

IN THE SUPREME COURT OF OHIO

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| The Office of the Ohio Consumers' Counsel, |) |
| |) Case No. 07-659 |
| Appellant, |) |
| |) Appeal from the Public Utilities Commission |
| v. |) of Ohio |
| |) |
| The Public Utilities Commission of Ohio, |) Public Utilities Commission of Ohio |
| |) Case No. 06-1013-TP-BLS |
| Appellee. |) |

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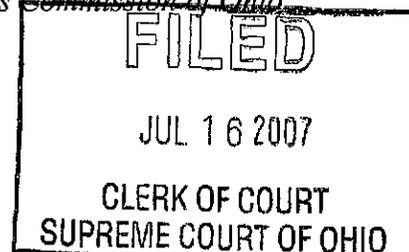
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I. STATEMENT OF THE FACTS AND THE CASE

A. Summary of Argument

For a variety of reasons in a number of recent cases, this Court has reversed, vacated or modified the Public Utilities Commission of Ohio's ("PUCO's") misapplication of Ohio's regulatory statutes.¹ This appeal by the Office of the Ohio Consumers' Counsel ("OCC") represents another occasion on which the Court should correct the PUCO's misapplication of law, and thus restore for consumers the law's intended protections against rate increases.

This appeal is the second case addressing the H.B. 218 amendments made in 2005 concerning alternative regulation ("alt. reg.") for the basic local exchange service ("basic service") that telephone companies offer to consumers in Ohio, coming right on the heels of the first case.² It is also the second case considering the legality of the basic service alt. reg. rules

¹ See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853 (denial of intervention); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (failure to allow discovery of settlement agreements; modification of order on rehearing); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 511, 2006-Ohio-3054 (vacating PUCO order); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110 (approval of rate stabilization plan that did not require rate determined by competitive bid).

² Before AT&T's filing, Cincinnati Bell Telephone Company filed a basic service alt. reg. application, *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation of Basic Local Exchange and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 06-1002-TP-BLS (OCC Appendix ("Appx.") at 000565), which was decided by the PUCO just before AT&T's cases and is currently on appeal by OCC to this Court as Case No. 07-570. OCC filed its brief in that case on July 2, 2007. In addition, AT&T was recently granted basic service alt reg. for eight other exchanges. *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. 07-259-TP-BLS, Opinion and Order (June 27, 2007).

adopted by the PUCO in 2006.³ And it is the second case to consider the grant of an application under those rules by an incumbent telephone company, in this instance AT&T Ohio (“AT&T”). Under those rules, if the PUCO grants basic service alt. reg. to a telephone company, then the company can annually increase customers’ basic service rates (up to \$1.25 on monthly bills) without applying to the PUCO.

H.B. 218 did not change the requirements of R.C. 4927.03(A) (Appx. at 000648) that alt. reg. can be granted only where it is shown that the service being examined -- in this case, basic service offered on its own (also known as “stand-alone” basic service) and not as part of a bundle of services -- is subject to competition or that the customers of that service have reasonably available alternatives. Under the PUCO’s rules, however, as interpreted and applied to the information provided by AT&T, the PUCO has granted alt. reg. for AT&T’s stand-alone basic service where competitors provide basic service only as part of bundles. This violates the very heart of R.C. 4927.03(A) (Appx. at 000648), including the requirement that the PUCO consider functionally equivalent and substitute services readily available at competitive rates, terms and conditions.⁴

³ *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Companies*, PUCO Case No. 05-1305-TP-ORD (the “05-1305 rulemaking”), Opinion and Order (March 7, 2006) (“05-1305 Order”) (Appx. at 000444); *id.*, Entry on Rehearing (“05-1305 Rehearing”) (May 3, 2006) (Appx. at 000515).

⁴ R.C. 4927.03(A)(2)(c) (Appx. at 000648).

AT&T has had alt. reg. for such bundles of services since January 6, 2003.⁵ In now granting alt. reg. to AT&T's stand-alone basic service, the PUCO has allowed the Company to raise rates for AT&T's "bare minimum" service, for which there is no competition that would meet the standards of R.C. 4927.03(A) (Appx. at 000648).

The PUCO's rules examine whether an incumbent telephone company qualifies for basic service alt. reg. in each exchange covered by the application. Under those rules, as interpreted and applied to the information provided by AT&T, the PUCO has granted alt. reg. to AT&T's stand-alone basic service in 136 exchanges even though some of the so-called competitors serve only part of an exchange and/or do not provide stand-alone basic service. The rates and terms and conditions of service of these so-called competitors' offerings also are not comparable to AT&T's stand-alone basic service. Thus, there are AT&T customers in the 136 exchanges who cannot avail themselves of the supposed competitive alternatives, yet may see their basic service rate increase without further PUCO review.

The PUCO's rules -- and the proof adduced by AT&T -- also fail to show two other conditions required by R.C. 4927.03(A) (Appx. at 000648) for alt. reg.: (1) that there are no barriers to entry for competitors to offer stand-alone basic service in the AT&T exchanges; and (2) that the grant of alt. reg. to AT&T for its stand-alone basic service is in the public interest. For all of these reasons, the PUCO's grant of basic service alt. reg. for AT&T should be reversed or vacated, and the PUCO should be directed -- as this Court has done in recent cases -- to follow the statutes under which the PUCO is required to regulate.

⁵ *In the Matter of the Application of Ameritech For Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 02-3069-TP-ALT, Finding and Order (January 6, 2003) (Appx. at 000421).* At the time, AT&T was known as Ameritech.

B. Standard of Review

This Court uses a de novo standard of review to decide all matters of law such as those raised in this case. *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105; *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523; *Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559, 563. Under this standard of review, the Court should reverse the PUCO's illegal effort to legislate a result rather than abide by Ohio law.

The Court's review of the case below is important because the PUCO has again gone beyond its statutory authority, with a result that AT&T's residential customers may see their basic service rates increase, and with the potential for annual rate increases to follow. This Court has repeatedly stated that the PUCO is a creature of statute, and as such does not have the authority to act beyond the authority allowed under Ohio statutes. See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1.

C. The Governing Law

R.C. 4927.03 (Appx. at 000648), originally enacted in 1989, allows alt. reg. for a telecommunications service if two conditions are met: (1) if the service is subject to competition or customers have reasonably available alternatives to that service; and (2) if alt. reg. is in the public interest. Basic service was, however, exempted from alt. reg. under this statute until 2005, when the General Assembly passed H.B. 218. The amended R.C. 4927.03 (Appx. at 000648) now reads:

(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.) Basic service is defined 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 * * *.”⁶ Thus “such telecommunications service,” in the context of consideration of alt. reg. for basic service, refers to stand-alone basic service and does not include bundled services or any other service.

The General Assembly imposed a specific additional condition on basic service alt. reg.:

(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**.⁷

Again, in context this would require a showing that there were no barriers to entry for the provisioning of stand-alone basic local exchange service.

In H.B. 218, the General Assembly did not alter the specific factors that the PUCO is required to consider in granting alt. reg. These factors are found in R.C. 4927.03(A)(2) (Appx. at 000648):

⁶ R.C. 4927.01(A) (Appx. at 000645). The sub-parts of the statute make clear that basic service does not include the other services that telephone companies provide in their bundles.

⁷ R.C. 4927.03(A)(3) (emphasis added) (Appx. at 000648).

(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 did, however, amend the state policy which the PUCO must also consider⁸ in implementing R.C. 4927.03(A) (Appx. at 000648):

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; * * *.⁹

This statutory framework controls the PUCO's powers in this context. As this brief will show, the PUCO has not followed the statute.

⁸ R.C. 4927.02(B) (Appx. at 000647).

⁹ R.C. 4927.02(A) (Appx. at 000647). The italicized material was added by H.B. 218.

D. Statement of the Case

1. The rulemaking proceeding

H.B. 218 went into effect on November 4, 2005. The statute required the PUCO to adopt rules to implement the provisions of the law.¹⁰

The PUCO adopted rules in the 05-1305 rulemaking (Appx. at 000444). The PUCO opened the docket with an Entry that included a PUCO staff proposal. The PUCO staff proposed amendments to Ohio Adm. Code Chapter 4901:1-4, to allow for basic service alt. reg.¹¹

The staff proposal included three so-called “competitive market tests,” under which, if met, companies would be deemed to have met the requirements for alt. reg. under R.C. 4927.03(A) (Appx. at 000648) and would thus be allowed to increase basic service rates. The staff proposal also contained a process by which an incumbent telephone company could apply for basic service alt. reg. in specific exchanges.¹²

The PUCO received comments and reply comments on the staff proposal from the industry and from consumer representatives including OCC (“Consumer Groups”). In addition,

¹⁰ R.C. 4927.03(D) (Appx. at 000649), as amended.

¹¹ That chapter was first adopted in 2001 *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) (“00-1532 Order”) (Appx. at 000365).

¹² An “incumbent” telephone company is, inter alia, any facilities-based local exchange carrier that provided basic service to a designated territory when the federal Telecommunications Act of 1996 was enacted. See Ohio Adm. Code 4901:1-4-01(I) (Appx. at 000651). A telephone “exchange” is defined as “a geographical service area established by an [incumbent] 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.” Ohio Adm. Code 4901:1-4-01(M) (Appx. at 000652).

upon the motion of the Consumer Groups, the PUCO held a series of local public hearings in seven cities around the state.

In the 05-1305 Order (Appx. at 000444), the PUCO adopted changes to the staff-proposed rules. Among these changes were provisions that limited basic service rate increases to \$1.25 per year, and others affecting the proposed basic service alt. reg. application process. The PUCO decision incorporated the PUCO staff's proposals by which an incumbent could qualify for basic service alt. reg., but also adopted a new competitive test, which was the primary one ultimately used by AT&T in the case below.

After applications for rehearing were filed, including by the Consumer Groups, an Entry on Rehearing was issued on May 3, 2006 (Appx. at 000515), setting final rules.¹³ The rules became effective on August 7, 2006.¹⁴

The rules adopted a total of four competitive tests, and provide, as relevant here, 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 basic service and other tier one services in that telephone exchange area.

....

(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

¹³ Pursuant to *Craun v. Pub. Util. Comm.* (1954), 162 Ohio St. 9, affected parties cannot take a direct appeal from a PUCO rulemaking.

¹⁴ Opinion and Order at 1 (Appx. at 000100).

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.¹⁵

Under these rules, the applicant explicitly bears the burden of demonstrating that it meets all prongs of one of the competitive tests for each exchange contained in the application.¹⁶

Thus, under Ohio Adm. Code 4901:1-4-10(C)(3) (Appx. at 000664) (“Test 3”), in each Test 3 exchange, the applicant must show that unaffiliated competitive local exchange carriers (“CLECs”) serve at least fifteen per cent of total residential access lines, **and** the presence of at least two unaffiliated facilities-based CLECs providing basic service to residential customers, **and** the presence of at least five alternative providers serving the residential market (the “alternative providers prong”). Similarly, under Ohio Adm. Code 4901:1-4-10(C)(4) (Appx. at 000664) (“Test 4”), the applicant must show for each exchange that it has lost at least fifteen per cent of its total residential access lines since 2002 (the “line loss prong”) **and** that there are at least five unaffiliated facilities-based alternative providers serving the residential market in the exchange (the “alternative providers prong”).¹⁷

The rules provide that interested persons may intervene within 14 days of the filing of an application.¹⁸ The rules also state that “[a]ny person or party who can show good cause why

¹⁵ Ohio Adm. Code 4901:1-4-10(C) (emphasis added) (Appx. at 000663).

¹⁶ Ohio Adm. Code 4901:1-4-10(A) (Appx. at 000663).

¹⁷ The difference between the two alternative providers prongs is that under Test 4, the alternative providers must not be affiliated with the incumbent, whereas under Test 3 the providers may be affiliated. In this case, AT&T did not submit any affiliated providers for its Test 3 exchanges.

¹⁸ Ohio Adm. Code 4901:1-4-09(D) (Appx. at 000661).

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.”¹⁹

2. AT&T’s application

On August 11, 2006, AT&T filed its application for basic service alt. reg. for 145 exchanges. In its application, AT&T asserted that Test 4 was met in 119 exchanges and Test 3 was met in the other 26 exchanges.²⁰ OCC and other consumer groups were granted intervention by Entry dated September 1, 2006.²¹

AT&T supplemented its application on September 8 and 13, 2006.²² As a result, the deadline for filing oppositions was extended to October 16, 2006.²³

On October 16, 2006, OCC joined with the other consumer groups (OCC and these groups were referred to collectively as the “Consumer Groups”²⁴) in filing a detailed opposition to AT&T’s application, including the affidavits of two telecommunications experts.²⁵ AT&T filed its response to the Consumer Groups’ opposition on October 26, 2006, and the Consumer Groups filed a reply to AT&T’s response on October 31, 2006.²⁶

¹⁹ Ohio Adm. Code 4901:1-4-09(F) (Appx. at 000661).

²⁰ See Opinion and Order at 2 (Supp. at 000101)

²¹ See id. at 2 (Appx. at 000101).

²² See id. at 1 (Appx. at 000100).

²³ See id. at 2 (Appx. at 000101).

²⁴ Most of the consumer groups who participated in the 05-1305 rulemaking also comprised the Consumer Groups in the case below.

²⁵ These experts had also provided affidavits that were filed by the Consumer Groups in the 05-1305 rulemaking proceeding.

²⁶ See id. (Appx. at 000100)

On December 20, 2006, the PUCO issued its Opinion and Order (Appx. at 000100) granting AT&T's application for 136 of the 145 exchanges. The PUCO found that AT&T had shown that it met both prongs of Test 4 in 118 of the 119 exchanges that AT&T included for that test in the application. The PUCO also found that AT&T had shown that it met all three prongs of Test 3 in 18 of the 26 exchanges that AT&T included for that test in the application. The PUCO also found that both Test 3 and Test 4 meet the terms of the R.C. 4927.03(A) (Appx. at 000648) requirements for basic service alt. reg. The Opinion and Order also incorporated the entire record of the 05-1305 rulemaking proceeding into the AT&T application docket.²⁷

On January 19, 2007, the Consumer Groups timely filed an application for rehearing from the Opinion and Order (Appx. at 000190). The application for rehearing, *inter alia*, argued: (1) that the PUCO's interpretation of the statute as reflected in the basic service alt. reg. rules was in error, (2) that the PUCO erred by treating bundles of service that include basic service as competition for stand-alone basic service, (3) that the PUCO's rules allowed basic service alt. reg. for customers who have no competition or alternatives, (4) that neither prong of Test 4 adequately addressed the factors that R.C. 4927.03(A)(2) (Appx. at 000648) requires the PUCO to consider, (5) that no prong of Test 3 adequately addressed the factors that R.C. 4927.03(A)(2) (Appx. at 000648) requires the PUCO to consider, (6) that the PUCO erred in finding no barriers to entry for the provision of stand-alone basic service in the 136 AT&T exchanges, and (7) that granting alt. reg. for AT&T's stand-alone basic service was not in the public interest.

On February 14, 2007, the PUCO issued its Entry on Rehearing (Appx. at 000166) denying the Consumer Groups' application for rehearing in its entirety. For the most part, the

²⁷ *Id.* at 6 (Appx. at 000105).

Entry on Rehearing did not contain any detailed responses to the Consumer Groups' arguments, stating merely that the Consumer Groups had "raised no new arguments for the PUCO's consideration."²⁸

This appeal by OCC followed. As demonstrated herein, the PUCO's basic service alt. reg. rules, and its implementation of those rules in this proceeding, did not follow the law set forth in R.C. 4927.03(A) (Appx. at 000648). The PUCO's decision granting alt. reg. for AT&T's stand-alone basic service should be reversed. Likewise Tests 3 and 4 -- which were used by AT&T and approved by the PUCO -- should be invalidated.

E. Statement of Facts

In 2001, as discussed above, the PUCO determined that bundles of services that include basic service met the terms of R.C. 4927.03(A) (Appx. at 000648), and in 2003 AT&T was granted alt. reg. for those bundled services. The proceeding below thus was focused on AT&T's stand-alone basic service in the 145 exchanges included in AT&T's application, and this appeal focuses on AT&T's stand-alone basic service in the 136 exchanges for which AT&T was granted alt. reg. in the case below.

The exchanges included in the application had a total of 1.6 million residential access lines as of 2005.²⁹ These exchanges combined serve 89% of AT&T's local Ohio residential access lines.³⁰ The number of stand-alone basic service lines within these totals is unknown.

²⁸ See generally Entry on Rehearing at 3-19 (Appx. at 000168-000184).

²⁹ See the Consumer Groups' Opposition to Application by AT&T Ohio for Basic Local Service Alternative Regulation; Demonstration Why the Application Should Not Be Granted (September 21, 2006) ("Consumer Groups' Opposition") at 3, citing AT&T 2005 PUCO Annual Report (Supp. at 000001).

³⁰ Id.

Test 4. AT&T asserted that it had lost more than 15% of its residential access lines in the 119 Test 4 exchanges since 2002.³¹ The Consumer Groups' expert stated:

The question of whether the 119 Test 4 exchanges pass or fail the first prong of Test 4 can only be answered after revising the Company's calculation to exclude (1) lines transferred to the Company's DSL service, its DSL affiliate or its wireless affiliates; (2) lines transferred to other broadband providers; (3) lines disconnected and not reconnected with an alternative provider within the Company's service area.³²

AT&T's information does not allow such an analysis. Thus it cannot be said that AT&T has passed the line loss test in any of the Test 4 exchanges.

The second prong of Test 4 requires that the applicant show the "presence of at least five unaffiliated facilities-based alternative providers serving the residential market." There were the four wireless carriers (Alltel, Cincinnati Bell Wireless, Sprint/Nextel and Verizon) that AT&T offered as alternative providers in various exchanges.³³ The Consumer Groups' expert showed that these carriers do not provide basic service as the statute defines it, because wireless phones do not offer customers a functional equivalent or substitute for dial tone, do not yet offer customers a functional equivalent or substitute for E9-1-1 emergency service, and miss the definition in other ways.³⁴ These carriers offer only bundles that include a number of other services (known as vertical calling features) and/or long distance calling.³⁵

³¹ See Opinion and Order at 2 (Appx. at 000101).

³² Williams Affidavit, ¶150 (Supp. at 000142). "DSL" refers to digital subscriber line service, which is a broadband service.

³³ See Opinion and Order at 22 (Appx. at 000121).

³⁴ Roycroft Affidavit, ¶¶53-61 (Supp. at 000046-000052).

³⁵ *Id.*, ¶¶53-59, 114 (Supp. at 000046-000050, 000056A).

AT&T also had included 17 “wireline” carriers in its application for Test 4.³⁶ Of those, the PUCO disqualified four.³⁷ The remaining 13, however, either do not provide stand-alone basic service, provide a stand-alone basic service at a price that is not competitive with AT&T’s, have ceased offering residential service or have a minimal presence in the AT&T exchanges where they are candidates. Most of these carriers provide only bundles that include flat-rate local service plus a number of other services (known as vertical calling features) and/or long distance calling.³⁸

Details from the record are set forth in the following table:

| Carrier | Number of exchanges | Has stand-alone basic service offering | Best-priced tariffed bundle | Other reasons |
|-----------------------------------|----------------------------|--|------------------------------------|--|
| ACN Communications Services | 116 | Does not include unlimited local calling. ³⁹ Rate for this lesser service is 20% more than AT&T Ohio’s BLES rate. ⁴⁰ | | Serves few residential lines ⁴¹ |
| Buckeye Telesystems ⁴² | 7 | Yes ⁴³ | | Does not serve entirety of exchanges ⁴⁴ |

³⁶ See Opinion and Order at 20 (Appx. at 000119). The carriers were ACN Communications Services, Buckeye Telesystems, Bullseye Communications, Cincinnati Bell Extended Territories, Cinergy Communications Company, Comcast, First Communications, Insight, MCI, New Access Communications, Revolution Communications, Sage, TalkAmerica, Time Warner Cable, Trinsic Communications and VarTec Telecom.

³⁷ Opinion and Order at 22 (Appx. at 000121). The PUCO excluded Bullseye, Cinergy, Time Warner and VarTec.

³⁸ See Williams Affidavit, ¶67 (Supp. at 000101).

³⁹ Id., ¶80 (Supp. at 000109).

⁴⁰ Id.

⁴¹ Id., ¶81 (Supp. at 000110).

⁴² This company was assumed to be Buckeye CableSystem, Inc. See id., ¶168 (Supp. at 000152).

⁴³ Id., ¶169 (Supp. at 000152).

| Carrier | Number of exchanges | Has stand-alone basic service offering | Best-priced tariffed bundle | Other reasons |
|--------------------------------------|---------------------|---|--|--|
| Budget Phone | 1 | Provides only prepaid service that is not equivalent to stand-alone basic service; priced at \$39.95. ⁴⁵ | | Serves minimal number of customers ⁴⁶ |
| Cincinnati Bell Extended Territories | 15 | No ⁴⁷ | Bundle offered at 25% higher than AT&T basic service ⁴⁸ | |
| Comcast | 11 | No ⁴⁹ | Bundled service at \$54.95 per month. ⁵⁰ | No longer markets basic service. ⁵¹ Does not serve entirety of exchanges. ⁵² |
| First Communications | 119 | No ⁵³ | Offers bundle at \$19.95 ⁵⁴ | |
| Insight | 3 | Yes ⁵⁵ | | No access lines shown ⁵⁶ |

⁴⁴ Id., ¶170 (Supp. at 000153).

⁴⁵ Id., ¶85 (Supp. at 000112).

⁴⁶ Id.

⁴⁷ Id., ¶175 (Supp. at 000156).

⁴⁸ Id., ¶181 (Supp. at 000160).

⁴⁹ Id., ¶89 (Supp. at 000115).

⁵⁰ Id., ¶¶90-91 (Supp. at 000115-000116).

⁵¹ Id., ¶89 (Supp. at 000115).

⁵² Id., ¶95 (Supp. at 000118).

⁵³ Id., ¶99 (Supp. at 000120).

⁵⁴ Id.

⁵⁵ Id., ¶103 (Supp. at 000122).

⁵⁶ Id., ¶164 (Supp. at 000149).

| Carrier | Number of exchanges | Has stand-alone basic service offering | Best-priced tariffed bundle | Other reasons |
|----------------|----------------------------|---|---|---|
| MCI | 119 | No ⁵⁷ | Bundled service 72% higher than AT&T. ⁵⁸ | Does not market residential service ⁵⁹ |
| New Access | 26 | No ⁶⁰ | Bundled services more than 100% higher than AT&T. ⁶¹ | Not accepting new residential customers. ⁶² Serves few customers. ⁶³ |
| Revolution | 4 | Basic service 49% higher than AT&T. ⁶⁴ | | Lacks website. ⁶⁵ Serves few residential customers. ⁶⁶ |
| Sage | 119 | No ⁶⁷ | Bundled service 67% higher than AT&T basic service. ⁶⁸ | |

⁵⁷ Id., ¶52 (Supp. at 000094).

⁵⁸ Id., ¶54 (Supp. at 000096).

⁵⁹ Id., ¶50-51 (Supp. at 000094).

⁶⁰ Id., ¶115 (Supp. at 000128).

⁶¹ Id., ¶114 (Supp. at 000127).

⁶² Id., ¶29 (Supp. at 000080).

⁶³ Id., ¶30 (Supp. at 000080).

⁶⁴ Id., ¶121 (Supp. at 000132).

⁶⁵ Id., ¶122 (Supp. at 000133).

⁶⁶ Id., ¶120 (Supp. at 000131).

⁶⁷ Id., ¶124 (Supp. at 000134).

⁶⁸ Id., ¶58 (Supp. at 000099).

| Carrier | Number of exchanges | Has stand-alone basic service offering | Best-priced tariffed bundle | Other reasons |
|----------------|----------------------------|--|------------------------------------|--|
| TalkAmerica | 102 | Basic product priced 57% higher than AT&T's ⁶⁹ | | Serves minimal customers in many of the 102 exchanges. ⁷⁰ |
| Trinsic | 34 | Basic offering priced two-and-a-half times AT&T's. ⁷¹ | | Serves few residential customers. ⁷² |

AT&T's residential stand-alone basic service rate in the 145 exchanges at the time of the application was \$14.25 per month. When the non-bypassable subscriber line charge is included, AT&T's wireline basic service rate was \$20.02 per month.⁷³

By contrast, the wireless carriers' service is priced 199% to 299% higher than AT&T's stand-alone basic service.⁷⁴ And as shown in the table above, most of the Test 4 wireline carriers' rates are substantially higher than AT&T's stand-alone basic service.

Further, many of these carriers' services are unavailable throughout most of the exchanges. As noted above, there is nothing in the record to show that the cable companies' franchises (Buckeye, Comcast and Insight) cover the entirety of the exchanges for which they were a candidate. And based on the wireless carriers' own disclaimers, they cannot guarantee

⁶⁹ Id., ¶126 (Supp. at 000136).

⁷⁰ Id., ¶125 (Supp. at 000134).

⁷¹ Id., ¶130 (Supp. at 000138).

⁷² Id., ¶132 (Supp. at 000139).

⁷³ See Roycroft Affidavit, ¶41 (Supp. at 000044).

⁷⁴ Id., ¶84 (Supp. at 000053).

that their service will work for customers at any particular location, much less indoors at any particular location.⁷⁵

Test 3. AT&T's application asserted that at least 15% of its total residential access lines were provided by unaffiliated "CLECs in each of the 26 Test 3 exchanges."⁷⁶ The Consumer Groups presented evidence that AT&T had not identified some of these CLECs; that some of the CLECs did not appear to provide residential service; and that some of the CLECs did not actively market to residential customers.⁷⁷ Despite this evidence, the PUCO determined that AT&T had met this prong of Test 3 in 18 exchanges.⁷⁸

The application also claimed that there were at least two nonaffiliated facilities-based carriers providing basic service (the second prong of Test 3)⁷⁹ and at least five nonaffiliated alternative providers serving residential customers in each exchange (the third prong).⁸⁰ As noted in the table above, the two providers identified for the second prong (MCI and Sage) do not offer stand-alone basic service. As for the third prong, the Consumer Groups presented similar evidence regarding the Test 3 alternative providers as for the Test 4 alternative providers.⁸¹ Nevertheless, as with the Test 4 alternative providers, the PUCO found that AT&T had met the alternative providers prongs of Test 3.

⁷⁵ *Id.*, ¶¶122-125 (Supp. at 000058-000063).

⁷⁶ See Opinion and Order at 2 (Appx. at 000101).

⁷⁷ Williams Affidavit, ¶20 (Supp. at 000072).

⁷⁸ Opinion and Order at 29-30 and Attachment B (Appx. at 000128-000129, 000162).

⁷⁹ See *id.* at 2, 30 (Appx. at 000101, 000129).

⁸⁰ See *id.* at 2, 31 (Appx. at 000101, 000130).

⁸¹ Consumer Groups' Opposition at 74-80 (Supp. at 000031).

AT&T had included three alternative providers for Test 3 (LDMI, PNG and Telecom Ventures) that were not included in Test 4. Of those, the PUCO accepted only PNG.⁸² PNG, in its three exchanges, offers a service that is an equivalent to AT&T's basic service.⁸³ Yet PNG has only a minimal presence in the three exchanges.⁸⁴

These are the facts most relevant to the question of whether the tests in R.C. 4927.03(A)(1)(a) and (b) (Appx. at 000648) have been met for AT&T's stand-alone basic service in the 136 exchanges for which AT&T has been granted basic service alt. reg. As to the R.C. 4927.03(A)(1) (Appx. at 000648) requirement that alt. reg. be in the public interest, and the R.C. 4927.03(A)(3) (Appx. at 000648) requirement that a lack of barriers to entry be shown, there are no facts and no other support in the record to show that the requirements are met.

II. ARGUMENT

A. Proposition of Law No. 1: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for AT&T's stand-alone basic service based on a finding that there are competition and alternatives for basic service that is part of a service bundle. Rules that permit such a grant are invalid as contrary to the statute, and a Commission order that follows such rules must be reversed.

"The commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly."⁸⁵ H.B. 218 required the PUCO to adopt rules

⁸² See Opinion and Order at 32 (Appx. at 000131).

⁸³ Williams Affidavit, ¶118 (Supp. at 000130).

⁸⁴ Id., ¶119 (Supp. at 000130). The specific numbers were confidential.

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

implementing its amendments within 120 days after the effective date of the amendments.⁸⁶ The basic service alt. reg. rules do not, in fact, implement the H.B. 218 amendments.⁸⁷ Further, a rule issued “pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute * * *.”⁸⁸ The PUCO rules setting forth the competitive tests -- 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 AT&T’s stand-alone basic service in the 136 exchanges. This is first shown in the fact that the PUCO allowed bundles of services to be treated as competition or alternatives for stand-alone basic service.

1. The service under consideration is stand-alone basic service.

In 2001, the PUCO found that bundles of services that include basic service -- along with almost all services other than stand-alone basic service -- met the requirements of R.C. 4927.03(A) (Appx. at 000648), and were subject to alternative regulation.⁸⁹ That decision was upheld by this Court in 2004.⁹⁰ The General Assembly was aware of the PUCO’s rulings when it addressed H.B. 218 in 2005.⁹¹

⁸⁶ R.C. 4927.03(D) (Appx. at 000649).

⁸⁷ R.C. 119.01(C) (Appx. at 000643) 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) (Appx. at 000648), the BLES alt. reg. rules were not issued “under the authority of the laws.” See also R.C. 111.15(A)(1) (Appx. at 000637).

⁸⁸ *State, ex rel. Celebrezze, v. National Lime & Stone Company* (1994), 68 Ohio St.3d 377, 383.

⁸⁹ 00-1532 Order (Appx. at 000365).

⁹⁰ *Stephens v. Pub. Util. Comm.*, 102 Ohio St.3d 44, 2004-Ohio-1798.

⁹¹ See Consumer Groups’ Application for Rehearing (January 19, 2007) at 17, n. 50, citing 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

After the PUCO's ruling in 2001, the only service not subject to alt. reg. was stand-alone basic service. Stand-alone basic service, therefore, was the focus of the General Assembly's actions in H.B. 218. That should also have been the focus of the PUCO's rulemaking in 05-1305; unfortunately, the PUCO missed that point in adopting the basic service alt. reg. rules and also in applying those rules to AT&T.

In order for the PUCO to authorize alt. reg. for stand-alone basic service, the PUCO 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.⁹²

In an application for alt. reg. for stand-alone basic service, "such public telecommunications service" refers to stand-alone basic service. It does not refer to basic service as part of bundles, which were granted alt. reg. status in 2001.

The PUCO acknowledged that "[p]rior to enactment of H.B. 218, basic service was beyond the scope of alternative regulation under Section 4927.03, Revised Code (Appx. at 000648)."⁹³ Again, based on the PUCO's previous finding that bundles could be granted alt. reg., the consideration of AT&T's application was limited to the question of alt. reg. for **stand-alone basic service**. Thus the existence of competition or alternatives for basic service in

can price its service offerings, except for stand-alone basic local telephone service and basic caller ID, at 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.") (Appx. at 000196).

⁹² R.C. 4927.03(A)(2) (emphasis added) (Appx. at 000648).

⁹³ 05-1305 Rehearing at 19 (Appx. at 000533).

bundles cannot be used to determine whether there is competition or customers have alternatives for stand-alone basic service.⁹⁴

2. Few of the alternative providers that the PUCO allowed offer stand-alone basic service.

As noted above, in attempting to meet its burden under the statute of showing competition or alternatives for its stand-alone basic service, AT&T submitted information regarding four wireless carriers and 20 “wired” carriers. At least six were offered as alternative providers in each exchange.⁹⁵ Yet only four of the carriers offer stand-alone basic service to customers: PNG in three Test 3 exchanges;⁹⁶ Revolution in four Test 3 exchanges and four Test 4 exchanges;⁹⁷ TalkAmerica in 25 Test 3 exchanges and 102 Test 4 exchanges;⁹⁸ and Trinsic in 22 Test 3 exchanges and 34 Test 4 exchanges.⁹⁹ To the extent that they offer basic service or a similar service,¹⁰⁰ the other carriers offer basic service only as part of a bundle that includes vertical services and long distance. Neither AT&T nor the PUCO ever asserted that these other providers offer stand-alone basic service.

⁹⁴ See Williams Affidavit, ¶30 (Supp. at 000080).

⁹⁵ See Consumer Groups’ Opposition at 30-34; 75-77 (Supp. at 000002-000006; 000032-000034).

⁹⁶ See Williams Affidavit, ¶117 (Supp. at 000129).

⁹⁷ See *id.*, ¶120 (Supp. at 000131); Consumer Groups’ Opposition at 58 (Supp. at 000026).

⁹⁸ See Williams Affidavit, ¶125 (Supp. at 000134); Consumer Groups’ Opposition at 59 (Supp. at 000027).

⁹⁹ See Williams Affidavit, ¶130 (Supp. at 000138); Consumer Groups’ Opposition at 62 (Supp. at 000030).

¹⁰⁰ The wireless carriers do not offer basic service as defined by the statute. See Roycroft Affidavit, ¶¶53-56 (Supp. at 000046-000049).

3. The PUCO's rationale for considering bundles does not comport with the law.

In the Entry on Rehearing, the PUCO stated, "in developing the rules for BLES alternative regulation, the Commission focused on specific factors that would demonstrate that the Section 4927.03(A), Revised Code, criteria was [sic] satisfied with respect to residential BLES customers."¹⁰¹ Yet 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" in this context is stand-alone basic service, the PUCO allowed the bundled services offered by the alternative providers to be used to qualify AT&T's stand-alone basic service for alt. reg.¹⁰² This is a crucial part of the PUCO's ruling; yet neither the Opinion and Order, the Entry on Rehearing, nor the rulings in 05-1305 provide support for the finding.

In the Opinion and Order, the PUCO cited to its earlier determination in the 05-1305 rulemaking Opinion and Order that the law does not restrict the analysis of competition and reasonably available alternatives "to the competitive products that are *exactly like*" basic service.¹⁰³ As discussed above, the bundles offered to customers by the alternative providers are so different from stand-alone basic service -- in price, and in terms and conditions -- that they cannot be seen to be competition for AT&T's stand-alone basic service. Nor can they be seen as reasonably available alternatives to AT&T's stand-alone basic service. The bundles are not

¹⁰¹ Entry on Rehearing at 4 (Appx. at 000169) (citation omitted).

¹⁰² To the extent that the line loss prong of Test 4 discussed in Proposition of Law 3 "counts" losses of AT&T's bundled service lines to alternative providers' bundled services as a basis for allowing alt. reg. for AT&T's stand-alone BLES, the error discussed here is repeated in the PUCO's line loss prong discussion.

¹⁰³ Opinion and Order at 12, quoting 05-1305 Order at 25 (emphasis added) (Appx. at 000111); see also Entry on Rehearing at 15 (Appx. at 000180).

functional equivalents or substitutes, and they are not provided to customers at competitive rates, terms and conditions, to AT&T's stand-alone basic service.¹⁰⁴

The PUCO also quoted the 05-1305 Order to the effect that "customers that leave an ILEC's basic service 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 basic service."¹⁰⁵ In the 05-1305 Order, the PUCO made the irrelevant and inaccurate statement that "consumers' perception of basic service is changing."¹⁰⁶ The statement is irrelevant because basic service is defined by statute.¹⁰⁷

The statement was inaccurate -- and unsupported by the 05-1305 rulemaking record -- as shown by the PUCO's citations to that record in the 05-1305 Order. The PUCO stated, "More customers are substituting their traditional basic service 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)."¹⁰⁸ **None of the cited material discusses customers substituting other providers' services for the incumbent telephone company's stand-alone basic service -- that is, basic service *not* offered as part of**

¹⁰⁴ 05-1305, Consumer Groups Comments, Williams Affidavit, ¶¶23-59 (Supp. at 000176-000211); Consumer Groups Reply Comments, Williams Affidavit, ¶¶19-20 (Supp. at 000217-000218).

¹⁰⁵ Opinion and Order at 12, quoting 05-1305 Order at 25 (Appx. at 000111); see also id. at 13 (Appx. at 000112).

¹⁰⁶ 05-1305 Order at 25 (Appx. at 000468).

¹⁰⁷ R.C. 4927.01(A) (Appx. at 000645). "VoIP" refers to "Voice over Internet Protocol," an Internet-based telephone service.

¹⁰⁸ 05-1305 Order at 25 (Appx. at 000468).

a package bundled with other services.¹⁰⁹ 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 basic service have few or no alternatives to the incumbents' basic service.¹¹⁰

The PUCO stated that it previously had "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."¹¹¹ But competition and alternatives for bundles that include basic service do not represent competition for consumers who subscribe only to stand-alone basic service, either in terms of functional equivalents or substitutes, or in terms of competitive rates, terms and conditions.¹¹²

The PUCO's Test 4 merely requires the "presence" of at least five unaffiliated facilities-based providers," and merely requires the alternative providers to be "serving" the residential market.¹¹³ The rule 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 basic service.¹¹⁴ Indeed, as discussed above, most of

¹⁰⁹ See Supp. at 000220, 000221; Supp. at 000223-000227; Supp. at 000229-000231 (at the time, AT&T was known as SBC Ohio).

¹¹⁰ See 05-1305, Corrected Comments of the Office of the Ohio Consumers' Counsel on Local Public Hearings (February 23, 2006) at 2 (Supp. at 000233). Given the PUCO decision to analyze basic service competition on an exchange-by-exchange basis, the presence of competition in one area of the state cannot be used to justify alt. reg. in another area.

¹¹¹ Entry on Rehearing at 16, citing 05-1305 Order at 25 (Appx. at 000181).

¹¹² R.C. 4927.03(A)(2)(c) (Appx. at 000648).

¹¹³ Ohio Adm. Code 4901:1-4-10(C)(4) (Appx. at 000664).

¹¹⁴ R.C. 4927.03(A)(2)(c) (Appx. at 000648).

the alternative providers “nominated” by AT&T either do not provide services for customers that are equivalents or substitutes for stand-alone basic service, or do not have competitive rates, terms or conditions, or both.

Further, the test, by requiring only a “presence” in the market, does not include any consideration of the size of alternative providers,¹¹⁵ or other indicators of market power such as market share or growth in market share.¹¹⁶ Neither does the “presence” of alternative providers show that market forces are capable of supporting a healthy and sustainable, competitive telecommunications market.¹¹⁷ Despite the law, the PUCO dismissed the Consumer Groups’ challenges to the rule, 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 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 [sic] demonstrates a greater commitment of a carrier to remain in the market as a competitor.¹¹⁸

The fact that there are “several” providers in the market says nothing about the ability of any one of those providers to contribute to a **healthy, sustainable** competitive market, consistent with the State’s telecommunications policy as amended by H.B. 218.¹¹⁹

Test 3 contains similar flaws. Although the test requires that 15% of residential access lines in an exchange be provided by CLECs, and requires that there be CLECs providing basic

¹¹⁵ R.C. 4927.03(A)(2)(a) (Appx. at 000648).

¹¹⁶ R.C. 4927.03(A)(2)(d) (Appx. at 000648).

¹¹⁷ R.C. 4927.02(A)(1) (Appx. at 000647).

¹¹⁸ Opinion and Order at 24 (Appx. at 000123).

¹¹⁹ R.C. 4927.02(A)(2) (Appx. at 000647).

service, there is no requirement that these CLECs provide a stand-alone basic service substitute. Indeed, few of the CLECs used by AT&T for Test 3 offer a stand-alone basic service. Customers who have switched, resulting in the CLEC market share, may have switched from the ILEC's bundled package to the CLEC's bundled package. Similarly, as to the alternative providers prong, there is also no requirement that the other alternative providers offer a stand-alone basic service substitute.

The Consumer Groups' expert Dr. Trevor R. Roycroft provided a valuable analogy that was ignored by the PUCO: Some individuals are observed to drive automobiles, and others are observed to ride motorcycles. But this does not mean that consumers find motorcycles to be functional equivalents or substitutes for automobiles.¹²⁰ 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, basic service."¹²¹

Likewise, Dr. Roycroft 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 \$14,000.¹²² The relevance here is that careful consideration

¹²⁰ Roycroft Affidavit, ¶¶19-20 (Supp. at 000039-000040).

¹²¹ Id., ¶22 (Supp. at 000040).

¹²² Id., ¶24 (Supp. at 000042).

must be given to the rates, terms, and conditions associated with the offerings of the alternative providers that have been identified by AT&T. If these differ significantly from the rates, terms and conditions associated with basic service, then the services cannot be viewed as competing with basic service, and the wireless carriers cannot be considered alternative providers that satisfy the PUCO's Competitive Tests.¹²³

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.

Such is the situation with AT&T's stand-alone basic service and the wireless and wireline bundles of the alternative providers that AT&T has nominated. The PUCO's use of the presence of bundles to justify alt. reg. for stand-alone basic service is contrary to the law and must be reversed. If AT&T had presented alternative providers that offer stand-alone basic service, or if the PUCO had interpreted its rule to require that presentation, this appeal would not likely have been necessary.¹²⁴

- B. Proposition of Law No. 2: The Public Utilities Commission of Ohio erred as a matter of law when it allowed the establishment of alternative regulation pursuant to R.C. 4927.03(A) 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. 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.**

¹²³ Id., ¶25 (Supp. at 000042).

¹²⁴ In that event, the lack of barriers to entry would have been likely, and the public interest would have likely been served.

The line loss prong of PUCO Test 4 requires a showing that the incumbent has lost 15% of its residential access lines in an exchange. But that showing does not demonstrate that AT&T's stand-alone basic service is subject to competition, or that AT&T's stand-alone basic service customers have reasonably available alternatives for their service. It also does not demonstrate that there are no barriers to entry for stand-alone basic service. The line loss prong says nothing about the "number and size of alternative providers of services."¹²⁵ The line loss prong says nothing about the "extent to which services are available from alternative providers in the relevant market."¹²⁶ The line loss prong says nothing about the "ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions."¹²⁷ The line loss prong 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."¹²⁸ Therefore, the line loss prong of Tests 4 says nothing about the factors that the General Assembly directed the PUCO to consider in deciding whether to grant alt. reg. for AT&T's stand-alone basic service.

The PUCO's defense of its finding regarding Test 4 underscores the major flaw in the line loss prong of that test. The PUCO stated:

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

¹²⁵ R.C. 4927.03(A)(2)(a) (Appx. at 000648).

¹²⁶ R.C. 4927.03(A)(2)(b) (Appx. at 000648).

¹²⁷ R.C. 4927.03(A)(2)(c) (Appx. at 000648).

¹²⁸ R.C. 4927.03(A)(2)(d) (Appx. at 000648).

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 [sic] unbundled network element (UNE) or when it ports the telephone number associated with the lost residential access line.¹²⁹

This points out the unrefined nature of the global line loss test. 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) (Appx. at 000648), which requires the lines to have gone to competition for stand-alone basic service or to alternatives to stand-alone basic service. In Test 3,¹³⁰ the PUCO included a prong that calls for the incumbent to calculate the competitors' market share. Clearly, in that context the PUCO believed that the incumbent would be able to identify what portion of the market the competitors had captured. (Even there, of course, as described above, the market share prong improperly includes CLECs that do not offer stand-alone basic service.)

The PUCO asserted "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."¹³¹ The PUCO was correct that there was no data in the record to support the proposition. **But there is also no data in the record to show what portion of the line loss went to competition for, or alternatives to, AT&T's stand-alone basic service.**

¹²⁹ Opinion and Order at 15 (Appx. at 000114); see also Entry on Rehearing at 6 (Appx. at 000171).

¹³⁰ Ohio Adm. Code 4901:1-10(C)(3) (Appx. at 000664).

¹³¹ Opinion and Order at 18 (emphasis added) (Appx. at 000117).

Likewise, the PUCO asserted that the Consumer Groups' argument in Test 4 was "lines lost to AT&T Ohio's wireless affiliate should be excluded from the 15 percent total residential line loss calculation * * *."¹³² This ignores most of the Consumer Groups' argument, which was, as the PUCO itself agreed, that "an ILEC is not always able to identify where the lost lines have migrated * * *."¹³³ Most of the line losses have nothing to do with the statutory standard of whether customers have competition or alternatives for stand-alone basic service, or whether there are barriers to entry for stand-alone basic service. Lines lost to an incumbent telephone company's wireless affiliate are not a measure of whether stand-alone basic service is subject to competition or has reasonably available alternative, and neither are lines lost to others of the identified categories. The line loss prong does not give the PUCO any reliable information regarding competition for customers or customers' alternatives to stand-alone basic service.

C. Proposition of Law No. 3: The Public Utilities Commission of Ohio erred as a matter of law when it allowed the establishment of alternative regulation pursuant to R.C. 4927.03(A) 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. Rules that allow alternative regulation in those circumstances are invalid, and a Commission order that follows such rules must be reversed.

R.C. 4927.03(A)(2)(c) (Appx. at 000648) requires the PUCO to consider whether functionally equivalent services are readily available for customers at competitive rates, terms and conditions. The PUCO ignored the information in the record concerning the significant price differentials between AT&T's stand-alone basic service and other providers' bundled offerings.

¹³² Id.

¹³³ Id. at 15 (Appx. at 000114).

Instead, the PUCO's ruling provides that the mere presence of these bundled offerings -- at whatever price -- meets the requirements of the statute.

Wireless providers do not supply a service that is competitive with AT&T's basic service. The Consumer Groups' evidence presented an extensive review of the differences between the services offered by AT&T's candidate wireless providers and AT&T's basic service, showing that the services offered to customers are not functionally equivalent.¹³⁴ This is because: wireless phones do not offer customers a functional equivalent or substitute for dial tone¹³⁵; do not yet offer customers a functional equivalent or substitute for E9-1-1 emergency service¹³⁶; and fall short of the definition in other ways.¹³⁷

Neither are the wireless carriers' rates competitive to AT&T's stand-alone basic service rates. As discussed above, AT&T's residential basic service rates are \$14.25 per month. When the non-bypassable subscriber line charge is included, AT&T's wireline basic service rates are \$20.02 per month for customers.¹³⁸

The Consumer Groups presented evidence that showed the disparity between the wireless carriers' rates and AT&T's stand-alone basic service rates. Dr. Roycroft stated that:

the price *increase* associated with substituting wireless for AT&T's BLES ranges from \$39.97 to \$59.97 (representing percentage increase amounts ranging from 199% to 299% per month, and overall). The wireless plans

¹³⁴ Summarized in the Consumer Groups' Opposition at 34-46 (Supp. at 000006-000018).

¹³⁵ Roycroft Affidavit, ¶¶53-56 (Supp. at 000046-000048); see Ohio Adm. Code 4901:1-04-01(C)(1) (Appx. at 000650).

¹³⁶ Roycroft Affidavit, ¶57 (Supp. at 000049); see Ohio Adm. Code 4901:1-04-01(C)(3) (Appx. at 000650).

¹³⁷ Roycroft Affidavit, ¶¶58-60 (Supp. at 000049-000050).

¹³⁸ See Id., ¶41 (Supp. at 000044).

rates are 3 to 4 times as costly as AT&T's BLES. A price point 3 to 4 times BLES does not provide a competing price. Thus, the rates identified above for AT&T's candidate wireless alternative providers are not competitive with AT&T's BLES. Competitive rates are rates which allow the consumer's choice to be unhindered by a significant price differential. Experiencing a price increase of 199% or more does not present the consumer with a "competitively priced" service. Such a price differential also does not provide much of a pricing constraint on AT&T. Thus AT&T's candidate wireless alternative providers do not, on the basis of price, provide a competing service with BLES.¹³⁹

In fact, Dr. Roycroft's analysis also showed that "AT&T's BLES rates and the prices of services offered by AT&T's candidate wireless alternative providers are not comparable, even if the consumer already subscribes to wireless."¹⁴⁰

The PUCO stated that it rejected the Consumer Groups' argument that "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 stand-alone BLES * * *."¹⁴¹ Yet the PUCO also noted that "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."¹⁴² The AT&T candidate alternative providers' services are so substantially different in price and in terms and conditions that they are **not** functionally equivalent and **not** competitively priced for customers.

¹³⁹ Id., ¶84 (emphasis in original) (Supp. at 000053).

¹⁴⁰ Id., ¶86 (Supp. at 000054).

¹⁴¹ Opinion and Order at 14 (Appx. at 000113).

¹⁴² Id.

The PUCO stated, however, that “to the extent that AT&T is losing basic service customers and the requisite number of alternative providers are present, it is evident that functionally equivalent or substitute services are readily available.”¹⁴³ The PUCO also opined:

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.¹⁴⁴

But just as customers move from AT&T’s stand-alone basic service to AT&T’s bundles, other customers may move from AT&T’s stand-alone basic service to alternative providers’ bundles. This does not make the bundles, whether offered by AT&T or by an alternative provider, competitive to stand-alone basic service, especially for stand-alone basic service customers who do not want the additional services. Again, the bundles are not functionally equivalent to stand-alone basic service. And again, as the Consumer Groups’ experts demonstrated,¹⁴⁵ services with prices that are 20% to 299% higher than AT&T’s stand-alone basic service rates cannot reasonably be viewed as competitive to AT&T’s stand-alone basic service.

The line loss prong fails to provide any reliable information relevant to the statute.¹⁴⁶

¹⁴³ Id.

¹⁴⁴ Id. at 13 (Appx. at 000112).

¹⁴⁵ See table on pages 14-16, above, and the accompanying footnotes. See also Roycroft Affidavit, ¶84 (Supp. at 000053).

¹⁴⁶ If AT&T had presented information on the loss of its stand-alone basic service lines to other providers of stand-alone basic service, or if the PUCO had interpreted its rule to require such information, this would more likely show the existence of competition or alternatives to stand-alone basic service and the lack of barriers to entry for that service.

D. Proposition of Law No. 4: The Public Utilities Commission of Ohio erred as a matter of law when it allowed the establishment of alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic local service where there has been no demonstration of a lack of barriers to entry for stand-alone basic service. 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.

As discussed above, in determining when alt. reg. can be allowed for basic service, the General Assembly added a specific requirement to the competition and alternatives requirements that are the subject of Propositions of Law 1-3. The law now provides that “[t]o 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.**”¹⁴⁷

With regard to this requirement, in the 05-1305 Rehearing, the PUCO 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.¹⁴⁸

¹⁴⁷ R.C. 4927.03(A)(3) (emphasis added) (Appx. at 000648).

¹⁴⁸ 05-1305 Rehearing at 17-18 (Appx. at 000531-000532).

The PUCO 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.”¹⁴⁹

Contrary to the explicit words of the statute, the PUCO thus interpreted “no barriers to entry” as meaning “no barriers to entry sufficient to prevent or significantly impede market entry.” In fact, if R.C. 4927.03(A)(3) (Appx. at 000648) is interpreted as the PUCO would have it, then the “additional” test from H.B. 218 is mere surplusage and the General Assembly’s intention for an additional protection for consumers is effectively written out of the law by PUCO fiat.¹⁵⁰ If there were barriers to entry sufficient to prevent or significantly impede market entry for basic service, then basic service could not be subject to competition or have reasonably available alternatives, as the tests from R.C. 4927.03(A)(1) (Appx. at 000648) require. The General Assembly is presumed to want all parts of a statute to be operative. R.C. 1.47 (Appx. at 000636). Surplusage is not to be found lightly.¹⁵¹

As a matter of fact, the market test proposed by the Consumer Groups in the 05-1305 rulemaking did not take the extreme position alleged by the PUCO. The Consumer Groups’ market tests provision on barriers to entry was that:

The applicant must demonstrate that there are no barriers to entry associated with the provision of basic service. 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 basic service throughout the exchange, outside

¹⁴⁹ Id. at 18 (Appx. at 000532).

¹⁵⁰ See *Canton Storage and Transfer Co., v. Public Util. Comm.* (1995), 72 Ohio St.3d 1, 17.

¹⁵¹ *East Ohio Gas v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299.

of packages or bundles, by unaffiliated [competitive local exchange carriers] CLECs and facilities-based CLECs.¹⁵²

This application of the statute is 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,”¹⁵³ unlike the PUCO-adopted Tests 3 and 4 used by AT&T, which do not require any such showing.

In the proceeding below, the PUCO also stated that “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.”¹⁵⁴ This is ironic, because neither the PUCO nor AT&T did any AT&T-specific or exchange-specific review of barriers to entry; rather, the PUCO and AT&T depended entirely on the PUCO’s generic, yet incorrect, determination in the 05-1305 rulemaking that the Competitive Tests adequately meet the requirements of R.C. 4927.03(A)(3) (Appx. at 000648).¹⁵⁵

As to Test 3, the PUCO’s reasoning was entirely conclusory and circular. The PUCO merely states, as to 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;

¹⁵² See 05-1305 Rehearing at 20, n.2 (Appx. at 000534).

¹⁵³ R.C. 4927.03(A)(2) (Appx. at 000648).

¹⁵⁴ Opinion and Order at 7 (Appx. at 000106).

¹⁵⁵ The PUCO’s view on this point put the burden on the Consumer Groups to show that AT&T does not meet the statute, whereas the PUCO’s rules put the burden of meeting the statute squarely on AT&T. Ohio Adm. Code 4901:1-4-10(A) (Appx. at 000663).

and (3) there are at least five alternative providers serving the residential market.”¹⁵⁶ With regard to Test 4, the PUCO alleged that the line loss prong of Test 4 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.”¹⁵⁷ But because, as the PUCO admitted, there is no way to discern to what provider(s) the lost residential lines went, the line loss test shows nothing of the sort; the PUCO’s statement lacks any basis in the record.¹⁵⁸

The PUCO’s rationale and support for the line loss prong in the rule fail to show that the prong meets the statute. The PUCO’s application of the prong to the specific situation in the 118 exchanges also fails to show that AT&T’s stand-alone basic service in those exchanges satisfies R.C. 4927.03(A) (Appx. at 000648).

As discussed above, the fact that most of the alternative providers accepted by the PUCO do not provide stand-alone basic service means that Test 4 says nothing about barriers to entry for basic service. Likewise, if the PUCO is unable to determine what portion of an incumbent’s lost lines is due to competition for basic service customers and what portion is due to other reasons, such as migration of customers’ second lines to DSL for using the Internet (even the incumbent’s DSL),¹⁵⁹ then the PUCO cannot reasonably determine that there are no barriers to entry for firms seeking to enter the basic service market in the ILEC’s territory.

¹⁵⁶ Opinion and Order at 8 (Appx. at 000107)

¹⁵⁷ Id. at 9 (Appx. at 000108).

¹⁵⁸ See *Vectren Energy Delivery of Ohio, Inc., v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 182, 2007-Ohio-386, ¶9.

¹⁵⁹ See Proposition of Law No. 2.

Similarly, Test 3 fails to show a lack of barriers to entry for stand-alone basic service. This is evidenced by the fact that few of the CLECs or alternative providers offer stand-alone basic service. In fact, as discussed above, even fewer carriers offer a service that is comparably priced to AT&T's stand-alone basic service.

Neither the PUCO nor AT&T has shown that there are no barriers to entry for stand-alone basic service in the AT&T exchanges under review. Other than AT&T, there are few providers of stand-alone basic service for customers in the 136 exchanges for which the PUCO granted AT&T alt. reg. for its basic service, a sure sign of entry barriers for the provision of that service.

E. Proposition of Law No. 5: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic service throughout AT&T's exchanges when competition and alternatives exist in only part of the exchange. Rules that permit such a grant are invalid and a Commission order that follows such rules must be reversed.

As discussed above, the bundles of services accepted by the PUCO are not competition for or alternatives to AT&T's stand-alone basic service. But the services are also not "readily available" to customers throughout the AT&T exchanges under examination.¹⁶⁰

In adopting the competitive market tests, the PUCO rejected incumbents' proposals to gauge competition by Metropolitan Statistical Area or by the entire incumbent's service area, in favor of applying the tests on an exchange basis, ostensibly in order to analyze at a granular level whether competition exists for customers in specific areas.¹⁶¹ But the PUCO has applied the rule to allow consideration of providers that operate in only parts of the exchanges under review.

¹⁶⁰ R.C. 4927.03(A)(2)(c) (Appx. at 000648).

¹⁶¹ 05-1305 Order at 17-19 (Appx. at 000460-000462). The PUCO also rejected the ILECs' applications for rehearing of the exchange-level assessment of competition. 05-1305 Rehearing at 12-13, 15 (Appx. at 000526-000527, 000529).

1. Cable companies do not serve the entirety of some of the exchanges for which they are claimed by AT&T.

AT&T asserted that four cable companies (Buckeye Telesystems, Comcast, Insight and Time Warner) are alternative providers, under both Test 3 and Test 4. The PUCO accepted Buckeye Telesystems, Comcast and Insight as alternative providers.¹⁶² The PUCO rejected Time Warner, stating only that it met “some, but not all, of the requirements of the second prong of Test 4.”¹⁶³ The PUCO did not explain why Time Warner met some requirements but not others.

There is nothing in the record that demonstrates that Buckeye Telesystems, Comcast and Insight serve the entirety of the exchanges for which they were “nominated,”¹⁶⁴ and in fact the Consumer Groups pointed out that least Buckeye Telesystems and Comcast do not serve all of some exchanges for which they were listed as alternative providers.¹⁶⁵ As the Consumer Groups’ expert stated, it is necessary to determine whether cable companies provide service throughout an exchange because, as facilities-based providers, cable companies “may not have cable network facilities throughout an exchange, and even if it did, those facilities may not be capable of providing voice communications services.”¹⁶⁶ The importance of this determination for alt. reg.

¹⁶² Opinion and Order at 22 (Appx. at 000121).

¹⁶³ Id.

¹⁶⁴ See the Consumer Groups’ Opposition at 49, 52-54 (Supp. 000019, 000022-000024); Williams Affidavit, ¶¶95, 104, 171 (Supp. at 000118, 000123, 000154).

¹⁶⁵ See Williams Affidavit, ¶171 (Supp. at 000154); Consumer Groups’ Opposition at 52-53 (Supp at 000022-000023).

¹⁶⁶ Williams Affidavit, ¶95 (Supp. at 000118).

lies in assessing the cable company's ability to constrain AT&T's prices.¹⁶⁷ And it is even more important given that the cable companies do not offer a stand-alone basic service like AT&T's.

To ignore the fact that alternative providers do not serve the entirety of the exchange renders moot the PUCO's decision to analyze competition at the exchange level. This is particularly true for cable companies, because they offer service over their own facilities that are limited in extent, and they cannot offer service where those facilities do not exist.

There will therefore be AT&T stand-alone basic service customers in several exchanges for whom cable companies are not a competitive option. This is contrary to both prongs of the R.C. 4927.03(A)(1) (Appx. at 000648) tests. AT&T is not "subject to competition" from cable companies in parts of several exchanges.¹⁶⁸ Likewise, customers in part of those exchanges do not have a "readily available alternative" from a cable company.¹⁶⁹

2. The PUCO's rationale for accepting the cable providers does not comport with the statute.

As discussed above, the PUCO chose the exchange as the unit of analysis for its competitive tests. As the PUCO subsequently stated:

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.

¹⁶⁷ See *id.*, ¶170 (Supp. at 000153)

¹⁶⁸ R.C. 4927.03(A)(1)(a) (Appx. at 000648).

¹⁶⁹ R.C. 4927.03(A)(1)(b) (Appx. at 000648).

(3) Be practical to administer as ILECs collect and report data at the exchange level.¹⁷⁰

But from a telephone service standpoint, the AT&T exchanges in question do not exhibit similar market conditions within their boundaries, because the cable companies each serve only parts of the exchanges.

The PUCO asserted that under its interpretation of the Consumer Groups' argument, the market would have to be defined by units as small as a city block.¹⁷¹ This is essentially a straw man argument, because the question is actually a simpler one: Given the geographic market **as the PUCO has defined it**, does the alternative provider serve the entirety of that market? And the answer, for the cable companies, is no.

What the PUCO has done, subsequent to the rulemaking, is to redefine the geographic market that will be evaluated in the Competitive Tests. The rule adopted by the PUCO -- Ohio Adm. Code 4901:1-4-10(A) (Appx. at 000663) -- states that:

In order to qualify for pricing flexibility for basic service 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 basic service 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

¹⁷⁰ Opinion and Order at 23, citing 05-1305 Order at 18-19 (footnote omitted) (Appx. at 000122).

¹⁷¹ Id.

at least five unaffiliated facilities-based alternative providers serving the residential market.¹⁷²

Similarly, Test 3 requires that:

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.

(Emphasis added.) Tests 3 and 4, as written, measure line losses on an exchange-wide basis.

The PUCO's tests would not allow basic service alt. reg. based on a 15% line loss in part of an exchange (e.g., in one wire center of an exchange), or a 15% market share in part of an exchange.

Thus, these rules should not allow alt. reg. based on the presence of alternative providers in parts of the exchange. As the PUCO has implemented the rules, however, an ILEC is merely required to meet the competitive test **in some portion** of an exchange. Indeed, under the PUCO's logic, if a competitor had facilities that could serve only one customer in an exchange, that would be sufficient to allow the incumbent to raise stand-alone basic service rates for all the other customers in that exchange. The PUCO's implementation of the rules is internally inconsistent and counter to the public interest.¹⁷³

In approving AT&T's application, the PUCO did not address head-on the fact that cable franchise areas seldom cover an entire telephone exchange. In the Entry on Rehearing, the PUCO merely cited to pages 22-25 of the Opinion and Order.¹⁷⁴ There, the PUCO found only that the cable companies have tariffs and interconnection agreements with AT&T and are

¹⁷² Ohio Adm. Code 4901:1-4-10(C)(4) (emphasis added) (Appx. at 000664).

¹⁷³ R.C. 4927.03(A)(1) (Appx. at 000648).

¹⁷⁴ Entry on Rehearing at 13 (Appx. at 000178).

“advertising their offerings on their respective websites in the relevant exchanges.”¹⁷⁵ The only discussion of the coverage issue concerned wireless carriers.¹⁷⁶

In the Entry on Rehearing, however, the PUCO characterized the situation as follows: “While recognizing that the identified cable providers do not serve all of the subscribers in an exchange, each of the customers in the exchanges served by the cable providers have an alternative provider in the respective cable companies.”¹⁷⁷ The Commission did not elaborate as to how that could be possible, given the limits of cable companies’ facilities.

The PUCO stated that its goal in adopting the Competitive Tests “is to have administratively practicable tests using the most objective criteria to comply with the statute.”¹⁷⁸ The PUCO, however, has placed administrative ease ahead of the public interest, and removed the burden of proof from the applicant. The information on the cable companies’ service areas, which would be available to AT&T,¹⁷⁹ shows that there are significant parts of AT&T’s exchanges where cable providers do not offer service, meaning that AT&T customers in those areas will not have a cable company alternative to AT&T’s basic service. This is thus not a flaw in the Consumer Groups’ argument, as the PUCO alleged,¹⁸⁰ and not a flaw in the alternative providers prong of Tests 3 and 4 as written, but rather a demonstration that AT&T cannot meet the test using these providers, and thus should not be allowed to subject its customers to basic

¹⁷⁵ Opinion and Order at 24 (Appx. at 000123).

¹⁷⁶ Id. at 23 (Appx. at 000122).

¹⁷⁷ Entry on Rehearing at 12 (Appx. at 000177).

¹⁷⁸ Opinion and Order at 19 (Appx. at 000118).

¹⁷⁹ See the Consumer Groups’ Application for Rehearing at 29-30 (Appx. at 000236-000237).

¹⁸⁰ See Opinion and Order at 23 (Appx. at 000122).

service alt. reg. rate increases in the exchanges that AT&T proposed where cable companies do not cover the entire exchange.¹⁸¹

3. The wireless carriers do not provide service throughout the AT&T exchanges.

The PUCO disregarded the Consumer Groups' extensive demonstration that the wireless carriers, according to their own disclaimers, cannot guarantee that their service will work for customers at any particular location, much less indoors at any particular location.¹⁸² Further, there is the fact that the coverage maps do not include any objective standard for signal strength.¹⁸³ And the disclaimers that accompany the maps show their limited reliability, and the limitations of the wireless carriers' service. The disclaimer that accompanies Verizon Wireless' coverage maps is the most extensive:

- The maps that display within the Coverage Locator Tool are not a guarantee of coverage and contain areas with no service. The maps rendered show only approximations (based on our internal data) of where rates and coverage apply.
- Verizon Wireless coverage depictions in the rate and coverage maps are based on generally accepted engineering predictive and modeling tools, used to measure radio frequency transmissions from cell towers. Our rate and coverage maps depict wireless coverage based on predictive modeling parameters determined by our network engineers.
- Since wireless service is transmitted on a radio signal over the airways, it is subject to network and transmission limitations such as cell site availability (particularly near boundaries and in remote areas).
- Your wireless equipment, weather, topography and other environmental considerations associated with radio technology, also affects wireless service. For example, your wireless phone may work perfectly driving home one night, but

¹⁸¹ If AT&T had presented stand-alone basic service providers that served the entirety of its exchanges, or if the PUCO had required such a presentation, then this appeal would not have been necessary.

¹⁸² See Roycroft Affidavit, ¶¶121-125 (Supp. at 000057-000061).

¹⁸³ See id., ¶¶120-121 (Supp. at 000057-000058).

then not work as well driving in the same place the next night during a thunderstorm. Additionally, service may vary significantly within buildings * * *¹⁸⁴

Notably, AT&T's application did not even mention these substantial disclaimers, which appear on the websites of each of the carriers that AT&T asserts provide service in the 136 exchanges.¹⁸⁵

Clearly, with regard to the wireless carriers' coverage, the PUCO did not hold AT&T to its ostensible burden of proof to "demonstrate that as of the date of the application, the ILEC meets" the competitive test.¹⁸⁶ Instead, the PUCO has lowered the bar in order to ensure that the incumbent will meet the test. If the wireless carriers served the whole exchange with a stand-alone basic service at a competitive price, this would meet the statute. But they do not.

F. Proposition of Law No. 6: The Public Utilities Commission of Ohio erred as a matter of law when it allowed the establishment of alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic service that was not in the public interest. The public interest requirement is not met when consumers may be harmed or receive no benefit from the alternative regulation.

R.C. 4927.03 (Appx. at 000648) has contained, since its first enactment in 1989, a requirement that the PUCO find any alt. reg. plan to be in the public interest.¹⁸⁷ In its first iteration of rules for alt. reg., the PUCO required incumbents to include commitments as part of their

¹⁸⁴ Roycroft Affidavit, ¶125, citing <http://www.verizonwireless.com/b2c/coveragelocator/mapInformation.jsp> (Supp. at 000061).

¹⁸⁵ Id., ¶¶121-125 (Supp. at 000057-000061).

¹⁸⁶ Ohio Adm. Code 4901:1-4-10(A) (Appx. at 000663).

¹⁸⁷ The PUCO may grant alt. reg. "provided the commission finds that any such measure is in the public interest * * *." R.C. 4927.03(A)(1) (Appx. at 000648).

submitted alt. reg. plans,¹⁸⁸ in order to ensure that the public interest was met. Commitments were made by each of the three companies that applied for “traditional” alt. reg., including AT&T.¹⁸⁹

Likewise, in the so-called elective alt. reg. rules, the PUCO required public interest commitments of incumbents applying for alt. reg.¹⁹⁰ Companies applying for elective. alt. reg., like AT&T, made those commitments.¹⁹¹

In the 05-1305 basic service alt. reg. rulemaking proceeding, the Consumer Groups proposed that the PUCO require incumbents seeking basic service alt. reg. to make additional

¹⁸⁸ *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 (Appx. at 000293-000298).

¹⁸⁹ See, e.g., *In the Matter of the Application of Ameritech Ohio (Formerly known as The Ohio Bell Telephone Company) for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Opinion and Order (April 27, 2000) at 4-14. (Appx. at 000313-000323). (At the time, AT&T was known as Ameritech Ohio.) The Commission noted that, because of the commitments and other components of the stipulation in that case, “Considered as a package, the stipulation clearly benefits both ratepayers and the public interest.” *Id.* at 17 (Appx. at 000326). The same cannot be said of the Opinion and Order in this proceeding.

¹⁹⁰ Ohio Adm. Code 4901:1-4-06 (Appx. at 000653). Although the Consumer Groups 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.

¹⁹¹ E.g., *In the Matter of the Applications of SBC Ameritech Ohio for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4 Ohio Administrative Code*, Case No. 02-3069-TP-ALT, Finding and Order (January 6, 2003) (Appx. at 000421).

commitments to enhance the public interest.¹⁹² The PUCO rejected that proposal.¹⁹³ The PUCO again rejected the proposal on rehearing.¹⁹⁴

The proceeding below reinforces the error in the PUCO's decision. In that proceeding, the PUCO granted alt. reg. for AT&T's stand-alone basic service in 118 Test 4 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 basic service; (2) the presence of wireless carriers that offer services substantially different in price and function from AT&T's stand-alone basic service, and that cannot commit to offering their service at any particular location in the exchanges; and (3) the existence of other providers that also offer services substantially different in price and function from AT&T's stand-alone basic service, some of which cannot offer their services in the entirety of the exchanges. The PUCO also granted AT&T alt. reg. for its basic service in 18 Test 3 exchanges based on: (1) a 15% CLEC market share, without regard to whether the CLECs provided stand-alone basic service to residential customers; (2) the presence of wireless carriers that offer services substantially different in price and function from AT&T's stand-alone basic service, and that cannot commit to offering their service at any particular location in the exchanges; and (3) the existence of other providers that also offer services substantially different in price and function from AT&T's stand-alone basic service, most of which cannot offer their services in the entirety of the exchanges.

¹⁹² 05-1305, Consumer Groups' Comments (December 6, 2005) at 37-38 (Supp. at 000173-000174); *id.*, Consumer Groups' Reply Comments (December 22, 2005) at 21-22 (Supp. at 000214-000215).

¹⁹³ 05-1305 Order at 11 (Appx. at 000454).

¹⁹⁴ 05-1305 Rehearing at 2 (Appx. at 000516).

In this case, the PUCO did not address the Consumer Groups' public interest arguments. The PUCO asserted that AT&T has met its burden of proving that granting alt. reg. for its stand-alone basic service is in the public interest.¹⁹⁵ Yet AT&T's customers receive **nothing** in exchange for the rate increases that AT&T has the freedom to impose without further PUCO review. In the context of R.C. 4927.03(A)(1) (Appx. at 000648) and the PUCO's previous alt. reg. requirements, this makes no sense.

In the Entry on Rehearing on this issue, the PUCO stated:

We previously determined that requiring enhanced or additional ILEC commitments would not be appropriate in a competitive environment. We believe that in a competitive environment, an ILEC will have the appropriate incentives to deploy additional advanced services and provide other public benefits to consumers.¹⁹⁶

This is both curious and illogical. The commitments required in the elective alt. reg. rules were part of the PUCO's finding that all non-basic services of all the incumbents were subject to competition and that customers had reasonably available alternatives to those non-basic services.¹⁹⁷ If one set of commitments were appropriate in that competitive environment, there is no reason why additional commitments would not be appropriate in this "competitive" environment.¹⁹⁸ The Commission's failure to adopt additional commitments in the basic service alt. reg. rules should be reversed. In any event, the PUCO's decision to allow AT&T to annually

¹⁹⁵ Opinion and Order at 35 (Appx. at 000134).

¹⁹⁶ Entry on Rehearing at 20 (Appx. at 000185), citing 05-1305 Rehearing at 2 (Appx. at 000516) and 05-1305 Order at 11 (Appx. at 000454).

¹⁹⁷ 00-1532 Order at 14 (Appx. at 000378).

¹⁹⁸ See *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431.

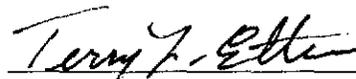
increase customers' rates without additional review should be reversed as contrary to the statutory requirement that a grant of alt. reg. must serve the public interest.

III. CONCLUSION

The PUCO's rules for alternative regulation of basic telephone service violate the requirements of R.C. 4927.03 (Appx. at 000648). Moreover, the PUCO violated R.C. 4927.03 (Appx. at 000648) when it granted AT&T's application for alternative regulation and allowed it to subject tens of thousands of Ohio customers to recurring annual rate increases. The PUCO's order granting alternative regulation for AT&T's stand-alone basic service in the 136 exchanges must be reversed, to give customers the protection intended under Ohio law.

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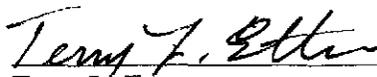
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief 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 16th day of July, 2007.



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