expressed by companies and still satisfy the public policy goals enumerated in the Ohio Revised Code. The Commission then opened this proceeding and sought comments on Staff's conclusions.

Based on Staff's conclusions and the comments received, we issued for comment, in March 2001, Staff-proposed rules adopting an elective alternative regulation plan that ILECs could opt into, provided that the ILEC agreed to certain public interest commitments. Numerous rounds of comments[5] have been entertained on Staff's proposal. Additionally, the Commission scheduled seven local public hearings throughout Ohio to afford the public an opportunity to comment on Staff's proposal. The record also reflects the submission of numerous letters expressing various views on Staff's proposal. Based upon the extensive opportunity for comment, we find that all stakeholders, including but not limited to the public and any affected telephone companies, have had an ample opportunity to comment on the Staff-proposed rules. Moreover, for the reasons discussed in more detail below, we find that nothing about the rules adopted herein warrants an evidentiary hearing as requested by certain consumer representatives. Through notice and written comment as well as the testimony obtained at local public hearings throughout Ohio, we find that we have fulfilled the due process requirements of Section 4927.03, Revised Code, in order to adopt a generic alternative regulation framework available to ILECs to establish in-territory prices for all nonbasic services other than basic local exchange service.

(a) Public Interest Standard

In order to establish elective alternative regulatory requirements, the Commission must find that to do so is in the public interest. As acknowledged by the Consumer Parties, there is no specific definition of "public interest" provided in Chapter 4927, Revised Code. In light of the fact that the public interest standard is undefined, we conclude that it is reasonable to discuss the policy of Ohio as set forth in Section 4927.02, Revised Code, in determining whether elective alternative regulation is in the public interest. As discussed in more detail below, we conclude that elective alternative regulation does satisfy the policy goals outlined in Section 4927.02, Revised Code. Consequently, we determine that the adoption of elective alternative regulation for nonbasic services, as revised by the Commission, on a generic basis satisfies the public interest. Section 4927.02, Revised Code, indicates that it is the policy of Ohio to:

(1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;

(2) Maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications service;

(3) Encourage innovation in the telecommunications industry;

(4) Promote diversity and options in the supply of public telecommunications services and equipment throughout the state; and

(5) Recognize the continuing emergence of a competitive telecommunications environment through flexible

5 Specifically, comments were sought by Commission entries issued March 1, May 31, and July 20, 2001.

regulatory treatment of public telecommunications services where appropriate.

As relevant to elective alternative regulation, the Commission will discuss these policy considerations in turn. First, the elective alternative regulation adopted by the Commission today does not diminish the availability of basic local exchange service to any customer. Indeed, as part of an elective alternative regulation plan, an ILEC must agree to cap its basic local exchange rates for the duration of the time the ILEC is operating subject to the elective plan. Thus, reasonable rates are maintained for basic local exchange service through an ILECs' adoption of the elective alternative regulation plan. For nonbasic services, we are confident that, should an ILEC under elective alternative regulation seek to raise rates beyond a reasonable level, competitors will enter the market offering lower rates, subscribers will elect to obtain the service from an alternative source, or subscribers will simply cancel those services that they perceive are overpriced. We further find that elective alternative regulation will encourage innovation inasmuch as ILECs are able to bundle services into packages that better meet customer needs and permit consumers to take advantage of savings that otherwise would not have been available to them. The elective alternative regulation plan also encourages companies to develop innovative products and services. In order to remain competitive, carriers will have an incentive to invest profits back into the company through network and product development thereby promoting diversity. Encouraging ILECs to innovate will, in turn, incent competitors to innovate and diversify the offerings they provide in Ohio. Lastly, through the adoption of elective alternative regulation, we are recognizing the continuing emergence of a competitive telecommunications environment and adopting more flexible regulatory treatment, where appropriate, for the public telecommunications services subject to competition.

We also note that by fulfilling the commitments adopted in Chapter 4901:1-4, O.A.C., an ILEC is furthering the public interest to the benefit of Ohio subscribers. In this regard, we observe that an ILEC opting into elective alternative regulation under the rules adopted today is committing to cap basic local exchange service rates for the duration of time it operates pursuant to these alternative regulation rules. Some stakeholders will argue that this is not a significant commitment because in the recent past, there have been few ILEC rate cases wherein rates for basic local exchange service have increased. Notwithstanding the fact there have been few basic local exchange service increases, the possibility of a company seeking to do so remains viable, particularly given the changing telecommunications landscape. Under the rate cap proposal, however, subscribers of basic local exchange service will be guaranteed that, for so long as an ILEC is operating pursuant to elective alternative regulation, rates for basic local exchange service will not increase above today's levels. In our view, this commitment represents a significant commitment for Ohioans and, we note, a commitment to cap basic local exchange service has been a cornerstone of every stipulation negotiated in response to a company-specific application for alternative regulation under the 92-1149 procedures.

Another commitment that advances the public interest is the advanced services commitment. Through this commitment, the electing ILEC agrees to upgrade its facilities in order to provide advanced telecommunications services capability from all Class 5 central offices in its traditional service territory which serve census tracts with a population

density of 500 or more people per square mile as defined by the 2000 census. For the counties that do not meet the population density threshold of 500 or more people per square mile, the electing ILEC commits to provide advanced telecommunications services capability from all Class 5 central offices in its traditional service territory that are within the county seat. Additionally, this commitment includes the deployment of digital capable loops (or the equivalent) upon demand within 60 days to any customer within 12,000 feet from a broadband-capable Class 5 central office no later than 12 months from the election of the alternative regulation plan, and within 18,000 feet from a broadband-capable Class 5 central office no later than 24 months from the election of the alternative regulation plan. These commitments assure many subscribers that advanced broadband services will be available where it would not otherwise make economic sense for the companies to provision advanced services. A lifeline assistance program that maximizes the amount of monthly state and federal assistance and includes automatic enrollment and self-certification for eligible customers is yet another commitment that customers would not receive but for an ILEC opting to take advantage of the elective alternative regulation plan. These commitments represent benefits for Ohioans that an ILEC would not otherwise be required to fulfill if it were not for the ILEC's adoption of the elective alternative regulatory treatment being adopted today for nonbasic services. In total, we find that these commitments certainly advance the public interest.

(b) Subject to Competition Standard and Reasonably Available Alternatives Standards

In addition to determining that the public interest is satisfied, the Commission must also find either that the involved telephone companies are subject to competition with respect to such public telecommunications service [Section 4927.03(A)(1)(a)] or that the customers of such public telecommunications service have reasonably available alternatives [Section 4927.03(A)(1)(b)]. In making either determination under Section 4927.03(A), Revised Code, Section 4927.03(A)(2), Revised Code, instructs the Commission to consider, at a minimum:

(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.

In making the necessary determination under Section 4927.03(A), Revised Code, the Commission finds that both the "subject to competition" and "reasonably available alternatives" standards are satisfied in order to adopt alternative regulatory requirements for nonbasic telecommunication services.

(i) Tier 2 Nonbasic[6] Services

As early as 1985, the Commission, in Case No. 84-944-TP-COI (84-944), Opinion and Order issued April 9, 1985, *In the Matter of the Commission Investigation into the Regulatory Framework for Telecommunication Services in Ohio,* recognized that many segments of the telecommunications industry were no longer characterized by a monopolistic marketplace; rather, those segments were characterized by a burgeoning of firms ready, willing, and able to enter into the telecommunications marketplace. In such a competitive environment, the Commission found that the premise of traditional regulation was no longer relevant and that the existence of competition generated market forces which replace the need for certain regulations that were designed to protect consumers in a monopoly utility setting. Thus, the Commission agreed with the commenters in 84-944 that the evolution of competition in certain segments of the telecommunications industry warranted exercising Commission jurisdiction in a more flexible and streamlined manner than traditional regulation. The Commission concluded that flexible and streamlined regulatory treatment for certain industry segments would promote competition while still allowing the Commission to maintain a residuum of regulatory authority necessary to fulfill its responsibility to protect the public interest and to reimpose full regulation should it become necessary. As a result of the above, the Commission adopted flexible, streamlined regulation for competitive service offerings provided by interexchange carriers, radio common carriers, cellular radio carriers, and local exchange carriers.

Thereafter, the Commission, in Case No. 86-1144-TP-COI (86-1144), Finding and Order issued August 2, 1988, *In the Matter of Phase II of the Commission's Investigation into the Regulatory Framework for Competitive Telecommunications Services in Ohio,* evaluated the conclusions and the regulatory framework adopted in 84-944. The Commission, as part of its further investigation in 86-1144, found that the 84-944 framework had been effective both in fostering a healthy competitive telecommunications environment in Ohio and in protecting the public interest. The Commission went on to find, however, that further streamlining of at least some of the 944 procedures was appropriate and necessary. The Commission also noted that, absent legislation, it was not possible to make certain other modifications with which the Commission might otherwise agreed. Therefore, the Commission signaled its intent to seek enabling legislation that would empower the Commission to consider exemption from the traditional ratemaking procedures for certain competitive telecommunications services or companies and to establish alternative forms of ratemaking for telecommunications companies. This enabling legislation, H.B. 563, was signed into law on December 15, 1988, and enacted Sections 4905.402 and 4927.01 through 4927.05, Revised Code.

On April 12, 1989, the Commission initiated Case No. 89-563-TP-COI (89-563) for the purpose of revisiting the issue of whether our regulatory framework for competitive telecommunications services remained appropriate in light of the legislative changes brought about by H.B. 563. This further evaluation culminated in a Finding and Order issued October 22, 1993, the express purpose of which was to establish alternative regulatory treatment for the provision of competitive telecommunication services, other

6 The words "nonbasic" and "noncore" have the same meaning throughout this Order.

than basic local exchange service and services provided by local exchange carriers. As a result of that investigation, the Commission found that adoption of a new, more flexible, regulatory framework for the provision of competitive telecommunication services in Ohio was in the public interest. Since adoption of this more flexible framework for competitive telecommunication services provided by entities other than local exchange carriers, the Commission has further streamlined the regulatory framework for commercial mobile radio services through Case No. 97-1700-TP-COI (97-1700), Finding and Order issued February 24, 2000, *In the Matter of the Commission Investigation Into the Treatment of Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers.* Additionally, adoption of the Telecommunications Act of 1996 (47 U.S.C. § 151 et. seq.) and our local service guidelines in Case No. 95-845-TP-COI, Finding and Order issued June 12, 1996, *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues,* has encouraged further development of competition and reasonably available alternatives for those services other than basic local exchange service. As a result of the evolution of service offerings other than basic local exchange service, the Commission determines that, today, it is appropriate to further embrace competition for nonbasic services and to adopt a framework whereby incumbent local exchange carriers gain more flexible regulatory treatment for those services other than basic local exchange service that are already subject to competition or reasonably available alternatives.

Regarding those services classified as competitive telecommunication services there is no reason not to afford ILECs similar regulatory flexibility as provided to non-ILECs provided the ILECs agree to commitments discussed elsewhere in this order. Examples of tier 2 services fitting within the category of competitive telecommunication services include: local and long distance toll, 800 services, private line (dedicated point-to-point) services, 900 and 900-like services, 500 services, synchronous optical network (SONET) service, frame relay service, Asynchronous Transfer Mode (ATM) service, software defined network, interexchange directory and operator assistance, data only service, service packages or bundled service offerings, centrex station features, centrex station intercom lines and features, and all custom calling features not otherwise identified as tier 1 services. Pursuant to the Commission's records, there are over 300 entities certified to offer wireline tier 2-type services throughout Ohio. The certificate of public convenience and necesssity held by these entities in no way limits the types of competitive services that can be offered, the class of customers that service can be offered to nor is there any limit on counties in which those entities may operate in. Further, entry and exit into and out of the competitive marketplace is subject to an automatic process subject to suspension only under unique circumstances. No reasonable argument can be made that those services deemed to be competitive telecommunication services pursuant to 89-563 are not subject to competition.

In addition to being subject to competition, it is also clear that Ohio consumers have access to an ever increasing array of wireless providers that operate as an alternative to wireline providers. The Commission's records reflect that there are more than 50 certificated providers of wireless service in Ohio. Thus, as was determined in our 97-1700 docket concerning CMRS providers, "consumers in every major Ohio city, as well as many rural communities, can choose from at least five facilities-based providers and various resellers" (Finding and Order issued February 24, 2000). In addition to having various providers of alternative services, there are also a variety of technologies that offer

competitive options or reasonably available alternatives to tier 2 services. For example, customer premise equipment, such as telephone equipment, offer alternatives to repeat dialing and last number redial. Telephone sets with programmable buttons serve as a substitute for speed dialing service. Large national toll providers (e.g., AT&T, WorldCom, and Sprint) as well as hundreds of smaller boutique firms offer facilities-based local and long distance toll services to Ohio consumers. Furthermore, there are numerous toll resellers providing some form of 10-10XXX services in Ohio. Operator services too are subject to competition from the large national toll providers. Operator services are also offered by facilities-based CLECs. Further, numerous smaller providers are certificated to offer alternative operator services. As a result, we conclude that ILEC consumers of competitive telecommunication services have reasonably available alternatives that warrants granting ILECs more flexible regulatory treatment for those services deemed to be tier 2 telecommunications services.

(ii) Tier 1 Nonbasic Services

For the reasons that follow, the Commission also determines that the services identified in the companion order in 998 today as tier 1 noncore and basic caller identification are subject to competition or have reasonably available alternatives. Therefore, those services should also be subject to the more flexible regulatory treatment being adopted today under the applicable provisions of Section 4927.03, Revised Code. As set forth above, in order to afford a nonbasic service alternative regulatory treatment Section 4927.03(A)(2), Revised Code, instructs the Commission to consider, at a minimum: (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; and (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.

In finding that the services listed in tier 1, except basic local exchange service, are subject to competition or have reasonably available alternatives, we note that the Telecommunications Act of 1996 made all nonbasic services subject to competition through one of three methods. First, an ILEC has an obligation to make available to its competitors for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Second, an ILEC has an obligation to make available to CLECs unbundled network elements which represent components of the ILECs network that can be reassembled into a service offered by the CLEC. This method permits a CLEC to purchase pieces of the ILECs' network and to reassemble them into a stand-alone offering that the CLEC then makes available to end use customers. The third method for competitive entry for CLECs to provision nonbasic services in competition with an ILEC is through its own facilities. Through any one of the aforementioned methods, a CLEC has the ability to provision a functionally equivalent or substitute service to the tier 1 services currently being offered by the ILEC. In addition, because the 1996 Act requires ILEC tier 1 retail services to be made available to competitive carriers at a rate that represents a wholesale discount off of the ILECs' retail rate, the competitive provider has the ability to offer to end users, its own service at a competitive rate. Similarly, the 1996 Act obligates this Commission to establish just and reasonable

rates, based on cost, for the unbundled network elements that an ILEC must make available to competitive providers. As noted above, competitive providers may configure those cost-based elements into a functionally equivalent or substitute service at a competitive rate. In the case of either a resold service or unbundled network elements obtained at cost from the ILEC, the competitive provider has the ability to offer a functionally equivalent or substitute service at a competitive rate that competes with any nonbasic tier 1 service currently offered by an ILEC. This satisfies the requirement of Section 4927.03(A)(2)(c), Revised Code.

Another important consideration in order to grant alternative regulatory treatment to nonbasic services is the number and size of competitive providers of services and the extent to which services are available from alternative providers. In this regard, our own records reflect that there are more than 145 CLECs certified to operate in Ohio. Those certificates authorize the involved CLECs to provide service to both residential and business customers. Further, there have been over 500 negotiated and/or arbitrated interconnection agreements filed with the Commission for approval since adoption of the 1996 Act. Again, nothing about these approved interconnection agreements limits the services of CLECs to providing particular services or to serving a particular class of customer. Additionally, CLECs have authority to provide service in every county in Ohio. Various other measures of CLEC activity are also on the rise. For example, based on information submitted by Ameritech in this docket on August 17, 2001, total interconnection trunks purchased, stand-alone unbundled network element loops, physical and virtual collocations currently operational, number of wire centers collocated, number of orders processed, quantity of numbers ported, and local minutes of use exchanged are all increasing for CLECs.

Moreover, in certain areas of Ohio, competition comes not only from a new competitive provider but also from an ILEC or a CLEC affiliated with an ILEC. For example, as a result of its merger with SBC Corporation, Ameritech Corporation committed to competing in four other ILECs' operating areas. The four impacted ILECs include Verizon, ALLTEL, Sprint, and CBT. In addition, the Commission has authorized numerous small ILECs to "edge out" into neighboring ILEC exchanges to provide some level of competitive options for those customers living in more rural areas of Ohio. Thus, not only are inroads being made in ILEC territories from CLECs but inroads are being made by other ILECs as well.

In addition to traditional wireline technology, alternatives to wireline service also compete against the traditional telephony providers. One such example is wireless service. For some customers, wireless service is an alternative to traditional wireline telephone service. In its report entitled *Local Telephone Competition: Status as of December 31, 2000*, the FCC reports that there are over 101 million wireless telephone subscribers and almost 4 million in Ohio as of December 2000. Comparing the number of wireless subscribers to landline subscribers (194 million nationwide, 7 million in Ohio) suggests that wireless service is unmistakably a public telecommunications service that offers an alternative to ILEC-provided second and third telephone lines. According to the FCC's statistics, the number of wireless subscribers increased by 27 percent nationwide and 23 percent in Ohio from 1999 to 2000. Additionally, the FCC's Sixth Annual Report on the state of competition in the wireless industry reflects that 77 percent of wireless customers use their wireless

phones primarily for personal calls and that about 3 percent of wireless subscribers nationally rely exclusively on their wireless telephone as their only telephone.[7] Moreover, wireless service offers customers the same features that they can get from their wireline phones. Some parties argue that price is a drawback to wireless service competing against wireline service. We note that price is but one consideration a customer examines when deciding whether to choose a particular provider or a particular form of communication. We further note that while wireless service is often packaged with a certain number of minutes of use, wireless service also often combines various custom calling features (e.g., caller identification, call waiting, call forwarding, repeat dialing, automatic callback) as part of its monthly package rate that a wireline subscriber otherwise will pay separately for. Additionally, a wireless customer has the same ability as a wireline customer to block number identification on a per line basis. Further, wireless telephone numbers are not routinely published in the directory thereby making wireless an alternative to non-published number service. Thus, we recognize that some subscribers view wireless as a reasonably available alternative to landline service for second and third phone lines and, in some instances, wireless is used as the exclusive method of communication by some subscribers.

Cable telephony serves as yet another available alternative to ILEC-provided landline service. With ready access to 65 million households, cable companies have access to a majority of telephone subscribers throughout the United States. Through cable modem service, cable already serves as a reasonably available alternative to ILEC-provided high speed internet access. Moreover, with the upgrades in cable plant made to provision high speed cable modem service, cable companies are well-positioned to begin deploying internet protocol (IP) telephony. Because both cable modems and DSL services enable customers to use their wireline telephone while connected to the internet, both services provide consumers an alternative to ILEC-provided second lines. And, in fact, ILEC-reported growth in second access lines has slowed considerably. While discounted by many due to the quality of service currently provided, IP telephony represents yet another competitor to traditional ILEC-provided telephone service. For the reasons set forth above, we find that the number and size of alternative providers and the extent to which services are available in the relevant market satisfy the conditions of Section 4927.03(a) and (b), Revised Code.

The last factor that the Commission must consider in making a determination to adopt alternative regulatory requirements is indicators of market power such as market share, growth in market share, ease of entry, and the affiliation of providers of services. As noted above, information provided by Ameritech on August 17, 2001, represents that total interconnection trunks purchased, stand-alone unbundled network element loops, physical and virtual collocations currently operational, number of wire centers collocated, number of orders processed, quantity of numbers ported, and local minutes of use exchanged are all increasing for CLECs. Further, wireless service, with nearly four million subscribers compared to ILEC-provided lines of just over seven million lines, clearly represents a reasonably available alternative to ILEC-provided lines. Another factor the Commission is directed to consider is the ease with which an alternative provider can

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7 *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Sixth Report*, released July 17, 2001.

enter the market and offer competitive services. Pursuant to our February 24, 2000, Finding and Order in 97-1700, wireless entities only must register and provide minimal information to the Commission in order to commence providing service. Pursuant to the procedures adopted in 95-845, CLECs file an application that is, in most instances, automatically approved 61 days after filing. Additionally, in our companion order issued today in 998, the Commission is further streamlining the requirements a CLEC must satisfy in order to commence providing service in Ohio. As a final matter on this issue, we take note of the fact that many of the wireline and wireless alternatives that are currently being offered in Ohio are being offered by companies affiliated with large, well-financed, national corporations.

As a final matter, we also note that this is not the first instance in which we have provided flexible regulatory treatment to a category of services and service providers under the provisions of Section 4927.03, Revised Code. Rather, the methodology employed here is similar to the methodology used by the Commission to adopt flexible regulatory treatment for a variety of long distance and special access services and the providers of those services in Case No. 89-563-TP-COI. More recently, as noted above, we adopted increased regulatory flexibility for those wireless services categorized as commercial mobile radio services and providers of those services in Case No. 97-1700-TP-COI. Following this progression, the Commission now finds that it is reasonable to provide more flexible regulatory treatment through the adoption alternative regulatory requirements under Section 4927.03, Revised Code, for those nonbasic services classified as tier 1 and tier 2 provided that an ILEC also satisfies the commitments found elsewhere in adopted Chapter 4901:1-4, O.A.C.

B. General Provisions

1. ILECs Currently Subject to Alternative Regulation Plans

Should the Commission proceed to adopt an elective alternative regulation framework, the Consumer Parties next argue that ILECs currently under alternative regulation (i.e., Ameritech and CBT) should not be eligible for elective alternative regulatory treatment until the term of their company-specific alternative regulation plans have expired. Additionally, the Consumer Parties submit that those companies operating pursuant to alternative regulation should be required to fulfill completely the terms and commitments of those plans before being eligible for elective alternative regulation (Consumer Parties process comments at 24). Moreover, once subject to an elective alternative regulation plan, the Consumer Parties argue that ILECs should not have the ability to exit an elective alternative regulation plan at will. To rectify that situation, the Consumer Parties urge the Commission to establish a minimum time period for an elective alternative regulation plan. In addition, there must be some process by which a company's performance under elective alternative regulation is reviewed to ensure that those commitments are completed (*Id.* at 25).

As to the first issue raised regarding the status of ILECs currently subject to alternative regulation plans, we agree with the Consumers Parties that those companies should not be eligible for elective regulation until the term of their company-specific alternative regulation plan has expired. This decision only impacts CBT and Ameritech

who are the only ILECs currently operating pursuant to alternative regulation plans pursuant to Chapter 4927, Revised Code. We also note that both companies will be notifying the Commission and the parties executing its last alternative regulation stipulation of the company's intentions for extending the existing plan or filing a new plan within the next six months. CBT's alternative regulation plan is currently scheduled to expire on June 30, 2002, while Ameritech's alternative regulation plan is currently scheduled to terminate on January 8, 2003, absent extension. As for the argument that there should be a minimum time period under which an ILEC would be required to operate once opting into elective alternative regulation and a process by which to review the company's performance to ensure that the commitments are completed, we decline to adopt either proposal. In making this determination, we find that the need to establish a minimum time frame under which the elective alternative regulation plan will remain in place is obviated by the fact that any subsequent mode of regulation (e.g., company-specific alternative regulation or traditional regulation) will have to be approved by the Commission. Therefore, that would be the appropriate juncture at which to investigate whether a company has fulfilled its commitments and to make the relevant corrections, if necessary.

2. Service Quality

The Consumer Parties next submit that the Staff's proposal fails to mention service quality. The Consumer Parties maintain that an ILEC providing less than adequate service should not be eligible for elective alternative regulation (Consumer Parties comments 45-47). Sprint and Verizon respond that the newly adopted minimum telephone service standards will govern performance levels and address noncompliance. Furthermore, as competition increases, the market will determine acceptable performance levels (Sprint reply comments, 15; Verizon reply comments, 5). CBT points out that CLECs are not held to a higher standard even though they have more pricing flexibility. Moreover, according to CBT, in competitive markets, carriers will have incentives to maintain high quality (CBT reply comments, 13-14). Consumer Parties reply that service quality should not be separated from rate regulation (Consumer Parties reply comments, 19-21).

The Commission determines that, regardless of the type of telephone company involved or regardless of whether a telephone company is regulated under traditional rate-of-return regulation or under alternative telephone regulation, all telephone companies shall be subject to the minimum telephone service standards. The Commission strongly believes that all telephone companies shall comply with these quality of service standards, and we intend to monitor closely, just as we always have, telephone companies' compliance with these standards, and pursue formal action where appropriate. The Commission has at its disposal a wide array of tools to enforce compliance with service quality standards and to order remedies and penalties, if necessary, and we will not hesitate to use them. Our concern with tying service quality directly to alternative rate regulation is that, taken to its logical extreme, one could argue that an ILEC that does not elect the off-the-shelf alternative regulation plan or any CLEC and interexchange carrier that provide solely competitive services, need not be subject to the Commission's minimum telephone service standards adopted in Chapter 4901:1-5, O.A.C. We just rejected a similar position advanced by telephone companies in our minimum telephone service standards docket, finding such a position contrary to the best interests of Ohio

consumers. Nevertheless, it would not be inappropriate to consider a companies' service quality compliance in reviewing an electing companies' notice seeking to participate in an elective alternative regulation plan.

3. Need for Elective Alternative Regulation

CBT, NKTC, and Verizon support the concept of an off-the-shelf alternative regulation plan that ILECs can opt into to avoid the lengthy and time-consuming proceedings that currently occur in a company-specific application proposing alternative regulation (CBT comments, 4-5; NKTC comments, 1; Verizon comments, 2). CBT points out that the general framework outlined in the Staff proposal is sound (CBT comments, 2). AT&T does not oppose the idea of elective alternative regulation so long as the plan includes significant commitments from the ILECs (AT&T comments, 4). XO agrees that if the Commission is to adopt elective alternative regulation, there needs to be strong commitments in place to remove barriers to competition ILECs have erected to date (XO comments, 3-4). OTIA observes that, while the concept of elective alternative regulation is procedurally appropriate, the Staff-proposal fails to adequately balance regulatory obligation and regulatory relief (OTIA comments, 1-2). Noting that those ILECs with less than 15,000 access lines are permitted to be treated differently than large ILECs, the small ILECs recommend adoption of a separate alternative regulation framework for small ILECs in Ohio (Small ILECs comments, 3-7).

We agree with our Staff conclusion that one of the most significant reasons more companies have not chosen to propose an alternative regulation plan is the process that is required to obtain approval for a plan. As Staff noted, only three large ILECs have proposed alternative regulation under the standards adopted by the Commission in 92-1149. All three prior alternative regulation plan proposals resulted in lengthy multi-party negotiations. All approved plans differed significantly from the plans initially proposed. The Commission also concurs with our Staff that an "off-the-shelf" alternative regulation plan that ILECs could adopt without a lengthy process might eliminate some of the concerns expressed by companies and still satisfy the public policy goals enumerated in the Ohio Revised Code. In adopting the elective alternative regulation plan we do today, we find that competitive commitments are not necessary insofar as we have determined, as discussed in more detail herein, that ILECs are subject to market opening commitments regardless of the form of regulatory structure they are operating under. While we do not rule out the concept of an additional investigation and further streamlining of regulatory flexibility for those ILECs serving fewer than 15,000 access lines in the future, we do not have a record before us to do so at this time. However, nothing prohibits a small ILEC today from proposing an alternative regulation plan specific to their own circumstances under the standards adopted by the Commission in 89-564.

C. Term of the Plan

1. Rule 4901:1-4-02(A)

Consumer Parties and AARP observe that an elective alternative regulation plan should terminate after four years unless the Commission acts affirmatively to extend it (Consumer Parties comments 25, 63-64; AARP comments, 4). Consumer Parties also

recommended that the Commission adopt some specific percentage to measure whether residential competition is materializing. Should less than 20 percent of an ILECs' residential customers fail to take service from a competitive provider within four years, the Consumer Parties aver that the involved ILECs' elective alternative regulation plan should be terminated and the ILEC returned to traditional regulation or to a company-proposed alternative regulation plan (Consumer Parties comments, 36-37). Although facilities-based competition is the most desirable, Consumer Parties would accept some level of resale competition to allow an ILEC to meet the criterion described here. However, some level of facilities-based competition must be required, according to Consumer Parties *(Id.)*. Commission approval should also be required if an ILEC seeks to terminate an elective alternative regulation plan before the end of the four-year term according to the Consumer Parties (*Id.* at 63-64; AARP comments, 4). Additionally, Consumer Parties recommended that there should be an annual review, including public input, as to whether the ILEC is making progress toward meeting its term commitments (Consumer Parties comments, 63-64).

The ILECs commenting on this issue disagree with the Consumer Parties' positions on term of the plan. Ameritech pointed out that an indefinite plan benefits customers and those benefits last over a longer period of time. Not only will customers benefit, according to Ameritech, but adoption of this provision as proposed will ensure regulatory stability and predictability thereby lowering risks and costs (Ameritech reply comments, 9). CBT and Verizon commented that the certainty that the proposed rules provide is an important component and sends the correct signals to the marketplace (CBT reply comments, 15; Verizon reply comments, 5). Moreover, according to CBT, limiting the term of the plan would unnecessarily impose expenses on the Commission and the carriers. If the Commission would need to amend an ILECs plan, the Commission has the authority to do so under Section 4927.03(D), Revised Code, CBT averred (CBT reply comments, 15). OTIA claimed that adoption of the Consumer Parties' recommendations concerning the competitive benchmark would unfairly penalize ILECs for the failure of the CLECs to enter their markets (OTIA reply comments 5-6). The small ILECs too commented that they should not be penalized for the lack of competition within their rural markets (Small ILEC reply comments, 2-3). Verizon also maintained that the rules should be modified to afford the ILEC the option to continue under the current alternative regulation plan once the company completed the commitments set forth in proposed Rule 4901:1-4-05, O.A.C. (Verizon reply comments, 6).

The Commission concurs with the Staff proposal that an individual ILECs' elective alternative regulation plan should have no established termination or annual review period generally, but rather should continue indefinitely provided the ILEC continues to progress towards meeting the commitments outlined in adopted Rule 4901:1-4-05, O.A.C., as those commitments may evolve over time. In making this determination, we note that there is little public interest benefit to investigating an ILECs' compliance with an alternative regulation plan merely because some arbitrarily chosen time frame has elapsed. Rather, we will continue to monitor, as we do today, an ILECs' compliance with the provisions of its alternative regulation plan and intercede immediately through a Commission-ordered investigation pursuant to Section 4905.26, Revised Code, should conditions warrant. In determining whether to abrogate or modify an ILEC's ability to participate in an elective alternative regulation framework, the Commission will follow the

applicable provisions of these rules. This is, in our view, far superior to a review triggered by nothing more than the lapse of a certain period of time. Additionally, we see no reason to adopt, as proposed by the Consumer Parties, an artificial benchmark of residential competition that would, if not met, force an ILEC to return to traditional regulation or a company-proposed alternative regulation plan. We have also added language to the adopted rule to signify that an ILEC may begin operating pursuant to the elective alternative regulation framework 46 days after filing a notice with the Commission.

2. Rule 4901:1-4-02(B)

Another provision of the proposed rules engendering comment was the provision permitting ILECs to terminate their involvement in elective alternative regulation once the "defined term commitments" were met. The Greater Cincinnati Chamber of Commerce commented that this term should be better defined. If this phrase was intended to mean the commitments outlined in proposed Rule 4901:1-4-05, O.A.C., then the rules should so state (GCCC comments, 2). The Consumer Parties noted that the proposed rules failed to establish a process that would be used by the Commission to determine if an ILEC had satisfied its commitments or the consequences of an ILECs failing to meet its commitments (Consumer Parties comments, 25). The small ILECs observed that requiring an ILEC to meet its defined term commitments prior to returning to traditional rate-of-return regulation is a major deterrent to adopting alternative regulation for small companies. Additionally, the small ILECs assert that if a small company is not generating a sufficient rate-of-return under alternative regulation, it should not be forced to remain under such regulation until it meets its commitments as that would further exacerbate the small company's rate-of-return problems (Small ILECs comments, 8). NKTC maintained that requiring an electing company to fulfill the retail rate cap commitments of proposed Rule 4901:1-4-05(D), O.A.C., before allowing the company to return to some other form of regulation could prove damaging to a small ILECs' financial stability, would serve no beneficial purpose, and appears to be regulation for the sake of regulation (NKTC comments, 5). In reply, the Consumer Parties note that the ILECs propose earnings reviews as a one-way street. That is, the ILECs want the Commission to forebear from future earnings reviews to see if rates are too high but want to retain the right to demand an earnings review if they believe their rates are too low (Consumer Parties reply comments, 60).

Based on the comments of GCCC and NKTC, the rules being adopted today clarify what commitments must be met before a company can seek to return to traditional regulation or propose a company-specific alternative regulation plan. With the clarifications being made to the commitments through this order today, it is unclear whether or to what extent a concern remains outstanding on a company's ability to opt out of elective alternative regulation and into some other form of regulation. Therefore, we will not further address the small ILECs comments on this issue at this time. Likewise, we find that the modifications to the commitments being made in this order may significantly lessen or eliminate the concerns expressed by NKTC. To the extent that the small ILECs and NKTC are recommending that their current revenue streams should be guaranteed as if they were under rate-of-return regulation, the Commission disagrees. Each ILEC must

make its own business decisions regarding whether to partake of the flexibility of the off-the-shelf alternative regulation after considering all potential consequences. It would not be reasonable, however, for the company's customers to entirely foot the bill for a company's decision that turned out to have negative consequences for the company. Rather, the company's shareholders, as the owners of the company, should be responsible for the consequences of alternative regulation, if any.

3. Rule 4901:1-4-02(C))

Ameritech noted that, while it is appropriate for an ILEC choosing to end alternative regulation to bring its rates and services into compliance with the appropriate regulatory framework for all regulated services, the Commission should clarify that the rates in effect at the end of the elective plan would stay in effect until changed pursuant to the applicable regulatory framework (Ameritech comments, 9). NKTC agrees that the Commission should clarify that rates that are just and reasonable under elective alternative regulation are certainly just and reasonable after termination of the plan (NKTC comments, 5-6). Verizon and Ameritech recommend that, because proposed Rule 02(C) is unclear, it should be eliminated (Verizon comments, 4; Ameritech reply comments, 9-10). The small ILECs disagree with the proposed provision should it require an ILEC returning to rate-of-return regulation to be subject to a costly and time-consuming rate case proceeding (Small ILEC reply comments, 7). A number of ILECs also object to the provision of the proposed rule that imposes the total risk of recovery of commitment investments during the period the company was under elective alternative regulation on the ILEC (Verizon comments, 4; small ILECs comments, 8; NKTC comments, 3-4). Verizon concluded that if the ILEC bears the total risk of commitment investments, the company should be entitled to keep the total reward, if any. Verizon recommended adoption of this principle in the final rules adopted by the Commission (Verizon comments, 4). The Consumer Parties challenge the ILEC arguments on this latter issue. According to the Consumer Parties, the ILECs merely want to jump back and forth between alternative regulation and rate-of-return so as to force their captive customers to bear all of the risk of ILEC investments undertaken under either regulatory framework (Consumer Parties reply comments, 61).

In the rules being adopted today, we have clarified that, for an ILEC opting out of elective alternative regulation, its elective alternative regulation rates will remain in existence until different rates are otherwise approved by the Commission. Regarding the small ILECs' concerns involving a costly rate case proceeding, we note that small ILECs will continue to have available to them the streamlined rate case procedures adopted in Case No. 89-564-TP-COI. This streamlined proceeding was designed to afford small ILECs the assistance necessary to adjust rates when necessary while, concurrently, offering interested persons a venue to challenge the companies' proposal. Consequently, we fail to see how the rule being adopted today puts small ILECs in a situation any different than the situation that exists today should a company seek approval of a company-proposed alternative regulation plan. Regarding the risk of recovery of commitment investments during the term the company is under elective alternative regulation, the Commission agrees in principal with the concept that the ILEC should be able to use any revenues, over and above the revenues needed to operate the business and comply with the specific commitments set forth in adopted Rule 4901:1-4-05, O.A.C., as the company sees fit. We

do not agree, however, if what is being proposed is that an ILEC should be permitted to recover costs associated with meeting alternative regulation commitments or other business expenses as if the company were still subject to rate-of-return regulation. While we have seen fit to clarify that matter here, we do not find it necessary to adopt a rule on this subject.

D. Earnings Review—Rule 4901:1-4-03

The ILECs argued that, as currently drafted, this provision is unreasonable because an ILEC under elective alternative regulation would still be subject to earnings review if initiated by a party other than the Commission (CBT comments, 6-7; Sprint comments, 7-8; Ameritech comments, 11-12; and Verizon comments, 5). Ameritech maintained that the potential for earning reviews contradicts the General Assembly's goal in adopting S.B. 235 and that the potential for earning reviews has been a primary disincentive in the current system of alternative regulation in Ohio (Ameritech reply comments, 11). Consumer Parties averred that in a monopoly environment, freedom from earnings review is not warranted (Consumer Parties comments, 28). Further, Consumer Parties note, even if stakeholders retain the ability to file rate-based complaint cases, if the ILEC is not under rate of return regulation, the complaint will go nowhere (Consumer Parties reply comments, 62).

We are persuaded that holding an ILEC operating pursuant to the elective alternative regulation subject to earnings review complaints would not be reasonable. Earnings reviews are relevant in the context of rate-of-return regulation but run completely counter to the concept of alternative regulation. The finding of reasonable grounds is a necessary prerequisite to a complaint under Section 4905.26, Revised Code, seeking to review the earnings of the company and reduce the rates charged. Where an ILEC is operating under an effective alternative regulation plan, it is not clear how any customer could establish reasonable grounds for such a complaint. We note, however, that, notwithstanding the lack of earnings review proceedings, the Commission still maintains the authority to investigate the reasonableness of individual service terms, conditions, and rates through a Commission investigation or a complaint brought pursuant to Section 4905.26, Revised Code.

E. Accounting Standards—Rule 4901:1-4-04

As a group, the ILECs commenting on this proposed rule opposed the continued obligation to comply with the Uniform System of Accounts (USOA). Complaining that the USOA is antiquated, Ameritech, CBT, Verizon, ALLTEL, and OTIA recommended that ILECs should make their own determinations on whether to continue to follow the USOA or whether to follow Generally Accepted Accounting Principals (GAAP) (Ameritech comments, 13; CBT comments, 7; Verizon comments, 5; ALLTEL comments, 3; and OTIA comments, 5). Allowing ILECs to move to GAAP, according to CBT, will put ILECs on equal footing with their competitors (CBT comments, 7). USOA accounting is only necessary, CBT claimed, if you plan to return to rate-of-return review *(Id.)*. Verizon submitted that, at a minimum, the final rule should include a provision for ILEC conversion to GAAP if and when the FCC makes such a change (Verizon comments, 5). Consumer Parties encourage the Commission to adopt the rule as proposed. The ILECs

have failed to acknowledge that they will remain obligated to keep USOA accounts for reporting purposes at the FCC even if permitted to adopt GAAP in Ohio (Consumer Parties reply comments, 63-64). Noting that Verizon's proposal to permit a conversion should the FCC make that change is a step in the right direction, the Consumer Parties still submit ILECs should remain on USOA until they are no longer dominant in the local market *(Id.)*.

At this time, we are not convinced by the arguments that ILECs should have the option of choosing to follow USOA or GAAP as the appropriate accounting practice for local exchange operations in Ohio. In making this determination, we note that though the FCC is continually reviewing and streamlining the accounting proposals applicable to ILECs, the FCC still requires ILECs to follow USOA principals. While not memorializing in a rule at this time the ability of an ILEC to move to GAAP practices, we note that, should the FCC make such a determination on a federal level, an ILEC could request that we waive this requirement and adopt GAAP practices on a prospective basis.

F. Alternative Regulation Commitments—General Comments

Consumer Parties assert that a closer examination of the individual commitments reveals that there is little value to consumers from the commitments that constitute action ILECs would do or would be required to do regardless of an elective alternative regulation filing (Consumer Parties comments, 64-65). Moreover, to the extent an ILEC has already fulfilled a commitment as a result of a settlement agreement or an order in which the ILEC received other benefits, the alternative regulation rules, as proposed, would effectively bestow these additional freedoms upon the ILECs as a gift *(Id.* at 54). Consumer Parties also argued that the commitments to cap basic local exchange service rates would have value only if rate increases for basic local exchange services and/or elimination of flat-rate residential service were significant possibilities in the absence of elective alternative regulation *(Id.* at 55). Likewise, the cap on retail rates is flawed, the Consumer Parties averred, because, following a limited waiting period, an electing ILEC could increase the price of a nonbasic local exchange service at will without having to provide cost or earnings information *(Id.* at 56). Consumer Parties also recommended adoption of a competitive benchmark and a mechanism to return an electing ILEC to traditional regulation or a company-specific alternative regulation plan should competition not develop without four years of an ILEC opting into the proposed off-the-shelf plan *(Id.* at 36-37).

In reply to the Consumer Parties' complaints concerning the commitments included in the proposed rules, CBT notes that commitments are not an essential component of an alternative regulation plan and are not required by Chapter 4927, Ohio Revised Code (CBT comments, 11-12). Several ILECs alleged that it is unlawful for the Commission to require certain commitments in order to participate in an elective alternative regulation plan. Those ILECs complained that being required to offer advanced services without adequate market demand and then being at risk for that investment would constitute an unlawful taking. Moreover, the OTIA and small ILECs claimed it is unreasonable to require the waiver of rights granted by the 1996 Act (OTIA comments, 8; small ILEC comments, 12). In response to these allegations, Consumer Parties aver that it is not unlawful for ILECs to

waive their rights in exchange for rate deregulation (Consumer Parties reply comments, 22).

NKTC claimed the proposed elective alternative regulation plan failed to recognize the entirely different burden that each of the commitments represents to a small ILEC versus a large ILEC. In this regard, NKTC opined that the Commission develop a plan and rules that take the small ILECs into account (NKTC comments, 2). AT&T maintained that the rules lack any procompetitive ILEC commitments. AT&T recommended that such commitments include a most favored nation provision, a commitment to provide unbundled network element combinations, and a commitment by nonfederal price cap ILECs to reduce inflated access charges (AT&T comments, 4-11). OTIA and the small ILECs maintained that the Commission is appropriately considering access charges in a separate proceeding. Accordingly, such a commitment is not warranted as part of an elective alternative regulation plan (OTIA reply comments, 7-8; small ILECs reply comments, 5-6).

We do not agree with the Consumer Parties' criticisms of the value of the commitments being adopted today. Regarding the commitments to cap basic local exchange service rates and the continuation of a flat-rate residential offering, the Commission notes that there is no statutory obligation that today requires ILECs to maintain existing rates nor continue to offer a flat-rate residential service offering. True, in order to either raise basic local exchange rates or discontinue the offering of flat-rate residential service, an ILEC would have to obtain the prior approval of the Commission. Nonetheless, an ILEC's voluntary agreement through electing to participate in the off-the-shelf alternative regulation plan adds stability and a level of assurance to the Consumer Parties' constituents. Regarding nonbasic price increases, the Commission has modified the Staff proposal to further limit the range of price increases that consumers could experience under elective alternative regulation. Nonetheless, we again note that both CBT and Ameritech have operated under alternative regulation plans for more than five years and neither companies' rates for nonbasic services have increased significantly even though the possibility exists that those rates could be increased. Part of the reason, as we stated before, is that consumers will either cancel or stop subscribing to those services should prices rise above a perceived reasonable threshold, and the ILEC would increase the likelihood that a competitor will steal its customer should rates rise unreasonably.

Additionally, we find that, as reflected in the testimony of all the local public hearings and a significant number of the letters docketed in the case filed in this matter, an advanced services commitment is of significant value to residential and business customers in Ohio because, through this commitment, ILECs are being required to upgrade their networks and to actually offer broadband services in those areas meeting certain established parameters. This broadband commitment, as modified herein, will ensure that every county in Ohio is able to take advantage of an ILEC-provided broadband service rather than leaving the implementation of broadband up to the sole discretion of the ILECs. Regarding the lifeline commitment, we note that the offering of a lifeline assistance program is an integral component of basic telephone service and is worthy of continuation for those companies already offering it and for the initiation of a lifeline program for those companies not offering it today. Finally, we note that the Commission has made and continues to make certain market opening commitments

through our local service guidelines and through individual company TELRIC proceedings such as the proceeding involving Ameritech in Case No. 96-922-TP-UNC. Through these latter proceedings, the Commission continues to further reduce the barriers to market entry for competitive providers and incent competitive providers to enter the local exchange marketplace which will benefit all Ohioans. In this regard, we also discount the ILECs' arguments concerning the lawfulness of commitments by merely noting that the alternative regulation proposal adopted today is voluntary. An ILEC is not being required to adopt this form of alternative regulation and can choose the status quo or can propose its own company-specific alternative regulation proposal.

We also disagree with establishing a competitive benchmark and a mechanism for returning an ILEC to traditional regulation premised on the failure of a certain level of competitive activity to unfold. Initially, we note that the 1996 Act makes no mention of competitive benchmarks. In fact, the 1996 Act envisions that one hundred percent of the ILECs local market will be subject to competition regardless of the type of rate regulation the ILEC is subject to. Thus, there is no need to consider anything less than complete openness. Additionally, as noted previously, the policy of Ohio, as manifested through alternative regulation, is to ensure the availability of adequate basic local exchange service, to maintain just and reasonable rates, encourage innovation, promote diversity and options, and recognize the continuing emergence of a competitive telecommunications environment. The statement of policy, adopted over a decade ago, serves as our guiding principal as we craft an alternative regulation proposal that protects those important public interest goals while at the same time encouraging ILECs to move away from traditional, monopoly regulation toward incentive-based competitive regulation. In adopting an elective incentive-based regulation model, we believe we are furthering the policy goals of Ohio. Through such policies, all Ohioans will benefit. We believe that adopting the Consumer Parties' recommendations regarding competitive benchmarks is an unnecessary requirement to fulfill our goal.

Regarding NKTC's claims that we should adopt an alternative regulation plan addressing alternative regulation from the small ILEC perspective, we note that small telephone company alternative regulation proposals already exist as adopted in Case No. 89-564-TP-COI (564). Those small company procedures already establish abbreviated time lines for both basic rate increases and other public service telecommunication service filings and flexible pricing for nonbasic services. No stakeholder has established why these procedures are not sufficient to address the unique concerns of a small ILEC.

G. Rate Caps

1. Proposed Rule 4901:1-4-05(A)(1)

Numerous ILECs argued that capping the in-territory rates for basic local exchange service is unreasonable. CTC advocated that ILECs should be permitted to increase basic rates in response to unexpected conditions such as rampant inflation (CTC comments, 3-4). Verizon and OTIA commented that an indefinite cap on basic local service rates is not economically feasible in a competitive environment. ALLTEL, Verizon and OTIA proposed capping basic rates for no more than two years and thereafter permitting revenue neutral increases tied to the Gross Domestic Product Price Index (Verizon

comments, 6; OTIA comments, 6; ALLTEL comments, 4). Given the uncertainties with universal service and access charge revenues, small ILECs also disputed the wisdom of capping basic local service rates with no mechanism for rate adjustments or rate rebalancing (NKTC comments, 8; ICORE comments, 2-3; Small ILEC comments 9-10). Verizon too maintained that rebalancing of basic local service rates may be required (Verizon comments, 6-7). ICORE observed that ubiquitous advanced service deployment, coupled with an inflexible cap on local rates, is a recipe for disaster (ICORE comments, 4-5).

CBT is concerned with capping rates for the life of the plan, when the plan has no expiration date. CBT recommends that, similar to its existing alternative regulation plan, that ILECs have the flexibility to increase nonresidential access lines, including Centrex lines and PBX trunks, by five percent per year and that further increases may be warranted to accommodate inflation, cost changes, or other market pressures if a company operates under the proposed plan for several years (CBT comments, 8). CBT also proposed that the phrase "basic local exchange service rates" be clarified to include primary residential lines and single line business lines based on application of the federal end user common line charge. According to CBT, this recommendation would ease administration for ILECs by providing a common, already used definition across all companies and would simply billing/tracking and minimize expenses (*Id.* at 8-9). Ameritech observed that the rule needs to accommodate pricing flexibility for the ILEC in response to two or more facilities-based CLECs competing in a wire center (Ameritech comments, 14).

Consumer Parties, on the other hand, argue that, if anything, existing basic local service rates have produced robust earnings for Ohio's ILECs. Consequently, basic local service rates should be reduced (Consumer Parties comments, 65). AARP concurred and argued that, given the existing rates, the value of a rate cap is questionable (AARP comments, 5).

The Commission does not generally agree that the off-the-shelf alternative regulation plan should contain a mechanism to increase basic local exchange service rates during the pendency of the alternative regulation plan. Rather, the existing rates for basic local exchange service were established through a proceeding whereby all aspects of a involved company were taken into account. To now permit changes, either upward or downward, to those basic local service rates in a generic proceeding would not be appropriate. We note that inasmuch as this proposal is an elective alternative regulation proposal, nothing herein prohibits an ILEC from seeking to modify its basic local service rates through either a traditional rate-of-return case and thereafter opt into the elective alternative regulation proposal or to file a company-designed alternative regulation plan that modifies basic local exchange service rates pursuant to Section 4927.04, Revised Code. We also note that the rules being adopted today will, pursuant to Section 119.032, Revised Code, be reviewed, at a minimum, every five years. Thus, to the extent that there are significant economic changes impacting the cost of basic local exchange service, those impacts can be reviewed and, if necessary, addressed during the regular review of the Commission's alternative regulation rules.

2. Proposed Rule 4901:1-4-05(A)(2)

OTIA and CBT note that this proposed rule is unreasonable to the extent it can be read to require the conversion of measured-rate EAS to flat-rate EAS or to require the creation of optional flat-rate EAS packages (OTIA comments, 6; CBT comments, 9-10). Consumer Parties responded that, if the Commission did not intend the result feared by OTIA and CBT, the Consumer Parties could accept the rewording of this rule as proposed by CBT (Consumer Parties reply comments, 65). The Consumer Parties recommend that the Commission should address the specific needs of rural consumers by expanding local calling areas to include, at a minimum, adjacent exchanges, the county seat, and nearby metropolitan areas within 22 miles of an exchange (Consumer Parties comments, 9). Contrary to this position, the Small ILECs respond that determining rates based upon customer calling scope would be almost impossible to implement in practice and would, nonetheless, ignore the generally higher costs of serving rural areas (Small ILECs reply comments, 4). Sprint averred that the expansion of local calling areas is not one of the goals contained in Section 4927.02, Revised Code, and the Consumer Parties fail to justify such a proposal (Sprint reply comments, 11). Consumer Parties also note that the draft rules are silent regarding residential message and measured-rate basic local service rates. These commenters recommend that, if flat-rate service is capped for the duration of the alternative regulation plan, local message and measured-rate services should be similarly capped *(Id.)*.

The Commission never intended, as OTIA and CBT averred, that this proposed rule would require generally the conversion of measured-rate EAS to flat-rate EAS nor that optional flat-rate EAS packages would have to be created. Accordingly, in the adopted rule, we have incorporated the revisions proposed by CBT to rectify the aforementioned concerns. Regarding the expansion of local calling areas to include adjacent exchanges, metropolitan areas within 22 miles, and county seats, we note that we have a pending generic docket, Case No. 01-2253-TP-ORD (01-2253), in which we are investigating issues involving our EAS rules and the EAS pilot programs. It is within the context of the 01-2253 ORD proceeding that issues similar to the ones raised by the Consumer Parties will be explored and addressed. Turning to the concern involving message- and measured-rate service, the Commission notes that the definition of basic local exchange service in Section 4927.01, Revised Code, does not distinguish between flat-, message-, and measured-rate offerings. Consequently, all three types of local service are included in the rate caps set forth in Rule 4901:1-4-05(A)(1), O.A.C. We see no need to further clarify the involved language.

H. Advanced Services

1. Proposed Rule 4901:1-4-05(B) General Comments

Numerous stakeholders commented generally and on the specific provisions of the advanced services commitment set forth in the Staff proposal. For example, OCC and the GCCC commented that the proposal failed to adequately define key terms used in the proposed rules. To address those concerns, the rules being adopted today better define key terms used to describe the advanced services commitment. Ameritech maintained that it is unreasonable and contrary to the policy of the state to condition alternative

regulation on an ILEC "agreeing" to a set of regulatory commitments the company would not otherwise commit to. In spite of Ameritech's arguments to the contrary, we are acting to fulfill our regulatory obligations and are fully acting in concert with the policy of the state in requiring certain commitments in exchange for increased earnings and regulatory flexibility. Among other state policies, we believe the advanced services network and broadband services commitments adopted today will encourage innovation in the telecommunications industry and promote diversity and options in the supply of public telecommunications services and equipment throughout the state. Moreover, requiring an ILEC to fulfill certain commitments as the *quid pro quo* for earnings and regulatory flexibility is not new. In fact, the Commission's large LEC alternative regulation guidelines adopted in 92-1149 specifically contemplate that a company-proposed alternative regulation plan will contain certain infrastructure development or service commitments. Ameritech has taken advantage of alternative regulation rules since 1993 and should not now be heard to complain regarding commitments as part of an alternative regulation plan. Finally, on this issue, we note that this commitment is part of an "elective" plan and, thus, Ameritech is free to opt into this plan or, if it chooses, propose its own company-designed alternative regulation plan.

Ameritech also submitted that the Commission should acknowledge that the company is prohibited from providing advanced services except through a separate affiliate by the terms of an FCC order. See *Ameritech Corp./SBC Communications, Inc.*, CC Docket 98-141, FCC 99-279, Released October 8, 1999, para. 367. We acknowledge the FCC merger condition mentioned by Ameritech in its comments. We also note that this particular merger condition lists certain triggering events that will cause the separate affiliate requirement to sunset. Since we are drafting a proposal that all ILECs can opt into, we see little reason to carve out an exception based on a temporary FCC requirement. Rather, at the time Ameritech chooses to opt into the elective alternative regulation proposal adopted herein, if ever, we would expect to deal with this consideration at that time.

2. Proposed Rule 4901:1-4-05(B)(1)

Ameritech recommended revising the definition of advanced services to incorporate "a data transmission speed of 128 kilobits per second (kbps) in one direction for accessing the internet" (Ameritech comments, 16). The Consumer Parties note that the FCC defines advanced services as speeds of 200 kbps in each direction (Consumer Parties reply comments, 65-66). The OCTA notes that Ameritech's proposal is much narrower that that proposed by Staff (OCTA reply comments, 3-4). For purposes of this commitment, we agree that the advanced services commitment should include a data transmission speed component. Consequently, we have modified the rule to be consistent with the FCC data transmission speed component adopted in the FCC's report entitled *Deployment of Advanced Telecommunications Capability: Second Report* (August 2000) at para. 10.

3. Proposed Rule 4901:1-4-05(B)(3-5)

Several ILEC stakeholders argued that the deployment schedule for advanced services is unreasonable and that the requirement to make advanced services available to

100 percent of the subscriber base goes well beyond the original Staff proposal (Ameritech comments, 16-18; OTIA comments, 6-7; Verizon comments, 8; CBT comments 3, 10; ICORE comments 4-6; Sprint comments, 10). Other ILECs noted that customer demand should be the focus of the commitment and that the most that should be required is a long-range plan that addresses the deployment of advanced services (OTIA comments, 6-7; Small ILEC comments, executive summary at iii; Sprint comments, 13). Ameritech averred that even the development of a long range plan addressing universal deployment of advanced services is an unnecessary and costly endeavor (Ameritech comments, 18). Returning to Staff's white paper proposal, CTC argued that it is prepared to commit to the advanced services build-out conditions but that it would suggest making advanced services available to only a percentage of the customer base in every exchange within 24 months of opting into alternative regulation (CTC comments, 4). ICORE recommended that small ILECs be viewed differently than large ILECs and suggested that size, density, or demographics be the focus of a small ILECs advanced services commitment (ICORE comments, 5). ICORE also submitted that small ILECs that have already, under their own volition at considerable cost, deployed advanced services should be eligible for the same benefits as those deploying such services under the Commission's plan (*Id*).

OCTA advocated for an independent analysis to determine whether there is any unsatisfied demand for advanced services. To the extent that there is no such demand or that such demand is already being adequately satisfied by existing providers, the Commission should require an additional commitment or commitments benefiting customers with disabilities, special needs, or customers utilizing lifeline services (OCTA comments, 1-2). The OCTA recommended that the Commission retain, at the applicant ILEC's expense, an independent consultant to study and analyze the unsatisfied demand for advanced services. OCTA continued by arguing that it does not make good economic sense to reward the electing ILECs for building plant that is not going to be used in satisfying customers' demands (*Id.* at 4).

Section 706 of the 1996 Act, as made applicable to the Commission through Section 4905.04(B), Revised Code, instructs us to encourage the deployment, on a reasonable and timely basis, of advanced telecommunications capability to all Ohioans by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. The measures we take today are the initial measures necessary to fulfill the obligations of the 1996 Act. In that vein, the Commission has significantly modified the Staff-proposed advanced services commitment. With this modification, we have had to balance the public policy principal of making broadband services as widely available as possible while at the same time recognizing that to require ubiquitous deployment throughout an ILECs' traditional service area with no linkage to demand is not reasonable. The modifications being adopted today will ensure that each county in the state has some geographic area where high-speed broadband services are being deployed.

4. Rule 4901:1-4-05(C)—Lifeline

(a) Amount of the Credit

A number of commenters recommended that the final rules clarify the amount of the credit (Empowerment comments, 4; Small ILECs comments, 11; Consumer Parties reply comments, 66; Ameritech reply comments, 22). NKTC stated that the proposed lifeline commitment fails to acknowledge the significant differences between large and small ILECs. For example, NKTC claimed that, because of their low monthly access line rate, the proposed rule as drafted would bring the customer's rate below zero (NKTC comments, 11-12). A simple and reasonable solution to this concern, NKTC avers, is to eliminate the lifeline requirement for any ILEC with a rate that is already below $10 per month (*Id.*) Empowerment claims that, should the application of the credit cause the customer's bill to go below zero, the credit should be available for use by the customer for other parts of the customer's bill (Empowerment comments, 10).

The rules adopted today do clarify that the credit that the customer should receive should be an amount that ensures that the customer also receives the maximum federal matching contribution. Regarding the concern with the rate falling below zero and the proposal to eliminate this requirement for those companies with a monthly access line rate below $10, we do not agree that such a significant step is warranted. As noted elsewhere in the rules, at no time will the monthly access line discounts cause the local service rates to be less than zero. Therefore, the maximum contribution that an ILEC would ever be responsible for is an amount that will drop the monthly access line rate to zero not below zero as feared. Based on the foregoing, we do not agree with the proposal by Empowerment that the maximum should result in an amount that is a credit for use by the customer on other parts of the customer's bill.

(b) Vertical Features

Numerous stakeholders commented that the lifeline proposal offered in the Staff-proposed rules is too limited (AARP comments, 4; Consumer Parties comments, 57, 66-67; Empowerment Center comments, 7; Parkview reply comments, 3). AARP recommends that the commitment should be modified to include the FCC program. At a minimum, AARP claims, the commitment should track the federal lifeline program rules that permit vertical services (AARP comments, 4). In a similar vein, a number of stakeholders submit that lifeline customers should have the option of purchasing Caller ID and other vertical features in addition to Call Waiting (Communities United for Action or CUFA/Edgemont comments, 3-4, AARP comments, 4; Consumer Parties comments, 57, 66-67; reply comments 8-10; Parkview reply comments, 3; Empowerment comments, 7; reply comments 8-10). CBT and Verizon concur that lifeline customers should have the option to purchase as many vertical features at the regular tariffed rates as any other customer of the company (Verizon comments, 8; CBT reply comments, 17). Empowerment goes a step further and recommends that all vertical features should be offered at low and reasonable rates, not at full price (Empowerment comments, 5; reply comments, 9-10). Ameritech disagrees, arguing that lifeline should provide access to basic telephone service only to those who can least afford it. Therefore, vertical services should not be included (Ameritech reply comments, 3-4). Pointing out that neither its existing lifeline programs

nor the federal lifeline program provide for waivers or credits related to optional features, CBT offers a clarification designed to limit nonrecurring charge (NRC) waivers to the NRC associated with establishing one basic exchange service line (CBT comments, 13).

The Commission agrees with those commenters who suggest that lifeline customers should, through a self-certification procedure, have the ability to purchase optional services at the regular rate for medical and/or safety reasons. Through this approach, we are balancing the needs of low income customers who have a legitimate need for vertical services to fulfill a medical and/or safety concern while, at the same time, recognizing that lifeline assistance is targeted to maintain access to the network. Since a lifeline customer will be paying the regular tariffed rate for the optional services, no ILEC should be harmed by this approach. Other modifications have been made to clarify that NRCs being waived are only those charges associated with establishing one access service line. Language has also been added to grandfather those customers having optional services prior to the ILEC's adoption of this lifeline program.

(c) Enrollment Options

Another issue engendering comment involved enrollment options. A number of commenters noted that while automatic enrollment is an important enrollment option, automatic enrollment should not be the exclusive enrollment option (AARP comments, 6-7; CBT comments, 13-14; Empowerment comments, 9; Consumer Parties, comments, 69; Sprint reply comments, 5-6; CUFA comments, 5). CBT noted that self-certification is currently used by the company and has worked well (CBT comments, 12-14). Other commenters too supported the concept of self-certification and, to address any concerns with fraud, would permit involved ILECs to perform periodic audits of a sample of customers to ensure accuracy (AARP comments, 7; Consumer Parties comments 68-69; Empowerment comments, 6; Small ILECs reply comments, 12; CUFA comments, 5). Concerned with the possibility of fraud, Ameritech urged the Commission to not implement a self-certification procedure as part of its adopted rules (Ameritech comments, 20; reply comments, 20-21). Several ILECs noted that an automatic enrollment process would be overly burdensome to ILECs and would improperly task ILECs with coordinating the process with multiple state agencies (ALLTEL comments, 5; OTIA comments, 7; Chillicothe comments, 4; Verizon comments, 11). Sprint observed that an ILEC should be afforded six months from opting into elective alternative regulation to implement an automatic enrollment mechanism (Sprint comments, Exhibit I, page V). NKTC averred that the implementation of a lifeline program as described in the Staff-proposed rules represents a very different burden for large and small ILECs. NKTC submitted that a better proposal would be for the Commission to generically negotiate with the involved state agencies the manner in which ILECs would connect with the state agencies (NKTC comments, 11). CBT recommended deleting the proposal concerning on-line verification noting that not all agencies will be able or willing to participate (CBT comments, 14). The small ILECs note that those ILECs with 15,000 or fewer access lines would not have enough lifeline customers to justify the expense involved in establishing an online access process (Small ILEC comments, 11-12).

Having fully considered the comments concerning enrollment options, the Commission has made certain modifications in the adopted rules. Initially, the

Commission notes that all ILECs with more than 15,000 access lines that participate in elective alternative regulation must enroll customers who participate in a qualifying program in their traditional service areas, in the lifeline program through automatic enrollment. Additionally, such companies must also enroll such customers using on-line company to agency verification and/or self-certification. All ILECs with 15,000 access lines or less that participate in elective alternative regulation must enroll customers in their traditional service areas who participate in a qualifying program, into the lifeline program through one or any combination of automatic enrollment, on-line company to agency verification and/or self-certification. All ILECs must use self-certification to enroll customers into the lifeline program who qualify through household income-based requirements. Further, in order to address the concerns regarding fraud, ILECs participating in elective alternative regulation may perform verification audits.

(d) Advisory Boards

A further area of disagreement involved the establishment, promotion, and funding of lifeline assistance advisory boards. A number of ILECs argue that coordinating lifeline activities through an advisory board is overly burdensome and there is no guarantee that an advisory board will provide any quantifiable benefits to customers (ALLTEL comments, 5; Verizon reply comments, 11; CBT comments, 14-15; Chillicothe comments, 4). OTIA maintained that the Staff proposal will create 40 new advisory boards (OTIA comments, 8). Certain other commenters note that advisory boards are essential to assure that lifeline programs benefit the eligible consumers (Empowerment reply comments, 10-12; Consumer Parties comments, 66). Consumer Parties observe that neither Ameritech nor CBT would have developed effective lifeline programs without the active assistance of their respective advisory boards (Consumer Parties reply comments, 44). To address the OTIA concerns with the number of advisory boards, the Consumer Parties recommend addressing this by establishing regional advisory boards or even a single advisory board for all small ILECs (Consumer Parties reply comments, 43-45). AARP submits that representation on an advisory board should include a representative of the elderly and a representative of local government (AARP comments, 7). Empowerment commented that ILECs offering a lifeline program should make use of community-based organizations to perform outreach and that adequate funding should be made available to these community-based organizations to promote the program (Empowerment comments, 9).

The Commission agrees with those commenters who noted that advisory boards serve a useful purpose in promoting and implementing lifeline services. However, we also acknowledge the small ILECs concerns. Therefore, while the large ILECs opting into elective alternative regulation must coordinate their lifeline programs with an advisory board made up of representatives of OCC and consumer groups representing low-income constituents, small ILECs can join with other such companies to establish one statewide advisory body. Commission Staff will participate on the boards in an advisory role. In addition, the rule being adopted today establishes an annual marketing budget threshold to be funded by the electing ILEC based on the number of access lines served. For those ILECs serving fewer than 100,000 access lines, the advisory board and the company will determine the size of the fund. The marketing budget will be used to promote lifeline and perform outreach and the advisory board will determine how the budget is spent.

(e) Payment Arrangements and Deposits

For those lifeline eligible customers with past due bills, several commenters noted that proposed provisions for reconnecting those customers were insufficient and should, in any event, provide for a longer period of time for consumers to pay the arrearage (AARP comments, 7; Parkview reply comments, 3; Consumer Parties comments, 69-70; Empowerment comments, 11). AARP and Parkview recommended that lifeline customers should have more than six months to repay past due local service charges (AARP comments, 7; Parkview reply comments, 3). Empowerment submitted that the proposal should be modified so that lifeline eligible customers could pay $25 toward past due arrearages with the remainder held in abeyance as long as the lifeline customer met all their other current payment obligations (Empowerment comments, 11). Verizon and CBT disagreed with these proposals. For purposes of disconnection and reconnection, CUFA and Edgemont maintained that all services, other than basic local exchange service, should be treated in the same manner as toll service (CUFA/Edgemont comments, 6). CBT noted that lifeline customers are under the same obligation as any other customer to pay for services they order. Easing payment obligations or changing the disconnection process would only serve to increase outstanding debt for some customers according to CBT (CBT reply comments, 18). Verizon maintained that six months is ample time pay off local service past due bills. Additionally, Verizon submitted, in response to the disconnection/reconnection issue, that ILECs should not become account managers for specific lifeline customers as such monitoring of payments would be intrusive for the customer and costly for the companies (Verizon reply comments, 11-12). Verizon also observed that ILECs should be able to request a deposit from lifeline customers with outstanding charges (Verizon comments, 9). Further, Verizon and Parkview contend that lifeline customers with outstanding toll debts should be toll restricted until the debt is paid in full (*Id.*; Parkview reply comments, 3). In reply, the Consumer Parties urge the Commission to maintain the distinctions set forth in its disconnection policy (Consumer Parties reply comments, 67).

In the rule being adopted today, the Commission recognizes that lifeline customers should be eligible for payment and deposit arrangements that are somewhat less stringent than other customers. Those accommodations reflect that lifeline customers should be expected to make an initial payment of $25 with the remainder of the past due bill for local service to be divided evenly over the next six months. Contrary to the concerns of some commenters, we believe that six months is a reasonable period of time in which to remit past due charges for local service as the monthly charge for local service is much lower than monthly bills for other utility services such as gas and electric service. ILECs may impose toll restrictions on lifeline assistance customers with past due toll service bills until the arrearage is paid off or until the lifeline customer is otherwise able to establish service under the provisions of our minimum telephone service standards (MTSS) set forth in Chapter 4901:1-5, O.A.C. Regarding the reconnection/disconnection issue, we note that our recently enacted MTSS established our policy concerning reconnection and disconnection. Specifically, Rule 4901:1-5-17(A), O.A.C., states that local service may be disconnected for subscriber nonpayment of charges for local services regulated by the Commission. Local service, for this purpose, is defined under the involved MTSS rule to include every regulated service provided by an ILEC other than toll service and 900 and

976-like service. Therefore, for purposes of calculating the arrearage, past due local charges may include all regulated services other than toll and 900 and 976-like services.

(f) Income Based Eligibility

Several commenters maintained that the Commission should not expand the lifeline commitment to include a stand-alone income-based eligibility requirement as such a proposal would far exceed the lifeline program previously authorized by the General Assembly in former Section 4905.78, Revised Code (repealed effective December 31, 1999). (Ameritech comments, 18-20, replies 19-20; OTIA comments 7-8; Chillicothe comments, 4; Verizon reply comments, 10). Ameritech noted that, from an administrative standpoint, the use of income information for purposes of automatic enrollment presents many problems (Ameritech comments, 19). Ameritech also maintained that income is a component, but is appropriately not the sole component, in determining lifeline eligibility for many needs-based programs, none of which involve the administrative and fraud problems associated with automatic enrollment based solely on income (*Id.* at 20). Consumer Parties support the Staff proposal by moving beyond the programs used as proxies for identifying low-income subscribers (Consumer Parties reply comments, 33-39). Consumer Parties note that basing the lifeline discount on household income will benefit the "working poor" who, for a variety of reasons, do not participate in the proxy programs (*Id.*). It is also significant, the Consumer Parties maintain, that CBT, a company with three years experience with a income-based eligibility program, has raised no objection to the Staff proposal (*Id.*). Additionally, the fraud concerns with automatic enrollment can be addressed, according to the Consumer Parties, by permitting income-based enrollment by self-certification (*Id.*). Empowerment not only supports the Staff proposal, but recommends increasing the income level to 200 percent of the federal poverty level rather than 150 percent (Empowerment comments, 8, reply comments 3-5).

The Commission concurs with the Staff proposal and will adopt such into the final rules being adopted today. In making this determination, the Commission expects that ILECs will recoup a substantial level of foregone revenues from the federal universal service fund as well as from the vertical services lifeline customers otherwise purchase at retail rates. Regarding the administrative concerns associated with automatic enrollment, we note that, as discussed in more detail above, an ILEC can only use self-certification to enroll customers that are eligible through income-based requirements. As to the concerns with fraud, the Commission notes that, in other provisions of the rules being adopted today, ILECs have the ability to perform verification audits. Additionally, we acknowledge that CBT, the only ILEC that has ever enrolled eligible customers based solely on an income-level basis, did not object to the income eligibility proposal. Although we are adopting the Staff proposal for income-based eligibility, we see no reason to increase the income level as proposed by Empowerment. In making this determination, we note that, as supported by the comments filed herein, there is no one standard low-income eligibility threshold. Some programs use a higher income threshold while others use a lower income threshold. The income level we have adopted falls substantially in the middle of those other various thresholds levels. For these reasons, we find the 150 percent of the federal poverty level appropriate.

(g) Other Comments on the Lifeline Program

Other comments on the lifeline program include comments from AARP and the Consumer Parties asserting that the rules should specify that any final adopted rules do not supplant existing ILEC lifeline programs that have benefits that exceed Staff's proposed rules (AARP comments, 6, reply comments, 3; Consumer Parties comments, 56-57, reply comments, 49-53). The Consumer Parties take this argument a step further and maintain that there is no justification for further rewarding companies with lifeline programs that have more customer benefits with additional pricing flexibility through elective alternative regulation in exchange for commitments for which those companies have already been compensated (Consumer Parties comments 56-57). CBT recommends that the adopted rules need to clarify whether customers can receive the lifeline discount on one phone line per household, or whether lifeline customers can only have one phone line per household (CBT comments, 13). Verizon and Empowerment note that the adopted rules should not disqualify a lifeline customer from having a second, fully rated line (Verizon comments, 10; Empowerment comments, 6). The Consumer Parties note that the rules need to be modified to address whether message and measured-rate local service is available to lifeline customers (Consumer Parties comments, 57; Empowerment comments, 3). CBT recommends that the final rules focus on flat-rate service for lifeline customers rather than adding measured and/or message rate lifeline service (CBT reply comments, 16). CBT continues by stating that, based on the company's experience with the Telephone Service Assistance (TSA) program, CBT expects that there will be very little demand for measured and/or message rate service, certainly not enough demand to justify the business office systems changes, billing changes, and additional training necessary to accommodate such a provision (*Id.*). Consumer Parties assert that the adopted rules must clarify that lifeline assistance must be offered to all eligible customers, not just new customers, from the effective date of adoption into an elective alternative regulation plan (Consumer Parties comments, 57). CUFA/Edgemont aver that the final rules should establish enrollment benchmarks (CUFA/Edgemont comments, 5-6). CBT and Ameritech dispute the need for enrollment benchmarks, noting that automatic enrollment ensures that virtually 100 percent of the customers may take advantage of a qualifying program if they choose to do so (CBT reply comments, 16-17; Ameritech reply comments 21).

As noted elsewhere, the Commission has made a determination that those companies operating pursuant to an approved alternative regulation plan may not opt into elective alternative regulation until their existing alternative regulation plans expire. Additionally, it is not our intent that the rules being adopted today supplant any existing lifeline obligation that provides greater customer benefits and that was developed as the result of a negotiated agreement or as a merger condition agreed to or imposed by the Commission. In making this determination, we do note, however, that the lifeline commitment being adopted today stands on its own merit and is not, as the Consumer Parties claim, a reward for which an ILEC has already been compensated. Rather, once an ILEC's current alternative regulation plan expires, there would no longer be an obligation on the part of the ILEC to continue the expired lifeline program beyond the life of the negotiated alternative regulation plan. Thus, the lifeline program adopted today does constitute, for those companies choosing to opt into such a program, a new commitment. As for the clarification regarding the lifeline discount, we note that the adopted rules have

been clarified to reflect that receiving the lifeline benefit does not disqualify automatically the lifeline customer from purchasing additional features and functionalities from the company, including additional phone lines, at full retail rates for medical or safety reasons. We have further clarified the adopted rules to reflect that ILECs must only offer flat-rate service to lifeline customers and not measured and/or message-rated service. We are persuaded that the potential costs associated with making lifeline service available on measured and/or message-rated lines would outweigh the benefits for the number of customers subscribing to either service to make that obligation worthwhile. We do agree with the Consumer Parties comment, however, that lifeline assistance should be available to all eligible customers, not just new customers, from the effective date of the adoption of an elective alternative regulation plan. However, we decline to adopt enrollment benchmarks because the decision as to whether to accept lifeline benefits ultimately rests with the customer and is beyond the control of the ILEC.

5. Rule 4901:1-5-05(D) Retail Rate Commitments

The Staff's proposed rules on retail rate commitments garnered comment as well. NKTC noted that the proposed caps are too burdensome to make adoption of the elective alternative regulation plan attractive to an ILEC (NKTC comments, 13). Verizon argued that there should be no caps on all nonbasic local exchange tier 1 or tier 2 services with the exception that revenues for these services must cover the cost of providing the service (Verizon comments, 12). Ameritech commented that rate caps are inappropriate absent any assessment of competition. Ameritech offered that the adopted rule should be modified to allow pricing flexibility if a competitive demonstration can be made in a relevant market, which, for an ILEC, is a wire center (Ameritech comments, 21). For large ILECs, Ameritech posits that a reasonable threshold is that the services in a wire center should be reclassified as competitive when two or more CLECs are collocated in that wire center and are serving customers *(Id.)*. Ameritech also averred that capping an ILEC's most competitive services for any period of time reflects poor public policy that is not grounded in the realities of the competitive marketplace *(Id.)*. NKTC claimed that capping all nonbasic tier 1 rates for 36 months is unreasonable particularly in light of the costly commitment to deploy high-speed broadband services as set forth in proposed Rule 4901:1-4-05(B), O.A.C. Sprint submitted that all tier 2 rate cap commitments should be eliminated and ILECs be permitted to operate immediately under the new pricing rules upon entering the elective alternative regulation plan. Further, Sprint alleged, the quid pro quo of regulatory flexibility in exchange for advanced broadband services requires simultaneous implementation of both the advanced services expenditures and the pricing flexibility (Sprint comments, 19-20). CBT noted that the proposed rules unreasonably eliminate the business services pricing flexibility that CBT has under its current alternative regulation plan. CBT recommended incorporating pricing rules similar to its current alternative regulation plan into the Commission-adopted elective alternative regulation plan (CBT comments, 15-16).

AARP contends that nonbasic tier 1 and tier 2 service rates should be regulated until and unless there is competition for such services in an ILEC's service area (AARP comments, 7). In response to this comment, the Small ILECs claimed that competition is not a proper test to determine whether or not an ILEC's services should be regulated, since an ILEC cannot control when or if competition moves into its area (Small ILECs reply

comments, 13). The Consumer Parties assert that upward pricing flexibility for noncompetitive services that are already priced significantly above cost is neither sound public nor sound economic policy. However, the Consumer Parties claim that that is the elective alternative regulation plan proposal for tier 1 and tier 2 services (Consumer Parties comments, 52-53). The Consumer Parties also aver that the premise behind this commitment is that it is a safeguard against unexpected rate increases; however, for this commitment to have any value, there needs to be a real possibility that, absent the commitment, rates will increase *(Id.* at 70). Further, the Consumer Parties note that the cost study requirement of proposed Rule 4901:1-4-05(E), O.A.C., could have the unintended consequence of harming smaller ILECs that may not have conducted long run service incremental cost (LRSIC) studies for their existing tier 2 services *(Id.)*. AT&T disputed Ameritech's definition of competition arguing that two CLECs collocating in a wire center provides the Commission with no relevant information and is no demonstration of competition (AT&T reply comments, 3-4). GCCC recommended certain clarifications within the rules (GCCC comments, 3).

In the 998 companion order we adopted today, changes have been made to the Staff proposal regarding the tier structure as well as the pricing structure for services within those tiers. Nonetheless, we find the underlying rationale behind adoption of certain retail rate commitments still appropriate for ILECs entering into elective alternative regulation. That underlying rationale is that retail customers must be able to count on some level of rate stability, in the form of a cap on retail rates, should their underlying ILEC opt into elective alternative regulation. In making this determination, we disagree with the commenters who assert that there is little value to this commitment. Rather than just an unknown possibility, this commitment offers retail subscribers a guarantee that their retail rates will not increase so long as the company remains under the elective alternative regulation plan. On the other hand, we are troubled by Ameritech's comments denoting that the presence of competition should lead to removal of rate caps with the implication that competition should lead to higher rates. We have attempted to balance the competing positions espoused by the ILECs and by the consumer groups with the goal of truly benefiting retail customers. The rule being adopted today does just that.

6. Rule 4901:1-5-05(F) Imputation Standards for Retail Services

Verizon, CBT, OTIA, Sprint, Ameritech, and the Small ILECs maintain that imputation standards are unnecessary especially inasmuch as the 1996 Act and existing Ohio laws require ILECs to offer service on a nondiscriminatory basis (Verizon comments, 13; CBT comments, 16; OTIA comments, 8; Sprint comments, 20; Ameritech reply comments, 23; Small ILECs executive summary, iv). Consumer Parties recommend that imputation standards be moved to the local competition rules and made applicable to all telephone companies that provide bottleneck facilities (Consumer Parties comments, 71). NKTC noted that small ILECs should not be required to file cost studies to introduce new services or lower rates for existing services but rather cost studies should only be required of small ILECs when there is a significant belief that the company is pricing below cost (NKTC comments, 4).

The Commission agrees with those commenters who maintain that imputation standards are inappropriate and unnecessary in the elective alternative regulation rules

adopted herein. We further find that the issue of cost studies for small ILECs is being addressed in the companion order noted above and will not be further addressed herein.

7. Rule 4901:1-4-05(G) Market Opening Commitments

The Small ILECs, NKTC, and OTIA submit that it is questionable, under existing state and federal law, and otherwise inappropriate for the Commission to tie the receipt of state regulatory benefits to the waiver of federal regulatory rights (Small ILECs comments, 12; NKTC comments, 15; OTIA comments, 8). In one sense, the Consumer Parties assert that the market opening commitment is of little value in that this commitment applies only to rural ILECs where competition for residential customers is less likely to be sought after by competitors. However, on the other hand, the Consumer Parties maintain that this provision provides valuable structure for interconnection requests involving rural ILECs and, thus, these provisions should be moved over to the negotiation/arbitration provisions in the 998 docket and made applicable to all ILECs not just those seeking elective alternative regulation (Consumer Parties comments, 34, 71).

After fully reviewing the comments submitted on this issue, we have decided to move the market opening provisions proposed by our Staff from the elective alternative regulation rules to the local service rules in 998. In doing so, we have made necessary modifications to make the involved provisions applicable to all rural ILECs. We also find it unnecessary, for the reasons below, to adopt market opening commitments as part of elective alternative regulation. In our view, Market opening commitments are not relevant to alternative regulation insofar as the decision to open the local exchange market to competition was made by Congress in adopting the Telecommunications Act of 1996. In fact, regardless of whether an incumbent local exchange carrier takes advantage of alternative regulation, whether company-specific or by opting into the elective plan we adopt today, the fact remains that we will continue to pursue a policy of opening the local exchange market to competitive forces through rulemaking proceedings and through individual company-specific TELRIC proceedings. Pursuit of that policy will not change based on the form of ratemaking regulation that an ILEC is operating under.

IV. OUTSTANDING PROCEDURAL MATTERS

I. Motion for Evidentiary Hearing

Throughout this proceeding numerous procedural matters have been brought to the Commission for resolution. There are still two outstanding procedural issues that the Commission needs to resolve at this time. First, on July 17, 2001, the Ohio Consumer's Counsel, AARP, the Appalachian People's Action Coalition, Communities United For Action, the Edgemont Neighborhood Coalition, Empowerment Center of Greater Cleveland, the City of Cleveland, the City of Columbus, and the City of Toledo (hereafter "Consumer Group") filed a motion seeking an evidentiary hearing in order to develop a sufficient evidentiary record on the reasonableness of the proposed elective alternative regulation plan. The Consumer Group claims that an evidentiary hearing would provide an opportunity for Staff, as the sponsor of elective alternative regulation, to explain the basis for and rationale underlying elective alternative regulation, as well as proving that elective alternative regulation is in the public interest. The Consumer Group also

propounds that an evidentiary hearing would afford ILECs an opportunity to prove their claim that competition and alternatives currently exist for all of the various nonbasic services offered by all Ohio ILECs that would be affected by elective alternative regulation, and that elective alternative regulation is in the public interest. Attendant with their request, the Consumer Group requests that Staff and the ILECs prefile testimony supporting their positions and that any evidentiary hearing procedural schedule include sufficient time for discovery, including depositions. In its reply to the memoranda contra the motion for evidentiary hearing, the Consumer Group submit that, in order for the Commission to adopt an elective alternative regulation proposal for nonbasic services that all ILECs could opt into, the Commission must find that there is competition or alternatives for each service for each ILEC for each customer class in each and every market.

Memoranda in opposition to the motion for evidentiary hearings were filed by Ameritech, Verizon, and the OTIA. Ameritech and Verizon responded that, after rounds of comments and replies, local public hearings, and many pleadings filed in this docket extending over a period of months, there is no reason to entertain the Consumer Group's request for evidentiary hearings. More importantly, Ameritech and Verizon note, there is no statutory requirement to hold a hearing in this matter unless a hearing is considered necessary by the Commission. Both companies recommend that the Commission deny the Consumer Group's request. The OTIA submits that neither due process nor the Ohio Revised Code requires evidentiary hearings. In fact, according to the OTIA, Section 4927.03(A)(1), Revised Code, specifically permits the Commission to consider granting to telephone companies an exemption from certain statutes or establishing alternative regulatory requirements for any public telecommunications service, except basic local exchange service, provided such a measure is in the public interest and either the telephone company or companies are subject to competition or customers of such service have reasonably available alternatives. The OTIA also submits that in prior similar cases (i.e., Case No. 89-563-TP-COI and Case No. 97-1700-TP-COI) considered pursuant to Section 4927.03(A)(1), Revised Code, the Commission found that hearings were not necessary. As a final matter, the OTIA observes that evidentiary hearings would only serve to compound time and expense in this case.

The request for an evidentiary hearing shall be denied. Section 4927.03(A)(1), Revised Code, leaves the matter of whether to hold a hearing solely in the discretion of the Commission. In this case, the record reflects that the Commission has afforded interested persons numerous rounds of comments and reply comments in order to develop a record on whether elective alternative regulation for services other than basic local exchange services is reasonable or not. In addition, though under no statutory obligation to do so, the Commission scheduled seven public hearings throughout Ohio, in response to a Consumer Group request for local public hearings, where customers could make their views known on the elective alternative regulation proposal. The Consumer Group has failed to present convincing arguments to explain why the seven local public hearings were insufficient. Finally, we note that, as an instrument of the legislative branch, the Commission at times performs legislative functions and at other times performs quasi-judicial functions. Insofar as the overriding purpose of this docket is to develop rules to govern Commission proceedings, the Commission is performing a legislative function

most appropriately considered through a notice and comment mechanism and not through a quasi-judicial mechanism.

J. Motion to Disclose

The second procedural motion was filed on August 13, 2001. In this motion, ICG, Time Warner, CoreComm, McLeod, AT&T, and WorldCom (hereafter "joint movants") sought disclosure of two competitive activity reports submitted by Ameritech as a result of Case No. 98-1082-TP-AMT and a similar report submitted by Verizon as a result of Case No. 98-1398-TP-AMT. According to the joint movants, these competitive activity reports were only made available to Commission Staff and were not formally docketed. Joint movants maintain that since Ameritech requested in its June 22, 2001 comments that the Commission take administrative notice of data and facts contained in those reports, interested parties should have an opportunity to review and comment on the information in those reports. Joint movants further assert that Ameritech's request that the Commission take administrative notice of the involved reports constitutes a clear waiver of any claim of continuing confidentiality.

Verizon filed a memorandum contra the joint movants' motion on August 29, 2001. In its memorandum contra, Verizon claimed that the joint movants have no right to access a report provided confidential treatment and not docketed at the Commission merely because a third party refers to it. In a memorandum contra filed on August 31, 2001, Ameritech argues that the motion is moot inasmuch as the attorney examiner, in an entry issued on August 9, 2001, describes how the Commission would accept for review the information that is subject to the motion. Based on this language, Ameritech asserts that a number of ILECs have filed extensive information making the demonstration called for by the examiner's August 9, 2001 entry. Indeed, according to the company, Ameritech filed a copy of its competitive report in this docket and only redacted from the public filing information that the company deemed confidential. Nonetheless, Ameritech notes that it would be willing to make a copy of the redacted information available to any party in this case subject to an appropriate protective agreement. Ameritech concludes by stating that the motion's underlying purpose has largely been fulfilled.

The Commission finds that the joint movants motion is moot in light of the examiner's August 9, 2001 entry and the information docketed in response to that entry. Additionally, we acknowledge that Ameritech has agreed to make copies of the redacted information available to any party in this case provided an appropriate protective agreement is entered into. As a result, we believe that the concerns raised in the joint movants motion to disclose have been addressed.

V. CONCLUSION

Over a decade ago, the Ohio General Assembly enacted Chapter 4927 of the Ohio Revised Code to provide the Commission with the necessary tools to adopt alternative methods of regulating the local exchange industry in Ohio. As codified in Section 4927.02, Revised Code, it is the policy of Ohio to ensure the availability of adequate basic local exchange service, to maintain just and reasonable rates and charges for public telecommunications services, to encourage innovation in the telecommunications industry,

to promote diversity and options in the supply of public telecommunications services and equipment throughout the state, and to recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of public telecommunications services where appropriate. The Commission is charged with weighing all of these factors in granting exemptions and adopting alternative regulatory requirements in lieu of traditional regulation. The Commission has considered all of the comments as well as the policy of Ohio and has adopted rules that safeguard the public interest while at the same time addressing the policy of Ohio. Through these rules, incumbent local telephone companies have the opportunity to obtain increased regulatory flexibility that will, in turn, encourage innovation and promote diversity. More importantly, the consumers of Ohio will benefit from the assurances of just and reasonable rates, including a cap on tier 1 noncore services for 24 months, while seeing the benefits of broadband services and new, innovative product offerings. As a result, the public interest is satisfied.

VI. ORDER

It is, therefore,

ORDERED, That new Chapter 4901:1-4, Ohio Administrative Code, as set forth in Appendix A to this finding and order is hereby adopted. It is, further,

ORDERED, That copies of new Chapter 4901:1-4, O.A.C., as set forth in Appendix A to this finding and order, be filed with the Joint Committee on Agency Rule Review, the Legislative Service Commission, and the Secretary of State in accordance with divisions (D) and (E) of Section 111. 15, Revised Code. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties and interested persons of record in this proceeding.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JRJ/vrm

Entered in the Journal
DEC - 6 2001

A True Copy

Gary E. Vigorito
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

CONCURRING OPINION OF CHAIRMAN ALAN R. SCHRIBER

The Order that this Opinion accompanies has been years in the making. This Commission embarked upon an alternative form of regulation in 1989 with the passage of HB 563. Since then, there have been a number of attempts to engage the "alt-reg" process that have been rendered too cumbersome by significant constraints within both the '89 law and previous Commission rules. Refinement has been called for and I believe that through this Order the Commission has answered this call.

The new regulatory approach provided for in this Order has gained momentum over the past year with the passage of SB 235 and corresponding proposals, responses, and hearings. Because of the gravity of its implications for Ohio consumers, this proceeding has not been without a certain degree of controversy. It has been played out in the media, in our mailboxes, and with the General Assembly. In some cases legitimate arguments have been made, while others have been somewhat disingenuous.

I believe that this Order represents a move that is perfectly consistent with an industry that is being propelled by technology into a world of competition that is unparalleled by other regulated utilities. The competitive thrust of telecommunications is unstoppable. I believe that the Commission has done customers and providers alike a great service in recognizing the benefits of the alternative regulation plan approved in this case.

The Staff-proposed flexibility in the pricing of non-basic services attracted a great amount of attention. The Commission in this Order agrees that Caller ID could be considered "basic" insofar as it might be thought of as a public safety issue. (It is interesting to note that when first proposed in the early '90s, Caller ID was met with great resistance as an infringement upon one's privacy. Some of those who advocate so strongly for it today are the same ones who opposed its introduction ten years ago.) Beyond Caller ID, we hold other vertical services to be discretionary. Whether or not there is a competitor offering these same services is <u>not</u> the issue here. Rather, the focus should be upon the elasticity of demand which is a measure of "discretion."

All of us can live without Call Forwarding, Call Waiting, Three-way Calling, etc. The ILECs understand that, and they price those services accordingly. In other words, the demand for most vertical services is elastic; a rise in price precipitates a greater than

proportional fall-off in revenue from the services. Furthermore, both Cincinnati Bell and Ameritech have had the authority to upward-price many of these services in their current alt-reg plans, but have not done so for the simple reason that demand for those services would fall for them. Consumer demand controls the pricing here, not the absence or presence of competitors.

There are those who nevertheless wish to cling to the "competition" arguments. Whether with respect to price flexibility or as a condition for entry into alt-reg, the concept of competition seems to have taken center stage. The Commission cannot force competitors to enter the market; we can only eliminate the barriers to entry. Whether or not a CLEC engages an ILEC depends upon business plans, pricing barriers, and non-price barriers to entry. I believe that the PUCO has taken significant steps forward in eliminating pricing barriers, most recently through its decision in 98-922-TP-COI. According to a recent analyst report, Ohio is second lowest in the nation in UNE-P pricing.[1] Further, our MTSS Rules and the rules that address local competition underscore our efforts to eliminate non-price barriers. If the CLEC business plan calls for entry into Ohio's residential markets, there is nothing to prevent it from doing so.

Finally, with respect to competition, a number of those who commented on the Staff proposal made convincing arguments as to its present existence. In my opinion, it depends upon how one defines the market for telecommunications services. Certainly the market must include the provision of voice and some level of data communications. As such, wireless technology has become a major player in this area and will continue to grow as such. Cable also employs technology that accommodates both voice and data traffic. Finally, satellite communications is re-emerging as a force to be reckoned with in data transmission.

Another contentious point of this enhanced form of regulation centers on the achievement of certain quality-of-service standards as a condition of entry. I believe that such standards send the wrong message to all telecommunications providers. Taken to its logical conclusion, stating this as a condition of entry to alt-reg would imply that a company need <u>not</u> be in compliance if it chooses to continue with rate-of-return regulation. This perverse outcome is in direct conflict with the principal that <u>all</u> companies, no matter the competitive stature, are bound to adhere to our service standards rules. I trust that the Commission's Order reflects this.

An integral part of the alt-reg Order is the provision of advanced services throughout service territories according to certain criteria. It has been suggested in some comments that a "needs assessment" ought to first be conducted. Those who advocate such an analysis are doing so with the rational (from their point of view) goal of protecting their competitive position in the affected territories. A couple of things need to be pointed out here. First of all, the Commission has the authority to grant waivers to an ILEC for this requirement if it finds that market conditions make the investment too

[1] "Status & Implications of UNE-Platform In Regional Bell Markets," Commerce Capital Markets, November 12, 2001.

burdensome in comparison to the benefits. Second of all, the ILEC may not, in fact, be the ultimate provider of broadband to the end-user; a CLEC, leasing elements from the ILEC, may chose to be the advanced services provider. Finally, an ILEC has the right to deploy any service it wishes to in its service territory. Presumably this would include those that would be required within the context of alt-reg which is clearly an elective program.

An enormous amount of deliberation went into this final product. There were numerous comment and reply-comment exercises; seven public hearings were conducted around the state; and thousands of letters and cards were received representing all sides. Much of the public input was based upon fact and a good deal was based upon information that was less than factual. The endless media accounts of the proceedings were similarly situated. Through it all, I believe that this Commission has today achieved its quest to streamline the regulation of an industry that is ripe for such consideration.

By: Alan R. Schriber
Chairman

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Gary E. Vigorito
Secretary

RULES FOR AN ELECTIVE ALTERNATIVE REGULATION PLAN FOR ILECS

4901:1-4-01 Elective alternative regulation plan general provisions

(A) The alternative regulation plan set forth below is available to any incumbent local exchange carrier (ILEC) that desires to take advantage of the retail services flexibility for telecommunication services, other than basic local exchange service as defined in Section 4927.01, Revised Code, set forth in Rules 4901:1-6-01 through 4901:1-6-12 of the Administrative Code, but that is not interested in pursuing an individual company-designed application for alternative regulation pursuant to Case No. 92-1149-TP-COI.

(B) Adoption of the elective alternative regulation plan by an ILEC enables the ILEC to operate under the proposed retail service requirements developed in Rules 4901:1-6-01 through 4901:1-6-12 of the Administrative Code.

(C) This elective alternative regulation plan does not limit an ILEC's ability to propose a company-specific plan under the existing alternative regulation guidelines set forth in Case No. 92-1149-TP-COI, which could also qualify the company for the proposed retail service rules.

(D) The retail service rules established in Chapter 4901:1-6 of the Administrative Code, while available to all telephone companies, are only an option for an ILEC if the ILEC adopts a qualifying alternative regulation plan.

(E) The Commission may upon its own motion, or for good cause shown, waive any requirement, standard, or rule set forth in this chapter.

4901:1-4-02 Term of the plan

(A) An ILEC can opt into this elective alternative regulation plan at anytime by making the appropriate filing with the Commission that includes all necessary tariff modifications. The ILEC's election shall be automatically approved on the 46th day, unless otherwise suspended by the Commission.

(B) There is no predetermined termination date for the elected alternative regulation plan absent a revocation proceeding outlined in subdivision (D).

(C) Once the ILEC has met the commitments set forth in Rule 4901:1-4-05 of the Administrative Code, the company may continue under its elected alternative regulation plan, terminate the alternative regulation plan and return to traditional rate-of-return regulation, or propose a company-specific alternative regulation plan.

(D) If the Commission believes that the ILEC has failed to comply with the terms of the plan, the Commission shall give the ILEC notice, including a basis, of such belief and a reasonable period of time to come into compliance. The Commission shall not revoke any elective alternative regulation plan, unless the Commission determines, after further notice to the ILEC and hearing, that the ILEC in fact has failed to materially comply with the terms of the plan and in fact has failed to come into compliance within such reasonable period of time. Prior to any such ruling to revoke any order approving the plan, the Commission shall take into consideration consequences of such action on the ILEC as well as the impact on its customers.

(E) In order to terminate or withdraw from an elected alternative regulation plan, an ILEC must file a notice with the Commission which sets forth the reasons for the withdrawal and informs the Commission whether the ILEC is proposing to return to traditional regulation or will be filing a company-specific alternative regulation plan. A notice of withdrawal will not be approved until another regulatory framework is adopted by the Commission. The Commission shall order such procedures as it deems necessary in its consideration of the request to withdraw.

(F) An ILEC choosing to return to rate-of-return regulation is required to bring its rates and services into compliance with the appropriate regulatory framework for all regulated services. All existing rules, guidelines, and orders that are available for ILECs today, such as Case Nos. 84-944-TP-COI, 86-1144-TP-COI, 89-564-TP-COI, and 92-1149-TP-COI, will still remain. The rates in effect under elective alternative regulation shall remain in effect until otherwise modified by the ILEC with the Commission's approval. An ILEC returning to rate-of-return regulation bears the total risk of recovery of commitment investments during the period it was under alternative regulation.

4901:1-4-03 Applicability of other rules and regulations

To the extent they do not conflict with the provisions set forth herein and absent a waiver, all commission requirements and policies will apply to the operations of every ILEC adopting elective alternative regulation. Examples of such requirements and policies include, but are not limited to, the minimum telephone service standards (MTSS) codified at Chapter 4901:1-5 of the Administrative Code, lifeline services such as service connection assistance (SCA) (Case Nos. 89-45-TP-UNC and 91-564-TP-UNC), discounts for persons with communications disabilities (Case No. 87-206-TP-COI), blocking of 976 services (Case No. 86-1044-TP-COI), disconnection of local service rules (Case No. 96-1175-TP-ORD), 9-1-1 service (Case No. 86-911-TP-COI), privacy and number disclosure requirements (Case No. 93-540-TP-COI), alternative operator service provisions (Case No. 88-560-TP-COI), provisions involving customer-owned, coin-operated telephones (Case No. 88-452-TP-COI), and carrier access charge policies and orders.

4901:1-4-04 Accounting standards

Accounting records are required to be maintained in accordance with the uniform system of accounts (USOA) for local telephone operations by all incumbent local exchange carriers as defined in rule 4901:1-6-01.

4901:1-4-05 Alternative regulation commitments

(A) Advanced services

(1) Advanced telecommunications services capability is the availability of high-speed, full broadband telecommunications that enables a customer to originate and receive high-quality data, graphics, and video using any technology (e.g., xDSL, cable, fiber optic, fixed wireless, satellite, or other system) at a minimum rate of 200 kilobits per second in either direction (upstream and downstream).

(2) An ILEC electing this alternative regulation plan must commit to provide digital loops (or the equivalent) capable of delivering advanced telecommunications services to customers.

(a) High Density Central Offices: No later than 12 months from the election of the alternative regulation plan, an ILEC must provide advanced telecommunications service capability from all Class 5 central offices (COs) in its traditional service territories which serve census tracts with a population density of 500 or more people per square mile as defined by the 2000 census.

(i) No later than 12 months from the election of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within 60 days to any customer within 12,000 feet from a high density CO.

(ii) No later than 24 months from the election of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within 60 days to any customer within 18,000 feet from a high density CO.

(b) County Seat Central Offices: For counties that do not meet the population density criterion described in (a) above, an ILEC must provide advanced telecommunications service capability from all Class 5 COs in its traditional service territories that are within the county seat no later than 12 months from the election of the alternative regulation plan.

(i) No later than 12 months from the election of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within 60 days to any customer within 12,000 feet from a county seat CO.

(ii) No later than 24 months from the election of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within 60 days to any customer within 18,000 feet from a county seat CO.

(B) Lifeline assistance

(1) The ILEC must implement a lifeline program that provides eligible residential customers with the maximum contribution of federally available assistance. Eligible lifeline service consists of flat-rate monthly access line service with touch-tone service.

(a) Credits: The ILEC shall credit one hundred percent (100%) of all nonrecurring service order charges for commencing service and a monthly amount that will ensure the maximum federal matching contribution.

(b) Other benefits: Lifeline customers shall receive a waiver of the local exchange service establishment deposit requirements, free blocking of toll and 900/976 dialing patterns, an option to purchase call waiting, and an option to purchase other features for medical and/or safety reasons. Requests to purchase vertical features must be signed by the customer certifying that the customer has a legitimate need, either for medical or safety reasons, for the optional feature(s) requested.

(c) Restrictions: The discount will apply to only one access line per household. Optional features, other than call waiting, are prohibited unless the phone company receives a signed statement from the customer self-certifying that the feature is necessary for medical and/or safety reasons. Existing lifeline customers that have optional features prior to the adoption of this plan will be grandfathered into the lifeline program. Telephone companies are prohibited from marketing vertical services to existing or new lifeline customers.

(2) Lifeline assistance eligibility shall include:

(a) Home Energy Assistance Program (LIHEAP, HEAP, and E-HEAP)
(b) Ohio Energy Credit Program (OECP)
(c) Foodstamps

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(d) Supplemental Security Income – blind and disabled (SSDI)
(e) Supplemental Security Income – aged (SSI)
(f) General Assistance (including disability assistance (DA)
(g) Medical Assistance (medicaid), including any state program that might supplant medicaid
(h) Federal public housing/section 8
(i) Ohio Works First (formerly AFDC)
(j) Household income at or below 150 percent of the poverty level

(3) Each ILEC participating in the elective alternative regulation plan shall offer a lifeline assistance program to eligible customers throughout the traditional service area of that carrier.

(a) ILECs with 15,000 or more access lines shall automatically enroll customers onto lifeline assistance who participate in a qualifying program. Additionally, such companies must also enroll customers who participate in a qualifying program by using on-line company to agency verification or self-certification.

(b) ILECs with less than 15,000 access lines may use one or any combination of automatic enrollment, on-line company to agency verification and/or self-certification to enroll customers onto lifeline assistance who participate in a qualifying program.

(c) All ILECs must use self-certification to enroll customers onto lifeline assistance who qualify through household income-based requirements.

(4) At no time will the monthly access line discounts cause the local service rates to be less than zero.

(5) Lifeline assistance customers with past due bills for regulated local service charges will be offered special payment arrangements with the initial payment not to exceed $25.00 before service is installed, with the balance for regulated local charges to be paid over six equal monthly payments. Lifeline assistance customers with past due bills for toll service charges will be required to have toll restricted-service until such past due toll service charges have been paid or until the customer establishes service with a subsequent toll provider pursuant to the minimum telephone service standards.

(6) Staff will work with the appropriate state agencies, which administer qualifying programs for lifeline assistance, and the ILECs to negotiate and acquire on-line access to the agencies' electronic databases for the purpose of accessing the information necessary to verify a customer's participation in an eligible program, and data necessary to automatically enroll customers into the lifeline program. On-line verification and automatic

enrollment will be in place within six months after a company opts into an elective alternative regulation plan.

(7) An ILEC is permitted to perform a verification audit of a customer applying for or a customer already on lifeline assistance service.

(8) All lifeline program activities must be coordinated through an advisory board composed of the Ohio Consumers' Counsel, consumer groups representing low-income constituents, and the company. The commission's staff will serve in an advisory role. Companies with less than 15,000 access lines may join with other such companies to form one advisory board.

(9) The ILEC will establish an annual marketing budget for promoting lifeline and performing outreach based on the number of company access lines as follows: 1) $250,000 for companies with more than 500,000 access lines; 2) $100,000 for companies with 100,000 to 500,000 access lines; and 3) the amount for companies with less than 100,000 access lines will be determined by the advisory board and the company. The advisory board will determine how the marketing budget funds should be spent to market and promote the lifeline program.

(C) Retail rate commitments

(1) An ILEC's offering of in-territory, basic local exchange service shall include flat-rate residential calling.

(2) Any measured-rate or optional extended area service plans that are being provided to customers at the time the ILEC opts into an elective alternative regulation plan shall continue to be available to customers unless the Commission subsequently approves changes to these plans.

(3) Tier 1 rate caps

(a) Core Service rate caps

An electing ILEC shall cap the rates for tier 1 core service (stand-alone basic local exchange service plus basic caller identification only) in its territory at the existing rates for so long as the company remains under the elective alternative regulation plan. The electing ILEC's existing rates shall represent the maximum or "ceiling" levels, below which the ILEC may lower or raise rates upon making the appropriate filing with the Commission. In doing so, the electing ILEC may not price below the long run service incremental cost of each service plus a common cost allocation. The ILEC may provide a common cost study to the Commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten percent for common costs.

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(b) Non-core service rate caps

An electing ILEC shall cap the rates for all non-core, tier 1 services as defined in Chapter 4901:1-6, Ohio Administrative Code, in their territory at existing rates for 24 months from the date the alternative regulation plan takes effect. During those 24 months, the electing ILEC may lower or raise rates below the cap, upon making the appropriate filing with the Commission. The electing ILEC may not price below the long run service incremental cost of each service plus a common cost allocation. The ILEC may provide a common cost study to the Commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten percent for common costs.

(i) After 24 months, upward pricing flexibility for a second local exchange access service line and call waiting shall be limited to no more than a ten percent increase in price per year for each service, up to a maximum cap for the life of the plan that is double the initial rate for each service.

(ii) After 24 months, upward pricing flexibility for all other tier 1, non-core services shall be limited to a cap that is double the initial rate.

(4) Tier 2

Tier 2 services include all regulated, public telecommunications services that do not fall on tier 1. Tier 2 service rates are not subject to any rate cap and may be priced at market-based rates. The rate for any tier 2 service must recover the long run service incremental costs associated with the service plus a common cost allocation. The ILEC may provide a common cost study to the Commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten percent for common costs.

(5) Nothing herein prohibits an electing ILEC from seeking, through an appropriate filing with the Commission, the flexibility to discount tier 1 service rates, on an exchange basis, provided the company demonstrates that the discount is necessary to meet competition and provided the discount is uniformly available to all tier 1 service customers within the designated exchange(s).

(6) Notice to customers of any changes in rates must comply with the notice requirements established in Chapter 4901:1-6 of the Administrative Code.

*1993 Ohio PUC LEXIS 35, *; 140 P.U.R.4th 23*

In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Telephone Companies

Case No. **92-1149**-TP-COI

PUBLIC UTILITIES COMMISSION OF OHIO

1993 Ohio PUC LEXIS 35; 140 P.U.R.4th 23

January 7, 1993

CORE TERMS: cell, regulation, staff, competitive, customer, notice, revised, pricing, earnings, tariff, flexibility, public interest, methodology, telecommunication, classified, provider, non-basic, application filed, rules provide, staff report, deleted, threshold, intervenor, proposed rule, rate-of-return, exogenous, telephone, basic service, new service, imputation

PANEL: [*1]

Craig A. Glazer, Chairman; J. Michael Biddison; Ashley C. Brown; Jolynn Barry Butler; Richard M. Fanelly

OPINIONBY: Summary of Case No. **92-1149**-TP-COI

Alternative Regulation for Large Local Exchange Telephone Companies

This order adopts rules for alternative regulation for the large local exchange companies (LLECs), pursuant to Chapter 4927 of the Revised Code. Specifically, the rules set forth two separate procedures by which a LLEC may request alternative regulation. First, a LLEC may request alternative regulation treatment for competitive services under Section 4927.03, Revised Code. Under the rules, a service which meets the competitive criteria set forth in the statute may be detariffed. Second, pursuant to Section 4927.04, Revised Code, a LLEC may request that an alternative methodology be applied for the establishment of basic service rates. This methodology would be different than the current rate base, rate-of-return methodology utilized by the Commission. Moreover, the rules provide numerous vehicles by which interested persons may participate in these proceedings.

This summary was prepared to provide a brief statement of the Commission's action. It is not a part of the Commission's **[*2]** decision and does not supersede the full text of the Commission's order.

OPINION: FINDING AND ORDER

The Commission finds:

I. HISTORY

Traditionally, local exchange telephone company rates have been set by a rate-of-return methodology pursuant to Section 4909.15, Revised Code. Rate base, rate-of-return regulation sets rates at a level that will cover the costs of providing the services with an opportunity for the company to earn a fair return on the investment. These factors determine the revenue requirement of the company, which is then allocated to the various services provided. For a local exchange telephone company, the revenues from interstate services, regulated by the Federal Communications Commission (FCC), are a significant part of the total requirement. The rates for the individual intrastate services are set by the Ohio Commission to equal the remaining revenue requirement. The allocation of the requirements to individual customer rates involves both cost-of-service and value of service considerations.

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In the past decade, the Commission has amended its practices and policies relating to the regulation

of telephone companies due to changes in the telecommunications industry. **[*3]** Most significant was the Commission's order in In the Matter of the Commission's Investigation into the Regulatory Framework for Telecommunication Services in Ohio, Case No. 84-944-TP-COI (the 944 Order), dated April 9, 1985, which established a more flexible, streamlined regulatory framework for the provision of various types of competitive telecommunication services in Ohio. These services included long distance telecommunication services, mobile and paging telephone service, cellular mobile services, and certain of the local telephone companies' services which are subject to competition. Under the 944 framework, the Commission continues to exercise full jurisdiction over market entry and exit, the setting of rates, establishment of new services, and the quality of service. However, significant flexibility was afforded to the companies in the setting of rates for competitive services so that the companies would be able to respond quickly in a competitive marketplace. The 944 Order permitted companies offering competitive services to establish a range of rates which must be approved by the Commission. Once approved, the companies would have the flexibility to move upward **[*4]** or downward within the range without needing Commission action.

Recognizing that additional flexibility for competitive telecommunication service providers was needed, the Commission, on August 2, 1988, in In the Matter of Phase II of the Commission's Investigation into the Regulatory Framework for Competitive Telecommunication Services in Ohio, Case No. 86-1144-TP-COI (the 1144 Order), provided for additional flexibility with respect to ratemaking for competitive services. Among other things, the Commission, established a streamlined proceeding in which a company may, through a self complaint process, increase the rates for competitive services without having to file for a general rate case under the traditional ratemaking methodology. The Commission concluded in the 1144 Order that further flexibility may be warranted for competitive telecommunication service providers, but that the Commission was constrained without additional legislative authority. On October 14, 1988, legislation was introduced in the Ohio General Assembly which, when enacted, would empower the Commission with authority to consider forms of alternative regulation for telephone companies.

On December **[*5]** 15, 1988, Amended Substitute House Bill Number 563 (H.B. 563) was signed into law. This bill, which took effect on March 17, 1989, enacted into law Sections 4905.402 and 4927.01 through 4927.05, Revised Code. These enabling statutes apply to all types of telephone companies operating in Ohio including local telephone companies, long distance companies, cellular mobile companies, and mobile and paging companies.

Specifically, Section 4927.03, Revised Code, enables the Commission to exempt from Chapters 4905 or 4909, Revised Code, or establish alternative regulatory requirements for, any telephone service (except basic local exchange service), provided the Commission finds such measure is in the public interest, and that the telephone company is subject to competition with respect to such public telecommunications service, or the customers of such service have reasonably available alternatives.

Section 4927.04(A), Revised Code, on the other hand, grants the Commission authority to consider alternatives to the traditional form of ratemaking for large local exchange companies (LLECs) (those companies with at least 15,000 access lines). Specifically, this section enables the Commission **[*6]** to establish rates for basic local exchange service, or other services which have not been subject to exemption or alternative regulation under Section 4927.03, Revised Code, by a method other than that specified in Section 4909.15, Revised Code (which sets forth the rate base, rate-of-return methodology), provided the Commission finds the use of the alternative method to be in the public interest. In carrying out both Sections 4927.03 and 4927.04, Revised Code, the Commission may establish different rates and charges for different companies as long as the methods are reasonable and do not confer any undue economic, competitive, or market advantage or preference upon any telephone company. The section does not give the Commission the authority to waive Sections 4909.18 or 4909.19, Revised Code, from which the Standard Filing Requirements, staff report and rate case process emanates.

Section 4927.02, Revised Code, sets forth the policy of the state of Ohio which must be considered by the Commission in carrying out Sections 4927.03 and 4927.04, Revised Code, as follows:

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1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;

2) Maintain **[*7]** just and reasonable rates, rentals, tolls, and charges for public telecommunications service;

3) Encourage innovation in the telecommunications industry;

4) Promote diversity and options in the supply of public telecommunications services and equipment throughout the state; and

5) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of public telecommunications services where appropriate.

The eight LLECs which are subject to Section 4927.04(A), Revised Code, include Century Telephone Company, Chillicothe Telephone Company, The Ohio Bell Telephone Company, Cincinnati Bell Telephone Company, Western Reserve Telephone Company of Ohio, ALLTEL Ohio, Inc., GTE North Incorporated, and United Telephone Company of Ohio. These companies combined provide basic service to more than 90 percent of Ohio's telephone subscribers.

Recognizing a deficiency in the current regulatory framework, the Commission's staff undertook a research project to study possible alternative regulatory approaches for the LLECs under Chapter 4927, Revised Code, in June 1989. Its focus was to discover ways to bring to regulatory decision making a **[*8]** comprehensive view of the operations of the LLECs and the interests of the public in a way that would permit the evaluation of specific company regulation by the public interest standards explicit in Chapter 4927, Revised Code. On October 17, 1991, the staff presented an alternative regulation proposal to the Senate Select Telecommunications Infrastructure and Technology Committee. Then, beginning in November 1991, staff conducted five informal workshops, which were open to all interested persons, to further the development of its proposal. The goal of the workshop process was to develop rules for alternative regulation which would be adopted by the Commission.

On April 8, 1992, the Ohio Telephone Association (OTA) presented a draft proposal for an alternative regulation process, and on May 21, 1992, the Office of the Consumers' Counsel (OCC) submitted its alternative regulation proposal. Taking into consideration these documents, the staff revised its original document and submitted it to the Commission for consideration. By entry dated July 2, 1992, the Commission initiated this docket and invited all stakeholders and interested entities to submit comments on staff's proposal. **[*9]** In order to ensure that potential commentors understood the proposal sufficiently to comment on it, the staff conducted a record conference at the Commission offices on July 9, 1992. At the conference, staff answered questions about the intent and reasoning behind its proposal. Between July 31 and August 14, 1992, Commissioners conducted seven public meetings around the state at Columbus, Cincinnati, Cleveland, Dayton, Mansfield, Marietta, and Tiffin to allow customers of all the LLECs an opportunity to express their views on the alternative regulation proposal. In addition to the testimony received at these public meetings, the Commission has received dozens of letters from members of the public expressing concerns about alternative regulation. These letters have been docketed and made a part of this case record. Initial and reply comments on staff's proposal were filed on August 10 and September 8, 1992, respectively, by the following entities:

Federal Executive Agencies and the Department of the Army; Coin Phones, Inc.; AT&T Communications of Ohio, Inc.; The Greater Cleveland Welfare Rights Organization, Western Reserve Alliance, and Consumers League of Ohio; Ohio State **[*10]** Legislative Committee, American Association of Retired Persons; MCI Telecommunications Corporation; Sprint Communications Company L.P.; Ohio Newspaper Association; CENTEX Telemanagement, Inc.; Century Telephone of Ohio, Inc.; The Ohio Bell Telephone Company; The Ohio Cable Television Association; The Ohio Public Communication Association; Cincinnati Bell Telephone Company; United Telephone Company of Ohio; The Ohio Telephone Association; LCI International; METAS-Ohio; City of Columbus; ALLTEL Ohio, Inc. and The Western Reserve Telephone Company; Allnet Communications Services, Inc.; Ohio Department of Administrative Services; Office of the Consumers' Counsel; Prodigy Services Company; GTE North Incorporated; Chillicothe Telephone Company; MetroComm, Inc.; City of Cleveland; and Ohio Linx.

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By entry dated September 4, 1992, New Par, Sterling Cellular, Inc., USA Mobile Communications, Inc. II, and RAM/BSE Paging Co. L.P. (hereinafter referred to as "Carriers") and Cellwave, Inc. were granted leave to file late comments on September 15, 1992. On September 30, 1992, the Ohio Council of Retail Merchants filed comments and a request for leave to file late comments. The Commission finds **[*11]** the request to be reasonable and will consider the comments to be timely filed.

After reviewing the staff's proposal and the initial and reply comments, the Commission has made several revisions to the staff's proposal which are now reflected in the document attached to this order as "Appendix 1". In the discussion that follows, the document which will be adopted in this order will be referred to as "revised rules".

II. DISCUSSION

A. Purpose and Scope

Several of the commentors submitted that the staff's proposal is confusing as to what procedures apply to which sections of Chapter 4927, Revised Code. AT&T Communications of Ohio, Inc. (AT&T) argued that the rules blur the critical distinction between regulatory exemption authorized under Section 4927.03, Revised Code, for competitive services and ratemaking flexibility under Section 4927.04(A), Revised Code, for all other services. We agree that the rules must carefully distinguish between the procedures for the two distinct and exclusive statutory frameworks. Thus, the rules have been amended so as to create two separate processes, one for the filing of an application under Section 4927.03, Revised Code, and one for the **[*12]** filing of an application under Section 4927.04(A), Revised Code. n1

n1 We note that the OTA proposal suffers from the same defect as did the staff's original proposal as pointed out by AT&T. OTA did not directly address in its reply comments the legal issues raised by AT&T.

Section 4927.03, Revised Code, provides that services that meet the competitive requirements set forth in the statute may be exempted from Chapters 4905 and 4909, Revised Code, or the Commission may establish alternative regulatory requirements for such services. In essence, if the Commission were to exempt a service from both of the chapters, the Commission would be deregulating the service. The implications of deregulation are extremely complex. We believe at this point that detariffing of fully competitive services in general will provide the LLECs the same substantive flexibility as would deregulation. While the LLECs are not precluded from requesting that certain competitive services be deregulated, the Commission, at this time, will not consider exempting any current service from Section 4905.26, Revised Code (the complaint statute).

Staff's proposal limited applications under Section 4927.03, **[*13]** Revised Code, to requests that are of such character "as to affect substantially the way in which the company as a whole is regulated." AT&T objected to this limitation since it infers that the Commission will not be evaluating a LLEC's services on an individual basis. Specifically, AT&T submitted that Section 4927.03, Revised Code, authorizes the Commission to create exemptions only on a service-by-service basis, and not on a company-wide basis independent of specific services, as contemplated by the proposed rules.

In the case of LLECs, attention really should be focused on individual services and whether they meet the mandatory competitive criteria of Section 4927.03, Revised Code, as argued by AT&T. However, while the language in that section states that such exemption may be granted "as to any public telecommunications service . . .", we do see a need to allow a company the option of including all of its competitive services in one application for exemption or alternative regulatory treatment under Section 4927.03, Revised Code, as long as the Commission finds each service meets the competitive criteria set forth in Section 4927.03, Revised Code. Accordingly, the revised rules **[*14]** will provide that a LLEC may file an application under Section 4927.03, Revised Code, for any number of services, and that it is the LLEC's burden to demonstrate that each service

included in the application meets the competitive criteria set forth in Section 4927.03, Revised Code, by filing the information set forth in the revised rules. n2 We agree with United that such a filing, if limited to competitive services which meet the standards set forth in Section 4927.03, Revised Code, need not constitute a plan under Section 4927.04, Revised Code.

n2 The Commission notes that Section 4927.03, Revised Code, applies to competitive services only. The statute also mandates that the Commission consider a host of factors related to market share and ease of entry, none of which had been specifically required to be shown in our 944 Order which predates the statute. In return, the companies now have an option of complete detariffing of fully competitive services, an option not available under our 944 Order. In keeping with the provisions of the statute, the rules have been drafted to require the companies to provide evidence on each of the points raised in Section 4927.03(A)(2)(a) through (d), Revised Code. **[*15]**

Aside from setting forth competitive criteria, Section 4927.03, Revised Code, mandates that certain due process requirements be met before the Commission is able to exempt a particular service. Those requirements include notice, an opportunity for comment, and a hearing if the Commission determines one is necessary. We recognize the importance and need for expediting the process in which services are deemed competitive; however, we cannot ignore the statutory due process protections. With separate rules for applications filed pursuant to Section 4927.03, Revised Code, the revised rules provide for these due process protections. Conceivably, under these rules, it is possible for the Commission to issue an order detariffing a service after 50 days from the date of filing an application if there is no hearing. Granted, this process may not be as expeditious as what is available to the LLECs under the 944 Order; however, it is important to keep in mind that the goal in filing an application under Section 4927.03, Revised Code, is the detariffing of fully competitive services as opposed to the flexible pricing allowed under 944. The Commission must be certain before it relinquishes **[*16]** its oversight of the pricing of these services that such an order is in the public interest. n3

n3 It should be noted that the speed at which such applications can be processed is, in many ways, in the hands of the applying LLEC. If the service does not clearly meet the competitive tests set forth in the statute or if the LLEC does not cooperate with the staff in providing the information it needs to ensure compliance with the competitive criteria set forth in the statute, then the process will inevitably be delayed. The Commission commits to expediting these cases given the need for the LLEC to respond to competition.

Section 4927.04(A), Revised Code, on the other hand, confers flexibility in the ratemaking process when increasing rates for basic services and any other services that have not been subject to alternative regulation under Section 4927.03, Revised Code. Since Section 4927.04(A), Revised Code, only exempts from the ratemaking process provided for in Sections 4909.18 and 4909.19, Revised Code, the rate base, rate-of-return methodology set forth in Section 4909.15, Revised Code, by law the application process under this section must provide traditional rate case **[*17]** protections including a hearing. n4 Under the rules, a LLEC must file a plan which includes the proposed methodology of establishing rates for all of its services and commitments focusing on enhanced customer service and infrastructure development. The revised rules set forth specific procedures for an application filed under this section.

n4 This is not to say that the process could not be more expeditious since we could be departing from a traditional cost of service review.

If a LLEC desires both alternative regulatory treatment for services that meet the competitive criteria under Section 4927.03, Revised Code, and alternative ratemaking for basic services under Section 4927.04(A), Revised Code, then all of the services can be included under one plan. If an applicant chooses to file such a plan, then the procedures set forth in these rules for plans filed

pursuant to Section 4927.04(A), Revised Code, will be applicable. Again, the applicant will have to demonstrate that any service it desires to be treated under Section 4927.03, Revised Code, meets the competitive criteria before such service can be detariffed.

In determining whether an alternative method is in the public **[*18]** interest, the Commission believes that it is imperative to look at the company's operations as a whole and how each service, including non-basic services, fits into the operating scheme. Therefore, we urge the LLECs to file plans which include all of their services. In doing so, the Commission in no way forfeits its right or any interested person's right to evaluate each service on an individual basis even though the services will be combined in an overall company plan. We note that, until a LLEC has an approved alternative regulation plan under Section 4927.04(A), Revised Code, or has been granted alternative regulatory treatment under Section 4927.03, Revised Code, the 944 and 1144 Orders still are applicable.

B. Definitions

1. Basic Local Exchange Service

Staff's proposal separated basic service into two categories. The first was "core basic", which included telecommunication services that face limited competition and are primarily non-discretionary in nature. The second was "non-core basic", which included telecommunication services which face higher levels of competition than core basic or are more discretionary in nature. Staff's proposal also listed several specific **[*19]** services which would be included in each of the two categories, including such form and amount of local usage as approved by the Commission.

MCI Telecommunications Corporation (MCI) and other commentors argued Chapter 4927 only distinguishes between basic and other services, and, therefore, the Commission has no authority to create "non-core basic" or any other classification of basic service. Specifically, MCI argued bifurcating basic service is inconsistent with the definition of basic local exchange service set forth in Section 4927.01, Revised Code. In addition, it argued that, because the Commission is prohibited from exempting basic service from any provision of Chapters 4905 or 4909, Revised Code, or any rule or order issued under those chapters, several of the proposed rules are unlawful, namely the ones allowing pricing flexibility, private contracts, and price changes without an evidentiary hearing.

In response to MCI's arguments, OTA argued that the statute does not mandate or compel the consideration of a specific alternative regulatory structure for basic services. Further, it argued that the Commission, under Section 4927.04(A), Revised Code, has been granted authority **[*20]** to consider and accept any treatment of basic services that is in the public interest, and that there would be no violation of the statute in creating such classifications, as long as the Commission would not classify under Section 4927.03, Revised Code, a service which falls under the definition of "basic" in Section 4927.01, Revised Code.

We agree with OTA that the Commission has authority under Chapter 4927, Revised Code, to create classifications of basic services. In fact, the revised rules now divide basic service into three categories, Cell 1, Cell 2, and Cell 3, with Cell 1 receiving minimal pricing flexibility, and Cell 2 and Cell 3 receiving more flexibility. Non-basic services, on the other hand, will be categorized as Cell 4.

It appears that MCI believes that the former non-core basic services, or the revised Cell 2 and Cell 3 services, would be treated on the same level as non-basic, Cell 4 services under Section 4927.03, Revised Code. That is not accurate. Services categorized in the revised Cell 2 and revised Cell 3 will be considered basic services under the rules and will be subjected to regulation albeit more relaxed than traditional regulation. Moreover, **[*21]** even though a plan may include a request for flexible pricing for Cell 2 and Cell 3 services, the pricing methodologies for those services would be reviewed in the context of an evidentiary hearing pursuant to Section 4909.19, Revised Code.

The next area of contention is the scope of basic service and whether the definition in these rules should include a laundry list of some services to the exclusion of others. OTA submitted the language "but not limited to" in the definition of "core basic" should be deleted. According to OTA, staff's proposal contemplates an ever-expanding category of services that will be considered core

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basic, and that this language presages the expansion of core services beyond the examples provided. OTA further submitted the language is inconsistent with the continuing emergence of a competitive telecommunications environment and the public policy recognizing the continuing expansion of competition. In addition, several non-LLEC commentors proposed that flat-rate service and access should be categorized as Cell 1 services.

It is not our intent to limit the alternative regulatory process by attempting to identify every service which may be categorized as **[*22]** a Cell 1 service in the rules. Instead, we expect the LLECs to propose as part of their plans their own lists of Cell 1 services. However, we find it imperative that monopoly access, including any bundled basic local exchange service that includes a monopoly access component, n5 or such service as is deemed essential by the Commission for the provision of public safety or the protection of privacy, all service installation or maintenance services not available from competitive sources, and local usage be placed into the Cell 1 category. n6 A further explanation of which basic services would be categorized in Cell 2 and Cell 3 is included in the discussion of the pricing rules.

n5 As the revised rules provide, unbundling is the key to a LLEC achieving maximum pricing flexibility for its services. We acknowledge that the mechanics of unbundling are not simple and must be done over a period of years. Nevertheless, if a LLEC wishes to establish maximum flexibility in order to meet competition, then, on its own, it needs to demonstrate movement toward unbundling of monopoly from competitive portions of a service.

n6 Although the effect of this rule is to place certain bundled business services into Cell 1, the Commission will not preordain a pricing scheme for such services in these rules but will consider greater flexibility for some services within Cell 1, e.g., bundled Centrex access interconnection and local loop elements, than would be the case for other services (e.g., single line residential or business) within Cell 1. The LLECs will be permitted to propose such plans within Cell 1 as part of their commitment toward unbundling services. **[*23]**

Further, we acknowledge the concerns raised by OCC and many residential and business consumers regarding flat-rate service. By definition, flat-rate service, being an essential monopoly service, would be categorized in Cell 1 as part of a LLEC's alternative regulation plan. We are expressly not predeciding issues concerning flat-rate service in this rulemaking docket nor would it be appropriate for us to do so without a sufficient record before us. The alternative regulation rules adopted in this order only provide a procedural framework in which a company may request alternative regulation. Any proposal made by a LLEC concerning flat-rate service would be subject to thorough investigation, legal hearings in which the OCC would participate, and local public hearings in the affected service area. This is simply not the case to decide this issue. n7

n7 The LLECs should consider the large amount of public testimony on this issue in formulating their plans. Moreover, we expect them to begin discussions with their customers concerning their intentions in this sensitive area.

Further, although, as noted above, we are not preordaining a particular categorization of services, **[*24]** we take special note of the arguments raised by Prodigy. We believe affordable ubiquitous Integrated Services Digital Network (ISDN) is a building block to the network of the future and expect the LLECs to offer and price the service so as to ensure widespread deployment.

2. Earnings

The proposed rules define "earnings" as "net income from all Ohio operations of the telephone company excluding only those operations which have been deregulated by the Commission or whose regulation has been pre-empted by a competent jurisdiction, binding upon the Commission," and provide that the measurement of earnings is governed by Section 4909.15, Revised Code. OTA submitted the entire definition should be deleted because earnings measurement should be

addressed within the context of an individual company's plan and not be confined to a limited definition. Further, OTA suggested that the definition calls into question the status of services that have not been deregulated by the Commission or the Federal Communications Commission, but that are not proper subjects for regulation, and, therefore, suggested that "earnings" be defined as "net operating income from all of the LLEC's regulated intrastate **[*25]** operations." Finally, the LLECs submitted that the definition should be deleted since earnings are tied to traditional rate base, rate-of-return regulation, which conflicts with the intent of H.B. 563.

The Ohio Cable Television Association (Cable Association) objected to the argument that earnings are tied to rate base, rate-of-return regulation, and not contemplated by the alternative regulation statute. It correctly explained that Section 4927.04 (A), Revised Code, addresses only the methodology of establishing rates pursuant to Section 4909.15, Revised Code, and does not eliminate the requirements under Sections 4909.18 and 4909.19, Revised Code, in an application to increase rates. Specifically, Section 4909.18(B), Revised Code, requires the rate application to include a complete operating statement showing receipts, revenues, and incomes. The OTA did not respond to the Cable Association's argument. Since the legislature did not grant us authority to exempt Section 4909.18, Revised Code, it is clear that income information must be provided. On the other hand, the legislature clearly envisioned the potential for a departure from Section 4909.15, Revised Code, for the **[*26]** purpose of setting rates as one option. Contrary to some of the arguments raised concerning this issue, the Commission finds that it may need earnings information in determining whether or not a proposed ratemaking methodology is in the public interest, in particular when an application addresses an increase in certain basic services. In a similar vein, such information is clearly relevant to a review of the reasonableness of the commitments presented. This is not to say that a company may not propose a different methodology. Therefore, we have added language in the definition which provides that other measures of earnings may be established in an alternative regulation plan. As with flat-rate service discussed above, we are not preordaining a particular methodology in these rules but rather setting forth the information the Commission will need to determine if the proposed methodology is in the public interest. In order for the Commission to test the reasonableness of that methodology, it needs to test it against a traditional methodology to see its effect on both the company and its ratepayers. We have added a provision which states that, should a non-earnings based, non-sharing **[*27]** plan be proposed, an applicant must show how ratepayers and the company will benefit from it when compared to rate base, rate-of-return methodology. n8 Further, we dismiss OTA's argument about the definition calling into question services which are not appropriately regulated by the Commission. A review of earnings will not include services deregulated in or since the company's last rate order. We are also allowing LLECs to propose additional measures of earnings.

n8 We note that in Illinois, Illinois Bell Telephone Company has provided the Illinois Commission, as justification for its price cap plan, a traditional rate case methodology in comparison.

3. Long Run Service Incremental Cost (LRSIC)

OTA submitted that this entire definition should be deleted since it creates a new concept for a cost test. OTA explained that the term "long-run incremental cost" is well known in the telecommunications industry and has been used by LLECs and the Commission as an element in the process of reviewing prices. According to OTA, the proposed definition unreasonably includes an "appropriate portion of group cost" as a component which eliminates and distorts the economic rationale of **[*28]** incremental costs. OTA submitted the addition of an arbitrary allocation of group costs will also inhibit pricing flexibility by including in the price floor costs that are not truly incremental for the service being priced, which will result in a higher cost floor and potentially higher prices than warranted.

The revised definition of "LRSIC" will address many of the concerns raised by OTA and others in the comments. It provides that LRSIC is equal to the per unit cost of increasing the volume of production from zero to a specified level, while holding all other product and service volumes constant, and includes an adjustment, as defined in Section XII(A)(7) of the revised rules. Where appropriate, the applicant shall also include in its LRSIC an appropriate proportion of the joint costs

necessary and used to provide a group or family of services. Joint costs are the cost of resources necessary and used to provide a group or family of services, e.g., CLASS services. However, the joint cost component does not include the common overhead costs of the firm as suggested by OTA. Further, LRSIC studies do not include any allocation of common overhead costs. Such costs are incurred **[*29]** for the benefit of a company as a whole and are not avoided if individual services or categories of services are discontinued. n9

n9 This does not mean that all common overhead costs are to be collected from Cell 1 services. The LRSIC merely sets the floor price. LLECs are encouraged through the rules to price a service above the floor to recover the allocated portion of the common overhead costs.

4. Non-basic

Staff's proposal provided that a non-basic service was a service for which there were competitive alternatives throughout the service territory of the company. OTA and several commentors argued that the proposed definition of "non-basic" is too rigid and goes well beyond the specifications set forth in Section 4927.03, Revised Code. The "total service area approach," according to OTA, cannot be justified based on the reality of how competition develops in specific areas over time. OTA submitted that "[c]ompetition evolves, it does not suddenly and uniformly spring up throughout a LLEC's service area." OTA further argued that, based on the proposed definition, a determination of whether a service is non-basic would be made without regard to the specific facts concerning **[*30]** a service, that is, "facts that may demonstrate the service to be highly competitive yet not in conformity with the strict definition." OTA argued that the proposal would prejudice a portion of a LLEC's plan (the treatment of non-basic services) without regard to the interrelationship with other pricing classifications or commitments. Finally, OTA suggested that each LLEC should present its evidence of competition and pricing proposals in relation to its overall plan. CBT added that such a measure of competition set forth in the proposed rules ignores the realities of today's telecommunications marketplace in that competition typically focuses on high-volume, low-cost customers in limited geographical areas such as a downtown business district. Therefore, according to CBT, competition must be measured "wire center by wire center."

We agree with OTA that the proposed definition of "non-basic" is contentious and unworkable, and goes beyond the specifications set forth in Section 4927.03, Revised Code. We agree with OTA and CBT that the requirement that competition be uniform throughout the service territory before Section 4927.03, Revised Code, (Cell 4) treatment will be afforded **[*31]** should be deleted. In its place, we will require the LLECs to file the specific information set forth in Section 4927.03(2)(a) through (d), Revised Code. That section clearly sets forth the factors which shall be considered by the Commission in determining whether 1) a LLEC is subject to competition with respect to a particular telecommunication service, or 2) the customers of the service have reasonably available alternatives. So, before the Commission can make the determination as to whether it is in the public interest to categorize a particular service as non-basic, a LLEC must file as part of its application appropriate information which will aid the Commission in determining whether the competitive requirements are met. Consistent with the statute, the revised rules provide that a LLEC must submit the information set forth in Section 4927.03(2) (a) through (d), Revised Code. It will be the burden of the LLEC to demonstrate that the information it provides meets the statutory criteria. Upon making the determination that a service is fully competitive, the Commission will then examine the interrelationship of the service with the overall company plan, as suggested by OTA. **[*32]**

Further, in assessing whether services are subject to competition and appropriately classified in Cell 4, the Commission may employ the Herfindahl-Hirschman Index, the 4-Firm Concentration Index, and other measures it deems appropriate to assess whether alternative providers are able to provide equivalent or substitute services to customers which are readily available at competitive rates, terms, and conditions.

5. Proprietary Basis

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OTA urged the Commission to reject this rule because the proposal would make the discovery process more burdensome. Other commentors found problems in the proposed rule because, when applied to the pricing rules, unreasonable presumptions that cost information is proprietary are created. Additionally, they argued the rule is not clear enough that the LLEC actually has the burden to demonstrate that the information should be deemed confidential. Some commentors recommended that the rules be modified to be consistent with Section 4905.07, Revised Code (open records law), but that reasonable protective agreements should be allowed. OTA further submitted that consideration should be given to the relationship of Ohio's trade secrets law, Section 1333.51, **[*33]** Revised Code, to the public records statutes.

Pursuant to Section 4901.16, Revised Code, any information acquired by the staff during the course of its investigation shall not be divulged except in its report to the Commission or when called upon to testify. If there would be a request for such information, we anticipate that the parties would enter into appropriate protective agreements rather than engage in a formal discovery dispute. However, if the matter was not resolved, the current Commission rules provide for a process in which a LLEC could request a protective order, at which point the LLEC would have the burden to demonstrate that the information was proprietary. Since the proposed rule creates an unnecessary procedural step, it will be eliminated along with all references to "proprietary basis" throughout the rules.

C. Filing Requirements

1. Waiver

Staff's proposal provided that the Commission may waive any of the rules upon motion for good cause shown, and that upon the grant of any waiver, the Commission may suspend the applicability of any or all time requirements, or replace them with alternative requirements. OCC and AT&T submitted that the language "for **[*34]** good cause shown" is overly broad, and that it is inappropriate to waive the provisions of Chapter 4927, Revised Code, or such substantive requirements as hearing and intervention. In addition, AT&T argued that prefiling waivers of filing requirements should not be permitted.

For alternative regulation to work, there must be rules so that we are not "reinventing the wheel" with each filing. On the other hand, there needs to be a process which would permit an applicant to seek a waiver of a rule which is not applicable to its particular filing. A broad waiver rule, with the opportunity for interested persons to file briefs in opposition, provides this balance. Although we disagree with AT&T that prefiling waivers of filing requirements should be prohibited, we do agree that some clarification as to what constitutes "good cause" for the waiving of certain filing requirements is warranted. Therefore, the revised waiver rule provides that such consideration as to the availability of the required information, the expense in providing the required information, and the sufficiency of any alternative information may be taken into account in determining whether good cause has been demonstrated. **[*35]** Additionally, even though waivers of filing requirements, pricing rules, and time frames may be permitted, no waivers of any due process protections, such as notice, intervention, and the requirement of a hearing, set forth in the Revised Code will be granted.

Further, the revised rules provide that the Commission, upon its own motion, may waive any time limitations as they may apply to the Commission itself. While we intend to expedite the alternative regulation processes intended in Chapter 4927, Revised Code, the Commission notes that its ability to adhere to the specific time limitations set forth in the rules will be based on the complexity of the plan. If a plan is consistent with the rules, then it is expected that the Commission will be able to meet the time limitations. Should the Commission have to become embroiled in waiver requests or discovery disputes, then the process will, by definition, be delayed. All parties must cooperate if alternative regulation is to work effectively. The Commission will consider imposing costs pursuant to Section 4903.24, Revised Code, on a party unreasonably delaying the process. n10

n10 The revised rules reflect the fact that the proposed rate increases are governed by the

requirements of Section 4909.42, Revised Code, which cannot be waived pursuant to Section 4927.04, Revised Code. **[*36]**

2. Notice of Intent

AT&T suggested that a notice of intent to file an application be served upon any person who has requested to be served from a particular LLEC. The interexchange carriers (IXCs) suggested that all IXCs as a matter of course should be served with a notice of intent to file. Some commentors also suggested that the time in which an applicant would file such notice be changed from up to 30 days to up to 90 days prior to the date of filing an application.

We agree with AT&T's suggestion that a LLEC should serve notice upon any person who has specifically requested to be served such notice and who is not otherwise represented in the proceeding. We do not believe that this would be overly burdensome for the LLECs. However, we do not find any reason to amend the time frame in which such notice would be filed. Further, while we see a need for a prefiling notice for an application filed pursuant to Section 4927.04(A), Revised Code, such notice is not required for an application filed pursuant to Section 4927.03, Revised Code.

3. Rate Case Exhibits

Staff's proposal includes two rules which speak to rate case information. The first, proposed rule II (A)(1), provided **[*37]** that Rule 4901-7-01, Ohio Administrative Code (O.A.C.), which sets forth standard filing requirements (SFRs) for applications filed under Section 4909.18, Revised Code, is not applicable to any application filed under the rules. The second, proposed rule II(B)(4), provided that the exhibits described in Section 4909.18(A) through (E), Revised Code, are required only for applications requesting an increase in core basic service rates.

OTA submitted that the rate case exhibits described in Section 4909.18(A) through (E), Revised Code, should not be required for applications to increase rates for core basic services because the requirement would limit the flexibility of the LLECs in the types of plans that can be filed. Further, OTA argued that such a rule would limit the Commission's flexibility in using alternate methods of establishing the rates and charges, as authorized by Section 4927.04(A), Revised Code, and that because each LLEC has the burden of providing the necessary information to demonstrate that its plan is in the public interest, the rule should be deleted. OCC argued that the SFRs and the exhibits should be filed for all rate increases to ensure a "public process". **[*38]**

We disagree with OTA that the SFRs would limit a LLEC's ability to propose an alternative method or ratemaking outside of Section 4909.15, Revised Code, or the Commission's ability to establish any alternative methodology. We find the SFRs, which include the exhibits identified in Section 4909.18 (A) through (E), Revised Code, and Rule 4901-7-01, O.A.C., are necessary in determining whether any alternative method of ratemaking for an increase in Cell 1 services is in the public interest. It is difficult to devise a rule which covers every type of proposal which may be made in an alternative regulation plan. Therefore, if a LLEC believes that there are particular schedules which are not relevant to an application, such as a proposal which may include a revenue neutral proposal or an increase for a single service, which may not require all of the SFRs, then it should address the concern in the waiver process. After reviewing the request for a waiver, the Commission may determine that less than the complete set of SFRs is needed.

4. Threshold Rate Increase

Staff's proposal provided that a threshold rate increase may be proposed as part of an alternative regulation plan, and is **[*39]** governed by Section 4909.42, Revised Code. Section 4909.42, Revised Code, specifically relates to applications for increases in rates and charges which have been filed pursuant to Sections 4909.18 and 4909.19, Revised Code.

CBT, although supporting the concept of a threshold rate adjustment, argued that reliance on Sections 4909.15 and 4909.18, Revised Code, for threshold rate adjustments is unwarranted. CBT submitted that traditional ratemaking proceedings have been extremely costly, have involved burdensome filing requirements, and have resulted in significant delays, and, therefore, proposed a

streamlined process for threshold adjustments. Specifically, CBT suggested using allowable costs determined in a LLEC's last rate proceeding and an agreed upon rate-of-return to calculate its authorized revenue requirement. This revenue requirement could then be used to develop a rate adjustment factor which would be applied across all local rates to arrive at the threshold rates.

OCC argued that the concept of a threshold rate increase is unbalanced and should refer to a rate "change" or a rate "increase or decrease." It argued that a non-LLEC or the Commission could initiate such **[*40]** a change under Section 4905.26, Revised Code, but that the LLEC should be allowed to initiate such a change only under Section 4909.18, Revised Code, wherein ratemaking would be based on Section 4909.15, Revised Code, and not Section 4927.04(A), Revised Code. OCC's basis for this is that the LLEC would have veto power under Section 4927.04(A), Revised Code, if it did not like the outcome after other parties have spent considerable time and effort in litigating the matter.

Section 4927.04(A), Revised Code, clearly states that, in considering an application pursuant to Sections 4909.18 and 4909.19, Revised Code, for an increase in basic rates, an alternative method of establishing rates and charges, one other than that specified in Section 4909.15, Revised Code, may be utilized. While we recognize CBT's concern that traditional rate base, rate-of-return proceedings have been costly to all parties involved and time consuming, we are not exempted from Section 4909.18, Revised Code, in considering increases in basic rates. Section 4927.04(A), Revised Code, only exempts from the rate proceeding the specific methodology set forth in Section 4909.15, Revised Code. Thus, any threshold **[*41]** rate increase included in an alternative regulation plan filed pursuant to Section 4927.09, Revised Code, will be considered an application to increase rates under Sections 4909.18 and 4909.19, Revised Code. As explained above, however, waiver of the complete set of SFRs, including the exhibits required to be filed under Section 4909.18, Revised Code, may be granted.

Further, we disagree with OCC's suggestion that, since a LLEC has veto power under the statute, a threshold rate increase should not be considered under Section 4927.04(A), Revised Code. We cannot ignore the intent of H.B. 563, which is to provide LLECs with an alternative to traditional rate base, rate-of-return. We concur, however, in OCC's concern that the LLECs have a consent provision under Section 4927.04(A), Revised Code, and that significant costs may be incurred in investigating an alternative regulation application which may be vetoed. To this end, we believe that, if a LLEC indiscriminately or repeatedly utilizes the veto, the Commission may in its discretion assess the costs of the investigation to the LLEC, pursuant to Section 4903.24, Revised Code. It is our intent that this discretion be exercised **[*42]** not in routine circumstances, but in cases where the LLEC's action constitutes an abuse of the regulatory process.

Finally, we disagree that the provision in the rules for a "threshold rate increase" is unbalanced. We agree, however, with OCC that a non-LLEC, or the Commission, would not be prohibited from initiating a complaint under Section 4905.26, Revised Code, if it believed that any rate or charge was unjust or unreasonable. Therefore, we find no reason to provide in the rules a specific mechanism for a non-LLEC or the Commission to initiate an action for a threshold rate change outside of a complaint proceeding.

D. Components of a Plan

1. Commitments

The comments relating to commitments centered around both the definition proposed in the rules and the relationship between commitments and an alternative regulation plan. CBT and OTA submitted that the requirement a commitment be "something that would not be provided in the absence of an approved alternative regulation plan" would be impossible to interpret and would lead to needless debate as to whether a commitment was already contemplated by a LLEC. They argued commitments should not be validated by comparing them **[*43]** to already planned activities because planned activities are inherently uncertain and constantly changing to reflect current market trends, technical innovations, and financial conditions. CBT specifically proposed that a LLEC should be able to provide a service under existing legal requirements in a more timely or cost-effective manner. CBT suggested that the definition be broadened in scope as follows: "a

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commitment is an obligation that a LLEC undertakes as part of an approved alternative regulation plan."

We agree with CBT and OTA that the proposed definition would lead to unnecessary debate as to what was or was not planned by a LLEC prior to the filing of an alternative regulation plan. There may be a need and desire to encourage efficiency, productivity, and value in existing services. In addition, a LLEC may have existing capital investments which may benefit from the commitment of additional revenues. However, we will require a LLEC to demonstrate that a commitment is in addition to what is required of a LLEC under the Minimum Telephone Service Standards. Accordingly, we shall amend the rules to reflect a broader definition of "commitment".

OTA had two additional **[*44]** arguments regarding the commitment rules. First, OTA argued that proposed rule II(D)(3)(d), which requires a LLEC to attach as an exhibit to its application detailed documentation regarding how the company has assessed customer opinions, should be deleted. OTA submitted that this requirement goes beyond the presentation of public input and attempts to specifically define the standard. Instead, OTA argued that the rules should simply reflect the general burden on the LLECs to justify the value of commitments from a public interest standpoint, which is accomplished by the language in proposed rule III(A)(1). Second, OTA submitted that proposed rule III(A)(2)(g) should be deleted. This rule required that certain incentives "implicit" in the alternative regulation plan be reflected in the level of commitments. OTA argued that the "structure" of alternative regulation, standing alone, provides no incentive or benefit, implicit or otherwise, and that if incentives are going to be effective and provide the benefit commensurate to the level of commitment, then they must be real and measurable.

United Telephone Company of Ohio (United) argued that network infrastructure commitments of **[*45]** any kind are not a proper criterion under H.B. 563. AT&T argued that the tying of flexible rate incentive regulation to demonstrated customer benefit has its basis in Section 4927.04, Revised Code, which lists customer benefit-conferring goals the telephone companies should strive to achieve in their plans. AT&T further argued, however, that the rules should go further, and must require a direct and demonstrable connection between the incentive plan for a service and the customer benefits that the plan will provide. Specifically, AT&T set forth three criteria which should be included in a company's commitments. They include: 1) How customers will benefit from service efficiencies or economies that are present in any LLEC alternative plan; 2) How prices and earnings risks and rewards are to be allocated between LLECs and their customers; and 3) How rate caps or ceilings should be developed to temper flexibility. The American Association of Retired Persons (AARP) and OCC proposed that a goal of reducing basic rates should be explicit as a commitment, while The Greater Cleveland Welfare Rights Organization, Western Reserve Alliance, and Consumers League of Ohio (GCWRO) proposed **[*46]** that a commitment must be tempered by the impact that such changes might have upon the goal of universal service, and that a LLEC should be required to establish a comprehensive lifeline service if it chooses alternative regulation.

Staff's proposed rule III(A)(1) states that "an application shall describe any sources of public input and how any such input was incorporated into the plan." (emphasis added) Several commentors noted that the word "any" is not appropriate and should be deleted since it infers that the LLECs have an option of seeking input. We encourage and expect consumers to be involved in the formulation of the commitments and to be the guiding light for the LLECs. The commitments are for consumers and the only way the LLECs will know what the consumers want is for the LLECs to obtain consumer input into the commitment process. Thus, we agree with the suggestion to eliminate the word "any" in order to clarify the intent of the rules that public input is essential and required to be demonstrated as part of an alternative regulation plan filing.

Further, we agree with AT&T and GCWRO, that the LLEC should provide information in its plan which describes the impact of **[*47]** commitments on the goal of universal service, how customers will benefit from the service efficiencies or economies included in an alternative regulation plan, how prices and earnings risks are to be allocated, and how rate caps or price ceilings should be developed to temper flexibility. Because the Commission feels so strongly about all of these concerns, we expect a LLEC to address each of these items in its application as it discusses how the proposed alternative regulation plan is in the public interest. As to the goal of reducing basic rates proposed by AARP and OCC, we would certainly condier granting additional flexibility to a LLEC if it

commits to maintaining or lowering, as much as possible, basic service rates. As to United's arguments, we feel that our adoption of the changes proposed by CBT and the OTA provide a more balanced approach to determining the public interest than the elimination of any infrastructure commitments as proposed by United.

2. Pricing

a. Mirrored Rates for Access Services

Staff's proposal permitted the Carrier Common Line Charge (CCLC) rate element of switched access to be higher than mirrored interstate access charges. AT&T objected to **[*48]** this approach for two reasons. First, AT&T argued that the rule erroneously assumes that switched access charge rate elements and the CCLC rate element are sufficiently different services to justify different pricing rules and different competitive classifications. AT&T stated that the CCLC does not represent a distinct service, but is instead a part of switched access charges. Second, AT&T argued that the CCLC should be no higher than mirrored interstate rates even if the current charges are higher than interstate rates and requested that the rule be amended to remove the LLECs' discretion to charge a higher CCLC.

AT&T further argued that access services have characteristics unlike other non-competitive LLEC services. According to AT&T, because they are higher contributing services and are growing in volume compared to other non-competitive services, capping the CCLC at the existing rate level is likely to generate additional revenues from the category of customers unsupported by additional related costs or market place efficiencies or superiority. Therefore, AT&T argued that commencing a plan with high existing rates which may continue throughout the plan would be contrary **[*49]** to cost causation goals set forth in Section 4927.04, Revised Code. Therefore, AT&T suggested proposed rule III(B)(5) be amended by including the phrase "or at interstate levels, whichever is lower", and by eliminating the mirroring aspect in the final sentence.

OCC argued that the proposed mirroring of interstate access rates and the proposed cap on the CCLC are substantive issues which should be addressed in ratemaking proceedings under Sections 4905.26, 4909.18, and 4909.19, Revised Code, instead of under the current rulemaking procedure. OCC submitted that these provisions are matters affecting rates which require a hearing. Sprint Communications Company L.P. (Sprint) submitted that the proposed rules should be revised, arguing that, in order to achieve a phase-down or general reduction of the carrier common line rate, revenues from CCLC (in addition to the rate itself) must be capped. Sprint submitted, as access minutes grow, the per line charge will decrease only if CCLC revenues are also capped.

We disagree with the arguments of AT&T, OCC, and Sprint, and find that staff's proposed rules on mirroring are appropriate. In addition, if a company does mirror its interstate **[*50]** access rates or concur in another company's tariff, then those services will be subject to the mirroring provisions set forth in its plan.

b. Imputation

Staff's proposal provided that the minimum price for service shall be the LRSIC plus an adjustment, under certain circumstances. OTA submitted that since the Commission has rejected imputation in past years, except in limited circumstances, and no reason exists to adopt such a broad-based doctrine in this proceeding, the rule should be rejected. OTA recommended, instead, that imputation be addressed within individual LLEC plans since it is a substantive issue.

LCI International (LCI) submitted that the proposed rule is vague as to what the adjustment would be and how it would be applied. It suggested that imputation requirements should be uniform for all LLECs, and that the Commission has the responsibility to ensure that costs are imputed properly instead of relying on the complaint process. Similarly, The Ohio Public Communication Association (OPCA) submitted that a specific imputation mechanism would alleviate the need for adversarial proceedings relating to imputation.

Under the revised rules, an adjustment for imputation **[*51]** would be made whenever a cost study

is required to be conducted, that is, when an initial change in price or a new service is proposed. The cost study will determine the minimum price, which is the LRSIC. The LRSIC shall include an adjustment whenever the service is offered such that an alternative provider must purchase a service of the applicant to provision its competitive product, and the applicant used the service so purchased by the alternative provider, but bundles such service in the price the applicant charges for its own service. In reviewing cost studies, the Commission will not be able to identify every problem with imputation. Therefore, the Commission will be dependent on competitors to bring to its attention problems with imputation through the complaint process. We recognize that the complaint process will be an integral part of the alternative regulation process, and it will be addressed in a separate section in this order.

c. Cell 1

i. Disposition of Earnings

Staff's proposal provided that, changes in rates or price structure and deaveraging is permitted for Cell 1 Services in an alternative regulation plan only if such plan addresses the ultimate disposition **[*52]** of earnings in excess of the company's cost of capital. United argued that the rule inappropriately combines alternative regulation and rate base, rate-of-return regulation, and that sharing of "excess" earnings should be incorporated into an alternative plan at the LLEC's discretion. More specifically, OTA argued that a mandatory requirement that the disposition of excess earnings or sharing be a part of a LLEC plan is in violation of Title 49, which does not contemplate a retroactive refund or mandatory sharing of earnings after rates have been established by the Commission. In addition, OTA argued that the exposure for retroactive refunds would make planning commitments and related capital programs with any degree of certainty virtually impossible.

MCI proposed that alternative regulatory plans should include a threshold for earnings reflecting current economic conditions, so that earnings above that level can be considered "over-earnings." MCI argued that, with this determination made, the IXCs can appropriately receive a refund of their "rightful share." City of Columbus (Columbus) proposed that a forum or hearing be required to review earnings.

The revised rules provide **[*53]** that a LLEC must address the ultimate disposition of earnings if the LLEC proposes an increase in rates or price structure, or rate changes resulting from exogenous factors, for Cell 1 services during the course of its plan. This provision is intended to provide significant flexibility to the LLECs as to how the earnings issue is addressed in the alternative regulation plan. We do not find any reason, however, to have a mandatory proceeding to review the level of earnings. Instead, during the course of a plan, the staff will request whatever financial information it deems appropriate to monitor the LLEC compliance with the plan. The Ohio Revised Code provides broad powers to the staff to request any information it deems relevant to carry out its regulatory responsibilities. Such information will receive the protections of Section 4901.16, Revised Code, as always. The Commission has added a provision to the rules which indicates that nothing in the rules limits the ability of the staff or the Commission to obtain needed information (including earnings information) during the course of the plan. This condition shall be deemed an implied term of every submitted plan. The staff's **[*54]** ability to obtain such information is a critical component of alternative regulation and is not negotiable. While the staff would be monitoring the plan, there is no intention that the Commission would alter the plan except as set forth in the rules. The term of the plans is short enough so that there is no need to disturb the agreed-upon rates or the plan during its life.

Further, we find no reason to devise a mandatory sharing mechanism in the rules. This is a matter for review in individual company plans. Certainly, there are different ways to disperse earnings outside of providing refunds, including reinvestment in the network. As the revised rules indicate, a company's commitments will be evaluated in light of its earnings. Moreover, we expect LLECs to include as part of their alternative regulation plans conditional commitments which will be based on an anticipated level of earnings.

ii. Cost Data

Staff's proposal provided that a cost test shall be used whenever a price change is proposed for a core basic service, and that the cost analysis associated with price changes subsequent to the implementation of a plan shall be submitted on a proprietary basis. Most non-LLECs **[*55]** urged the Commission to require cost information in support of core basic rates to be filed in the public record. AT&T recommended that cost data be available to parties under protective agreements or protective orders so that the information could be reviewed without jeopardizing the confidentiality and value of the data.

AT&T submitted that the cost test for price increases, which determines whether the price is at or below its fully allocated cost, should be required for threshold rate increases rather than requiring the test only for price increases for Cell 1 services proposed during the course of the plan. AT&T further submitted that this price restriction, fully allocated costs, should be placed on all basic service categories, including all access service categories.

AT&T's specific arguments relating to cost tests should be addressed in the context of individual alternative regulation plans. In place of "fully allocated costs", the revised rules provide that, in determining and setting rates for Cell 1 services, the Commission wills exercise strict regulatory oversight and review whatever cost information it deems necessary to establish such rates in accordance with **[*56]** Section 4909.151, Revised Code. Further, the Commission expects that the price of Cell 1 services reflect contribution from services classified in other pricing cells.

iii. Deaveraging

Staff's proposal provided for deaveraging as a method of changing or restructuring rates for core basic services subsequent to the implementation of a plan. CBT suggested that deaveraging be permitted for all service categories. According to CBT, the ability to deaverage rate structures is becoming more and more critical as competition in the current marketplace continues to drive prices closer to true economic costs. CBT explained that as LLECs lose high-volume, low-cost customers to competition, their ability to subsidize high-cost customers diminishes, and, therefore, with fewer customers paying for the network, the cost for remaining customers most likely will increase.

OCC submitted that deaveraging is inappropriate for monopoly services, explaining that uniform rates promote universal service and eliminate discrimination between customers. MCI recommended that the Commission limit a LLEC's ability to deaverage its prices to geographic- or cost-based considerations. MCI argued that quantity-based **[*57]** deaveraging generally cannot be justified because it is rarely a specific customer's level of usage that produces economies of scale that would justify a quantity discount. Rather, it is the total usage of all customers that causes the cost saving. Such savings, according to MCI, should be shared among all customers, not allocated to a specific customer or customer class on a preferential basis.

The Commission strongly encourages the unbundling of services. As an incentive, the revised rules reflect that a LLEC may request geographic, market-based deaveraging by customer type for Cell 2 services. Specifically, if a Cell 1 or Cell 3 service has components which meet the Cell 2 limited competitive criteria set forth in the rules, in the relevant market, that portion of the service subject to competition may be unbundled from the monopoly portion of the service and reassigned to Cell 2 for deaveraging. Factors which may be considered for the establishment of deaveraged rates are cost of service, existence of alternative providers, and market demand. While the revised rules do not specifically address deaveraging for the monopoly portions of services remaining in Cell 1 and Cell **[*58]** 3, the Commission would consider a proposal through the waiver process, provided that the applicant could demonstrate a) that the proposal is cost-based and b) that such a proposal is in the public interest by addressing the effect that deaveraging of monopoly services would have on the goal of universal service.

iv. Exogenous Factors

Staff's proposal provided that an applicant may request a change or restructuring of prices for core basic services based on corresponding exogenous cost factors, which are cost changes related to external causes beyond the control of the company. MCI suggested the definition of "exogenous" be expanded to indicate that all fluctuations of these factors must be reflected in service prices. MCI

submitted that not only should increases in the rate of inflation, for example, be passed on to ratepayers in the form of rate increases, but corresponding decreases must be assimilated as well. Specifically, MCI proposed that a LLEC specify in its plan an interval of time at which exogenous factors would be reflected in its rates. At that time, the Commission would require the LLEC to reflect any downward adjustments in its rates that the level of the exogenous **[*59]** factors suggests. For increases, however, MCI proposed that they may be deferred until a later time at the discretion of the LLEC because there could be competitive reasons not to increase rates at a particular time. MCI further submitted that such increases should not be cumulative, but should reflect the level of the pre-selected exogenous factors at the time the LLEC chooses to pass the impact through to ratepayers. AT&T submitted that the rule should specify what would be included or excluded as an exogenous cost factor. In addition, it argued that the rule should be applied consistently to each LLEC, explaining that if state income tax is exogenous for customers of a LLEC serving one part of Ohio, it should be exogenous in all parts of Ohio.

In order for a LLEC to make rate changes during the course of its plan which reflect exogenous factors, it must address the matter in its alternative regulation plan and propose the procedures which will be used in evaluating such a request. A LLEC proposal must be symmetrical, i.e., provide for rate increases or decreases based on exogenous factors.

d. Cell 2 and Cell 3 (Non-core Basic)

OTA urged that the proposed pricing structure **[*60]** for non-core basic services be rejected. OTA submitted that the proposed pricing structure undermines the policy goal of H.B. 563, which is to provide an incentive for the introduction of new services. The basic premise of the proposed structure, according to OTA, is that the more successful the LLECs' efforts, the greater penetration they achieve, which results in less pricing flexibility. Thus, such a pricing structure actually creates a disincentive to the introduction and promotion of new services. OTA went on to recommend that the Commission adopt a simple "min-max" formula since it is easy to administer, contains no vague or undefined terms, is readily understandable by the public, and has worked well over the years.

CBT likewise urged the Commission to reject the proposed pricing rules for this category. Specifically, CBT stated that it is imperative that discretionary new services achieve high levels of subscribership since core basic services will be supported by the revenues of the new services. Thus, according to CBT, if the pricing scheme applicable to new services limits prices to the LLEC's fully allocated costs once a certain level of market penetration is achieved, **[*61]** then the LLEC would lose needed contribution and may forego the risk associated with introducing new services that depend upon significant customer demand.

AT&T submitted that the rules should include an enforcement mechanism that permits intervenors to the proceeding, and other interested parties, to claim, through complaint or otherwise, that the cost components or levels of non-core basic services have changed during the plan and that minimum prices should be increased, or maximum decreased. Under OCC's proposal, monopoly services, whether or not discretionary, would not be eligible for pricing flexibility. Services that would be categorized as emerging competitive, however, would be eligible for pricing flexibility with a proposed minimum-maximum pricing structure under OCC's proposal.

We agree that staff's proposed pricing structures for "non-core basic" services are unworkable and provides no incentive for the LLECs. The revised rules provide that Cell 2 services are basic services, but must face a limited degree of competition. A company proposing to categorize a service in Cell 2 shall provide similar information that is required for non-basic, Cell 4 services in order **[*62]** for the Commission to determine whether alternative providers are available to provide to customers comparable services which are reasonably available. In addition, for each service proposed to be classified in Cell 2, the applicant shall propose a price range which establishes a minimum price, which is above LRSIC, and a maximum price determined within the context of the applicant's earnings and proposed commitments. The applicant may flex its pricing for the Cell 2 services within the range. Cell 3 services are also basic services, but which cannot appropriately be classified in Cell 1 or Cell 2. Cell 3 also includes any new basic local exchange service introduced during the term of the alternative regulation plan, unless classification in Cell 2 or Cell 4 is specifically sought. For Cell 3 services, the applicant shall propose only a minimum price. A company may flex its pricing above

the minimum price. A company may continue to charge a current rate for an existing service which falls into Cell 2 or Cell 3 even though the price may be below LRSIC. However, when the company first proposes that the rate be lowered during the course of its plan, the company shall submit cost **[*63]** data to the staff which demonstrates that the new proposed rate is above the LRSIC.

We disagree with AT&T that the rules should provide for a specific enforcement mechanism. Nothing in the rules precludes any party from initiating a complaint under Section 4905.26, Revised Code. The revised rules provide that a LRSIC study will be required for a change in the current rate in Cell 2 and Cell 3, or for new services proposed to be classified in Cell 2 or Cell 3. In addition, any requests to lower the floor or increase the ceiling will be considered an amendment to an alternative regulation plan, and will be subject to whatever procedures the Commission deems appropriate consistent with the rules, which may include a hearing.

Up-to-date price lists are required to be maintained at all times for Cell 2 and Cell 3 services. A company that changes a price within a pre-approved range shall file its new price list on or before the effective date of such change. Further, the revised rules provide that, for both Cell 2 and Cell 3, the applicant shall file an application, including a proposed customer notice, when it intends to withdraw a service. The Commission shall review the application **[*64]** and customer notice within 30 days after the application is filed and unless an entry suspending the application is issued, the service will be withdrawn automatically on the 31st day.

e. New Services

Staff's proposal provided that all new services will be classified as non-core basic, unless upon investigation, complaint, or application, the Commission finds that the service should be classified differently. AT&T had no objection to all new services being categorized as "non-core basic" as long as the category is considered a basic category under Section 4927.04, Revised Code, and that the new services be treated pursuant to that section. OTA submitted that the proposal lacks a procedure for the introduction of new services, arguing that the rules should specifically require an informational submission to the staff and timely review of a LLEC's determination of the pricing treatment for the new service. CBT objected to the proposed rule, arguing that the rule goes beyond Sections 4905.26 and 4909.18, Revised Code, which require a hearing and a finding by the Commission that a filing is unjust or unreasonable before negative action may be taken towards it. CBT recommended the **[*65]** adoption of the rule for classification of new services proposed by OTA, which provides that "all new services would be classified as non-core basic unless, upon complaint and after a hearing, the Commission found that the classification of the service was unjust, unreasonable, or in violation of law."

Under the revised rules, unless the applicant seeks classification in Cell 2 or Cell 4 and the service meets the competitive requirements, all new services proposed during the term of an alternative regulation plan shall be categorized as Cell 3 services. We agree with CBT's argument that these services, which may be tariffed pursuant to the Commission's authority under Section 4909.18, Revised Code, would remain in Cell 3, unless upon complaint, or upon its own motion, and after hearing, the Commission finds that the filing is unjust or unreasonable. Therefore, the rule will be revised accordingly. Applications for new services are to be served upon all parties to the proceeding in which the alternative regulation plan was approved or anyone who requests notice of new service applications, and who is not otherwise represented. The applications for new services shall be reviewed **[*66]** by the Commission within 30 days after the application is filed, and unless an entry suspending the tariff is issued, the proposed service will go into effect automatically on the 31st day.

Further, the revised rules provide that, for all new services, a company shall provide a proposed customer notice to be approved by the Commission, or shall explain why such notice is not necessary. Finally, the application shall also discuss the company's plans to educate customers concerning existing alternatives to the service (e.g., the Annoyance Call Bureau as a substitute for Call Trace) or other information deemed by the Commission necessary for public education (e.g., blocking service for Caller ID).

f. Cell 4 (Non-Basic)

AT&T suggested that staff's proposal be clarified to indicate that the informational price sheets and the notices of withdrawal be deemed public documents. Sprint objected to the entire premise that non-basic services would be detariffed, again arguing that such a measure is unreasonably preferential to the LLECs, since the IXCs are not afforded such treatment. In addition, Sprint argued that as to non-basic services, the LLECs should be required to demonstrate **[*67]** that proposed prices are in compliance with an imputation requirement.

First, we acknowledge Sprint's argument that the detariffing of fully competitive LLEC services creates a disparity between the LLECs and their competitors. The Commission notes that it is reviewing this issue in Case No. 89-563-TP-COI, In the Matter of the Commission's Promulgation of Alternative Regulation Requirements for Competitive Providers (89-563), in an expeditious manner. Next, as to imputation, the revised rules require that non-basic services shall be priced above their LRSIC, which by definition includes imputation. We agree with Sprint that the LLECs should demonstrate that the prices are in compliance with this requirement. Accordingly, the rules have been revised so as to require the LLECs to provide a LRSIC study upon the request of the staff. Staff will be able to monitor the pricing of the Cell 4 services by conducting a periodic compliance review. Finally, the LLECs will not be required to file informational price sheets, but will be required to file a notice of withdrawal of a Cell 4 service.

g. Tariff Review

Staff's proposal provided that tariffs for price changes after an alternative **[*68]** regulation plan is implemented will automatically go into effect on the 31st day after the application is filed, unless an entry suspending the tariff is issued within that time period. Sprint argued that the proposed rule is unreasonable and should be rejected since the IXCs are subjected to a more lengthy time frame (45 days) for similar filings of their competitive services. Many other non-LLECs argued that 30 days is not sufficient time for the Commission to review such filings. OPCA requested that the rules should provide for a mechanism which would allow interested parties to trigger the suspension of a tariff.

We find that 30 days is a reasonable time period in which to review tariff filings. In allowing tariffs to go in effect, the Commission would not be making a determination that there is nothing wrong with the tariff; rather, the Commission would be making a determination that the tariff does not appear to be unjust or unreasonable based on the information submitted in the application. Certainly, for those changes that will be more complicated, the Commission can suspend the tariff filing. The revised rules provide a mechanism in which an interested person may request **[*69]** the suspension of a tariff filing which is similar to the current practice before the Commission. Specifically, an interested person may file an objection, which sets forth the basis on which the Commission should reject the filing, to a tariff application or an application for a contractual arrangement up to 14 days after the filing of the application. The LLEC would then have seven days in which to respond to the objection. This opportunity to object does not mean that interested persons should automatically file motions to intervene in the tariff proceeding. Motions to intervene should not be filed until such time as the Commission would decide, based on the information filed in the objection, that the rate may be unjust or unreasonable and schedules a hearing.

Furthermore, the revised rules provide that the automatic approval of a tariff filing may be fully or partially suspended by an attorney examiner for further Commission review. Under full suspension, the service introduction or change in conditions or terms of service may not occur until the Commission takes further action. Under partial suspension, the automatic approval may be suspended, but the service may be permitted **[*70]** to be introduced or offered under the proposed terms and conditions of service. However, such terms and conditions of service may be modified by the Commission subsequent to its further review. Again, we recognize the IXCs' concern about the inequity in the tariff review process. However, that concern is being addressed within the Commission's investigation in 89-563.

As discussed above, a LLEC may request to classify a new service in Cell 4, or move an existing service into Cell 4. Since the application would be a formal filing with the Commission, interested persons would in effect have notice and an opportunity to file objections before the application was approved under a 30-day review process. Notice of the filing of such an application is to be served on each party to the proceeding in which the alternative regulation plan was approved and anyone

else not otherwise represented who requests such notice. We find that this process meets the statutory due process requirements set forth in Section 4927.03, Revised Code. The Commission notes that this expedited process (30-day review) is only available to LLECs who have an approved alternative regulation plan which includes **[*71]** existing Cell 4 services. A LLEC who does not have such an approved plan, or a LLEC who has no alternative regulation plan, would have to file under the alternative regulation rules for an application under Section 4927.03, Revised Code, if it desired to have any service classified as Cell 4, or otherwise detariffed. In essence, this is an incentive for a LLEC to file an alternative regulation plan which includes all of its existing services.

h. Capital Recovery

Staff's proposal provided that an applicant as part of its plan may propose capital recovery levels that reflect the current calculated economic lives of telecommunications equipment. OCC submitted that this language, in essence, proposes one particular depreciation methodology, remaining life, over other methodologies. OCC argued that it is inappropriate to single out this one depreciation methodology since it would provide the most depreciation expense in rates for LLECs. MCI expressed concern that if LLECs are given undue flexibility regarding capital recovery decisions, basic service rates could unjustifiably increase. MCI cited two possible situations which may cause problems: 1) When plant that is adequate for **[*72]** delivery of basic telecommunications service is prematurely retired, to the detriment of monopoly rate-payers; and 2) When investment in plant is made, which is not necessary for regulated services.

In an attempt to quell the concern that the rules only allow a LLEC to propose a remaining life methodology, we have added the language, "proposals to be considered by the Commission include", to the capital recovery rule. A LLEC certainly is not precluded from proposing a different depreciation methodology just because the remaining life methodology is mentioned within the rule. We are not intending by the rule to signal a preference for one methodology over another.

i. Cross-Subsidization

The Ohio Newspaper Association (ONA) and others raise concerns about the potential for cross-subsidization of a LLEC's competitive services by monopoly revenues. ONA further argues that we should require separate subsidiaries for certain competitive LLEC services.

The Commission, along with the FCC and other state commissions, is vitally concerned about potential cross-subsidization as LLECs move into more competitive arenas. Although we will not address the merits of ONA's proposal in this **[*73]** rulemaking, we have added a provision requiring the LLECs to address this issue in their alternative regulation plans and in their Section 4927.03, Revised Code, filings. The LLECs should consider and address the pros and cons of creating separate subsidies or other means to eliminate possible subsidies.

3. Contractual Arrangements

Staff's proposal provided that a LLEC may enter into individual contracts with its customers for non-core basic and non-basic services. AT&T submitted that the rule would have to be modified if the Commission approves a definition for "non-core basic" that would include services that lack sufficient competitive aspects to satisfy Section 4927.03, Revised Code, in order to prohibit cross-subsidization in contracts that include both competitive and non-competitive services.

Sprint argued that a LLEC should be prohibited from entering into private contractual arrangements for basic services. It explained that since Section 4927.03, Revised Code, does not provide for exemption of Chapters 4905 and 4909, Revised Code, for basic services, then those chapters still apply to the LLECs. Specifically, Sprint noted that Sections 4905.26 and 4905.35, Revised **[*74]** Code, provide that complaints may be brought against a public utility for unjust discrimination or preferential rates, charges or services, and that a public utility is prohibited from giving undue or unreasonable preference or advantage to any person, respectively. Hence, Sprint argued that because there are no exemptions from these provisions available for basic service, private contractual arrangements for basic service which result in preference or advantage to a particular person must be prohibited. Sprint also submitted that the public should be advised when a contract

has been filed, and that the language "sufficient cost justification" be replaced with an imputation requirement.

The Federal Executive Agencies (FEA) submitted that contracts should be permitted for core basic services to cover usage charges on Centrex or PBX systems. In addition, they suggested that instead of a 30-day approval, contracts should be implemented immediately, and that the Commission's review should extend only to a determination that all services recover at least the LRSIC. If the Commission would determine that the services are provided at below LRSIC, then the Commission should direct the **[*75]** LLEC to absorb any losses from the non-compensatory contracts. FEA argued that without automatic implementation, the LLECs could be at a competitive disadvantage.

The Carriers argued that contracts should be allowed for cellular and radio common carrier interconnection services, which are core-basic services, since virtually all interconnection services and facilities are provided pursuant to contract. In addition, the Carriers requested that the Commission clarify that the LLECs cannot unilaterally impose interconnection rates by filing tariffs for interconnection services.

We find no basis to prohibit a LLEC from entering into a contract for a Cell 1 or Cell 2 service, where it faces a current competitive challenge for the provision of such services and is able to demonstrate, or has demonstrated, the legitimacy of the specific competitive challenge to the Commission, or faces other unique circumstances. The LLEC, however, will have to submit sufficient cost justification for the individualized rates set forth in a contract for Cell 1 and Cell 2 services including that the contract price is above LRISC with imputation. The Commission shall review the proposed contract and **[*76]** supporting cost justification within 30 days after the application is filed, and unless an entry is issued suspending the application within that time period, the proposed contract will be approved automatically and be effective on the 31st day. As discussed, infra, there would be an opportunity to object to the filing within 14 days of the filing of the contract. In extraordinary situations, upon notice to the Commission, a LLEC may implement a contract immediately with a particular customer for a Cell 2 service or for Cell 2 services combined with other services if it faces an imminent competitive threat. If this privilege is abused, the Commission may, in a subsequent order, limit the applicant's use of such authority if it deems that the applicant has utilized this procedure contrary to the intent of the rule. n11

n11 The LLECs can work with the Commission staff and exercise considerable self-help in this area. Specifically, LLECs can submit and obtain pre-approval of cost catalogues and then have the ability to implement contracts immediately upon filing.

Further, the proposed rules provide that, in cases where a contractual arrangement contains both Cell 1 services **[*77]** and Cell 2 or Cell 4 services, cost justification shall be provided to ensure that Cell 2 and Cell 4 service elements are each priced above their respective LRSIC, including an adjustment as defined in the rules. In addition, the proposed rules provide that a company may seek pre-approval of contractual arrangements for Cell 2 services, provided the company seeks approval of the terms and the criteria for the rate schedules applicable to the services covered by the arrangements. Once the terms and criteria for rate schedules are approved by the Commission, contractual arrangements falling within those approved parameters will be allowed to take effect immediately upon their filing with the Commission. Finally, as discussed infra, any references to "proprietary basis" have been deleted from the rules, including the rules for contractual arrangements. Thus, a contract for services will not automatically be deemed proprietary.

4. Privacy

The LLECs argued that staff's proposed privacy rule should be deleted since the Commission could adequately address the relevant issues for a particular service during the review process of a plan or in a complaint proceeding. OCC, on the **[*78]** other hand, urged the Commission to adopt penalties for failure of the LLEC to invoke the suspension when, after implementation of the service, privacy concerns arose. OCC suggested that the statement indicating that no privacy concerns exist

in regards to a particular service should be verified, under oath, by a designated officer.

We find that this proposed rule is unnecessary. The 30-day review period for new tariff filings will give staff and intervenors an opportunity to identify the possibility that a new service invokes privacy concerns. Aside from that provision, we would expect that the LLECs would request on their own that the 30-day time frame be suspended when they know or suspect that a particular service would cause such concern. In addition, the complaint process is available to address these concerns after a tariff has been issued, and we encourage interested parties to use this process. Accordingly, the rule will be deleted.

E. Hearings

Staff's proposal provided provide that, upon a motion for good cause shown, the Commission may order that a hearing be held on an application. The motion was to be filed within five days after the filing of the staff report. **[*79]** Most of the non-LLECs argued that since a hearing is required under Section 4909.19, Revised Code, an application filed pursuant to Section 4927.04, Revised Code, would also be subject to a hearing requirement. Specifically, LCI submitted that the Ohio Supreme Court held that Section 4905.26, Revised Code, mandates that an evidentiary hearing be held when price changes are being proposed for basic services, citing Ohio Bell Telephone Company v. Pub. Util. Comm., 64 Ohio St. 3d 145 (1992). In addition, LCI suggested that additional time be allowed for filing a motion for a hearing after the staff report has been issued.

OTA argued that just because a plan submitted under Section 4927.04, Revised Code, would be filed pursuant to Sections 4909.18 and 4909.19, Revised Code, does not necessarily mean that all of Section 4909.19, Revised Code, would be controlling. Further, OTA refuted LCI's reliance on the Ohio Bell case, arguing the court had "narrowly" held that before the Commission may unilaterally reduce a rate through its policy making authority, it must hold an evidentiary hearing under Section 4905.26, Revised Code. OTA submitted that the court's holding does not **[*80]** extend to every rate action, or alter the "in its discretion" language in Chapter 4927, Revised Code.

It is clear that, under a plan filed pursuant to Sections 4909.18 and 4909.19, Revised Code, only the method in which rates are established under Section 4909.15, Revised Code is waived. That part of Section 4909.19, Revised Code, which provides that an evidentiary hearing shall be held for an increase in rates, is not waived. The statute is clear that a hearing is discretionary only for an application filed under Section 4927.03, Revised Code. In the revised rules, we have clarified that hearings are mandatory for alternative regulation plans filed under Section 4927.04(A), Revised Code, and that they shall be conducted within 45 days after the filing of the staff report. In addition, local hearings shall also be held in accordance with the criteria set forth in Section 4903.083, Revised Code. The revised rules provide that a request for a hearing on an application filed under Section 4927.03, Revised Code, shall be filed within 20 days of the Commission's entry accepting the application for filing.

OTA requested that a time limitation be set for the completion of a hearing. **[*81]** In addition, United specifically proposed that a hearing on an alternative regulation plan be completed within 40 days after scheduling the hearing. We find OTA and United's proposals on this point to be administratively unworkable and potentially violative of due process guarantees contained in Section 4927.04, Revised Code. Moreover, if implemented it could prove extremely shortsighted since it may be a LLEC which would request additional time to submit rebuttal testimony. That being said, we expect full cooperation from all parties so that the hearing process may proceed as expeditiously as possible and reserve the right to prevent repetitive examination or cumulative evidence and to impose costs pursuant to our existing authority.

F. Participation By Parties And Staff

1. Intervention

Staff's proposal provided that intervention must be requested within 14 days following the Commission's order accepting the application for filing, and that if an intervenor fails to file an objection to the application or staff report, its status as an intervenor is lost. Most non-LLEC

commentors objected to both aspects of the proposed rule and proposed that the time in which intervention **[*82]** may be requested be extended to 30 days. OTA, on the other hand, argued that the Commission should restrict participation of intervenors to those who have filed objections, pointing out that "the statute presupposes that objections will be filed in calling for consideration of the legal position advanced by the prospective intervenor."

Columbus argued that the newspaper publication ordered by the Commission in the entry accepting the application for filing may be the only notice that some intervenors receive and, consequently, 14 days for filing a motion to intervene is inadequate. Columbus further argued that, since intervention must be sought prior to the filing of a staff report, many intervenors would be compelled to "undertake blanket preventative interventions". Further, Columbus argued that, if an intervenor loses intervention status by not objecting, then the intervenor would be forced to file artificial objections or objections in the nature of positive support, but coached in objection-type language, should an intervenor agree with the staff and/or company positions. AT&T suggested that an enforcement mechanism be created in the rules to allow intervening parties to **[*83]** commence actions to enforce the plan restrictions during the course of a LLEC's plan.

For the reasons stated by Columbus, we agree that the provision which requires objections to be filed in order to intervene should be deleted. In addition, we agree that additional time to request intervention should be allowed. A motion in an application under Section 4927.04(A), Revised Code, shall be filed within 30 days after the filing of the staff report. Further, since a hearing is discretionary in proceedings pursuant to Section 4927.03, Revised Code, motions to intervene in those proceedings should not be made until the Commission determines that a hearing is necessary.

2. Objections

OCC suggested that the requirement in staff's proposal that objections be under oath be deleted since objections are not evidence and are usually based on information received from the company. AT&T submitted that the rule should require only that the objecting party explain why the application fails to meet the requirements of the statute or these rules, or is otherwise not in the public interest. Specifically, AT&T argued that the rule inappropriately places a burden on the customers and competitors **[*84]** by requiring demonstration that the proposal is "unjust and unreasonable." AT&T suggested that it is the applicant's burden to demonstrate affirmatively that the proposal is consistent with either Section 4927.03 or 4927.04, Revised Code, and is in the public interest.

MCI submitted that not only is the 30-day time frame too short, but the requirement that objections be filed is burdensome and meaningless. MCI argued that specific objections are unnecessary and meaningless since all rates are at issue in a rate application relying on AT&T Communication, Inc. v. PUCO, 51 Ohio St. 3d 150 (1990). METAS-Ohio suggested that the requirement of filing objections be deleted since issues can be narrowed in prehearing conferences.

We disagree that objections to the staff report are meaningless, and that the rule places the burden on intervenors instead of the applicant. The purpose of having objections is to frame the contested issues that will be addressed in the hearing so as to expedite the hearing process. Objections will be particularly meaningful in the alternative regulation proceedings since there will presumably be numerous intervenors. Further, we agree with OCC that the **[*85]** requirement objections be under oath should be deleted. We interpret staff's intent behind the original rule to be to discourage frivolous objections. We agree with staff's intent but feel that existing Commission procedures adequately handle such matters. The requirement of an affirmation would add little substantive value but instead might cause a flurry of Ohio Rules of Civil Procedure, Rule 11-type motions which will only work to delay the process. Objections to the staff report shall be filed within 30 days. A LLEC shall have 10 days to file a response to the objections.

According to Section 4927.03, Revised Code, the public is entitled to submit comments on an application filed pursuant to that statute. Thus, the revised rules provide that comments may be submitted concerning an application filed pursuant to Section 4927.03, Revised Code, within 20 days after the filing of the Commission's entry accepting the application for filing. Such comments should sufficiently explain how the applicant has failed to demonstrate in its application that the service(s)

meet the competitive requirements of Section 4927.03, Revised Code, and sufficiently explain how the application **[*86]** is not in the public interest. A LLEC shall have 10 days to file a reply to the comments.

3. Discovery

CBT submitted that the discovery rule should require that intervenors demonstrate that the information sought is clearly relevant to the specific proposal being considered, and that limitation on the scope of discovery should be strictly enforced. United and MCI submitted that staff should be subject to discovery. Specifically, MCI stated that staff's expertise is a resource that could be of "inestimable value" in alternative regulation cases, and, therefore, staff should not be handicapped from full participation as a party.

We find no reason to limit discovery as suggested by CBT since the term "clearly relevant" is undefined and since the general assembly has already instructed us to use the Ohio Rules of Civil Procedure as a guide concerning discovery. We also disagree with the suggestion that staff be subjected to discovery. Such a measure would impose an enormous burden on the staff and delay the very process which United wants to expedite. Further, the staff's report will provide the necessary and valuable input needed in these cases.

4. Stipulations

Staff's proposal **[*87]** provided that, unless the Commission acts otherwise, a stipulated plan would be effective on the 16th day after the stipulation was filed. Coin Phones, Inc. and GCWRO suggested that 15 days is inadequate for the Commission to make its review of a stipulation. They specifically recommended that at least 30 days be allotted for Commission review. OCC submitted that all automatic approvals set forth in the proposed rules are unlawful. In support of its argument, OCC cited: 1) Section 121.22, Revised Code, which requires a public revelation of Commission considerations for decision making; 2) Section 4903.09, Revised Code, which requires the Commission to file "findings of fact and written opinions setting forth the reasons prompting the decisions. . ."; and 3) Section 4909.19, Revised Code, which requires consideration of a recommended opinion and order in an "open, formal, public proceeding in which overview and explanation is presented orally. Thereafter, the Commission shall make such order respecting the prayer of such application as seems just and reasonable to it."

We agree with GCWRO and Coin Phones, Inc. that 15 days would not be enough time for the Commission to determine **[*88]** the reasonableness of the stipulation. Accordingly, the revised rule will reflect that the stipulation would not be effective until the 31st day after the filing of the stipulation, unless the Commission acts otherwise.

It is not clear why OCC is objecting to the automatic approval process in cases where all the parties and staff would enter into a stipulation. Contrary to OCC's arguments, completely stipulated cases would no longer be contested and the requirements of Section 4909.19, Revised Code, would no longer apply. OCC's argument, however, would have merit if it was directed to the filing of partial stipulations. Partially stipulated cases would still be considered contested and subject to Section 4909.19, Revised Code, which would require a hearing for an application filed under Section 4927.04(A), Revised Code, and which would require the Commission to issue an order with findings of facts and conclusions of law.

G. Commission Order

1. Commission Consideration

OCC recommended that the list of factors to be considered by the Commission in its order should not be all-inclusive, and that an additional factor should be added which would allow the Commission to consider **[*89]** any other factors regarding the public interest which parties may raise. Several other commentors suggested adding specific factors such as how the plan impacts at-risk groups and the goal of universal service, and whether the plan unduly or unreasonably disadvantages a particular customer class or telephone company. OTA submitted that it does not

oppose adding other factors to the list, but cautioned that the list should not be all-inclusive and should not limit the Commission's flexibility.

We agree with both OCC and OTA that the Commission should not be limited to an all-inclusive list of considerations. While the factors already listed in the proposed rules are sufficiently broad so that the Commission would have flexibility, OCC's suggestion of adding language to the effect that "the Commission may consider any other factor which the Commission may deem relative in determining whether the plan is in the public interest" has merit. In addition, the Commission will consider the effect that a particular plan will have on the goal of universal service. Accordingly, the revised rules will reflect such additional language.

2. Consent

Section 4927.04, Revised Code, provides **[*90]** that in instances where the alternative method is proposed by the Commission, the applicant must consent. Staff's proposal provided that an applicant shall consent to a plan which has been amended by the Commission "with respect to elements proposed under the provisions of Section 4927.04, Revised Code", within 30 days of the Commission's order, or applicant forfeits any such rights.

OCC argued that the statutory consent requirement is an unconstitutional delegation of authority by the Commission and the legislature to the LLECs, and is not in the public interest. OCC suggested, however, that if the consent provision is implemented, then the Commission should specifically limit the frequency with which a LLEC may refile an application when it has denied consent, such as not more than one application every two years. ONA argued that, if a LLEC fails to consent to a plan, then the application should be treated under traditional rate-of-return regulation.

OTA submitted that the rule should be amended to reflect that consent is not required until after a final Commission order is issued. Otherwise, according to OTA, the applicant may be forced to exercise its consent option while **[*91]** applications for rehearing are pending. In addition, OTA argued that the language "elements proposed under the provisions of Section 4927.04, Revised Code", should be deleted from the proposed rule, since it contemplates that there may be "elements" of a plan which are not subject to the applicant's right to consent. OTA urged that the applicant's right to consent must extend to any aspect of a plan which is modified by the Commission, as provided by the statute, or else the LLECs would be subjected to unquantifiable risk in filing a plan.

Contrary to OCC's arguments, the Commission cannot deny a LLEC a statutory right regardless of how the Commission views that statutory provision. Therefore, the consent provision shall remain a part of the rules for an alternative regulation plan. We agree with OTA that consent should not be required until after the Commission issues its final order. We also agree that the language "with respect to elements" is vague and not consistent with the statute. We find the consent provision in the statute applies to the entire alternative regulation plan. Specifically, we find that "method" as used in the statute refers to the entire plan, including **[*92]** commitments, which is being considered by the Commission. Accordingly, the rule should be revised to reflect clearly that the applicant's right to consent goes to the entire plan. This being said, we find that the consent provision requires the LLEC to accept or reject the Commission's order on the plan as a package. A LLEC cannot "line item veto" a Commission order modifying a LLEC filed plan. Further, subsequent to plan adoption, if a LLEC proposes an amendment to a plan, its right to consent to the Commission's final order concerning that amendment still exists.

We do not agree that the application should remain in effect and default into traditional rate-of-return regulation should a LLEC fail to consent to an alternative method proposed by the Commission. We would note, however, that failure of any alternative regulation plan of a LLEC for lack of consent would result in the LLEC continuing to be subject to whatever rates were in effect at the time of filing. Thus, in the case of a LLEC making a first alternative regulation filing, failure of the plan for lack of consent would result in the LLEC continuing to be subject to rates set under traditional regulation. Upon **[*93]** LLEC rejection of a Commission order concerning an alternative regulation plan, the Commission retains all of its statutory authority under Title 49 of the Revised Code and may take any action it deems appropriate pursuant to its lawful authority. We are

concerned, however, about the significant costs that would be incurred by the Commission in investigating an alternative regulation application as was discussed previously in this order.

H. Term Of An Alternative Regulation Plan

1. Extension

Staff's proposal provided that a LLEC may request an extension of the term of an approved plan by filing an application with the Commission. AT&T and the Cable Association recommended that intervenors and interested parties should be served notice of a request to extend a plan.

We agree that, upon filing a request to extend the plan, the intervenors in the proceeding in which the plan was adopted and anyone who requests to be served with such notice who is not otherwise represented should be served a copy of the request by the LLEC. Further, the revised rules provide that a LLEC should request the extension no later than three months, prior to the expiration of the plan, in order to give **[*94]** the Commission and interested parties sufficient time to review the status of the plan. The Commission shall order such procedures as it deems necessary, consistent with the rules, in its consideration of the request. If a LLEC does not want to extend an approved alternative regulation plan, but instead wants to submit a new plan, then it must file a notice of intent to file a new proposed plan no sooner than 12 months, but no later than six months, prior to the expiration of the approved plan. The new proposal will be subject to the filing requirements set forth in Section III of the rules.

On another front, the rules should not be read as prohibiting a LLEC from filing a plan in phases in order to expedite the process. Although the Commission and the parties should be made aware of the entirety of the company's proposal, it may be prudent, under certain circumstances, for the company to propose and the Commission to review the plan in phases.

2. Amendment or Termination

Staff's proposal provided that if a LLEC requests that a plan be amended or terminated, then the Commission has 60 days to act on the request, or the amendment or termination goes automatically in effect. **[*95]** OCC again asserted that an automatic approval would be contrary to law, citing Section 4909.19, Revised Code, which requires the Commission to set forth findings of facts and conclusions of law. In addition, OCC submitted that the rule applying to amendments of a plan is so vague that it would be possible for a LLEC to propose a new plan outside the regulatory process and thereby avoid a hearing. OCC also recommended that a LLEC should be precluded from switching back and forth between alternative regulation and rate-of-return regulation. OCC cited the FCC's alternative regulation order which stated in part ". . . a LLEC electing price cap regulation shall not have the option to return to rate of return regulation." Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, para. 269 (1990).

Because an amendment to a plan could be very comprehensive or just a minor modification, it is difficult to contemplate to what extent and under what circumstances an alternative regulation plan would be amended. Likewise, a mid-term request for termination of a plan may raise various issues, all of which cannot be contemplated at this time. Thus, it is imperative that **[*96]** the Commission have the flexibility to direct the appropriate procedures to be taken, whether that be the filing of comments or holding a hearing, consistent with these rules. Contrary to OCC's suggestion, a LLEC will not be able to make such a request outside the regulatory process just because the rules do not provide for specific procedures. Therefore, the revised rules will still provide that the Commission will order certain procedures that it deems necessary, consistent with the rules. We share OCC's concern with a LLEC switching back and forth from alternative to traditional regulation. Such action could defeat the allocation of risks and rewards inherent in incentive regulation. This issue needs to be addressed on a case-by-case basis.

Finally, we find no reason that a request to amend or terminate an alternative regulation plan should be subject to an automatic time frame. Since the Commission would be issuing an entry advising the applicant and interested parties of the relevant procedures, such a provision is contradictory and should be deleted from the rules.

The revised rules provide that proposed changes of price floors or ceilings during the course of an alternative **[*97]** regulation plan, which were not contemplated within the plan, constitute a proposed amendment of such plan. However, nothing in the rules prohibits a LLEC from filing a self complaint to propose minor rate changes, e.g., a bad check charge. The Commission would deem such a filing as a request to amend an alternative regulation plan and would order procedures that it deems appropriate, consistent with the rules.

3. Modification or Revocation by the Commission

The proposed rules provide that the Commission may, after hearing, revoke any approved alternative regulation plan when it finds that such revocation is in the public interest. OTA and United submitted that the rule should be deleted since Section 4927.04, Revised Code, does not enable the Commission to unilaterally revoke an alternative regulation plan. OTA suggested that a procedure should be available for the Commission and the company to mutually review the progress of a plan. AT&T and AARP suggested that any party should be able to either request an investigation as to whether a plan should be revoked or modified, or move to revoke a plan.

In their comments, the LLECs have expressed major concern over the broad **[*98]** authority set forth in the staff's initial rules for the Commission to modify or revoke a plan where the Commission deems it in the public interest to do so. The LLECs have expressed concern with the uncertainty such a rule would create in the financial community. For a plan to work, there must be a certain amount of trust on the part of all parties coupled with strict regulatory oversight as to whether its terms are being abided by. Through a significant revision to this rule, the Commission is herein indicating its commitment to abide by the terms of an agreed-upon plan by rejecting the staff's initial proposal and instead providing a rule which indicates the Commission's intentions to abide by a plan's terms with modification or revocation only if its terms are not abided by. Moreover, as a further protection, the LLECs are being provided notice and hearing (as suggested by CBT) along with an opportunity to cure non-compliance prior to Commission action. In order to provide balance to this rule, the Commission will accept filings by interested persons petitioning for such action on the basis of LLEC non-compliance. In ruling on any request or on the Commission's own motion, **[*99]** the Commission will consider the financial impact on the LLEC of the action being proposed.

I. Complaint Proceedings

Several commentors suggested that specific procedures for the expeditious resolution of disputes need to be included in the rules. OCC expressed concern about consumers' rights if all non-basic services would be detariffed and exempted from Chapters 4903 and 4905, Revised Code. In addition, CENTEX Telemanagement, Inc. suggested that Section 4909.153, Revised Code (hearing of service complaints during rate proceeding), should still apply to a LLEC that has detariffed services.

As we explained in the discussion of non-basic services, the Commission does not intend to exempt any LLEC from Sections 4905.26 and 4909.153, Revised Code. We recognize that the complaint proceeding will be an integral part of alternative regulation. We will endeavor to carry out the complaint process in the most expeditious manner possible and create an environment conducive for alternative dispute resolution. To that end, we will issue a procedural entry in the case within 60 days of the filing of the complaint. Further, to ease the burden on complainants and to enable the parties' **[*100]** experts to deliberate the relevant issues, the Commission would consider, on a case-by-case basis, waiving its rule that the parties have to be represented by counsel in the settlement process. We reserve judgment as to whether we need to devise a special complaint process for the handling of complaints which may arise under alternative regulation.

J. Customer Education

Today's telecommunication environment and incentive regulation provide many more choices for consumers in choosing the type of services they take from the network, as well as from whom. For consumers to be able to make these choices, they must receive full and balanced information from their providers. The Commission clearly has a role in assuring the accuracy and completeness of customer information, particularly since traditional protection for consumers such as that found in

the Ohio Consumer Protection Act are not applicable to LLECs. For this reason, the Commission has added a provision making clear its continued oversight role in this area. We expect LLECs to work with the staff in a cooperative manner to resolve any differences in this area in an expeditious manner and would expect the OCC to continue **[*101]** to bring these matters to the staff's attention, although hopefully in a less confrontational manner than has been seen to date.

III. CONCLUSION

The Commission concludes that the framework for alternative regulation for the LLECs, set forth in Appendix 1 of this order, is in the public interest and establishes processes through which the specific policy goals articulated in Section 4927.02, Revised Code, may be achieved. Specifically, this framework provides for two separate procedures by which the LLECs may request alternative regulation, as contemplated by H.B. 563. The first procedure allows LLECs to request alternative regulatory requirements for fully competitive services under Section 4927.03, Revised Code. If a LLEC demonstrates that a service is fully competitive based on the specific criteria set forth in the statute, the service may be detariffed under these rules, provided the Commission determines that such a measure is in the public interest. While this detariffed service would still be subjected to the Commission's regulatory oversight authority, we believe this measure would afford the LLECs the flexibility, as intended by H.B. 563, to meet the market demands **[*102]** present in today's telecommunications environment.

The second procedure allows LLECs under Section 4927.04(A), Revised Code, to request alternative methods of establishing rates for basic services, and services not otherwise subject to alternative regulation. The methodology established under this statute will be one other than the traditional rate base, rate-of-return methodology currently utilized by the Commission to regulate the LLECs. We believe the intent of the statute was to afford the LLECs reasonable flexibility in the pricing of their services in return for, among other things, universal service, high efficiency, quality of service, enhanced customer service, and advanced technology. We believe that the flexible pricing schemes provided in these rules, in particular for the emerging competitive and discretionary services, will allow the LLECs to achieve all of these goals, while still affording the LLECs an opportunity to develop unique, individual alternative regulation plans. Through the requirement of commitments by the LLECs, which will be generated from customer input, the Commission will be able to measure the reasonableness of the methods for establishing rates. **[*103]** Again, we believe that these rules are consistent with the goals set forth in the statute and will provide LLECs sufficient flexibility in the pricing of their services so they can respond actively to market demand, as contemplated by H.B. 563.

Most importantly, these procedures established in the rules will be conducted in a public forum. The Commission has made several changes to the staff's proposal which exemplify our sincere desire to create an environment for active participation among the various interests. First and foremost, the Commission has assured that all alternative regulation plans would be subject to an evidentiary hearing, along with local public hearings. Second, we have extended the time frames in which interested persons may file objections and motions to intervene. Third, the Commission has established a process whereby interested persons may file objections to new tariff filings and contractual agreements. Finally, the rules set forth specific procedures which ensure due process protections for the competitive service applications. In addition to these changes, the Commission has expressly committed itself to expediting the complaint process. We believe **[*104]** that these particular changes to the staff's proposal improve the ability for interested persons to participate in the alternative regulation processes.

These rules are simply the next step begun in our 944 cases to relax regulation as we move toward a more competitive environment. Because of the diversity of our LLECs and the situations they face, it has been difficult to craft a set of rules to govern every situation. We urge all parties to work with rather than against the Commission and its staff to make the rules work within a constructive and positive atmosphere.

ORDER:

It is, therefore,

ORDERED, That it is in the public interest to adopt the alternative regulatory requirements, as set forth in Appendix 1 of this order, for large local exchange companies with 15,000 access lines or more. It is, further,

ORDERED, That these rules for alternative regulation of large local exchange companies shall remain in effect as long as the Commission finds that the rules are in the public interest. It is, further,

ORDERED, That copies of this Finding and Order be served upon all telephone companies in Ohio, The Ohio Telephone Association, the Office of Consumers' Counsel, all **[*105]** commentors in this docket, and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

APPENDIX 1

RULES FOR ALTERNATIVE REGULATION OF LARGE LOCAL EXCHANGE COMPANIES

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Attachment A - Application Form

I. Purpose and Scope

A. These rules govern the filing and consideration of an application made pursuant to Section 4927.03, Revised Code, to exempt a competitive **[*106]** public telecommunications service(s) from Sections 4905 or 4909, Revised Code, or to request alternative regulatory requirements for such service(s). The applicant has the burden to demonstrate that services filed under Section 4927.03, Revised Code, meet the criteria in Section 4927.03(A)(1)(a) or (b), Revised Code, utilizing the factors set forth in Section 4927.03(A)(2), Revised Code, and must file the information required in Section XII(E)(1) of these rules.

B. These rules also govern the filing and consideration of an application in the form of an alternative regulatory plan filed pursuant to Section 4927.04(A), Revised Code, requesting the adoption of an alternative method of establishing the rates and charges for basic local exchange service, or any other public telecommunications service for which an exemption or alternative regulatory treatment under Section 4927.03, Revised Code, has not been granted.

C. An applicant may file an alternative regulation plan which combines a request for exemption and/or alternative regulatory treatment of non-basic services pursuant to Section 4927.03, Revised Code, with a request for alternative ratemaking for basic services under Section **[*107]** 4927.04 (A), Revised Code. In doing so, the applicant must designate which service(s) is being filed under Section 4927.03, Revised Code, and which service(s) is being filed under Section 4927.04(A), Revised Code.

D. Waivers

1. The Commission may waive any provision in these rules upon a motion for good cause shown, or upon its own motion. In determining whether good cause has been shown, the following factors, among other things, may be taken into consideration:

a. Whether other information, which the utility would provide if the waiver is granted, is sufficient so that the Commission staff can effectively and efficiently review the application;

b. Whether the information required to be filed by these rules, absent a waiver, is relevant to the Commission's consideration of whether the application is reasonable and in the public interest;

c. Whether the information, which is the subject of the waiver request, is reasonably available to the applicant from the information which it maintains;

d. The expense to the applicant in providing the information which is the subject of a waiver request;

e. Whether a request to extend a time limit is intended to delay or frustrate **[*108]** the expedited processes envisioned in these rules; and

f. Whether granting of the waiver is in the public interest.

2. Upon the grant of any waiver, the Commission may suspend the applicability of any or all time requirements, or replace them with alternative requirements when it finds that the waiver may adversely affect the balance of interests inherent in the rules.

3. Upon its own motion, the Commission may extend any time limit as it may apply to the Commission itself when same is necessary to ensure adequate review of the application.

E. Except as provided in these rules, the Commission's rules of practice and procedure set forth in Chapter 4901-1, Ohio Administrative Code (O.A.C.), apply to any application filed pursuant to these rules.

II. Definitions

A. "Allocation" means to charge an item or group of items of direct or indirect cost to one or more activities, processes, operations, or products in accordance with cost responsibilities or other identifiable measures of activity or use.

B. "Alternative regulation plan" means a plan that is proposed and/or approved pursuant to Section 4927.04(A), Revised Code.

C. "Applicant" means a company that files an application **[*109]** pursuant to these rules.

D. "Basic local exchange service" has the same meaning as set forth in Section 4927.01(A), Revised

Code. There are three categories of basic local exchange service:

"Cell 1" means a basic local exchange service that provides monopoly access including any bundled basic local exchange service that includes a monopoly access component, or such service as is deemed essential by the Commission for the provision of public safety or the protection of privacy, all service installation or maintenance services not available from competitive sources and all local usage.

"Cell 2" means a basic local exchange service for which an adequate alternative, not necessarily similar in nature and function, is available from at least one other provider in the relevant market, but which is deemed not to be fully competitive by the Commission after its review of the information required to be filed by Section XII(C)(3) of these rules.

"Cell 3" means a basic local exchange service not appropriately classified in Cell 1 or Cell 2, including any new basic local exchange service introduced during the term of the alternative regulation plan and classified in Cell 3 pursuant to Section **[*110]** XV of these rules.

E. "Commitment" means an obligation to provide services or enhance their value to customers pursuant to a company's approved alternative regulation plan.

F. "Company" means a company described in Section 4905.03(A)(2), Revised Code, that is a public utility under Section 4905.02, Revised Code, and provides basic local exchange services over more than 15,000 access lines.

G. "Detariffed" means the status of a public telecommunications service(s), as to all rates, rules, and regulations affecting the service(s), which has been granted exemption from the filing requirements of Section 4905.30, Revised Code, and other provisions of Chapters 4905 and 4909, Revised Code, except Section 4905.26, Revised Code, and except to the extent the Commission asserts jurisdiction through the exercise of oversight authority.

H. "Earnings" means net operating income from all Ohio operations of the telephone company excluding only those operations which have been deregulated by the Commission or whose regulation has been pre-empted by a competent jurisdiction, binding upon the Commission and such other additional measures of earnings as set forth in a company's approved plan. **[*111]**

I. "Exogenous" means cost changes that originate from or are due to external causes, including, but not limited to, tax law changes, depreciation represcription, and changes to separations and accounting rules.

J. "Long-run service incremental cost" (LRSIC) means the cost for a new or existing product that is equal to the per unit cost of increasing the volume of production from zero to a specified level, while holding all other product and service volumes constant, and includes an adjustment where warranted pursuant to Section XII(A)(5) of these rules.

K. "Non-basic" (Cell 4) means a service which meets the criteria of Section 4927.03(A)(1)(a) or (b), Revised Code, is available from unaffiliated alternative providers in the relevant market, and is deemed fully competitive by the Commission after review of the information required to be filed by Section XII(E)(1) of these rules. Each non-basic service for which exemption or alternative regulatory treatment is sought under Section 4927.03, Revised Code, within the context of an alternative regulatory plan is to be classified in Cell 4.

L. "Threshold rate increase" means a rate increase that is part of a proposed alternative **[*112]** regulation plan under Section 4927.04(A), Revised Code, but which takes effect upon the approval of the plan.

III. Filing Requirements for Applications Filed Pursuant to Section 4927.04(A), Revised Code

A. Notice of Intent

1. Not later than 30 days prior to the filing of an application, the applicant shall notify, in writing, the Office of the Consumers' Counsel, each party to the company's last general rate case or alternative regulation case, any party not otherwise represented who requests from the company to be notified, and the mayor and legislative authority of each municipality included in such application of the intent of the company to file an application and of the proposed rates to be contained therein. If the proposed rates cannot be specified, the notice shall provide an explanation of the methodology proposed for changing rates during the term of the plan.

2. The written notice shall also be filed with the Commission. Such notice shall include a listing of the municipalities included in the application along with the addresses of the mayors and legislative authorities to whom the notices were sent.

B. Form of an Application

1. An application shall be made **[*113]** in a form substantially similar to the form contained in Attachment A of these rules.

2. To complete the application form an applicant shall follow the steps outlined below:

a. Insert the name of the applicant in blanks number 1 and 2. The case number blank will be completed by the Commission.

b. Place the total number of access lines served by the applicant within Ohio in blank 3 and the approximate number of customers served in blank 4.

c. Check the appropriate box in paragraph 2 and fill in the exhibit number blanks.

d. The president or vice president, and the secretary or treasurer of the applicant must sign the application form at blank 5 and provide the address and telephone number of the applicant. The verification on page 3 must also be completed.

3. If applicable, an applicant shall delineate in its filing which aspects are proposed pursuant to Section 4927.03, Revised Code, and which are filed pursuant to Section 4927.04(A), Revised Code.

4. An applicant shall file with the Commission the original and 20 copies of its application.

5. An applicant shall deliver one copy of its proposal to the Office of the Consumers' Counsel and mail a copy to each party **[*114]** of record in its previous alternative regulation plan or rate case proceeding. An applicant shall have available one copy of its plan in each principle business office for public inspection and shall provide a copy to each library system in its service territory.

6. An application shall be designated by the Commission's Docketing Division using the acronym ALT.

C. Exhibits to an Application

1. A detailed alternative regulation proposal, which states the facts and grounds upon which the application is based, and which sets forth the proposal's elements, transition plans, and other matters as required by these rules shall be filed. This exhibit shall also state and support the rationale for the initial proposed tariff changes for all basic local exchange services;

2. Unless otherwise ordered by the Commission, Standard Filing Requirements pursuant to Rule 4901-7-01, O.A.C., and the exhibits described in Sections 4909.18(A) through (E), Revised Code, (SFRs) are required to be filed when an increase in rates for Cell 1 services is requested. Upon a motion for good cause shown, pursuant to Section I(D)(1) of these rules, or upon its own motion, the Commission may determine that **[*115]** less than the complete set of SFRs are required;

3. A list specifying in which cell each telecommunications service is proposed to be classified;

4. A complete matrix showing the following: each rate, service, or regulation that is included in the proposal and an explanation of how it may be affected during the term of the plan;

5. A proposed newspaper notice disclosing the substance and prayer of the application;

6. A detailed description of the manner in which the company will conduct LRSIC studies and all other cost studies as required in the implementation of its plan including examples of the information it will provide and the information that will be available for audit of individual studies;

7. For each threshold rate increase that is proposed, attach a schedule showing the existing rate and the proposed rate, and the methodology for determining the rate increase;

8. If applicable, an explanation of how the services designated as non-basic meet the criteria of Section 4927.03(A)(1)(a) or (b), Revised Code, utilizing the criteria contained in Section 4927.03(A)(2), Revised Code, and the information required to be filed by Section XII(E)(1) of these rules;

9. A **[*116]** detailed discussion of how potential issues concerning cross-subsidization of services have been addressed in the plan, including whether the establishment of a separate subsidiary for the provision of competitive services would be beneficial to the company and its ratepayers to avoid potential cross-subsidization;

10. A detailed discussion of how the public policy goals set forth in Chapter 4927, Revised Code, will be achieved through adoption of the proposed plan, specifically addressing the substantive components of the proposal;

11. A detailed discussion of how the proposed plan is in the public interest. Such discussion should focus on, among other things, how customers will benefit from service efficiencies or economies that are included in the plan, how prices and earnings risks and rewards are to be allocated between the company and the customers, how the plan might impact the goal of universal service, and, if applicable, how rate caps or ceilings should be developed to temper flexibility;

12. A list of witnesses sponsoring each of the exhibits in its application; and

13. An applicant may propose a partial phased plan for Commission review. An applicant shall explain **[*117]** in the application how the different proposed phases relate to the company's overall plan.

IV. Components of an Alternative Regulation Plan

A. A proposed alternative regulation plan must include commitments, but may also include other substantive components as part of the plan including, but not limited to, pricing flexibility, capital recovery, and earnings flexibility. The application shall describe any interdependencies among the substantive components.

B. Commitments

1. A plan shall include commitments related to infrastructure development or services to customers.

2. The commitment section of an application shall include the following:

a. Description of each commitment and its relationship to other components of the plan;

b. Estimated time table for completion (if applicable) which includes a yearly completion percent and the year of final completion;

c. Projected expenditure levels (if applicable);

d. A specific method for tracking the progress of the commitment over the term of the plan;

e. A demonstration that the commitments are consistent with the policy goals of Section 4927.02, Revised Code, and the expressed goals of the Commission; and

f. A demonstration **[*118]** that the commitments are in addition to the Minimum Telephone Service Standards.

3. A plan shall include a description of sources of public input concerning the proposed commitments and how such input was incorporated into the plan.

4. Conditional commitments which are contingent upon the company meeting or exceeding a pre-specified level of performance may be proposed.

5. An applicant shall file annual progress reports with the Commission which shall include (a) a progress evaluation for each commitment, and (b) the percentage of completion achieved. If conditional commitments are included in the alternative regulation plan, an applicant shall also document that conditional commitment implementation is commensurate with the level of company performance.

6. An applicant shall also provide to the staff such information as deemed necessary by the staff to monitor the company's progress in meeting its commitments under the plan. Proprietary information concerning the same shall be protected pursuant to Section 4901.16, Revised Code.

C. If pricing flexibility is proposed as part of the plan, the applicant shall include with its application a matrix of public telecommunications **[*119]** services included in its plan, categorized as Cell 1, Cell 2, Cell 3, and Cell 4.

D. An applicant may propose capital recovery levels that reflect the current calculated economic lives of telecommunications equipment. Proposals to be considered by the Commission may include revised procedures for setting depreciation rates and determining lives for categories of telephone plant. The Commission's approval of an alternative regulation plan that affects capital recovery pursuant to these rules shall be deemed to be the Commission's approval for purposes of Section 4905.19, Revised Code.

E. An applicant may propose a plan that permits earnings flexibility which, in conjunction with other components of the plan, is tailored to its own requirements and circumstances. If such a plan is proposed, an applicant shall submit a description of the methods it proposes for earnings measurement and the interrelationship of earnings achievement with other components over the term of the plan.

F. Should an applicant propose a non-earnings based, non-sharing plan which provides for an increase in basic local exchange services, an applicant must, in its application, demonstrate through the filing **[*120]** of SFRs, unless otherwise waived under Section I(D)(1) of these rules, that such methodology is as beneficial for ratepayers as application of Section 4909.15, Revised Code.

V. Filing Requirements for Applications Filed Pursuant to Section 4927.03, Revised Code

A. An application shall be made in a form substantially similar to the form contained in Attachment A of these rules. To complete the application form the applicant shall follow the steps outlined in Section III(B)(2) of these rules. The application shall be designated by the Commission's Docketing Division using the acronym COM.

B. The following exhibits shall be attached to an application:

1. A statement of the facts and grounds upon which the application is based;

2. A proposed newspaper notice disclosing the substance and prayer of the application;

3. An explanation of how each service meets the criteria in Section 4927.03(A)(1)(a) or (b), Revised Code, utilizing the information contained in Section 4927.03(A)(2), Revised Code, and the

information required to be filed by Section XII(E)(1) of these rules;

4. A list of witnesses sponsoring each of the exhibits in the application; and

5. A detailed discussion **[*121]** of how issues concerning cross-subsidization of services, including whether the establishment of a separate subsidiary for the provision of competitive services would be beneficial to the company and its ratepayers to avoid potential cross-subsidization.

VI. Acceptability for Filing

A. The staff shall make an initial determination of the facial acceptability of any application filed pursuant to Section 4927.03 or Section 4927.04(A), Revised Code, within 20 days after the application is filed. An application shall be considered acceptable for filing if it substantially complies with the requirements of these rules.

B. Opportunity to Correct

1. If the staff determines that an application is unacceptable for filing, it shall immediately inform the applicant in writing and give the applicant an opportunity to correct any deficiencies in the application within five working days.

2. The applicant shall correct all deficiencies identified by the staff within five working days.

3. The staff shall review the corrections and shall make a further determination of the facial acceptability of the application for filing within five working days after the corrections are filed. Upon **[*122]** the determination that an application is acceptable for filing, the staff shall immediately file a letter with the Commission's Docketing Division indicating that fact.

C. Commission Entry Accepting Application

1. In an application filed pursuant to Section 4927.03, Revised Code, the Commission shall issue an entry (a) accepting the application for filing, (b) ordering newspaper publication in a section other than the legal section, and (c) specifying the deadlines for requests for hearing and the filing of comments.

2. In an application filed pursuant to Section 4927.04(A), Revised Code, the Commission shall issue an entry (a) accepting the application for filing; (b) ordering a staff report concerning the application; (c) ordering newspaper publication in the format described in Section 4909.19, Revised Code, in a section other than the legal section; (d) specifying the deadlines for the filing of motions to intervene and objections; and (e) scheduling hearings.

3. The Commission may dismiss any application which does not substantially comply with the filing requirements of these rules.

VII. Staff Report

A staff report shall be filed for every application filed pursuant **[*123]** to Section 4927.04(A), Revised Code. The staff report shall include consideration of whether the proposal set forth in the application would satisfy the policies set forth in Section 4927.02, Revised Code, the telecommunications policies of the Commission, the extent to which the commitments are consistent with the guidelines set forth in Section IV(B) of these rules, and the extent to which the commitments satisfy the evaluation criteria of Section X(B)(2) of these rules. The staff report may provide additional information to the Commission concerning the company's quality of service or financial status which the staff deems relevant for the Commission's consideration in determining whether the application serves the public interest.

VIII. Hearings

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A. Section 4927.03, Revised Code, Application

Upon motion for good cause shown by any person or upon its own order, the Commission may hold a hearing on an application filed under Section 4927.03, Revised Code. A motion for hearing shall be filed within 20 days of the Commission's entry accepting the application for filing.

B. Section 4927.04(A), Revised Code, Application

1. A hearing shall be held to consider an application **[*124]** filed pursuant to Section 4927.04(A), Revised Code, regardless of whether the application includes a request for a threshold rate increase. The hearing is to begin within 45 days of the filing of the staff report.

2. Local public hearings shall be held in accordance with the criteria set forth in Section 4903.083, Revised Code.

IX. Participation by Parties and Staff

A. Intervention

1. Intervention in a proceeding shall be governed by Section 4903.221, Revised Code, and Rule 4901-01-11, O.A.C.

2. A motion to intervene in a proceeding pursuant to Section 4927.03, Revised Code, shall not be filed until the Commission issues an entry ordering a hearing on the application.

3. In an application filed pursuant to Section 4927.04(A), Revised Code, a motion to intervene shall be filed no later than 30 days from the filing of the staff report.

B. Comments in a Section 4927.03, Revised Code, Case

1. Any person may file comments concerning an application within 20 days after the filing of the Commission's entry accepting the application for filing. Such comments shall:

a. Sufficiently explain how the applicant has failed to demonstrate in its application that the service (s) **[*125]** meet the competitive requirements of Section 4927.03(A)(1)(a) or (b), Revised Code;

b. Sufficiently explain how the application is not in the public interest; and

c. A company shall have 10 days after the date that the comments are due to file a response to the comments.

C. Objections in a Section 4927.04(A), Revised Code, Case

1. In a proceeding filed pursuant to Section 4927.04(A), Revised Code, objections to the staff report may be filed by the applicant or any person provided the objections comply with the following:

a. Specifically designate portions of the report which the objector considers to be objectionable and explain the objection;

b. Sufficiently explain how the portions of the report objected to are unjust and unreasonable;

c. Be filed with the Commission and served on all parties within 30 days after the filing of the staff report.

2. Any party may file a response to an objection within 10 days after the deadline for the filing of the objections.

D. Discovery

Discovery shall be governed by Rules 4901-1-16 through 4901-1-24, O.A.C. A proceeding under

Section 4927.04 (A), Revised Code, shall be deemed to be a general rate proceeding for purposes of **[*126]** Rule 4901-1-17(B), O.A.C.

E. Informal Resolution of the Issues

In either type of proceeding, the parties are encouraged to meet with each other and, wherever possible, resolve or narrow their differences on the procedural and substantive issues on an informal basis. If agreement is reached, it should be set forth in a stipulation pursuant to Section IX(G)(1) of these rules.

F. Settlement Conference

The Commission may, at any time, schedule a settlement conference to discuss and consider issues raised by either type of application and, if available, the staff report and any pleadings filed in the proceeding. The Commission may appoint an attorney examiner to act as a facilitator at the settlement conference. The goal of the conference shall be to reach consensus on the terms of an application.

G. Stipulations

1. If a stipulation is reached between the applicant, all intervenors, and staff which resolves all issues in a case, the stipulation shall be filed with the Commission. Unless the Commission acts otherwise, the plan or detariffing schedule described in the stipulation will be effective on the 31st day after the stipulation is filed with the Commission.

2. If a **[*127]** stipulated plan is automatically approved, the applicant shall file, within five days after the effective date of the plan any revised tariffs or informational price sheets as may be required by the plan.

3. The Commission shall issue an order within 10 days of the filing approving the revised tariffs, and ordering actual notice of the implementation of the alternative regulation plan be given to affected customers.

4. Partial stipulations may be filed with the Commission at any time for its consideration.

X. Commission Order

A. Section 4927.03, Revised Code, Application

In considering an application filed pursuant to Section 4927.03, Revised Code, the Commission shall issue an order granting, in whole or in part, or denying the application.

B. Section 4927.04(A), Revised Code, Application

1. In considering an application filed pursuant to Section 4927.04(A), Revised Code, the Commission shall issue an order granting, in whole or in part, or denying the application. If the application proposes an increase in a rate which is tariffed, the provisions of Section 4909.42, Revised Code, shall govern any such increase.

2. In determining whether an alternative regulation **[*128]** plan should be authorized as proposed in the application or with modifications, the Commission shall consider, but not be limited to, the following:

a. Whether the commitments are of sufficient value to the public to warrant the provision of regulatory opportunities for superior company performance outcomes linked to those commitments;

b. The probable impact of the plan on the financial status of the company;

c. The probable impact of the plan on customer bills;

d. The probable impact of the plan on telecommunications competition;

e. The probable impact of the plan on the goal of universal service;

f. Whether the commitments conform to the guidelines of Section IV(B) of these rules;

g. Whether the commitments promote efficient development of the public switched network;

h. The quality of the evidence of public support for the appropriateness of the commitments;

i. Whether the reporting and oversight provisions are sufficient to reasonably monitor the plan and assure its objectives are properly pursued;

j. Whether the plan satisfies each of the public policy goals set forth in Section 4927.02, Revised Code; and

k. Any other factor which the Commission may deem **[*129]** relevant in determining whether the plan is in the public interest.

C. Consent

If after rehearing on an application filed pursuant to Section 4927.04(A), Revised Code, the Commission's order has established rates and charges by a method different than what was proposed in the applicant's plan, or has significantly modified the proposed plan in any other manner, then the applicant shall have 30 days to consent to the alternative method. Failure to consent will be deemed a withdrawal of the application.

XI. Term of an Alternative Regulation Plan

A. Length of a Plan

An alternative regulation plan, unless otherwise provided therein, shall be effective for three years from the date that the Commission enters in its journal an order approving the plan. An applicant who proposes a longer term must demonstrate why a term longer than three years is in the public interest and must provide sufficient safeguards for the Commission to review the company's compliance with the terms of the plan.

B. Extension of an Approved Plan

By no later than three months prior to the expiration of the term of a plan, a company may request an extension of the term of an approved plan by filing a written **[*130]** request with the Commission and serving it upon each party to the proceeding in which the original plan was approved, and any person who requests to be served with such notice. The Commission shall order such procedures as it deems necessary, consistent with these rules, in its consideration of the request.

C. Amendment of an Approved Plan

At any time during the term of a plan, a company may request that the plan be amended by filing with the Commission a notice of amendment which sets forth the specific elements of the plan that are to be affected and the effect that such amendment would have upon the plan. Such notice shall also be served upon all parties to the proceeding in which the original plan was approved, and any person not otherwise represented who requests to be served with such notice. The Commission shall order such procedures as it deems necessary, consistent with these rules, in its consideration of any request to amend an approved plan.

D. Withdrawal of an Approved Plan

At any time during the term of a plan, a company may request that its plan be withdrawn by filing with the Commission a notice of withdrawal which sets forth the reasons for withdrawal. Such **[*131]** notice shall also be served upon all parties to the proceeding in which the original plan was approved, or any person who requests notice of such withdrawal. The Commission shall order such procedures as it deems necessary, consistent with these rules, in its consideration of the request.

E. Modification and Revocation of an Approved Plan

The Commission may not modify or revoke any order accepting a plan issued pursuant to Section 4927.04(A), Revised Code, unless it determines, after notice to the company and hearing, that the company has failed to comply with the terms of its plan. Prior to any such ruling, the Commission shall take into consideration, after notice and hearing, consequences of such action on the company and its financial status as well as the impact on its customers and shall provide the company an opportunity to cure its noncompliance.

F. Filing of a Subsequent Alternative Regulation Plan

By no sooner than 12 months, but no later than six months, prior to the expiration of the term of an approved plan, a company may file a subsequent alternative regulation plan application by filing a notice of intent pursuant to Section III(A) of these rules. In such circumstances, **[*132]** the filing requirements set forth in Section III of these rules apply.

XII. Pricing Rules for an Alternative Regulation Plan

A. General

1. If the applicant continues to mirror its interstate access rates in its intrastate access rates and concurs in another company's tariff, such services will be subjected to the mirroring provisions set forth in the company's plan. Switched and special carrier access prices, other than carrier common line, shall be no higher than the mirrored interstate access rates.

2. Carrier common line charges will be capped at their current levels, with the exception of those companies that choose to mirror their interstate carrier common line rate, to which the mirroring rules in Section XII(A)(1) of these rules apply. The applicant may submit transitional or phase down plans for mirroring or general reduction of the carrier common line rate.

3. The Commission will consider requests for geographical market-based deaveraging by customer type for Cell 2 services. If a Cell 1 or Cell 3 service has components which meet the Cell 2 limited competitive criteria set forth in these rules, that portion of service subject to competition may be unbundled **[*133]** from the monopoly portion of the service and reassigned to Cell 2 for deaveraging. Factors which may be considered for the establishment of deaveraged rates are cost of service, existence of alternative providers, and market demand.

4. The company's policies and practices regarding the resale and sharing of its services shall be explicitly addressed in the company's proposed alternative regulation plan.

5. The minimum price for any new or existing service for which a cost test is required to be submitted pursuant to these rules shall be the LRSIC. LRSIC shall include an adjustment whenever the service is offered such that an alternative provider must purchase a service of the applicant to provision its competitive product, and the applicant uses the service so purchased by the alternative provider, but bundles such service in the price applicant charges for its own service. The amount of the adjustment in the minimum price shall be the difference between the price charged the competitor for the service less the costs of the self-provisioned other service included in the LRSIC. The cost study undertaken by the applicant will demonstrate at a minimum that the price floor includes **[*134]** such adjustment.

6. For a new or an existing product, the LRSIC is equal to the per unit cost of increasing the volume of production from zero to a specified level, while holding all other product and service volumes

constant, and includes an adjustment where warranted pursuant to Section XII(A)(5) of these rules. LRSIC studies do not include any allocation of common overhead costs. Common overhead costs are incurred for the benefit of a firm as a whole and are not avoided if individual services or categories of services are discontinued.

7. Where appropriate, applicant shall provide a joint cost test to indicate what revenues for the group or family of services are sufficient to recover both joint costs and LRSIC. Joint costs are the cost of resources necessary and used to provide a group or family of services. The joint cost component does not include the common overhead costs of the firm.

B. Cell 1 Services

1. A company may change or restructure rates for Cell 1 services in accordance with its plan. This rate change or restructuring may include, but is not limited to, changes in rate or price structure or level, and changes in rates or prices corresponding to exogenous **[*135]** cost factors. An alternative regulation plan shall define the parameters of any such rate changes or restructuring to include the limits and the permitted frequency of changes within those limits.

2. In determining and setting rates for Cell 1 services, the Commission will exercise strict regulatory oversight and review whatever cost information it deems necessary to establish such rates. A company may propose and the Commission may allow flexible pricing for certain Cell 1 bundled services based on a specific need demonstrated by the applicant.

3. Increases in rate or price structure, or rate changes resulting from exogenous factors will be permitted in an alternative regulation plan only if such plan addresses the ultimate disposition of the company's earnings in excess of the company's cost of capital.

C. Cell 2 Services

1. For each service proposed to be classified in Cell 2 the applicant shall propose a price range which establishes a minimum price and a maximum price determined within the context of the applicant's earnings and proposed commitments.

2. A LRSIC study shall be submitted at the initial time that a price list change is made for an existing service classified **[*136]** in Cell 2 or when a new service is classified in Cell 2. For each such service classified in Cell 2, the LRSIC shall constitute the price floor.

3. Cell 2 services face a limited degree of competition. The following information shall be filed for each service proposed to be classified in Cell 2:

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 comparable services readily available at competitive rates, terms, and conditions; and

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.

4. In assessing whether services are subject to limited competition and appropriately classified in Cell 2, the commission may employ measures it deems appropriate to assess whether alternative providers are able to provide comparable services to customers which are reasonably available. Such services must be obtainable throughout the relevant market from at least one alternative provider not affiliated with the applicant.

D. Cell 3 Services **[*137]**

1. For each service proposed to be classified in Cell 3 the applicant shall propose a minimum price

floor.

2. A LRSIC study shall be provided at the initial time that a price list change is made for an existing service classified in Cell 3 or when a new service is classified in Cell 3. For each such service classified in Cell 3, the LRSIC shall constitute the price floor.

E. Cell 4 Services

1. Cell 4 services are non-basic and, therefore, must satisfy the criteria set forth in Section 4927.03 (A)(1)(a) or (b), Revised Code. The following information shall be filed for each service proposed to be classified in Cell 4:

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; and

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.

2. In assessing whether services are subject to competition and appropriately classified **[*138]** in Cell 4, the Commission may employ the Herfindahl-Hirschman Index, the 4-Firm Concentration Index, or other measures it deems appropriate to assess whether alternative providers are able to provide equivalent or substitute services to customers which are readily available at competitive rates, terms, and conditions.

3. All Cell 4 services shall be detariffed. However, a cost test demonstrating that the price charged is above the LRSIC shall be provided for each Cell 4 service.

4. An applicant shall file a notice with the Commission when it intends to withdraw a Cell 4 service. Such notice must be filed on or before the effective date of the proposed withdrawal, and will be considered approved upon filing. The notice must also include a copy of the notice the applicant intends to utilize for notification of those customers currently utilizing such service.

XIII. Contractual Arrangements

A. A company may enter into individual contracts with its customers for Cell 1 and Cell 2 services, where it faces a current competitive challenge for the provision of such services and is able to demonstrate the legitimacy of the specific competitive challenge to the Commission, or other **[*139]** unique circumstances.

B. The Commission shall review the proposed contract and supporting cost justification for Cell 1 or Cell 2 services within 30 days after the application is filed, and unless an entry is issued suspending the application within that time period, the proposed contract will be approved automatically and be effective on the 31st day.

C. A company may seek pre-approval of contractual arrangements for Cell 2 services, provided the company seeks approval of the terms and the criteria for the rate schedules applicable to the services covered by the arrangements, through the process set forth in Section XIII(B) of these rules. Once the terms and criteria for rate schedules are approved by the Commission, contractual arrangements falling within those approved parameters will be allowed to take effect immediately upon their filing with the Commission.

D. In those cases where a contractual arrangement contains a combination of Cell 1 services and Cell 2 or Cell 4 services, the contract shall be filed in accordance with the procedures set forth above. A LRSIC study shall be provided whenever the contracted service is priced lower than it would be if provisioned under **[*140]** tariff or price list.

E. Upon notice to the Commission, a company may implement a contract for a Cell 2 service or for a combination of Cell 2 services and other services with a specific customer upon filing when necessary to respond to an imminent competitive threat to a specific customer. The Commission may in a subsequent entry limit the applicant's use of this provision if it deems that the company has utilized this provision contrary to the intent of the provision.

XIV. Filing Requirements for Filings Made During the Term of an Alternative Regulation Plan

A. In addition to the filing of 10 copies with the Commission's docketing division, all filings regarding any new service or changes, other than price list revisions, for Cell 1, 2, and 3 services shall be served on the Office of Consumers' Counsel on the same day that they are docketed with the Commission.

B. The company shall file tariffs for all Cell 1 service price changes made subsequent to the implementation of the plan. These price changes shall be consistent with the pricing parameters as defined in the plan. The Commission shall review the proposed tariff and a supporting cost study if required pursuant to **[*141]** these rules within 30 days after the application is filed and, unless an entry suspending the tariff is issued, the proposed tariff will go into effect automatically on the 31st day.

C. Up-to-date price lists are required to be maintained at all times for Cell 2 and Cell 3 services. A company that changes a price within a pre-approved range shall file three copies of its new price list on or before the effective date of such change. A cost study may be required, as specified in the pricing rules.

D. Proposed changes of price floors or ceilings during the course of an alternative regulation plan constitute a proposed amendment of such plan. When such an amendment is proposed, a LRSIC study must be provided for a service(s) in Cell 2, Cell 3, or Cell 4. If an amendment is proposed for a service(s) in Cell 1, cost studies deemed necessary by the Commission must be provided.

E. In accordance with a company's plan, the Commission may initiate or the applicant may propose to change or restructure rates reflecting revenue neutral changes or exogenous factors. In considering such changes, the Commission shall determine the scope of the proceeding and the procedures it deems appropriate. **[*142]**

F. Interested persons shall have the right to file objections to applications for tariff revisions, including new service applications, as well as applications for contractual arrangements, within 14 days after the filing of the application. An applicant shall have seven days to file a response to the objections.

G. The automatic approval of a tariff filing under an alternative regulation plan may be suspended by attorney examiner entry for further Commission review. Under full suspension, the service introduction or change in conditions or terms of service may not occur until the Commission takes further action. Under partial suspension, the automatic approval may be suspended, but the service may be permitted to be introduced or offered under the proposed terms and conditions of service. However, such terms and conditions of service may be modified by the Commission subsequent to its further review.

H. The applicant shall file applications to reclassify services in alternative cells during the term of the plan in conformance with procedures specified in the alternative regulation plan.

I. An applicant shall file an application including its proposed customer notice when **[*143]** it intends to withdraw any service. For other than Cell 4, the Commission shall review the application and customer notice within 30 days after the application is filed and unless an entry suspending the application is issued, the service will be withdrawn automatically on the 31st day.

XV. New Services Proposed During the Term of the Plan

A. Unless a company seeks classification in Cell 2 or Cell 4 pursuant to Paragraph B, all new services introduced during the term of an alternative regulation plan may be classified in Cell 3, unless upon complaint, or upon its own motion, and after hearing, pursuant to Section 4909.18, Revised Code, the Commission finds that a new service as being offered is unjust, unreasonable, or in violation of law. If it so finds, the Commission may order that the subject service be reclassified, or may order that it be offered only on specific terms and conditions, or both.

B. A company may propose to classify a new service in Cell 2 or Cell 4 if such service meets the appropriate competitive standard pursuant to these rules.

C. The Commission shall review a proposed tariff for a new Cell 2 service and information supporting a limited competitive **[*144]** showing within 30 days after the application is filed and, unless an entry suspending the tariff is issued, the proposed tariff will go into effect automatically on the 31st day.

D. The Commission shall review a proposed tariff for a new Cell 3 service within 30 days after the application is filed and, unless and entry suspending the tariff is issued, the proposed tariff will go into effect automatically on the 31st day.

E. For new services proposed to be classified in Cell 4, the Commission shall review the proposed service filing, cost study, and information supporting a fully competitive showing within 30 days after the filing has been accepted for filing and, unless an entry suspending the tariff is issued, the proposed service will go into effect automatically on the 31st day.

F. A notice of filing of an application for a new service proposed to be classified in Cell 4 or an application to move an existing service into Cell 4 shall be served by the LLEC upon each party to the proceeding in which the alternative regulation plan was approved and anyone not otherwise represented who requests such notice on the same day that it is docketed with the Commission.

G. For all **[*145]** new services, a company shall submit a proposed customer notice to be approved by the Commission, or a company shall explain why it believes such notice is not necessary.

XVI. Customer Education

As part of any plan filed pursuant to Section 4927.04(A), Revised Code, and any application for a new service, the applicant must detail its proposed efforts to educate customers concerning the new service and functionally equivalent options available to customers from existing services. Under any plan, the Commission reserves the right to review and order modification of customer notices or other customer education materials and shall consider requests from interested parties concerning same. Failure of a company to comply with such an order shall be actionable by the Commission.

XVII. Compliance Provision

Nothing in these rules limits the ability of the staff or the Commission to obtain whatever information they deem appropriate to monitor the compliance with a Commission order issued under Chapter 4927, Revised Code.

XVIII. Assessment of Costs

The Commission may, in its discretion, and after notice and hearing, assess the costs of hearing or investigation on a non-consenting applicant **[*146]** pursuant to Section 4903.24, Revised Code.

Attachment A

In the Matter of the Application of (1) for approval of an alternative form of regulation [and for a threshold increase in rates] *

* - if applicable

Case No.

APPLICATION

(2), the applicant in this proceeding, is a telephone company providing public telecommunications service to (3) access lines and approximately (4) customers in its local service area in the State of Ohio.

Applicant submits this application pursuant to (check one) [] Section 4927.04(A) or [] Sections 4927.03 and 4927.04 for approval of an alternative form of regulation. Exhibits through are attached to this application and are incorporated herein.

The applicant requests the Commission to consider the facts and proposals set forth in this application, [to approve the proposed threshold rate increases,] * and to approve the applicant's alternative regulation proposal.

Respectfully submitted,

(5)

President or Vice President

Secretary or Treasurer

Company Address:

Company

Telephone Number:

VERIFICATION

STATE OF OHIO

SS

COUNTY OF

I, , President/Vice President and I, , Secretary/Treasurer of hereby verify **[*147]** that the information contained in this application is true and correct to the best of our knowledge.

President/Vice President

Secretary/Treasurer

Sworn and subscribed before me this day of , 199 .

Notary Public

My term expires:

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative Law > Governmental Information > Public Meetings > General Overview
Communications Law > General Overview

Energy & Utilities Law > Utility Companies > General Overview

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000139

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies.	))))	Case No. 05-1305-TP-ORD

OPINION AND ORDER

The Commission finds:

I. BACKGROUND

Chapter 4927, Revised Code, authorizes the Commission to adopt alternative regulatory frameworks for large and small telephone companies in Ohio. The Commission previously utilized this authority to adopt an alternative regulatory framework for those incumbent local exchange companies (ILECs) serving fewer than 15,000 lines (otherwise known as small local exchange companies) in Case No. 89-564-TP-COI (89-564), *In the Matter of the Commission Investigation Into the Implementation of Sections 4927.01 to 4927.05, Revised Code, as They Relate to Regulation of Small Local Exchange Telephone Companies*, Supplemental Finding and Order (August 15, 1991). Similarly, the Commission adopted an alternative regulatory framework for large incumbent ILECs (ILECs serving 15, 000 or more access lines) in Case No. 92-1149-TP-COI, *In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Telephone Companies*, Finding and Order (January 7, 1993). Further, in Case No. 00-1532-TP-COI, *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*, the Commission adopted an off-the-shelf alternative regulation plan that could be opted into by an ILEC and still satisfy the public policy goals enumerated in Chapter 4927, Revised Code.

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. Among other things, Section 4927.03(A)(1), Revised Code, now authorizes the Commission to allow for alternative regulation of basic local exchange service (BLES) offered by ILECs. Specifically, Section 4927.03(D), Revised Code, requires that the Commission adopt rules initially implementing the H.B. 218 amendments within 120 days after the effective date of November 4, 2005. The Commission opened this docket for the purpose of considering the authorization of alternative regulation of BLES as part of Chapter 4901:1-4, Ohio Administrative Code (O.A.C.).

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Pursuant to its entry of November 4, 2005, the Commission sought public comment specific to the Commission staff (staff) proposal to add to Chapter 4901:1-4, O.A.C., a plan for authorizing alternative regulation of BLES. The staff proposal was attached as an appendix to the Commission's entry of November 4, 2005. Initial comments were originally directed to be filed by December 2, 2005, and reply comments were originally directed to be filed by December 19, 2005. Pursuant to the attorney examiner entries of November 30, 2005, the filing dates for initial and reply comments were extended to December 6, 2005, and December 22, 2005, accordingly. The record in this matter reflects that the following entities have filed either initial comments, reply comments, or both:

> SBC Ohio (now AT&T Ohio)[1]; Verizon North Inc. (Verizon North); the Ohio Cable Telecommunications Association (OCTA); the Ohio Telecom Association (OTA); Cincinnati Bell Telephone Company LLC (Cincinnati Bell); the Office of the Consumers' Counsel (OCC), the cities of Cleveland, Toledo, Holland, Maumee, Northwood, Oregon, Perrysburg, and Sylvania, Lucas County, Appalachian Peoples Action Coalition, Communities United for Action, Edgemont Neighborhood Coalition, Consumers for Fair Utility Rates, and the Neighborhood Environmental Coalition (jointly, Consumer Groups); the Department of Defense and all other Federal Executive Agencies (jointly, Department of Defense); American Association of Retired Persons (AARP); and Mr. William H. Sims.

On November 9, 2005, the Commission held a conference at its offices in order to allow interested persons to ask staff questions for the purpose of gaining a better understanding of the staff's proposal and rationale.

Pursuant to the Commission's entry of December 21, 2005, as clarified by the attorney examiner entry of December 23, 2005, seven public hearings were scheduled for the purpose of allowing consumers an opportunity to express their views on the staff proposal. Specifically, the following public hearings were held in this matter:

(1) Cleveland- Wednesday January 11, 2006
(2) Mansfield- Friday January 13, 2006
(3) Columbus- Wednesday, January 18, 2006
(4) Cincinnati- Friday, January 20, 2006
(5) Toledo- Monday, January 23, 2006
(6) Athens- Tuesday, January 24, 2006
(7) Dayton- Thursday, January 26, 2006

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1 Pursuant to Case No. 05-1445-TP-ACN, SBC Ohio changed its name to AT&T Ohio.

Additionally, the Commission has received numerous letters from interested persons opining on the staff's proposal.

Twenty people testified at the Cleveland public hearing. Six people testified at the Mansfield public hearing. Seven people testified at the Columbus public hearing. Twenty people testified at the Cincinnati public hearing. Twenty-two people testified at the Toledo public hearing. Twelve people testified at the Athens public hearing. Fourteen people testified at the Dayton public hearing. The significant majority of the testimony can be attributed to the following two viewpoints: (1) those that are concerned about the ability to afford potential increases in their basic local exchange rates, and (2) those that feel competition is healthy for business growth and job stability and support a level playing field for all telecommunications providers.

II. DISCUSSION OF SPECIFIC RULES

After reviewing the staff's proposal, the initial comments, reply comments, and the testimony provided at the seven public hearings held in this matter, the Commission hereby adopts appropriate rules, attached as appendix C to this opinion and order, to allow for the alternative regulation of BLES offered by ILECs as required by H.B. 218. We will directly address only the more salient initial/reply comments and public testimony. In some respects, we agree with certain comments and have incorporated them into the rules without specifically addressing such changes in detail in this order. To the extent that a comment was raised and is neither addressed in this order nor incorporated into our adopted rules, it has been rejected. To the extent that the commentors did not discuss portions of the staff's proposed rules, unless otherwise noted, such portions are incorporated into our adopted rules. For the sake of clarity, within this opinion and order, the rule references are to the proposed rules unless otherwise noted. A discussion of the substantive comments by rule is denoted below.

A. Rule 4901:1-4-01 - Definitions[2]

In its proposal of November 4, 2005, the staff proposed a number of definitions related to the alternative regulation of ILEC basic local exchange service. These definitions are limited to the specific purposes of Chapter 4901:1-4, O.A.C. As described below, comments were filed in response to some of the staff's proposed definitions. In some cases, commentors are seeking to have definitions included in this rule in addition to those proposed by the staff.

2 As a result of the inclusion of this new rule, all previously existing rules in Chapter 4901:1-4 will be rescinded and renumbered to reflect the next sequential rule number.

1. Staff proposed definition of BLES

The staff proposed to define BLES as 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 services:

(1) Local dial tone
(2) Touch tone dialing
(3) Access to and usage of 9-1-1 services, where such services are available
(4) Access to operator and directory assistance
(5) Provision of a telephone directory and listing in that directory
(6) Per call, caller identification blocking
(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.

AARP proposes that BLES be defined as a stand-alone service that is offered under tariff by ILECs to residential customers (AARP Initial Comments at 4-8). In response to AARP's proposal, OTA contends that AARP's proposal ignores the reality that wireless and cable-provided voice over Internet protocol (VoIP) is functionally equivalent to ILEC-provided BLES (OTA Reply Comments at 7). AT&T Ohio states that AARP is attempting to narrowly define BLES in order to demonstrate that there are few companies that provide BLES. AT&T Ohio submits that such an approach would not serve the public interest. Specifically, AT&T Ohio opines that access lines that are included in bundled service can still constitute BLES (AT&T Ohio Reply Comments at 16, 17).

The Commission finds that the staff's proposed definition mirrors the definitions of BLES incorporated in Section 4927.01(A), Revised Code, as well as the Commission's competitive retail service rules (Rule 4901:1-6-01, O.A.C.) and, therefore, requires no further modification at this time and should be incorporated within the final adopted Rule 4901:1-4-01. To the extent that there are issues regarding the substitutability of other services for BLES, these issues will be addressed within Rule 4901:1-4-10.

2. Staff proposed definition of "intermodal services"

The staff proposed to define intermodal services as referring to facilities or technologies other than those found in traditional telephone networks, but are utilized to provide competing services. Intermodal facilities or technologies were defined to include, but not be limited to, traditional or new cable plant, wireless technologies, and power line technologies.

The Consumer Groups assert that the definition of intermodal services is vague. In lieu of the staff's definition of intermodal services, the Consumer Groups recommend that the Commission adopt the term "intermodal facilities," which they define as follows:

> Facilities or technologies other than those found in traditional circuit switched telephone networks. Intermodal facilities or technologies include, but are not limited to, traditional or new cable plant, wireless technologies, and power line technologies.

The Consumer Groups would then define intermodal services as services other than local exchange services which are provided over intermodal facilities.

Although Verizon North agrees with the staff's proposed definition of intermodal services, it suggests that the Commission should define the term intermodal carrier. Specifically, Verizon North believes that an intermodal carrier is any carrier that provides intermodal services.

In light of the adoption of the term alternative provider which, as discussed below, incorporates intermodal services, the terms intermodal services and intermodal provider no longer need to be defined in the final adopted Rule 4901:1-4-01. Therefore, the term intermodal services will be deleted from the final adopted Rule 4901:1-4-01.

3. OCTA proposed definitions of "facilities-based local exchange company," and "nonfacilities-based local exchange carrier" and Consumer Groups' proposed definition of "facilities-based competitive local exchange carrier"

Although not included in the initial staff proposal, OCTA recommends that the Commission adopt a definition for the terms "facilities-based local exchange carrier" and "nonfacilities-based local exchange carrier." OCTA explains that these definitions are derived from the definitions contained in the Local Competition Guidelines in Case No. 95-845-TP-COI (95-845), *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues.*

Specifically, OCTA's proposed definitions of facilities-based local exchange carrier and nonfacilities-based local exchange carrier center around whether the carrier owns, operates, manages, or controls plant or equipment located in each exchange for which alternatives of BLES and other tier one services are sought.

The Consumer Groups propose a similar definition for the term "facilities-based competitive local exchange carrier." Cincinnati Bell and AT&T Ohio assert that OCTA's and the Consumer Groups' proposed definitions should be rejected because they are limited to providers of BLES, do not consider providers of functionally equivalent services, and do not serve the public interest (Cincinnati Bell Reply Comments at 14; AT&T Ohio Reply Comments at 16, 17).

The Commission recognizes the intent of the definitions proposed by both the Consumer Groups and OCTA. Based on the Commission's decision to adopt the four predefined tests discussed in Rule 4901:1-4-10, the Commission has adopted definitions for facilities-based alternative provider and facilities-based competitive local exchange carrier (CLEC) that will best assist in the implementation of the four tests, and at the same time incorporate some of the distinctions raised in the definitions proposed by OCTA and the Consumer Groups.

4. OTA proposed definition of "alternative provider"

OTA recommends that the term alternative provider be defined as part of Rule 4901:1-4-01, O.A.C., in order to capture the statutory notion that CLECs are not the only competitors and that there are other competing and functionally equivalent services (e.g. wireless providers, CLECs, VoIP providers, cable television providers etc.) (OTA Initial Comments at 5, 13). The Consumer Groups object to OTA's proposed definition due to the fact that it includes both intramodal and intermodal service providers whose services, in the Consumer Groups' view, are not all functionally equivalent to the ILECs' BLES (Consumer Groups Reply Comments at 21).

The Commission agrees that a definition for the term "alternative provider" should be incorporated within the final adopted Rule 4901:1-4-01.

5. Consumer Groups' proposed definition of "affiliate"

Although not included in the initial staff proposal, Consumer Groups propose that the final rules in this proceeding include a definition of "affiliate" due to the fact that the term is included in the proposal. Specifically, the Consumer Groups recommend that the term should be defined consistent with 95-845 Local Service Guidelines (Consumer Groups Initial Comments at 13).

The Commission agrees that the term "affiliate" should be incorporated within the final adopted Rule 4901:1-4-01, and that the definition should be consistent with the FCC definition of affiliate.

6. Other definition issues

AARP asserts that the term "functionally equivalent alternatives" be defined. Consumer Groups likewise suggest that "barriers to entry" and "sustainable market" be defined.

In order to be considered "functionally equivalent," AARP avers that the service must be:

> "close enough" in terms of functional characteristics and prices that the consumer of one service would consider it to be a functional equivalent service based on price, perceived quality of service, and terms and conditions associated with obtaining and maintaining the service.

Verizon North rejects AARP's proposed definition of "functionally equivalent alternatives." It opines that AARP's proposed definition essentially requires the identical "plain old telephone service" (POTS) offered by an ILEC. Verizon North does not believe that the rules should limit a "functionally equivalent" service to a particular service.

The Commission finds that based on the aforementioned definitions and the four predefined competitive market tests incorporated in proposed Rule 4901:1-4-10 these terms do not need to be specifically defined at this time. The four tests, including the incorporated defined terms, provide sufficient parameters to allow the Commission to perform the requisite competitive market analyses, without unduly restricting its delegated authority pursuant to H.B. 218 .

OCTA recommends that the Commission incorporate the term "subsidized price" as part of Rule 4901:1-04-01. OCTA proposes that the term be defined as:

> A price for BLES and other tier one services that allows a provider of such services to recover sufficient revenues in excess of LRSIC for the service and thus enables the provider to price other services below the LRSIC in order to gain an unfair competitive advantage.

(OCTA Initial Comments at 2). OCTA explains that this definition is necessary in order to make the Commission's rules consistent with the amended policy of the state as set forth in Section 4927.02(A)(7), Revised Code (*Id.*).

The Commission finds that the proposed definition should not to be included in the final rules adopted in this proceeding. The issue of subsidized pricing is not directly related to the Commission's delegated authority in this proceeding and is already addressed in other Commission orders pursuant to specific pricing rules and regulations.

Finally, the Commission corrects the definition of "telephone exchange" to reflect that there are currently 738 exchanges in the state of Ohio. We have also deleted the definition of "commercial mobile radio service" inasmuch as the term is not used anywhere in the rules. The Commission further revises the definition of tier one service to conform to Rule 4901:1-6-20(A), O.A.C. Additionally, the Commission is adding the definition of "large ILEC" and "small ILEC," consistent with the H.B. 218.[3]

B. Rule 4901:1-4-08 - Eligibility for alternative regulation of BLES and other tier one services

The staff's proposed Rule 4901:1-4-08(A) would require an ILEC to first have an approved qualifying elective alternative regulation plan (EARP) in place before it may request alternative regulation of BLES and other tier one services.

Furthermore, proposed Rule 4901:1-4-08(B) requires ILECs to have fully complied with the advanced services and Lifeline commitments set forth in paragraphs (A) and (B) of either existing Rule 4901:1-4-05, O.A.C., for large ILECs or proposed Rule 4901:1-4-07, for small ILECs. The proposed rule permits an ILEC to apply for EARP and alternative regulation for BLES and other tier one services, contemporaneously, if the applicant can demonstrate that it fully meets the applicable EARP commitments on the day of filing of both applications.

With regard to the advanced services commitment under existing Rule 4901:1-4-05(A), O.A.C., the Consumer Groups support the proposed requirement that prefaces eligibility for BLES alternative regulation on successful completion of the EARP commitments. The Consumer Groups point out that it also makes sense that the proposed rule allow those ILECs not currently subject to EARP to file for EARP and BLES alternative regulation at the same time, if the ILEC has met the EARP commitments before applying.

The Consumer Groups note that both of these provisions in essence assume that the blanket finding made by the Commission at the time of the initial establishment of the EARP rules (i.e., that all ILECs' nonbasic services are subject to competition or have reasonably available alternatives) would stand if re-examined today. The Consumer Groups assert that these provisions must also be considered in light of the new prerequisite

3 As a result of the amended definition of "small ILEC", all existing references in Chapter 4901:1-4, O.A.C., to "ILECs with fifteen thousand or more access lines" shall be amended accordingly.

of a healthy and sustainable competitive market as required by amended Section 4927.02(A), Revised Code (Consumer Groups Initial Comments at 14, 15). The Consumer Groups also note that all of the ILECs with current EARP will have satisfied their advanced service commitments by the time they are able to apply for alternative regulation of BLES (Consumer Groups Reply Comments at 21). According to AT&T Ohio, it currently meets the proposed advanced eligibility requirements and, therefore, does not object to the staff's proposal with regard to eligibility (AT&T Ohio Initial Comments at 7).

On the other hand, Verizon North states that although the proposed rules are correct in that an ILEC can contemporaneously apply for both EARP and BLES alternative regulation, it argues that there is no reason to require the ILEC to meet the 24-month requirement for provisioning advanced services before it is afforded BLES alternative regulation and the pricing flexibility that comes with it. Specifically, Verizon North argues that once it has simply agreed to meet the advanced services commitment in EARP, it should be afforded the opportunity to apply for BLES alternative regulation. Therefore, Verizon North argues that the Commission should modify the proposed rule to state that an ILEC applying for both EARP and BLES alternative regulation has met its EARP commitment for purposes of complying with the proposed rule if it has submitted a plan for completion of the advanced services commitment when it files for BLES alternative regulation (Verizon North Initial Comments at 2, 3).

OTA also encourages latitude for eligibility if a carrier has developed and filed its plan for implementing its broadband commitment but has not yet completed implementation. OTA argues that if a carrier can show "no barriers to entry," under those conditions it should be an eligible candidate for Chapter 4901:1-4, O.A.C., alternative regulation of BLES (OTA Initial Comments at 5, 6). In this regard, OTA proposes that the final Rule 4901:1-4-08(B) include the following language:

> Additionally, if an ILEC has not completed its advanced service commitment in the EARP, it will be eligible for alternative regulation of BLES upon filing its plan for completion thereof.

(*Id.* at 15)

OTA also identifies in its comments that one of the eligibility requirements for ILECs seeking to opt into Chapter 4901:1-4, O.A.C., alternative regulation is the successful completion of the Lifeline commitment under existing Rule 4901:1-4-05(B), O.A.C. OTA notes that automatic Lifeline enrollment for all EARP companies has been delayed due to the inability of carriers to receive the necessary information from various governmental agencies responsible for Lifeline qualifying programs. Therefore, OTA believes that the proposed requirement for "full compliance" of the EARP commitments is currently impossible (OTA Initial Comments at 5). OTA proposes additional language for the final

eligibility rule in order to clarify that an ILEC will be deemed to have fully complied with the Lifeline commitment if it has in good faith made use of all data available to it (*Id.*).

The Commission agrees with the staff's proposal relative to eligibility for alternative regulation of BLES. The Commission determines that the requirement to fully meet the EARP broadband and Lifeline commitments prior to, or contemporaneously with, the filing of an application for alternative regulation of BLES strikes the appropriate balance between the needs of consumers for access to advanced telecommunication services and Lifeline services and the ability of the company to have pricing flexibility for BLES. Therefore, we reject Verizon North's and OTA's proposal that the submission of a plan for completion of the advanced services commitment is sufficient for the purposes of qualifying for alternative regulation. The proposed rule does not impose any additional commitments on the ILEC beyond that which currently exists under existing Rule 4901:1-4-05, O.A.C. We agree with the comments of the Consumer Groups, as confirmed by AT&T Ohio with regards to its own company-specific situation, that by the time these rules are finalized, ILECs with current EARPs should have already met the commitments required to participate in both EARP and alternative regulation for BLES.

With regard to OTA's concern that automatic Lifeline enrollment has been delayed due to the inability of carriers to receive necessary information from certain governmental agencies, while the Commission is aware of this situation, we do not find it necessary to revise the rule as suggested by OTA. Under the current circumstances, the Commission finds that ILECs subject to elective alternative regulation must only comply with the Commission's existing directives with regard to Lifeline service. Specifically, ILECs are only required to auto enroll customers into qualifying programs to the extent that the various governmental agencies accomodate such enrollment. Once resolution of this issue is reached, the ILECs shall work with the staff to comply with any directives regarding Lifeline service and automatic enrollment.

The Consumer Groups recommend that the Commission enhance the current EARP commitments to include the ubiquitous deployment of advanced services throughout all of an ILEC's central offices and to require the ILEC to update the Lifeline commitment to offer a discounted lifeline/advanced services package as proposed by the Consumer Groups in recent telephone merger cases.[4] In addition, the Consumer Groups recommend the addition of two new commitments including funding new and existing community technology centers and providing support to community voice mail programs within an ILEC's territory. The Consumer Groups posit that an ILEC should meet all of these

4 See Case No. 05-269-TP-ACO (05-269), *In the Matter of the Joint Application of SBC Communications Inc. and AT&T Corporation for Consent and Approval of a Change in Control*; Case No. 05-497-TP-ACO, *In the Matter of the Joint Application of Verizon Communications, Inc. and MCI, Inc. for Consent and Approval of a Change in Control.*

commitments prior to receiving alternative regulation for BLES (Consumer Groups Initial Comments at 37, 38; Reply Comments at 22).

Cincinnati Bell, Verizon North, AT&T Ohio and OTA disagree with the Consumer Groups' proposal to impose additional commitments. Cincinnati Bell argues that the Consumer Groups' proposed imposition of additional social commitments as a requirement to attain alternative regulation of BLES is not consistent with H.B. 218 because the law does not contain any such requirements. Further, Cincinnati Bell believes that imposing such requirements would be anticompetitive because only the ILEC would be subject to them and this would place ILECs at a disadvantage when competing with CLECs and alternative providers, none of which are subject to any such requirements (Cincinnati Bell Reply Comments at 11).

Verizon North argues that the Consumer Groups' proposed imposition of "specific commitments" has no basis in the statute and is unlawful (Verizon North Reply Comments at 4). AT&T Ohio claims that the Consumer Groups' proposed commitment of ubiquitous deployment of advanced services throughout all of the ILECs' central offices, rather than as currently required by the EARP rules, was made without regard to the cost or feasibility of the proposal (AT&T Ohio Reply Comments at 42). OTA also believes that the Consumer Groups' suggested commitments are inappropriate and unlawful. Likewise, OTA views the proposed commitments as a burden that would be placed on ILECs alone. OTA argues that the Consumer Groups' proposals result in obstruction and discrimination and add little to a fair debate of BLES alternative regulation (OTA Reply Comments at 5, 6).

The Commission agrees with the ILECs that enhanced or additional commitments would not be appropriate in a competitive environment. In such an environment, an ILEC should have the appropriate incentives to deploy additional advanced services and provide other public benefits to consumers. Additionally, the Commission notes that testimony provided at the public hearings in this proceeding demonstrates the widespread philanthropic activities of ILECs in Ohio resulting in public benefit to Ohio consumers (e.g., Cincinnati Tr. at 28, 31, 32; Columbus Tr. at 32-34, 37-39; Mansfield Tr. at 34). Thus, the Commission declines to adopt the proposals for enhanced or additional commitments as set forth by the Consumer Groups for the purpose of requiring additional public benefits to consumers.

C. Rule 4901:1-4-09 - Filing requirements and process for application

The staff proposed requisite time frames and a process for the application and all required exhibits. As described below, comments were filed in response to the review and automatic approval process, including the exchange-by-exchange analysis.

1. Proposed Rule 4901:1-4-09(B)(3) – Application exhibits

As part of Rule 4901:1-4-09 (B)(3), the staff proposed that one of the exhibits to the application should be supporting information and a detailed analysis demonstrating that the applicant meets, on an exchange basis, at least one of the competitive market tests, as set forth in paragraph (C) of Rule 4901:1-4-10, or an alternative competitive market test proposed by the ILEC.

AT&T Ohio states that it is unclear as to how much information will constitute sufficient supporting information and what level of detailed analysis will be considered appropriate to satisfy the application process (AT&T Ohio Initial Comments at 7, 8).

We view AT&T Ohio's concerns regarding the sufficiency of the supporting information and the level of detailed analysis as being equally applicable in any application made before the Commission. We have, however, intentionally designed all of the market tests so that ILECs would have access to sufficient information to satisfy the proposed tests in those areas where the company faces a level of competition necessary to satisfy the competitive market test. Moreover, even if the initial application failed to contain the needed information, the company would still have an opportunity to supplement its filing in order to rectify any deficiencies.

The Commission finds that the requisite application and its accompanying exhibits should be filed in a form similar to appendix A to this opinion and order. Further, the staff's proposed Rule 4901:1-4-09(B)(3) should be modified to include an attestation verifying the veracity of the data upon which the application is premised. The affidavit should be filed in a form similar to appendix B to this opinion and order.

2. Proposed Rule 4901:1-4-09(C) – Prefiling requirement

As part of proposed Rule 4901:1-4-09(C), the staff proposed that not later than thirty days prior to the filing of an application, the applicant was to provide a copy of its proposed application and all required exhibits to the staff for review.

In its comments, AT&T Ohio states that the proposed application process, while being relatively straightforward and modeled after the successful process used for the EARP rules, has several arduous elements. First, AT&T Ohio explains that the prefiling requirement, which is also a part of the existing EARP rules, is burdensome and unnecessarily extends the approval time frame with no real countervailing benefit except for the "advance notice" it provides to the staff (AT&T Ohio Initial Comments at 7). AT&T Ohio further avers that ILECs planning on opting into the new rules will certainly consult with the staff prior to doing so. Therefore, AT&T Ohio suggests that the Commission encourage the ILECs to provide the courtesy of advance notice to the staff without the need for a prefiling requirement, which would add unnecessary time into the process (*Id.*). In

response to AT&T Ohio's proposal, OCTA and AARP state that the staff's prefiling requirement is appropriate and should remain as part of the final rules (OCTA Reply Comments at 1, 2; AARP Reply Comments at 41).

A prefiling requirement is more advantageous to the company than it is to the staff. It essentially allows the company an opportunity for staff to preview an application to ensure that it is sufficient without delaying the auto approval time clock. Thus, the Commission sees no reason to require companies to prefile an application in advance of the commencement of the auto time frame. In the event that that application is found to be insufficient, the auto time clock may be suspended.

3. New Rule 4901:1-4-09 (D) - Intervention

Although not originally included as part of the staff's proposal, the Commission finds that, consistent with Rule 4901-1-11, O.A.C., all persons seeking intervention must file the appropriate motion with the Commission within seven days of the ILECs' application. This rule is necessary in order to allow for a timely resolution of all applications filed pursuant to Chapter 4901:1-4, O.A.C. Therefore, this requirement shall be incorporated within the final adopted Rule 4901:1-4-09, O.A.C., as Rule 4901:1-4-09(D), O.A.C.

4. Proposed Rule 4901:1-4-09(E) – Confidential information.

As part of Rule 4901:1-4-09(E), the staff proposed that all confidential information filed by the ILEC will be eligible for proprietary treatment in accordance with Rule 4901-1-24, O.A.C.

The Consumer Groups suggest that in order to ensure that interested parties have access to the ILEC data, the Commission should make access to any information that an ILEC asserts is confidential available through a blanket protective order. The Consumer Groups reason that although the staff proposes that confidential information filed by an ILEC will be eligible for proprietary treatment in accordance with Rule 4901-1-24, O.A.C., it does not provide for an expedited process (Consumer Groups Initial Comments at 19). Further, the Consumer Groups contend that interested parties should not be required to go through the process of negotiating a confidentiality agreement with the ILEC within the twenty-day time frame required for a response to the ILEC's application (*Id.* at 20). AARP concurs that a blanket protective order should be adopted in each proceeding to save time and expense involved in obtaining confidential treatment of information (AARP Reply Comments at 38, 39).

While the Commission disagrees with the expressed need for a blanket protective order, the Commission recognizes the need for parties to obtain timely information. Therefore, the ILECs are directed to negotiate such agreements in good faith and in a timely manner. As discussed further below, the Commission has also extended the time

frames related to BLES alternative regulation cases. Based on this determination, the Commission finds that the staff's proposed rule should be modified and incorporated within the final adopted Rule 4901:1-4-09, as denoted in the attached appendix.

5. Proposed Rule 4901:1-4-09(F) – Objection time frame

As part of Rule 4901:1-4-09(F), the staff proposed that any interested entity who can show good cause why such application should not be granted must file with the Commission a written statement detailing the reasons within twenty calendar days after the application is docketed.

The Consumer Groups suggest that the twenty-day time frame proposed by the staff for parties to show good cause why the BLES alternative regulation application should not be granted is too short and unreasonable. Consumer Groups further argue that twenty days is inadequate to allow for the parties to resolve potential confidentiality issues, to obtain and analyze data submitted for each exchange, and to submit written statements detailing reasons why the application should not be approved (Consumer Groups Initial Comments at 17, 18). Consumer Groups opine that, given the complexity of BLES alternative regulation applications as compared to elective alternative regulation applications, the time frame for interested parties to file objections should be at least twice the current allotted twenty-day period (Consumer Groups Initial Comments at 18, 19). The AARP concurs with the Consumer Groups' objection to the short time frames for comment filings and recommends a sixty-day review (AARP Reply Comments at 38).

The Commission agrees with both the Consumer Groups and AARP that the staff proposed twenty-day time frame is unnecessarily short and, therefore, we determine that staff's proposed time frame should be expanded to forty-five days within the final adopted Rule 4901:1-4-09, O.A.C.

6. Proposed Rule 4901:1-4-09(G), - Automatic approval

The staff proposed as part of paragraph (G) of proposed Rule 4901:1-4-09 that:

> An ILEC's application shall be approved automatically and become effective on the ninety-first day after the initial filing is made with the Commission, unless suspended. In cases where the Commission determines a hearing is necessary and/or a suspension is ordered, the Commission will render a decision on the application within two hundred seventy days of filing. Applications containing competitive market test proposals not found in paragraphs (C)(1) to (C)(3) of rule 4901:1-4-10 of the Administrative Code will not be subject to the automatic time frames.

The Consumer Groups contend there should be no automatic approval time frame for BLES alternative regulation applications filed using one of the competitive market tests outlined in proposed Rule 4901:1-4-10. They maintain that this short process does not allow enough time for proper examination of the detailed information contained within the application and that this type of application should be subject to extensive scrutiny, including a hearing process and cross-examination. The Consumer Groups further explain that the statute does not require the Commission to act upon a BLES alternative regulation application within a given time period and that the rationale for the elective alternative regulation automatic approval process does not exist for BLES alternative regulation. (Consumer Groups Initial Comments at 16, 17).

Regarding the alternative competitive market test proposed by the staff, the Consumer Groups recommend that the Commission adopt a process whereby an application containing an alternative competitive market test is automatically suspended and set for an evidentiary hearing to be held 120 days after the application is filed. Moreover, the Consumer Groups posit that the Commission should not be constrained to issue a decision within two hundred seventy days after an application offering an alternative comparative test is filed (*Id.* at 22, 23). On the other hand, OTA, Verizon North, and Cincinnati Bell all comment that the staff proposed time frames for the automatic approval should be shortened from ninety-one days to forty-six days. Additionally, in the event of a suspension, these ILECs believe that suspension period should be shortened from two hundred seventy to one hundred thirty-five days (OTA Initial Comments at 8; Verizon North Initial Comments at 3 and 7; and Cincinnati Bell Initial Comments at 18)

In their reply comments, the Consumer Groups state that the more truncated automatic approval time frames suggested by OTA, Cincinnati Bell and Verizon North would compound the lack of meaningful participation by the public by causing the Commission to unnecessarily and unwisely act in even more haste (Consumer Groups Reply Comments at 23). AARP strongly supports removal of the automatic approval process and states that BLES is an essential service that should not be price deregulated on an automatic basis (AARP Reply Comments at 38).

Contrary to the initial comments filed by OTA, Verizon North and Cincinnati Bell to shorten the time frames the OCTA believes that the staff's proposed time frames contained in proposed paragraph (G) are appropriate (OCTA Reply Comments at 1, 2). OTA argues on reply that the Consumer Groups' recommendations seeking extensive discovery, evidentiary hearings, numerous public forums on each application and a mandatory review of a BLES alternative regulation plan in the fourth year are all intended to deter the adoption of BLES alternative regulation and thwart the legislative intent of the process itself (OTA Reply Comments at 5). OTA further submits that Department of Defense's proposal of a three-year term for BLES alternative regulation is unnecessary and burdensome, obstructive and unduly restrictive and should be rejected (*Id.* at 6).

Similarly, Cincinnati Bell suggests that the Consumer Groups' attempts to overcomplicate and delay the process should be rejected (Cincinnati Bell Reply Comments at 9). Cincinnati Bell claims that the Consumer Groups' request for public hearings on every BLES alternative regulation application provides no additional benefit. Further, Cincinnati Bell states that evidentiary hearings are unnecessary and are not required by statute. Moreover, Cincinnati Bell asserts that if an interested party was to have factual evidence that the information contained in the ILEC application was inaccurate the application review period would still provide for ample review time (*Id.* at 10). Cincinnati Bell also asserts that the Consumer Groups' proposal of a mandatory fourth-year review of all ILEC BLES alternative regulation plans is inefficient and unnecessary as the Commission is already empowered to modify or revoke plans if competitive conditions no longer exist (*Id.*).

The Commission recognizes that a ninety-day automatic approval process for applications filed using one of the competitive market tests discussed below presents interested persons with a short time line in order to acquire, evaluate and digest the detailed technical documentation that will accompany an ILEC's application for BLES alternative regulation in a given exchange. Accordingly, we find that it is appropriate to extend the automatic approval time frame to one hundred twenty days after initial filing with the Commission.

Additionally, the Commission, on its own motion, is allowing for suspension of a BLES alternative regulation automatic approval time frame by the legal director or an attorney examiner. Further, consistent with the rules governing elective alternative regulation, and contrary to the Consumer Groups' comments, the Commission determines that hearings should only be held in extraordinary circumstances. In light of the determinations made above, the staff's proposed rule should be modified accordingly.

As for the Consumer Groups' concerns regarding the handling of applications containing an alternative competitive market test, the Commission has revised the rule to clarify its intent. Applications proposing an alternative competitive market test are not subject to the one hundred twenty-day automatic time line, or the two hundred seventy-day limit on rendering a Commission decision. Rather, the Commission will establish the appropriate process and time frames for such consideration after reviewing each relevant application.

D. Rule 4901:1-4-10 - Competitive market test

1. Staff proposed competitive market test area

The staff's proposed Rule 4901:1-4-10(A) requires that an ILEC applying for alternative regulation of BLES and other tier one services must demonstrate that it satisfies

at least one of the competitive market tests in each of the requested telephone exchange area(s), and must apply the test to individual telephone exchange area(s) within its application.

The Consumer Groups and AARP support the staff proposal of an exchange-specific application of the competitive market test and point out that it is consistent with this Commission's prior determination in the mass market impairment analysis proceeding[5] and with other states. The Consumer Groups point out that the Commission in the impairment proceeding found that large areas like metropolitan statistical areas (MSAs) or an entire ILEC service territory are not appropriate geographic areas to judge the existence of barriers to entry or whether there are real competitive alternatives (Consumers Groups Initial Comments at 26; AARP Initial Comments at 34).

Cincinnati Bell argues that the staff proposal defines the relevant market area too narrowly, and proposes that each ILEC should be able to propose its own market definition. If the Commission does define a market standard, Cincinnati Bell posits that the market should be defined as the ILEC territory within an MSA. Cincinnati Bell states that the MSA is the more appropriate measure of competition as most competitors choose to enter markets throughout metropolitan areas. According to Cincinnati Bell, telephone exchanges have no significance from an economic or consumer perspective. Cincinnati Bell states that an MSA analysis would also have the benefit of mitigating the effects of population shifts from the urban to the suburban and rural areas and population data is readily available on an MSA, rather than an exchange basis (Cincinnati Bell Initial Comments at 11-13). In its initial comments, the Department of Defense supports the use of telephone exchange areas as a precise measure of competitive market conditions (Department of Defense Initial Comments at 12). However, in its reply comments, the Department of Defense agrees with Cincinnati Bell's proposal to use MSA as the geographic market for competition evaluation by the Commission and, for any region outside an MSA, the Department of Defense proposes that local exchange areas be used (Department of Defense Reply Comments at 13).

OTA proposes to remove references to exchanges and instead replaces the term with market areas (OTA Initial Comments at 8). Similarly, AT&T Ohio argues that exchange boundaries are "essentially irrelevant" for intermodal competition and proposes that the Commission eliminate telephone exchanges from the test (AT&T Ohio Initial Comments at 22). Verizon North does not agree with the exchange level of analysis required by the staff's proposed tests and believes that, due to the large number of exchanges, it will be administratively burdensome and unnecessary. Verizon North claims that the Commission has moved away from collecting information on an exchange level, and such information may not be even available. In the alternative, Verizon North recommends that

5 Case No. 03-2040-TP-COI, *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in the Mass Market.*

the Commission adopt a statewide measurement, or if less than statewide, the test should be applied on an extended area service (EAS) local calling area basis (Verizon North Initial Comments at 4).

The Department of Defense objects to the arguments of OTA, AT&T Ohio, and Verizon North against the staff's proposal to perform the competitive market evaluation on an exchange level and to their alternative suggestion that the Commission adopt statewide market evaluation standards. Moreover, the Department of Defense argues that competition does not exist in all areas (Department of Defense Reply Comments at 13). OCTA also objects to OTA, AT&T Ohio, and Verizon North's proposals to adopt a statewide market evaluation as well as Cincinnati Bell's proposal to adopt an MSA analysis. OCTA opines that the rules must provide an objective definition of the market, and staff's proposed use of exchanges is the best option available (OCTA Reply Comments at 2). Similarly, AARP recommends that the Commission reject Cincinnati Bell's proposal to perform the competitive market test on an MSA level, and argues that MSAs include a mix of adjoining rural areas and small towns that have different market environments. AARP maintains that it is critical that the rules for BLES price deregulation employ a proper level of granularity of data to avoid having consumers in areas that do not have competitive alternatives being swept into price deregulation as a result of using overly large market areas that contain both competitive and noncompetitive areas (AARP Reply Comments at 35-37).

The Commission agrees with the Consumer Groups, AARP and OCTA that there should be an objective definition of the market that allows for evaluation of competition in the marketplace on a reasonably granular level. We find support for our conclusion in Section 4927.02(A)(2), Revised Code. According to that section, it is the policy of the state to "[r]ely on market forces, where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market, to maintain just and reasonable rates. . . ." We conclude that proposals to use an entire ILEC territory in the state or to use MSAs for conducting competitive market evaluation would not provide a reasonable level of granularity to ensure that the only areas which win more pricing flexibility are those in which market forces are present to support a healthy, competitive environment. Conducting the competitive market analysis on a telephone exchange area basis as proposed by staff, on the other hand, would allow, in our opinion, for the evaluation of competition in the marketplace on a granular level that exhibits similar market conditions within its boundary. To the extent that an ILEC believes that competition is more widespread than an exchange, the company may group multiple exchanges together in its application. Further, an ILEC is not precluded from proposing a market different than a telephone exchange as part of an alternative competitive market test.

Contrary to Verizon North's argument that the Commission has moved away from collecting information on an exchange level, and that it may not even be available, we note that all ILECs in Ohio are required to provide the number of residential access lines on a

telephone exchange area basis in their annual reports that are submitted to the Commission. Additionally, we note that the CLECs are certified by the Commission by telephone exchange area. Accordingly, we adopt staff's proposal to use telephone exchange area as the predefined market for purposes of evaluating competition for BLES in the marketplace or the existence of reasonably available alternatives to BLES in the final rules.

2. Proposed Rule 4901:1-4-10(C)

a. Barriers to entry

The Consumer Groups argue that the staff's proposed tests do not meet the statutory requirements to allow for alternative regulation of BLES as permitted by Section 4927.03, Revised Code, because the proposed tests fail to show that there are no barriers to entry for BLES as required by Section 4927.03(A)(3), Revised Code. In support of their position, the Consumer Groups attached the affidavit of witness Dr. Roycroft to their comments. According to Dr. Roycroft, if the staff's proposed competitive market tests are met, it does not demonstrate that there are no barriers to BLES entry. He contends that to the extent that there may be competition for BLES in Ohio, it exists because some carriers have overcome those barriers for now, yet barriers to BLES entry continue to exist (Consumer Groups Initial Comments at 9). Among barriers to entry identified by Dr. Roycroft are:

(1) The lack of ILECs entering into interconnection agreements with competitors and the declining number of interconnection agreements.

(2) The ILECs' economies of scale and scope and their lower cost of capital.

(3) The ILECs' advantages in terms of access to rights-of-way.

(4) The ILECs' benefit of being first in the marketplace.

(5) The level of wholesale rates paid by CLECs, as well as the ILECs' long-term contract requirements.

Finally, Dr. Roycroft argues that staff's proposal to allow ILECs to demonstrate that the statutory criteria are satisfied through an alternative competitive market test does not suggest a "barriers to entry" analysis as a component of the alternative test (Consumer Groups' Initial Comments, Roycroft Affidavit at 15-40).

It is AARP's position that the rules lack the H.B. 218 requirement that the Commission find that there are no barriers to entry, and further it is AARP's position that

barriers to entry should be separately defined and identified and evaluated in detail for the residential market. AARP suggests that the Commission specifically consider the following barriers to entry in making its statutorily required findings: ILECs' economy of scale; joint level of exit and entry barriers; product differentiation; capital requirements; and sunk costs (AARP Initial Comments at 10, 11). AARP concurs with the Consumer Groups' recommendation that the Commission should adopt a rebuttable presumption that barriers to entry for competing BLES exist throughout the state (AARP Reply Comments at 9).

Cincinnati Bell objects to the Consumer Groups' interpretation of the statutory requirement regarding no barriers to entry to mean that another provider offer exactly the same stand-alone BLES service an ILEC is required to provide. Cincinnati Bell argues that the Consumer Groups' interpretation would ensure that no ILEC could ever receive the benefit of BLES alternative regulation no matter how competitive the market. Cincinnati Bell opines that the Commission's finding of no barriers is one of the purposes of an objective competitive test. It is Cincinnati Bell's position that when multiple, unaffiliated, facilities-based providers are providing services in the market that is the subject of an ILEC application, that fact demonstrates that no barriers to entry exists (Cincinnati Bell Reply Comments at 2, 3).

Similarly, AT&T Ohio objects to the position of the Consumer Groups and AARP that the rules lack H.B. 218's requirement that the Commission find that there are no barriers to entry separately for the residential market and evaluated in detail using a metrics test. AT&T Ohio maintains that Section 252(a) of the 1996 Act is carried over to the Ohio law through H.B. 218 and is better analyzed on the basis of contestable markets. AT&T Ohio argues that no one can suggest that Ohio's telecommunications market is not contestable. AT&T Ohio also argues that AARP ignores the fact that the very presence of CLECs and cable companies in the marketplace, which AARP views as a significant source of facilities-based competition for ILECs, proves that there are no barriers to entry in the provision of BLES (AT&T Ohio Reply Comments at 19, 20, 23).

AT&T Ohio counters the Consumer Groups' argument, advanced by Dr. Roycroft, that interconnection agreements may act as a barrier to entry, by stating that the very existence of these federally mandated interconnection agreements is proof of competition. AT&T Ohio further points out that competitors also enter into voluntarily negotiated commercial agreements. As to Dr. Roycroft's argument that the ILECs' economies of scale and scope and lower cost of capital constitute barriers to entry, AT&T Ohio contends that Dr. Roycroft ignores the fact that several well-funded CLECs operating in Ohio are growing and performing to the satisfaction of their investors. In response to Dr. Roycroft's argument that ILECs' advantages in terms of access to rights-of-way represents a barrier to entry, AT&T Ohio points out that federal and state law requires ILECs to provide other carriers with access to their facilities, and that intermodal providers (e.g., cable companies and wireless carriers) are already in the rights-of-way. As to the claim that wholesale rates

charged by the ILECs serve as a barrier to entry, AT&T Ohio argues that these rates are set by the state commission at just and reasonable levels, and that while these rates impact the CLEC competitors, these rates have no visible impact on the overall competitiveness of the marketplace. As to the claim that ILECs' long-term contract offerings serve as a barrier to entry, AT&T Ohio contends that BLES is rarely the subject of any special contracts, and in almost all cases is provided pursuant to tariffed rates, terms and conditions (AT&T Ohio Reply Comments at 29-32).

Additionally, Verizon North objects to the Consumer Groups' analysis of the barriers to entry test. Contrary to the Consumer Groups' analysis, Verizon North argues that a "no barriers to entry" finding does not equate to the conclusion that there are no challenges to entry in the competitive telecommunications market. While there are very difficult challenges to operate in a competitive market, Verizon North posits that challenges are not the same as barriers that prevent a carrier from even trying to compete. Verizon North maintains that the fact that even one competitor operates in a service territory of an ILEC proves that no barriers to entry exists (Verizon North Reply Comments at 3).

AT&T Ohio recommends that the Commission explicitly find that if a competitive test is met, there are no barriers to entry as contemplated by H.B. 218 (AT&T Ohio Initial Comments at 23). Cincinnati Bell suggests that the staff proposal should find that there are no barriers to entry in the applicable market in accordance with Section 4927.03, Revised Code, as guided by the policy statements set forth in Section 4927.02, Revised Code (Cincinnati Bell Initial Comments at 3). It is Verizon North's position that today it is self-evident that there are no barriers to entry in Verizon North's service territory as those barriers were removed years ago (Verizon North Initial Comments at 3). OTA maintains that the staff's proposal far exceeds any reasonable test for no barriers to entry. OTA asserts that the statute tests the possibility of competition at a competitor's choosing but does not require an assessment of the number of competitive efforts made. Additionally, OTA argues that H.B. 218 makes no distinction between residential and business barriers to entry (OTA Initial Comments at 9).

AARP disagrees with AT&T Ohio's recommendation that the Commission find, as a result of its competitive test, that there are no barriers to entry, arguing that the statutory requirement for the Commission finding no barriers to entry is entirely separate from the provisions of the competitive market test. AARP recommends that the Commission make a separate and specific fact-based finding as to whether or not barriers to entry exist. AARP questions Verizon North's statement that it is self-evident that there are no barriers to entry in Verizon North's service territory as those have been removed years ago. AARP argues that if Verizon North is referring to the 1996 Act requirements for market opening, the latest court and FCC actions limiting the list of unbundled network elements (UNEs) required to be offered by ILECs discounts any conclusion that markets are fully and irreversibly open to competition (AARP Reply Comments at 9-11).

Similarly, the Consumer Groups object to OTA's assertion that the statute makes no distinction between residential and business barriers to entry. The Consumer Groups contend that even if it were true that there are no barriers to entry in providing BLES to business customers, Dr. Roycroft's affidavits demonstrate that there remain barriers to entry for residential customers. Further, they maintain that the ILECs, in their initial comments, avoided any consideration of actual barriers to entry (Consumer Groups Reply Comments at 11-13).

The Commission recognizes that H.B. 218, codified in Section 4927.03(A)(3), Revised Code, requires the Commission to find that there are no barriers to entry in order to authorize alternative regulation for BLES. However, we do not accept AARP's and the Consumer Group's interpretation that any condition which makes entry more difficult constitutes a barrier to entry. The Commission acknowledges that the issues identified by AARP and the Consumer Groups as barriers to entry are indeed challenges that face any new entrant in a given market. 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. We agree with Verizon North that the statute does not require that there be no challenges to entry in the competitive telecommunications market. Challenges that face a new competitive entrant in a given market are not the same as barriers that prevent a carrier from even being able to compete in that market.

In regard to AARP's and Consumer Groups' recommendation that the Commission evaluate barriers to entry separately for the residential market, the Commission notes that the rules attached to this Order acknowledge, to some extent, the concerns expressed by these entities and, therefore, focus the tests on the residential market.

On balance, we find that if the ILEC satisfies one of the competitive market tests adopted by the Commission in Rule 4901:1-1-10(C), in a given telephone exchange area, this presents sufficient evidence that competitors for BLES are able to enter the market and compete with the ILEC in that market. As a related matter, by virtue of the fact that the adopted rules require a demonstration that competitors have captured a sufficient percentage of residential access lines, we conclude that such a demonstration signifies that there are no barriers to entry in that telephone exchange area. To this point, we clarify that the final adopted rules authorizing the ILECs to propose an alternative competitive market test require the ILECs to satisfy division (A) of Section 4927.03, Revised Code, in its entirety, including the demonstration that that there are no barriers to entry.

b. Reasonably available alternatives and competition for BLES

The Consumer Groups argue that the staff's proposed tests do not comply with Section 4927.03, Revised Code, because the proposed tests do not show that BLES is subject to competition or has reasonably available alternatives, as required by Section

4927.03(A)(2), Revised Code. In support of their position, the Consumer Groups attached the affidavit of Douglas S. Williams. Mr. Williams argues that intermodal services do not represent competition for, reasonably available alternatives to or functionally equivalent services for ILEC-provided BLES (Consumer Groups Initial Comments at 6-9).

According to AARP, BLES addresses the needs of that segment of the population that is not interested in the more sophisticated features of the telecommunications network. AARP posits that bundles exist for those users who appreciate features and are intensive users of the telecommunications network. AARP argues that any competition focused on service bundles will not serve to constrain prices for BLES. Therefore, AARP urges the Commission to provide for analysis and data that only pertain to BLES and to exclude any data regarding access lines included in service bundles (AARP Initial Comments at 4-8). AARP and the Department of Defense argue that cable telephony should not count as being a functionally equivalent substitute for BLES, unless it is demonstrated that it is equivalent to BLES on the key parameters of price, quality of service, terms and conditions and service definition. The Department of Defense argues that cable telephony may not be as attractive to business customers as it is to residential customers (AARP Initial Comments at 29; Department of Defense Reply Comments at 8). AARP acknowledges that wireless subscription recently increased due to mobility benefits and different calling plans to a point nearly equivalent to wireline end user service levels. AARP argues that wireless service is more of a complement to wireline service rather than a replacement for it because: (a) customers use wireless service for long distance calling; (b) customers typically cannot get bandwidth at the DSL/cable modem level for Internet access; (c) wireless service quality is variable; and (d) wireless service is often included as an element of a bundle which includes wireline service. Accordingly, AARP maintains that wireless service is not a substitute for basic local exchange residential service due to price, function and quality of service reasons (AARP Initial Comments at 29-32).

OTA disagrees with the Consumer Groups' argument that ILECs' BLES is subject to neither competition nor reasonably available alternatives. OTA maintains that cable providers market their VoIP service as a substitute for switch-based BLES and that wireless service provides the same functionality as BLES, including 9-1-1 service in most markets, and is available from multiple providers in virtually every market. OTA argues that H.B. 218 only requires the evaluation of "reasonably available alternatives" to BLES (OTA Reply Comments at 4).

Cincinnati Bell objects to Consumer Groups' and AARP's position regarding the lack of "competition" and "reasonably available alternatives" from competitive products that are exactly like BLES. Cincinnati Bell maintains that the true test is whether there is product substitution; products that, while not exactly the same, are viewed by consumers as substitutes. The company argues that the fact that there is clearly some wireless substitution for BLES is a sufficient indication that it is a reasonable alternative. Cincinnati Bell also argues that consumers' perception of BLES is changing, demonstrated by the fact

that only a small percentage of consumers subscribe to stand-alone BLES. The company maintains that every customer subscribing to a bundled service which includes BLES is, by definition, also a BLES customer. Further, Cincinnati Bell believes that just because an alternative service (i.e., wireless, VoIP and cable telephony) might include other features and functionalities, it does not change the fact that the alternative service provides the same basic functionality, including the ability to place and receive voice calls to other public switched telephone network end users. Therefore, Cincinnati Bell contends that these alternative services are functionally equivalent to BLES (Cincinnati Bell Reply Comments at 5-7).

Similarly, AT&T Ohio objects to the argument that in order for the ILEC to meet the competitive tests, competitors must offer a "perfect substitute" to BLES. AT&T Ohio maintains that, according to economic theory, competition causes firms to develop new products, services and technologies as substitutes for the original product. Such substitutes do not have to be perfect substitutes in order for competition to flourish (AT&T Ohio Reply Comments at 7). As to AARP's argument that wireless, VoIP, service bundles and cable telephony are not functionally equivalent to BLES, AT&T Ohio posits that each of these alternatives allow the customer to make and receive telephone calls, which is the essence of the functional equivalence (*Id.* at 21).

It is AT&T Ohio's opinion that the significant loss it experienced in retail and wholesale operations lately is attributed to the growing intermodal competition. In support of its argument, AT&T Ohio cites data included in the FCC's reports that: the quantity of wireless lines now exceeds the quantity of landlines in Ohio; that wireless phones are now a mass-market consumer device; in the second half of 2004, 5.5 percent of adults lived in households with only wireless phones; and one-third of all households receive more than half of their calls over wireless phones. Also, AT&T Ohio cites data included in the FCC's reports demonstrating the growth in the cable telephony market (AT&T Ohio Initial Comments at 15-17).

AARP characterizes AT&T Ohio's use of the FCC's reported data on the wireless and cable telephony markets as being an "apples to oranges" comparison on both a price and functional basis (AARP Reply Comments at 2-5). AARP argues that there are clear market segments in the residential market; customers that consider and purchase a bundled service and others that need little or nothing more than BLES (*Id.* at 7, 8). Likewise, the Department of Defense posits that intermodal competition is usually a complement rather than a replacement for conventional wireline telecommunications (Department of Defense Reply Comments at 8).

Similarly, the Consumer Groups object to the position expressed by AT&T Ohio and Cincinnati Bell that there are many competitors offering identical services or reasonably close substitute services to BLES. Specifically, the Consumer Groups assert that stand-alone BLES, and not bundles of services, is required to be examined pursuant to H.B. 218

with respect to whether there are identical services or functionally equivalent services. The Consumer Groups allege that since CLEC competition is declining, the ILECs must now rely on intermodal alternatives to justify alternative regulation for BLES. The Consumer Groups maintain that the companies cannot show that intermodal services meet the requisite statutory tests (Consumer Groups Reply Comments at 14, 15).

In reviewing the record, the Commission finds that some of the comments filed, as well as testimony from several customers at the local public hearings, indicate that consumers' perception of BLES is changing. More customers are substituting their traditional BLES with competitive service offered by alternative providers such as wireline CLECs, wireless, VoIP and cable telephony providers (Columbus Tr. at 27, 39; Cincinnati Tr. at 20, 33, 37, 39, 48; AT&T Initial Comments at 15-17). Although the products offered by those alternative providers may not be exactly the same as the ILECs' BLES offerings, those customers view them as substitutes for the ILECs' BLES. Thus, the alternative providers compete against the ILECs' provision of BLES. We also 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 the "analysis of competition" and "reasonably available alternatives" to 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 added). 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 offering as a reasonable alternative service, and a substitute to the ILECs' BLES. Additionally, customers which subscribe to these bundled offerings are by definition BLES customers. Accordingly, we find that, with technology advancements, alternative providers such as wireline CLECs, wireless, VoIP and cable telephony providers are relevant to our consideration in determining whether an ILEC is subject to competition or customers have reasonably available alternatives to the ILECs' BLES offering at competitive rates, terms and conditions.

We acknowledge, as the Consumer Groups and AARP argue, that there is a customer segment that does 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 this customer segment does not mean that the ILECs are facing less competition for BLES in those markets. Furthermore, we point out that the stand-alone BLES offering will continue to be available to this customer segment as an option under the rule we adopt today.

c. Competitive market tests

The Consumer Groups propose a two-part test as an alternative to the staff proposed market tests. This test is as follows:

> 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.
>
> The applicant must demonstrate in each requested exchange that at least 20 percent of total residential access lines are provided by unaffiliated facilities-based CLECs; that at least 35 percent of total residential access lines are provided by unaffiliated CLECs (both facilities-based and nonfacilities-based); and that BLES is available and is being provided by unaffiliated facilities-based CLECs throughout the exchange, at prices reasonably comparable to prices for the ILEC's BLES.

The Consumer Groups raise a concern about the possibility for the use of multiple tests by a single ILEC under the staff proposal and suggest that if ILECs are given the option to use their own competitive market test, they should be permitted only a single alternative test per ILEC (Consumer Groups Initial Comments at 26, 27). Specifically, Mr. Williams, in his affidavit, argues that in the self-defined alternative test, the ILEC could select different criteria than those proposed by staff and that an ILEC would have the opportunity to define different geographic and/or product markets (Williams Affidavit at 6). AARP supports the two-part test proposed by the Consumer Groups and recommends the two-part test as an alternative to the staff's proposed three tests (AARP Reply Comments at 12).

Cincinnati Bell objects to two aspects of the Consumer Groups' proposed competitive market test. First, Cincinnati Bell maintains that the test is based on the flawed premise that BLES is not subject to competition or does not constitute a reasonably available alternative to BLES exists unless substantial stand-alone BLES is provided by facilities-based CLECs in the same market. Second, Cincinnati Bell points out that although the Consumer Groups claim that their proposed test takes into account intermodal competition, the test itself clearly requires that the competitive showing be made solely with respect to CLECs. Further, Cincinnati Bell objects to the Consumer Groups' proposal to prohibit ILECs from proposing alternative competitive market tests in addition to the staff's proposed tests. Cincinnati Bell argues that the ILEC's ability to propose an alternative competitive market test is not a loophole because any such test would still have to satisfy the statutory requirements (Cincinnati Bell Reply Comments at 8, 9). AT&T

Ohio also objects to the Consumer Groups' supposition regarding the ILECs' option to use their own competitive market test, and further argues that the staff's proposal that an ILEC could use any of the proposed four tests (the three standard tests and the company-specific optional test) in an application for a given exchange is consistent with the requirement outlined in Section 4927.03(A)(1)(a)(b), Revised Code, that competition or reasonably available alternatives be present (AT&T Ohio Reply Comments at 28).

AARP also finds fault with the staff's proposed competitive market tests. Specifically, AARP does not support the basic premise of the staff tests that assumes a trend of declining residential access lines in aggregate is indicative of competitive market conditions for a specific service such as BLES. AARP argues that a change in aggregate residential access line volumes is significantly influenced by demand factors other than a demand for BLES. For example, AARP points out that as broadband connections have grown, second line demand levels have fallen and that this does not necessarily indicate that competition for BLES lines is increasing. AARP, therefore, recommends that whenever access line data is used, the Commission must ensure that AARP and any other interested parties have adequate data to validate and verify the information. In addition, AARP points out that H.B. 218 uses the term providers and thus the emphasis in the rules should be on the actual provision, rather than simply an offering of BLES to consumers (AARP Initial Comments at 34-42).

AARP also posits that, due to court decisions and FCC rules that eliminated UNE-P, CLECs may begin to transition to be "niche" players and limit their offerings to focus on market segments that have the potential to maximize their profit. Accordingly, AARP recommends that the Commission make clear in the rules that UNE-based service provided by CLECs does not count as being functionally equivalent to BLES. According to AARP, only CLEC services provided on a facilities basis are functionally equivalent to BLES on the key parameters of price, quality of service, terms and conditions. AARP argues that its recommendation is supported by AT&T Ohio's recognition that traditional CLEC competition is a rapidly eroding competitive factor (AARP Initial Comments at 25; AARP Reply Comments at 18).

The Department of Defense believes that the staff proposal does not provide protections for business users. In particular, the Department of Defense takes issue with the requirement of gauging the percentage of residential customers served by competitors. The Department of Defense points out that there is a general misconception that business users have more alternatives for telecommunications services than residential customers. While the Department of Defense acknowledges that ILECs face intermodal competition from providers such as wireless, cable telephony and VoIP providers, the Department of Defense argues that these services are often a complement and not a substitute for traditional wireline services for business users due to reliability and services offered by these providers. Furthermore, the Department of Defense points out that large business users often have remote locations in rural areas where competition may have not yet

developed (Department of Defense Initial Comments at 7, 8). The Department of Defense recommends that the staff tests be applied separately for business and residential lines on an exchange basis. According to the Department of Defense, basic business services should only receive pricing flexibility if the services meet the business test for that exchange (Department of Defense Initial Comments at 11, 12).

OTA disagrees with the Department of Defense's argument that business service is not competitive because it is not competitive statewide. OTA acknowledges that while no service is competitive in every locale statewide, business service is competitive in many markets. OTA continues that any ILEC applying for BLES alternative regulation in a given market would have to demonstrate that there are no barriers to entry in that market (OTA Reply Comments at 6). Similarly, Cincinnati Bell points out that there has been substantial competition for business customers by facilities-based CLECs like MCI, Time Warner, NuVox and Level 3 for a number of years as evidenced by competitive bidding for large business customers' contracts by telecommunication carriers. Cincinnati Bell also points out that the alternative competitive market test would apply on a market-specific basis, not statewide (Cincinnati Bell Reply Comments at 12). Contrary to Department of Defense's allegations that large business users often have remote locations in rural areas where no competitive alternatives are available, AT&T Ohio argues that competition for providing services to the federal government is significant, as demonstrated by information from the General Service Administration's website (AT&T Reply Comments at 36, 37).

It is OTA's position that none of staff's proposed tests could be met by any carrier in Ohio. The tests fail, according to OTA, for several reasons, including the reliance on diminishing CLEC competition; the arbitrary measure of line loss from the year 1996 rather than each company's apex of access lines; and absolute measures that do not account for the possibility of competition. OTA recommends that the Commission adopt a "bright line" test that relies on practical observation and the capability for competition. OTA maintains that such a test would be a more appropriate measure of no barriers to entry than the consideration of arbitrarily measured line loss or a headcount of unaffiliated CLECs offering competitive service to residential customers. OTA points to Missouri, Michigan and Arkansas as states that have adopted significantly more straightforward measures than those proposed by the staff (OTA Initial Comments at 8, 9).

Furthermore, OTA proposes revisions to the proposed tests including: (1) the use of the term "market area" in lieu of "exchanges"; (2) the use of the term to "alternative providers" in lieu of "CLECs"; (3) the lowering of most access line percentages; (4) the removal of all references to residential service; and (5) in the first test, the use of "the year in which the applicant served the greatest number of access lines" in lieu of "1996." Finally, OTA proposes an additional test as follows:

> An applicant must demonstrate in each requested market area the presence of at least five unaffiliated alternative providers,

> and at least five percent of total company access lines have been lost since the year in which the applicant served the greatest number of access lines

(OTA Initial Comments at 10; Exhibit OTA-1 at 16, 17).

As to the arguments of OTA, Cincinnati Bell and AT&T Ohio that the Commission should lower the staff's proposed access lines percentages, the Department of Defense argues that ILECs still enjoy substantial market power at the statewide level as demonstrated by the FCC's most recent "Local Telephone Competition Report," which purportedly reflects that CLECs had only 15 percent of the Ohio market as of December 31, 2004.[6] The Department of Defense also points to AT&T Ohio's acknowledgement in its initial comments that the company has only 11 exchanges in Ohio where more than 20 percent of residential access lines are provided by unaffiliated CLECs (Department of Defense Reply Comments at 7).

Cincinnati Bell urges the Commission to reject the staff's proposed competitive market tests because the tests focus almost exclusively on CLECs and do not take into account the competitive market as a whole, including intermodal providers. Cincinnati Bell points out that only one test allows for the demonstration of intermodal competition, but only after the carrier has first shown a fifteen percent provision of CLEC access lines. According to the company, the Commission must not ignore the evidence that more and more customers are substituting services like VoIP or wireless for their traditional local service. In sum, Cincinnati Bell contends that by not giving equal weight to intermodal competitors in evaluating the level of competition, ILECs are unduly disadvantaged by effectively keeping the companies under strict regulatory pricing constraints unless a particular type of competitor enters the market (Cincinnati Bell Initial Comments at 3 -8).

Cincinnati Bell agrees with OTA that the competition from CLECs is continuing to diminish and, therefore, submits that any carrier that does not currently meet the staff proposed tests today would be unlikely to ever meet such a test. In addition, Cincinnati Bell claims that it is almost impossible for an ILEC to present definitive evidence on how many customers CLECs or other competitors serve that were never served by the ILEC. Cincinnati Bell also disagrees with a starting point of 1996 to gauge access lines lost to competitors as such a starting point disregards any growth that occurred in the first few years after the passage of the 1996 Act. To this end, Cincinnati Bell, like OTA, proposes that the starting point for comparison be the year in which the ILEC reached its peak number of access lines (*Id.* at 9-11).

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6 Federal Communications Commission, Industry Analysis and Technology Division, *Local Telephone Competition as of December 31, 2004*, published July 2005, Table 6.

In addition, Cincinnati Bell proposes its own competitive market test that Cincinnati Bell believes more closely meets the statutory factors than the staff's proposed test. The test consists of the following five factors which all need to be satisfied:

(1) At least five competitive providers must offer a service plan that assigns numbers from the North American Numbering Plan (NANP) and allows for voice calling to any other person or business on the PSTN.

(2) At least three of the competitive providers must be unaffiliated, facilities-based providers regardless of the type of facilities or technology used to provide the service (e.g., circuit-switches, packet switches, copper wire, fiber optic cable, coaxial cable, wireless, power lines, Internet protocol, etc.).

(3) Each of the facilities-based competitive providers need not currently be serving all areas within the market, but all of the ILEC's service territory within the market must be within the service area of at least one facilities-based provider as demonstrated by evidence that the ILEC has ported numbers to competitive providers from every rate center in its territory within the market.

(4) The ILEC has fully complied with the market-opening provisions of 47 U.S.C. 251.

(5) The ILEC has fully complied with the Commission's Minimum Telephone Service Standards (MTSS) over the five calendar years prior to the ILEC's filing of its application as evidenced by a lack of penalties, fines or forfeitures against the company for violation of the quality standards established in the MTSS rules.

(*Id.* at 14).

OTA points out that the requirement of Cincinnati Bell's competitive market test mandating that the ILEC fully comply with the Commission's MTSS, is inappropriate as the statute does not have any condition other than those related to barriers to entry. OTA argues that a new regulatory framework neither affects an ILEC's requirement to adhere to the MTSS, nor does it diminish the Commission's authority to enforce the MTSS (OTA Reply Comments at 6).

AT&T Ohio believes that the staff's proposed competitive tests are outdated and significantly underestimate the impact of intermodal competition. AT&T Ohio divides its access line growth and competition into four phases. AT&T Ohio explains that it continued

to see residential access line growth until the third phase which lasted from 2002 until 2003, when it started experiencing significant retail line loss. During this period, however, AT&T Ohio notes that, while it experienced residential access line loss, there was wholesale line gain. According to AT&T Ohio, the market has changed dramatically in the last two years (beginning in 2004), which AT&T Ohio claims is the fourth phase of its market cycle. AT&T Ohio argues that during this phase it has noted the decrease of both retail and wholesale access lines which can only be explained by the increase in intermodal competition. Like Cincinnati Bell, AT&T Ohio finds fault in the staff's proposed test due to its reliance on a CLEC line-loss metrics test that will be increasingly difficult for an ILEC to meet (AT&T Ohio Initial Comments at 8-19).

In order to improve the staff's proposal, AT&T Ohio suggests that the thresholds for each competitive test should be changed by drastically reducing reliance on CLEC competition and by completely eliminating the requirement to demonstrate competitive losses on an exchange basis. While AT&T Ohio does not agree that the Commission should rely on any metrics test for determining the existence of competition, AT&T Ohio believes that, if necessary, only one test should be adopted. AT&T Ohio's recommended test is:

> An applicant must demonstrate that it has at least five percent fewer retail residential access lines compared to a previous time period since 1996 (excluding the impact of line losses to affiliated CLECs), and the presence of at least five intermodal carriers serving the residential market.

(AT&T Ohio Initial Comments at 21-23).

AARP argues that under AT&T Ohio's proposed test, price deregulation of BLES would be permitted in a market in which AT&T Ohio has a ninety-five percent market share, which is considered a highly concentrated monopolistic marketplace (AARP Reply Comments at 14, 16).

Verizon North also takes issue with the staff proposed tests. Verizon North believes that it is unreasonable to subject an ILEC to a competitive market test before it can change its basic local exchange rates. Verizon North maintains that a level of competition test is not required by H.B. 218. If the Commission deems that a market test is necessary, Verizon North recommends that the test is satisfied if there is at least one intermodal carrier providing functionally equivalent services in the market to customers in Verizon North's service territory. In addition, Verizon North also does not agree with staff's proposal to use 1996 as the basis year for calculating access line loss and believes that a more reasonable threshold should be the year since 1996 that a carrier had the greatest number of lines. Verizon North also recommends that all access lines, both residential and business, should be included in any calculation of lost access lines. Verizon North reiterates that a level of competition test, like that proposed by staff, is unnecessary. According to Verizon

North, the statute only requires that there be no barriers to entry. Nevertheless, the company recommends that, if the Commission deems that the alternative market tests are necessary, then the Commission should modify the staff proposal as follows: a) five percent total statewide line loss from the highest access line count of an ILEC since 1996; b) a minimum of three unaffiliated CLECs and/or intermodal carriers providing BLES within the ILEC's EAS local calling area; or c) a minimum of five intermodal carriers within the ILEC's statewide serving territory (Verizon North Initial Comments at 3-6).

The Department of Defense and AARP object to Verizon North's proposal to use a year since 1996 in which a carrier had the greatest number of lines. Department of Defense and AARP argue that the increase and subsequent decline in total lines is due to a change in Internet access technology, causing a declined need for a second line for dial-up, and has very little to do with progress in wireline competition (Department of Defense Reply Comments at 14). AARP argues that Verizon North's proposal would lead to premature and inappropriate price deregulation of BLES (AARP Reply Comments at 17).

OCTA opines that the ILECs' criticism that the staff's proposed competitive market tests ignore intermodal competition, is misplaced. OCTA points out that an ILEC that can satisfy the third test, which considers intermodal providers, may qualify for alternative regulation of BLES and other tier one services. OCTA additionally states that not every market has CLECs or intermodal carriers, that the staff's proposal provides various alternative scenarios to fit different market situations, and that a single test, as proposed by the ILECs, may not fit all situations. Accordingly, OCTA urges the Commission to adopt the staff's proposed three alternative tests (OCTA Reply Comments at 3).

The Consumer Groups maintain that the competitive market tests proposed by AT&T Ohio, Cincinnati Bell, Verizon North and OTA do not demonstrate the existence of competition or reasonably available alternatives for BLES (Consumer Groups Reply Comments at 15). Mr. Williams opines that the AT&T Ohio and Verizon North tests requiring that the ILEC lose a mere five percent of residential lines since 1996 (in AT&T Ohio's test) or the apex of the ILEC's line count since 1996 (in Verizon North's test) across the entire ILEC service area, inappropriately includes lines that are not stand-alone BLES lines. The Consumer Groups opine that those tests present an unreasonably low standard to demonstrate competition for BLES and to gain alternative regulation. Consumer Groups' witness Williams also argues that the second criteria, offered by AT&T Ohio and Verizon North, suffers from the same problem as staff's third test, as it relies on intermodal providers which, in his opinion, do not provide functionally equivalent or substitutable services to BLES. As to Cincinnati Bell's proposed competitive market test, Mr. Williams argues that the test attempts to equate with BLES any voice service plan that utilizes telephone numbers assigned from the NANP and that the test relies on facilities-based alternative providers that, in his opinion, do not provide functionally equivalent or substitutable services to BLES. Cincinnati Bell's test is further flawed, according to Mr. Williams, as it requires only a single competitor (affiliated or not affiliated with the ILEC)

to the ILEC for any given customer and requires the ILEC to comply with existing federal (i.e., 47 U.S.C. 251) and state (i.e., MTSS) requirements. Mr. Williams opines that OTA's first three proposed competitive market tests represent a modification to the staff's proposed tests that further weaken the staff's proposal. Therefore, Mr. Williams opines that OTA's proposed market tests should be rejected by the Commission. As to the fourth proposed test offered by OTA, Mr. Williams opines that it suffers the same problem as AT&T Ohio's proposed test and, in addition, it does not restrict access line loss to only residential customers (Williams Reply Affidavit at 18-30).

OCTA objects to the staff proposal to allow ILECs to propose alternative competitive market tests. OCTA urges the Commission to set the standards by which an alternative regulation application for BLES will be judged in advance of the filing of such a test. Therefore, OCTA believes that only the three predefined tests provided in staff's proposal should be the standard on which all applications are judged. Further, OCTA recommends that the staff's third test should be amended such that the word "unaffiliated" is added before "intermodal" so that ILECs cannot count affiliated providers of intermodal service (OCTA Initial Comments at 2, 3). AT&T Ohio also does not embrace the staff proposal to allow ILECs to propose alternative competitive market tests stating that there is no clear indication as to the kind of test that would be appropriate. AT&T Ohio also posits that since such alternative tests, will not be subject to automatic approval, they will cause delays in the regulatory process. Additionally, AT&T Ohio objects to OCTA's suggestion to add an "unaffiliated" qualification to the "intermodal carriers" in the third test proposed by staff. AT&T Ohio argues that the customers' perspective of the availability of competitive options is what matters in the analysis regardless of the affiliation between competitors (AT&T Ohio Reply Comments at 18).

Cincinnati Bell objects to OCTA's proposal to prohibit ILECs from proposing alternative competitive market tests. Cincinnati Bell maintains that staff's proposal only provides limited opportunities to show competition in a market. Cincinnati Bell argues that there are other ways to demonstrate that a market is competitive, and all of them can not be predetermined (Cincinnati Bell Reply Comments at 13, 14).

Upon consideration of all the arguments regarding the competitive market tests, the Commission concludes that the staff proposed tests should be adopted, with some modifications, and that an additional test should be adopted as well. First, we will address objections raised by the Consumer Groups and OCTA regarding staff's proposal to allow a single ILEC to apply alternative tests to different telephone exchange areas and to allow that ILEC the option to use a company-specific alternative competitive market test to satisfy the statutory criteria. We note that, as outlined in the proposed rules, the company-specific alternative test would have to satisfy the statutory requirements of Section 4927.03(A), Revised Code; will not be subject to the automatic time frame applicable to the predefined tests; and will be subject to scrutiny by the Commission and all interested parties. There are different ways to satisfy the statutory requirements and, due to

technology advancement and the potential entry by new players into the telecommunications market, it is difficult to anticipate and address all of these methods in a written rule. The Commission agrees with OCTA that a single test does not fit all situations and that the staff proposal provides various alternative scenarios to fit different market situations. Consequently, we determine that ILECs should have the opportunity to demonstrate to the Commission's satisfaction that the statutory requirements are met via a company-specific alternative market test through presenting different criteria and/or different market proposals. Accordingly, we find that the staff's proposal to have some predefined objective tests available to the ILECs, in addition to allowing the ILECs the option to design their own company-specific test, is reasonable, consistent with the statute, and shall be adopted in the final Rule 4901:1-4-10(C).

Another objection to the staff proposed competitive market tests is raised by the Consumer Groups and AARP. They argue that the criteria included in these tests could include CLECs' lines as part of a bundled service or high-speed Internet service, which are not BLES-only lines, and accordingly fails to measure effective competition for BLES. As previously stated, H.B. 218 does not restrict the "analysis of competition" and "reasonably available alternatives" to competitive products that are exactly like BLES. We found in the prior section of this order that alternative providers such as wireline CLECs, wireless, VoIP and cable telephony companies are relevant to our consideration in determining whether an ILEC is subject to competition or customers have reasonably available alternatives. Accordingly, we find the staff's proposed criteria of using CLEC-provided residential access lines to be reasonable regardless of whether the customer is subscribing to BLES only or bundled services.

Next, we address AT&T Ohio's, Cincinnati Bell's, Verizon North's and OTA's objections to the staff's competitive market tests. They contend that the market tests improperly rely on CLEC competition and CLEC residential line counts, while underestimating the impact of intermodal competition. These commentors opine that CLEC competition is no longer the predominant form of competition the ILECs face for BLES (AT&T Ohio Initial Comments at 8-19; Cincinnati Bell Initial Comment at 9). As discussed earlier, the comments reflect that intermodal competitors are gaining more ground in the telecommunications marketplace as more customers use the services of alternative providers to replace the ILECs' BLES service. Although we understand the ILECs' concerns, we do not fully agree with the ILECs' view of the staff's proposed three predefined tests for several reasons. First, we find that the staff's third proposed test considers the existence of both the CLECs and alternative providers, including intermodal competitors, in a given telephone exchange area, and accepts a lower percentage to pass the test in recognition of alternative providers. Second, we find that although some ILECs may not encounter CLEC competition in their service territory, other ILECs may have several CLECs serving residential customers in their service territory and, therefore, can utilize any of the staff's proposed tests on an individual, telephone exchange area basis. Accordingly, we find the reliance on the existence of CLEC competition in some competitive market tests

and on both the CLEC and alternative providers in others, as proposed by the staff, to be reasonable. Moreover, the staff's proposal provides the ILECs with flexibility in demonstrating compliance with the statutory requirements and addresses the factors identified in division (A) of Section 4927.03, Revised Code. Therefore, the staff's three tests shall be adopted in the final adopted Rule 4901:1-4-10(C).

In addition, based on the comments in this docket, we are adopting a fourth predefined competitive market test to be incorporated within the final adopted Rule 4901:1-4-10(C). In adopting this additional predefined competitive market test, we are addressing the arguments concerning technology advancement, the changing competitive market characteristics since the enactment of the 1996 Act and various concerns raised by the ILECs about their market experience. We would also note, as pointed out earlier, that ILECs are not precluded from proposing their own company-specific competitive market test, consistent with the statute.

In evaluating alternative competitive market tests proposed by various commenting parties to replace the staff's proposed three predefined competitive market tests, we note that there are two themes introduced: one advanced by the Consumer Groups; the other advanced by AT&T Ohio, Cincinnati Bell, Verizon North and OTA. We find the single competitive market test proposed by the Consumer Groups to be unreasonable, and shall be rejected for the following reasons: (1) the first part of the test lacks specific objective measures to be used in the evaluation of the barriers to entry requirement in a given application; (2) the second part of the test fails to consider the impact of competition from alternative providers; (3) the second part of the test sets an unreasonably high standard in measuring market competition; and (4) a single competitive market test denies the ILECs the opportunity to satisfy the statutory requirement in different telephone exchange areas exhibiting different market characteristics that would not fit a single criterion.

We also find the alternative competitive market tests proposed by AT&T Ohio, Cincinnati Bell, Verizon North and OTA to be unreasonable, and those tests shall be rejected for the following reasons: (1) these tests would be applied to the entire ILEC territory within the state (in the case of AT&T Ohio, Verizon North and OTA) or within an MSA (in the case of Cincinnati Bell) which we found to be unreasonable in a previous section of this order; (2) all of the proposed tests apply an unreasonably low standard in measuring market competition that effectively would deem most of the ILECs' service territory statewide to be competitive, irrespective of the availability of competing alternative providers; and (3) AT&T Ohio, Cincinnati Bell, and Verizon North propose a single competitive market test to replace the three proposed tests by the staff, which contradicts their own arguments on the record that a single test would deny the ILECs the opportunity to satisfy the statutory requirement in different markets exhibiting different market characteristics that would not fit a single criterion.

As a final matter, the Commission addresses the criticisms of the Department of Defense relative to staff's failure to consider the business market as part of the competitive market tests. In our order adopting elective alternative regulation, the Commission already determined that all ILEC services other than BLES and basic caller ID service are subject to competition or have reasonably available alternatives. Based on that finding, we adopted, under our authority granted by Section 4927.03, Revised Code, alternative regulatory treatment for both business and residential nonbasic services provided by any ILEC which opts into an EARP. Thus, today, all but one of our large Ohio ILECs are operating pursuant to an EARP, which grants considerable upward pricing flexibility for those business services about which the Department of Defense expresses concerns. For that reason, the Commission concludes that the staff's proposed focus on the residential market for purposes of the competitive market tests is appropriate.

E. 4901:1-4-11 Pricing of BLES and other tier one services

The staff proposed Rule 4901:1-4-11(A) states that, in each telephone exchange area where an ILEC meets at least one of the competitive market tests set forth in paragraph (C) of Rule 4901:1-4-10, the ILEC will be granted pricing flexibility for tier one core and noncore services. Specifically, the ILEC would be afforded tier two pricing flexibility for all tier one noncore services. However, for BLES and basic Caller ID, the staff stated that the pricing flexibility shall be limited to rate increases of no more than twenty percent per year. Further, staff included a proposal for banking, up to one year, any unused increases for BLES and basic Caller ID.[7]

Additionally, the proposed rule prohibits an ILEC from pricing its tier one retail services below the long-run incremental cost of each service plus a common cost allocation. The proposed rule also requires that an ILEC seeking BLES alternative regulation continue to charge Lifeline customers the applicable rates in existence for stand-alone BLES at the time that ILEC files an application for alternative regulation of BLES. To the extent that an ILEC seeks, pursuant to its application for alternative regulation of BLES, to also increase its rates for Lifeline customers, it must adjust the Lifeline discount in order to ensure that there is no net rate increase to qualifying Lifeline customers.

Finally, the proposed rule requires that all ILECs granted pricing flexibility for BLES and other tier one services shall comply with the customer notice requirements set forth in Rule 4901:1-6-17, O.A.C.

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7 Paragraph (B) of this proposed rule exempts certain tier one core services from pricing flexibility. Additionally, pursuant to the proposed rule, the Commission would have the opportunity to add any new services to this list to the extent that it determines that a specific public policy interest exists.

1. Pricing flexibility for BLES and basic Caller ID

The Consumer Groups argue that the proposed rule would allow an ILEC that has been granted BLES and basic Caller ID pricing flexibility the ability to increase rates on an annual basis more than six times the current inflation rate and almost double most ILECs' cost of capital (Consumer Groups Initial Comments at 28). The Consumer Groups point out that the Commission has already determined that the ILECs' current rates are reasonable. Thus, they argue that to permit a twenty percent increase which has no relationship to the absence of entry barriers for BLES would be unreasonable (*Id.* at 30). AARP agrees with the Consumer Groups that the staff's proposed twenty percent limit on annual rate increases for BLES is insufficient to protect consumers. It believes that the current rates are presumed to be just and reasonable, and that there is no reason to permit the increases, particularly when these increases are not justified based either on costs or productivity (AARP Reply Comments at 39).

The Consumer Groups further suggest that the Commission should examine whether the ILECs' current rate structures are still appropriate given the passage of time and changes in technology. The Consumers Groups claim, for instance, that Sprint's current rate structure was approved in 1981. They argue that Sprint's rate structure includes banded rates and zone charges that are not appropriate today (Consumer Groups Initial Comments at 30, 31).

To the extent that rate relief is granted for BLES, the Consumer Groups recommend that the Commission adopt a phased-in approach for any resulting rate increases. According to the Consumer Groups, the phased-in increase should occur over a five- to seven-year period limited to no more than three percent per year, with only one increase per year, up to a total rate cap of twenty percent for the duration of the plan. The Consumer Groups claim that this would be similar to the approach that was adopted by the Commission for tier one noncore service in the elective alternative regulation proceeding (*Id.* at 32).

For the same reasons it disagrees with staff's proposed twenty percent annual limit, Cincinnati Bell disagrees with the Consumer Groups' proposed three percent annual limit and overall limit of twenty percent over five years. Cincinnati Bell repeats its contention that the rate increases will be limited by competitive alternatives. According to Cincinnati Bell, artificial price controls should not exist in a competitive market (Cincinnati Bell Reply Comments at 11). Verizon North asserts that the Consumer Groups' proposal to impose price controls on BLES moves in the opposite direction from that mandated by H.B. 218 and is unlawful. Verizon North avers that under the statute, market forces will restrain BLES rates. Verizon North further asserts that the Commission should remove any artificial price controls from the proposed rules altogether and let the market set BLES rates under BLES alternative regulation pursuant to the statute (Verizon North Reply Comments at 3, 4).

OTA argues that the Commission should allow the competitive market to regulate pricing limits. OTA describes the proposed rules as a "command-and-control" approach to BLES pricing that is likely unnecessary and unworkable. OTA argues that if a market is determined by the Commission to be competitive with no barriers to entry, then BLES should not continue to be governed by a tier one price-control method with pricing limits. OTA further argues that, in light of the fact that no one can predict what pricing adjustments may be necessary in a competitive environment, artificial pricing constraints are inappropriate, counterproductive, and contrary to the intent of the legislature. OTA believes that once competition in a market has been determined to exist, this rule should convert the regulatory treatment of tier one core services to that which is currently in effect for tier one noncore services pursuant to Rule 4901:1-4-05(C)(3)(b), O.A.C., with the exception of the twenty-four-month cap (OTA Initial Comments at 10, 11).

AARP believes that the twenty-percent cap should be replaced with zero percent due to the fact that there is no reason to permit twenty percent increases when the cost of service is declining. In support of its opinion, AARP cites to Cincinnati Bell's contention that "intermodal competitors may control ILEC pricing behavior more effectively than CLECs because the intermodal competitors' cost structures may be lower than that of a circuit-switched competitor"[8] (AARP Reply Comments at 41).

AT&T Ohio maintains that adopting the Consumer Groups' proposal would violate the prohibition against unduly favoring one group of providers to the disadvantage of another. As such, AT&T Ohio believes that the Consumer Groups' proposal should be rejected (AT&T Ohio Reply Comments at 39). AT&T Ohio points out that pricing flexibility has been available for tier two services since 2003, and has been available for competitive telecommunication services since 1993.

Additionally, AT&T Ohio states that all of the ILECs' competitors, including CLECs and intermodal providers price their services to the marketplace. Therefore, AT&T Ohio believes that the Commission must revise its rules to permit the maximum rate for ILEC tier one offerings to be established based on the marketplace in order to mirror the treatment afforded CLECs providing the same services. AT&T Ohio believes this action will comply with the statute, properly reflect the competitive nature of BLES, and be consistent with the pricing flexibility afforded other services that the Commission has already deemed to be competitive (*Id.* at 6, 7).

Further, AT&T Ohio points out that its BLES prices have not increased since 1985 (*Id.* at 14). The company reiterates that if an ILEC passes the competitive test that AT&T Ohio has proposed, then the Commission should forbear from regulating retail prices (*Id.* at 37). On the other hand, AT&T Ohio believes that if temporary or transitional limits are

8 Cincinnati Bell Initial Comments at 7.

necessary, then the Commission could consider upward pricing limits of a twenty percent cap for each of the first two years of the alternative regulation of BLES plan with no limits thereafter (AT&T Ohio Initial Comments at 24).

The Department of Defense does not agree with the ILECs' assertion that the twenty-percent annual rate cap is unnecessary. Department of Defense maintains that competition or the absence of barriers to entry in a market is not appropriate grounds for eliminating the maximum limits on prices (Department of Defense Reply Comments at 15, 16). The Department of Defense recommends that in all exchanges passing one of the competitive tests, a carrier should be permitted to adjust prices of services designated for price flexibility as often as it wishes, but the increases should be capped at ten percent in any twelve-month period (*Id.* at 17, 18).

The Consumer Groups assert that AT&T Ohio and the other ILECs fail to acknowledge that their competitors only offer packages of services and do not offer stand-alone BLES (Consumer Groups Reply Comments at 25). The Consumer Groups state that the ILECs' goal is to obtain the ability to raise BLES rates in order to then decrease rates for services and packages where they face competition. The Consumer Groups do not believe that the General Assembly intended that H.B. 218 should allow ILECs to lower prices for services facing competition at the expense of customers who do not have competitive alternatives (Consumer Groups Reply Comments at 27).

The Commission recognizes that this section of the rules has the greatest impact on consumers, and, therefore, many consumers provided comment either at the public hearings or through letters filed in this docket as to the impact of any rate increases. Specifically, consumers expressed a concern that an increase in BLES would be untenable for senior citizens, low-income customers, and the working poor due to the current cost of living (e.g. Cincinnati Tr. at 17-19; Dayton Tr. at 12, 13; Athens Tr. at 16-19). Initially, we would like to point out that staff's proposal never contemplated that a twenty-percent per year increase to BLES would be allowed everywhere in Ohio upon adoption of the final rules.

First, as explained previously in these rules, an ILEC must have or be able to apply for elective alternative regulation before it can even propose a plan for alternative regulation of BLES. Next, an ILEC must prove, utilizing one of the four tests or a self-defined test, that competition and no barriers to entry exist in an exchange. Only those exchanges where the test is met, will an ILEC be eligible to increase prices. Finally, the staff's proposed twenty percent served as a limit on upward pricing flexibility and did not envision that a company would necessarily utilize any or all of the twenty-percent, in a competitive environment.

After consideration of the comments filed in this docket and the public comments made at the local public hearings, the Commission concludes that proposed Rule 4901:1-4-

11 should be modified. This rule spells out the alternative regulatory treatment to be afforded BLES and other tier one services, in the event an ILEC demonstrates that it meets any of the competitive market tests set forth in final Rule 4901:1-4-10, O.A.C. As originally proposed, the rule allowed upward pricing flexibility for BLES and basic caller ID, but such pricing flexibility was limited to no more than twenty percent a year, with the ability to bank up to one year, if not utilized. The Consumer Groups, AARP and public witnesses opposed staff's proposal and suggested, at the very least, that upward pricing flexibility be far more limited. While we agree with staff that an ILEC that passes a competitive market test in any exchange warrants additional pricing flexibility for BLES and other tier one services, the Commission believes that the public interest demands that we modify the alternative regulatory pricing flexibility proposed by staff.

In order to establish alternative regulatory requirements for BLES and other tier one services, the Commission must, under the law, not only find that the services are subject to competition or have reasonably available alternatives, but we must also find that the alternative regulatory requirements are in the public interest. To guide us in determining whether alternative regulatory requirements 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 points out, many of the ILECs have been charging the same rates for BLES since the early 1980's. Therefore, in the final rules, we have attempted 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 this conclusion, we have considered the regulatory treatment of competing alternative providers, including wireline CLECs, wireless, VoIP and cable telephony providers. We do not believe that the alternative regulatory treatment we adopt herein will unduly disadvantage the ILECs, since all ILECs operating under an EARP already have the ability to provide bundled BLES offerings at market-based rates without prior Commission approval, just as alternative providers do. Additionally, the Commission believes that the pricing flexibility we have allowed gives the ILECs appropriate latitude to respond to the market, particularly in light of the ILECs' own arguments that competitive pressures would prevent them from utilizing the full flexibility proposed by the staff.

The Commission, therefore, concludes that if an ILEC satisfies one of the adopted competitive market tests in an exchange, the ILEC will be permitted upward pricing flexibility for BLES and basic Caller ID. As clarified in the adopted Rule 4901:1-4-11,

O.A.C., rather than allowing an annual percentage rate increase along with the permissible banking of increases, the Commission will only allow eligible ILECs the ability to increase their BLES and basic caller ID rates on an annual basis no more than a $1.25 above the ILEC's monthly BLES rates and $.50 above the monthly basic caller ID rate in those telephone exchange areas where the competitive test has been met with no banking allowed. This pricing flexibility shall remain in effect until the Commission performs a further review consistent with H.B. 218.

2. Pricing flexibility for tier one noncore services

In regard to tier one noncore services, the Consumer Groups suggest that the Commission has correctly recognized tier one noncore "as those services that are essential but nevertheless retain such a high level of public interest that these services require regulatory oversight." Therefore, Consumer Groups argue that these services should not be afforded market-based pricing flexibility. According to the Consumer Groups, tier one noncore services, such as second lines, are essential to customers who prefer dial-up Internet access due to cost or lack of availability of broadband services. The Consumer Groups further argue that call waiting is a popular service and, therefore, should not receive pricing freedoms as proposed by the staff. The Consumer Groups also believe that under the proposed rule, justification for increases would not be required (Consumer Groups Initial Comments at 28-30).

The Consumer Groups propose that the Commission continue rate caps for second lines and call waiting. They recommend that the Commission cap such rates for 24 months and then limit increases to those services to ten percent per year with pricing flexibility limited to a cap of two times the initial rates. Also, the Consumer Groups claim that services such as toll restriction and toll blocking (that allow customers to control their bills) and services such as call trace, per line blocking and nonpublished number (that allow customers to protect their privacy) should be free, or at least protected from rate increases (*Id.* at 32, 33).

Once competition in a market has been determined, both OTA and AT&T Ohio agree with staff's proposal to convert the regulatory treatment of the current tier one noncore services to tier two regulatory treatment (OTA Initial Comments at 11; AT&T Ohio Initial Comments at 24). They point out that none of these services are subject to any kind of rate regulation when offered by their competitors.

The Commission finds that the Consumer Groups have misquoted the proposed rule regarding tier one noncore services. Rule 4901:1-6-20 O.A.C, states that "tier one services includes basic local exchange service as defined in Section 4927.01 of the Revised Code, as well as those services that are <u>not</u> essential but nevertheless retain such a high level of public interest that these services still require regulatory oversight" (emphasis added). As these services are not essential, and will only be subject to tier two regulatory

treatment where competition has been proven through a competitive test, the Commission agrees with the staff and adopts the proposal for tier one noncore services, as part of the final rules.

As to the Consumer Groups' belief that Call Trace, per line blocking and nonpublished number service should be free or protected from rate increases due to the need for consumers to control their bills and their privacy, the Commission's existing regulations and pricing constraints pertaining to customer privacy and number disclosure as found in Case No. 93-540-TP-COI, *In the Matter of the Commission's Ordered Investigation into the Forwarding of the Calling Party's Number Via SS7 or Other Future Signaling Technologies*, will continue to apply as will all other existing Commission rules and regulations.

3. Banking

The Consumer Groups opine that the proposed banking provision would only exacerbate the effect of the proposed increases. The Consumer Groups argue that the proposal would create the possibility of forty percent increases for BLES within a thirteen-month period. They argue that the proposed pricing freedoms provide too much leeway while the ILECs can continue to control between seventy-five to eighty-five percent of the residential market under the staff's three proposed market tests. The Consumer Groups further claim that the banking proposal is flawed because there is no provision regarding how the carry-over percentage would be treated in subsequent years if the ILEC did not increase its rates. The Consumer Groups argue that ILECs should not be permitted to bank rate increases and that the Commission should reject the proposed rule as unreasonable and complicated. Instead, the Consumer Groups believe that the Commission should adopt a more reasonable and simpler rate increase regime (Consumer Groups Initial Comments at 31, 32). The Department of Defense agrees with the Consumer Groups' explanation that the banking provision in the staff's proposal would create the possibility of forty percent increases for BLES in a thirteen-month period (Department of Defense Reply Comments at 17).

As discussed in more detail previously, the ILECs unanimously agree that any price controls, including banking are artificial and unnecessary in a competitive market (Verizon North Reply Comments at 4; AT&T Ohio Reply Comments at 38, 39; Cincinnati Bell Reply Comments at 11; and OTA Reply Comments at 5).

The Commission agrees with the Consumer Groups that the staff's proposed banking provision complicates the pricing scheme and could become difficult to administer. We have attempted to craft simpler and more straight-forward rules for pricing as set forth in Sections 1 and 2 of this discussion. Therefore, the staff's banking provision has been eliminated from the final rules.

4. Exempted services

Section B of proposed Rule 4901:1-4-11 exempts certain tier one core services from pricing flexibility. Specifically, this rule exempts intrastate carrier access rates from pricing flexibility and requires those rates to mirror interstate access rates, except as otherwise determined by the Commission. Further, 9-1-1 service and telecommunications relay service are also exempted from pricing flexibility under this rule. In addition, the rule affords the Commission the opportunity to add any new services to this list to the extent that the Commission determines that a specific public policy interest exists.

OCTA agrees with the proposed rule that provides for the pricing exemptions given to tier one services, such as 9-1-1 and telecommunications relay services. OCTA suggests that pole attachments and conduit occupancy rates and ancillary conditions must be added to this list of exempted services. OCTA argues that cable television operators must rely on ILECs and electric utilities for access to poles and conduit occupancy. OCTA opines that there are no competitive sources for poles and conduits and, therefore, there is support for exempting these rates from the pricing flexibility in this rule (OCTA Initial Comments at 3, 4). OTA, AT&T Ohio and Cincinnati Bell disagree with OCTA's suggestion that pole attachments and conduit occupancy rates should be included on the list of exempted services. OTA asserts that OCTA's proposal is "no more than a wish list" that is unrelated to the alternative regulation of BLES (OTA Reply Comments at 8). AT&T Ohio rejects OCTA's proposal because it believes that pole attachments and conduits are not elements of BLES (AT&T Ohio Reply Comments at 37). Cincinnati Bell maintains that rates for pole attachments and conduit occupancy are governed by Section 4905.71, Revised Code, and can be the subject of complaint proceedings should any occupant believe the rates being charged are unreasonable (Cincinnati Bell Reply Comments at 14).

AT&T Ohio and Verizon North disagree with the staff's proposal that the Commission should have the ability to add any services to the list of exempted services for which the Commission determines a specific public policy interest exists. Specifically, AT&T Ohio appears to be concerned that the proposed rule does not provide any standards for adding a service to the exempted services list. AT&T Ohio is also concerned that this rule will allow the Commission to amend the rules in the future and add to the list of protected services, thus unjustly impacting companies already operating under an alternative regulation plan (AT&T Ohio Initial Comments at 26, 27). Like AT&T Ohio, Verizon North argues that this rule is contrary to the pricing rule under EARP that specifies that when an ILEC introduces a new service offering, the new service is afforded tier two pricing flexibility. Verizon North is concerned that the rule might be interpreted to allow the Commission to unilaterally exempt certain existing services from pricing flexibility under the BLES alternative regulation. Verizon North suggests that if the Commission were to decide to give itself the ability to exempt services, it should provide for notice, hearing and subject its investigation to a contested case process or other due process in order to determine if such action is appropriate (Verizon Initial Comments at 7).

OCTA states that the Commission must retain authority to modify the list of services that are exempt from the pricing flexibility of this rule. Further, OCTA agrees with the notion that a notice and an opportunity for a hearing should be provided before a service is added to the list. OCTA, however, notes that the Commission needs to keep its options open as to which services may not be appropriate for flexible pricing (OCTA Reply Comments at 3). The Department of Defense concurs with the staff that intrastate carrier access charges should not be subject to increased pricing flexibility, but should continue to mirror interstate rates. It believes that residential and business users of toll services in Ohio benefit from the continued protection of carrier access charges (Department of Defense Initial Comments at 14).

The Commission has amended this rule to state more clearly the intent of the Commission. Contrary to the suggestion of AT&T Ohio and Verizon North, the Commission does not intend to utilize this section of the rule to take away existing pricing freedoms from the ILECs absent due process considerations. The intent of this rule is to simply clarify that granting BLES alternative regulation does not affect some services that are currently subject to laws, rules, and orders of this Commission and the FCC. The Commission only reserves the right to add to this list if a specific public policy interest demands that we make such an addition (e.g., some new regulated service that we cannot now anticipate). We would envision that there would likely be some process or opportunity for public input as part of such Commission determination. The language in this section of the rule has been revised accordingly.

5. Cost requirements

Paragraph (C) of the proposed rule requires that the ILEC not be permitted to price its tier one retail offerings below the LRSIC of each service plus a common cost allocation in those exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services. In addition, upon a request of staff, the ILEC shall provide the staff with cost support.

OCTA argues that, as proposed, alternative regulation of BLES and other tier one services could be used by an ILEC to establish a subsidized price for a service which would give an unfair advantage to the ILEC with respect to the prices of other services established by the ILEC. OCTA claims that the ILECs' use of bundled and unbundled services could also be used to unfairly drive out competition. Therefore, the OCTA seeks modification to this rule by adding to the rule that "alternative regulation of BLES and other tier one services shall not be used to establish a subsidized price. Further, bundling and unbundling shall not be permitted to be used in order to establish a subsidized price" (OCTA Initial Comments at 4).

Cincinnati Bell rejects OCTA's recommendation that a definition of subsidized prices should be established. Cincinnati Bell states that OCTA's reason for recommending this definition is not because of the markup of BLES, but the below-cost pricing of other services. Cincinnati Bell points out that Ohio law already prohibits pricing below cost for the purpose of destroying competition. Further, Cincinnati Bell notes that EARP rules specify that tier two services cannot be priced below LRSIC plus a common cost allocation. Cincinnati Bell believes this existing rule would cover any regulated services provided in a bundle (Cincinnati Bell Reply Comments at 13).

Verizon North argues that in a competitive market there is no need for a cost floor requirement and it is not required by statute. Verizon North goes on to claim that as long as competitors only have to price their service above LRSIC, then requiring the ILEC to add a common cost allocation sets a price floor for ILEC services at a level that their competitors are not required to meet. Therefore, at a minimum, Verizon North recommends that the Commission remove the common cost allocation requirement from this rule (Verizon North Initial Comments at 7, 8). OCTA does not agree with Verizon North's proposal that the price floor for tier one services should be LRSIC only. OCTA believes that lowering the price floor invites cross-subsidization, especially where the entity has a large market share. As such, OCTA urges the Commission to adopt a price floor for tier one services at LRSIC plus a common cost allocation (OCTA Reply Comments at 3).

The Department of Defense concurs with the staff proposal in recommending that ILECs not be permitted to price any service, including services with increased flexibility, below its LRSIC, including a reasonable allocation of common costs. Further, it concurs with the proposal to permit ILECs to employ a common cost allocator of ten percent in lieu of a specific analysis in each instance (Department of Defense Initial Comments at 13, Department of Defense Reply Comments at 15, 16).

The Commission finds it unnecessary to modify the proposed rule as requested by OCTA. We agree with Cincinnati Bell that Section 4905.33, Revised Code, already prohibits a public utility from pricing below cost for the purpose of destroying competition. As Cincinnati Bell notes, the current EARP rules specify that tier two services cannot be priced below LRSIC plus a common cost allocation. This includes the price of regulated services (both tier one and tier two) that are included in bundled or packaged offerings. The Commission further disagrees with Verizon North's argument that there is no need for a cost floor or one that includes a common cost allocation. The Commission points out that it has long required retail pricing floors above LRSIC for tier one and tier two service offerings of both ILECs and CLECs. Further, our pricing floor standards are in place to limit a LEC's ability to cross-subsidize service offerings and to limit the potential of price squeezing for the purpose of destroying competition. We continue to find that our LRSIC requirements for setting pricing floors for retail services in a competitive environment serve as a useful tool for this purpose and we find it to be in the public interest to continue to do so.

6. Rate freeze for Lifeline customers

Paragraph (D) of proposed Rule 4901:1-4-11 requires that the ILEC continue to offer to qualifying Lifeline customers stand-alone BLES, including nonrecurring charges for service establishment, service connection and service changes associated with establishing a single BLES access line, at the rates in existence at the time the ILEC files an application for BLES alternative regulation.

The Consumer Groups support the staff's proposed rate freeze on BLES for Lifeline customers because they believe it provides a necessary public benefit to offset the ILECs' ability to increase BLES and other tier one rates (Consumer Groups Reply Comments at 30). The Consumer Groups further aver that the General Assembly recognized the necessity to keep BLES affordable for low-income consumers by inserting language for the continuation of Lifeline assistance programs; not the reduction or elimination of the program as proposed by the ILECs (*Id.* at 31).

AARP believes that the Commission should retain the staff proposed treatment of Lifeline. AARP states that Lifeline rates serve the critical purpose of maximizing the number of Ohio citizens that are connected to the telecommunications network. This purpose would be defeated according to AARP at the increased level of BLES rates contemplated if all of AT&T Ohio's recommendations are adopted by the Commission (AARP Reply Comments at 45).

The Department of Defense opines that a twenty percent annual increase would be unconscionable for Lifeline customers. Although government users are not direct beneficiaries of Lifeline programs, the Department of Defense notes that the ability to communicate with all citizens is vital for many federal agencies (Department of Defense Reply Comments at 19). Acknowledging the arguments of the ILECs for unlimited flexibility, the Department of Defense suggests a compromise. The Department of Defense urges the Commission to limit the increase in the charges for stand-alone basic services, for Lifeline customers in exchange areas where ILECs are given additional flexibility, to five percent in any twelve-month period. It believes this compromise would balance the position that an indefinite hard cap on the charges for Lifeline service works a hardship on LECs with the need for protection for lower income households with minimal telecom needs (*Id.* at 19, 20).

OTA, Verizon North, AT&T Ohio and Cincinnati Bell all argue that Lifeline rates should not be capped as proposed by the staff's rules. OTA opines that the proposal goes beyond the intent of H.B. 218 in that the statute does not require "indefinite maintenance of existing Lifeline rates." OTA points out that although Lifeline rates are an important issue and that Lifeline was included as a state policy for the protection of low-income subscribers, the statute does not require the rates to be capped. OTA continues by arguing

that the proposed rule goes beyond the EARP Lifeline commitment, as required in existing Rule 4901:1-4-05(B), O.A.C., and, therefore, no additional commitment is appropriate (OTA Initial Comments at 11).

Verizon North argues that the proposed rules should not require caps on Lifeline rates for eternity. Although Verizon North believes that there may be a public interest in continuing to apply discounts to the Lifeline rates, the rates should be allowed to increase over time. Verizon North claims that it is not practical that Lifeline rates should not change or that, if the rate does change, the discount be increased to achieve the net effect of no rate change to Lifeline customers. Finally, Verizon North argues that there is no requirement under the statute for this proposed rule (Verizon North Initial Comments at 7, 8).

AT&T Ohio argues that the Commission should not adopt an open-ended Lifeline rate freeze. In support of its position, AT&T Ohio reminds the Commission of the company's commitment in 05-269, in which it assumed that the Commission would grant pricing flexibility for BLES in this rulemaking and, therefore, committed to freeze eligible Lifeline customers' current rate for two years (AT&T Ohio Initial Comments at 25, 26). AT&T Ohio claims that the Lifeline commitment, for an ILEC under an EARP, is not fully compensatory. AT&T Ohio claims that it has over 200,000 Lifeline customers and that over 10 million dollars per year is not recovered due to the program. AT&T Ohio argues that the cost of a "social program" cannot be maintained as a single provider's cost of doing business in a competitive environment. AT&T Ohio further claims that, due to decreasing retail access line counts and increasing Lifeline customers, fewer non-Lifeline customers are left to bear the burden of the subsidy. Therefore, AT&T Ohio requests that the Commission establish a two-year sunset to the Lifeline pricing requirement. Then, after the two-year sunset time frame, the ILEC would be required to offer services pursuant to the existing federal Lifeline program (AT&T Ohio Initial Comments at 26).

In regard to the proposed rule for freezing Lifeline rates to qualifying ILECs, Cincinnati Bell opines that it is unreasonable that the Lifeline program would not allow for an inflationary increase in the price of that telephone service. Cincinnati Bell suggests that because income levels for the Lifeline eligibility programs have been adjusted upwards over the years, the price of Lifeline service should also be adjusted for inflationary reasons. Cincinnati Bell further argues that although Section 4927.02(A)(8), Revised Code, states that low-income subscribers should have protected affordable rates for their telephone service through the continuation of a Lifeline assistance program, it does not suggest that Lifeline rates must be frozen in time without end. Therefore, Cincinnati Bell argues that the proposed rule falls short of the stated policy due to the fact that the rule fails to recognize an affordable rate based on increasing income levels of low-income subscribers (Cincinnati Bell Initial Comments at 19). Further, Cincinnati Bell claims that freezing Lifeline rates would exacerbate the existing inequities between ILECs and other telecommunications providers. Cincinnati Bell suggests that this result would be in violation of Section 4927.02(A)(7), Revised Code. Cincinnati Bell suggests that this disparity will continue over

time as rates increase, thereby, forcing ILECs to absorb an increasing subsidy that other competitors would not have to incur. Cincinnati Bell points out that this burden, along with its carrier of last resort obligations, places the ILEC at a disadvantage relative to competitive alternative providers (*Id.* at 20).

The Consumer Groups refute the ILECs' assertion that the Lifeline customer base continues to grow, creating burdensome financial consequences. According to the Consumer Groups, in 2005, only ALLTEL Ohio Inc., CenturyTel of Ohio Inc., Chillicothe Telephone Company, and United Telephone Company of Ohio dba Sprint increased their Lifeline subscribership. With respect to these increases, the Consumer Groups consider them to be minimal at best. The Consumer Groups point out that Cincinnati Bell, AT&T Ohio, and Verizon North experienced a decline in the number of Lifeline customers throughout 2005. The Consumer Groups believe that the downward trend will continue through 2006 (Consumer Groups Reply Comments at 32). The Consumer Groups consider AT&T Ohio's claim that it does not recover over $10 million per year due to Lifeline programs to be exaggerated (*Id.* at 32, 33).

Mr. William H. Sims, a telephone consumer, filed written comments suggesting, among other things, alternative language to more clearly articulate that any price increase to BLES will not affect the actual price paid by Lifeline customers. The Commission has adopted in part Mr. Sims suggestion, which states more clearly that if the rate for Lifeline customers' BLES increases, the Lifeline discount shall be adjusted to ensure that there is no net rate increase to qualifying Lifeline customers.

The Commission agrees with the Consumer Groups' comments that the General Assembly recognized the importance of the continuation of the Lifeline assistance program for low-income consumers by inserting that language into H.B. 218. If BLES rates for lifeline customers were subject to increases while lifeline benefits did not increase, the whole purpose behind the state policy of protecting the affordability of telephone service for low-income subscribers would be defeated. Therefore, the ILECs' arguments to eliminate the Lifeline assistance altogether or to allow for unknown future increases are not convincing. In order to respond to the ILECs' concerns of the indefinite freeze to the Lifeline cap, however, the Commission has inserted language into the final rule that reserves the right for the Commission to reconsider this cap based on changes made by the FCC to the Lifeline or universal service funding programs. Additionally, as noted below, the Commission intends to review BLES alternative regulation before the five-year sunset provision in the law expires. A determination of whether it is appropriate to continue to require protected Lifeline rates would certainly be part of such review.

7. Stand-alone BLES

Consumer Groups express concern that the proposed rules do not contain a specific requirement for a commitment from ILECs that they continue to provide stand-alone BLES.

Specifically, the Consumer Groups point out that the competitive retail service rules do provide that, within the ILEC's traditional service territory, the ILEC has an obligation to provide stand-alone BLES. They note a possible contradiction, however, in paragraph (D) of the proposed rules, which states that the ILEC is required to continue to offer "stand-alone" BLES to qualifying lifeline customers. Because this language could be read to imply that the ILEC is free to withdraw stand-alone BLES for their other customers, the Consumer Groups request that the Commission make clear that the ILECs continue to be obligated to provide stand-alone BLES to their customers (*Id.* at 36).

The Commission clarifies that the statement with respect to an ILEC's obligation to Lifeline customers was not intended to imply that an ILEC is no longer required to comply with the requirement of Rule 4901:1-6-09(M)(2), O.A.C., to continue to provide stand-alone BLES as a standard service offering to non-Lifeline customers. The requirements of Chapter 4901:1-6, O.A.C., shall remain in effect, unless and until the Commission revisits those rules. To clear up any confusion in this chapter, we have removed the words "stand-alone" from the adopted rule.

8. Tariff filing processes

Paragraph (E) of the proposed rule requires that where an ILEC is granted pricing flexibility for BLES and other tier one services, it will utilize the processes set forth in Rule 4901:1-6-21, O.A.C., for the filing of all subsequent tariff applications for BLES and other tier one services. The rule further requires that an ILEC comply with the customer notice requirements set forth in Rule 4901:1-6-17, O.A.C. Such rule requires an ILEC to provide a price increase notice to affected customers at least 15 days prior to the effective date of the price increase. According to the proposed rule, all other applicable rules for ILECs operating pursuant to EARP will continue to apply to all ILEC's retail service offerings.

The Consumer Groups and public hearing witnesses express concern that the proposed 15-day customer notice period is inadequate (Consumer Groups Initial Comments at 33; Cleveland Tr. at 49; Toledo Tr. at 21, 75). They suggest that the time frame is too short for customers that may want to find a new carrier without incurring increased charges. The Consumer Groups state that customers should have 60 days notice regarding proposed rate increases (Consumer Groups Initial Comments at 33).

The Commission finds the Consumer Groups' arguments to be compelling. We point out that Rule 4901:1-6-17, O.A.C., requires the LEC's customers be noticed of price increases at least fifteen days prior to the LEC filing notice of such price increases with the Commission. While this is reasonable in most instances, in the case of a customer wishing to end their BLES subscription with the ILEC and seeking an alternative provider for the first time, fifteen days may simply be too short of a time frame to allow ILEC customers to contact alternative providers, research pricing plans and ultimately decide whether to switch to an alternative provider. On the other hand, we believe sixty days, as suggested

by the Consumer Groups, is excessively long. Therefore, we find that a thirty-day notice is more reasonable. Further, the Commission notes that, as a practical matter, ILECs are likely to provide customer notice in conjunction with companies' billing cycles, which approximate thirty days. Thus, the Commission does not find a thirty-day notice prior to the effective date of a BLES rate increase to be unduly burdensome on the ILEC.

F. 4901:1-4-12 Term, revocation and modification of alternative regulation of basic local exchange service and other tier one services

This rule sets forth standards for the term, revocation and modification of a grant of alternative regulation of BLES and other tier one services.

A number of parties offered recommendations and revisions regarding paragraph (B) of the staff proposed rule. Citing to Section 4927.03(C), Revised Code, OTA and Cincinnati Bell submit that the adopted rule should recognize that the Commission's authority to revoke or modify alternative regulation of BLES is limited to five years after a grant of such authority (OTA Initial Comments at 12; Cincinnati Bell Initial Comments at 19). Related to this argument, Consumer Groups recommend that the proposed rule be modified to include a review of an ILEC's alternative regulation for BLES on the fourth anniversary of the plan to ensure that the continuation of the plan is in the public interest (Consumer Groups Initial Comments at 33-36). OTA also submits that the proposed rule should be modified to acknowledge that a grant of alternative regulation for BLES will only be revoked in an exchange if the exchange no longer meets any of the competitive tests outlined in paragraph (C) of staff proposed Rule 4901:1-4-10 and if meaningful barriers to entry are found (OTA Initial Comments at 12). Further, OTA and Verizon North recommend that the show cause requirement should be eliminated and replaced with the counterpart found in the elective alternative regulation rules, Rule 4901:1-4-02(H), O.A.C. (*Id.*). Verizon North opines that the proposed rule should be clarified to reflect that during the review contemplated within paragraph (B) of the staff proposed Rule 4901:1-4-12, the ILEC should be permitted to continue under basic local exchange alternative regulation during any revocation action (Verizon North Initial Comments at 8). AT&T Ohio recommends that the rule be deleted in its entirety as the marketplace changes are irreversible at this point (AT&T Ohio Initial Comments at 27).

In its reply comments, Cincinnati Bell challenged Consumer Groups' recommendation for a company-specific review on the fourth anniversary. Cincinnati Bell argues that this requirement would be inefficient and unnecessary as the Commission is already empowered to modify or revoke plans if competitive conditions no longer exist. Should such a situation arise, the Commission can take the appropriate steps to address these issues, Cincinnati Bell claims (Cincinnati Bell Reply Comments at 10). Contrary to the position of AT&T Ohio, the Consumer Groups claim that a revocation rule is essential insofar as residential competition by CLECs continues to decline and AT&T Ohio's market share continues to increase (Consumer Groups Reply Comments at 34). Responding to

Verizon North's comments, the Consumer Groups aver that the nature of the show cause proceeding affords an ILEC the opportunity to rebut any information that led to the Commission's order in the first place. This requirement does not assign guilt as Verizon North claims, according to the Consumer Groups (*Id.* at 35).

OTA, Cincinnati Bell and the Consumer Groups all recommend that the Commission's rules address the five-year sunset provision relative to abrogating or modifying an order granting an ILEC alternative regulatory treatment. While the Commission has every intention of reviewing, in a timely fashion, the individual plan of each ILEC granted alternative regulation for BLES before the five-year sunset provision expires, we see little to be gained at this time by either specifying the scope of the review or codifying it in the rules being adopted today. Rather, we will leave such discretion to a future Commission to determine the timing, extent and scope of such reviews consistent with the applicable law. We have, however, added language to the adopted rule that acknowledges the applicability of Section 4927.03(C), Revised Code.

Regarding the arguments offered by OTA and Verizon North against a show cause provision, we disagree. The show cause provision does nothing more than afford the ILEC an opportunity to respond to an allegation that a telephone exchange area may no longer meet one of the competitive tests outlined in adopted Rule 4901:1-4-10(C). As noted in the sentence that follows the show cause provision, the Commission will determine, after reviewing all the information provided on the subject, whether to close its review, initiate a more formal investigation or schedule a hearing concerning whether to pursue revocation of an ILECs' authority in the identified telephone exchange area. Contrary to OTA and Verizon North's concerns, we view this provision as affording the ILECs more, not less, due process, in that it is possible that the Commission would decide, in an initial show cause proceeding, not to pursue the abrogation or modification proceeding permitted by Section 4927.03(C), Revised Code. Regarding Verizon North's concerns involving the continuation of alternative regulation of BLES during a revocation proceeding, the Commission clarifies that, like the elective alternative rules (Rule 4901:1-4-03(H)), an ILEC will maintain the pricing flexibility set forth in Rule 4901:1-4-11, unless or until the Commission orders otherwise.

Finally, regarding AT&T Ohio's comments on this proposed rule, we believe it would be unwise given the newness of BLES alternative regulation to concede that the market for BLES is irreversibly open to competition. Further, pursuant to Section 119.032(E)(2), Revised Code, the Commission is obligated to review the rules adopted today. Any provision adopted herein is subject to further review during that subsequent rule review.

III. CONCLUSION

Upon consideration of the record as a whole, including the staff proposal and all comments and reply comments submitted in response to it, as well as the record of the seven public hearings held in this matter, the Commission rescinds the existing rules incorporated in Chapter 4901:1-4, O.A.C., and enacts the rules attached as the appendix to this opinion and order for the reasons discussed above. The adopted rules are not intended to replace any of the Commission's existing rules in other chapters of the O.A.C. but, rather, should be read in conjunction with such existing requirements.

IV. ORDER

It is, therefore,

ORDERED, That existing Chapter 4901:1-4, O.A.C., be rescinded with such recission becoming effective simultaneously with the effectiveness of the new rules being adopted today, as set forth in appendix C to this opinion and order. It is, further,

ORDERED, That the new Chapter 4901:1-4, as set forth in appendix C to this opinion and order, is hereby adopted. It is, further,

ORDERED, That applications for BLES alternative regulation be consistent with appendices A and B to this opinion and order. It is, further,

ORDERED, That following the statutory rehearing period, copies of Chapter 4901:1-4, O.A.C., as set forth in appendix C to this opinion and order, be filed with the Joint Committee on Agency Rule Review, the Legislative Service Commission, and the Secretary of State in accordance with divisions (D) and (E) of section 111.15, Revised Code. It is, further,

ORDERED, That, except as specifically provided for or clarified in this opinion an 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 to the extent not addressed in this opinion and order or the attached appendices, all other arguments raised are denied. It is, further,

ORDERED, That a copy of this opinion and order by served on all incumbent local exchange companies, 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

Clarence D. Rogers, Jr.

JSA;geb

Entered in the Journal

MAR 07 2006

Reneé J. Jenkins
Secretary

Appendix A

In the Matter of the Application of	)	
_____	)	
For Approval of an Alternative Form of	)	
Regulation of Basic Local Exchange	)	Case No.
And other Tier 1 Services Pursuant to	)	
Chapter 4901:1-4, Ohio Administrative	)	
Code.	)	

APPLICATION

_____, the applicant in this proceeding, is a telephone company providing public telecommunications service to _____ access lines and approximately _____ customers in its local service area in the State of Ohio.

Applicant submits this application pursuant to Sections 4927.03 and 4927.04, Revised Code, for approval of an alternative form of regulation for Basic Local Exchange Service and other Tier 1 Services pursuant to Chapter 4901:1-4, Ohio Administrative Code.
Exhibits _____ through _____ are attached to this application and are incorporated herein.

The applicant requests the Commission to consider the proposals set forth in this application and to approve the applicant's alternative regulation proposal for Basic Local Exchange Service and other Tier 1 Services.

Respectfully submitted,

_____
President or Vice President

_____
Secretary or Treasurer

Company Address: _____

Company Telephone Number: _____

Appendix B

VERIFICATION

STATE OF OHIO)
COUNTY OF _____)

I, _____, President/Vice President and
I, _____, Secretary/Treasurer of
_____ hereby verify that the information contained in this application is true and correct to the best of our knowledge.

_____
President or Vice President

_____
Secretary or Treasurer

Sworn and subscribed before me this _____ day of _____, 20

_____
Notary Public
My term expires: _____

APPENDIX C

4901:1-4-01 **Definitions.**

As used within this chapter, these terms denote the following:

(A) "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of these rules, the term "own" means to own an equity interest (or the equivalent thereof) of more than ten per cent.

(B) "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.).

(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.

(D) "Commission" means the public utilities commission of Ohio.

(E) "Competitive local exchange carrier (CLEC)" means any facilities-based and nonfacilities-based local exchange carrier that was not an incumbent local exchange

carrier on the date of the enactment of the Telecommunications Act of 1996 (1996 Act) or is not an entity that, on or after such date of enactment, became a successor, assign, or affiliate of an incumbent local exchange carrier.

(F) "Elective alternative regulation plan (EARP)" means a plan adopted in case number 00-1532-TP-COI under which an incumbent local exchange carrier receives earnings-free regulation with greater pricing flexibility for services other than BLES in exchange for specific commitments.

(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.).

(H) "Facilities-based competitive local exchange carrier" means any local exchange carrier that uses facilities it owns, operates, manages or controls to provide service(s) subject to the commission evaluation; and that was not an incumbent local exchange carrier in that exchange on the date of the enactment of the 1996 Act. Such carrier may partially or totally own, operate, manage or control such facilities. Carriers not included in this classification are carriers providing service(s) solely by resale of the incumbent local exchange carrier's local exchange services.

(I) "Incumbent local exchange carrier (ILEC)" means with respect to any area, any facilities-based local exchange carrier that: (a) on the date of the enactment of the 1996 Act, provided BLES in such area; and (b) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R 69.601(b), as effective on March 1, 2006; or (ii) is a person or entity that, on or after such date of enactment, became a successor or assignee of a member described in clause.

(J) "Large ILEC" means any ILEC serving fifty thousand or more access lines within Ohio.

(K) "Long-run service incremental cost (LRSIC)" represents the forward-looking economic cost for a new or existing product that is equal to the per unit cost of increasing the volume of production from zero to a specified level, while holding all other product and service volumes constant. LRSIC does not include any allocation of forward-looking common overhead costs. Forward-looking common overhead costs are costs efficiently incurred for the benefit of a firm as a whole and are not avoided if individual services or categories of services are discontinued. Further, forward-looking joint costs, which are the forward-looking costs of resources necessary to provide a group or family of services shall be added to or included in the LRSIC of the products or services.

(L) "Small ILEC" means any ILEC serving less than fifty thousand access lines within Ohio.

(M) "Telephone exchange area" means a geographical service area established by an ILEC and approved by the commission, which usually embraces a city, town, or village and a designated surrounding or adjacent area. There are currently seven hundred thirty-eight exchanges in the state.

(N) "Tier one" services include BLES 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.

(O) "Tier two" services include all regulated telecommunications services that do not fall in tier one.

4901:1-4-02 **EARP general provisions.**

(A) The alternative regulation plan set forth below is available to any ILEC that desires to take advantage of the retail services flexibility for telecommunication services, other than BLES as defined in section 4927.01 of the Revised Code, set forth in the rules for competitive telephone companies but that is not interested in pursuing an individual company-designed application for alternative regulation pursuant to case number 92-1149-TP-COI.

(B) Adoption of the EARP by an ILEC enables the ILEC to operate under the retail service requirements developed for competitive telephone companies.

(C) This EARP does not limit an ILEC's ability to propose a company-specific plan under the existing alternative regulation guidelines set forth in case number 92-1149-TP-COI, which could also qualify the company for the proposed retail service rules.

(D) The retail service rules established for competitive telephone companies is only an option for an ILEC if the ILEC adopts a qualifying alternative regulation plan.

(E) Although not favored, the commission may upon its own motion, or for good cause shown, waive any requirement, standard, or rule set forth in this chapter.

4901:1-4-03 **Term of the plan.**

(A) An ILEC can opt into this EARP at anytime by making the appropriate filing with the commission. An appropriate filing is one that includes:

(1) A completed application form, as may be modified from time-to-time by the commission.

(2) An application proposing to cap BLES rates at existing levels as an alternative to rate base/rate-of-return regulation, pursuant to section 4927.04 of the Revised Code, and to price all other telecommunication services pursuant to the provisions of paragraph (C) of rule 4901:1-4-06 of the Administrative Code and section 4927.03 of the Revised Code.

(3) All necessary tariff modifications to implement EARP, to be prefiled with the commission's staff thirty days before docketing the application.

(4) A plan as to how the ILEC will meet all of the commitments set forth in rule 4901:1-4-06 of the Administrative Code.

(B) An ILEC shall deliver one copy of its application to the office of the Ohio consumers' counsel at the time the ILEC files the application with the commission.

(C) An ILEC electing alternative regulation pursuant to this chapter agrees to cap its BLES rates for the term of the plan. Accordingly, the commission waives the requirement to file the schedules set forth in divisions (A) to (D) of section 4909.18 of the Revised Code.

(D) Any person may file a request for hearing on the application within twenty days. Absent extraordinary circumstances established through clear and convincing evidence that reasonable grounds for a hearing exist, a hearing will not be held. Unless otherwise ordered, a hearing request not ruled upon by the commission will be automatically denied on the forty-sixth day after the ILEC application was filed.

(E) The ILEC's application shall be automatically approved on the forty-sixth day, unless otherwise suspended by the commission. In all cases where reasonable grounds for hearing are found and/or a suspension of the approval process is granted, the commission will render a decision on the application within one hundred eighty days of filing.

(F) There is no predetermined termination date for the EARP absent a revocation proceeding outlined in paragraph (H) of this rule.

(G) Once the ILEC has met the commitments set forth in rule 4901:1-4-06 of the Administrative Code, the company may continue under its EARP, terminate the alternative regulation plan and return to traditional rate-of-return regulation, or propose a company-specific alternative regulation plan.

(H) If the commission believes that the ILEC has failed to comply with the terms of the plan, the commission shall give the ILEC notice, including a basis, of such belief and a reasonable period of time to come into compliance. The commission shall not

revoke any EARP, unless the commission determines, after further notice to the ILEC and hearing, that the ILEC in fact has failed to materially comply with the terms of the plan and in fact has failed to come into compliance within such reasonable period of time. Prior to any such ruling to revoke any order approving the plan, the commission shall take into consideration consequences of such action on the ILEC as well as the impact on its customers.

(I) In order to terminate or withdraw from an EARP, an ILEC must file a notice with the commission which sets forth the reasons for the withdrawal and informs the commission whether the ILEC is proposing to return to traditional regulation or will be filing a company-specific alternative regulation plan. Such notice shall also be served upon the office of the Ohio consumers' counsel. A notice of withdrawal will not be approved until another regulatory framework is adopted by the commission. The commission shall order such procedures as it deems necessary in its consideration of the request to withdraw.

(J) An ILEC choosing to return to rate-of-return regulation is required to bring its rates and services into compliance with the appropriate regulatory framework for all regulated services. All existing rules, guidelines, and orders that are available for ILECs today, such as case numbers 84-944-TP-COI, 86-1144-TP-COI, 89-564-TP-COI, and 92-1149-TP-COI, will still remain. The rates in effect under elective alternative regulation shall remain in effect until otherwise modified by the ILEC with the commission's approval. An ILEC returning to rate-of-return regulation bears the total risk of recovery of commitment investments during the period it was under alternative regulation

4901:1-4-04 **Applicability of other rules and regulations.**

To the extent they do not conflict with the provisions set forth herein and absent a waiver, all commission requirements and policies will apply to the operations of every ILEC adopting elective alternative regulation. Examples of such requirements and policies include, but are not limited to, the minimum telephone service standards (MTSS) codified at Chapter 4901:1-5 of the Administrative Code, lifeline services such as service connection assistance (case numbers 89-45-TP-UNC and 91-564-TP-UNC), discounts for persons with communication disabilities (case number 87-206-TP-COI), blocking of 976 services (case number 86-1044-TP-COI), disconnection of local service rules (case number 96-1175-TP-ORD), 9-1-1 service (case number 86-911-TP-COI), privacy and number disclosure requirements (case number 93-540-TP-COI), alternative operator service provisions (case number 88-560-TP-COI), provisions involving customer-owned, coin-operated telephones (case number 88-452-TP-COI), local competition carrier requirements (case numbers 95-845-TP-COI and 99-998-TP-COI), and carrier access charge policies and orders.

4901:1-4-05 **Accounting standards.**

Accounting records are required to be maintained in accordance with the uniform system of accounts for local telephone operations by all ILECs.

4901:1-4-06 **Alternative regulation commitments.**

(A) Advanced services

(1) Advanced telecommunications services capability is the availability of high-speed, full broadband telecommunications that enables a customer to originate and receive high-quality data, graphics, and video using any technology (e.g., xDSL, cable, fiber optic, fixed wireless, satellite, or other system) at a minimum rate of two hundred kilobits per second in one direction.

(2) An ILEC electing this alternative regulation plan must commit to provide the following:

(a) High density central offices: No later than twelve months from the effective date of the alternative regulation plan, an ILEC must provide advanced telecommunications service capability from all class five central offices (CO) in its traditional service territories which serve census tracts with a population density of five hundred or more people per square mile as defined by the 2000 census.

(i) No later than twelve months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within twelve thousand feet from a high density CO.

(ii) No later than twenty-four months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within eighteen thousand feet from a high density CO.

(b) County seat central offices: For counties that do not meet the population density criterion described in paragraph (A)(2)(a) of this rule, an ILEC must provide advanced telecommunications service capability from all class five COs in its traditional service territories that are within the county seat no later than twelve months from the effective date of the alternative regulation plan.

(i) No later than twelve months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within twelve thousand feet from a county seat CO.

(ii) No later than twenty-four months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within eighteen thousand feet from a county seat CO.

(B) Lifeline assistance

(1) The ILEC must implement a lifeline program that provides eligible residential customers with the maximum contribution of federally available assistance. Eligible lifeline service consists of flat-rate monthly access line service with touch-tone service.

(a) Credits: The ILEC shall credit one hundred per cent of all nonrecurring service order charges for commencing service and a monthly amount that will ensure the maximum federal matching contribution.

(b) Other benefits: Lifeline customers shall receive a waiver of the local exchange service establishment deposit requirements, free blocking of toll and 900/976 dialing patterns, an option to purchase call waiting and an option to purchase other features for medical and/or safety reasons. Requests to purchase vertical features must be signed by the customer certifying that the customer has a legitimate need, either for medical or safety reasons, for the optional feature(s) requested.

(c) Restrictions: The discount will apply to only one access line per household. Optional features, other than call waiting, are prohibited unless the phone company receives a signed statement from the customer self-certifying that the feature is necessary for medical and/or safety reasons. Existing lifeline customers that have optional features prior to the adoption of this plan will be grandfathered into the lifeline program so long as the customer makes no changes whatsoever to their existing local exchange service. Telephone companies are prohibited from marketing vertical services to existing or new lifeline customers.

(2) Lifeline assistance eligibility shall include:

(a) Home energy assistance program (LIHEAP, HEAP, and E-HEAP).

(b) Ohio energy credit program (OECP).

(c) Food stamps.

(d) Supplemental security income-blind and disabled (SSDI).

(e) Supplemental security income-aged (SSI).

(f) General assistance (including disability assistance [DA]).

(g) Medical assistance (medicaid), including any state program that might supplant medicaid.

(h) Federal public housing/section eight.

(i) Ohio works first (formerly AFDC).

(j) Household income at or below one hundred fifty per cent of the poverty level.

(3) Each ILEC participating in the EARP shall offer a lifeline assistance program to eligible customers throughout the traditional service area of that carrier, in conformance with this rule.

(a) ILECs with fifty thousand or more access lines shall automatically enroll customers into lifeline assistance who participate in a qualifying program. Additionally, such companies must also enroll customers who participate in a qualifying program by using on-line company to agency verification or self-certification.

(b) ILECs with less than fifty thousand access lines may use one or any combination of automatic enrollment, on-line company to agency verification and/or self-certification to enroll customers into lifeline assistance who participate in a qualifying program.

(c) All ILECs must use self-certification to enroll customers into lifeline assistance who qualify through household income-based requirements.

(4) At no time will the monthly access line discounts cause the local service rates to be less than zero.

(5) Lifeline assistance customers with past due bills for regulated local service charges will be offered special payment arrangements with the initial payment not to exceed twenty-five dollars before service is installed, with the balance for regulated local charges to be paid over six equal monthly payments. Lifeline assistance customers with past due bills for toll service charges will be required to have toll restricted service until such past due toll service charges have been paid or until the customer establishes service with a subsequent toll provider pursuant to the minimum telephone service standards.

(6) Staff will work with the appropriate state agencies, which administer qualifying programs for lifeline assistance, and the ILECs to negotiate and acquire on-line access to the agencies' electronic databases for the purpose of accessing the

information necessary to verify a customer's participation in an eligible program, and data necessary to automatically enroll customers into the lifeline program. On-line verification and automatic enrollment will be in place within six months after the effective date of a company's alternative regulation plan.

(7) An ILEC is permitted to perform a verification audit of a customer already on lifeline assistance service.

(8) All lifeline program activities must be coordinated through an advisory board composed of commission staff, the office of the Ohio consumers' counsel, consumer groups representing low-income constituents, and the company. Commission staff will work with the advisory board to reach consensus. However, where consensus is not possible, the commission's staff shall make the final determination. Advisory board decisions on how the program is implemented and the lifeline promotional plan are subject to commission review. Companies with less than fifty thousand access lines may join with other such companies to form one advisory board.

(9) The ILEC will establish an annual marketing budget for promoting lifeline and performing outreach using ten cents per access line multiplied by the number of residential access lines the company serves. The ILEC shall work with the advisory board to reach a consensus, where possible, regarding how the marketing budget funds will be spent. The marketing budget funds shall only be spent for the promotion and marketing of lifeline service and not for the administrative costs of implementing and operating the lifeline program.

(C) Retail rate commitments

(1) An ILEC's offering of in-territory, BLES shall include flat-rate residential calling.

(2) Any measured-rate or optional extended area service plans that are being provided to customers on the effective date of the alternative regulation plan shall continue to be available to customers unless the commission subsequently approves changes to these plans.

(3) Tier one rate caps

(a) Core service rate caps

(i) Tier one core services as used in these rules shall include BLES as defined in section 4927.01 of the Revised Code, and basic caller ID only.

(ii) An ILEC adopting alternative regulation pursuant to this chapter, shall cap the in-territory rates for tier one core service at the existing rates for so long as the company remains under the EARP. The electing ILEC's

existing rates shall represent the maximum or "ceiling" levels, below which the ILEC may lower or raise rates upon making the appropriate filing with the commission.

(iii) The electing ILEC may not price below the LRSIC of each service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(b) Noncore service rate caps

(i) Noncore tier one services shall include:

(a) Second and third local exchange service access lines.

(b) Call waiting.

(c) Call trace (*57).

(d) Centrex access lines.

(e) Private branch exchange (PBX) trunks.

(f) Per line number identification blocking.

(g) Nonpublished number service.

(h) N11 access and usage, unless exempted.

(ii) An electing ILEC shall cap the rates for all in-territory, noncore, tier one services at existing rates for twenty-four months from the effective date of the alternative regulation plan.

(iii) During those twenty-four months, the electing ILEC may lower or raise rates below the cap, upon making the appropriate filing with the commission.

(iv) The electing ILEC may not price below the LRSIC of each service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(v) After twenty-four months, upward pricing flexibility for a second local exchange access service line and call waiting shall be limited to no

more than a ten per cent increase in price per year for each service, up to a maximum cap for the life of the plan that is double the initial rate for each service.

(vi) After twenty-four months, upward pricing flexibility for all other tier one, noncore services shall be limited to a cap that is double the initial rate for the life of the plan.

(4) Tier two services

(a) Tier two services include all regulated, public telecommunication services that do not fall on tier one.

(b) Tier two service rates are not subject to any rate cap and may be priced at market-based rates.

(c) The rate for any tier two service must recover the LRSIC associated with the service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(5) Nothing herein prohibits an electing ILEC from seeking, through an appropriate filing with the commission, the flexibility to discount tier one service rates, on an exchange or on a wire center basis when an exchange has more than one wire center, provided the company demonstrates that the discount is necessary to meet competition and provided the discount is uniformly available to all tier one service customers within the designated exchange(s) or wire center(s).

(6) Notice to customers of any changes in rates must comply with the notice requirements established in the rules for competitive telephone companies.

4901:1-4-08 **Eligibility for alternative regulation of BLES and other tier one services.**

(A) Any ILEC with an approved qualifying EARP set forth in rules 4901:1-4-01 to 4901:1-4-07 of the Administrative Code, may request, pursuant to section 4927.03 of the Revised Code, alternative regulation of BLES and other tier one services.

(B) An ILEC is not eligible to apply for alternative regulation of BLES and other tier one services until it has fully complied with the advanced services and lifeline commitments set forth in paragraphs (A) and (B) of rule 4901:1-4-06 of the Administrative Code for large ILECs and set forth in rule 4901:1-4-07 of the Administrative Code for small ILECs. An ILEC may apply for EARP and alternative regulation for BLES and other tier one services, contemporaneously, if

the applicant can demonstrate that it fully meets the applicable EARP commitments on the day of filing of both applications.

4901:1-4-09 **BLES filing requirements and process for application.**

(A) An application and all required exhibits shall be made in the form provided by the commission.

(B) Exhibits to an application

(1) An affidavit from an officer of the ILEC verifying that the applicant fully complies with the elective alternative regulation commitments as required by paragraphs (A) and (B) of rule 4901:1-4-06 of the Administrative Code for large ILECs and as required by rule 4901:1-4-07 of the Administrative Code for small ILECs.

(2) An identification of the telephone exchange area(s) for which the ILEC seeks alternative regulation for BLES and other tier one services and the competitive market test proposed by the applicant for each telephone exchange area.

(3) Supporting information and detailed analysis demonstrating that the applicant meets, on a telephone exchange area basis, at least one of the competitive market tests, as set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code. This information should be contained within an affidavit filed by an officer of the ILEC attesting to the veracity of the data upon which the application is premised.

(4) Any proposed tariff modifications necessary to implement the pricing flexibility rules set forth in paragraph (A) of rule 4901:1-4-11 of the Administrative Code.

(C) The application shall be designated by the commission's docketing division using the case purpose code "BLS". On the same day that the ILEC files its complete application with the commission, the ILEC shall deliver one copy of its application to the office of the Ohio consumers' counsel.

(D) All persons seeking intervention must file the appropriate motion within seven calendar days of the filing of the ILEC's application.

(E) Confidential information filed by the ILEC will be eligible for proprietary treatment in accordance with rule 4901-1-24 of the Administrative Code. Parties shall be afforded access to all confidential information and supporting data addressed within an application by entering into a protective agreement with the ILEC. The ILEC has the duty to negotiate such agreements in good faith with the parties in a timely manner and the commission will decide any issues that the parties are unable to resolve regarding the protective agreement.

(F) Any party who can show good cause why such application should not be granted must file with the commission a written statement detailing the reasons within forty-five calendar days after the application is docketed.

(G) With respect to the four tests identified in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, an ILEC's application shall be approved automatically and become effective on the one hundred twenty-first day after the initial filing, unless suspended by the commission, the legal director, or an attorney examiner. A hearing will not be held absent extraordinary circumstances established through clear and convincing evidence, satisfying the commission, that a hearing is needed. Where the commission determines a hearing is necessary and/or a suspension is ordered, the commission will render a decision on the application within two hundred seventy days of filing.

(H) An application containing an alternative competitive market test (i.e., a test not found in paragraphs (C)(1) to (C)(4) of rule 4901:1-4-10 of the Administrative Code) will not be subject to the automatic timeframe. The commission will establish the appropriate process and timeframes for review of such application.

4901:1-4-10 **Competitive market tests.**

(A) In order to qualify for pricing flexibility for BLES and other tier one services, the applicant has the burden to demonstrate that the ILEC meets at least one of the competitive market tests set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code in each of the requested telephone exchange area(s). Thus, an application for alternative regulation of BLES and other tier one services may contain more than one telephone exchange area, but the test(s) must be applied to each telephone exchange area individually within that application.

(B) For any telephone exchange area(s) in which the ILEC is not granted alternative regulation for BLES and other tier one services, the ILEC's BLES and other tier one services remain subject to all the requirements of EARP, including the pricing requirements pursuant to paragraph (C) of rule 4901:1-4-06 of the Administrative Code. For any telephone exchange area(s) in which the ILEC is granted alternative regulation for BLES and other tier one services, pricing flexibility for the ILEC's BLES and other tier one services will not be subject to paragraph (C)(3) of rule 4901:1-4-06 of the Administrative Code. All of the remaining requirements of EARP will continue to apply to the ILEC's retail service offerings.

(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.

(1) An applicant must demonstrate in each requested telephone exchange area that at least twenty-five per cent of total residential access lines are provided by unaffiliated CLECs, and at least twenty per cent of total company access lines have been lost since 1996 as reflected in the applicant's annual report filed with the commission for 1996.

(2) An applicant must demonstrate in each requested telephone exchange area that at least twenty per cent of total residential access lines are provided by unaffiliated CLECs, and the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers.

(3) An applicant must demonstrate in each requested telephone exchange area that at least fifteen per cent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five alternative providers serving the residential market.

(4) An applicant must demonstrate 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 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 its competitive market test, count as a CLEC or an alternative provider, any other ILEC affiliate serving the residential market in the requested telephone exchange areas.

4901:1-4-11 **Pricing of BLES and other tier one services.**

(A) In each telephone exchange area where an ILEC meets at least one of the competitive market tests set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, the ILEC will be granted pricing flexibility, as set forth below, for tier one core and noncore services in lieu of the EARP pricing rules set forth in paragraph (C)(3) of rule 4901:1-4-06 of the Administrative Code. An ILEC will be granted, in those telephone exchange areas, tier two pricing flexibility for all tier one noncore services. BLES and basic caller ID will also be subject to pricing flexibility in those telephone exchange areas. Subject to the pricing flexibility in this rule, the rate for BLES and basic caller ID may be lowered or raised upon making the appropriate tier two filing with the commission. For the twelve months following approval of alternative regulation for BLES in the relevant telephone exchange areas, the ILEC's initial upward pricing flexibility for BLES and basic caller ID shall be limited to an

annual increase of no more than one dollar twenty-five cents above the BLES rate at the time that the ILEC is granted BLES alternative regulation and an annual increase of no more than fifty cents above the basic caller ID rate in existence at the time that the ILEC is granted BLES alternative regulation. In subsequent years, the ILEC's upward pricing flexibility for BLES and basic caller ID shall be limited to an annual increase of no more than one dollar twenty-five cents above the BLES rate in effect at the end of the preceding twelve months and an annual increase of no more than fifty cents above the basic caller ID rate in effect at the end of the preceding twelve months. No banking of increases will be allowed.

(B) Rates for intrastate carrier access, 9-1-1 service, pole attachments and conduit occupancy, pay telephone services, toll presubscription, and telecommunications relay service are not affected by this rule and shall continue to be subject to the applicable laws, rules and orders of the commission and the federal communications commission. In addition, the commission may, in the future, add additional regulated new services to this list of exempted services for which the commission determines that a specific public policy interest exists.

(C) In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, an ILEC is not permitted to price its tier one retail service(s) below the LRSIC of each service plus a common cost allocation. A telephone company may allocate common costs using a fixed allocator of ten per cent. In the event the ILEC chooses to use a different common cost allocator, the ILEC will have the burden of establishing the reasonableness of the chosen common cost allocator. Upon request of the commission staff, the ILEC shall provide cost support to the staff.

(D) In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, it must continue to offer to qualifying lifeline customers BLES, including any nonrecurring charges for service establishment, service connection and service change orders associated with establishing a single BLES access line, at the rates in existence at the time the ILEC files an application under this chapter. If rates for a lifeline customer's BLES increase pursuant to paragraph (A) of rule 4901:1-4-11 of the Administrative Code, the lifeline discount shall be adjusted to ensure there is no net rate increase to qualifying lifeline customers. The commission reserves the right to modify this restriction based on changes made by the federal communications commission to the lifeline or universal service funding programs.

(E) In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, the ILEC shall utilize the processes set forth in rule 4901:1-6-21 of the Administrative Code for the filing of all subsequent tariff applications for BLES and other tier one services. In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, the ILEC shall provide prior actual customer notice to the affected customers by bill insert, bill message, direct mail, or, if the customer consents, electronic mail, a

minimum of thirty days prior to any increase in rates. The application, when filed with the commission, must include a copy of the actual notice that was sent to affected customers and an affidavit verifying that such notice was given to customers. The customer notice shall comply with the customer notice requirements set forth in paragraphs (B) and (C) of rule 4901:1-6-17 of the Administrative Code. All of the remaining rules for ILECs operating pursuant to EARP found in Chapters 4901:1-4 and 4901:1-6 of the Administrative Code will continue to apply.

4901:1-4-12 **Term, revocation and modification of alternative regulation of BLES and other tier one services.**

(A) The EARP rules set forth in paragraphs (F), (H), (I) and (J) of rule 4901:1-4-03 of the Administrative Code also apply to the term, revocation and withdrawal of the plan for alternative regulation of BLES and other tier one services.

(B) If the commission has reason to believe, based on a change in the telecommunications market in a telephone exchange area(s) or based on the motion of an interested stakeholder setting forth reasonable grounds, that the market in a telephone exchange area(s) has changed such that it may no longer meet one of the competitive market tests set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, the commission shall notice the ILEC and require it to show cause as to why alternative regulation for BLES and other tier one services in the involved telephone exchange area(s) should not be revoked. Based on that review, the commission will take whatever action it deems necessary, if any, including initiating an investigation or scheduling a hearing, to consider revocation of the alternative regulation for BLES and other tier one services in a telephone exchange area(s). Consistent with division (C) of section 4927.03 of the Revised Code, the commission may modify or revoke any order granting the ILEC alternative regulation for BLES and other tier one services in a telephone exchange area(s). Pending any review of alternative regulation of BLES, the ILEC will maintain the pricing flexibility previously granted until or unless otherwise modified by the commission.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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.	)))))	Case No. 05-1305-TP-ORD

ENTRY ON REHEARING

The Commission finds:

(1) On March 7, 2006, the Commission issued an Opinion and Order in this matter in which we adopted new elective alternative regulation plan (EARP) rules, as set forth in Appendix C of the opinion and order. We directed that the new EARP rules become effective upon the earliest date permitted by law and that the existing EARP rules, as set forth in Chapter 4901:1-4, Ohio Administrative Code (O.A.C.) should be rescinded simultaneously with the new EARP rules becoming effective.

(2) Applications for rehearing of the Opinion and Order of March 7, 2006, were filed on April 6, 2006, by the following entities: the Ohio Telecom Association (OTA), AT&T Ohio (AT&T), Verizon North Incorporated (Verizon), Cincinnati Bell Telephone Company LLC (Cincinnati Bell), and jointly by the Ohio Consumers' Counsel (OCC), the cities of Cleveland, Toledo, Holland, Maumee, Northwood, and Oregon, the Appalachian Peoples Action Coalition, Communities United for Action, Edgemont Neighborhood Coalition, Consumers for Fair Utility Rates, and the Neighborhood Environmental Coalition (collectively Consumer Groups). Memoranda contra of one or more of the submitted applications for rehearing were timely filed on April 17, 2006, by the Ohio Cable Telecommunications Association (OCTA), OTA, AT&T, Cincinnati Bell, and Consumer Groups.

(3) Section 4903.10, Revised Code, among other things, provides that any affected person, firm, or coporation may make an application for a rehearing within 30 days following the journalization of the order. The Commission may grant and hold a rehearing on the matters specified in the application if, in its judgment, sufficient reason appears.

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(4) In the March 7, 2006 Opinion and Order, the Commission rejected Consumer Groups' recommendation that incumbent local exchange companies (ILECs) seeking basic local exchange service (BLES) alternative regulation should be required to meet commitments in addition to those commitments they have already met pursuant to their EARPs (Opinion and Order, March 7, 2006, at 11).

Specific to Rule 4901:1-4-08, O.A.C., Consumer Groups argue that the Commission erred in determining that additional commitments are not appropriate in a competitive environment (Consumer Groups Application for Rehearing at 25). In their application for rehearing, Consumer Groups posit that additional commitments are necessary in order to ensure that alternative regulation for BLES may be in the public interest (*Id.* at 27). By requiring the ILEC to make advanced services available throughout every exchange for which BLES alternative regulation is granted, Consumer Groups claim that the Commission will provide the public with a benefit in return for increased BLES rates. Consumer Groups assert that the increased public benefit will help make BLES alternative regulation in the public interest (*Id.*).

(5) The Commission fully considered Consumer Groups' arguments concerning additional commitments in the March 7, 2006, Opinion and Order. Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, Consumer Groups' application for rehearing on the issue of additional commitments is denied.

(6) With respect to Rule 4901:1-4-09, O.A.C., the Consumers Groups seek rehearing of the Commission's rejection of their request for the adoption of a blanket protective agreement for information that the ILEC alleges is confidential. Consumer Groups assert that the schedule contemplated by the Commission's BLES alternative regulation rules does not provide sufficient time for the parties to negotiate a protective agreement, receive the confidential information, and serve discovery regarding the confidential information. In support of their position, Consumer Groups represent that interested parties have only one opportunity to state their objections to an application. They believe that the adoption of a blanket protective agreement will

assist interested parties in presenting their case to the Commission in a timely manner.

Consumer Groups also recommend that the Commission should shorten the time for ILECs to respond to discovery. In particular, Consumer Groups recommend that the Commission require that discovery responses be provided within ten days of service. Additionally, they request that Rule 4901:1-4-09, O.A.C., require electronic service of discovery requests and responses (Consumer Groups' Application for Rehearing at 38, 39).

(7) In regard to the Consumers Groups' application for rehearing specific to the request for the adoption of a blanket protective order, the application for rehearing is denied. Issues such as confidentiality agreements are initially best left for parties to negotiate. To the extent that the Commission becomes aware of problems in the negotiation process, it can, at that time, adjudicate the disputed issues. In rendering this decision, the Commission recognizes that it is likely that many of the potential parties to such confidentiality agreements have already entered into such similar agreements with one another in the past. The Commission notes that it will be in an ILEC's best interest to work cooperatively with the other parties regarding the negotiation of confidentiality agreements. Otherwise, the ILEC runs the risk of losing the automatic approval process due to the suspension of the application in the event additional time is needed to address disputed issues.

With respect to the Consumers Groups' application for rehearing specific to its request for shortening of the discovery process, the application for rehearing is granted. The Commission agrees that an expedited discovery is appropriate in order to allow parties to timely review data prior to the filing of pleadings. Therefore, Rule 4901:1-4-09, O.A.C., shall be amended as follows:

(I) All parties shall electronically serve their discovery requests. All discovery responses are to be electronically served within ten days of being served with the discovery request, or within the time frame specified by the commission.

(8) Consumer Groups seek rehearing relative to Rule 4901:1-4-09(B)(3), O.A.C. Specifically, Consumer Groups interpret the Commission's Opinion and Order to allow ILECs the opportunity to supplement their applications without suspending the application or providing interested persons with an additional opportunity to respond. Consumer Groups reference the Commission's acknowledgement that, "even if the initial application failed to contain the needed information, the company would still have an opportunity to supplement its filing in order to rectify any deficiencies" (Consumer Groups' Application for Rehearing at 28 citing to the Opinion and Order of March 7, 2006, at 12). Consumer Groups submit that Rule 4901:1-4-09(B)(3), O.A.C., does not currently provide for the supplementing of an application. To the extent that any supplementing of the application is allowed, Consumer Groups assert that interested persons should be provided with the opportunity to respond to the supplemental material (*Id.* at 28). Consumer Groups point out that if the supplemental filing occurs after the expiration of the 45-day window to file objections, interested persons would have no opportunity to comment on or object to the supplemental filing. Consumer Groups also note that the subsequent supplementing of the application will reduce the amount of time for the Commission to review the revised application (*Id.* at 29).

Based on their identified concerns regarding supplemented applications, Consumer Groups request that the Commission amend its rules accordingly. Specifically, Consumer Groups recommend that the Commission require its staff to docket a certification that an application is complete. This certification would trigger the time frames contained in the BLES alternative regulation rules (*Id.* at 30). Alternatively, Consumer Groups recommend that the Commission suspend all deficient applications and allow interested persons to respond to the supplemental information (*Id.* at 30, 31).

(9) The while discussion of Rule 4901:1-4-09(B)(3), O.A.C., in the Opinion and Order specifically allowed for the possibility of an ILEC supplementing its application to rectify any deficiencies. Rule 4901:1-4-09, O.A.C., as currently written, does not account for this possibility. While we do not think it necerssary to adopt Consumer Groups' proposal to require a suspension of any supplemented application and a staff certification of a complete

application, we do believe that, depending upon the significance of the additional material, the Commission may find it necessary, pursuant to Rule 4901:1-4-09(J), O.A.C., to change the time frames associated with approval of the application including the 45-day deadline for objections to an application. Of course, the Commission may, at any time, suspend an application as set forth in Rule 4901:1-4-09(G), O.A.C., including allowing for further review of supplemental information if the Commission deems it appropriate due to a material change in the substance of the application.

Additionally, consistent with of our amendment of Rule 4901:1-4-09(B)(3), O.A.C., above, the Commission clarifies that Rule 4901:1-4-09(C), O.A.C., should be amended to require that any supplemental information filed with the Commission should also be concurrently served on OCC. All other rehearing arguments with respect to this issue are denied.

(10) Consumer Groups seek rehearing with respect to Rule 4901:1-4-09(D), O.A.C.. Specifically, Consumer Groups contend that the Commission erred by failing to provide a longer time frame for the filing of motions to intervene. Rather than all persons seeking intervention filing the appropriate motion to intervene within seven calendar days of the filing of an ILEC's application, Consumer Groups request that the Commission provide a 14-day time frame for the filing of motions to intervene. In support of its position, Consumer Groups state that the current seven calendar days is AN inadequate time frame due to the voluminous nature of the BLES alternative regulation applications and the limited staffing resources of many of Consumer Groups' offices. Consumer Groups assert that the current time frame will result in entities being forced to file motions to intervene simply to protect their interests. Consumer Groups also point out that, based on the Commission's established time frames, an ILEC applicant will have twice as much time to file a memorandum contra as a potential intervenor would have to file a motion to intervene (*Id.* at 32-34).

Further, Consumer Groups recommend that ILECs filing BLES alternative regulation applications should provide notice of the filing of the application so that interested persons have a greater chance of knowing that the application has been filed. Con-

sumer Groups note that, absent adequate public notice to the BLES customers to be affected by the BLES alternative regulation, the ability for public participation will be greatly hindered (*Id.* at 41, 42). Therefore, similar to the requirements of the alternative regulation rules originally adopted in Case No. 92-1149-TP-COI, *In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Companies*, Consumer Groups advocate that the Commission require that ILECs provide individual notice to OCC, parties to the companies last rate case, and affected municipalities, as well as newspaper notices to customers in communities covered by BLES alternative regulation (*Id.* at 42).

(11) With respect to Consumer Groups' request for a longer time frame for the filing of motions to intervene in BLES alternative regulation cases, the Commission finds it appropriate to grant rehearing, as specifically addressed below. In particular, the Commission agrees with Consumer Groups that extending the deadline for the filing of motions to intervene from 7 days to 14 days is appropriate in order to provide potential intervenors with additional time to more thoroughly review the applicable BLES alternative regulation application. The Commission believes that the additional seven days for the filing of motions to intervene should not significantly interfere with the Commission's ability to timely consider an application for BLES alternative regulation.

Additionally, the Commission agrees that some form of public notice of the filing of an application for BLES alternative regulation is appropriate. Although the Commission does not see the value of notifying municipalities or parties to an ILECs' last rate case, which may have occurred almost twenty years ago, the Commission believes that Rule 4901:1-4-09(B), O.A.C., should be amended as follows:

(B)(5) Copy of proposed legal notice notifying the public of the filing of the application. The public notice should occur within 7 days of the filing of the application and should be printed in the legal notice section of a newspaper of general circulation in each county corresponding to the exchanges for which BLES alternative regulation is being requested. The requesting ILEC should

> confer with the Commission staff regarding the content of the legal notice prior to commencing with the publication of the public notice.

All other arguments raised on rehearing specific to this issue are denied.

(12) Consumer Groups seek rehearing regarding the Commission's use of the terms "persons" and "parties" in Rule 4901:1-4-09, O.A.C. Specifically, Consumer Groups note that in Rule 4901:1-4-09(D), O.A.C., the Commission states that "persons" seeking intervention must file a motion to intervene within seven calendar days following the filing of the application. Consumer Groups also call attention to the fact that, pursuant to Rule 4901:1-4-09(F), O.A.C., any "party" who can show good cause why the application should not be granted must file its objection within 45 days of the application being filed. Consumer Groups contend that the distinction created by the Commission in Rule 4901:1-4-09, O.A.C., results in two adverse effects. First, nonparties will be precluded from filing objections to a BLES alternative regulation application and those persons seeking intervention would have to wait for their motions for intervention to be approved prior to filing an objection (*Id.* at 35, 36).

Additionally, Consumer Groups assert that if a person is not a party until the granting of intervention, it will impede their ability to enter into confidentiality agreements, as contemplated in Rule 4901:1-4-09(E), O.A.C., until subsequent to the granting of intervention. Consumer Groups submit that such a result will adversely affect the filing of objections pursuant to Rule 4901:1-4-09(F), O.A.C. (*Id.* at 37). Therefore, Consumer Groups recommend that the Commission change "party" to "person" in Rule 4901:1-4-09(F), O.A.C., and include as "parties" all persons who have pending motions to intervene (*Id.*).

(13) Rehearing is granted for the limited purpose of clarifying that Rule 4901:1-4-09(D), O.A.C., should be amended to reflect that "all persons seeking intervention in order to be considered as a party in this proceeding must file a motion to intervene within 14 days of the filing of an application seeking BLES alternative regulation." Additionally, we have included the words "person or" in Rule 4901:1-4-09(F), O.A.C., immediately prior to the

word "party" in order to clarify that a person does not have to be a party in order to file objections to an application. However, the Commission notes that, consistent with our procedural rules contained in Chapter 4901, O.A.C., to the extent that an objecting person does not seek intervention, the person will not be entitled to discovery privileges.

Additionally, the Commission emphasizes that Rule 4901-1-16, O.A.C., states that for the purposes of Rules 4901-1-16 to 4901-1-24, O.A.C., the term "party" includes any person who has filed a motion to intervene which is pending at the time that a discovery request or motion is to be served or filed. Therefore, all persons with pending motions to intervene can participate in discovery, including the entering into confidentiality agreements. All other arguments raised on rehearing specific to this issue are denied.

(14) Consumer Groups also seek rehearing in regard to Rule 4901:1-4-09(F), O.A.C., and the requirement that objections to an ILEC's application must be filed within 45 days. Specifically, Consumer Groups assert that for those applications in which an ILEC relies on a customized competitive market test, additional time beyond the normally allotted 45 days must be provided due to the fact that the basis for the ILEC's competitive test might not be readily discernible (*Id.* at 31, 32). Specifically, Consumer Groups believe that the Commission should modify the rules so that for those cases in which the ILEC uses an alternative competitive test, interested persons file their objections 45 days after the Commission has issued an entry establishing the process and time frames for consideration of the application (*Id.* at 32).

(15) Consumer Groups' application for rehearing with respect to this issue is granted for the purpose of clarification inasmuch as it appears that Consumer Groups misunderstand the BLES alternative regulation rules. The Commission specifically provided in Rule 4901:1-4-09(H), O.A.C., that applications containing an alternative market test are not subject to the predefined process set forth in Rule 4901:1-4-09(G), O.A.C. Rather, as stated in Rule 4901:1-4-09(H), O.A.C., the Commission will establish the appropriate process and time frames for consideration of such applications, after reviewing each application.

(16) AT&T seeks rehearing relative to Rule 4901:1-4-09(G), O.A.C. Specifically, AT&T contends that the 90-day time frame originally proposed by the Commission staff is more than sufficient time for interested parties to review the information submitted by an ILEC specific to the competitive tests. In support of its position, AT&T notes that no approval time frame in the Commission's Competitive Retail Service Rules (Chapter 4901:1-6, O.A.C.) exceeds 90 days (AT&T Application for Rehearing at 16).

Cincinnati Bell asserts that, due to the fact that the Commission has provided the mechanism to extend the automatic approval deadline in those cases in which there is some controversy, there is no need for the automatic approval to be 120 days. Cincinnati Bell further points out that, inasmuch as objections to the application must be filed within 45 days, it should be apparent shortly thereafter as to whether the application will require a hearing or additional analysis that would prevent the automatic approval process from occurring. Therefore, Cincinnati Bell contends that it is unnecessary to hold all applications subject to a 120-day automatic approval process. In lieu of the existing rule, Cincinnati Bell recommends that the Commission shorten the automatic approval time to 75 days from the date of filing the application (Cincinnati Application for Rehearing at 3, 4).

Verizon and OTA both assert that the Commission has provided no justification for the 120-day automatic approval process. Each advocates that the Commission adopt a 45-day automatic approval process similar to that which currently exists for elective alternative regulation (Verizon Application for Rehearing at 6; OTA Application for Rehearing at 8). OTA also submits that the timeline for a suspended application should be 135 days, rather than the current 270 days. In support of its position, OTA states that 135 days is the timetable established for intercarrier arbitrations (*Id.*).

(17) AT&T's, Cincinnati Bell's, Verizon's, and OTA's applications for rehearing with respect to this issue are denied. The Commission believes that 120 days is appropriate to allow sufficient review by interested persons and the Commission.

(18) Consumer Groups seek rehearing with respect to the automatic approval time frames incorporated in Rule 4901:1-4-09(G), O.A.C. Specifically, Consumer Groups assert that the Commission erred in adopting an automatic approval process for BLES alternative regulation applications. In support of their position, Consumer Groups posit that, unlike the elective alternative regulation framework (Case No. 00-1532-TP-COI [00-1532], *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*), BLES alternative regulation is much more subjective and requires much closer scrutiny regarding the application of various tests being performed on an exchange basis (Consumer Groups' Application for Rehearing at 40).

(19) Consumer Groups have failed to raise new arguments for the Commission's consideration. Therefore, their application for rehearing with respect to this issue is denied.

(20) Cincinnati Bell seeks rehearing relative to Rule 4901:1-4-09(H), O.A.C. Specifically, the company advocates that the Commission establish an automatic 180-day approval process for customized BLES alternative regulation cases filed pursuant to Rule 4901:1-4-09(H), O.A.C. In support of its position, the company notes that pursuant to Section 4909.42, Revised Code, even in a traditional rate case, if an application is not resolved within 275 days, the proposed rates may go into effect subject to a refund order. Cincinnati Bell asserts that a BLES alternative regulation case should be far simpler to resolve than a total company rate case. Cincinnati Bell contends that absent a specified automatic approval process, a primary goal of alternative regulation, to simplify regulation, will be lost (Cincinnati Bell Application for Rehearing at 5).

Similarly, OTA submits that the Commission has failed to define any process whatsoever for customized BLES alternative regulation cases. Rather than having no process parameters, OTA proposes that, consistent with Rule 4901:1-4-09(I), O.A.C., the Commission should be required to issue a decision within 270 days (OTA Application for Rehearing at 3).

(21) Cincinnati Bell's and OTA's applications for rehearing specific to this issue are denied. As discussed above, rather than establishing a procedural process and approval time frames for cus-

tomized competitive market tests, the Commission, in Rule 4901:1-4-9(H), O.A.C., clearly stated that the Commission will establish the appropriate process and time frames for review of such applications. Until the Commission receives such an application, it has no ability to anticipate the level of review that will be necessary for these types of filings.

(22) Rule 4901:1-4-10, O.A.C., provides that in order to qualify for pricing flexibility for BLES and other tier one services, an ILEC has the burden of demonstrating that it meets at least one of the competitive market tests set forth in paragraph (C) of the rule in each of the requested exchanges. These tests include the following:

(a) An applicant must demonstrate in each requested telephone exchange area that at least 25 percent of total residential access lines are provided by unaffiliated competitive local exchange companies (CLECs), and at least 20 percent of total company access lines have been lost since 1996 as reflected in the applicant's annual report filed with the Commission for 1996.

(b) An applicant must demonstrate in each requested telephone exchange area that at least 20 percent of total residential access lines are provided by unaffiliated CLECs, and the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers.

(c) An applicant must demonstrate in each requested telephone exchange area that at least 15 percent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five alternative providers serving the residential market.

(d) An applicant must demonstrate in each requested telephone exchange area 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 for 2002, and the presence of at least five unaffiliated facilities-based alternative providers serving the residential market.

(23) With respect to its alleged assignment of error relative to Rule 4901:1-4-10(C)(4), O.A.C., AT&T objects to the use of December 31, 2002, as the date for measuring ILEC line losses. AT&T considers this date to be arbitrary inasmuch as the use of the same test year for all exchanges of all ILECs fails to recognize that competition entered the local exchange arena at different times, different locations, and thru different technologies. In support of its position, AT&T contends that its total residence lines in service reached its peak in 2000 and actually began to decline in 2001. Therefore, AT&T believes that by utilizing December 31, 2002, as the starting point for the analysis under the fourth competitive market test, the Commission has ignored the first two years of residential line loss.

Rather than the Commission's proposed reliance on December 31, 2002, data, AT&T proposes that for any specific exchange, the Commission should allow an ILEC to use any post-1996 year data as the starting point for the analysis required by the test, provided the data is obtained from an ILEC's annual report. Therefore, each exchange could have its own specific starting point for the purpose of applying the fourth competitive market test under Rule 4901:1-4-10(C), O.A.C. AT&T opines that this approach will allow for an evaluation on a more granular level (*Id.* at 8, 9).

Similarly, OTA, in its application for rehearing, asserts that the identification of 2002 as the test year for all carriers under the fourth competitive test of Rule 4901:1-4-10, O.A.C., is arbitrary and discriminatory. OTA advocates that the Commission should permit each company to identify its own apex for access lines and measure line loss from that point.

Further, OTA opines that the Commission erred by premising Rule 4901:1-4-10(C)(4), O.A.C., on exchange-level information (OTA Application for Rehearing at 4). In lieu of exchange–level information, OTA proposes that the Commission allow for market-measures proposed by the applicant carriers (OTA Application for Rehearing at 4-6). Likewise, Verizon believes that, inasmuch as competitors do not compete on an exchange

basis, the Commission should, at a minimum, allow pricing flexibility on an extended area service local calling area basis (Verizon Application for Rehearing at 5).

(24) As to AT&T's and the OTA's request for rehearing regarding the selection of year 2002 as the base period for the fourth competitive market test, their applications for rehearing are denied. As we stated in our Opinion and Order, the fourth predefined competitive market test was adopted to address various concerns raised by commenting parties regarding the technology advancements and its impact on the competitiveness of the local telecommunications service market that was not reflected in the staff's proposed three predefined tests (Opinion and Order at 35). The fourth test captures the changing market characteristics identified by data and affidavits submitted by various parties of record. Both AT&T and OTA raise the argument that using a specific year as the starting point for measuring the impact of competition or reasonably available alternatives to BLES would disadvantage some carriers that started experiencing competition earlier than such set date. Both AT&T and OTA argue that the Commission should use the peak year of residential access lines for each exchange as the starting point of the analysis. Data presented by the OTA in Attachment B to its initial comments reflect that the ILECs experienced a peak in their access lines in the years 1999 and 2000. However, we are mindful of, and agree with, the AARP and Consumer Groups' argument that not all of the residential access line losses occurring since the residential access lines peak in a given exchange area are the result of competition but may, in some cases, be due to a loss of lines to the ILEC's affiliate DSL offering or the use of cable modem as a substitute for dial-up internet access from a second line (AARP Reply Comments at 17; Williams Affidavit at 9; Consumer Groups memorandum Contra at 12).

In support of its selection of 2002 as the starting point in the fourth "off-the- shelf" competitive market test, the Commission believes that 2002 recognizes the transition of the loss of second lines replaced by DSL and cable modem and excludes any data distortions due to access line losses not due to the presence of competition for BLES or the availability of reasonable alternatives to BLES Further, the Commission highlights that it

was not until *Iowa Utilities Board v. FCC*[1], on January 22, 2001, that the UNE-P became a potential competitive offering to BLES. The Commission, itself, did not incorporate the requisite UNE-P offering until its October 4, 2001, decision in Case Nos. 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*. The actual implementation of UNE-P offerings did not occur until 2002.

Accordingly, the applications for rehearing relative to the selection of 2002 as the starting point for the competitive test in Rule 4901:1-4-10(C), O.A.C., are denied. While reaching this decision, the Commission notes that, to the extent that an ILEC can demonstrate its own unique circumstances, it may certainly avail itself of the alternative market test option pursuant to Rule 4901:1-4-09(H), O.A.C.

(25) With respect their next assignment of error pertaining to Rule 4901:1-4-10, O.A.C., AT&T, OTA, and Verizon each object to the Commission's reliance on the presence of facilities-based alternative providers for the purpose of satisfying the fourth test in Rule 4901:1-4-10(C)(4), O.A.C. In lieu of facilities-based alternative providers, AT&T proposes that the Commission premise the rule on the presence of alternative providers. AT&T and OTA assert that the term facilities-based alternative provider is inappropriate inasmuch as it excludes some voice-over-Internet (VoIP) providers and nonfacilities-based competitive local exchange companies (CLECs). Specifically, AT&T and OTA believe that by premising the rule on facilities-based providers, the Commission is inappropriately excluding: (1) broadband service providers that do not offer their own VoIP service, (2) VoIP providers that provide VoIP services over another provider's broadband, and (3) CLECs that serve their end users solely via resale arrangements with ILECs (*Id.* at 9-12, OTA Application for Rehearing at 5, Verizon Application for Rehearing at 3).

(26) In regard to the request for the removal of "facilities-based" qualifier for the alternative providers used to meet criteria set forth in the fourth competitive market test, AT&T's, OTA's, and

[1] 219 F.3d 744 (8th Cir. 2000), *cert. granted in part*, 148 L.Ed. 2d 788, 121 S.Ct. 877 (Jan. 22, 2001)

Verizon's applications for rehearing are denied. As we explained earlier, the access line losses included in the fourth competitive market test account for any access line lost by the ILEC, including losses to facilities-based CLECs, nonfacilities-based CLECs, facilities-based VoIP providers, nonfacilities-based VoIP providers and wireless providers. Therefore, contrary to AT&T's and OTA's allegation, the first part of the fourth competitive market test adopted by the Commission indeed accounts for the impact of nonfacilities-based VoIP providers and nonfacilities-based CLECs offering resale competition.

Nevertheless, the Commission believes that it is important that the second part of the test focus on the presence of facilities-based alternative providers.

Pursuant to Section 4927.02(A)(2), Revised Code, it is the policy of the state to rely on market forces, where they are **present** and capable of supporting a healthy and **sustainable**, competitive telecommunications market, and to maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications services (emphasis added). Nonfacilities-based alternative providers are entities that can be in the market today and gone tomorrow, with no investment in facilities to indicate the serious commitment to the provision of alternative services to BLES. For an ILEC to demonstrate that there is either competition for BLES in a given telephone exchange area or the customer has reasonably available alternatives, and that there are no barriers to entry, we find that the ILEC has to demonstrate that the alleged competition is a sustainable competition through the showing of the presence of facilities-based alternative providers, in addition to a certain level of market share loss.

Additionally, as AT&T admits, broadband services providers that do not offer their own VoIP services should be excluded from the second part of the test as they do not provide alternative telecommunications service to the ILEC's BLES.

(27) Relative to the test incorporated in Rule 4901:1-4-10(C)(4), O.A.C., Consumer Groups assert that neither the established benchmark year of 2002 or the threshold of a loss of at least fifteen percent of the access lines was subject to public comment as required by Section 4927.03(A)(1), Revised Code,

and was not proposed by any of the parties in this proceeding (*Id.* at 21, 22). Consumer Groups similarly argue that Rule 4901:1-4-10(D), O.A.C., was not issued for public comment and was not discussed in the Commission's Opinion and Order (*Id.* at 24, 25). Consumer Groups also assert that the Commission failed to comply with Section 4903.09, Revised Code, by failing to justify the criteria of the fourth competitive market test and not providing the findings of fact and written opinions setting forth the decisions reached in the order (*Id.* at 22).

(28) With respect to the preceding Consumer Groups' assignment of errors, the application for rehearing is denied. Specifically, the Commission emphasizes that all changes made by the Commission to the staff proposal were based on the Commission's analysis of the record, including the comments filed by the various parties.

(29) In regard to their assignment of error related to the specific competitive market tests incorporated in Rule 4901:1-4-10(C), O.A.C., Consumer Groups assert that the Commission's competitive market tests fail to comply with the statutory criteria of Section 4927.03, Revised Code. Specifically, Consumer Groups contend that the mere fact that there is a presence of competitors in a market does not constitute the lack of barriers to entry required by the statute. Rather, Consumer Groups submit that such a fact simply signals that competitors have overcome the barriers that do exist.

Consumer Groups reject the Commission's finding that barriers to entry are intended to focus on barriers that prevent a carrier from ever being able to compete in a market and do not include challenges that face a new competitive entrant in a given market (*Id.* at 12 citing the Opinion and Order of March 7, 2006, at 22). Consumer Groups contend that the additional language in Section 4927.03(A)(3), Revised Code, demonstrates that the required "no barriers to entry" is something in addition to the requirement that services be "subject to competition."

Consumer Groups submit that the Commission has failed to establish that satisfying one of the tests incorporated in Rule 4901-1-4-10(C), O.A.C., constitutes a demonstration that there are no barriers to entry for the provision of stand-alone BLES. Consumer Groups opine that the existing available BLES

alternatives, including intermodal services, are all offered as part of a package bundled with other services and that these bundled service offerings are not the type of services which are addressed in H.B. 218. In support of its argument Consumer Groups note that prior to H.B. 218, the Commission, in 2001, determined that bundles that include BLES are subject to competition or had reasonably available alternatives for all of the ILECs in the entire state (*Id.* at 15 citing to 00-1532 Opinion and Order, December 6, 2001). Therefore, Consumer Groups argue that if bundled services are considered to be an existing substitute to stand-alone BLES, there would have been no reason to enact H.B. 218 (*Id.*).

As further support for its position, Consumer Groups note that the competitive test established pursuant to Rule 4901:1-4-10(C)(1), O.A.C., fails to require a showing of competition for BLES, or the lack of barriers to entry for BLES (*Id.* at 18). Rather, Consumer Groups state that this test simply requires a showing that there are unaffiliated CLECs serving a percentage of residential access line in an exchange (*Id.*). Consumer Groups call attention to the fact that the CLECs identified for the test may not actually offer stand-alone BLES. With respect to the test identified in Rule 4901:1-4-10(C)(1) and (4), O.A.C., Consumer Groups provide that simply because an ILEC has lost lines does not reflect the lack of barriers to entry (*Id.* at 19). While the tests established in Rule 4901:1-4-10(C)(2) and (3), O.A.C., require the presence of competitors providing BLES, Consumer Groups indicate that there is no requirement that BLES competition has reached a specified level or that there has been a demonstration that there are no barriers to entry for the provisioning of BLES (*Id.* at 20). For example, Consumer Groups posit that the potential exists that an alternative provider may only serve a portion of an exchange and, therefore, would not satisfy the criteria set forth in H.B. 218 (*Id.* at 21).

(30) Consumer Groups' assignment of error relative to the Commission's treatment of the issue of "barriers to entry" and the established criteria of Rule 4901:1-4-10(C), O.A.C., is denied. In reaching this decision, the Commission finds Consumer Groups' arguments appear to be premised on the belief that in order for an ILEC to satisfy H.B. 218, any condition that makes entry more difficult must be removed for all potential competitors. The Commission finds such an interpretation to be

unreasonable and impractical. Realistically, all 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. Further, the Commission points out that, while the legislature provided general guidance to the Commission regarding the establishment of alternative BLES regulation, the ultimate decision-making authority regarding the implementation of this authority was delegated to the Commission.

As we explained in our Opinion and Order, the intent of the competitive market tests set forth in Rule 4901:10-4-10(C), O.A.C., is to require the applicant to demonstrate that that BLES is subject to competition or that reasonably available alternatives exist and that no barriers to entry exist for BLES. Inasmuch as the telecommunications market is continuously evolving, the Commission cannot pigeonhole a competitive market analysis via one specific test. Rather, the Commission, in its rules, focused on specific factors demonstrating for residential BLES customers that all of the statutory criteria found in Section 4927.03(A), Revised Code, have been satisfied. For example, to the extent that an ILEC can demonstrate that it has lost a "real" percentage of its residential customer base and that there are competitive alternatives available to BLES customers, the Commission is satisfied that barriers to entry are not restricting the ability of competitors to compete. As part of its analysis, the Commission previously noted that every customer subscribing to a bundled service which includes BLES is, by definition, also a BLES customer. Similarly, contrary to the Consumer Groups' argument, the test components measuring access line losses do measure BLES competition because each access line customer previously purchased BLES from the ILEC. In this regard, Consumer Groups' position also ignores Section 4927.03(A)(2)(c), Revised Code, which requires the Commission to consider the availability of "functionally equivalent or substitute services." Further, as additional

protection, the Commission's 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.

By suggesting that there was no reason to enact H.B. 218 because the Commission's 00-1532 orders already found competition exists for BLES, the Consumer Groups inaccurately portray our 00-1532 decision and the implications of H.B. 218's subsequent enactment. Prior to enactment of H.B. 218, BLES was beyond the scope of alternative regulation under Section 4927.03, Revised Code. Our decision in 00-1532 did not deregulate stand-alone BLES or otherwise provide regulatory exemptions applicable to stand-alone BLES. Rather, in 00-1532, we made certain competitive findings applicable largely to discretionary services that extended to the entire state of Ohio. For example, we found that bundled service packages offered by the ILEC (including those containing BLES) are competitive with bundled service packages offered by CLECs. Therefore, pursuant to our Order in 00-1532, ILECs received relief limited to bundled service packages.

By contrast, in the current rulemaking under H.B. 218, we are creating an alternative regulatory framework applicable to BLES and imposing additional competitive market tests to be applied on a granular level. The competitive market tests in Rule 4901:1-4-10(C), O.A.C., are new and go well beyond the competitive findings in the 00-1532 rulemaking. The new competitive market tests 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 or that BLES is subject to competition in the affected exchange; those same demanding test criteria also demonstrate that no barriers to entry exist for alternative BLES providers in the affected exchange. Accordingly, the Commission is satisfied that the competitive market tests in our rule satisfy all of the requirements found in Section 4927.03(A), Revised Code.

Notwithstanding the aforementioned conclusions, an interested person can always file an objection alleging barriers to entry in specific exchanges addressed in an ILEC's application. Further, the Commission emphasizes that the competitive market tests available pursuant to Rule 4901:1-4-09(C), O.A.C., simply

represent the available "off-the-shelf" options and do not restrict the ability of an ILEC to still propose their own competitive market test for the Commission's consideration.

(31) Verizon contends that the thresholds for access lines lost and the number of competitive providers are arbitrary and unreasonable and do not comport with the requirements of Section 4927.03(A)(1) and (A)(3), Revised Code (Verizon Application for Rehearing at 2). Rather than requiring an ILEC to demonstrate both a percentage of access line loss and a specific number of competitors, Verizon proposes that the Commission require that an ILEC satisfy only one of the two portions of the tests currently incorporated in Rule 4901:1-4-10(C), O.A.C. (*Id.* at 4).

(32) Verizon's application for rehearing with respect to this assignment of error is denied. As discussed above, the requirement of satisfying both criteria of the competitive market test provides additional assurance that the statutory intent of H.B. 218 is satisfied.

(33) As one of their assignments of error, Consumer Groups dispute the Commission's rejection of their proposed competitive market test.[2] They contend that of all the competitive market tests proposed in this proceeding, only their test comports with the statutory requirements and will ensure that there are no barriers to entry and that the service will be subject to competition or that customers will have reasonably available alternatives (Consumers Groups Application for Rehearing at 23).

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2 The Consumer Groups proposed a two-part test as an alternative to the staff proposed market tests. This test is as follows:

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.

The applicant must demonstrate in each requested exchange that at least 20 percent of total residential access lines are provided by unaffiliated facilities-based CLECs; that at least 35 percent of total residential access lines are provided by unaffiliated CLECs (both facilities-based and nonfacilities-based); and that BLES is available and is being provided by unaffiliated facilities-based CLECs throughout the exchange, at prices reasonably comparable to prices for the ILEC's BLES (Opinion and Order at 35).

(34) Consumer Groups' application for rehearing with respect to this assignment of error is denied inasmuch as it fails to raise any new arguments for the Commission's consideration.

(35) Consumer Groups also object to ILECs being provided with the opportunity to propose their own competitive market test due to their belief that the General Assembly did not contemplate allowing ILECs to establish their own criteria for demonstrating that no barriers to entry exist in a market. Rather, Consumer Groups contend that the General Assembly directed the Commission to establish rules relative to BLES alternative regulation (*Id.* at 24).

(36) In regards to Consumer Groups' argument that the Commission erred in allowing the ILECs to demonstrate that the statutory criteria is satisfied through proposing their own alternative competitive market test, Consumer Groups' application for rehearing is denied. We note that Section 4927.03(A)(1), Revised Code, provides that the Commission, upon its own initiative or the application of a telephone company or companies, may, by order, exempt any such telephone company or companies, as to any public telecommunications service, including basic local exchange service, from any provision of Chapter 4905. or 4909., or Sections 4931.01 to 4931.35 of the Revised Code, or any rule or order adopted or issued under those provisions, or establish alternative regulatory requirements. Therefore, it is clear that the statute contemplates both the Commission formulating rules for allowing BLES alternative regulation and for consideration of an ILEC's application for BLES alternative regulation. Accordingly, the Commission's rules are consistent with the statutory provision.

(37) Finally, with respect to Rule 4901:1-4-10(D), O.A.C., AT&T, OTA, and Consumer Groups each contend that it is unclear as to whether an ILEC can count its own affiliate, as well as an affiliate, or the edge-out operations of another ILEC operating within the applicant's exchange, as a residential CLEC. Due TO the ambiguity of the rule, they each believe that the Commission should clarify its intentions (AT&T Application for Rehearing at 12; OTA Application for Rehearing at 9; Consumer Groups' Application for Rehearing at 25).

(38) AT&T's, OTA's, and Consumer Groups' applications for rehearing requesting clarification of Rule 4901:1-4-10(D), O.A.C., is granted. Specifically, the Commission revises the rule to clarify that an applicant may count an affiliate of **another** ILEC serving the residential market as a CLEC or an alternative provider in the applicants' telephone exchange area subject to the applicable competitive market test. For example, AT&T can count Cincinnati Bell Extended Territory LLC. (an affiliate of another ILEC, Cincinnati Bell), as a CLEC for the purpose of satisfying the criteria of the selected competitive market test in a given AT&T exchange. However, an ILEC may not count its own affiliate for the purpose of satisfying a competitive market test. Because the definition of CLEC (Rule 4901:1-4-01(E), O.A.C.,) automatically excludes ILECs, the ILECs competiting outside their territory against other ILECs would be inappropriately excluded absent this clarification.

(39) Among other things, Rule 4901:1-4-11, O.A.C., provides the pricing parameters for BLES and other tier one core and noncore services once an ILEC meets at least one of the competitive market tests set forth in paragraph (C) of Rule 4901:1-4-10, O.A.C. Specifically, Rule 4901:1-4-11, O.A.C., affords an ILEC tier two pricing flexibility for all tier one noncore services. BLES and basic Caller ID are also afforded pricing flexibility in an exchange where at least one of the competitive markets tests is satisfied. The ILECs' initial upward pricing flexibility for BLES and basic caller ID is limited to an annual increase of no more than $1.25 and $.50, respectively. In subsequent years, the ILEC's upward pricing flexibility similarly shall be limited. No banking of increases is permitted under Rule 4901:1-4-11, O.A.C. Regarding Lifeline customers, an ILEC afforded the pricing flexibility set forth above must not increase the rates, including any nonrecurring service establishment, service connection and service change order charges. Alternatively, if an ILEC does increase the rates of BLES for Lifeline customers, the ILEC must also adjust the lifeline discount to ensure that there is no net rate increase to qualifying lifeline customers.

(40) AT&T, Verizon, Cincinnati Bell, and OTA complain that the Commission acted unreasonably and unlawfully by establishing an absolute cap of $1.25 for annual rate increases under alternative regulation of BLES. Cincinnati Bell and Verizon assert that

there is no authority for rate caps or price controls under H.B. 218 (Cincinnati Bell Application for Rehearing at 5; Verizon Application for Rehearing at 5). Cincinnati Bell and OTA maintain that the Commission provided no information or analysis to support how the annual rate limits were calculated (Cincinnati Bell Application for Rehearing at 6; OTA Application for Rehearing at 7). Cincinnati Bell also claims rate restrictions appear to be more of a political solution rather than a legal or economic solution as those rates limits are far more restrictive and arbitrary than the 20 percent limit contained in the staff proposal (Cincinnati Bell Application for Rehearing at 7). AT&T, Verizon, Cincinnati Bell, and OTA urge the Commission to eliminate the rate restrictions on rehearing. AT&T, Cincinnati Bell, and OTA submit that the elimination of banking is counterproductive and inappropriate (AT&T Application for Rehearing at 15; Cincinnati Bell Application for Rehearing at 8-9; OTA Application for Rehearing at 7, 8). OTA continues that, as adopted, the rule encourages carriers to adjust prices when it is permitted to do so, rather than when the market requires it. This "use it or lose it" approach has no place in pricing policy in a competitive market the OTA opines (*Id.*).

(41) The Commission is not surprised that the ILECs are opposed to anything less than unfettered pricing flexibility. As stated in the Opinion and Order, the Commission attempted 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" (Opinion and Order, March 7, 2006 at 40). By adopting straightforward pricing constraints and no banking for BLES and basic Caller ID, the Commission accomplished this goal. While recognizing that the rule did not give the ILECs the total market freedoms the companies sought, the Commission pointed out that the alternative regulatory treatment afforded BLES and basic Caller ID would not duly disadvantage the ILECs since most have the ability to offer bundled BLES offerings at market-based rates without prior Commission approval. Furthermore, as the ILECs have argued, competition should restrain the ILEC's need to increase or "bank" rates. The Commission, therefore, will not grant rehearing on this issue.

(42) AT&T next argues that the application of the actual dollar amounts included in the rules rewards companies with lower rates and penalizes companies with higher rates (AT&T Application for Rehearing at 14). AT&T also claims that it is unclear just how the $1.25 increase can be applied. For example, AT&T explains that typical local exchange service is comprised of several elements. For AT&T, local exchange service is broken down into the network access line, central office termination and the local usage plan selected by the customer. AT&T inquires as to which rate element the $1.25 would apply or whether it would apply to all three components for a total monthly increase of $3.75. Additionally, AT&T inquires as to the manner in which the $1.25 applies if the customer subscribes to measured-rate service instead of flat-rate service. AT&T suggests that these types of issues are the reason why percentages, rather than dollar amounts were used in the early ILEC-specific alterative regulation cases (*Id.* at 14, 15).

(43) As to AT&T's concern that the application of an actual dollar amounts rewards companies with lower rates and penalizes companies with higher rates, the Commission is not convinced that this is an issue that merits rehearing. Any rate increase must have a starting point and, as was the case with the staff's percentage limits, some companies would benefit more than others. However, the Commission agrees with Consumer Groups' argument that the differential between the large ILEC's residential flat rate service is not significant (Consumer Groups Memorandum Contra at 7, footnote 21). Therefore, the Commission denies rehearing of this issue.

With regard to AT&T's confusion regarding the application of the $1.25 increase to disaggregated rate elements of central office termination, network access line and usage, the Commission agrees with Consumer Groups that the $1.25 increase applies to BLES no matter how the tariffs, service or bills are structured (*Id.*). In other words, while it seems logical to apply the increase to the network access line, AT&T Ohio could apply it to any of the other elements as long as the customer's total increase for BLES did not exceed $1.25 in a 12-month period as set forth in Rule 4901:1-4-11(A), O.A.C. The same reasoning would also hold true for measured- and message-rate services. AT&T could apply the increase to any portion of the

disaggregated service as long as the total increase does not exceed $1.25. Rehearing on this issue is, therefore, denied.

(44) Notwithstanding its objection to the validity of the rate caps, Cincinnati Bell seeks clarification on how the annual limits on rate increases will operate in practice. Cincinnati Bell's understanding is that the monthly rate for BLES could increase or decrease in one or more steps over the twelve-month period following approval of an application for BLES alternative regulation, so long as the monthly rate in that twelve-month period never exceeds the rates at the time of the approval of the application by more than $1.25. Cincinnati Bell then understands that the BLES rate in effect on the anniversary date of the approval of the BLES alternative regulation would become the new base from which the $1.25 limit would be measured for the next twelve-month period. Cincinnati Bell seeks clarification that this accurately describes how the $1.25 limit is to apply (Cincinnati Bell Application for Rehearing at 8).

(45) Cincinnati Bell's request for clarification regarding Rule 4901:1-4-11(A), O.A.C., is understandable. The Commission was careful to craft this rule to explain how the annual limits on rate increases would operate in practice. We can appreciate Cincinnati Bell's desire to confirm its interpretation of the rule. Cincinnati Bell is indeed correct as to its understanding of how the rule would operate in practice. Since Cincinnati Bell's explanation is accurate, we see no need to further clarify the rule.

(46) AT&T, Cincinnati Bell, Verizon and OTA argue that the Commission acted unreasonably and unlawfully by freezing Lifeline rates at current levels. AT&T, Cincinnati Bell, Verizon, and OTA maintain that the enabling legislation does not require a freeze of rates for Lifeline customers. Rather, the enabling legislation suggests that one of the policies of the state of Ohio is to "protect the affordability of telephone service for low-income subscribers through the continuation of Lifeline assistance programs" (AT&T Application for Rehearing at 16, 17). AT&T, Cincinnati Bell, and OTA continue that Lifeline should be a discount off of normal rates and should not continue as a special subsidy borne only by ILECs operating pursuant to a qualifying EARP (AT&T Application for Rehearing at 17; Cincinnati Bell

Application for Rehearing at 9; OTA Application for Rehearing at 2).

As an alternative, AT&T and OTA support a freeze on Lifeline rates for two years after which the Commission should permit the Lifeline discount that is incremental to the federal plan to be phased down over a two or three-year period until the discount merely mirrors the federal plan (AT&T Application for Rehearing at 18; OTA Application for Rehearing at 2). AT&T also recommends, similar to the federal plan, that the Commission eliminate the vertical feature restriction. At a minimum, AT&T submits, the Commission should permit Lifeline customers to subscribe to the most popular features, such as Caller ID and Caller ID with Name, without the need for medical or safety self-certification. Similarly, once the foregoing restrictions are lifted, AT&T recommends that the Commission also repeal the prohibition on the ILECs' marketing of such services (AT&T Application for Rehearing at 18, 19). As a final matter, AT&T notes that the Commission failed to amend the rule to reflect the April 13, 2005 and July 19, 2005 orders on Lifeline programs eligibility in Case No. 05-461-TP-UNC. AT&T recommends that the Commission rectify this matter on rehearing (*Id.*).

(47) The only Lifeline issue that merits rehearing is the Commission's failure to amend the current Lifeline provisions of the EARP rules to reflect the Commission's April 13, 2005 and July 19, 2005 orders on Lifeline programs and eligibility. The Commission agrees with AT&T that the existing EARP Lifeline rule should be revised to reflect these orders, and, therefore, amends Rule 4901:1-4-06(B), O.A.C., accordingly. The remaining rehearing arguments raise nothing new not previously considered by the Commission in this or some previous alternative regulation proceeding (i.e., Case No. 00-1532-TP-COI). Therefore, the remaining arguments on rehearing are denied.

(48) We believe that we have fully addressed all of the relevant arguments raised in the applications for rehearing filed in this matter. However, to the extent that there are arguments raised on rehearing that have not been addressed herein, those arguments are rejected and rehearing is denied.

(49) The rules being adopted today shall take effect at the earliest effective date permitted by law. Until the effective date of the rules attached hereto, the Commission will continue to process cases under the regulatory procedures applicable to the involved carrier at that time. The Commission will, by subsequent entry in this docket, announce the effective date of the new rules.

It is, therefore,

ORDERED, That the applications for rehearing are granted in part and denied in part, as outlined in this entry on rehearing. It is, further,

ORDERED, That the attached proposed rules (Appendix A) for Chapter 4901:1-4, O.A.C., as we have further modified them, are hereby adopted. It is, further,

ORDERED, That copies of all adopted rules contained in Chapter 4901:1-4 be filed with the Joint Committee on Agency Rule Review, the Legislative Service Commission, and the Secretary of State pursuant to Section 111.15, Revised Code. It is, further,

ORDERED, That the adopted rules be effective on the earliest day permitted by law, unless otherwise ordered by the Commission. It is, further,

ORDERED, That the Commission is the ultimate arbiter of the meaning of these rules. It is, further,

ORDERED, That, unless otherwise stated herein, the rules in Chapter 4901-1, O.A.C., apply to the filing of BLES alternative regulation applications. It is, further,

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

Donald L. Mason

JSA;geb

Entered in the Journal
MAY - 3 2006

Reneé J. Jenkins
Secretary

*** DRAFT – NOT FOR FILING ***

4901:1-4-01 **Definitions.**

As used within this chapter, these terms denote the following:

(A) "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of these rules, the term "own" means to own an equity interest (or the equivalent thereof) of more than ten per cent.

(B) "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.).

(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.

(D) "Commission" means the public utilities commission of Ohio.

(E) "Competitive local exchange carrier (CLEC)" means any facilities-based and nonfacilities-based local exchange carrier that was not an incumbent local exchange

carrier on the date of the enactment of the Telecommunications Act of 1996 (1996 Act) or is not an entity that, on or after such date of enactment, became a successor, assign, or affiliate of an incumbent local exchange carrier.

(F) "Elective alternative regulation plan (EARP)" means a plan adopted in case number 00-1532-TP-COI under which an incumbent local exchange carrier receives earnings-free regulation with greater pricing flexibility for services other than BLES in exchange for specific commitments.

(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.).

(H) "Facilities-based competitive local exchange carrier" means any local exchange carrier that uses facilities it owns, operates, manages or controls to provide service(s) subject to the commission evaluation; and that was not an incumbent local exchange carrier in that exchange on the date of the enactment of the 1996 Act. Such carrier may partially or totally own, operate, manage or control such facilities. Carriers not included in this classification are carriers providing service(s) solely by resale of the incumbent local exchange carrier's local exchange services.

(I) "Incumbent local exchange carrier (ILEC)" means with respect to any area, any facilities-based local exchange carrier that: (a) on the date of the enactment of the 1996 Act, provided BLES in such area; and (b) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R 69.601(b), as effective on May 1, 2006; or (ii) is a person or entity that, on or after such date of enactment, became a successor or assignee of a member described in clause.

(J) "Large ILEC" means any ILEC serving fifty thousand or more access lines within Ohio.

(K) "Long-run service incremental cost (LRSIC)" represents the forward-looking economic cost for a new or existing product that is equal to the per unit cost of increasing the volume of production from zero to a specified level, while holding all other product and service volumes constant. LRSIC does not include any allocation of forward-looking common overhead costs. Forward-looking common overhead costs are costs efficiently incurred for the benefit of a firm as a whole and are not avoided if individual services or categories of services are discontinued. Further, forward-looking joint costs, which are the forward-looking costs of resources necessary to provide a group or family of services shall be added to or included in the LRSIC of the products or services.

(L) "Small ILEC" means any ILEC serving less than fifty thousand access lines within Ohio.

(M) "Telephone exchange area" means a geographical service area established by an ILEC and approved by the commission, which usually embraces a city, town, or village and a designated surrounding or adjacent area. There are currently seven hundred thirty-eight exchanges in the state.

(N) "Tier one" services include BLES 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.

(O) "Tier two" services include all regulated telecommunications services that do not fall in tier one.

*** DRAFT – NOT FOR FILING ***

4901:1-4-02 **EARP general provisions.**

(A) The alternative regulation plan set forth below is available to any ILEC that desires to take advantage of the retail services flexibility for telecommunication services, other than BLES as defined in section 4927.01 of the Revised Code, set forth in the rules for competitive telephone companies but that is not interested in pursuing an individual company-designed application for alternative regulation pursuant to case number 92-1149-TP-COI.

(B) Adoption of the EARP by an ILEC enables the ILEC to operate under the retail service requirements developed for competitive telephone companies.

(C) This EARP does not limit an ILEC's ability to propose a company-specific plan under the existing alternative regulation guidelines set forth in case number 92-1149-TP-COI, which could also qualify the company for the proposed retail service rules.

(D) The retail service rules established for competitive telephone companies is only an option for an ILEC if the ILEC adopts a qualifying alternative regulation plan.

(E) Although not favored, the commission may upon its own motion, or for good cause shown, waive any requirement, standard, or rule set forth in this chapter.

*** DRAFT – NOT FOR FILING ***

4901:1-4-03 **Term of the plan.**

(A) An ILEC can opt into this EARP at anytime by making the appropriate filing with the commission. An appropriate filing is one that includes:

(1) A completed application form, as may be modified from time-to-time by the commission.

(2) An application proposing to cap BLES rates at existing levels as an alternative to rate base/rate-of-return regulation, pursuant to section 4927.04 of the Revised Code, and to price all other telecommunication services pursuant to the provisions of paragraph (C) of rule 4901:1-4-06 of the Administrative Code and section 4927.03 of the Revised Code.

(3) All necessary tariff modifications to implement EARP, to be prefiled with the commission's staff thirty days before docketing the application.

(4) A plan as to how the ILEC will meet all of the commitments set forth in rule 4901:1-4-06 of the Administrative Code.

(B) An ILEC shall deliver one copy of its application to the office of the Ohio consumers' counsel at the time the ILEC files the application with the commission.

(C) An ILEC electing alternative regulation pursuant to this chapter agrees to cap its BLES rates for the term of the plan. Accordingly, the commission waives the requirement to file the schedules set forth in divisions (A) to (D) of section 4909.18 of the Revised Code.

(D) Any person may file a request for hearing on the application within twenty days. Absent extraordinary circumstances established through clear and convincing evidence that reasonable grounds for a hearing exist, a hearing will not be held. Unless otherwise ordered, a hearing request not ruled upon by the commission will be automatically denied on the forty-sixth day after the ILEC application was filed.

(E) The ILEC's application shall be automatically approved on the forty-sixth day, unless otherwise suspended by the commission. In all cases where reasonable grounds for hearing are found and/or a suspension of the approval process is granted, the commission will render a decision on the application within one hundred eighty days of filing.

(F) There is no predetermined termination date for the EARP absent a revocation proceeding outlined in paragraph (H) of this rule.

(G) Once the ILEC has met the commitments set forth in rule 4901:1-4-06 of the Administrative Code, the company may continue under its EARP, terminate the

alternative regulation plan and return to traditional rate-of-return regulation, or propose a company-specific alternative regulation plan.

(H) If the commission believes that the ILEC has failed to comply with the terms of the plan, the commission shall give the ILEC notice, including a basis, of such belief and a reasonable period of time to come into compliance. The commission shall not revoke any EARP, unless the commission determines, after further notice to the ILEC and hearing, that the ILEC in fact has failed to materially comply with the terms of the plan and in fact has failed to come into compliance within such reasonable period of time. Prior to any such ruling to revoke any order approving the plan, the commission shall take into consideration consequences of such action on the ILEC as well as the impact on its customers.

(I) In order to terminate or withdraw from an EARP, an ILEC must file a notice with the commission which sets forth the reasons for the withdrawal and informs the commission whether the ILEC is proposing to return to traditional regulation or will be filing a company-specific alternative regulation plan. Such notice shall also be served upon the office of the Ohio consumers' counsel. A notice of withdrawal will not be approved until another regulatory framework is adopted by the commission. The commission shall order such procedures as it deems necessary in its consideration of the request to withdraw.

(J) An ILEC choosing to return to rate-of-return regulation is required to bring its rates and services into compliance with the appropriate regulatory framework for all regulated services. All existing rules, guidelines, and orders that are available for ILECs today, such as case numbers 84-944-TP-COI, 86-1144-TP-COI, 89-564-TP-COI, and 92-1149-TP-COI, will still remain. The rates in effect under elective alternative regulation shall remain in effect until otherwise modified by the ILEC with the commission's approval. An ILEC returning to rate-of-return regulation bears the total risk of recovery of commitment investments during the period it was under alternative regulation

*** DRAFT – NOT FOR FILING ***

4901:1-4-04 **Applicability of other rules and regulations.**

To the extent they do not conflict with the provisions set forth herein and absent a waiver, all commission requirements and policies will apply to the operations of every ILEC adopting elective alternative regulation. Examples of such requirements and policies include, but are not limited to, the minimum telephone service standards (MTSS) codified at Chapter 4901:1-5 of the Administrative Code, lifeline services such as service connection assistance (case numbers 89-45-TP-UNC and 91-564-TP-UNC), discounts for persons with communication disabilities (case number 87-206-TP-COI), blocking of 976 services (case number 86-1044-TP-COI), disconnection of local service rules (case number 96-1175-TP-ORD), 9-1-1 service (case number 86-911-TP-COI), privacy and number disclosure requirements (case number 93-540-TP-COI), alternative operator service provisions (case number 88-560-TP-COI), provisions involving customer-owned, coin-operated telephones (case number 88-452-TP-COI), local competition carrier requirements (case numbers 95-845-TP-COI and 99-998-TP-COI), and carrier access charge policies and orders.

*** DRAFT – NOT FOR FILING ***

4901:1-4-05 **Accounting standards.**

Accounting records are required to be maintained in accordance with the uniform system of accounts for local telephone operations by all ILECs.

*** DRAFT – NOT FOR FILING ***

4901:1-4-06 **Alternative regulation commitments.**

(A) Advanced services

(1) Advanced telecommunications services capability is the availability of high-speed, full broadband telecommunications that enables a customer to originate and receive high-quality data, graphics, and video using any technology (e.g., xDSL, cable, fiber optic, fixed wireless, satellite, or other system) at a minimum rate of two hundred kilobits per second in one direction.

(2) An ILEC electing this alternative regulation plan must commit to provide the following:

(a) High density central offices: No later than twelve months from the effective date of the alternative regulation plan, an ILEC must provide advanced telecommunications service capability from all class five central offices (CO) in its traditional service territories which serve census tracts with a population density of five hundred or more people per square mile as defined by the 2000 census.

(i) No later than twelve months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within twelve thousand feet from a high density CO.

(ii) No later than twenty-four months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within eighteen thousand feet from a high density CO.

(b) County seat central offices: For counties that do not meet the population density criterion described in paragraph (A)(2)(a) of this rule, an ILEC must provide advanced telecommunications service capability from all class five COs in its traditional service territories that are within the county seat no later than twelve months from the effective date of the alternative regulation plan.

(i) No later than twelve months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within twelve thousand feet from a county seat CO.

(ii) No later than twenty-four months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced

telecommunications services upon customer demand within sixty days to any customer within eighteen thousand feet from a county seat CO.

(B) Lifeline assistance

(1) The ILEC must implement a lifeline program that provides eligible residential customers with the maximum contribution of federally available assistance. Eligible lifeline service consists of flat-rate monthly access line service with touch-tone service.

(a) Credits: The ILEC shall credit one hundred per cent of all nonrecurring service order charges for commencing service and a monthly amount that will ensure the maximum federal matching contribution.

(b) Other benefits: Lifeline customers shall receive a waiver of the local exchange service establishment deposit requirements, free blocking of toll and 900/976 dialing patterns, an option to purchase call waiting and an option to purchase other features for medical and/or safety reasons. Requests to purchase vertical features must be signed by the customer certifying that the customer has a legitimate need, either for medical or safety reasons, for the optional feature(s) requested.

(c) Restrictions: The discount will apply to only one access line per household. Optional features, other than call waiting, are prohibited unless the phone company receives a signed statement from the customer self-certifying that the feature is necessary for medical and/or safety reasons. Existing lifeline customers that have optional features prior to the adoption of this plan will be grandfathered into the lifeline program so long as the customer makes no changes whatsoever to their existing local exchange service. Telephone companies are prohibited from marketing vertical services to existing or new lifeline customers.

(2) Lifeline assistance eligibility shall include:

(a) Home energy assistance program (LIHEAP, HEAP, and E-HEAP).

(b) Ohio energy credit program (OECP).

(c) Food stamps.

(d) Supplemental security income-blind and disabled (SSDI).

(e) Supplemental security income-aged (SSI).

(f) General assistance (including disability assistance [DA]).

(g) Medical assistance (medicaid), including any state program that might supplant medicaid.

(h) Federal public housing/section eight.

(i) Ohio works first (formerly AFDC).

(j) National school lunch's free lunch program 42 U.S.C. 1751 to 1769h, as effective on May 1, 2006.

(k) Household income at or below one hundred fifty per cent of the poverty level.

(3) Each ILEC participating in the EARP shall offer a lifeline assistance program to eligible customers throughout the traditional service area of that carrier, in conformance with this rule.

(a) ILECs with fifty thousand or more access lines shall automatically enroll customers into lifeline assistance who participate in a qualifying program. Additionally, such companies must also enroll customers who participate in a qualifying program by using on-line company to agency verification or self-certification.

(b) ILECs with less than fifty thousand access lines may use one or any combination of automatic enrollment, on-line company to agency verification and/or self-certification to enroll customers into lifeline assistance who participate in a qualifying program.

(c) All ILECs must verify customer eligibility consistent with the federal communication commission's requirements in 47 C.F.R. 54, as effective on May 1, 2006, to enroll customers into lifeline assistance who qualify through household income-based requirements.

(4) At no time will the monthly access line discounts cause the local service rates to be less than zero.

(5) Lifeline assistance customers with past due bills for regulated local service charges will be offered special payment arrangements with the initial payment not to exceed twenty-five dollars before service is installed, with the balance for regulated local charges to be paid over six equal monthly payments. Lifeline assistance customers with past due bills for toll service charges will be required to have toll restricted service until such past due toll service charges have been paid or until the customer establishes service with a subsequent toll provider pursuant to the minimum telephone service standards.

(6) Staff will work with the appropriate state agencies, which administer qualifying programs for lifeline assistance, and the ILECs to negotiate and acquire on-line access to the agencies' electronic databases for the purpose of accessing the information necessary to verify a customer's participation in an eligible program, and data necessary to automatically enroll customers into the lifeline program. On-line verification and automatic enrollment will be in place within six months after the effective date of a company's alternative regulation plan.

(7) An ILEC is permitted to perform a verification audit of a customer already on lifeline assistance service.

(8) All lifeline program activities must be coordinated through an advisory board composed of commission staff, the office of the Ohio consumers' counsel, consumer groups representing low-income constituents, and the company. Commission staff will work with the advisory board to reach consensus. However, where consensus is not possible, the commission's staff shall make the final determination. Advisory board decisions on how the program is implemented and the lifeline promotional plan are subject to commission review. Companies with less than fifty thousand access lines may join with other such companies to form one advisory board.

(9) The ILEC will establish an annual marketing budget for promoting lifeline and performing outreach using ten cents per access line multiplied by the number of residential access lines the company serves. The ILEC shall work with the advisory board to reach a consensus, where possible, regarding how the marketing budget funds will be spent. The marketing budget funds shall only be spent for the promotion and marketing of lifeline service and not for the administrative costs of implementing and operating the lifeline program.

(C) Retail rate commitments

(1) An ILEC's offering of in-territory, BLES shall include flat-rate residential calling.

(2) Any measured-rate or optional extended area service plans that are being provided to customers on the effective date of the alternative regulation plan shall continue to be available to customers unless the commission subsequently approves changes to these plans.

(3) Tier one rate caps

(a) Core service rate caps

(i) Tier one core services as used in these rules shall include BLES as defined in section 4927.01 of the Revised Code, and basic caller ID only.

(ii) An ILEC adopting alternative regulation pursuant to this chapter, shall cap the in-territory rates for tier one core service at the existing rates for so long as the company remains under the EARP. The electing ILEC's existing rates shall represent the maximum or "ceiling" levels, below which the ILEC may lower or raise rates upon making the appropriate filing with the commission.

(iii) The electing ILEC may not price below the LRSIC of each service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(b) Noncore service rate caps

(i) Noncore tier one services shall include:

(a) Second and third local exchange service access lines.

(b) Call waiting.

(c) Call trace (*57).

(d) Centrex access lines.

(e) Private branch exchange (PBX) trunks.

(f) Per line number identification blocking.

(g) Nonpublished number service.

(h) N11 access and usage, unless exempted.

(ii) An electing ILEC shall cap the rates for all in-territory, noncore, tier one services at existing rates for twenty-four months from the effective date of the alternative regulation plan.

(iii) During those twenty-four months, the electing ILEC may lower or raise rates below the cap, upon making the appropriate filing with the commission.

(iv) The electing ILEC may not price below the LRSIC of each service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(v) After twenty-four months, upward pricing flexibility for a second local exchange access service line and call waiting shall be limited to no more than a ten per cent increase in price per year for each service, up to a maximum cap for the life of the plan that is double the initial rate for each service.

(vi) After twenty-four months, upward pricing flexibility for all other tier one, noncore services shall be limited to a cap that is double the initial rate for the life of the plan.

(4) Tier two services

(a) Tier two services include all regulated, public telecommunication services that do not fall on tier one.

(b) Tier two service rates are not subject to any rate cap and may be priced at market-based rates.

(c) The rate for any tier two service must recover the LRSIC associated with the service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(5) Nothing herein prohibits an electing ILEC from seeking, through an appropriate filing with the commission, the flexibility to discount tier one service rates, on an exchange or on a wire center basis when an exchange has more than one wire center, provided the company demonstrates that the discount is necessary to meet competition and provided the discount is uniformly available to all tier one service customers within the designated exchange(s) or wire center(s).

(6) Notice to customers of any changes in rates must comply with the notice requirements established in the rules for competitive telephone companies.

*** DRAFT – NOT FOR FILING ***

4901:1-4-08 **Eligibility for alternative regulation of BLES and other tier one services.**

(A) Any ILEC with an approved qualifying EARP set forth in rules 4901:1-4-01 to 4901:1-4-07 of the Administrative Code, may request, pursuant to section 4927.03 of the Revised Code, alternative regulation of BLES and other tier one services.

(B) An ILEC is not eligible to apply for alternative regulation of BLES and other tier one services until it has fully complied with the advanced services and lifeline commitments set forth in paragraphs (A) and (B) of rule 4901:1-4-06 of the Administrative Code for large ILECs and set forth in rule 4901:1-4-07 of the Administrative Code for small ILECs. An ILEC may apply for EARP and alternative regulation for BLES and other tier one services, contemporaneously, if the applicant can demonstrate that it fully meets the applicable EARP commitments on the day of filing of both applications.

*** DRAFT – NOT FOR FILING ***

4901:1-4-09 **BLES filing requirements and process for application.**

(A) An application and all required exhibits shall be made in the form provided by the commission.

(B) Exhibits to an application

(1) An affidavit from an officer of the ILEC verifying that the applicant fully complies with the elective alternative regulation commitments as required by paragraphs (A) and (B) of rule 4901:1-4-06 of the Administrative Code for large ILECs and as required by rule 4901:1-4-07 of the Administrative Code for small ILECs.

(2) An identification of the telephone exchange area(s) for which the ILEC seeks alternative regulation for BLES and other tier one services and the competitive market test proposed by the applicant for each telephone exchange area.

(3) Supporting information and detailed analysis demonstrating that the applicant meets, on a telephone exchange area basis, at least one of the competitive market tests, as set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code. This information should be contained within an affidavit filed by an officer of the ILEC attesting to the veracity of the data upon which the application is premised.

(4) Any proposed tariff modifications necessary to implement the pricing flexibility rules set forth in paragraph (A) of rule 4901:1-4-11 of the Administrative Code.

(5) Copy of proposed legal notice notifying the public of the filing of the application and stating that objections can be filed with the commission consistent with paragraph (F) of this rule. The public notice should occur within seven days of the filing of the application and should be printed in the legal notice section of a newspaper of general circulation in each county corresponding to the exchanges for which BLES alternative regulation is being requested. The requesting ILEC should confer with the commission staff regarding the content of the legal notice prior to commencing with the publication of the public notice.

(C) The application shall be designated by the commission's docketing division using the case purpose code "BLS". On the same day that the ILEC files its complete application with the commission, the ILEC shall deliver one copy of its application to the office of the Ohio consumers' counsel.

(D) All persons seeking intervention in order to be considered as a party in the proceeding must file the appropriate motion to intervene within fourteen calendar days of the filing of the ILEC's application.

(E) Confidential information filed by the ILEC will be eligible for proprietary treatment in accordance with rule 4901-1-24 of the Administrative Code. Parties shall be afforded access to all confidential information and supporting data addressed within an application by entering into a protective agreement with the ILEC. The ILEC has the duty to negotiate such agreements in good faith with the parties in a timely manner and the commission will decide any issues that the parties are unable to resolve regarding the protective agreement.

(F) Any person or party who can show good cause why such application should not be granted must file with the commission a written statement detailing the reasons within forty-five calendar days after the application is docketed.

(G) With respect to the four tests identified in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, an ILEC's application shall be approved automatically and become effective on the one hundred twenty-first day after the initial filing, unless suspended by the commission, the legal director, or an attorney examiner. A suspension may be granted at any time if deemed appropriate. A hearing will not be held absent extraordinary circumstances established through clear and convincing evidence, satisfying the commission, that a hearing is needed. Where the commission determines a hearing is necessary and/or a suspension is ordered, the commission will render a decision on the application within two hundred seventy days of filing.

(H) An application containing an alternative competitive market test (i.e., a test not found in paragraphs (C)(1) to (C)(4) of rule 4901:1-4-10 of the Administrative Code) will not be subject to the automatic time frames set forth in paragraph (G) of this rule. The commission will establish the appropriate process and time frames for consideration of such application after reviewing each relevant application.

(I) All parties shall electronically serve their discovery requests. All discovery responses are to be electronically served within ten days of being initially served with the discovery request.

(J) The commission, legal director, or attorney examiner may modify the time frames stated herein based upon a material modification filed subsequent to the initial application.

*** DRAFT – NOT FOR FILING ***

4901:1-4-10 **Competitive market tests.**

(A) In order to qualify for pricing flexibility for BLES and other tier one services, the applicant has the burden to demonstrate that as of the date of the application, the ILEC meets at least one of the competitive market tests set forth in paragraph (C) of this rule in each of the requested telephone exchange area(s). Thus, an application for alternative regulation of BLES and other tier one services may contain more than one telephone exchange area, but the test(s) must be applied to each telephone exchange area individually within that application.

(B) For any telephone exchange area(s) in which the ILEC is not granted alternative regulation for BLES and other tier one services, the ILEC's BLES and other tier one services remain subject to all the requirements of EARP, including the pricing requirements pursuant to paragraph (C) of rule 4901:1-4-06 of the Administrative Code. For any telephone exchange area(s) in which the ILEC is granted alternative regulation for BLES and other tier one services, pricing flexibility for the ILEC's BLES and other tier one services will not be subject to paragraph (C)(3) of rule 4901:1-4-06 of the Administrative Code. All of the remaining requirements of EARP will continue to apply to the ILEC's retail service offerings.

(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.

(1) An applicant must demonstrate in each requested telephone exchange area that at least twenty-five per cent of total residential access lines are provided by unaffiliated CLECs, and at least twenty per cent of total company access lines have been lost since 1996 as reflected in the applicant's annual report filed with the commission for 1996.

(2) An applicant must demonstrate in each requested telephone exchange area that at least twenty per cent of total residential access lines are provided by unaffiliated CLECs, and the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers.

(3) An applicant must demonstrate in each requested telephone exchange area that at least fifteen per cent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five alternative providers serving the residential market.

(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 its 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.

*** DRAFT – NOT FOR FILING ***

4901:1-4-11 **Pricing of BLES and other tier one services.**

(A) In each telephone exchange area where an ILEC meets at least one of the competitive market tests set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, the ILEC will be granted pricing flexibility, as set forth below, for tier one core and noncore services in lieu of the EARP pricing rules set forth in paragraph (C)(3) of rule 4901:1-4-06 of the Administrative Code. An ILEC will be granted, in those telephone exchange areas, tier two pricing flexibility for all tier one noncore services. BLES and basic caller ID will also be subject to pricing flexibility in those telephone exchange areas. Subject to the pricing flexibility in this rule, the rate for BLES and basic caller ID may be lowered or raised upon making the appropriate tier two filing with the commission. For the twelve months following approval of alternative regulation for BLES in the relevant telephone exchange areas, the ILEC's initial upward pricing flexibility for BLES and basic caller ID shall be limited to an annual increase of no more than one dollar twenty-five cents above the BLES rate at the time that the ILEC is granted BLES alternative regulation and an annual increase of no more than fifty cents above the basic caller ID rate in existence at the time that the ILEC is granted BLES alternative regulation. In subsequent years, the ILEC's upward pricing flexibility for BLES and basic caller ID shall be limited to an annual increase of no more than one dollar twenty-five cents above the BLES rate in effect at the end of the preceding twelve months and an annual increase of no more than fifty cents above the basic caller ID rate in effect at the end of the preceding twelve months. No banking of increases will be allowed.

(B) Rates for intrastate carrier access, 9-1-1 service, pole attachments and conduit occupancy, pay telephone services, toll presubscription, and telecommunications relay service are not affected by this rule and shall continue to be subject to the applicable laws, rules and orders of the commission and the federal communications commission. In addition, the commission may, in the future, add additional regulated new services to this list of exempted services for which the commission determines that a specific public policy interest exists.

(C) In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, an ILEC is not permitted to price its tier one retail service(s) below the LRSIC of each service plus a common cost allocation. A telephone company may allocate common costs using a fixed allocator of ten per cent. In the event the ILEC chooses to use a different common cost allocator, the ILEC will have the burden of establishing the reasonableness of the chosen common cost allocator. Upon request of the commission staff, the ILEC shall provide cost support to the staff.

(D) In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, it must continue to offer to qualifying lifeline customers BLES, including any nonrecurring charges for service establishment, service connection and service change orders associated with establishing a single

BLES access line, at the rates in existence at the time the ILEC files an application under this chapter. If rates for a lifeline customer's BLES increase pursuant to paragraph (A) of this rule, the lifeline discount shall be adjusted to ensure there is no net rate increase to qualifying lifeline customers. The commission reserves the right to modify this restriction based on changes made by the federal communications commission to the lifeline or universal service funding programs.

(E) In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, the ILEC shall utilize the processes set forth in rule 4901:1-6-21 of the Administrative Code for the filing of all subsequent tariff applications for BLES and other tier one services. In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, the ILEC shall provide prior actual customer notice to the affected customers by bill insert, bill message, direct mail, or, if the customer consents, electronic mail, a minimum of thirty days prior to any increase in rates. The application, when filed with the commission, must include a copy of the actual notice that was sent to affected customers and an affidavit verifying that such notice was given to customers. The customer notice shall comply with the customer notice requirements set forth in paragraphs (B) and (C) of rule 4901:1-6-17 of the Administrative Code. All of the remaining rules for ILECs operating pursuant to EARP found in Chapters 4901:1-4 and 4901:1-6 of the Administrative Code will continue to apply.

*** DRAFT – NOT FOR FILING ***

4901:1-4-12 **Term, revocation and modification of alternative regulation of BLES and other tier one services.**

(A) The EARP rules set forth in paragraphs (F), (H), (I) and (J) of rule 4901:1-4-03 of the Administrative Code also apply to the term, revocation and withdrawal of the plan for alternative regulation of BLES and other tier one services.

(B) If the commission has reason to believe, based on a change in the telecommunications market in a telephone exchange area(s) or based on the motion of an interested stakeholder setting forth reasonable grounds, that the market in a telephone exchange area(s) has changed such that it may no longer meet one of the competitive market tests set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, the commission shall notice the ILEC and require it to show cause as to why alternative regulation for BLES and other tier one services in the involved telephone exchange area(s) should not be revoked. Based on that review, the commission will take whatever action it deems necessary, if any, including initiating an investigation or scheduling a hearing, to consider revocation of the alternative regulation for BLES and other tier one services in a telephone exchange area(s). Consistent with division (C) of section 4927.03 of the Revised Code, the commission may modify or revoke any order granting the ILEC alternative regulation for BLES and other tier one services in a telephone exchange area(s). Pending any review of alternative regulation of BLES, the ILEC will maintain the pricing flexibility previously granted until or unless otherwise modified by the commission.

1.47 Presumptions in enactment of statutes.

In enacting a statute, it is presumed that:

(A) Compliance with the constitutions of the state and of the United States is intended;

(B) The entire statute is intended to be effective;

(C) A just and reasonable result is intended;

(D) A result feasible of execution is intended.

Effective Date: 01-03-1972

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ORC Ann. 111.15

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JUNE 19, 2007 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2007 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 4, 2007 ***

TITLE 1. STATE GOVERNMENT
CHAPTER 111. SECRETARY OF STATE
ORGANIZATION

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§ 111.15. Adoption and filing of agency rules

(A) As used in this section:

(1) "Rule" includes any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule. "Rule" does not include any guideline adopted pursuant to section 3301.0714 [3301.07.14] of the Revised Code, any order respecting the duties of employees, any finding, any determination of a question of law or fact in a matter presented to an agency, or any rule promulgated pursuant to Chapter 119., section 4141.14, division (C)(1) or (2) of section 5117.02, or section 5703.14 of the Revised Code. "Rule" includes any amendment or rescission of a rule.

(2) "Agency" means any governmental entity of the state and includes, but is not limited to, any board, department, division, commission, bureau, society, council, institution, state college or university, community college district, technical college district, or state community college. "Agency" does not include the general assembly, the controlling board, the adjutant general's department, or any court.

(3) "Internal management rule" means any rule, regulation, bylaw, or standard governing the day-to-day staff procedures and operations within an agency.

(4) "Substantive revision" has the same meaning as in division (J) of section 119.01 of the Revised Code.

(B) (1) Any rule, other than a rule of an emergency nature, adopted by any agency pursuant to this section shall be effective on the tenth day after the day on which the rule in final form and in compliance with division (B)(3) of this section is filed as follows:

(a) The rule shall be filed in electronic form with both the secretary of state and the director of the legislative service commission;

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History

Case Notes & OAGs

Section Notes

Resources & Practice Tools

Law Reviews & Journals

> The continued viability of Ohio's procedure for legislative review of agency rules in the post-Chadha era. Comment. 49 Ohio St. L.J. 251 (1988).

> The Federal APA and state administrative law. Earl Bonfield. 72 VirginiaLRev 297 (1986).

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Related Statutes & Rules

Cross-References to Related Statutes

> Administrative rule codification procedure, RC § 103.05.

> Administrative services department to manage risk management and insurance programs, RC § 9.82.1.

> Aging, department of; deadlines for annual payments to by facilities, RC § 173.26.

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> Rule drafting manual. OAC 103-3-02.

> Rules of agencies required to be filed with legislative service commission pursuant to RC § 111.15 --

> Administrative services, director of. OAC 123:1-47-01.

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(b) The rule shall be filed in electronic form with the joint committee on agency rule review. Division (B)(1)(b) of this section does not apply to any rule to which division (D) of this section does not apply.

An agency that adopts or amends a rule that is subject to division (D) of this section shall assign a review date to the rule that is not later than five years after its effective date. If no review date is assigned to a rule, or if a review date assigned to a rule exceeds the five-year maximum, the review date for the rule is five years after its effective date. A rule with a review date is subject to review under section 119.032 [119.03.2] of the Revised Code. This paragraph does not apply to a rule of a state college or university, community college district, technical college district, or state community college.

If all filings are not completed on the same day, the rule shall be effective on the tenth day after the day on which the latest filing is completed. If an agency in adopting a rule designates an effective date that is later than the effective date provided for by division (B)(1) of this section, the rule if filed as required by such division shall become effective on the later date designated by the agency.

Any rule that is required to be filed under division (B)(1) of this section is also subject to division (D) of this section if not exempted by division (D)(1), (2), (3), (4), (5), (6), (7), or (8) of this section.

If a rule incorporates a text or other material by reference, the agency shall comply with sections 121.71 to 121.76 of the Revised Code.

(2) A rule of an emergency nature necessary for the immediate preservation of the public peace, health, or safety shall state the reasons for the necessity. The emergency rule, in final form and in compliance with division (B)(3) of this section, shall be filed in electronic form with the secretary of state, the director of the legislative service commission, and the joint committee on agency rule review. The emergency rule is effective immediately upon completion of the latest filing, except that if the agency in adopting the emergency rule designates an effective date, or date and time of day, that is later than the effective date and time provided for by division (B)(2) of this section, the emergency rule if filed as required by such division shall become effective at the later date, or later date and time of day, designated by the agency.

An emergency rule becomes invalid at the end of the ninetieth day it is in effect. Prior to that date, the agency may file the emergency rule as a nonemergency rule in compliance with division (B)(1) of this section. The agency may not refile the emergency rule in compliance with division (B)(2) of this section so that, upon the emergency rule becoming invalid under such division, the emergency rule will continue in effect without interruption for another ninety-day period.

(3) An agency shall file a rule under division (B)(1) or (2) of this section in compliance with the following standards and procedures:

(a) The rule shall be numbered in accordance with the numbering system devised by the director for the Ohio administrative code.

(b) The rule shall be prepared and submitted in compliance with the rules of the legislative service commission.

(c) The rule shall clearly state the date on which it is to be effective and the date on which it will expire, if known.

(d) Each rule that amends or rescinds another rule shall clearly refer to the rule that is amended or rescinded. Each amendment shall fully restate the rule as amended.

If the director of the legislative service commission or the director's designee gives an agency notice pursuant to section 103.05 of the Revised Code that a rule filed by the agency is not in

compliance with the rules of the legislative service commission, the agency shall within thirty days after receipt of the notice conform the rule to the rules of the commission as directed in the notice.

(C) All rules filed pursuant to divisions (B)(1)(a) and (2) of this section shall be recorded by the secretary of state and the director under the title of the agency adopting the rule and shall be numbered according to the numbering system devised by the director. The secretary of state and the director shall preserve the rules in an accessible manner. Each such rule shall be a public record open to public inspection and may be transmitted to any law publishing company that wishes to reproduce it.

(D) At least sixty-five days before a board, commission, department, division, or bureau of the government of the state files a rule under division (B)(1) of this section, it shall file the full text of the proposed rule in electronic form with the joint committee on agency rule review, and the proposed rule is subject to legislative review and invalidation under division (I) of section 119.03 of the Revised Code. If a state board, commission, department, division, or bureau makes a substantive revision in a proposed rule after it is filed with the joint committee, the state board, commission, department, division, or bureau shall promptly file the full text of the proposed rule in its revised form in electronic form with the joint committee. The latest version of a proposed rule as filed with the joint committee supersedes each earlier version of the text of the same proposed rule. Except as provided in division (F) of this section, a state board, commission, department, division, or bureau shall also file the rule summary and fiscal analysis prepared under section 121.24 or 127.18 of the Revised Code, or both, in electronic form along with a proposed rule, and along with a proposed rule in revised form, that is filed under this division.

As used in this division, "commission" includes the public utilities commission when adopting rules under a federal or state statute.

This division does not apply to any of the following:

(1) A proposed rule of an emergency nature;

(2) A rule proposed under section 1121.05, 1121.06, 1155.18, 1163.22, 1349.33, 1707.201 [1707.20.1], 1733.412 [1733.41.2], 4123.29, 4123.34, 4123.341 [4123.34.1], 4123.342 [4123.34.2], 4123.40, 4123.411 [4123.41.1], 4123.44, or 4123.442 [4123.44.2] of the Revised Code;

(3) A rule proposed by an agency other than a board, commission, department, division, or bureau of the government of the state;

(4) A proposed internal management rule of a board, commission, department, division, or bureau of the government of the state;

(5) Any proposed rule that must be adopted verbatim by an agency pursuant to federal law or rule, to become effective within sixty days of adoption, in order to continue the operation of a federally reimbursed program in this state, so long as the proposed rule contains both of the following:

(a) A statement that it is proposed for the purpose of complying with a federal law or rule;

(b) A citation to the federal law or rule that requires verbatim compliance.

(6) An initial rule proposed by the director of health to impose safety standards and quality-of-care standards with respect to a health service specified in section 3702.11 of the Revised Code, or an initial rule proposed by the director to impose quality standards on a facility listed in division (A)(4) of section 3702.30 of the Revised Code, if section 3702.12 of the Revised Code requires that the rule be adopted under this section;

(7) A rule of the state lottery commission pertaining to instant game rules.

If a rule is exempt from legislative review under division (D)(5) of this section, and if the federal law or rule pursuant to which the rule was adopted expires, is repealed or rescinded, or otherwise terminates, the rule is thereafter subject to legislative review under division (D) of this section.

(E) Whenever a state board, commission, department, division, or bureau files a proposed rule or a proposed rule in revised form under division (D) of this section, it shall also file the full text of the same proposed rule or proposed rule in revised form in electronic form with the secretary of state and the director of the legislative service commission. Except as provided in division (F) of this section, a state board, commission, department, division, or bureau shall file the rule summary and fiscal analysis prepared under section 121.24 or 127.18 of the Revised Code, or both, in electronic form along with a proposed rule or proposed rule in revised form that is filed with the secretary of state or the director of the legislative service commission.

(F) Except as otherwise provided in this division, the auditor of state or the auditor of state's designee is not required to file a rule summary and fiscal analysis along with a proposed rule, or proposed rule in revised form, that the auditor of state proposes under section 117.12, 117.19, 117.38, or 117.43 of the Revised Code and files under division (D) or (E) of this section. If, however, the auditor of state or the designee prepares a rule summary and fiscal analysis of the original version of such a proposed rule for purposes of complying with section 121.24 of the Revised Code, the auditor of state or designee shall file the rule summary and fiscal analysis in electronic form along with the original version of the proposed rule filed under division (D) or (E) of this section.

History:

GC § 161-1; 119 v 149; 120 v 358; Bureau of Code Revision, 10-1-53; 136 v H 317 (Eff 9-30-76); 137 v H 25 (Eff 11-4-77); 137 v H 257 (Eff 1-1-78); 137 v S 321 (Eff 4-14-78); 138 v S 8 (Eff 9-19-79); 138 v H 204 (Eff 9-19-79); 138 v H 657 (Eff 9-24-79); 138 v H 440 (Eff 3-13-81); 138 v H 1 (Eff 8-5-81); 139 v H 694 (Eff 11-15-81); 140 v H 244 (Eff 7-4-84); 140 v S 239 (Eff 1-1-85); 141 v H 201 (Eff 7-1-85); 141 v S 269 (Eff 3-13-86); 144 v H 437 (Eff 4-30-92); 144 v S 359 (Eff 12-22-92); 145 v H 695 (Eff 9-29-94); 146 v S 50 (Eff 4-20-95); 146 v S 156 (Eff 6-30-95); 146 v H 473 (Eff 9-26-96); 146 v S 211 (Eff 9-26-96); 146 v H 538 (Eff 1-1-97); 146 v S 82 (Eff 3-7-97); 147 v H 215 (Eff 6-30-97); 147 v S 130 (Eff 9-18-97); 147 v H 562 (Eff 9-30-98); 147 v H 850 (Eff 3-18-99); 148 v S 11, § 1 (Eff 9-15-99); 148 v S 11, § 3 (Eff 4-1-2001); 148 v S 11, § 6 (Eff 4-1-2002); 149 v H 386 (Eff 5-24-2002); 149 v S 138 (Eff 6-18-2002); 149 v S 265. Eff 9-17-2002; 151 v H 81, § 1, eff. 4-14-06; 151 v H 197, § 1, eff. 11-13-06.

Section Notes:

See provisions, § 3 of SB 265 (149 v --) following RC § 119.03.

The provisions of § 8 of SB 265 (149 v --) read as follows:

SECTION 8. Section 111.15 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. H.B. 386 and Am. Sub. S.B. 138 of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

EFFECT OF AMENDMENTS

151 v H 197, effective November 13, 2006, in (D)(6), deleted "and quality-of-care data reporting requirements" preceding "with respect to".

151 v H 81, effective April 14, 2006, inserted "1163.22" in (D)(2).

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Related Statutes & Rules:

Cross-Reference to Related Statutes:

Administrative rule codification procedure, RC § 103.05.

Administrative services department to manage risk management and insurance programs, RC § 9.82.1.

Aging, department of; deadlines for annual payments to by facilities, RC § 173.26.

Residential state supplement program, RC § 173.35.

Agricultural financing commission not required to adopt certain rules, when, RC § 901.61.

Arts and sports facilities commission, RC §§ 3383.02, 3383.04.

Auditor of state; procedure for adopting rules, RC § 117.20.

Certification or licensure of substitute care providers, RC § 121.37.2.

Charitable bingo license, RC § 2915.08.

Defense conversion assistance program, RC § 122.12.

Department of job and family services, RC § 5101.09.

Administration of refugee act, RC § 5101.49.

Administration of Title IV-A programs, RC § 5101.80.1.

Administration of Title XX social services, RC § 5101.46.

Adult protective services, RC § 5101.71.

Agreements with state agencies, state universities and colleges for family services or workforce development activities, RC § 5101.21.1.

County payments to children eligible for foster care maintenance; federal financial participation, RC § 5101.14.1.

County public assistance fund, RC § 5101.16.1.

Disability assistance, RC §§ 5115.01, 5115.01.1, 5115.02, 5115.20.

Distribution of food commodities, RC § 5101.48.

Domestic violence training programs, RC § 5101.25.1.

Federal child welfare and abuse programs, RC § 5103.07.

Food stamp program, RC § 5101.54.

Funding for administration, training, education and research, RC § 5101.10.

Incentive awards to county agencies, RC § 5101.23.

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Kinship care navigators program, RC § 5101.85.3.

Medical assistance, RC §§ 5111.01, 5111.01.1, 5111.01.3, 5111.18, 5111.22.

Payment procedure for publicly funded child day-care, RC § 5104.42.

Payments to counties for children's services, RC § 5101.14.

Recovery of cost of social services provided or diverted to ineligible persons, RC § 5101.18.3.

Reimbursement of excess county food stamp or medicaid expenditures, RC § 5101.16.2.

Department of mental retardation and developmental disabilities--

Family support services program, RC § 5126.11.

Independent living arrangements, RC § 5123.19.4.

Department of rehabilitation and corrections --

Administrative releases, RC § 5145.24.

Maintenance of the housing and usage by department personnel, RC § 5120.22.

Minimum standards for jails, RC § 5120.10.

Recovery of cost of incarceration or supervision from offender, RC § 5120.56.

Rules infraction board at each institution, RC § 2967.11.

Transitional control program; passes, RC § 2967.26.

Department of transportation, RC § 5501.20.

Director of development to adopt rules for small, Ohio-based research and development and technology transfer companies, RC § 122.15.1.

Election officials, compensation, RC § 3501.28.

Electronic rule-filing system, RC § 103.05.11.

Energy credit program, RC § 5117.02.

Environmental protection; provisions applicable to proposed legislation or administrative rules, RC § 121.39.

Executive agency lobbying; joint legislative ethics committee to adopt rules, RC § 121.68.

Financial planning and supervision commission rules, RC §§ 118.05, 3316.05.

Governor's residence advisory commission, RC § 107.40.

Job classification plan for unclassified employees, RC § 124.14.

Joint legislative ethics committee to serve general assembly, RC § 101.34.

Legislative lobbying; rules, RC § 101.78.

Legislative drafting format, RC § 101.53.

Long-term care insurance for state employees and officials, RC § 124.84.

Long-term forecasts of needs for gas and electric transmission service, RC § 4935.04.

Office of budget and management--

Reimbursement of expenses of job interviewee; relocation expenses of appointees, RC § 126.32.

Reimbursement of traveling and other expenses, RC § 126.31.

Ohio housing finance agency not subject to RC § 111.15 under certain conditions, RC § 175.02.

Ohio tuition trust authority, RC §§ 3334.08, 3334.20.

Ohio works first program, RC § 5107.05.

Payment of state expenses by financial transaction device, RC § 113.40.

Police and fire pension fund; board of trustees rule-making powers, RC §§ 742.08, 742.10, 742.53.

Procedure for adoption, amendment, or rescission of administrative rules, RC § 119.03.

Legislative review of rules, RC § 119.03.1.

Review date to be assigned to each rule, RC § 119.03.2.

Summary and fiscal analysis, RC § 121.24.

Property division orders involving public retirement program, RC § 3105.90.

Public employees retirement board; rule-making powers and duties of board, RC § 145.09.

Long-term care insurance for recipients of pension, benefit or allowance, RC § 145.58.1.

Purchase of credit for service as school board member, RC § 145.29.9.

Reimbursement of expenses of board members, RC § 145.08.

Public health council rules, RC § 3709.09.

Public school employees retirement system, RC §§ 3309.04, 3309.10, 3309.31.1, 3309.69.1.

Public utilities commission; energy emergency rules, RC § 4935.03 et seq.

Registrar of motor vehicles, temporary license placards and windshield stickers, RC § 4503.18.2.

Rule-making agency defined, RC § 119.01.

Rule-making agency to prepare fiscal analysis of each proposed rule, RC § 127.18.

Safety standards, quality-of-care standards, and quality-of-care data reporting requirements, director of health, RC § 3702.12.

School facilities commission, RC §§ 3318.30, 3318.31.

Standards and conditions for the furnishing and acceptance of travel, meals, and lodging, expenses, or reimbursement, RC § 102.03.

State highway patrol retirement board, RC §§ 5505.04, 5505.05, 5505.33.

State lottery commission; instant game rules, RC § 3770.03.

State-regulated banks equivalent right, power or privilege, RC § 1121.05.

Reducing or eliminating disadvantage to Ohio bank or trust company, RC § 1121.06.

State teachers retirement system; administration and management vested in board, RC §§ 3307.04, 3307.10, 3307.26, 3307.39.1, 3307.78.

State universities, board of trustees, RC § 3345.14.

State universities; office of budget and management and committee to develop rules, RC §§ 3345.72, 3345.73.

Uniform electronic transactions act, RC §§ 1306.20, 1306.21.

Voter registration program, RC § 3501.05.

Workforce development system, RC § 6301.03.

OH Administrative Code:

Legislative service commission --

Format for bills, acts and joint resolutions. OAC ch. 103-5.

Rule drafting manual. OAC 103-3-02.

Rules of agencies required to be filed with legislative service commission pursuant to RC § 111.15 --

Administrative services, director of. OAC 123:1-47-01.

Budget and management, office of. OAC ch. 126-1.

Health department: medically handicapped children's services payments. OAC ch. 3701-43.

Lottery commission: instant lottery games. OAC 3770:1-2-03.

State retirement systems --

Highway patrol. OAC 5505-1-01.

Police and fire. OAC 742-17-01.

Public employees. OAC 145-1-07.

School employees. *3 Ohio Sch. Law:* OAC 3309-1-57.

Teachers. *3 Ohio Sch. Law:* OAC 3307-1-01.

Workers' compensation: rating for state insurance fund. *OWCH:* OAC ch. 4123-17.

Self-insuring employers. *OWCH:* OAC ch. 4123-19.

Law Reviews & Journals:

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Analysis of the Ohio Securities Act. Milton C. Boesel, Jr. 5 WestResLRev 352 (1954).

The continued viability of Ohio's procedure for legislative review of agency rules in the post-Chadha era. Comment. 49 Ohio St. L.J. 251 (1988).

The Federal APA and state administrative law. Earl Bonfield. 72 VirginiaLRev 297 (1986).

Legislative veto in Ohio: the "twilight zone of distinction." Note. 9 UDayLRev 557 (1984).

Recent developments in Ohio administrative law: regulating the regulators? Henry P. Tseng. 4 Ohio N.U.L. Rev. 317 (1977).

Regulating state chartered savings associations: an introduction to the Ohio scheme. Ronald E. Alexander. 11 Akron L. Rev. 399 (1978).

Savings and loan service corporations: regulation in Ohio. Ronald E. Alexander. 13 Akron L. Rev. 403 (1980).

Case Notes & OAGs:

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COLLEGES AND UNIVERSITIES.

Revised Code § 111.15, as amended by Am. Sub. H.B. 317, is not applicable to the public colleges and universities, including community colleges and technical colleges, in the State of Ohio: OAG No. 76-079 (1976).

CONFLICT WITH STATUTE.

A rule that impermissibly adds to or subtracts from a statute automatically creates a clear conflict, invalidating the rule. A rule is also invalid if it is not a reasonable or supportable interpretation of a statute: Franklin Iron & Metal Corp. v. Ohio Petroleum Underground Storage Tank Release Compensation Bd., 117 Ohio App. 3d 509, 690 N.E.2d 1310, 1996 Ohio App. LEXIS 5972 (1996).

Because his power is administrative rather than legislative in nature, the director of administrative services may not issue rules which are unreasonable, which conflict with statutory enactments covering the subject matter, or which add to his delegated powers: Carroll v. Dept. of Admin. Services, 10 Ohio App. 3d 108, 460 N.E.2d 704 (1983).

CONSTRUCTION OF RULES.

A plain reading of RC § 122.71(E)(1) and its term "Orientals" includes people with origins in India, and any restriction on that statutory definition by the Ohio Administrative Code is contrary to law: DLZ Corp. v. Ohio Dep't of Admin. Servs., 102 Ohio App. 3d 777, 658 N.E.2d 28, 1995 Ohio App. LEXIS 2073 (1995).

CONTINUATION OF PRIOR RULES.

Revised Code § 1.54, concerning continuation of prior statutes, may be applied to administrative rules: Reynolds v. Budzik, 134 Ohio App. 3d 844, 732 N.E.2d 485, 1999 Ohio App. LEXIS 5742 (1999).

EFFECTIVENESS OF RULE.

For purposes of RC § 5739.16(B), an administrative rule adopted by the tax commissioner remains "in full force and effect" until the commissioner rescinds it or a court specifically declares it invalid as being contrary to statute or unreasonable: Lyden Co. v. Tracy, 76 Ohio St. 3d 66, 666 N.E.2d 556, 1996 Ohio LEXIS 433, 1996 Ohio 112, (1996).

EMERGENCIES.

Emergency interim orders issued pursuant to RC § 4909.16 need not comply with the procedures in RC § 111.15: Inland Steel Development Corp. v. Public Utilities Comm., 49 Ohio St. 2d 284, 361 N.E.2d 240 (1977).

Under RC § 4909.16, the public utilities commission has authority to temporarily alter or amend an existing order affecting any public utility in case of emergency without following the procedures in RC § 111.15 for amendment of rules: Ohio Manufacturers' Assn. v. Public Util. Comm., 45 Ohio St. 2d 86, 341 N.E.2d 585 (1976).

EXEMPTIONS.

A policy prohibiting smoking by patients at a state psychiatric hospital is exempt from the requirements of RC § 111.15: Arbogast v. Peterson, 91 Ohio App. 3d 22, 631 N.E.2d 673, 1993 Ohio App. LEXIS 4883 (1993).

--FILING REQUIREMENTS.

Although RC § 3745.03 exempts the rulemaking procedures of the Environmental Board of Review from the provisions of RC Chapter 119., RC § 111.15 nevertheless requires the proposed rules of the Environmental Board of Review to be filed with the Clerk of the Senate for legislative review pursuant to RC § 119.03(I), unless the proposed rules come within the exceptions set forth in RC § 111.15(D)(1) through (7): OAG No. 79-088 (1979).

FILING REQUIREMENTS.

The filing requirements of RC § 111.15 were not met where the federal motor carrier safety regulations were merely incorporated by reference into a rule adopted by the public utilities commission: B&T Express, Inc. v. PUC of Ohio, 145 Ohio App. 3d 656, 763 N.E.2d 1241, 2001 Ohio App. LEXIS 4185 (2001).

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An inmate does not have a remedy by way of declaratory judgment where the adult parole authority adopts nonbinding "guidelines" for release and such guidelines have not been formally adopted as "rules" for purposes of RC § 2721.03: Wise v. Ohio Dep't of Rehabilitation & Correction, 84 Ohio App. 3d 11, 616 N.E.2d 251, 1992 Ohio App. LEXIS 6088 (1992).

No rule or regulation of the school employees retirement system shall be effective unless promulgated and filed in accordance with the provisions of this section: State ex rel. Board of Education v. Holt, 174 Ohio St. 55, 186 N.E.2d 862 (1962).

This section requires only the filing of rules and regulations which have a general and uniform operation: 1941 OAG No. 4043 (1941).

INVALID RULES.

Where the director of administrative services issues a rule which is outside his authority to promulgate, that rule is illegal and any failure to obey an order made pursuant to that rule cannot constitute insubordination: Carroll v. Dept. of Admin. Services, 10 Ohio App. 3d 108, 460 N.E.2d 704 (1983).

NOTICE.

The notice requirements of RC §§ 3719.43 and 3719.44 in adopting a rule of schedule amendments, coupled with the public record requirements, are sufficient to satisfy the due process notice of proscribed conduct requirements of the state and federal constitutions: State v. Reed, 14 Ohio App. 3d 63, 470 N.E.2d 150 (1983).

POWER OF AGENCY.

The power of an administrative agency to administer a program necessarily requires the formulation of policy and the making of reasonable rules to fill any gap left, implicitly or explicitly, by the legislature: Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad, 92 Ohio St. 3d 282, 750 N.E.2d 130, 2001 Ohio LEXIS 1874, 2001 Ohio 190, (2001).

PUBLIC EMPLOYEES.

A rule which does not clearly grant public employees procedural rights will not be presumed to be a mandatory prerequisite to removal actions against those employees if promulgated under RC § 111.15: Parfitt v. Correctional Facility, 62 Ohio St. 2d 434, 406 N.E.2d 528 (1980).

PUBLIC UTILITIES.

In enacting RC ? 4927.03, the legislature chose to require only a streamlined process. Had it wanted PUCO to engage in administrative rulemaking, it presumably would have chosen words to that effect. Thus RC ? 111.15 and RC Chapter 119 did not apply: Disc. Cellular, Inc. v. PUC, 112 Ohio St. 3d 360, 859 N.E.2d 957, 2007 Ohio LEXIS 55, 2007 Ohio 53, (2006).

RETIREMENT SYSTEM RULES.

School employee retirement system rules are invalid unless promulgated in accordance with RC § 111.15: State ex rel. Ryan v. State Teachers Retirement Sys., 71 Ohio St. 3d 362, 643 N.E.2d 1122, 1994 Ohio LEXIS 2906 (1994).

UNIFORM APPLICATION OF RULES.

A joint memorandum between the State Teachers Retirement System ("STRS") and the Public Employees Retirement System ("PERS") seeking to transfer certain employees from PERS membership to STRS membership is a "rule" and may not be implemented unless the procedures set forth in RC § 111.15 are followed. The RC § 111.15(A)(1) provision that a proposed rule have "general and uniform operation" does not require that the rule be broadly applied statewide. It is only required that the proposed rule be uniformly applied by the promulgating agency to those affected by the rule. An administrative rule, having the force and operation of a statute, which extinguishes or impairs a vested legal relationship, creates a new obligation, imposes a new duty or attaches a new disability to previous transactions constitutes a retroactive enactment and results in a deprivation of property without due process of law: Ohio Ass'n of County Bds. of Mental Retardation & Developmental Disabilities v. Public Employees Retirement System, 61 Ohio Misc. 2d 836, 585 N.E.2d 597, 1990 Ohio Misc. LEXIS 94 (1990).

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Date/Time: Thursday, June 21, 2007 - 11:28 AM EDT

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ORC Ann. 119.01

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JUNE 19, 2007 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2007 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 4, 2007 ***

TITLE 1. STATE GOVERNMENT
CHAPTER 119. ADMINISTRATIVE PROCEDURE

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§ 119.01. Definitions

As used in sections 119.01 to 119.13 of the Revised Code:

(A) (1) "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the civil service commission, the division of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

Except as otherwise provided in division (I) of this section, sections 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission. Sections 119.01 to 119.13 of the Revised Code do not apply to the utility radiological safety board; to the controlling board; to actions of the superintendent of financial institutions and the superintendent of insurance in the taking possession of, and rehabilitation or liquidation of, the business and property of banks, savings and loan associations, savings banks, credit unions, insurance companies, associations, reciprocal fraternal benefit societies, and bond investment companies; to any action taken by the division of securities under section 1707.201 [1707.20.1] of the Revised Code; or to any action that may be taken by the superintendent of financial institutions under section 1113.03, 1121.06, 1121.10, 1125.09, 1125.12, 1125.18, 1157.01, 1157.02, 1157.10, 1165.01, 1165.02, 1165.10, 1349.33, 1733.35, 1733.361 [1733.36.1], 1733.37, or 1761.03 of the Revised Code.

Sections 119.01 to 119.13 of the Revised Code do not apply to actions of the industrial commission or the bureau of workers' compensation under sections 4123.01 to 4123.94 of the Revised Code with respect to all matters of adjudication, or to the actions of the industrial commission, bureau of workers' compensation board of directors, and bureau of workers' compensation under division (D) of section 4121.32, sections 4123.29, 4123.34, 4123.341 [4123.34.1], 4123.342 [4123.34.2], 4123.40, 4123.411 [4123.41.1], 4123.44, 4123.442 [4123.44.2], 4127.07, divisions (B), (C), and (E) of section 4131.04, and divisions (B), (C), and (E) of section 4131.14 of the Revised Code with respect to all matters concerning the establishment of premium, contribution, and assessment rates.

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> Anderson's Appellate Practice and Procedure in Ohio § 12.02 Appeal Under the Administrative Procedure Act

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> The continued viability of Ohio's procedure for legislative review of agency rules in the post-Chadha era. Comment. 49 Ohio St. L.J. 251 (1988).

> Due process and the Ohio administrative procedure act: the central panel proposal. Christopher B. McNeil. 23 Ohio N.U.L. Rev. 783 (1997).

More...

(2) "Agency" also means any official or work unit having authority to promulgate rules or make adjudications in the department of job and family services, but only with respect to both of the following:

(a) The adoption, amendment, or rescission of rules that section 5101.09 of the Revised Code requires be adopted in accordance with this chapter;

(b) The issuance, suspension, revocation, or cancellation of licenses.

(B) "License" means any license, permit, certificate, commission, or charter issued by any agency. "License" does not include any arrangement whereby a person, institution, or entity furnishes medicaid services under a provider agreement with the department of job and family services pursuant to Title XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended.

(C) "Rule" means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule. "Rule" does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted pursuant to section 3301.0714 [3301.07.14] of the Revised Code.

(D) "Adjudication" means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.

(E) "Hearing" means a public hearing by any agency in compliance with procedural safeguards afforded by sections 119.01 to 119.13 of the Revised Code.

(F) "Person" means a person, firm, corporation, association, or partnership.

(G) "Party" means the person whose interests are the subject of an adjudication by an agency.

(H) "Appeal" means the procedure by which a person, aggrieved by a finding, decision, order, or adjudication of any agency, invokes the jurisdiction of a court.

(I) "Rule-making agency" means any board, commission, department, division, or bureau of the government of the state that is required to file proposed rules, amendments, or rescissions under division (D) of section 111.15 of the Revised Code and any agency that is required to file proposed rules, amendments, or rescissions under divisions (B) and (H) of section 119.03 of the Revised Code. "Rule-making agency" includes the public utilities commission. "Rule-making agency" does not include any state-supported college or university.

(J) "Substantive revision" means any addition to, elimination from, or other change in a rule, an amendment of a rule, or a rescission of a rule, whether of a substantive or procedural nature, that changes any of the following:

(1) That which the rule, amendment, or rescission permits, authorizes, regulates, requires, prohibits, penalizes, rewards, or otherwise affects;

(2) The scope or application of the rule, amendment, or rescission.

(K) "Internal management rule" means any rule, regulation, or standard governing the day-to-day staff procedures and operations within an agency.

History:

GC § 154-62; 120 v 358; 121 v 578; Bureau of Code Revision, 10-1-53; 132 v S 97 (Eff 1-1-68); 133 v H 1 (Eff 3-18-69); 135 v H 366 (Eff 11-22-73); 136 v H 1 (Eff 6-13-75); 136 v H 920 (Eff 10-11-76); 136 v S 545 (Eff 1-17-77); 137 v H 257 (Eff 1-1-78); 138 v H 204 (Eff 7-30-79); 138 v H 403 (Eff 7-1-80); 140 v H 260 (Eff 9-27-83); 140 v H 244 (Eff 7-4-84); 141 v H 201 (Eff 7-1-85); 143 v H 111 (Eff 7-1-89); 144 v H 437 (Eff 4-30-92); 145 v H 695 (Eff 9-29-94); 146 v H 7 (Eff 9-1-95); 146 v S 162 (Eff 10-29-95); 146 v S 293 (Eff 9-26-96); 146 v H 538 (Eff 1-1-97); 146 v S 82 (Eff 3-7-97); 147 v H 215 (Eff 6-30-97); 147 v H 850 (Eff 3-18-99); 148 v H 470 (Eff 7-1-2000); 149 v H 386 (Eff 5-24-2002); 149 v S 138. Eff 6-18-2002; 151 v H 81, § 1, eff. 4-14-06; 152 v H 100, § 101.01, eff. 9-10-07.

Section Notes:

The effective date is set by § 609.03 of 152 v H 100.

The provisions of § 3 of 151 v H 81 read as follows:

SECTION 3. Section 119.01 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. H.B. 386 and Am. Sub. S.B. 138 of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composites are the resulting versions of the sections in effect prior to the effective date of the sections as presented in this act.

EFFECT OF AMENDMENTS

152 v H 100, effective September 10, 2007, in the third paragraph of (A)(1), inserted "bureau of workers' compensation board of directors" and "4127.07, divisions (B), (C), and (E) of section 4131.04", and added "with respect to all matters concerning the establishment of premium, contribution, and assessment rates" to the end.

151 v H 81, effective April 14, 2006, in the second paragraph of (A)(1), inserted "action"; and corrected internal references and made minor stylistic changes.

Practice Manuals & Treatises:

Anderson's Appellate Practice and Procedure in Ohio § 12.02 Appeal Under the Administrative Procedure Act

ALR

"Agency," what constitutes within meaning of Federal Sunshine Act (5 USCS § 552b). 68 ALRFed 842.

What constitutes "good cause" under provision of Administrative Procedure Act (5 USCS § 533(d)(3)) allowing agency rule to become effective less than 30 days after publication. 55 ALRFed 880.

What is an "agency" for purposes of 28 USCS § 1345, granting original jurisdiction to United States District Courts of civil actions by any agency of the United States. 51 ALRFed 874.

Law Reviews & Journals:

Administrative adjudications: an overview of the existing models and their failure to achieve uniformity and a proposal for a uniform adjudicatory framework. Comment. 46 Ohio St. L.J. 355 (1985).

Administrative res judicata in Ohio: a suggestion for the future. Comment. 37 Clev. St. L. Rev. 595

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(1989).

Administrative review and the Ohio modern courts amendment. Ivan Cate Rutledge. 35 Ohio St. L.J. 41 (1974).

Appellate review of administrative rule making in Ohio -- prospects for revival. Robert L. Brubaker, David E. Northrop. 37 Ohio St. L.J. 471 (1976).

A comparative analysis of the federal and Ohio administrative procedure acts. Note. 24 CinLRev 365 (1955).

The continued viability of Ohio's procedure for legislative review of agency rules in the post-Chadha era. Comment. 49 Ohio St. L.J. 251 (1988).

Development of environmental law through the administrative process. Barry H. Smith. 4 CAP. U.L. Rev. 203 (1975).

Due process and the Ohio administrative procedure act: the central panel proposal. Christopher B. McNeil. 23 Ohio N.U.L. Rev. 783 (1997).

The Federal APA and state administrative law. Earl Bonfield. 72 VirginiaLRev 297 (1986).

Judicial interpretation of administrative regulations: an overview. Russell L. Weaver. 53 CinLRev 681 (1984).

Judicial review of decisions of the industrial commission of Ohio: Is some evidence a non-existent standard? Ronald T. Bella. 12 UDayLRev 535 (1987).

Legislative control over administrative rule making. Charles H. Melville. 32 CinLRev 33 (1963).

Legislative veto in Ohio: the "twilight zone of distinction." Note. 9 UDayLRev 557 (1984).

Licensing, and administrative procedure acts. Homer W. Giles. 6 ClevMarLRev 301 (1957).

Ohio administrative law and procedure -- recent developments. Maurice S. Culp. 14 WestResLRev 765 (1963).

The Ohio division of securities: rule-making, the administrative procedure act and the Ohio securities bulletin. Note. 36 Ohio St. L.J. 662 (1975).

The right of appeal by administrative authority from adverse judicial rulings. Ervin H. Pollack, Harriet S. Martin. 14 Ohio St. L.J. 408 (1953).

Search and seizure -- administrative searches -- industries not subject to pervasive government regulation. Donovan v. Dewey, 101 SCt 2534 (1981). Note. 9 NoKyLRev 121 (1982).

A survey of the Ohio Administrative Procedure Act. Note. 22 Clev. St. L. Rev. 337 (1973).

Case Notes & OAGs:

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- Rule construed
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GENERALLY.

Administrative rules are not an unlawful delegation of legislative authority where the legislature properly confines the scope of rulemaking. The "guidelines" concerning the educational management information system are not "rules" under RC Chapter 119. Revised Code § 3301.07.14, OAC 3301-14-01 and the guidelines establishing EMIS are not preempted by or in conflict with FEPRA: Princeton City Sch. Dist., Bd. of Educ. v. Ohio State Bd. of Educ., 96 Ohio App. 3d 558, 645 N.E.2d 773, 1994 Ohio App. LEXIS 3557 (1994).

The tax commissioner's special instruction No. 21 concerning computation of an interstate carrier's Ohio corporate franchise tax liability is an RC § 119.01(C) rule and is therefore invalid in that it was not promulgated in accordance with the statutory provisions for administrative rules: McLean Trucking Co. v. Lindley, 70 Ohio St. 2d 106, 435 N.E.2d 414 (1982).

The Ohio Civil Rights Commission is not required to comply with RC Chapter 119.: Plumbers & Steamfitters v. Ohio Civil Rights Commission, 66 Ohio St. 2d 192, 421 N.E.2d 128 (1981).

Where no prejudice is shown, a state agency's failure to follow administrative code rules on dismissals does not invalidate the dismissals: Parfitt v. Correctional Facility, 62 Ohio St. 2d 434, 406 N.E.2d 528 (1980).

There are three ways in which a state board may be subjected to the administrative procedure act under par. (A) of RC § 119.01, namely: (1) certain boards are specifically named, (2) the legislation concerning a board specifically subjects such board to this act, and (3) a board which has authority to issue, suspend, remove or cancel licenses: In re Martins Ferry Met. Housing Authority, 2 Ohio App. 2d 237, 207 N.E.2d 672 (1965).

The state board of housing, in a proceeding for enlarging a metropolitan housing authority under RC

§ 3735.27, is not subject to the administrative procedure act: In re Martins Ferry Metropolitan Housing Authority, 2 Ohio App. 2d 237, 207 N.E.2d 672 (1965).

A proceeding by the director of highways to relocate a federal aid highway without the consent of the municipality through which such highway is to be relocated is not governed by the administrative procedure act [RC § 119.01(A)]: City of Lakewood v. Thormyer, 10 Ohio Op. 2d 61, 154 N.E.2d 777 (CP 1958).

A member of the Ohio board of building appeals is prohibited by RC § 102.04(A) from rendering services, for compensation, in regard to offering testimony on proposed equal employment opportunity rules and regulations which are the subject of a proceeding, pursuant to the administrative procedures act, (RC Chapter 119.), which is before the state equal employment opportunity coordinator, department of administrative services: Ohio Ethics Commission Advisory Opinion No. 75-017 (1975).

The amendments made by 129 v 1694 (1697), effective October 24, 1961, to RC § 4112.05(G) and (I), making certain procedures of the Ohio civil rights commission subject to the administrative procedure act, RC § 119.01 et seq, have the effect of making said chapter applicable to procedures of the commission only as they relate to the manner in which final orders of the commission are issued and served on respondents and to modification or reconsideration of final orders of the commission: 1961 OAG No. 2462 (1961).

Under RC § 3301.16 the state board of education in reaching a determination of the qualification of a school for the granting of a high school charter, is governed by RC § 119.01 et seq: 1959 OAG No. 345 (1959).

It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the administrative procedure act, RC § 119.01 et seq, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally: 1956 OAG No. 6810 (1956).

The division of shore erosion in its functions as defined and imposed in RC Chapter 1507., is not subject to the administrative procedure act: 1954 OAG No. 3437 (1954).

The board of liquor control, being an "agency" as defined in GC § 154-62 (RC § 119.01), may, in the reasonable exercise of its discretion, determine the date, time and place of each adjudication hearing required under either the administrative procedure act, GC § 154-62 (RC § 119.01) et seq, or the Ohio liquor control act, GC § 6064-1 (RC § 4301.01) et seq: 1953 OAG No. 2422 (1953).

The Ohio state board of optometry, by virtue of its possession of licensing powers, is subject to the rules and provisions of the administrative procedure act and must, therefore, follow the procedure prescribed therein for the adoption, filing and promulgation of its rules and regulations: 1950 OAG No. 2340 (1950).

The superintendent of building and loan associations in issuing, suspending, revoking or canceling the certificates provided for in GC §§ 9643-1, 9660-3a, 679 and 690 (RC §§ 1151.03, 1151.38 and 1151.64), is subject to the administrative procedure act: 1945 OAG No. 523 (1945).

In giving or withholding his approval, consent or certificate provided for in GC §§ 693-1, 693-2, 9643-4, 9645, 9649, 9655, 9657, 9660-2, 9660-3, 9660, 9665 and 9670 (RC §§ 1151.61, 1151.62, 1151.05, 1151.08, 1151.09, 1151.10, 1151.20, 1151.27, 1151.29, 1151.36, 1151.37, 1151.34, 1151.45 and 1151.49), the superintendent of building and loan associations is not subject to the administrative procedure act: 1945 OAG No. 523 (1945).

"ADJUDICATION" CONSTRUED.

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The transportation director's letters were not "adjudication orders" where the denial was indicated as preliminary and the right to a hearing prior to a final determination was noted: Hurst v. Liberty-Bel, Inc., 117 Ohio App. 3d 138, 690 N.E.2d 40, 1996 Ohio App. LEXIS 5948 (1997).

The order issuing a permit was an "adjudication," not a "rule," because it did not have general application: State ex rel. Fisher v. Nacelle Land & Mgmt. Corp., 90 Ohio App. 3d 93, 628 N.E.2d 67, 1993 Ohio App. LEXIS 4060 (1993).

The act of suspending a provider pursuant to OAC 4123-7-41 is not ministerial in nature and is an adjudication under RC § 119.01(D) and the result of a quasi-judicial proceeding under OConst art IV, § 4: In re Seitzer, 1992 Ohio App. LEXIS 2637 (1992).

To constitute an "adjudication" for purposes of RC § 119.12, a determination must be (1) that of the highest or ultimate authority of an agency which (2) determines the rights, privileges, benefits, or other legal relationships of a person: Russell v. Harrison Township Montgomery County, 75 Ohio App. 3d 643, 600 N.E.2d 374, 1991 Ohio App. LEXIS 4022 (1991).

The determination, by letter, of the Director of Transportation, pursuant to RC Chapter 5516., to deny a permit to advertise off-premise businesses on a billboard outside an urban area is an "adjudication" within the meaning of RC § 119.01(D), and may be appealed to the proper court of common pleas pursuant to RC § 119.12: Liberty Bell, Inc. v. Ohio Dept. of Transp., 34 Ohio App. 3d 267, 518 N.E.2d 32 (1986).

The determination of a petitioner's right to an operator's license, or reinstatement thereof, constitutes an "adjudication" as defined by RC § 119.01(D), and petitioner has available the administrative and appeal remedies provided by RC Chapter 119.: Stieben v. Dollison, 8 Ohio App. 3d 188, 456 N.E.2d 842 (1983).

Revised Code § 5101.51.4(B) does not provide a right to a pretermination hearing where a provider agreement is terminated because HEW has declared the provider ineligible for participation in the Medicare program. In such case the act of the department of public welfare terminating the agreement is purely ministerial in nature and not an adjudication as defined in RC § 119.01(D): New London Hospital v. Creasy, 18 Ohio Op. 3d 201 (App 1980).

In the absence of an "adjudication" as defined in RC § 119.01(D), the right to notice and hearing does not obtain and, consequently, in such a case the Court of Common Pleas of Franklin County lacks jurisdiction under RC § 119.12 to review actions taken by a state administrative agency (Fortner v. Thomas, 22 OS2d 13, 51 OO2d 35; M. J. Kelley Co. v. Cleveland, 32 OS2d 150, 61 OO2d 394, approved and followed): State ex rel. Bd. of Edn. v. State Bd. of Edn., 53 Ohio St. 2d 173, 373 N.E.2d 1238 (1978).

The refusal of the State Board of Education to grant a local school district an additional exemption to the requirements of RC § 3311.29 does not constitute an "adjudication" within the meaning of RC § 119.01(D): State ex rel. Bd. of Edn. v. State Bd. of Edn., 53 Ohio St. 2d 173, 373 N.E.2d 1238 (1978).

A notice that an examination would be held to determine the competency of the holder of a driver's license, pursuant to RC § 4507.20, absent an order of revocation or suspension, is not an adjudication or appealable order within the meaning of RC § 119.01: Davison v. Bureau of Motor Vehicles, 46 Ohio App. 2d 86, 345 N.E.2d 619 (1975).

ADJUDICATION CONSTRUED.

To constitute an "adjudication" for the purposes of Ohio Rev. Code Ann. § 119.12, regarding judicial review of agency decisions, a determination had to be (1) that of the highest or ultimate authority of an agency which (2) determined the rights, privileges, benefits or other legal relationships of a person, and both elements were required. Miller v. Crawford, 2006 Ohio App. LEXIS 4610, 2006 Ohio 4689, (Sept. 7, 2006).

AGENCY CONSTRUED.

As a minority business enterprise (MBE) certificate pursuant to Ohio Rev. Code Ann. § 122.71(E)(1) was a "license" pursuant to Ohio Rev. Code Ann. § 119.12, an appeal from the denial of recertification should have been taken to the common pleas court where the MBE was located, and an appeal to a different county required dismissal. The Equal Employment Opportunity Coordinator (EEOC) was an "agency" under Ohio Rev. Code Ann. § 123.151(B) for purposes of Ohio Rev. Code Ann. ch. 119, and the MBE certificate was a "license" under Ohio Rev. Code Ann. § 119.01(B), and accordingly, the EEOC's adjudication order was a denial of a license renewal. Total Office Prods. v. Dep't of Admin. Servs., 2006 Ohio App. LEXIS 3230, 2006 Ohio 3313, (June 29, 2006).

APPEAL.

The state board of education, in making the determination required by RC § 3311.06, as to an equitable division of the funds and indebtedness between school districts involved in a transfer of territory, is not subject to the provisions of the administrative procedure act (RC Chapter 119.); the action of the state board of education in such matter is final, and a school district board of education may not appeal therefrom: State ex rel. Bd. of Education v. State Bd. of Education, 110 Ohio App. 527, 166 N.E.2d 253 (1959).

"AGENCY" CONSTRUED.

The Ohio expositions commission was not a state agency subject to RC Chapter 119.: Abt v. Ohio Expositions Comm'n, 110 Ohio App. 3d 696, 675 N.E.2d 43, 1996 Ohio App. LEXIS 1809 (1996).

A state psychiatric hospital is not an "agency" under RC § 119.01: Arbogast v. Peterson, 91 Ohio App. 3d 22, 631 N.E.2d 673, 1993 Ohio App. LEXIS 4883 (1993).

The Ohio Department of Rehabilitation and Correction is not an agency whose decisions are subject to judicial review by appeal pursuant to RC § 119.12: Augustine v. Ohio Dept. of Rehab. and Corr., 3 Ohio App. 3d 398, 445 N.E.2d 706 (1981).

Ohio State University is not an agency within the meaning of RC Chapter 119.: Bd. of Trustees v. Dept. of Admin. Services, 68 Ohio St. 2d 149, 429 N.E.2d 428 (1981).

Section 461.2 of the Ohio public assistance manual, which makes available a special dietary allowance to persons receiving aid for the aged but specifically denies such allowance to persons receiving aid to disabled persons, is not a "rule" within the purview of RC § 119.01 (the administrative procedure act), and the department of public welfare is not an "agency" thereunder or subject to the act: Lehew v. Rhodes, 23 Ohio App. 2d 102, 261 N.E.2d 280 (1970).

The public health council is an "agency" within the meaning of the administrative procedure act, with authority to adopt rules and regulations for nursing homes: Ohio State Federation of Nursing Homes v. Public Health Council, 172 Ohio St. 227, 174 N.E.2d 251 (1961).

The state board of examiners of architects of the state of Ohio is a board subject to the provisions of RC Chapter 119., commonly referred to as the administrative procedure act: State ex rel. Burchard v. State Board of Examiners, 110 Ohio App. 286, 163 N.E.2d 391 (App 1959).

The definition of "agency" in RC § 119.01, includes "civil service commission": Owens v. Ackerman, 72 Ohio L. Ab. 552, 136 N.E.2d 93 (App 1955).

Both the board of liquor control and the department of liquor control are agencies as defined in GC § 154-62 (RC § 119.01): Detelich v. Department of Liquor Control, 62 Ohio L. Ab. 195, 107 N.E.2d 415 (App 1950).

APPEALS.

Disciplinary orders issued by the self-insuring employers evaluation board pursuant to RC § 4123.35.2(C) are not subject to judicial review under RC § 119.12 of the administrative procedure act: Balt. Ravens, Inc. v. Self-Insuring Emplrs. Evaluation Bd., 94 Ohio St. 3d 449, 764 N.E.2d 418, 2002 Ohio LEXIS 765, 2002 Ohio 1362, (2002).

Revocation of a Type B day-care certificate is appealable pursuant to RC Chapter 119.: McAtee v. Ottawa County Dep't of Human Servs., 111 Ohio App. 3d 812, 677 N.E.2d 395, 1996 Ohio App. LEXIS 2498 (1996).

The common pleas court lacked jurisdiction over a challenge to boiler classifications made in an administrative rule. Also, the plaintiffs, stationary engineers, lacked standing: Nielsen v. Ford Motor Co., 113 Ohio App. 3d 495, 681 N.E.2d 470, 1996 Ohio App. LEXIS 3404 (1996).

Orders of the Administrator of the Bureau of Workers' Compensation, issued pursuant to RC § 4121.44(R), are not subject to judicial review under the Administrative Procedure Act, RC Chapter 119.: In re Seltzer, 67 Ohio St. 3d 220, 616 N.E.2d 1108, 1993 Ohio LEXIS 1817, 1993 Ohio 15, (1993).

A finding by a district hearing officer on the issue of continued temporary total compensation is not, in view of the right to appeal under RC § 4123.51.6, a determination "by the highest or ultimate authority" of the commission. Thus, procedures governing this area are not exempt from RC Chapter 119. requirements: State ex rel. Eaton Corp. v. Lancaster, 40 Ohio St. 3d 404, 534 N.E.2d 46 (1988).

An appeal to the Court of Common Pleas of Franklin County from an order of the Board of Building Standards denying an individual's application for approval as the chief building official for a municipal building department is governed by RC Chapters 119. and 3781. Revised Code Chapter 2506. has no application to such an appeal: Wahle v. Dept. of Indus. Relations, 14 Ohio App. 3d 101, 470 N.E.2d 200 (1983).

Although a church, which wants to protest the issuance of a liquor permit, may be entitled to a hearing pursuant to RC § 4303.26, neither RC Chapter 4303. nor Chapter 119. authorize the church to appeal the subsequent decision of the Director of Liquor Control concerning the liquor permit application to the Court of Common Pleas: Ninth Street Church v. Reich, 1 Ohio App. 3d 141, 439 N.E.2d 958 (1981).

After a decision of an administrative board is appealed, the board loses its jurisdiction to reconsider its decision. Thus, where an appeal from an order of the environmental board of review is still pending in the court of appeals, a writ of prohibition will issue to prevent the board from attempting to act in what is essentially the same cause: State ex rel. Republic Steel Corp. v. Board of Review, 54 Ohio St. 2d 75, 374 N.E.2d 1355 (1978).

The review of final orders or actions of administrative officers or agencies authorized by OConst art IV, § 3(B)(2) enables the general assembly to confer upon the Courts of Appeals appellate jurisdiction to review the final orders of administrative officers or agencies, irrelative of the fact that it is an appeal from an administrative rule-making action: Williams v. Akron, 54 Ohio St. 2d 136, 374 N.E.2d 1378 (1978).

The director of a state department does not have a right of appeal to the Court of Common Pleas of Franklin County from an order of the State Personnel Board of Review disaffirming the director's layoff order of an employee for alleged lack of work. (RC §§ 119.01 and 119.12) (Corn v. Board of Liquor Control, 160 OS 9, 50 OO 479; Lindblom v. Board of Tax Appeals, 151 OS 250, 39 OO 66, paragraph two of the syllabus, approved and followed.): State ex rel. Osborn v. Jackson, 46 Ohio St. 2d 41, 346 N.E.2d 141 (1976).

Since the school employees retirement board is not one of the specified agencies enumerated in RC § 119.01(A), and, since there is no statutory provision making RC Chapter 119. applicable to orders or adjudications by that board, there is no remedy by way of administrative appeal, pursuant to RC § 119.12, from an order or adjudication of the school employees retirement board: Fair v. School Employees Retire. System, 44 Ohio App. 2d 115, 335 N.E.2d 868 (1975).

A decision of the state personnel board of review affirming an order of an appointing authority "laying off" an employee in the classified service of the state is a final appealable order, and, pursuant to the provisions of RC Chapter 119., such employee may appeal therefrom to the court of common pleas of Franklin county: State ex rel. Kendrick v. Masheter, 120 Ohio App. 168, 201 N.E.2d 707 (1963).

An "appointing authority" has no right of appeal to the common pleas court from a decision of the state personnel board of review disaffirming a job-abolishment by such "appointing authority": In re Job Abolishment of Jenkins, 120 Ohio App. 385, 202 N.E.2d 634 (1963).

Proceedings before the state personnel board of review, and on appeal from such board, are governed by the administrative procedure act: Graul v. Board of Review, 117 Ohio App. 108, 191 N.E.2d 188 (1962).

On appeal from an order of an agency (as defined in RC § 119.01) to the court of common pleas, the power of the court to modify such order is limited to the ground set forth in RC § 119.12, i.e., the absence of a finding that the order is supported by reliable, probative, and substantial evidence: Henry's Cafe, Inc. v. Board of Liquor Control, 170 Ohio St. 233, 163 N.E.2d 678 (1959).

"Civil service commission" as used in RC § 119.01, includes both state and municipal civil service commission, thus a municipal civil service commission has the right to appeal from an adverse ruling of the court of common pleas involving the removal from duty of a police officer: Owens v. Ackerman, 72 Ohio L. Ab. 552, 136 N.E.2d 93 (App 1955).

The "civil service commission" is designated by RC § 119.01 as one of the agencies which may take an appeal from the judgment of the court of common pleas under authority of RC § 119.12: Owens v. Ackerman, 72 Ohio L. Ab. 552, 136 N.E.2d 93 (App 1955).

The administrative procedure act (RC § 119.01 [GC § 154-62] et seq) did not confer upon the director of education and the high school board the right to appeal from a judgment of the court of common pleas rendered on appeal from an order of the department of education: In re Millcreek Local Dist. High School, 160 Ohio St. 234, 115 N.E.2d 840 (1953).

ATTORNEY FEES.

The Ohio Civil Rights Commission is not an "agency" for purposes of RC § 119.09.2, concerning awards of attorney fees in connection with adjudication hearings: State ex rel. Auglaize Mercer Community Action Comm'n v. Ohio Civil Rights Comm'n, 73 Ohio St. 3d 723, 654 N.E.2d 1250, 1995 Ohio LEXIS 1941, 1995 Ohio 180, (1995).

CIVIL SERVICE.

A municipal civil service commission, not being an "agency" as defined by RC § 119.01, is not subject to the provisions of the administrative procedure act in promulgating rules: Karrick v. Board of Education, 174 Ohio St. 467, 190 N.E.2d 256 (1963).

A person who becomes chief of police of a city without taking the civil service examination required by law is not in the classified service, is not entitled to the benefits of the civil service law, and has no right of appeal to the municipal civil service commission from an order of removal by the mayor of the city or to the common pleas court from a decision of the municipal civil service commission affirming the mayor's removal order: In re Taylor, 172 Ohio St. 394, 176 N.E.2d 214 (1961).

The reference in RC § 119.01 to the civil service commission is to the state civil service commission and not to a municipal civil service commission: In re Taylor, 172 Ohio St. 394, 176 N.E.2d 214 (1961).

The civil service commission is an "agency" as defined by RC § 119.01 and its orders are appealable to the court of common pleas under authority of RC § 119.12: State ex rel. Oliver v. State Civil Service Comm., 168 Ohio St. 445, 155 N.E.2d 897 (1959).

COURT OF CLAIMS.

The availability of administrative remedies has no effect upon the jurisdiction of the Court of Claims: Crestwood Nursing Home v. White, 52 Ohio App. 2d 274, 369 N.E.2d 804 (1977).

Revised Code § 2743.02(A), of the court of claims act, states, "... To the extent that the state has previously consented to be sued, this chapter has no applicability." A remedy for one wrongfully denied a nursing home license is provided by RC § 119.01 et seq., the administrative procedure act. Thus the court of claims lacks jurisdiction over such a claim: Marshall Nursing Home v. Ackerman, 3 Ohio Op. 3d 143 (App 1976).

The Court of Claims has no jurisdiction to review decisions of the Department of Public Welfare: Bolin v. White, 51 Ohio App. 2d 92, 367 N.E.2d 63 (1976).

DUE PROCESS.

Support Enforcement Tracking System, an automated data processing system, is mandated by Ohio Rev. Code Ann. § 3125.07. Any rule-making concerning the use of the system or the operation of child support enforcement is subject to the notice and comment requirements of Ohio Rev. Code Ann. § 119.01 et seq.; this notice and comment provision provides adequate predeprivation protection. Hughlett v. Romer-Sensky, 2006 U.S. App. LEXIS 16823 (6th Cir. July 6, 2006).

Ohio Liquor Control Commission did not violate due process under RC § 119.01 et seq. in revoking the former licensee's liquor license, as the commission issued a notice of hearing, and the notice included a detailed description of the alleged violations and the possible penalties for such violations. Consun Food Indus. v. Ohio Liquor Control Comm'n, 2003 Ohio App. LEXIS 4212, 2003 Ohio 4683, (2003).

EXEMPTION.

Exemption under RC § 119.01(A)(1) was inapplicable to the Ohio Bureau of Workers' Compensation's reimbursement rates for Health Partnership Program providers, which did not fall within the purview of RC § 4121.32(D) because they did not concern "bases for decisionmaking" thereunder. There was no authority that invalidated the legislative mandate of RC § 4121.441(A)(8) which required actual discounted pricing. Ohio Hosp. Ass'n v. Ohio Bur. of Workers' Compensation, 2007 Ohio App. LEXIS 1370, 2007 Ohio 1499, (Mar. 30, 2007).

EXPLANATORY DOCUMENTS.

Industrial commission Memo E-7 does not constitute a rule subject to RC Chapter 119. Documents that explain rather than expand fall outside those provisions: State ex rel. Saunders v. Indus. Comm'n, 101 Ohio St. 3d 125, 802 N.E.2d 650, 2004 Ohio LEXIS 260, 2004 Ohio 339, (2004).

HEARING.

Revised Code § 4731.34.1 is an independent special statute which expressly provides for an injunction action to abate a public nuisance, the unlawful practice of medicine; it does not provide for an administrative hearing as a condition precedent to the injunction action: State Medical Bd. v. Mt. Sinai Hospital, 8 Ohio App. 3d 105, 456 N.E.2d 577 (1983).

IMPLIED POWERS OF AGENCY.

The state board of pharmacy's authority to promulgate rules regulating the practice of pharmacy and the distribution of dangerous drugs includes implied powers, such as issuing opinion letters interpreting and applying its rules: OPUS III-VII Corp. v. Ohio State Bd. of Pharmacy, 109 Ohio App. 3d 102, 671 N.E.2d 1087, 1996 Ohio App. LEXIS 304 (1996).

INDIVIDUAL ORDER.

There are circumstances which arise where an agency is justified in acting by individual order rather than by general rule: (1) situations that could not reasonably be foreseen; (2) problems which must be solved despite the absence of a relevant general rule; and (3) insufficient experience with the particular problem to warrant rigidifying a tentative judgment into a hard and fast rule; and (4) problems so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule: Dressler Coal Corp. v. Call, 4 Ohio App. 3d 81, 446 N.E.2d 785 (1981).

INTERNAL MANAGEMENT RULES.

Supreme court denied injured worker's mandamus petition and affirmed his denial of permanent partial disability (PPD) because he failed to submit medical evidence attributing a percentage of disability to his allowed injury and to meet requirements of the Industrial Commission's internal management memo setting rules for evaluating PPD claims, which did not expand the statute and case law that it was based on, but instead directed hearing officers to exclude non-allowed conditions in PPD assessments and to assess the percentage of PPD for allowed claims. State ex rel. Saunders v. Indus. Comm'n, 101 Ohio St. 3d 125, 802 N.E. 2d 650, 802 N.E.2d 650, 2004 Ohio LEXIS 260, 2004 Ohio 339, (2004).

The BMV license reinstatement center policy limiting the number of applications an agent could submit at one time was an "internal management rule" for purposes of RC § 119.01: State ex rel. Savage v. Caltrider, 100 Ohio St. 3d 363, 800 N.E.2d 358, 2003 Ohio LEXIS 3439, 2003 Ohio 6806, (2003).

Superintendent's policy of considering only fifteen applications at each meeting is a regulation concerning internal management of the agency, not an administrative rule: State ex rel. Life of Maryland, Inc. v. Katz, 4 Ohio St. 3d 140, 447 N.E.2d 116 (1983).

LEGISLATIVE INTENT.

The fiscal analysis of OAC 3745-1-26 filed by the director of Environmental Protection, which rule designated a segment of the lower Cuyahoga River as a marine life warmwater habitat complies with RC Chapter 119. The legislative intent of RC Chapter 119. is to provide an opportunity for opponents of a proposed regulation to express their views as to the wisdom of the proposal and to present evidence with respect to its illegality: Northeast Ohio Regional Sewer Dist. v. Shank, 58 Ohio St. 3d 16, 567 N.E.2d 993, 1991 Ohio LEXIS 329 (1991).

"LICENSE" CONSTRUED.

Certification of a health care provider by ODH for compliance with federal Medicaid requirements constitutes a "license" for purposes of RC § 119.12; it is not an arrangement whereby a person

institution, or entity furnishes Medicaid services under a provider agreement with ODHS: Bayside Nursing Ctr. v. Ohio Dep't of Health, 96 Ohio App. 3d 754, 645 N.E.2d 1314, 1994 Ohio App. LEXIS 3946 (1994).

The duties of the Registrar of Motor Vehicles under RC Chapter 4507., including RC § 4507.08(A), with respect to operator's licenses as defined by RC § 4507.01, constitute the exercise of licensing functions within the contemplation of RC § 119.01(A): Stieben v. Dollison, 8 Ohio App. 3d 188, 456 N.E.2d 842 (1983).

The action of the Superintendent of Banks approving a branch application constitutes an exercise by an agency of a licensing function and is appealable pursuant to RC Chapter 119. to the Court of Common Pleas of Franklin County. Any bank receiving notice of a branch bank application pursuant to RC Chapter 1111. is a proper party to bring an appeal of the approval of the application by the Superintendent of Banks pursuant to RC Chapter 119.: Genoa Banking Co. v. Mills, 67 Ohio St. 2d 106, 423 N.E.2d 161 (1981).

The approval of an application by a building and loan association to operate a branch office pursuant to RC § 1151.05 is not a licensing function within the provisions of the administrative procedure act (RC Chapter 119.): Home Sav. & Loan Assn. v. Boesch, 41 Ohio St. 2d 115, 322 N.E.2d 878 (1975).

The permits which the division of shore erosion is empowered to grant under the provisions of RC Chapter 1507. are not licenses as that term is used in the administrative procedure act; such permits are only licenses in the sense of an incorporeal hereditament in and to property of the state and are to be negotiated on a contractual basis, in the same manner as employed by other bodies or officers generally empowered to contract on behalf of the state: 1954 OAG No. 3437 (1954).

A certificate issued by the industrial commission of Ohio pursuant to the provisions of GC § 1465-69 (RC § 4123.35) certifying that the employer named therein has been granted authority by said commission to pay compensation directly to its injured or the dependents of killed employees and that said employer has furnished the necessary bond and has paid the premium required by paragraph 2 of GC § 1465-54 (RC § 4123.34) for the period designated in such certificate, is such a license as will bring the industrial commission in its issuance or revocation within the provisions of the "administrative procedure act," as enacted in Senate Bill 36 by the 95th General Assembly and codified as GC §§ 154-61 to 154-73 (RC § 119.01 et seq): 1943 OAG No. 6458 (1943).

LICENSE REVOCATION.

Mandamus does not lie to compel the superintendent of insurance to revoke the license of third persons where relators have not sought an adjudication under the administrative procedure act: State ex rel. Ohio Assn. of Ins. Agents v. Ohio Dept. of Ins., 29 Ohio St. 2d 188, 281 N.E.2d 9 (1972).

MAGISTRATE'S REPORT.

Bureau was a party to the proceeding before the referee and had standing to object to the referee's report and recommendation: Gralewski v. Ohio Bureau of Workers' Comp., 167 Ohio App. 3d 468, 855 N.E.2d 879, 2006 Ohio App. LEXIS 1401, 2006 Ohio 1529, (2006).

MANDAMUS.

When a warden denied an inmate's claims that his inmate account was exempt, under Ohio Rev. Code Ann. § 2329.66, from execution of a judgment requiring the inmate to pay the costs of his criminal prosecution, the inmate's remedy was not to seek judicial review under Ohio Rev. Code Ann. § 119.12, because the Ohio Department of Rehabilitation and Correction was not listed in Ohio Rev. Code Ann. § 119.01(A) as an agency whose decisions were reviewable under that statute, so the inmate had to seek a writ of mandamus requiring the warden to comply with applicable statutes

and regulations. State v. Glandon, 2006 Ohio App. LEXIS 30, 2006 Ohio 39, (Jan. 6, 2006).

NOTICE REQUIREMENTS.

Notice of suspension of a driver's license under the financial responsibility law must comply with the notice requirements of the administrative procedure act: State v. Foreman, 54 Ohio Misc. 31, 376 N.E.2d 987 (MC 1978).

"PARTY" CONSTRUED.

A state agency is not a "party" under RC § 119.01 with a right of appeal under RC § 119.12: Collyer v. Broadview Developmental Center, 74 Ohio App. 3d 99, 598 N.E.2d 75, 1991 Ohio App. LEXIS 2347 (1991).

A person who files a complaint with the Ohio motor vehicle dealers board alleging that a dealer's license should be revoked is not a "party" within the meaning of RC § 119.01(G): State ex rel. Barron v. Ohio Motor Vehicle Dealers Bd., 2 Ohio App. 3d 454, 442 N.E.2d 799 (1981).

A target company which has requested a hearing pursuant to RC § 1707.04.1(B)(1)(a) is a party to the adjudication order of the division of securities with respect to the takeover bid, and, if the order be adverse to the target company, it is a party adversely affected, having a right of appeal from the order pursuant to RC § 119.12. The offeror is a party-appellee to such an appeal even though it is not notified of the appeal by the appellant: Babcock & Wilcox Company v. Hurd, 5 Ohio Op. 3d 408 (App 1977).

PAROLE GUIDLINES.

When an inmate sought mandamus relief because the parole guidelines used in his parole hearing had been found null and void, as they were not properly promulgated as administrative regulations, he did not show that he had a clear legal right to the relief he sought or that the parole authority had a clear legal duty to apply different guidelines because the judicial decision on which he relied was reversed, as parole guidelines were not administrative regulations which had to be promulgated in accordance with the Administrative Procedure Act, RC § 119.01 et seq., so the inmate's petition was dismissed under Ohio R. Civ. P. 12 (B)(6). State ex rel. Watson v. Ohio Adult Parole Auth., 2003 Ohio App. LEXIS 6189, 2003 Ohio 6931, (2003).

PRE-ADJUDICATION HEARING.

Where an application for a charitable bingo license is rejected on the basis that an investigation revealed numerous prior violations, the applicant is entitled to a pre-adjudication hearing: Boys Town v. Brown, 69 Ohio St. 2d 1, 429 N.E.2d 1171 (1981).

PUBLIC POLICY.

Administrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the general assembly: D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health, 96 Ohio St. 3d 250, 773 N.E.2d 536, 2002 Ohio LEXIS 1996, 2002 Ohio 4172, (2002).

PUBLIC UTILITIES COMMISSION.

In enacting RC ? 4927.03, the legislature chose to require only a streamlined process. Had it wanted PUCO to engage in administrative rulemaking, it presumably would have chosen words to that effect. Thus RC ? 111.15 and RC Chapter 119 did not apply: Disc. Cellular, Inc. v. PUC, 112 Ohio St.

3d 360, 859 N.E.2d 957, 2007 Ohio LEXIS 55, 2007 Ohio 53, (2006).

The administrative procedure act, by RC § 119.01, specifically exempts the public utilities commission from the provisions of the act, and the commission has no authority to promulgate a rule under such act: Akron & Barberton Belt R. Co. v. Public Util. Comm., 165 Ohio St. 316, 135 N.E.2d 400 (1956).

The administrative procedure act, GC § 154-62 (RC § 119.01) et seq., sets up a formal procedure for rule-making, but by RC § 119.01, the public utilities commission is specially excepted from the provisions of the act: Craun Transp., Inc. v. Public Util. Comm., 162 Ohio St. 9, 120 N.E.2d 436 (1954).

RACING COMMISSION.

A charge that a licensed race horse owner violated Ohio state racing commission Rule 65, which permits license revocation "for conduct detrimental to the best interests of racing" in that he "was on the premises of... race track without authorization in the stall of" a certain horse and that such "unauthorized presence" "constituted improper practice on the part of a racing commission license holder," relates directly to the conduct of horse racing and is supported by reliable, probative and substantial evidence where witnesses testify to seeing him in the stable area and in the stable of such horse on the date alleged and he admits being in such stable area about the time in question: In re Cline, 3 Ohio App. 2d 345, 210 N.E.2d 737 (1964).

REAL ESTATE DIVISION.

As to complaints filed against licensees subject to regulation by the Ohio Division of Real Estate, the provisions of RC Chapter 4735. specifically governing Division of Real Estate proceedings prevail over any conflicting general hearing requirements of RC Chapter 119. In proceedings held pursuant to RC Chapter 4735., the more specific time provisions of RC § 4735.05.1, as they apply to time of hearing and submission of hearing examiner reports, prevail over those articulated in RC Chapter 119.; however, the due process protections of RC Chapter 119. regarding the contents of the letter providing notice of a right to a hearing and the filing and consideration of objections to the hearing examiner's report and recommendations are applicable, since RC Chapter 4735. does not speak specifically to those matters: OAG No. 80-092 (1980).

REHABILITATION AND CORRECTION DEPARTMENT.

The department of rehabilitation and correction is not an agency whose decisions are subject to judicial review pursuant to RC § 119.12: State v. Brown, 156 Ohio App. 3d 120, 804 N.E.2d 1021, 2004 Ohio App. LEXIS 401, 2004 Ohio 558, (2004).

REVOCATION OF PERMIT.

The revocation of a permit granted under the provisions of RC Chapter 1507. is governed by, and dependent upon, the terms and provisions of the permit which is, in essence, a contract: 1954 OAG No. 3437 (1954).

"RULE" CONSTRUED.

The "interpretation" by the board of dietetics that RC § 4759.06(D) required a college course in chemistry for a degree to qualify as being in "another related field acceptable to the board" was a "rule" under RC § 119.01(C) because it was to have a general and uniform operation: Livisay v. Ohio Bd. of Dietetics, 73 Ohio App. 3d 288, 596 N.E.2d 1129, 1991 Ohio App. LEXIS 2052 (1991).

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A "position paper" which permits regulated persons to perform certain procedures should be "rule-filed" pursuant to RC Chapter 119. since it is tantamount to a rule no matter how it is characterized: Ohio Nurses Assoc., Inc. v. Ohio State Bd. of Nursing Edn. & Nurse Registration, 44 Ohio St. 3d 73, 540 N.E.2d 1354 (1989).

The tax commissioner's informal instruction as to the 70/30 apportionment of situsable utility property was in fact a rule and thus invalid, as not adopted in accordance with RC §§ 119.01 et seq. and 5703.14: Condee v. Lindley, 12 Ohio St. 3d 90, 465 N.E.2d 450 (1984).

RULE CONSTRUED.

Based on the definitions of "rule" and "adjudication" in RC § 119.01(C) and (D), the Ohio Bureau of Workers' Compensation's declaration of reimbursement rates under its Health Partnership Program to providers, which were set out in its provider manual and bulletins, did not satisfy its requirements of informing providers of the discounted pricing pursuant to RC § 4121.441(A)(8). As policy guidelines did not establish any binding rules and the reimburesment rates were intended to be binding on hospitals and health care providers with the force and effect of a legal rule, the reimbursement rates were not within the meaning of "policy guidelines" or "bases for decisions" for purposes of RC § 4121.32(D). Ohio Hosp. Ass'n v. Ohio Bur. of Workers' Compensation, 2007 Ohio App. LEXIS 1370, 2007 Ohio 1499, (Mar. 30, 2007).

As the Division of Mineral Resources Management of the Ohio Department of Natural Resources failed to provide the requisite public notice under RC § 119.03(A) when it adopted its policy and procedure directive guidelines for coal mining permit procedures, which were deemed "rules" pursuant to RC §§ 119.01(C) and 119.02, the guidelines were not enforceable. Buckeye Forest Council, Inc. v. Div. of Mineral Resources Mgmt., 2007 Ohio App. LEXIS 900, 2007 Ohio 965, (Mar. 5, 2007).

RULES BY ADJUDICATION.

Motor vehicles bureau's policy restricting the number of license reinstatement applications an agent for those seeking such reinstatement could present in person at one time was an internal management rule which, under RC § 119.01(C), did not have to be adopted pursuant to the formal rule-making procedures of RC ch. 119, so an agent seeking a writ of mandamus to require that the policy be subject to such procedures did not show a clear legal right to the relief he sought or a corresponding clear legal duty on the part of the bureau's registrar. State ex rel. Savage v. Caltrider, 100 Ohio St. 3d 363, 800 N.E. 2d 358, 800 N.E.2d 358, 2003 Ohio LEXIS 3439, 2003 Ohio 6806, (Dec. 31, 2003).

The state medical board may, in the reasonable exercise of its informed discretion, promulgate rules by adjudication: Marion Ob/Gyn v. State Med. Bd., 137 Ohio App. 3d 522, 739 N.E.2d 15, 2000 Ohio App. LEXIS 1925 (2000).

STATE EMPLOYMENT RELATIONS BOARD.

A decision of the SERB not to file a complaint after an investigation pursuant to RC § 4117.12 is not a final, appealable order because the investigation was a ministerial function. The decision to prosecute or not to prosecute a claim is purely executory and nonjudicial function: Boieru v. State Emp. Relations Bd., 54 Ohio App. 3d 23, 560 N.E.2d 801 (1988).

An order of the State Employment Relations Board certifying a bargaining unit, over objections that the employees in question are not "public employees" under RC § 4117.01(C)(10), is an "adjudication" within the meaning of RC § 119.01(D) and as such is a final appealable order within the meaning of RC § 2505.02. (South Community, Inc. v. State Emp. Relations Bd. [1988], 38 OS3d 224, 527 NE2d 864, followed.): Hudson Twp. Bd. of Trustees v. State Emp. Relations Bd., 42 Ohio App. 3d 118, 536 N.E.2d 1197 (1988).

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Citation: **O.R.C. 119.01(C)**
View: Full
Date/Time: Thursday, June 21, 2007 - 11:27 AM EDT

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4927.01 Telecommunications - alternative regulation definitions.

As used in this chapter:

(A) "Basic local exchange service" means:

(1) 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:

(a) Local dial tone service;

(b) Touch tone dialing service;

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

(d) Access to operator services and directory assistance;

(e) Provision of a telephone directory and a listing in that directory;

(f) Per call, caller identification blocking services;

(g) Access to telecommunications relay service; and

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

(2) 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.

(B) "Cable television service" means any transmission of video or other programming service to subscribers and any subscriber interaction required for the selection of that video or other programming service.

(C) "Local service area" means the geographic area within which a telephone customer may complete a call to another telephone customer without being

assessed long distance toll charges.

(D) "Public telecommunications service" means the transmission by a telephone company, by electromagnetic or other means, of signs, signals, writings, images, sounds, messages, or data originating and terminating in this state regardless of actual call routing, but does not include a system, including its construction, maintenance, or operation, for the provision of telecommunications service, or any portion of such service, by any entity for the sole and exclusive use of that entity, its parent, a subsidiary, or an affiliated entity, and not for resale, directly or indirectly; the provision of terminal equipment used to originate or terminate telecommunications service; broadcast transmission by radio, television, or satellite broadcast stations regulated by the federal government; or cable television service.

(E) "Telephone company" means any company described in division (A)(2) of section 4905.03 of the Revised Code that is a public utility under section 4905.02 of the Revised Code.

Effective Date: 04-05-2001

4927.02 State policy.

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

(1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;

(2) 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, rentals, tolls, and charges for public telecommunications service;

(3) Encourage innovation in the telecommunications industry;

(4) Promote diversity and options in the supply of public telecommunications services and equipment throughout the state;

(5) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of public telecommunications services where appropriate;

(6) Consider the regulatory treatment of competing and functionally equivalent services in determining the scope of regulation of services that are subject to the jurisdiction of the public utilities commission;

(7) Not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services; and

(8) Protect the affordability of telephone service for low-income subscribers through the continuation of lifeline assistance programs.

(B) The public utilities commission shall consider the policy set forth in this section in carrying out sections 4927.03 and 4927.04 of the Revised Code and in reducing or eliminating the regulation of telephone companies under those sections as to any public telecommunications service.

Effective Date: 03-17-1989; 11-04-2005

4927.03 Exemption orders.

(A)(1) The public utilities commission, upon its own initiative or the application of a telephone company or companies, after notice, after affording the public and any affected telephone company a period for comment, and after a hearing if it considers one necessary, may, by order, exempt any such telephone company or companies, as to any public telecommunications service , including basic local exchange service, from any provision of Chapter 4905. or 4909., or sections 4931.01 to 4931.35 of the Revised Code or any rule or order adopted or issued under those provisions, or establish alternative regulatory requirements to apply to such public telecommunications service and company or companies; 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.

(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.

(3) To authorize an exemption or 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. Further, as to an exemption with respect to basic local exchange service, the commission shall not exempt a telephone company from sections 4905.20, 4905.21, 4905.22,

4905.231, 4905.24, 4905.241, 4905.242, 4905.243, 4905.244, 4905.25, 4905.26, 4905.30, 4905.32, 4905.33, 4905.35, and 4905.381 of the Revised Code.

(B) In carrying out this section, the public utilities commission may prescribe different classifications, procedures, terms, or conditions for different telephone companies and for the public telecommunications services they provide, provided they are reasonable and do not confer any undue economic, competitive, or market advantage or preference upon any telephone company.

(C) The public utilities commission has jurisdiction over every telephone company providing a public telecommunications service that has received an exemption or for which alternative regulatory requirements have been established pursuant to this section. As to any such company, the commission, after notice and hearing, may abrogate or modify any order so granting an exemption or establishing alternative requirements if it determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest. No such abrogation or modification shall be made more than five years after the date an order granting an exemption or establishing alternative requirements under this section was entered upon the commission's journal, unless the affected telephone company or companies consent.

(D) The public utilities commission shall adopt such rules as it finds necessary to carry out this section. It shall adopt rules initially implementing the amendment of this section by H.B. No. 218 of the 126th general assembly within one hundred twenty days after the effective date of the amendment. In adopting those rules, the commission shall consider the establishment of elective alternative regulation specific to a telephone company that is an incumbent local exchange carrier as defined in 47 U.S.C. 251(h) having fewer than fifty thousand access lines.

Effective Date: 03-17-1989; 11-04-2005

4901:1-4-01 Definitions.

As used within this chapter, these terms denote the following:

(A) "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of these rules, the term "own" means to own an equity interest (or the equivalent thereof) of more than ten per cent.

(B) "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.).

(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.

(D) "Commission" means the public utilities commission of Ohio.

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(E) "Competitive local exchange carrier (CLEC)" means any facilities-based and nonfacilities-based local exchange carrier that was not an incumbent local exchange carrier on the date of the enactment of the Telecommunications Act of 1996 (1996 Act) or is not an entity that, on or after such date of enactment, became a successor, assign, or affiliate of an incumbent local exchange carrier.

(F) "Elective alternative regulation plan (EARP)" means a plan adopted in case number 00-1532-TP-COI under which an incumbent local exchange carrier receives earnings-free regulation with greater pricing flexibility for services other than BLES in exchange for specific commitments.

(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.).

(H) "Facilities-based competitive local exchange carrier" means any local exchange carrier that uses facilities it owns, operates, manages or controls to provide service(s) subject to the commission evaluation; and that was not an incumbent local exchange carrier in that exchange on the date of the enactment of the 1996 Act. Such carrier may partially or totally own, operate, manage or control such facilities. Carriers not included in this classification are carriers providing service(s) solely by resale of the incumbent local exchange carrier's local exchange services.

(I) "Incumbent local exchange carrier (ILEC)" means with respect to any area, any facilities-based local exchange carrier that: (a) on the date of the enactment of the 1996 Act, provided BLES in such area; and (b) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R 69.601(b), as effective on May 1, 2006; or (ii) is a person or entity that, on or after such date of enactment, became a successor or assignee of a member described in clause.

(J) "Large ILEC" means any ILEC serving fifty thousand or more access lines within Ohio.

(K) "Long-run service incremental cost (LRSIC)" represents the forward-looking economic cost for a new or existing product that is equal to the per unit cost of

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increasing the volume of production from zero to a specified level, while holding all other product and service volumes constant. LRSIC does not include any allocation of forward-looking common overhead costs. Forward-looking common overhead costs are costs efficiently incurred for the benefit of a firm as a whole and are not avoided if individual services or categories of services are discontinued. Further, forward-looking joint costs, which are the forward-looking costs of resources necessary to provide a group or family of services shall be added to or included in the LRSIC of the products or services.

(L) "Small ILEC" means any ILEC serving less than fifty thousand access lines within Ohio.

(M) "Telephone exchange area" means a geographical service area established by an ILEC and approved by the commission, which usually embraces a city, town, or village and a designated surrounding or adjacent area. There are currently seven hundred thirty-eight exchanges in the state.

(N) "Tier one" services include BLES 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.

(O) "Tier two" services include all regulated telecommunications services that do not fall in tier one.

Effective: 08/07/2006

R.C. 119.032 review dates: 05/31/2011

Promulgated Under: 111.15

Statutory Authority: 4927.03

Rule Amplifies: 4927.01, 4927.02, 4927.03, 4927.04

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4901:1-4-06 Alternative regulation commitments.

(A) Advanced services

(1) Advanced telecommunications services capability is the availability of high-speed, full broadband telecommunications that enables a customer to originate and receive high-quality data, graphics, and video using any technology (e.g., xDSL, cable, fiber optic, fixed wireless, satellite, or other system) at a minimum rate of two hundred kilobits per second in one direction.

(2) An ILEC electing this alternative regulation plan must commit to provide the following:

(a) High density central offices: No later than twelve months from the effective date of the alternative regulation plan, an ILEC must provide advanced telecommunications service capability from all class five central offices (CO) in its traditional service territories which serve census tracts with a population density of five hundred or more people per square mile as defined by the 2000 census.

(i) No later than twelve months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within twelve thousand feet from a high density CO.

(ii) No later than twenty-four months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within eighteen thousand feet from a high density CO.

(b) County seat central offices: For counties that do not meet the population density criterion described in paragraph (A)(2)(a) of this rule, an ILEC must provide advanced telecommunications service capability from all class five COs in its traditional service territories that are within the county seat no later than twelve months from the effective date of the alternative regulation plan.

(i) No later than twelve months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications

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services upon customer demand within sixty days to any customer within twelve thousand feet from a county seat CO.

(ii) No later than twenty-four months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within eighteen thousand feet from a county seat CO.

(B) Lifeline assistance

(1) The ILEC must implement a lifeline program that provides eligible residential customers with the maximum contribution of federally available assistance. Eligible lifeline service consists of flat-rate monthly access line service with touch-tone service.

(a) Credits: The ILEC shall credit one hundred per cent of all nonrecurring service order charges for commencing service and a monthly amount that will ensure the maximum federal matching contribution.

(b) Other benefits: Lifeline customers shall receive a waiver of the local exchange service establishment deposit requirements, free blocking of toll and 900/976 dialing patterns, an option to purchase call waiting and an option to purchase other features for medical and/or safety reasons. Requests to purchase vertical features must be signed by the customer certifying that the customer has a legitimate need, either for medical or safety reasons, for the optional feature(s) requested.

(c) Restrictions: The discount will apply to only one access line per household. Optional features, other than call waiting, are prohibited unless the phone company receives a signed statement from the customer self-certifying that the feature is necessary for medical and/or safety reasons. Existing lifeline customers that have optional features prior to the adoption of this plan will be grandfathered into the lifeline program so long as the customer makes no changes whatsoever to their existing local exchange service. Telephone companies are prohibited from marketing vertical services to existing or new lifeline customers.

(2) Lifeline assistance eligibility shall include:

(a) Home energy assistance program (LIHEAP, HEAP, and E-HEAP).

(b) Ohio energy credit program (OECP).

(c) Food stamps.

(d) Supplemental security income-blind and disabled (SSDI).

(e) Supplemental security income-aged (SSI).

(f) General assistance (including disability assistance [DA]).

(g) Medical assistance (medicaid), including any state program that might supplant medicaid.

(h) Federal public housing/section eight.

(i) Ohio works first (formerly AFDC).

(j) National school lunch's free lunch program 42 U.S.C. 1751 to 1769h, as effective on May 1, 2006.

(k) Household income at or below one hundred fifty per cent of the poverty level.

(3) Each ILEC participating in the EARP shall offer a lifeline assistance program to eligible customers throughout the traditional service area of that carrier, in conformance with this rule.

(a) ILECs with fifty thousand or more access lines shall automatically enroll customers into lifeline assistance who participate in a qualifying program. Additionally, such companies must also enroll customers who participate in a qualifying program by using on-line company to agency verification or self-certification.

(b) ILECs with less than fifty thousand access lines may use one or any combination of automatic enrollment, on-line company to agency verification and/or self-certification to enroll customers into lifeline assistance who participate in a qualifying program.

(c) All ILECs must verify customer eligibility consistent with the federal communication commission's requirements in 47 C.F.R. 54, as effective on May 1, 2006, to enroll customers into lifeline assistance who qualify through household income-based requirements.

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(4) At no time will the monthly access line discounts cause the local service rates to be less than zero.

(5) Lifeline assistance customers with past due bills for regulated local service charges will be offered special payment arrangements with the initial payment not to exceed twenty-five dollars before service is installed, with the balance for regulated local charges to be paid over six equal monthly payments. Lifeline assistance customers with past due bills for toll service charges will be required to have toll restricted service until such past due toll service charges have been paid or until the customer establishes service with a subsequent toll provider pursuant to the minimum telephone service standards.

(6) Staff will work with the appropriate state agencies, which administer qualifying programs for lifeline assistance, and the ILECs to negotiate and acquire on-line access to the agencies' electronic databases for the purpose of accessing the information necessary to verify a customer's participation in an eligible program, and data necessary to automatically enroll customers into the lifeline program. On-line verification and automatic enrollment will be in place within six months after the effective date of a company's alternative regulation plan.

(7) An ILEC is permitted to perform a verification audit of a customer already on lifeline assistance service.

(8) All lifeline program activities must be coordinated through an advisory board composed of commission staff, the office of the Ohio consumers' counsel, consumer groups representing low-income constituents, and the company. Commission staff will work with the advisory board to reach consensus. However, where consensus is not possible, the commission's staff shall make the final determination. Advisory board decisions on how the program is implemented and the lifeline promotional plan are subject to commission review. Companies with less than fifty thousand access lines may join with other such companies to form one advisory board.

(9) The ILEC will establish an annual marketing budget for promoting lifeline and performing outreach using ten cents per access line multiplied by the number of residential access lines the company serves. The ILEC shall work with the advisory board to reach a consensus, where possible, regarding how the marketing budget funds will be spent. The marketing budget funds shall only be spent for the promotion and marketing of lifeline service and not for the administrative costs of

implementing and operating the lifeline program.

(C) Retail rate commitments

(1) An ILEC's offering of in-territory, BLES shall include flat-rate residential calling.

(2) Any measured-rate or optional extended area service plans that are being provided to customers on the effective date of the alternative regulation plan shall continue to be available to customers unless the commission subsequently approves changes to these plans.

(3) Tier one rate caps

(a) Core service rate caps

(i) Tier one core services as used in these rules shall include BLES as defined in section 4927.01 of the Revised Code, and basic caller ID only.

(ii) An ILEC adopting alternative regulation pursuant to this chapter, shall cap the in-territory rates for tier one core service at the existing rates for so long as the company remains under the EARP. The electing ILEC's existing rates shall represent the maximum or "ceiling" levels, below which the ILEC may lower or raise rates upon making the appropriate filing with the commission.

(iii) The electing ILEC may not price below the LRSIC of each service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(b) Noncore service rate caps

(i) Noncore tier one services shall include:

(a) Second and third local exchange service access lines.

(b) Call waiting.

(c) Call trace (*57).

(d) Centrex access lines.

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(e) Private branch exchange (PBX) trunks.

(f) Per line number identification blocking.

(g) Nonpublished number service.

(h) N11 access and usage, unless exempted.

(ii) An electing ILEC shall cap the rates for all in-territory, noncore, tier one services at existing rates for twenty-four months from the effective date of the alternative regulation plan.

(iii) During those twenty-four months, the electing ILEC may lower or raise rates below the cap, upon making the appropriate filing with the commission.

(iv) The electing ILEC may not price below the LRSIC of each service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(v) After twenty-four months, upward pricing flexibility for a second local exchange access service line and call waiting shall be limited to no more than a ten per cent increase in price per year for each service, up to a maximum cap for the life of the plan that is double the initial rate for each service.

(vi) After twenty-four months, upward pricing flexibility for all other tier one, noncore services shall be limited to a cap that is double the initial rate for the life of the plan.

(4) Tier two services

(a) Tier two services include all regulated, public telecommunication services that do not fall on tier one.

(b) Tier two service rates are not subject to any rate cap and may be priced at market-based rates.

(c) The rate for any tier two service must recover the LRSIC associated with the service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(5) Nothing herein prohibits an electing ILEC from seeking, through an appropriate filing with the commission, the flexibility to discount tier one service rates, on an exchange or on a wire center basis when an exchange has more than one wire center, provided the company demonstrates that the discount is necessary to meet competition and provided the discount is uniformly available to all tier one service customers within the designated exchange(s) or wire center(s).

(6) Notice to customers of any changes in rates must comply with the notice requirements established in the rules for competitive telephone companies.

Replaces: 4901:1-4-05

Effective: 08/07/2006

R.C. 119.032 review dates: 05/31/2011

Promulgated Under: 111.15

Statutory Authority: 4927.03, 4927.04

Rule Amplifies: 4927.01, 4927.02, 4927.03, 4927.04

Prior Effective Dates: 7/18/02

4901:1-4-09 BLES filing requirements and process for application.

(A) An application and all required exhibits shall be made in the form provided by the commission.

(B) Exhibits to an application

(1) An affidavit from an officer of the ILEC verifying that the applicant fully complies with the elective alternative regulation commitments as required by paragraphs (A) and (B) of rule 4901:1-4-06 of the Administrative Code for large ILECs and as required by rule 4901:1-4-07 of the Administrative Code for small ILECs.

(2) An identification of the telephone exchange area(s) for which the ILEC seeks alternative regulation for BLES and other tier one services and the competitive market test proposed by the applicant for each telephone exchange area.

(3) Supporting information and detailed analysis demonstrating that the applicant meets, on a telephone exchange area basis, at least one of the competitive market tests, as set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code. This information should be contained within an affidavit filed by an officer of the ILEC attesting to the veracity of the data upon which the application is premised.

(4) Any proposed tariff modifications necessary to implement the pricing flexibility rules set forth in paragraph (A) of rule 4901:1-4-11 of the Administrative Code.

(5) Copy of proposed legal notice notifying the public of the filing of the application and stating that objections can be filed with the commission consistent with paragraph (F) of this rule. The public notice should occur within seven days of the filing of the application and should be printed in the legal notice section of a newspaper of general circulation in each county corresponding to the exchanges for which BLES alternative regulation is being requested. The requesting ILEC should confer with the commission staff regarding the content of the legal notice prior to commencing with the publication of the public notice.

(C) The application shall be designated by the commission's docketing division using the case purpose code "BLS". On the same day that the ILEC files its complete application with the commission, the ILEC shall deliver one copy of its application to the office of the Ohio consumers' counsel.

(D) All persons seeking intervention in order to be considered as a party in the proceeding must file the appropriate motion to intervene within fourteen calendar days of the filing of the ILEC's application.

(E) Confidential information filed by the ILEC will be eligible for proprietary treatment in accordance with rule 4901-1-24 of the Administrative Code. Parties shall be afforded access to all confidential information and supporting data addressed within an application by entering into a protective agreement with the ILEC. The ILEC has the duty to negotiate such agreements in good faith with the parties in a timely manner and the commission will decide any issues that the parties are unable to

resolve regarding the protective agreement.

(F) Any person or party who can show good cause why such application should not be granted must file with the commission a written statement detailing the reasons within forty-five calendar days after the application is docketed.

(G) With respect to the four tests identified in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, an ILEC's application shall be approved automatically and become effective on the one hundred twenty-first day after the initial filing, unless suspended by the commission, the legal director, or an attorney examiner. A suspension may be granted at any time if deemed appropriate. A hearing will not be held absent extraordinary circumstances established through clear and convincing evidence, satisfying the commission, that a hearing is needed. Where the commission determines a hearing is necessary and/or a suspension is ordered, the commission will render a decision on the application within two hundred seventy days of filing.

(H) An application containing an alternative competitive market test (i.e., a test not found in paragraphs (C)(1) to (C)(4) of rule 4901:1-4-10 of the Administrative Code) will not be subject to the automatic time frames set forth in paragraph (G) of this rule. The commission will establish the appropriate process and time frames for consideration of such application after reviewing each relevant application.

(I) All parties shall electronically serve their discovery requests. All discovery responses are to be electronically served within ten days of being initially served with the discovery request.

(J) The commission, legal director, or attorney examiner may modify the time frames stated herein based upon a material modification filed subsequent to the initial application.

Effective: 08/07/2006

R.C. 119.032 review dates: 05/31/2011

Promulgated Under: 111.15

Statutory Authority: 4927.03

Rule Amplifies: 4927.03

4901:1-4-10 Competitive market tests.

(A) In order to qualify for pricing flexibility for BLES and other tier one services, the applicant has the burden to demonstrate that as of the date of the application, the ILEC meets at least one of the competitive market tests set forth in paragraph (C) of this rule in each of the requested telephone exchange area(s). Thus, an application for alternative regulation of BLES and other tier one services may contain more than one telephone exchange area, but the test(s) must be applied to each telephone exchange area individually within that application.

(B) For any telephone exchange area(s) in which the ILEC is not granted alternative regulation for BLES and other tier one services, the ILEC's BLES and other tier one services remain subject to all the requirements of EARP, including the pricing requirements pursuant to paragraph (C) of rule 4901:1-4-06 of the Administrative Code. For any telephone exchange area(s) in which the ILEC is granted alternative regulation for BLES and other tier one services, pricing flexibility for the ILEC's BLES and other tier one services will not be subject to paragraph (C)(3) of rule 4901:1-4-06 of the Administrative Code. All of the remaining requirements of EARP will continue to apply to the ILEC's retail service offerings.

(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.

(1) An applicant must demonstrate in each requested telephone exchange area that at least twenty-five per cent of total residential access lines are provided by unaffiliated CLECs, and at least twenty per cent of total company access lines have been lost since 1996 as reflected in the applicant's annual report filed with the commission for 1996.

(2) An applicant must demonstrate in each requested telephone exchange area that at least twenty per cent of total residential access lines are provided by unaffiliated CLECs, and the presence of at least two unaffiliated facilities-based

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CLECs providing BLES to residential customers.

(3) An applicant must demonstrate in each requested telephone exchange area that at least fifteen per cent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five alternative providers serving the residential market.

(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 its 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.

Effective: 08/07/2006

R.C. 119.032 review dates: 05/31/2011

Promulgated Under: 111.15

Statutory Authority: 4927.03

Rule Amplifies: 4927.03