

**In The  
Supreme Court of Ohio**

**The Office of the Ohio Consumers'  
Counsel,**

Appellant,

v.

**The Public Utilities Commission of  
Ohio,**

Appellee.

: Case No. 07-570  
:  
:  
: On appeal from the Public Utilities  
: Commission of Ohio, Case No. 06-  
: 1002-TP-BLS, *In the Matter of the*  
: *Application of Cincinnati Bell*  
: *Telephone Company LLC for Approval*  
: *of an Alternative Form of Regulation of*  
: *Basic Local Exchange Service and*  
: *Other Tier 1 Services Pursuant to*  
: *Chapter 4901:1-4 Ohio Administrative*  
: *Code.*

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**MERIT BRIEF**

**Submitted on Behalf of Appellee,  
Public Utilities Commission of Ohio**

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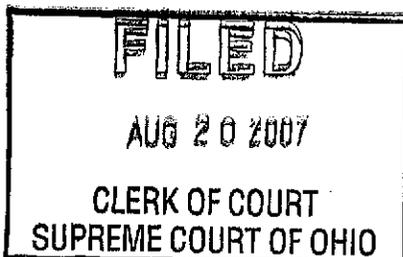
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Appellant,	:	On appeal from the Public Utilities Commission of Ohio, Case No. 06- 1002-TP-BLS, <i>In the Matter of the Application of Cincinnati Bell Telephone Company LLC for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code.</i>
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<b>The Public Utilities Commission of Ohio,</b>	:	
Appellee.	:	

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**MERIT BRIEF  
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**Introduction**

The General Assembly, through R.C. 4927.03, expressly permitted alternative regulation of basic local exchange service or “BLES” and directed the Public Utilities Commission of Ohio (Commission) to adopt rules “as it finds necessary.” The Commission promulgated a series of market tests that consider the criteria enumerated in R.C. 4927.03(A)(2). Cincinnati Bell Telephone Company (CBT) presented facts that met the Commission’s market test rule and showed a marketplace where competition for residential service is strong and, under R.C. 4927.03, alternative regulation is proper. The Commission authorized alternative regulation

for BLES just as the statute and rules require. Its factual findings are supported by sufficient probative evidence and should be affirmed.

While the facts indicate that the Commission can and should relax regulatory oversight, the Office of the Ohio Consumers' Counsel (OCC) advocates the opposite result to thwart alternative regulation and undermine legislative intent. OCC's misplaced focus attacks Commission policy judgments rather than CBT's compliance with the Commission's market test. OCC wants *its own test* applied, a test that will virtually ensure that R.C. 4927.03 cannot achieve its intended purpose. This case is entirely a policy dispute, and policy differences are not legal error. The Commission's rules and its decision apply the statute as written and allow the competitive marketplace to dictate pricing and product decisions, to grow and sustain competition in the residential market and promote the continued availability of reasonably-priced basic local service and additional rate protections for low-income customers.

### **Statement of the Facts and Case**

The General Assembly amended R.C. 4927.03 with the enactment of H.B. 218 on August 5, 2005. This amendment expressly authorized alternative regulation of basic local exchange service and directed the Commission to establish alternative regulatory requirements by adopting rules "as it finds necessary to carry out this section." Ohio

Rev. Code Ann. § 4927.03(D) (Anderson 2007), App. at 3.<sup>1</sup> Under this mandate, the Commission promptly adopted rules, both procedural and substantive, that include a series of competitive market tests to determine if alternative regulation is proper in a given exchange. *In re Basic Local Exchange Service*, Case No. 05-1305-TP-ORD (hereinafter *Rules Case*) (Opinion and Order) (March 7, 2006), Appellant's App. at 440-510; *Rules Case* (Entry on Rehearing) (May 3, 2006), Appellant's App. at 511. The rules were adopted after notice to and multiple rounds of comments by numerous industry and consumer interests. Appellant OCC was part of a consumer group that participated significantly in that case. Public comments were elicited at seven public hearings held throughout Ohio. *Rules Case* (Opinion and Order at 2) (March 7, 2006), Appellant's App. at 441. The rules became effective on August 7, 2006.<sup>2</sup> The rules apply objective, measurable criteria that rigorously evaluate the level of competition and alternative providers and services in the marketplace. Consistent with the General Assembly's streamlined notice and comment process, the tests are easy to understand and apply. An application that factually meets the market test requirements complies with R.C. 4927.03. The rules promote efficient, objective and consistent adjudication of applications filed under R.C. 4927.03 and encourage investment in, and customer access to, new telecommunications technologies and services.

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<sup>1</sup> References to appellant's supplement are denoted "Appellant's Supp. at \_\_\_\_;" references to appellant's appendix are denoted "Appellant's App. at \_\_\_\_;" references to appellee's appendix attached hereto are denoted "App. at \_\_\_\_;" and references to appellee's second supplement are denoted "Sec. Supp. at \_\_\_\_."

<sup>2</sup> There is no dispute that the Commission rules were lawfully promulgated.

CBT filed an application on August 7, 2006 seeking alternative regulation for basic local exchange service it offers in the Cincinnati and Hamilton telephone exchanges,<sup>3</sup> the first filed under amended R.C. 4927.03 and the Commission's new alternative regulation market tests. Procedurally, the statute requires notice of the application, and a period for comment by the public and the affected telephone company and these requirements were met. Ohio Rev. Code Ann. § 4927.03(A)(1) (Anderson 2007), App. at 1-2. Under the statute, a hearing is discretionary and required only if the Commission "considers one necessary," which, in this instance, it did not. The Commission made each required finding based upon facts submitted by CBT in its application that were largely unchallenged by OCC.

The Commission's rules recognize public benefits and provide explicit rate protections for residential customers. An applicant for alternative regulation must be in full compliance with its Elective Alternative Regulation Plan, including all *public interest* commitments. Ohio Admin. Code § 4901:1-4-08 (Anderson 2007), App. at 15. Additionally, the applicant must show that it fully complies with advanced services and residential lifeline (low-income) commitments. *Id.*; Ohio Admin. Code § 4901:1-4-10 (Anderson 2007), App. at 17-18. Commission rule 4901:1-4-11 provides straightforward pricing constraints for basic local service. It caps the incumbent provider's upward pricing flexibility at \$1.25 monthly and the rule prohibits "banking" of increases. Basic local

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<sup>3</sup> CBT serves other exchanges but sought alternative regulatory treatment for the Cincinnati and Hamilton exchanges only. The Cincinnati exchange comprises most of Hamilton County and the Hamilton exchange is within Butler County.

service rates paid by low-income lifeline customers cannot be increased, even where alternative regulation pricing flexibility is granted under R.C. 4927.03. Ohio Admin. Code § 4901:1-4-11(D) (Anderson 2007), App. at 19.

The Commission's rules include a series of market tests that, like the statute, evaluate marketplace dynamics. Ohio Admin. Code Chapter 4901:1-4-01, *et seq.* (Anderson 2007), App. at 3-20. The tests consider the number and size of alternative providers, the ready availability of substitute services and technologies at competitive rates and terms, and provider market share in the CBT service area as required under R.C. 4927.03(A)(2). Ohio Admin. Code § 4901:1-4-10 (Anderson 2007), App. at 17-18. The market tests are applied on an individual exchange basis (a proposal that OCC and other consumer groups supported), and where the applicant meets all requirements of any single test, it complies with R.C. 4927.03. *Rules Case* (Opinion and Order at 17-18) (March 7, 2006), Appellant's App. at 456-457.

CBT proposed compliance with O.A.C. 4901:1-4-10(C)(4) or competitive test four. CBT Application at Ex. 2, Sec. Supp. at 3. This test requires that CBT demonstrate *both* that since 2002 it had lost at least 15 percent of total residential access lines in each of the two exchanges *and* the presence of at least five unaffiliated, facilities-based alternative providers presently serving the residential market. Ohio Admin. Code § 4901:1-4-10(C)(4) (Anderson 2007), App. at 18. Generally, this test gauges the sustainability of competing residential providers in the subject market area.

CBT demonstrated compliance with both requirements of test four. *See, e.g.*, CBT Application at Ex. 3 at 1-12, Sec. Supp. at 6-17. It showed that, between 2002 and 2005,

it had lost over 18 percent of its residential access lines in each of the Cincinnati and Hamilton exchanges. CBT Application at Ex. 3. at 2, Sec. Supp. at 7. It also showed at least five unaffiliated, facilities-based providers in each exchange that compete with CBT to provide residential service. *Id.* at 2-12, Sec. Supp. at 7-17. These included Time Warner Cable and Current Communications, as well as a host of wireless providers. *Id.* CBT customer surveys showed that former CBT residential customers have switched their basic local service to Time Warner and Current Communications as well as to competing wireless providers. *Id.* at 6-8, 11-12, Sec. Supp. at 11-13, 16-17; Application at Ex. at F-1, Sec. Supp. at 24. *OCC did not dispute CBT's factual submission* that former CBT customers have switched to substitute services provided by alternative providers.

The Commission issued an order granting CBT's application for alternative regulatory treatment in both exchanges. *In re Cincinnati Bell Tele. Co.*, Case No. 06-1002-TP-BLS (hereinafter "*In re CBT*") (Opinion and Order) (November 28, 2006), Appellant's App. at 58-89. It did so after making all factual determinations required under the statute. The Commission found that: alternative regulation in the Cincinnati and Hamilton exchanges promotes the public interest; CBT's residential service is subject to competition; customers have reasonably available substitute services in those exchanges; and, finally, that there are no barriers to entry for residential service in this market. *Id.* at 30, Appellant's App. at 87.

Noting the close connection between the CBT application case and the 05-1305 *Rules Case*, the Commission incorporated the entire record of the latter case, including its reasoning and decision, into the record of CBT's application case below. *Id.* at 8, Appel-

lant's App. at 65. OCC sought rehearing which was denied by the Commission. *In re CBT* (Entry on Rehearing) (January 31, 2007), Appellant's App. at 90-104.

This appeal ensued.

### **Argument**

OCC's shotgun approach alleges numerous errors to complicate and obfuscate what is a straightforward case. What OCC incorrectly characterizes as legal issues are nothing more than policy and factual disputes it has with the Commission. The Commission adopted rules to implement a new statute and it applied those rules and made factual findings based upon specific evidence submitted by CBT. R.C. 4927.03 is unambiguous and evinces a legislative preference for relaxed regulation in a competitive marketplace where a wide variety of telecommunications providers, services, and technologies are readily available to residential customers. CBT presented facts that met the requirements of the Commission's market test and showed that both the Cincinnati and Hamilton exchanges enjoy strong competition for residential customers. The Commission applied the plain words of the statute in a logical way that lawfully carries out legislative intent. The Commission's market test rules considered the statutory criteria and elicited facts sufficient to enable the Commission to make all findings required under R.C. 4927.03. Its rules are valid, lawful, and its decision should be upheld.

**Proposition of Law No. I:**

**R.C. 4927.03 requires a competitive analysis that reflects actual marketplace dynamics and considers alternative providers who offer functionally equivalent or substitute services to residential customers at competitive rates, terms, and conditions. The Commission's market test considers and applies the statutory criteria.**

To grant alternative regulation of basic local exchange service, the Commission must find:

- it to be in the public interest (R.C. 4927.03(A)(1)); and,
- EITHER that the applicant is subject to competition with regard to such service (R.C. 4927.03(A)(1)(a)) OR that the applicant's customers have reasonably available alternatives (R.C. 4927.03(A)(1)(b)); and,
- that there are no barriers to entry (R.C. 4927.03(D)).

**A. OCC misreads the statute.**

The law requires that the Commission consider the ability of alternative providers to make *functionally equivalent* or *substitute services* readily available at *competitive* rates, terms, and conditions. Ohio Rev. Code Ann. § 4927.03(A)(2)(c) (Anderson 2007), App. at 2. The Commission and the General Assembly agree that substitute or equivalent services are competitive. The Commission's market test applies the plain words of the statute and considers the availability of alternative providers and functionally equivalent or substitute services on competitive rates and terms for residential customers. The Commission noted:

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

*In re CBT* (Opinion and Order at 13) (November 28, 2006), Appellant’s App. at 70.

In contrast, OCC advances a gross misreading of the law that undermines the General Assembly’s directive to implement alternative regulation where a competitive marketplace supports it. OCC argues that the Commission can only consider competing providers who sell stand-alone basic service identical to that provided by CBT. R.C. 4927.03 nowhere mentions “stand-alone” basic service. OCC conveniently adds words to the statute while ignoring express statutory text that directs the Commission to consider the presence of alternative providers and the availability of *substitute or functionally equivalent services* at competitive rates. The General Assembly could easily have said that only identical services are to be considered. It did not. The Commission applied the plain words of R.C. 4927.03 to promote, not hinder, alternative regulation in a highly competitive marketplace environment.

**B. OCC’s test is unlawful and impractical.**

OCC argues that the Commission should have applied OCC’s proffered test that the Commission previously rejected in the *Rules Case*. OCC’s test would require that:

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

*In re CBT* (Opinion and Order at 10, n.2) (November 28, 2006), Appellant's App. at 67.

Again, OCC's test ignores the actual words of R.C. 4927.03 that require the Commission to consider *functionally equivalent or substitute* products and services. The Commission's practical view considers the criteria delineated in R.C. 4927.03 as well as the legislative policies in R.C. 4927.02. *See, e.g., In re CBT* (Entry on Rehearing at 9) (January 31, 2007), Appellant's App. at 98. While the Commission's evaluation fully considers the dynamics of the CBT marketplace, OCC ignores the efforts of alternative service providers to naturally differentiate their products as a competitive marketing strategy. The Commission logically inquired whether bundled services<sup>4</sup> offered by competing providers constitute acceptable equivalent or *substitute* services for CBT residential BLES customers. In rejecting OCC's meritless "identical services" argument, the Commission found that whether one product *substitutes* for another does not turn on whether the product is exactly the same. *Id.* The Commission observed that customers who subscribe to bundled service remain, by definition, basic local service customers

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<sup>4</sup> OCC mistakenly argues that the Commission's grant of alternative regulatory treatment for bundled services (that included BLES) in Case No. 00-1532-TP-COI limited the Commission's consideration to only stand-alone basic service in this case. The Commission rejected this same OCC argument in its BLES rulemaking case, noting that its earlier decision was limited to competitive findings regarding discretionary services that extended to the entire state of Ohio. *Rules Case* (Entry on Rehearing at 19) (May 3, 2006), Appellant's App. at 529.

because BLES forms the foundation of the service bundle. *Id.* The Commission's market test and its decision focus upon marketplace characteristics – that is, the presence of competing residential service providers and whether customers can readily obtain substitute services at competitive rates and terms. This is what R.C. 4927.03 requires.

In this same vein, OCC argues that substitute services must be similarly priced and have similar terms and conditions to CBT's stand-alone service. Again, this argument is at odds with the plain words of R.C. 4927.03 that require only that substitute services be readily available at *competitive* rates, terms, and conditions. Ohio Rev. Code Ann. § 4927.03(A)(2)(c) (Anderson, 2007), App. at 2. CBT's facts establish both its loss of market share and easy customer accessibility to multiple alternative providers. The facts further demonstrate that former CBT stand-alone basic service customers are selecting substitute services because they view the rates and terms of alternative service bundles to be competitive and reasonable. Thus, they switched. *In re CBT* (Opinion and Order at 14) (November 28, 2006), Appellant's App. at 71; *In re CBT* (Entry on Rehearing at 9) (January 31, 2007), Appellant's App. at 98. These alternative providers market to residential customers and compete with CBT's basic residential service. The fact that there may be customers in both exchanges that want only basic local service does not negate the fact that CBT faces competition for residential service in this marketplace.

Not only is it unlawful, but OCC's proposal is impractical as well. Rather than using objective, measurable factors as the Commission's test does, OCC employs vague, subjective terms like "timely," "significant," and "sustainable" that invite prolonged argument. OCC requires CBT to prove a negative, while the statute and the Commis-

sion's test require CBT to make an affirmative showing of competition in the marketplace. OCC's proposal frustrates legislative intent and virtually ensures that R.C. 4927.03 can never be implemented for its intended purpose despite a factual showing that the Cincinnati and Hamilton exchanges enjoy strong competition for residential service. Frustration of legislative intent is never a legitimate statutory goal. *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St. 3d 382, 384, 481 N.E.2d 632 (1985).

**C. OCC ignores the highly competitive marketplace in CBT's Cincinnati and Hamilton exchanges.**

OCC's "perfect substitute" argument ignores the highly competitive marketplace that exists in CBT's Cincinnati and Hamilton exchanges, where residential customers can currently choose from a wide array of services, technologies, and providers as substitutes for CBT basic local service. The Commission noted that more customers are substituting traditional basic local exchange service with competitive services from a variety of alternative providers:

Further, we have already concluded that:

Most customers are substituting their traditional BLES with competitive services offered by alternative service providers such as wireline CLECs, wireless, VoIP and cable telephony providers. Although the products offered by those alternative providers may not be exactly the same as the ILEC's BLES offerings, those customers view them as substitutes for the ILEC's BLES.

\* \* \*

Accordingly, we find that, with technology advancements, alternative providers such as wireline CLECs, wireless, VoIP and cable telephone providers are relevant to our consideration in determining whether an ILEC is

subject to competition or customers have reasonably available alternatives to the ILEC's BLES offering at competitive rates, terms and conditions.

*In re CBT* (Opinion and Order at 13-14) (November 28, 2006) citing to *Rules Case* (Opinion and Order at 25) (March 7, 2006), Appellant's App. at 70-71.

The requirements of the Commission's market test and its decision give full effect to R.C. 4927.03 and lawfully implement the legislative mandate to the Commission to promote the policies delineated in R.C. 4927.02. *Discount Cellular, Inc. v. Pub. Util. Comm'n*, 112 Ohio St. 3d 360, 362, 859 N.E.2d 957, 961 (2007). The choice before the Court is whether to retreat from the legislative mandate to encourage alternative regulation in a competitive marketplace, as OCC wants, or to affirm a Commission decision that promotes competition and development of new technologies and services that today's residential customers want. The Commission applied R.C. 4927.03 as the General Assembly intended.

**Proposition of Law No. II:**

**The Court will not reverse Commission factual determinations where the record contains sufficient supporting evidence. *Discount Cellular, Inc. v. Pub. Util. Comm'n*, 112 Ohio St. 3d 360, 859 N.E.2d 957 (2007). Based upon uncontroverted facts, the Commission found that CBT's basic local service is subject to competition from a host of alternative providers and that CBT residential customers are switching their basic service to reasonably available substitute services from these providers. These factual findings should be affirmed.**

As authorized under R.C. 4927.03, the Commission adopted alternative regulatory requirements by creating several competitive market tests that evaluate the criteria con-

tained in the statute. Ohio Admin. Code § 4901:1-4-10(C)(1)-(4) (Anderson 2007), App. at 17-18. CBT chose to demonstrate compliance with competitive test four that requires:

(4) An applicant must demonstrate that in each requested telephone exchange area that at least fifteen per cent of total residential access lines have been lost since 2002 as reflected in the applicant's annual report filed with the commission in 2003, reflecting data for 2002; and the presence of at least five unaffiliated facilities-based alternative providers serving the residential market.

Ohio Admin. Code § 4901:1-4-10(C)(4) (Anderson 2007), App. at 18. CBT bore the burden of showing that competition is both real and sustainable and also the requisite loss of market share to satisfy the market test requirements.

As already pointed out, OCC attacks the Commission's market test rule rather than CBT's compliance with it. Each of the Commission's factual determinations under R.C. 4927.03 is supported by largely uncontroverted evidence. The Court will not reverse fact determinations where the record contains sufficient probative evidence to support those findings. *Discount Cellular v. Pub. Util. Comm'n*, 112 Ohio St. 3d 360, 859 N.E.2d 957 (2007). The Court neither reweighs the evidence nor substitutes its opinion or judgment for that of the Commission on factual, evidentiary matters. *Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006). OCC bears the heavy burden of showing that the Commission's findings are against the manifest weight of the evidence. *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm'n*, 113 Ohio St. 3d 180, 863 N.E.2d 599 (2007). OCC's misguided assertions assail the adequacy, quality, and weight of the evidence, all matters for the Commission's judgment, and thus should be rejected. *Stephens v. Pub. Util. Comm'n*, 102 Ohio St. 3d 44, 806 N.E.2d 527 (2004). The evi-

dentiary shortcomings alleged by OCC do not change the fact that the Commission's factual findings are supported by probative record evidence. OCC has failed to sustain the required burden to support reversal of the Commission's decision.

**A. CBT demonstrated the requisite percentage loss of its residential access lines in each exchange.**

The line loss requirement measures market power, the level of competition that CBT currently faces from alternative providers, and the availability of competing alternative services for CBT residential customers in each telephone exchange. *Rules Case* (Opinion and Order at 33-35) (March 7, 2006), Appellant's App. at 472-474; *In re CBT* (Entry on Rehearing at 4) (January 31, 2007), Appellant's App. at 93. The Commission designed this test with an eye to the practical because it can be easily implemented using data that is readily available to CBT. CBT's application showed that it lost over 18 percent of its residential access lines in each exchange between 2002-2005. CBT Application at Ex. 3 at 2, Sec. Supp. at 7. Although OCC argues about what these losses do or do not mean, OCC did not dispute the actual percentages of residential access lines lost by CBT in the Cincinnati and Hamilton exchanges. These facts support, as the Commission found, the first requirement of market test four and consider factors enumerated in the statute. Ohio Rev. Code Ann. § 4927.03(A)(2) (Anderson 2007), App. at 2; *In re CBT* (Opinion and Order at 18) (November 28, 2006), Appellant's App. at 75; *In re CBT* (Entry on Rehearing at 3-5) (January 31, 2007), Appellant's App. at 92-94.

OCC challenges the line loss requirement primarily for two reasons. It argues that the standard is insufficient because CBT cannot show that all these lines were actually

lost to competition. OCC also takes issue with use of the year 2002 as the beginning of the measurement period. OCC previously made these arguments in the *Rules Case* where the Commission noted the impracticability of OCC's position and discounted the statements in OCC witness Dr. Roycroft's affidavit. *In re CBT* (Opinion and Order at 17-18) (November 28, 2006), Appellant's App. at 74-75. The Commission found that it is not possible for CBT, or any other incumbent local exchange carrier (ILEC), to identify with precision, where "lost" residential lines went,<sup>5</sup> because CBT does not have access to other competitor's *confidential* market share information. *In re CBT* (Entry on Rehearing at 4) (January 31, 2007), Appellant's App. at 93. OCC misses the point. CBT's loss of residential access lines shows that customers have readily-available service alternatives and are exercising their right to choose them. This test requirement measures competition because each "lost" customer formerly purchased CBT basic local service and now has chosen bundled service as a competitive substitute. *Rules Case* (Entry on Rehearing at 17-18) (May 3, 2006), Appellant's App. at 527-528. This requirement measures customer migration, an indicium of market power, and whether substitute services are readily available at competitive rates, terms, and conditions. The Commission rejected, for lack of evidence, OCC's contention that disconnected residential access lines were used for internet access rather than voice communications. *In re CBT* (Opinion and Order at 17) (November 28, 2006), Appellant's App. at 74. The Commission also found irrelevant

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<sup>5</sup> CBT's application showed that former CBT residential customers have switched to bundled BLES provided by multiple wireless providers in both the Cincinnati and Hamilton exchanges. *See, e.g.* CBT Application at Ex. 3 at 12, Sec. Supp. at 17.

OCC's showing of increased DSL connections *statewide* because CBT's narrow application applied only to two telephone exchanges in two of Ohio's 88 counties. *Id.* Finally, the Commission expressed its belief that the line loss requirement fully captures movement of families in and out of the Cincinnati and Hamilton exchanges.

Likewise, the Commission explained its selection of the 2002 start date. On rehearing in the *Rules Case*, the Commission noted that 2002 was chosen carefully, *in response to OCC criticisms*, to exclude any data distortions due to access line losses *for reasons other than competition* for basic local service from alternative providers and technologies. *Rules Case* (Entry on Rehearing at 13-14) (May 3, 2006), Appellant's App. at 523-524. Importantly, the year 2002 coincided with widespread availability of UNE-P<sup>6</sup> that established a favorable pricing structure for competitive local exchange carriers or "CLECs" to obtain facilities needed to compete for residential customers. This opened up the residential marketplace to CLEC providers, that formerly served mainly the commercial market, and resulted in greater competition and more choices for residential customers. The Commission reiterated this same finding and its reasoning in its order below. *In re CBT* (Opinion Order at 17-18) (November 28, 2006), Appellant's App. at 74-75; *In re CBT* (Entry on Rehearing at 4-5) (January 31, 2007), Appellant's App. at 93-94.

CBT presented uncontroverted facts that show its loss of market share. The Commission fully explained the facts it relied upon and why those facts were sufficient to

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<sup>6</sup> UNE-P standards for unbundled network element – platform.

satisfy the first requirement of its market test. The Commission's factual finding should be affirmed.

**B. CBT showed that there are more than the requisite five unaffiliated facilities-based alternative providers presently serving residential customers in each exchange.**

R.C. 4927.03 also states that the Commission shall consider the number and size of alternative service providers. The second requirement of the Commission's competitive market test does this. It requires a showing of at least five unaffiliated, facilities-based alternative providers that serve the residential market in which alternative regulation is sought. This requirement can be broken down as follows:

- (1) There can be no affiliation between any of the alternative providers and the applicant;
- (2) Each alternative provider must be "facilities-based;"
- (3) In addition to some form of BLES, the providers may market and sell alternative or different products and services and/or employ different technologies to those of the applicant; and,
- (4) Each alternative provider must be serving the residential marketplace.

This prong evaluates the overall vibrancy of the market and independence of competitive providers. As the Commission noted, the required presence of multiple, active facilities-based providers is probative evidence of a healthy, sustainable market. *In re CBT* (Opinion and Order at 24-29) (November 28, 2006), Appellant's App. at 81-86. By considering only alternative providers that are "facilities-based," the Commission evaluates the commitment of a provider to remain a competitor in the market due to investment in plant and equipment, that, in turn, coincides with greater market stability and sustain-

ability. *Id.*; *In re CBT* (Entry on Rehearing at 6-7) (January 31, 2007), Appellant's App. at 95-96. In the event of market deterioration or slippage, Ohio law also provides a safety net that allows the Commission to modify a previous order granting alternative regulatory treatment for good cause. Ohio Rev. Code Ann. § 4927.03(C) (Anderson 2007), App. at 2-3.

CBT presented facts in its application sufficient to meet the alternative provider portion of the test. Initially, the Commission determined that various technologies compete with CBT basic local service and should be considered. *In re CBT* (Opinion and Order at 25) (November 28, 2006), Appellant's App. at 82. CBT showed that a mix of alternative providers and technologies, including wireline incumbent local exchange carriers, wireless providers, VoIP (voice over internet protocol), and cable telephony currently compete with CBT to provide residential service in both exchanges. CBT Application at Ex. 3 at 4-12 (and various exhibits thereto), Sec. Supp. at 4-17; *In re CBT* (Opinion and Order at 24-28) (November 28, 2006), Appellant's App. at 81-85. CBT's factual submission is, again, largely uncontroverted by the OCC. For example, the Commission found, and OCC did not dispute, that Verizon, Sprint, T-Mobile, and Cingular wireless services are unaffiliated with CBT, that each utilizes facilities they own, operate, manage, or control, and that each is a viable residential service provider in the Cincinnati and Hamilton exchanges. *In re CBT* (Opinion and Order at 28-29) (November 28, 2006), Appellant's App. at 85-86. Evidence of customer surveys showed that former CBT residential customers have "cut the cord" and switched their service to wireless providers. *Id.* As wireless service quality and coverage continue to improve and gain customer

popularity, these services will continue to supplant and become substitutes for traditional residential home landline service in many cases. The Commission discounted OCC's criticisms of wireless service as a competitive substitute, noting that wireless serves the same functionality and that wireless providers customize their services to meet a wide range of customer needs and lifestyles. *In re CBT* (Opinion and Order at 27) (November 28, 2006), Appellant's App. at 84. Similarly, the Commission found that residential service provided by Time Warner Cable ("Digital Phone") and Current Communications ("Current Voice") compete with CBT's current basic local exchange service and that customers have substituted their former CBT service with these functionally equivalent, substitute service alternatives. *Id.* at 25, Appellant's App. at 82, referencing CBT Application at Ex. 3, Sec. Supp. at 4-18.

Unable to credibly challenge the facts, OCC chooses instead to rail against the test requirements. OCC attacks Commission policy decisions that were made and authorized under R.C. 4927.03, and advances instead the type of competition that *OCC believes is acceptable* and the level of proof that *OCC believes should be necessary* to satisfy the *Commission's* rule. OCC once again mistakenly asserts that competitive alternative services must be identical to CBT basic local exchange service. As an initial matter, the Commission (not the OCC) is the trier of fact that determines the nature, weight, and sufficiency of the evidence. *Stephens, supra*. Product and service variation and differentiation should be embraced as perhaps the best evidence of intensive competition in the marketplace, because it shows innovative providers who develop and aggressively bring to market new products and services that customers want. The Commission has repeat-

edly noted that the law does not restrict the analysis of competition and reasonably available alternatives to providers whose services are exactly like or identical to CBT stand-alone BLES. *In re CBT* (Entry on Rehearing at 9) (January 31, 2007), Appellant's App. at 98. Logically, customers who switch from stand-alone basic local exchange service and subscribe to alternative bundled service (that includes basic service), view these alternatives as reasonable, functionally equivalent or substitute services. *Id.*<sup>7</sup> R.C. 4927.03 directs that the Commission consider availability of "functionally equivalent" or adequate "substitute" services. Ohio Rev. Code Ann. § 4927.03(A)(2) (Anderson 2007), App. at 2. Customers voluntarily switch providers because they perceive greater value in other services and technology platforms offered by competing alternative providers. OCC's overly restrictive view limits customer choices and effectively decides for the customer what service and provider will be used.

OCC further asserts that services from these providers must be at or near the same price as CBT stand-alone BLES to be considered. Again, R.C. 4927.03 requires that substitute services be available at *competitive* rates and terms, *not identical* rates and terms as OCC mistakenly asserts. The services of these alternative providers are readily available and CBT customers are switching to them. This is what the facts show. Former CBT *customers* have found these alternative service packages to be acceptable substitutes

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<sup>7</sup> The Commission previously found that customers who subscribe to bundled service offerings that include basic local exchange service (BLES) are by definition BLES customers because basic local service is the foundation upon which the service package or bundle is built. *Rules Case* (Opinion and Order at 25) (March 7, 2006), Appellant's App. at 464.

with competitive, reasonable rates and terms. *In re CBT* (Entry on Rehearing at 6) (January 31, 2007), Appellant's App. at 95.

Finally, OCC asserts that where an alternative service provider identified by CBT does not serve the entirety of the Cincinnati and Hamilton exchanges, its services cannot be readily available to CBT BLES customers in that exchange. The Commission disagreed. Dating back to the *Rules Case*, the Commission found that its new competitive market tests (including market test four) were sufficiently rigorous and granular to evaluate reasonably available alternatives to basic service in each affected telephone exchange.<sup>8</sup> *Rules Case* (Entry on Rehearing at 19) (May 3, 2006), Appellant's App. at 529. The Commission fully explained the impracticality of OCC's argument:

We reject OCC's narrow interpretation. . . . [T]he market would need to be defined as small as a "city block" and, now for wireless it would need to be even smaller, defined as a "single residence" to guarantee that wireless service is reaching consumers indoors at their homes; otherwise such a provision cannot be satisfied. We find that such requirement is clearly without merit and *impractical to administer*.

*In re CBT* (Opinion and Order at 28) (November 28, 2006) (emphasis added), Appellant's App. at 85 (emphasis added).

The Commission found no requirement in the law or under its rules dictating that an alternative, competitive provider must serve 100 percent of CBT's market area. *In re CBT* (Entry on Rehearing at 7-8) (January 31, 2007), Appellant's App. at 96-97. Stated differently, nothing requires that every residential customer in an exchange have access

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<sup>8</sup> OCC supported an *exchange-specific* application of the competitive market test. *Rules Case* (Opinion and Order at 17-18) (March 7, 2006), Appellant's App. at 456-457.

to all alternative providers and their services, or that all alternative providers offer ubiquitous service throughout the exchange. The salient point is that all such providers and technologies allow the same thing – residential customers to talk to each other. Rather than creating a rigid standard, like that advocated by OCC, the General Assembly left it to the judgment and expertise of the Commission to consider “the extent to which services are available from alternative providers in the relevant market.” Ohio Rev. Code Ann. § 4927.03(A)(2)(b) (Anderson 2007), App. at 2. The Commission’s alternative regulation requirements, including market test four, do this, and allow R.C. 4927.03 to be implemented as the General Assembly intended.

**Proposition of Law No. III:**

**The presence of numerous competitors that serve residential customers, coupled with CBT’s loss of residential market share in each exchange, factually demonstrates that there are no barriers to entry.**

The facts submitted by CBT to meet the requirements of the Commission’s market test also support a finding that there are no barriers to entry for residential service providers in the Cincinnati and Hamilton exchanges. *In re CBT* (Opinion and Order at 12) (November 28, 2006), Appellant’s App. at 69; *In re CBT* (Entry on Rehearing at 10) (January 31, 2007), Appellant’s App. at 99. The Commission’s market test evaluates the actual dynamics of this marketplace and provides a good indicator of the openness of this market:

The Commission finds significance in the facts that an ILEC experiences a threshold loss of at least 15 percent of the total residential access lines and that the relevant market (at the exchange level) has the presence of at least five unaffiliated facilities-based alternative providers serving residential

customers. . . . The required presence of unaffiliated alternative providers combined with the requisite ILEC loss of residential access lines adequately establishes that there are no barriers to entry, thus satisfying Section 4927.03(A)(3), Revised Code.

*In re CBT* (Opinion and Order at 12-14) (November 28, 2006), Appellant's App. at 69-71; *In re CBT* (Entry on Rehearing at 10) (January 27, 2007), Appellant's App. at 99.

OCC argues that the Commission's test is not an effective indicator of barriers to entry for competing stand-alone BLES providers. This argument, again, springs from the faulty premise that R.C. 4927.03 limits the Commission's consideration to only alternative providers that offer residential service identical to that of CBT. As already shown, OCC's proposition finds no support in the statute. The availability of competing *substitute* services, not identical services, is what R.C. 4927.03 directs the Commission to consider, and that is what the Commission did.

The OCC in the *Rules Case* advanced the notion that barriers-to-entry must consider any condition that makes marketplace entry more difficult. Again, OCC proposes an insurmountable hurdle that renders R.C. 4927.03 unusable for its intended purpose – alternative regulation of basic local exchange service. OCC fails to distinguish, as it should, between conditions that may *affect* market entry and *barriers* that *preclude* it. *Rules Case* (Opinion and Order at 22) (March 7, 2006), Appellant's App. at 461. The Commission found:

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

*entry difficult have to be eliminated for all potential competitors, such an interpretation will create an insurmountable burden of proof for an ILEC to satisfy.*

*Rules Case* (Entry on Rehearing at 18) (May 3, 2006), Appellant's App. at 528 (emphasis added).

This distinction comports with the dictionary definition of "barrier" as, among other things, that which "bars," "prevents," or "obstructs." WEBSTER'S NEW WORLD DICTIONARY (Second College Edition 1982). The Commission found that any retail provider seeking to enter a competitive marketplace may, and likely will, face challenges that affect, but do not bar, market entry. *Rules Case* (Opinion and Order at 22) (March 7, 2006), Appellant's App. at 461; *Rules Case* (Entry on Rehearing at 18-20) (May 3, 2006), Appellant's App. at 528-530. Nothing in R.C. 4927.03 requires that a new market entrant be totally free of conditions, including financial, geographic, and a host of other factors and circumstances that naturally exist. OCC mistakenly assumes that all potential competitors are created equal in terms of financial and marketing resources, knowledge of the marketplace, etc., an assumption that, at best, is totally unrealistic. The Commission considered, as the statute requires, only "barriers" that preclude a would-be competitor from entering the market, rather than conditions that simply affect ease of entry. This is a critical distinction that requires the Commission's judgment. As a safety net, the Commission further explained that an interested party can always file a complaint with the Commission alleging barriers to entry in a specific factual setting. *Id.* at 19, Appellant's App. at 529. A complaint on concrete facts is preferable to OCC's speculation in the abstract.

Finally, and most important, whether barriers to entry exist is a *factual* question for the Commission to determine. The facts of this case support the Commission's finding that there are no barriers to market entry. *See, e.g.* CBT Application at Ex. 3 at 2-12 and Supporting Exs. B-K, Sec. Supp. at 7-52. CBT showed that it lost over 18 percent of its residential access lines in each of the Cincinnati and Hamilton exchanges between 2002 and 2005. *Id.* OCC does not dispute the percentage of residential access lines CBT lost. In addition to Time Warner Cable and Current Communications, CBT established the presence of other unaffiliated, facilities-based competitors, including wireless providers Cingular, Verizon, T-Mobile, and Sprint that compete for residential customers in those exchanges. *Id.* at 8-9, Sec. Supp. at 13-14. These facts dispel any notion that there are barriers to entry for residential service in the competitive market area where CBT seeks alternative regulatory treatment. Additionally, CBT noted that these wireless providers aggressively advertise across both exchanges, while CBT surveys showed that it has lost customers who have switched to wireless service in this market area. *Id.* at 11-12, Sec. Supp. at 16-17; *In re CBT* (Opinion and Order at 12) (November 28, 2006), Appellant's App. at 69; *In re CBT* (Entry on Rehearing at 10) (January 31, 2007), Appellant's App. at 99. Former CBT residential customers have switched to Time Warner and Current Communications services as well. *OCC did not challenge these facts.*

OCC ignores what these facts show – a dynamic marketplace where residential customers can choose how they will communicate with each other from among numerous providers, services, and technologies. Customer switching, coupled with the product and

service differentiation by the alternative competing providers listed above, show a vibrant marketplace for residential service that is *free of barriers* to entry. The futility of OCC's effort is perhaps best illustrated by its inability to present any evidence of specific barriers to entry unique to either the Cincinnati or the Hamilton exchanges. *In re CBT* (Opinion and Order at 12) (November 28, 2006), Appellant's App. at 69. The Commission found that OCC witness Dr. Roycroft identified only general types of barriers that *may* generally be associated with any marketplace, and that he failed to identify a single barrier to entry that applies to either of the exchanges for which CBT seeks alternative regulation of basic local service. *Id.*

The Commission's alternative regulatory requirements fully incorporate what the Commission believes is the proper barriers-to-entry analysis contemplated under R.C. 4927.03. Its rules apply a standard that is practical, measurable, and that considers facts that bear directly on the issue. *In re CBT* (Opinion and Order at 11-12) (November 28, 2006), Appellant's App. at 68-69. In the Commission's judgment, there can be no better indicator of a lack of barriers to entry than a healthy, sustained competitive marketplace like that presented here. Nor does the Commission's rationale treat the statutory "no barriers to entry" test as surplusage as OCC mistakenly asserts. The Commission's factual determination is supported. The same facts that CBT submitted to fulfill the Commission's market test requirements also support the Commission's finding that no barriers to entry exist.

The Commission applied its judgment to the plain words of R.C. 4927.03 and concluded that there are no barriers to entry for residential service in the highly competitive

Cincinnati and Hamilton telephone exchanges. The Commission's judgment is sound, and its factual findings are supported and should be upheld. *Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006).

**Proposition of Law No. IV:**

**Where the Commission's decision implements stated goals of the General Assembly, it promotes the public interest requirement under R.C. 4927.03.**

Under R.C. 4927.03, the Commission must find that alternative regulatory treatment of basic local exchange service is in the "public interest." The Commission made this factual determination by applying its reasoned judgment to the record before it. *In re CBT* (Opinion and Order at 30) (November 28, 2006), Appellant's App. at 87; *In re CBT* (Entry on Rehearing at 11-12) (January 31, 2007), Appellant's App. at 100-101. OCC opposes this finding because the Commission refused to order CBT to provide *additional* public commitments that OCC wanted. OCC's position is not mandated by law and ignores public benefits that customers already enjoy under the Commission's elective alternative regulation rule.<sup>9</sup> In rejecting OCC's wish list, the Commission correctly reasoned that the marketplace, and not administrative fiat, should dictate the level of public benefits and services where residential competition is strong as it is in the Cincinnati and Hamilton exchanges:

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 appropri-

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<sup>9</sup> This is found at Section 4901:1-4-09(B)(1) of the Ohio Administrative Code. App. at 15.

ate incentives to deploy additional advanced services and provide other public benefits to consumers.

*In re CBT* (Entry on Rehearing at 12) (January 31, 2007) citing *Rules Case* (Entry on Rehearing at 2) (May 3, 2006) and *Rules Case* (Opinion and Order at 11) (March 7, 2006), Appellant's App. at 101.

R.C. 4927.03 does not define "public interest." The General Assembly left this determination to the expertise and judgment of the Commission. OCC chooses to define public interest in terms of benefits to customers and there are indeed customer benefits in this case. By approving a modest, capped rate increase for basic local service, the Commission ensures its continued affordability for residential customers. The pricing flexibility authorized by the Commission allows CBT to actually charge *less* to meet competition. Over objections from CBT and other incumbent providers, the Commission adopted a rule that insulates low-income, lifeline customers from rate increases even where alternative regulation is appropriate. *Rules Case* (Opinion and Order at 40-41, 48) (March 7, 2006), Appellant's App. at 479-480, 487; *Rules Case* (Entry on Rehearing at 24) (May 3, 2006), Appellant's App. at 534.

The Commission's determination of "public interest" balances competing legislative policies enunciated in R.C. 4927.02. *Rules Case* (Opinion and Order at 40) (March 7, 2006), Appellant's App. at 479. On the one hand, while the Commission is directed to ensure the availability of basic local exchange service and affordability and continuation of low-income telephone service programs, it is also challenged to encourage innovation and diversity of options in terms of telecommunications services and technologies. The

Commission's balanced view of the public interest promotes these goals, and necessarily encompasses benefits to customers. The error alleged by OCC is a meritless attack upon a judgment call that the General Assembly has directed the Commission to make. The Commission's finding gives full effect and consideration to related statutes, including the policies in R.C. 4927.02, and should be upheld.

There are other customer benefits that OCC ignores. To qualify for BLES alternative regulation treatment, CBT must show that it is in full compliance with an already-approved elective alternative regulation plan. Ohio Admin. Code § 4901:1-4-08 (Anderson 2007), App. at 15. The Commission's rules require that CBT demonstrate full compliance with all the public interest commitments of its plan. Ohio Admin. Code § 4901:1-4-09 (Anderson 2007), App. at 15-17. Low-income customers are protected; CBT must show that it has fully complied with all advanced services and lifeline (low-income) program commitments and it must continue to offer qualifying lifeline customers basic local exchange service at existing rate levels in both the Cincinnati and Hamilton exchanges. Ohio Admin. Code §§ 4901:1-4-06; 4901:1-4-08; 4901:1-4-11, App. at 8-13, 15, 18-20; *Rules Case* (Opinion and Order at 46) (March 7, 2006), Appellant's App. at 485. OCC and other consumer groups supported this proposed rate freeze as a *public benefit* to offset the incumbent local exchange carrier's (*i.e.* CBT) ability to implement measured increases in basic local service rates. *Rules Case* (Opinion and Order at 46) (March 7, 2006), Appellant's App. at 485. OCC previously agreed that the Commission's rules promote the statutory policy of protecting affordability of telephone service to low-income subscribers. *Rules Case* (Opinion and Order at 48) (March 7, 2006),

Appellant's App. at 487; *Rules Case* (Entry on Rehearing at 25-26 (May 3, 2006), Appellant's App. at 535-536; Ohio Rev. Code Ann. § 4927.02(A)(8) (Anderson 2007), App. at 1.

The General Assembly authorized the Commission to apply its judgment and expertise to determine the "public interest" under R.C. 4927.03. The Commission exercised its judgment reasonably and lawfully, to continue availability of reasonably-priced basic local service and to promote a competitive marketplace with numerous provider and service choices for residential customers. OCC's "more strings attached" view lacks any legal basis and should be rejected.

### **Conclusion**

R.C. 4927.03 expressly directs the Commission to establish regulations "as it finds necessary" to promote alternative regulation of basic local service. Applying its expertise and judgment, the Commission created a series of market tests that evaluate the level of competition and residential customer access to alternative providers and substitute services. The Commission's market test applies the criteria in R.C. 4927.03, as written, and implements, in a balanced way, the policies delineated in R.C. 4927.02.

The dispositive issue before the Court is straightforward and factual. Did CBT submit facts that satisfy both requirements of the Commission's competitive market test? It did, presenting evidence regarding the size and number of alternative providers, the ready availability of substitute services, and loss of its residential market share in the highly competitive Cincinnati and Hamilton exchanges. Although these facts were

largely unchallenged, OCC does complain about the quality and sufficiency or weight of the evidence, matters left for the Commission's determination. OCC seeks to supplant the Commission, and impose its own standard, that, if adopted, will thwart alternative regulation of basic service that R.C. 4927.03 expressly permits.

The merit or wisdom of the policy contained within R.C. 4927.03 is well outside the scope of this appeal. Such arguments are properly directed to the General Assembly and are irrelevant to the factual issues at hand. Equally unpersuasive is OCC's attack on Commission policy judgments embodied in rules that it adopted pursuant to the enabling language in the statute. Whether OCC agrees or not, the General Assembly directed the Commission to adopt standards to implement alternative regulation where, as here, facts show the existence of a competitive marketplace. The Commission's rules and its decision do this, applying the statute as written and in a straightforward way. The Commission's decision should be affirmed.

Respectfully submitted,

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## Proof of Service

I hereby certify that a true copy of the foregoing **Merit Brief** submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 20<sup>th</sup> day of August, 2007.



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## **4927.02 State policy**

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

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

(2) Rely on market forces, where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market, to maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications service;

(3) Encourage innovation in the telecommunications industry;

(4) Promote diversity and options in the supply of public telecommunications services and equipment throughout the state;

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

(6) Consider the regulatory treatment of competing and functionally equivalent services in determining the scope of regulation of services that are subject to the jurisdiction of the public utilities commission;

(7) Not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services; and

(8) Protect the affordability of telephone service for low-income subscribers through the continuation of lifeline assistance programs.

(B) The public utilities commission shall consider the policy set forth in this section in carrying out sections 4927.03 and 4927.04 of the Revised Code and in reducing or eliminating the regulation of telephone companies under those sections as to any public telecommunications service.

## **4927.03 Exemption orders**

(A)(1) The public utilities commission, upon its own initiative or the application of a telephone company or companies, after notice, after affording the public and any affected telephone company a period for comment, and after a hearing if it considers one necessary, may, by order, exempt any such telephone company or companies, as to any public telecommunications service, including basic local exchange service, from any provision of Chapter 4905. or 4909., or sections 4931.01 to 4931.35 of the Revised Code

or any rule or order adopted or issued under those provisions, or establish alternative regulatory requirements to apply to such public telecommunications service and company or companies; provided the commission finds that any such measure is in the public interest and either of the following conditions exists:

(a) The telephone company or companies are subject to competition with respect to such public telecommunications service;

(b) The customers of such public telecommunications service have reasonably available alternatives.

(2) In determining whether the conditions in division (A)(1)(a) or (b) of this section exist, factors the commission shall consider include, but are not limited to:

(a) The number and size of alternative providers of services;

(b) The extent to which services are available from alternative providers in the relevant market;

(c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions;

(d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(3) To authorize an exemption or establish alternative regulatory requirements under division (A)(1) of this section with respect to basic local exchange service, the commission additionally shall find that there are no barriers to entry. Further, as to an exemption with respect to basic local exchange service, the commission shall not exempt a telephone company from sections 4905.20, 4905.21, 4905.22, 4905.231, 4905.24, 4905.241, 4905.242, 4905.243, 4905.244, 4905.25, 4905.26, 4905.30, 4905.32, 4905.33, 4905.35, and 4905.381 of the Revised Code.

(B) In carrying out this section, the public utilities commission may prescribe different classifications, procedures, terms, or conditions for different telephone companies and for the public telecommunications services they provide, provided they are reasonable and do not confer any undue economic, competitive, or market advantage or preference upon any telephone company.

(C) The public utilities commission has jurisdiction over every telephone company providing a public telecommunications service that has received an exemption or for which alternative regulatory requirements have been established pursuant to this section. As to any such company, the commission, after notice and hearing, may abrogate or

modify any order so granting an exemption or establishing alternative requirements if it determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest. No such abrogation or modification shall be made more than five years after the date an order granting an exemption or establishing alternative requirements under this section was entered upon the commission's journal, unless the affected telephone company or companies consent.

(D) The public utilities commission shall adopt such rules as it finds necessary to carry out this section. It shall adopt rules initially implementing the amendment of this section by H.B. No. 218 of the 126th general assembly within one hundred twenty days after the effective date of the amendment. In adopting those rules, the commission shall consider the establishment of elective alternative regulation specific to a telephone company that is an incumbent local exchange carrier as defined in 47 U.S.C. 251(h) having fewer than fifty thousand access lines.

#### **4901:1-4-01 Definitions**

As used within this chapter, these terms denote the following:

(A) "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of these rules, the term "own" means to own an equity interest (or the equivalent thereof) of more than ten per cent.

(B) "Alternative provider" means a provider of competing service(s) to the basic local exchange service offering(s), regardless of the technology and facilities used in the delivery of the services (wireline, wireless, cable, broadband, etc.).

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

- (1) Local dial tone service.
- (2) Touch tone dialing service.
- (3) Access to and usage of 9-1-1 services, where such services are available.
- (4) Access to operator services and directory assistance.
- (5) Provision of a telephone directory and listing in that directory.

(6) Per call, caller identification blocking services.

(7) Access to telecommunications relay service.

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

(D) “Commission” means the public utilities commission of Ohio.

(E) “Competitive local exchange carrier (CLEC)” means any facilities-based and nonfacilities-based local exchange carrier that was not an incumbent local exchange carrier on the date of the enactment of the Telecommunications Act of 1996 (1996 Act) or is not an entity that, on or after such date of enactment, became a successor, assign, or affiliate of an incumbent local exchange carrier.

(F) “Elective alternative regulation plan (EARP)” means a plan adopted in case number 00-1532-TP-COI under which an incumbent local exchange carrier receives earnings-free regulation with greater pricing flexibility for services other than BLES in exchange for specific commitments.

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

(H) “Facilities-based competitive local exchange carrier” means any local exchange carrier that uses facilities it owns, operates, manages or controls to provide service(s) subject to the commission evaluation; and that was not an incumbent local exchange carrier in that exchange on the date of the enactment of the 1996 Act. Such carrier may partially or totally own, operate, manage or control such facilities. Carriers not included in this classification are carriers providing service(s) solely by resale of the incumbent local exchange carrier’s local exchange services.

(I) “Incumbent local exchange carrier (ILEC)” means with respect to any area, any facilities-based local exchange carrier that: (a) on the date of the enactment of the 1996 Act, provided BLES in such area; and (b) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R. 69.601(b), as effective on May 1, 2006; or (ii) is a person or entity that, on or after such date of enactment, became a successor or assignee of a member described in clause.

(J) “Large ILEC” means any ILEC serving fifty thousand or more access lines within Ohio.

(K) “Long-run service incremental cost (LRSIC)” represents the forward-looking economic cost for a new or existing product that is equal to the per unit cost of increasing the volume of production from zero to a specified level, while holding all other product and service volumes constant. LRSIC does not include any allocation of forward-looking common overhead costs. Forward-looking common overhead costs are costs efficiently incurred for the benefit of a firm as a whole and are not avoided if individual services or categories of services are discontinued. Further, forward-looking joint costs, which are the forward-looking costs of resources necessary to provide a group or family of services shall be added to or included in the LRSIC of the products or services.

(L) “Small ILEC” means any ILEC serving less than fifty thousand access lines within Ohio.

(M) “Telephone exchange area” means a geographical service area established by an ILEC and approved by the commission, which usually embraces a city, town, or village and a designated surrounding or adjacent area. There are currently seven hundred thirty-eight exchanges in the state.

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

(O) “Tier two” services include all regulated telecommunications services that do not fall in tier one.

#### **4901:1-4-02 EARP general provisions**

(A) The alternative regulation plan set forth below is available to any ILEC that desires to take advantage of the retail services flexibility for telecommunication services, other than BLES as defined in section 4927.01 of the Revised Code, set forth in the rules for competitive telephone companies but that is not interested in pursuing an individual company-designed application for alternative regulation pursuant to case number 92-1149-TP-COI.

(B) Adoption of the EARP by an ILEC enables the ILEC to operate under the retail service requirements developed for competitive telephone companies.

(C) This EARP does not limit an ILEC's ability to propose a company-specific plan under the existing alternative regulation guidelines set forth in case number 92-1149-TP-COI, which could also qualify the company for the proposed retail service rules.

(D) The retail service rules established for competitive telephone companies is only an option for an ILEC if the ILEC adopts a qualifying alternative regulation plan.

(E) Although not favored, the commission may upon its own motion, or for good cause shown, waive any requirement, standard, or rule set forth in this chapter.

#### **4901:1-4-03 Term of the plan**

(A) An ILEC can opt into this EARP at anytime by making the appropriate filing with the commission. An appropriate filing is one that includes:

(1) A completed application form, as may be modified from time-to-time by the commission.

(2) An application proposing to cap BLES rates at existing levels as an alternative to rate base/rate-of-return regulation, pursuant to section 4927.04 of the Revised Code, and to price all other telecommunication services pursuant to the provisions of paragraph (C) of rule 4901:1-4-06 of the Administrative Code and section 4927.03 of the Revised Code.

(3) All necessary tariff modifications to implement EARP, to be prefiled with the commission's staff thirty days before docketing the application.

(4) A plan as to how the ILEC will meet all of the commitments set forth in rule 4901:1-4-06 of the Administrative Code.

(B) An ILEC shall deliver one copy of its application to the office of the Ohio consumers' counsel at the time the ILEC files the application with the commission.

(C) An ILEC electing alternative regulation pursuant to this chapter agrees to cap its BLES rates for the term of the plan. Accordingly, the commission waives the requirement to file the schedules set forth in divisions (A) to (D) of section 4909.18 of the Revised Code.

(D) Any person may file a request for hearing on the application within twenty days. Absent extraordinary circumstances established through clear and convincing evidence that reasonable grounds for a hearing exist, a hearing will not be held. Unless otherwise ordered, a hearing request not ruled upon by the commission will be automatically denied on the forty-sixth day after the ILEC application was filed.

(E) The ILEC's application shall be automatically approved on the forty-sixth day, unless otherwise suspended by the commission. In all cases where reasonable grounds for hearing are found and/or a suspension of the approval process is granted, the commission will render a decision on the application within one hundred eighty days of filing.

(F) There is no predetermined termination date for the EARP absent a revocation proceeding outlined in paragraph (H) of this rule.

(G) Once the ILEC has met the commitments set forth in rule 4901:1-4-06 of the Administrative Code, the company may continue under its EARP, terminate the alternative regulation plan and return to traditional rate-of-return regulation, or propose a company-specific alternative regulation plan.

(H) If the commission believes that the ILEC has failed to comply with the terms of the plan, the commission shall give the ILEC notice, including a basis, of such belief and a reasonable period of time to come into compliance. The commission shall not revoke any EARP, unless the commission determines, after further notice to the ILEC and hearing, that the ILEC in fact has failed to materially comply with the terms of the plan and in fact has failed to come into compliance within such reasonable period of time. Prior to any such ruling to revoke any order approving the plan, the commission shall take into consideration consequences of such action on the ILEC as well as the impact on its customers.

(I) In order to terminate or withdraw from an EARP, an ILEC must file a notice with the commission which sets forth the reasons for the withdrawal and informs the commission whether the ILEC is proposing to return to traditional regulation or will be filing a company-specific alternative regulation plan. Such notice shall also be served upon the office of the Ohio consumers' counsel. A notice of withdrawal will not be approved until another regulatory framework is adopted by the commission. The commission shall order such procedures as it deems necessary in its consideration of the request to withdraw.

(J) An ILEC choosing to return to rate-of-return regulation is required to bring its rates and services into compliance with the appropriate regulatory framework for all regulated services. All existing rules, guidelines, and orders that are available for ILECs today, such as case numbers 84-944-TP-COI, 86-1144-TP-COI, 89-564-TP-COI, and 92-1149-TP-COI, will still remain. The rates in effect under elective alternative regulation shall remain in effect until otherwise modified by the ILEC with the commission's approval. An ILEC returning to rate-of-return regulation bears the total risk of recovery of commitment investments during the period it was under alternative regulation.

#### **4901:1-4-04 Applicability of other rules and regulations**

To the extent they do not conflict with the provisions set forth herein and absent a waiver, all commission requirements and policies will apply to the operations of every ILEC adopting elective alternative regulation. Examples of such requirements and policies include, but are not limited to, the minimum telephone service standards (MTSS) codified at Chapter 4901:1-5 of the Administrative Code, lifeline services such as service connection assistance (case numbers 89-45-TP-UNC and 91-564-TP-UNC), discounts for persons with communication disabilities (case number 87-206-TP-COI), blocking of 976 services (case number 86-1044-TP-COI), disconnection of local service rules (case number 96-1175-TP-ORD), 9-1-1 service (case number 86-911-TP-COI), privacy and number disclosure requirements (case number 93-540-TP-COI), alternative operator service provisions (case number 88-560-TP-COI), provisions involving customer-owned, coin-operated telephones (case number 88-452-TP-COI), local competition carrier requirements (case numbers 95-845-TP-COI and 99-998-TP-COI), and carrier access charge policies and orders.

#### **4901:1-4-05 Accounting standards**

Accounting records are required to be maintained in accordance with the uniform system of accounts for local telephone operations by all ILECs.

#### **4901:1-4-06 Alternative regulation commitments**

##### **(A) Advanced services**

(1) Advanced telecommunications services capability is the availability of high-speed, full broadband telecommunications that enables a customer to originate and receive high-quality data, graphics, and video using any technology (e.g., xDSL, cable, fiber optic, fixed wireless, satellite, or other system) at a minimum rate of two hundred kilobits per second in one direction.

(2) An ILEC electing this alternative regulation plan must commit to provide the following:

(a) High density central offices: No later than twelve months from the effective date of the alternative regulation plan, an ILEC must provide advanced telecommunications service capability from all class five central offices (CO) in its traditional service territories which serve census tracts with a population density of five hundred or more people per square mile as defined by the 2000 census.

(i) No later than twelve months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer

demand within sixty days to any customer within twelve thousand feet from a high density CO.

(ii) No later than twenty-four months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within eighteen thousand feet from a high density CO.

(b) County seat central offices: For counties that do not meet the population density criterion described in paragraph (A)(2)(a) of this rule, an ILEC must provide advanced telecommunications service capability from all class five COs in its traditional service territories that are within the county seat no later than twelve months from the effective date of the alternative regulation plan.

(i) No later than twelve months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within twelve thousand feet from a county seat CO.

(ii) No later than twenty-four months from the effective date of the alternative regulation plan, an ILEC must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within eighteen thousand feet from a county seat CO.

(B) Lifeline assistance

(1) The ILEC must implement a lifeline program that provides eligible residential customers with the maximum contribution of federally available assistance. Eligible lifeline service consists of flat-rate monthly access line service with touch-tone service.

(a) Credits: The ILEC shall credit one hundred per cent of all nonrecurring service order charges for commencing service and a monthly amount that will ensure the maximum federal matching contribution.

(b) Other benefits: Lifeline customers shall receive a waiver of the local exchange service establishment deposit requirements, free blocking of toll and 900/976 dialing patterns, an option to purchase call waiting and an option to purchase other features for medical and/or safety reasons. Requests to purchase vertical features must be signed by the customer certifying that the customer has a legitimate need, either for medical or safety reasons, for the optional feature(s) requested.

(c) Restrictions: The discount will apply to only one access line per household. Optional features, other than call waiting, are prohibited unless the phone company receives a

signed statement from the customer self-certifying that the feature is necessary for medical and/or safety reasons. Existing lifeline customers that have optional features prior to the adoption of this plan will be grandfathered into the lifeline program so long as the customer makes no changes whatsoever to their existing local exchange service. Telephone companies are prohibited from marketing vertical services to existing or new lifeline customers.

(2) Lifeline assistance eligibility shall include:

(a) Home energy assistance program (LIHEAP, HEAP, and E-HEAP).

(b) Ohio energy credit program (OECF).

(c) Food stamps.

(d) Supplemental security income-blind and disabled (SSDI).

(e) Supplemental security income-aged (SSI).

(f) General assistance (including disability assistance [DA]).

(g) Medical assistance (medicaid), including any state program that might supplant medicaid.

(h) Federal public housing/section eight.

(i) Ohio works first (formerly AFDC).

(j) National school lunch's free lunch program 42 U.S.C. 1751 to 1769h, as effective on May 1, 2006.

(k) Household income at or below one hundred fifty per cent of the poverty level.

(3) Each ILEC participating in the EARP shall offer a lifeline assistance program to eligible customers throughout the traditional service area of that carrier, in conformance with this rule.

(a) ILECs with fifty thousand or more access lines shall automatically enroll customers into lifeline assistance who participate in a qualifying program. Additionally, such companies must also enroll customers who participate in a qualifying program by using on-line company to agency verification or self-certification.

(b) ILECs with less than fifty thousand access lines may use one or any combination of automatic enrollment, on-line company to agency verification and/or self-certification to enroll customers into lifeline assistance who participate in a qualifying program.

(c) All ILECs must verify customer eligibility consistent with the federal communication commission's requirements in 47 C.F.R. 54, as effective on May 1, 2006, to enroll customers into lifeline assistance who qualify through household income-based requirements.

(4) At no time will the monthly access line discounts cause the local service rates to be less than zero.

(5) Lifeline assistance customers with past due bills for regulated local service charges will be offered special payment arrangements with the initial payment not to exceed twenty-five dollars before service is installed, with the balance for regulated local charges to be paid over six equal monthly payments. Lifeline assistance customers with past due bills for toll service charges will be required to have toll restricted service until such past due toll service charges have been paid or until the customer establishes service with a subsequent toll provider pursuant to the minimum telephone service standards.

(6) Staff will work with the appropriate state agencies, which administer qualifying programs for lifeline assistance, and the ILECs to negotiate and acquire on-line access to the agencies' electronic databases for the purpose of accessing the information necessary to verify a customer's participation in an eligible program, and data necessary to automatically enroll customers into the lifeline program. On-line verification and automatic enrollment will be in place within six months after the effective date of a company's alternative regulation plan.

(7) An ILEC is permitted to perform a verification audit of a customer already on lifeline assistance service.

(8) All lifeline program activities must be coordinated through an advisory board composed of commission staff, the office of the Ohio consumers' counsel, consumer groups representing low-income constituents, and the company. Commission staff will work with the advisory board to reach consensus. However, where consensus is not possible, the commission's staff shall make the final determination. Advisory board decisions on how the program is implemented and the lifeline promotional plan are subject to commission review. Companies with less than fifty thousand access lines may join with other such companies to form one advisory board.

(9) The ILEC will establish an annual marketing budget for promoting lifeline and performing outreach using ten cents per access line multiplied by the number of residential access lines the company serves. The ILEC shall work with the advisory board

to reach a consensus, where possible, regarding how the marketing budget funds will be spent. The marketing budget funds shall only be spent for the promotion and marketing of lifeline service and not for the administrative costs of implementing and operating the lifeline program.

(C) Retail rate commitments

(1) An ILEC's offering of in-territory, BLES shall include flat-rate residential calling.

(2) Any measured-rate or optional extended area service plans that are being provided to customers on the effective date of the alternative regulation plan shall continue to be available to customers unless the commission subsequently approves changes to these plans.

(3) Tier one rate caps

(a) Core service rate caps

(i) Tier one core services as used in these rules shall include BLES as defined in section 4927.01 of the Revised Code, and basic caller ID only.

(ii) An ILEC adopting alternative regulation pursuant to this chapter, shall cap the in-territory rates for tier one core service at the existing rates for so long as the company remains under the EARP. The electing ILEC's existing rates shall represent the maximum or "ceiling" levels, below which the ILEC may lower or raise rates upon making the appropriate filing with the commission.

(iii) The electing ILEC may not price below the LRSIC of each service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(b) Noncore service rate caps

(i) Noncore tier one services shall include:

(a) Second and third local exchange service access lines.

(b) Call waiting.

(c) Call trace (\*57).

(d) Centrex access lines.

(e) Private branch exchange (PBX) trunks.

(f) Per line number identification blocking.

(g) Nonpublished number service.

(h) N11 access and usage, unless exempted.

(ii) An electing ILEC shall cap the rates for all in-territory, noncore, tier one services at existing rates for twenty-four months from the effective date of the alternative regulation plan.

(iii) During those twenty-four months, the electing ILEC may lower or raise rates below the cap, upon making the appropriate filing with the commission.

(iv) The electing ILEC may not price below the LRSIC of each service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(v) After twenty-four months, upward pricing flexibility for a second local exchange access service line and call waiting shall be limited to no more than a ten per cent increase in price per year for each service, up to a maximum cap for the life of the plan that is double the initial rate for each service.

(vi) After twenty-four months, upward pricing flexibility for all other tier one, noncore services shall be limited to a cap that is double the initial rate for the life of the plan.

#### (4) Tier two services

(a) Tier two services include all regulated, public telecommunication services that do not fall on tier one.

(b) Tier two service rates are not subject to any rate cap and may be priced at market-based rates.

(c) The rate for any tier two service must recover the LRSIC associated with the service plus a common cost allocation. The ILEC may provide a common cost study to the commission's staff to justify the common cost allocation or the ILEC may use a default allocation of ten per cent for common costs.

(5) Nothing herein prohibits an electing ILEC from seeking, through an appropriate filing with the commission, the flexibility to discount tier one service rates, on an exchange or on a wire center basis when an exchange has more than one wire center, provided the

company demonstrates that the discount is necessary to meet competition and provided the discount is uniformly available to all tier one service customers within the designated exchange(s) or wire center(s).

(6) Notice to customers of any changes in rates must comply with the notice requirements established in the rules for competitive telephone companies.

#### **4901:1-4-07 Elective alternative regulation provisions specific to small ILECs**

(A) A small ILEC adopting alternative regulation pursuant to this chapter shall be subject to the following provisions:

(1) **Advanced services:** A small ILEC electing this alternative regulation plan must commit to providing advanced telecommunications service capability no later than twelve months from the effective date of the alternative regulation plan from all class five central offices (COs) in its traditional service territory or to providing such capability through an affiliate provider. A small ILEC electing this alternative regulation plan must also commit to the following:

(a) No later than twelve months from the effective date of the alternative regulation plan, a small ILEC or an affiliate provider must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within twelve thousand feet from a CO.

(b) No later than twenty-four months from the effective date of the alternative regulation plan, a small ILEC or an affiliate provider must deploy broadband, advanced telecommunications services upon customer demand within sixty days to any customer within eighteen thousand feet from a CO.

(2) **Lifeline assistance:** In lieu of paragraphs (B)(8) and (B)(9) of rule 4901:1-4-06 of the Administrative Code, all lifeline program activities for small ILECs, including how the program is implemented and outreach efforts, shall be subject to commission review and coordinated with commission staff, who will consult with the office of the Ohio consumers' counsel. Lifeline program activities for small ILECs shall comply with paragraph (B) of rule 4901:1-4-06 of the Administrative Code, in all other respects.

(3) **Retail rate commitments:** Notwithstanding paragraph (C)(3) of rule 4901:1-4-06 of the Administrative Code, a small ILEC may petition the commission for an adjustment to tier one rates during the term of the plan, if a mandated federal or state legislative or regulatory action significantly impairs the company's ability to maintain the availability of adequate tier one services to its customers. Requests for such an adjustment will be governed by the alternative ratemaking process specified in case number 89-564-TP-COI for increases in BLES rates. Pending a commission decision on the request of the affected

small ILEC, the alternative regulation plan of the affected small ILEC shall remain in effect for tier two services. An affected small ILEC also has the right to terminate its alternative regulation plan and return to rate-of-return regulation or propose a company-specific alternative regulation plan under paragraph (G) of rule 4901:1-4-03 of the Administrative Code.

(B) To the extent that the specific provisions for small ILECs contained in paragraph (A) of this rule conflict with other elective alternative regulation provisions in this chapter, these provisions control. In all other respects, a small ILEC shall be subject to the elective alternative regulation rules contained in this chapter.

#### **4901:1-4-08 Eligibility for alternative regulation of BLES and other tier one services**

(A) Any ILEC with an approved qualifying EARP set forth in rules 4901:1-4-01 to 4901:1-4-07 of the Administrative Code, may request, pursuant to section 4927.03 of the Revised Code, alternative regulation of BLES and other tier one services.

(B) An ILEC is not eligible to apply for alternative regulation of BLES and other tier one services until it has fully complied with the advanced services and lifeline commitments set forth in paragraphs (A) and (B) of rule 4901:1-4-06 of the Administrative Code for large ILECs and set forth in rule 4901:1-4-07 of the Administrative Code for small ILECs. An ILEC may apply for EARP and alternative regulation for BLES and other tier one services, contemporaneously, if the applicant can demonstrate that it fully meets the applicable EARP commitments on the day of filing of both applications.

#### **4901:1-4-09 BLES filing requirements and process for application**

(A) An application and all required exhibits shall be made in the form provided by the commission.

(B) Exhibits to an application

(1) An affidavit from an officer of the ILEC verifying that the applicant fully complies with the elective alternative regulation commitments as required by paragraphs (A) and (B) of rule 4901:1-4-06 of the Administrative Code for large ILECs and as required by rule 4901:1-4-07 of the Administrative Code for small ILECs.

(2) An identification of the telephone exchange area(s) for which the ILEC seeks alternative regulation for BLES and other tier one services and the competitive market test proposed by the applicant for each telephone exchange area.

(3) Supporting information and detailed analysis demonstrating that the applicant meets, on a telephone exchange area basis, at least one of the competitive market tests, as set

forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code. This information should be contained within an affidavit filed by an officer of the ILEC attesting to the veracity of the data upon which the application is premised.

(4) Any proposed tariff modifications necessary to implement the pricing flexibility rules set forth in paragraph (A) of rule 4901:1-4-11 of the Administrative Code.

(5) Copy of proposed legal notice notifying the public of the filing of the application and stating that objections can be filed with the commission consistent with paragraph (F) of this rule. The public notice should occur within seven days of the filing of the application and should be printed in the legal notice section of a newspaper of general circulation in each county corresponding to the exchanges for which BLES alternative regulation is being requested. The requesting ILEC should confer with the commission staff regarding the content of the legal notice prior to commencing with the publication of the public notice.

(C) The application shall be designated by the commission's docketing division using the case purpose code "BLS". On the same day that the ILEC files its complete application with the commission, the ILEC shall deliver one copy of its application to the office of the Ohio consumers' counsel.

(D) All persons seeking intervention in order to be considered as a party in the proceeding must file the appropriate motion to intervene within fourteen calendar days of the filing of the ILEC's application.

(E) Confidential information filed by the ILEC will be eligible for proprietary treatment in accordance with rule 4901-1-24 of the Administrative Code. Parties shall be afforded access to all confidential information and supporting data addressed within an application by entering into a protective agreement with the ILEC. The ILEC has the duty to negotiate such agreements in good faith with the parties in a timely manner and the commission will decide any issues that the parties are unable to resolve regarding the protective agreement.

(F) Any person or party who can show good cause why such application should not be granted must file with the commission a written statement detailing the reasons within forty-five calendar days after the application is docketed.

(G) With respect to the four tests identified in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, an ILEC's application shall be approved automatically and become effective on the one hundred twenty-first day after the initial filing, unless suspended by the commission, the legal director, or an attorney examiner. A suspension may be granted at any time if deemed appropriate. A hearing will not be held absent extraordinary circumstances established through clear and convincing evidence, satisfying the

commission, that a hearing is needed. Where the commission determines a hearing is necessary and/or a suspension is ordered, the commission will render a decision on the application within two hundred seventy days of filing.

(H) An application containing an alternative competitive market test (i.e., a test not found in paragraphs (C)(1) to (C)(4) of rule 4901:1-4-10 of the Administrative Code) will not be subject to the automatic time frames set forth in paragraph (G) of this rule. The commission will establish the appropriate process and time frames for consideration of such application after reviewing each relevant application.

(I) All parties shall electronically serve their discovery requests. All discovery responses are to be electronically served within ten days of being initially served with the discovery request.

(J) The commission, legal director, or attorney examiner may modify the time frames stated herein based upon a material modification filed subsequent to the initial application.

#### **4901:1-4-10 Competitive market tests**

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

(B) For any telephone exchange area(s) in which the ILEC is not granted alternative regulation for BLES and other tier one services, the ILEC's BLES and other tier one services remain subject to all the requirements of EARP, including the pricing requirements pursuant to paragraph (C) of rule 4901:1-4-06 of the Administrative Code. For any telephone exchange area(s) in which the ILEC is granted alternative regulation for BLES and other tier one services, pricing flexibility for the ILEC's BLES and other tier one services will not be subject to paragraph (C)(3) of rule 4901:1-4-06 of the Administrative Code. All of the remaining requirements of EARP will continue to apply to the ILEC's retail service offerings.

(C) If the applicant can demonstrate that at least one of the following competitive market tests is satisfied in a telephone exchange area, the applicant will be deemed to have met the statutory criteria found in division (A) of section 4927.03 of the Revised Code for BLES and other tier one services in that telephone exchange area. These competitive

market tests do not preclude an ILEC from proposing to demonstrate the statutory criteria are satisfied through an alternative competitive market test.

(1) An applicant must demonstrate in each requested telephone exchange area that at least twenty-five per cent of total residential access lines are provided by unaffiliated CLECs, and at least twenty per cent of total company access lines have been lost since 1996 as reflected in the applicant's annual report filed with the commission for 1996.

(2) An applicant must demonstrate in each requested telephone exchange area that at least twenty per cent of total residential access lines are provided by unaffiliated CLECs, and the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers.

(3) An applicant must demonstrate in each requested telephone exchange area that at least fifteen per cent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five alternative providers serving the residential market.

(4) An applicant must demonstrate that in each requested telephone exchange area that at least fifteen per cent of total residential access lines have been lost since 2002 as reflected in the applicant's annual report filed with the commission in 2003, reflecting data for 2002; and the presence of at least five unaffiliated facilities-based alternative providers serving the residential market.

(D) For purposes of demonstrating that a competitive market test is satisfied under this rule, the applicant may, in its competitive market test, count as a CLEC or an alternative provider, any affiliate of an ILEC other than the applicant, serving the residential market in the requested telephone exchange areas.

#### **4901:1-4-11 Pricing of BLES and other tier one services**

(A) In each telephone exchange area where an ILEC meets at least one of the competitive market tests set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, the ILEC will be granted pricing flexibility, as set forth below, for tier one core and noncore services in lieu of the EARP pricing rules set forth in paragraph (C)(3) of rule 4901:1-4-06 of the Administrative Code. An ILEC will be granted, in those telephone exchange areas, tier two pricing flexibility for all tier one noncore services. BLES and basic caller ID will also be subject to pricing flexibility in those telephone exchange areas. Subject to the pricing flexibility in this rule, the rate for BLES and basic caller ID may be lowered or raised upon making the appropriate tier two filing with the commission. For the twelve months following approval of alternative regulation for BLES in the relevant telephone exchange areas, the ILEC's initial upward pricing

flexibility for BLES and basic caller ID shall be limited to an annual increase of no more than one dollar twenty-five cents above the BLES rate at the time that the ILEC is granted BLES alternative regulation and an annual increase of no more than fifty cents above the basic caller ID rate in existence at the time that the ILEC is granted BLES alternative regulation. In subsequent years, the ILEC's upward pricing flexibility for BLES and basic caller ID shall be limited to an annual increase of no more than one dollar twenty-five cents above the BLES rate in effect at the end of the preceding twelve months and an annual increase of no more than fifty cents above the basic caller ID rate in effect at the end of the preceding twelve months. No banking of increases will be allowed.

(B) Rates for intrastate carrier access, 9-1-1 service, pole attachments and conduit occupancy, pay telephone services, toll presubscription, and telecommunications relay service are not affected by this rule and shall continue to be subject to the applicable laws, rules and orders of the commission and the federal communications commission. In addition, the commission may, in the future, add additional regulated new services to this list of exempted services for which the commission determines that a specific public policy interest exists.

(C) In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, an ILEC is not permitted to price its tier one retail service(s) below the LRSIC of each service plus a common cost allocation. A telephone company may allocate common costs using a fixed allocator of ten per cent. In the event the ILEC chooses to use a different common cost allocator, the ILEC will have the burden of establishing the reasonableness of the chosen common cost allocator. Upon request of the commission staff, the ILEC shall provide cost support to the staff.

(D) In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, it must continue to offer to qualifying lifeline customers BLES, including any nonrecurring charges for service establishment, service connection and service change orders associated with establishing a single BLES access line, at the rates in existence at the time the ILEC files an application under this chapter. If rates for a lifeline customer's BLES increase pursuant to paragraph (A) of this rule, the lifeline discount shall be adjusted to ensure there is no net rate increase to qualifying lifeline customers. The commission reserves the right to modify this restriction based on changes made by the federal communications commission to the lifeline or universal service funding programs.

(E) In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, the ILEC shall utilize the processes set forth in rule 4901:1-6-21 of the Administrative Code for the filing of all subsequent tariff applications for BLES and other tier one services. In those telephone exchange areas where an ILEC is granted pricing flexibility for BLES and other tier one services, the ILEC shall provide

prior actual customer notice to the affected customers by bill insert, bill message, direct mail, or, if the customer consents, electronic mail, a minimum of thirty days prior to any increase in rates. The application, when filed with the commission, must include a copy of the actual notice that was sent to affected customers and an affidavit verifying that such notice was given to customers. The customer notice shall comply with the customer notice requirements set forth in paragraphs (B) and (C) of rule 4901:1-6-17 of the Administrative Code. All of the remaining rules for ILECs operating pursuant to EARP found in Chapters 4901:1-4 and 4901:1-6 of the Administrative Code will continue to apply.

**4901:1-4-12 Term, revocation and modification of alternative regulation of BLES and other tier one services**

(A) The EARP rules set forth in paragraphs (F), (H), (I) and (J) of rule 4901:1-4-03 of the Administrative Code also apply to the term, revocation and withdrawal of the plan for alternative regulation of BLES and other tier one services.

(B) If the commission has reason to believe, based on a change in the telecommunications market in a telephone exchange area(s) or based on the motion of an interested stakeholder setting forth reasonable grounds, that the market in a telephone exchange area(s) has changed such that it may no longer meet one of the competitive market tests set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, the commission shall notice the ILEC and require it to show cause as to why alternative regulation for BLES and other tier one services in the involved telephone exchange area(s) should not be revoked. Based on that review, the commission will take whatever action it deems necessary, if any, including initiating an investigation or scheduling a hearing, to consider revocation of the alternative regulation for BLES and other tier one services in a telephone exchange area(s). Consistent with division (C) of section 4927.03 of the Revised Code, the commission may modify or revoke any order granting the ILEC alternative regulation for BLES and other tier one services in a telephone exchange area(s). Pending any review of alternative regulation of BLES, the ILEC will maintain the pricing flexibility previously granted until or unless otherwise modified by the commission.