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I. STATEMENT OF THE FACTS AND THE CASE

A. Summary of Argument

While this is the first case before this Court addressing the Commission's implementation of the H.B. 218 amendments to Revised Code Chapter 4927, it does not present any novel issues that cannot be resolved on fundamental principles of administrative law. The General Assembly enacted a statute empowering the Commission to authorize alternative regulation for basic local exchange service ("BLES"). The statute directed the Commission to develop rules for that purpose, which it did in Case 05-1305.² The rules developed by the Commission created a set of four objective "safe harbor" provisions for incumbent telephone companies to apply for BLES alternative regulation. If the applicant met the objective criteria in one of those rules, the applicant would be deemed to have satisfied all of the statutory criteria. An applicant could also propose a company-specific test, but would have to justify that the test met the requirements of the statute. CBT filed an application that fully complied with the Commission's competitive test 4. The Commission found that CBT's application complied with its rules and approved it.

This appeal is not about misapplication of the law or a real dispute of fact. This case is about a difference of opinion between the Commission and the Office of the Ohio Consumers' Counsel ("OCC") over BLES alternative regulation policy in Ohio. The OCC does not like the policy choices the General Assembly and the Commission have made. But, the General Assembly empowered the Commission, not the OCC, to write the rules and apply them. This Court should defer to the Commission's judgment and affirm both its rules and its decision on CBT's individual application.

² *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Case No. 05-1305-TP-ORD ("Case 05-1305").

B. Standard of Review

The OCC contends that the standard of review in this case is de novo. While correctly citing several decisions finding that the Court reviews questions of law de novo, the OCC has incorrectly characterized many of the issues in this case as questions of law. Most of what the Commission did below (in both the rulemaking proceeding and in CBT's individual BLES case) involved policy making and fact finding. In Case 05-1305, the Commission conducted a notice and comment proceeding in which it promulgated rules to implement amendments to Chapter 4927 of the Ohio Revised Code. In Case No. 06-1002-TP-BLS, the Commission applied the BLES alternative regulation rules to the specific facts presented by CBT's application and the supporting evidence. The de novo review standard is not applicable to such policy and fact decisions.

The statutory standard of review of Commission decisions is whether, upon consideration of the record, the order is "unlawful or unreasonable."³ This has different meanings when the issue is one of law, fact or policy. The Court will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.⁴ The appellant bears the burden of demonstrating that the PUCO's decision is against the

³ R.C. 4903.13; *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, at ¶ 50.

⁴ *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, at ¶ 29.

manifest weight of the evidence or is clearly unsupported by the record.⁵ Although the Court has “complete and independent power of review as to all questions of law” in appeals from the Commission,⁶ it may rely on the expertise of a state agency in interpreting a law where “highly specialized issues” are involved and “where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.”⁷

In this case and the related rulemaking proceeding, the Commission: 1) interpreted a new statute where it was given the power by the General Assembly to issue rules to implement the statute; 2) used its expertise and policymaking discretion to consider comments and other evidence from a variety of sources in order to promulgate rules; and 3) made factual findings based on the specific evidence presented by CBT in its individual BLES case and applied the rules to those facts. The Commission had considerable leeway to hear and interpret the evidence and render a decision.

The Commission must be affirmed on all factual findings if the Court concludes that the Commission's findings were not manifestly against the weight of the evidence.⁸ The OCC is, in essence, asking the Court to reweigh the evidence and substitute its judgment for that of the

⁵ *Id.*

⁶ *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469, 678 N.E.2d 922.

⁷ *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370. See also *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 511, 2006-Ohio-3054, at ¶ 12; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853 at ¶ 11; *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 2007-Ohio-1386, at ¶ 9.

⁸ *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.* (1999), 86 Ohio St.3d 53, 58, 711 N.E.2d 670; *Cincinnati v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 523, 528-529, 620 N.E.2d 826.

Commission, an invitation which the Court routinely declines.⁹ Here, the record contains sufficient evidence supporting the Commission's decision. The Court should overrule all of the OCC's propositions of law.

C. Statement of Facts and the Case

1. The Rulemaking Proceeding

In 2005, the General Assembly amended R.C. 4927.03(A) to authorize the Commission to grant alternative regulation of BLES.¹⁰ It directed the Commission to adopt "such rules as it finds necessary to carry out this section."¹¹ In determining whether the conditions required by R.C. 4927.03(A)(1)(a) or (b) existed, the General Assembly directed the Commission to consider the factors found in R.C. 4927.03(A)(2). The ability of the Commission to implement alternative regulation of BLES was not limited to a company specific or company-initiated proceeding. Revised Code 4927.03(A)(1) authorized the Commission to act on its own initiative, after public notice and comment, to establish alternative regulatory requirements to apply to a company or companies. This Court previously upheld the Commission's adoption of generic rules authorizing alternative regulation of all telephone services other than BLES.¹²

The Commission exercised the powers granted to it by R.C. 4927.03(A) and (D) by adopting BLES alternative regulation rules in Case 05-1305. The Commission provided public notice of proposed rules and invited comment by numerous affected parties.¹³ It received

⁹ *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, at ¶ 16.

¹⁰ Am. Sub. H.B. 218, 126th General Assembly.

¹¹ R.C. 4927.03(D).

¹² *Stephens v. Pub. Util. Comm.*, 102 Ohio St.3d 44, 2004-Ohio-1798, 806 N.E.2d 527.

¹³ Case 05-1305, November 4, 2005 Entry.

comments and evidence on each of the factors it was directed to consider in R.C. 4927.03(A)(2). The OCC participated significantly in Case 05-1305.¹⁴ Most of the arguments the OCC advances here were first raised in Case 05-1305 in an effort to shape the Commission's policy on BLES alternative regulation. The Commission accepted some and rejected some of the OCC's ideas in the final BLES alternative regulation rules. However, the OCC has never accepted the Commission's final authority to establish BLES alternative regulation rules and continues to this day to try to author its own rules.

As part of its BLES alternative regulation rules, the Commission created four competitive tests. Compliance with any of those tests is deemed full compliance with the requirements of R.C. 4927.03(A)(1) for that exchange.¹⁵ The rules established in Case 05-1305 were designed to be self-executing. The rules created objective tests and standardized means of demonstrating entitlement to alternative regulation of BLES, thus negating any need to independently establish compliance with the subjective standards in the statute in each case.¹⁶ Competitive test 4, the

¹⁴ The OCC filed joint comments with a group of municipalities and consumer groups on December 6, 2005, which were accompanied by lengthy affidavits of Trevor R. Roycroft, Ph.D., and Douglas S. Williams (excerpts in Appellant's Supp. at 85, 87). The comments and affidavits taken together addressed every conceivable issue raised by the H.B. 218 amendments to R.C. 4927.03. The OCC participated in lengthy reply comments filed by the same group on December 22, 2005, which included additional affidavits by Dr. Roycroft and Mr. Williams (excerpts in Appellant's Supp. at 123, 125). The Commission's March 7, 2006 Opinion and Order (Appellant's Appx. at 440) addressed all of the OCC's comments and explained how it had considered each of the required statutory factors in developing its rules. On April 6, 2006, the OCC filed an Application for Rehearing of the Commission's March 7, 2006 Opinion and Order, with yet another affidavit from Dr. Roycroft. The Commission's May 3, 2006 Entry on Rehearing addressed the OCC's issues again (Appellant's Supp. at 511). There can be no doubt that the Commission considered each of the items identified in R.C. 4927.03(A)(2) in the course of Case 05-1305.

¹⁵ Ohio Adm. Code 4901:1-4-10(C).

¹⁶ In addition to the four pre-established tests, the Commission preserved the right of any ILEC to propose its own competitive test and demonstrate how compliance with that test would satisfy the statutory requirements. Ohio Adm. Code 4901:1-4-10(C). The OCC would discard all of the

one under which CBT applied, is met in an exchange if an ILEC has lost 15% of its residential access lines in that exchange since 2002, and at least five unaffiliated facilities-based alternative providers serving the residential market are present in the exchange.¹⁷

2. CBT's Application

CBT's BLES alternative regulation application demonstrated that it had suffered line losses in excess of 15% in both its Cincinnati and Hamilton exchanges.¹⁸ The application further demonstrated the presence of at least five competitors in each of those exchanges.¹⁹ The application satisfied all of the requirements of competitive test 4.²⁰ The Commission had predetermined that compliance with one of the four competitive tests would be a sufficient demonstration of the elements of R.C. 4927.03(A) to permit alternative regulation of BLES.²¹

The OCC presented no evidence that CBT's line losses did not meet the objective criteria established in the Commission's rules. The OCC presented an affidavit of its witness challenging the premise of the Commission's rules, but not CBT's evidence. The OCC's witness opined that certain types of line losses should not be considered in measuring the 15% loss requirement. However, all of the issues raised by this opinion had already been presented to the

competitive tests and require an ILEC to independently prove that it complies with the statute in each case, an unnecessary and inefficient process.

¹⁷ Ohio Adm. Code 4901:1-4-10(C)(4).

¹⁸ 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, Case No. 06-1002-TP-BLS, Exhibit A (Appellant's Supp. at 11).

¹⁹ *Id.* at 3-12 (Appellant's Supp. at 1-10).

²⁰ November 28, 2006 Order, Case No. 06-1002-TP-BLS, at 17-18, 24-29 (Appellant's Appx. at 74-75, 81-86).

²¹ Ohio Adm. Code 4901:1-4-10(C).

Commission in the rulemaking case and rejected. Thus, his criticisms went to the Commission's policymaking judgment in establishing the rules and not to whether CBT's evidence satisfied the rules. There is no genuine fact dispute whether CBT met the line loss test established by the Commission.

The OCC contested CBT's compliance with the second (five alternative providers) prong of competitive rule 4 by criticizing the quality of the competition presented by the five alternative providers. The OCC argued that they should not count if they do not offer stand-alone BLES. But, nothing in the rules requires that. Again, the OCC's challenge was to the rule, not CBT's evidence. The Commission determined in Case 05-1305 that competitors did not have to offer stand-alone BLES in order to be considered available competitive alternatives. The OCC's criticism of competitive services is that they provide *more* than just BLES. But that does not render those services non-competitive with BLES. The OCC challenges the Commission's policy judgment on that issue, not the quality of CBT's evidence.

With respect to wireless carriers, the OCC complains that wireless service does not include "dial tone" and that there is not an equivalent to E-911 service. These are red herrings. There is no dial tone "sound" when using a wireless phone because the technology works differently. But the purpose of dial tone and the reason it is included in the definition of BLES is not because the particular sound is important, but to express the notion that BLES includes dialing access to the local calling network.²² Wireless phones offer that same functionality, they just do not generate a dial tone sound. The OCC's other major issue, E-911, is not even a

²² See R.C. 4931.40(W), defining "telephone company" as a company "furnishing access and a dial tone to persons within a local calling area for use in originating and receiving voice grade communications over a switched network operated by the provider of the service" and including both wireline and wireless service providers unless otherwise expressly specified.

required feature of BLES. Only basic 911 service is required to be offered with BLES²³ and wireless providers are also required to (and do) provide at least basic 911 service.²⁴ For the OCC to rely on E-911 to distinguish wireless service from BLES is disingenuous because E-911 is not part of the definition of either service.

The OCC criticizes the alternative providers identified by CBT because they offer additional calling features that are not required as part of BLES and long distance service as part of a package price. The OCC complains that rates for these alternative providers are higher than CBT's BLES.²⁵ However, the OCC ignores the evidence submitted by CBT that numerous standalone BLES customers did switch to these alternative providers.²⁶ This evidence showed that the services offered by these alternative providers were competitive with CBT's BLES.

The OCC also argues that service is not available from alternative providers in every conceivable location within the subject exchanges. But the rules do not impose a ubiquitous service requirement. The rules only require that the competitors have a *presence* in an exchange and that they are serving residential customers.²⁷ CBT provided unrefuted evidence that both of these facts were true.²⁸ The OCC does not dispute that each of the competitors identified by CBT is present in the subject exchanges and that each of them was actually providing service to

²³ R.C. 4927.01(A)(1)(c).

²⁴ Section 20.18, Title 47, C.F.R..

²⁵ CBT identified prepaid wireless services that cost less than CBT's BLES, some as low as \$10 per month. See Response of Cincinnati Bell Telephone Company LLC to the Office of the Ohio Consumers' Counsel's Opposition to Its Application for Basic Local Exchange Service Alternative Regulation, filed Oct. 6, 2006, at 45 and Exhibit E thereto.

²⁶ CBT Application, Exh. 3, at 5-8, 12 (Appellant's Supp. at 3-6, 10).

²⁷ Ohio Adm. Code 4901:1-4-10(C).

²⁸ CBT Application, Exh. 3.

residential customers.²⁹ Instead, it challenges the Commission's policy judgment that the availability of these alternative providers was sufficiently widespread to be deemed a competitive check on CBT.

Finally, the OCC contends that there was no evidence that alternative regulation was in the public interest or that there was a lack of barriers to entry. In Case 05-1305, the Commission found that, if its rules for alternative regulation for BLES were satisfied, there was necessarily a lack of barriers to entry and it would be in the public interest to grant alternative regulation of BLES.³⁰ This was one of the reasons for the pre-defined competitive tests, so that satisfaction of the statutory requirements could be reliably determined by objective standards. Thus, in an individual BLES case, the applicant demonstrates a lack of barriers to entry and that alternative regulation is in the public interest by demonstrating the criteria established by the Commission in the rulemaking case.

²⁹ With its comments in Case 05-1305, the OCC presented the Affidavit of Douglas S. Williams, who complained that, if an affiliated wireless provider was permitted to count as one of the five required alternative providers, CBT would automatically qualify for BLES alternative regulation based on wireless carriers alone, because of the *presence* of four national wireless carriers (Cingular, Verizon, Sprint and T-Mobile). Affidavit of Douglas S. Williams, submitted December 6, 2005, at 17, ¶ 26 & fn. 20 (Appellant's Supp. at 89). Thus, in the rulemaking case, the OCC admitted that those wireless carriers had a "presence" in CBT's territory within the meaning of the Commission's rules.

³⁰ March 7, 2006 Opinion and Order, at. 22, 40 (Appellant's Appx. at 461, 479).

II. ARGUMENT

A. **Proposition of Law No. 1: The Public Utilities Commission of Ohio May Grant Alternative Regulation of BLES Pursuant to R.C. 4927.03(A) When It Finds That There Is Competition Or That There Are Alternatives to BLES, Even If The Competitive Alternatives Are Bundled Services.**³¹

The OCC obviously disagrees with how the Commission has implemented BLES alternative regulation, including its decision to make the competitive tests self-executing. But those disagreements are differences of policy with the Commission, not legal issues. The Commission had the legal authority to devise the tests. And there is no question that the General Assembly entrusted the Commission to determine how much weight to afford each of the factors identified in R.C. 4927.03(A)(2). The statute only required the Commission to *consider* those listed matters – which it did. The statute did not specify any particular outcome or threshold criteria that would be necessary to justify alternative regulation. Those details were left for the Commission’s judgment alone.

It is a long-accepted principle of Ohio law that considerable deference should be accorded to an agency’s interpretation of rules the agency is required to administer.³² An administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter.³³ Where a challenge to an agency construction of a statutory provision centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within the authority conferred by the legislative

³¹ The OCC has improperly phrased its Propositions of Law as assignments of errors. S.Ct.Prac.R. VI(2)(B)(4); *Drake v. Buchar* (1966), 5 Ohio St.2d 37, 39, 213 N.E.2d 360, at paragraph 3 of the syllabus. CBT has rephrased the issues raised by the OCC in the required form.

³² See *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151, 155, 438 N.E.2d 120.

³³ *Youngstown Sheet & Tube Co. v. Lindley* (1988), 38 Ohio St.3d 232, 234, 527 N.E.2d 828.

body, the challenge must fail. The responsibility for assessing the wisdom of such a policy choice and resolving the struggle between competing views of the public interest are political questions, not legal ones.

It is axiomatic that if a statute provides the authority for an administrative agency to perform a specified act, but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme.³⁴ A court must give due deference to the agency's reasonable interpretation of the legislative scheme.³⁵ When agencies promulgate and interpret rules to fill these gaps, as they must often do in order to function, "courts * * * must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command."³⁶

While the OCC may disagree with the policy choices made by the Commission in Case 05-1305, it cannot credibly claim that the Commission did not consider all of the issues identified in the statute. The OCC's comments alone addressed each and every one of the statutory factors.³⁷ The Commission's order implementing the rules and its order on rehearing addressed all of the issues raised by the OCC and all other participants in Case 05-1305.³⁸ By

³⁴ See *Swallow v. Indus. Comm.* (1988), 36 Ohio St.3d 55, 57, 521 N.E.2d 778.

³⁵ *Id.* See also, *Northwestern Ohio Building & Construction Trades Council v. Conrad*, 92 Ohio St.3d 282, 2001-Ohio-190, 750 N.E.2d 130, at ¶ 45, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), 467 U.S. 837, 843, 104 S.Ct. 2278, 2782, 81 L.Ed.2d 694.

³⁶ *Swallow* at 57.

³⁷ See December 6, 2005 comments; December 22, 2005 reply comments.

³⁸ March 7, 2006 Opinion and Order (Appellant's Appx. at 440).

definition, the Commission considered each of the required matters, so the OCC has no legal basis for challenging the rules established in Case 05-1305. *How* the Commission chose to implement those considerations in the actual rules it wrote was a policy determination for it alone to make. After considering the required statutory factors in Case 05-1305, the Commission decided to develop clear, objective competitive tests, so that each of the subjective factors would not have to be revisited every time a telephone company filed an application.

The General Assembly entrusted the Commission, based on its longstanding experience with the telecommunications industry, to devise appropriate rules for alternative regulation of BLES. In doing so, the Commission made numerous policy decisions about what type of competition would be accepted and what kind of proof would be required. Obviously, the OCC and its witness do not agree with the Commission's policy choices. But the OCC has presented no proper basis for depriving the Commission of its right to make those policy choices. The OCC and CBT would both have made different policy choices than the Commission did, but the statute gives the Commission that power, not the parties before it, and not this Court.

The OCC's main criticism of the Commission's rules is that they permit the use of competitive bundles to demonstrate competition with BLES.³⁹ The OCC would only allow the use of "standalone BLES" by alternative providers as a competitive choice in determining whether to permit alternative regulation. The OCC cites no law for the proposition that only identical services can serve as competitive choices. The only authority for the OCC's basic proposition is *ipse dixit*.

³⁹ The OCC states that it probably would not have filed this appeal if alternate providers offered standalone BLES. Appellant's Brief at 27 & n. 92.

CBT presented evidence that standalone BLES customers were leaving for alternative providers who were not providing standalone BLES. These customers found the competitors' bundled services to be competitive with CBT's BLES. The real world facts belie the OCC's self-proclaimed assertion that only BLES can compete with BLES. Of course, the statute demands no such limitation. The statute only requires that BLES be subject to competition – it does not say competition from what source. *Any* source of competition is a possibility, so long as the Commission finds it adequate. And the Commission expressly found cable telephony, broadband over power line and wireless were competitive services to be considered in a BLES alternative regulation case.

The OCC continues to advance the groundless argument that the services that are competitive to BLES must be only standalone BLES and not bundled services. The statute says no such thing. In 2001, the Commission allowed alternative regulation of bundles of services that include BLES – but not stand-alone BLES – because that is all the statute allowed at the time. The General Assembly amended R.C. 4927.03 in 2005 to authorize the Commission to apply alternative regulation to BLES also. The General Assembly did not limit the Commission's power to grant alternative regulation to situations of direct competition between standalone BLES and standalone BLES. Nothing in the alternative regulation statutes limits the services the Commission can consider as competitive to BLES. The only condition required by R.C. 4927.03(A)(1) is that either:

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

or

(b) the customers of such public telecommunications service have reasonably available alternatives.⁴⁰

⁴⁰ R.C. 4927.03(A)(2).

The statute authorizes alternative regulation of BLES if “*such public telecommunications service*” (meaning BLES, in this case) is *subject to* competition. It did not limit what services could be deemed competitive to BLES and left that to the Commission to determine. The statute does not require, in any way, shape or form, that the service that competes with BLES or which comprises the “reasonably available alternative” itself *be* BLES. That flaw in the OCC’s logic dooms its argument. Had the General Assembly wished to limit eligible competitive services to only standalone BLES, it could have easily done so. Instead, the General Assembly empowered the Commission to determine which services would be deemed competitive with BLES. That was one of the major issues addressed in Case 05-1305. The OCC has a policy disagreement with the decision the Commission made that is not justiciable.

The Commission did not merely consider competition between ILEC bundles containing BLES and competitors’ bundles. It also considered competition between ILEC BLES and competitors’ bundles.⁴¹ The Commission determined in Case 05-1305 that cable telephony, VoIP and wireless services were sufficiently competitive with BLES and that bundled services also would be considered competitive to BLES. CBT’s evidence of actual customer behavior supported both of those conclusions. CBT provided evidence that many of its standalone BLES customers had switched to competitive services.⁴² The OCC has ignored this point and failed to refute this evidence.

The OCC merely repeats the same policy arguments here that it made in Case 05-1305 and in opposition to CBT’s BLES alternative regulation application, all of which were rejected

⁴¹ March 7, 2006 Opinion and Order at 34 (Appellant’s Appx. at 473).

⁴² Application, Exhibit 3, at 6-7, 12 (Appellant’s Supp. at 4-5, 10).

by the Commission. The Commission determined that cable telephony, wireless and VoIP service were competitive with BLES in Case 05-1305:

Although the products offered by those alternative providers [wireline CLECs, wireless, VoIP and cable telephony providers] may not be exactly the same as the ILECs' BLES offerings, those customers view them as substitutes of the ILECs' BLES. Thus, the alternative providers compete against the ILECs' provision of BLES.⁴³

The Commission was familiar with the features of these services and their capabilities and the shortcomings alleged by the OCC from the various comments and evidence presented in Case 05-1305. The OCC has shown no reason why the alternative providers identified in CBT's application were qualitatively or quantitatively any different from those types of providers the Commission had considered competitive to BLES in the course of the rulemaking. The Commission determined that an alternative provider need not provide service that is identical to BLES for that service to be competitive with BLES because consumers find these services similar enough that they are willing to substitute one for the other. The feature differences between CBT's BLES and the alternative providers' telephone service are insufficient to eliminate them as competitive services. The BLES features that competitors' services may lack are obviously not deemed that important by consumers who choose them.

The Commission determined that the law does not restrict the analysis of competition and reasonably available alternatives "to the competitive products that are *exactly like* BLES."⁴⁴ It found that "customers that leave an ILEC's BLES offering to subscribe to another alternative provider's bundled service offering view such bundled service offerings as a reasonable

⁴³ Opinion and Order at 25 (Appellant's Appx. at 464).

⁴⁴ Case 06-1002, Opinion and Order at 13 (Appellant's Supp. at 70), citing Case 05-1305, Opinion and Order at 25 (Appellant's Supp. at 464) (emphasis added).

alternative service, and a substitute to the ILEC's BLES."⁴⁵ There is no basis for the Court to disturb the Commission's factual findings or its policy conclusions, all of which find support in the record of Case 05-1305.

The Commission came to the same conclusions in CBT's individual case, based on the specific evidence that CBT submitted:

[T]o the extent that CBT is losing BLES customers and the requisite number of alternative providers are present, it is evident that functionally equivalent or substitute services are readily available. The customers CBT loses must find the other providers' rates, terms and conditions to be competitive to what they received from CBT's BLES service. Otherwise, it is reasonable to assume that they would not have switched from CBT's BLES service.⁴⁶

Because customers moved from CBT's stand-alone BLES service to alternative providers' services, the Commission drew the reasonable conclusion that the alternative providers' bundles are competitive to CBT's standalone BLES.

Because standalone BLES is not the only service that the Commission considered to be competitive to BLES, CBT was not required to show that a competitor was providing standalone BLES or that there were no barriers to entry for stand-alone BLES. The Commission's conclusions are in accord with the governing statute and within the discretion granted to it by the General Assembly. There is no legal basis for overturning the Commission's decision.

⁴⁵ *Id.*

⁴⁶ Case 06-1002, Opinion and Order at 14 (Appellant's Supp. at 71).

B. Proposition of Law No. 2: The Public Utilities Commission of Ohio May Grant Alternative Regulation Pursuant to R.C. 4927.03(A) In An Exchange Area Without Finding That Competitive Alternatives Are Available At Every Location in the Exchange.

The OCC criticizes the Commission's acceptance of Time Warner Cable, Current Communications and the four wireless carriers as alternative providers because they do not offer service to every customer location in CBT's Cincinnati or Hamilton exchanges. Nothing in the statute or the Commission's rules requires such ubiquitous coverage. The Commission found that there was a sufficient presence by these competitors to offer meaningful competition to CBT's service. The Commission's decision was a reasonable interpretation of the alternative regulation statute that should not be disturbed:

The Commission rejects OCC's narrow interpretation that the facilities-based alternative provider's service has to be available in the entirety of the market area. The Commission, in selecting an "exchange" as the market where competition for an ILEC's BLES can be evaluated under any of the four predefined competitive market tests, clearly stated that an exchange would: a) exhibit similar market conditions within its boundary; b) provide an objective definition that would allow for evaluation of competition on a reasonable granular level; and c) be practical to administer as ILECs collect and report data at the exchange level in their annual reports that are submitted to the Commission. (05-1305, Opinion and Order at 18-19.) To meet OCC's narrow interpretation of the statutory requirement, the market would need to be defined as small as a "city block," which is clearly without merit and impractical to administer, otherwise such a provision cannot be satisfied. The Commission, being mindful of the market realities, and to ensure that an ILEC would only attain BLES pricing flexibility in markets where it faces competition for BLES or where BLES customers have reasonably available alternatives, reasonably selected an exchange as a market definition. The Commission also rejects OCC's requirement for an ILEC to verify that its competitor makes the service available to 100 percent of the customer base to demonstrate that the alternative provider's service offering is available in the relevant market. We find that such information is likely confidential and available only to the alternative provider, not the ILEC, and, more importantly, that information is not required by either the statute or our rules.⁴⁷

That competitors do not serve 100% of the customers in an exchange does not make CBT's service not "subject to competition." Telephone companies do not price services at a block by

⁴⁷ Opinion and Order at 27-28 (footnote omitted).

block level. When a telephone company is subject to competition in a significant portion of one of its geographic service areas in which it uniformly prices services, even those customers who reside in areas that the competitor does not serve will reap the benefit of price competition in areas where both providers do offer service. Thus, CBT's BLES is "subject to competition" even in parts of an exchange that competitors do not serve directly.

The Commission was justified in relying on wireless carriers' coverage maps to find that wireless service is reasonably available to customers in the Cincinnati and Hamilton exchanges, as this is the same material these carriers use to market their service to retail customers. The fact that wireless carriers issue disclaimers that their service may not work in all locations under all conditions does not diminish the fact that all of the proffered wireless carriers advertise service areas that blanket both of the exchanges at issue. Furthermore, a consumer can, on any given day, walk into a wireless retail store, subscribe to service and have it virtually instantly – hence, it is readily available. The Commission received substantial evidence and commentary in Case 05-1305 about the widespread availability – and popularity – of wireless service. More and more consumers are choosing wireless service as their *only* telephone service. CBT demonstrated that this is actually occurring in the Cincinnati and Hamilton exchanges.

Competitive test 4 only requires that all five alternative providers have a "presence" in the exchange, which CBT demonstrated. The OCC simply disagrees with the Commission on what it means to have a "presence" in the exchange. As the author of the rules, the Commission is the arbiter of what "presence" means. "Presence" does not demand ubiquitous coverage, so the Commission's test need not require any more granularity than an exchange. The Commission rejected broader market definitions, such as a local service area or an MTA, as that might have enabled alternative regulation in an exchange with no competitive presence in that

exchange. Conversely, the Commission rejected the OCC's suggestion that markets be defined more narrowly at the wire center level. The OCC is now effectively trying to impose the smallest possible market area definition by requiring 100% coverage of a particular exchange. There is no statutory basis for requiring ubiquitous coverage, so the policy judgment of the Commission on this issue should be affirmed.

C. Proposition of Law No. 3: The Public Utilities Commission of Ohio is Empowered to Exercise Its Policy Judgment in Promulgating Rules to Implement R.C. 4927.03(A) and Such Rules Must Be Judged In Their Entirety.

The OCC attacks the line loss prong of competitive test 4 as if it, alone, was the basis for allowing alternative regulation of BLES. Satisfying the 15% line loss by itself does not allow an ILEC any relief. Only by coupling the line loss with a showing that there are multiple alternative facilities-based providers actually serving the residential market can an ILEC obtain regulatory relief with respect to BLES. The OCC's Third Proposition of Law ignores that fact.

The Commission thoroughly explained in Case 05-1305 how and why it developed the line loss test. The OCC raised all of the same arguments on rehearing in that case as it does here. The Commission answered them in Case 05-1305 and it answered them in response to the OCC's objections to CBT's application in this case. The Court should also reject the OCC's arguments because the Commission has articulated a rational basis for its rules that is within the scope of the enabling legislation and is supported by the evidence.

Much of the OCC's criticism of the line loss test is that there is no requirement for the applicant to demonstrate where the lost lines went. Nor should there be. As CBT showed, it has no basis to know where customers who cancelled residential access lines went, so there is no basis for requiring it to show that. In any event, for purposes of competitive test 4, it is not important where those lines went. The fact that at least five alternative providers are serving the

residential market is sufficient, in and of itself, to demonstrate that CBT's service is subject to competition, regardless of the number of lines CBT lost. The line loss test actually underestimates the incumbent's loss of market share because it does not account for new line growth that the incumbent never even had in its customer base. Every new cable line used for telephone service or new wireless handset represents a line "lost" by the incumbent company, but it is not even counted towards the 15% threshold if those customers did not take telephone service from the incumbent in 2002.

The OCC's criticism of the line loss test goes to the Commission's decision to adopt the test, not CBT's evidentiary compliance with it. The OCC has presented no reason to dispute the Commission's finding of fact that CBT has lost at least 15% of its residential access lines in the Cincinnati and Hamilton exchanges since 2002. The evidence on that point was undisputed. Having complied with the line loss test (coupled with the showing of the presence of five alternative providers), CBT was entitled to alternative regulation of its BLES in those two exchanges.

The OCC's criticisms of the line loss test standing alone is meaningless because the test is never applied in isolation. The OCC totally ignores the simultaneous requirement in competitive test 4 that there be at least five alternative providers serving the residential market. The OCC picks on individual elements of the competitive tests to argue that, standing alone, such element does not demonstrate compliance with the statutory criteria. The tests cannot be so dissected, but must be considered as a whole.⁴⁸ The Commission has never claimed that the line loss test, by itself, demonstrates no barriers to entry, so to attack

⁴⁸ See *E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, at ¶ 27 (rationality of interconnected provisions must be considered together, not separately).

that proposition is unfair and proves nothing. It is the line loss test coupled with the presence of five alternative providers that is intended to demonstrate the absence of barriers to entry, not line loss alone.

D. Proposition of Law No. 4: The Public Utilities Commission of Ohio is Empowered to Promulgate Rules, Compliance With Which Is Deemed To Satisfy the Lack of Barriers to Entry Standard in R.C. 4927.03(A).

The Commission has addressed the OCC's "barriers to entry" arguments multiple times in Case 05-1305 and in CBT's individual BLES alternative regulation case. The Commission determined that market factors that might present difficulties for a new entrant, but which did not prevent the new entrant from providing competitive service, were not barriers to entry.⁴⁹ The Commission concluded in Case 05-1305 that if one of the competitive tests is satisfied, the applicant ILEC has demonstrated that there are no barriers to entry. In accordance with competitive test 4, CBT demonstrated the presence of at least five alternative providers in each of the applicable exchanges, which is sufficient to satisfy the no barriers to entry requirement.

OCC argues that the Commission's interpretation of "no barriers to entry" would make that so-called "additional" test from H.B. 218 "mere surplusage." That, of course, is the OCC's opinion of what the statute means. Under Ohio law, as the agency entrusted with implementing H.B. 218 "as it deems necessary," the Commission was delegated the power to interpret the statute. The Commission properly determined that the OCC's proposed interpretation would render the statute impossible to satisfy and impermissibly defeat the purpose of the legislation.

⁴⁹ Case 05-1305, Opinion and Order at 19-22 (Appellant's Appx. at 458-61); Order on Rehearing at 16-19 (Appellant's Appx. at 526-29).

In attempting to discern the intentions of the General Assembly, a strong presumption exists against any construction which produces unreasonable or absurd consequences.⁵⁰ The General Assembly is presumed not to have enacted legislation in vain, but for a real purpose. “A result feasible of execution is intended.”⁵¹ If the statute is deemed ambiguous, in determining the intent of the legislature, the Commission would have to consider the consequences of a particular construction.⁵² The OCC’s interpretation of “no barriers to entry” would preclude the Commission from ever making that finding, rendering execution of the statute infeasible, with the consequence that the statute was a nullity from the time it was passed. The General Assembly had to have intended for it to be possible for there to be a finding of “no barriers to entry” so it could not have intended the kinds of inherent economic factors identified by the OCC to control that determination.

The Commission explained how the competitive market tests satisfy the “no barriers to entry” portion of the statute.⁵³ The Commission rejected the OCC’s position that any condition which makes entry more difficult constitutes a barrier to entry.⁵⁴ The factors identified by the OCC are inherent in almost any market, so the General Assembly could not have meant for them to be impediments to alternative regulation of BLES because that would make alternative regulation of BLES impossible to achieve.

⁵⁰ *State ex rel. Belknap v. Lavelle* (1985), 18 Ohio St.3d 180, 181-82, 480 N.E.2d 758; R.C. 1.47(C).

⁵¹ R.C. 1.47(D).

⁵² R.C. 1.49(E).

⁵³ Case 05-1305, Opinion and Order at 19-22 (Appellant’s Appx. at 458-61).

⁵⁴ *Id.* at 22 (Appellant’s Appx. at 461).

The statute does not require that there be no challenges to entry – challenges that face a new entrant are not the same as barriers that prevent a carrier from being able to compete in a market. The Commission expressly determined that its competitive tests were designed to establish that there were no barriers to entry:

On balance, we find that if the ILEC satisfies one of the competitive market tests adopted by the Commission in Rule 4901:1-1-10(C), in a given telephone exchange area, this presents sufficient evidence that competitors for BLES are able to enter the market and compete with the ILEC in that market.⁵⁵

The OCC made the same arguments on rehearing in Case 05-1305 that it makes here and they have already been rejected.⁵⁶ The Commission found OCC's interpretation of "no barriers to entry" to be "unreasonable and impractical."⁵⁷ It would "create an insurmountable burden of proof for an ILEC to satisfy."⁵⁸ The Commission found the competitive tests sufficiently rigorous and granular to support a finding, consistent with H.B. 218, that no barriers to entry exist.⁵⁹ The competitive market tests expressly satisfy all of the requirements found in R.C. 4927.03(A) :

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.⁶⁰

⁵⁵ *Id.*

⁵⁶ Entry on Rehearing at 17, ¶ 30 (Appellant's Appx. at 527).

⁵⁷ *Id.* at 18 (Appellant's Appx. at 528).

⁵⁸ *Id.*

⁵⁹ *Id.* at 19 (Appellant's Appx. at 529).

⁶⁰ Ohio Adm. Code 4901:1-4-10(C).

The OCC contends that it did not take as extreme a position as the Commission claimed. Still, the OCC's proposed test would have required a finding that there were no barriers to entry with respect to the provision of standalone BLES.⁶¹ As the Commission stated repeatedly, services that compete with ILEC BLES are not limited to standalone BLES. Therefore, the OCC's proposed market test on barriers to entry would not allow an ILEC to obtain alternative regulation of BLES based upon any other type of services except for standalone BLES, regardless of whether there were any barriers to entry for other non-identical competitive services. This difference in opinion is a policy choice over which the Commission has control, not the OCC.

E. Proposition of Law No. 5: The Public Utilities Commission of Ohio Is Empowered to Promulgate Generic Rules Pursuant to R.C. 4927.03(A) Determining When Alternative Regulation is in the Public Interest.

The Commission appropriately dismissed OCC's public interest arguments in this case because the issue is not unique to CBT's application. As with most of its assertions of error; the OCC's complaint is with the BLES alternative regulation rules, not CBT's application. The issue was addressed in the BLES alternative regulation rulemaking proceeding.

Revised Code 4927.03(A)(1) authorized the Commission to exempt BLES from various regulatory requirements "provided the Commission finds that any such measure is in the public interest." In Case 05-1305, the Commission concluded that, if an ILEC satisfied the requirements of one of the pre-established competitive market tests, alternative regulation of that ILEC's BLES would be in the public interest.⁶² There is no reason to independently make

⁶¹ The OCC's argument that only standalone BLES is relevant competition was addressed under Proposition of Law No. 1.

⁶² Case 05-1305, Opinion and Order at 40 (Appellant's Appx. at 479).

the same public interest determination in every individual case. Nevertheless, the Commission did make a finding in CBT's case that alternative regulation was in the public interest.⁶³

The OCC contends that ILECs should be forced to make additional social commitments as part of alternative regulation of BLES in order to satisfy the "public interest" provision of the statute. This is yet another policy disagreement between the OCC and the Commission. This issue was thoroughly vetted in Case 05-1305 and the Commission properly rejected the OCC's idea.⁶⁴ The commitments the OCC desires do not come without a cost and competitors are not required to make the same commitments, so ILECs would be placed at a competitive disadvantage as the price of obtaining alternative regulation of BLES. The Commission acted properly by not adding additional commitments as a prerequisite for alternative regulation of BLES.⁶⁵

In arguing for additional commitments, such as were required in the elective alternative regulation plan ("EARP") rules,⁶⁶ the OCC ignores that it is a prerequisite of alternative regulation of BLES that the applicant be in compliance with all EARP public interest commitments.⁶⁷ All of the EARP public interest commitments are automatically part of the BLES alternative regulation public interest commitments, so BLES alternative regulation does not reduce those commitments at all. In fact, the BLES alternative regulation rules add an additional public interest requirement. The BLES alternative rules require that Lifeline rates be

⁶³ Opinion and Order at 30 (Appellant's Appx. at 87).

⁶⁴ Case 05-1305, Opinion and Order at 8-11 (Appellant's Appx. at 447-50), Entry on Rehearing at 2 (Appellant's Appx. at 512).

⁶⁵ Case 05-1305, Opinion and Order at 11 (Appellant's Appx. at 450).

⁶⁶ Ohio Adm. Code 4901:1-4-06.

⁶⁷ Ohio Adm. Code 4901:1-4-09(B)(1).

frozen, even if regular BLES rates are increased.⁶⁸ CBT provided the requisite affidavit with its Application, attesting that it is in compliance with the EARP commitments.⁶⁹ The OCC did not contest this affidavit and offered no evidence of its own to the contrary.

The Commission's decision complied with the public interest requirement of R.C. 4927.03, so the OCC's Fifth Proposition of Law should be rejected.

⁶⁸ Ohio Adm. Code 4901:1-4-11(D).

⁶⁹ CBT Application, Exhibit 1.

III. CONCLUSION

The OCC's arguments repeat what it has been saying since its initial comments in Case 05-1305 and are no more valid today. This is not the forum for the OCC to debate the Commission's policy decisions. That time has passed. The Commission's rules for alternative regulation of BLES are compliant with R.C. 4927.03 and should be upheld.

CBT presented evidence to the Commission satisfying all of the requirements of the applicable rules. The Commission made appropriate factual determinations, based upon the evidence, that CBT was eligible for alternative regulation of BLES in the subject exchanges. By meeting competitive test 4 of the Commission's rules, CBT has met all of the statutory requirements of R.C. 4927.03(A). For the reasons set forth herein, the Commission's grant of alternative regulation for CBT's BLES was appropriate. Therefore, CBT respectfully requests that the Court affirm the decision of the Commission below.

Respectfully submitted,

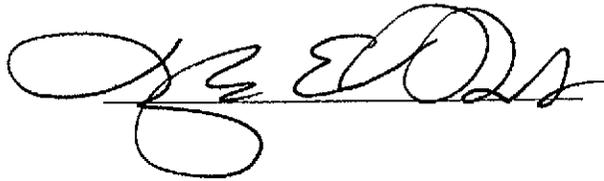


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon David C. Bergmann, Assistant Consumers' Counsel, Office of the Ohio Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3485, and upon William L. Wright and Stephen A. Reilly, Assistant Attorneys General, Public Utilities Section, 180 E. Broad Street, 9th Floor, Columbus, OH 43215-3793, by regular U.S. Mail, postage prepaid, this 20th day of August, 2007.

A handwritten signature in black ink, appearing to be "J. E. O'Connell", written over a horizontal line.

APPENDIX

1.49 Determining legislative intent.

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

4931.40 Uniform emergency telephone number system definitions.

As used in sections 4931.40 to 4931.70 of the Revised Code:

(A) "9-1-1 system" means a system through which individuals can request emergency service using the telephone number 9-1-1.

(B) "Basic 9-1-1" means a 9-1-1 system in which a caller provides information on the nature of and the location of an emergency, and the personnel receiving the call must determine the appropriate emergency service provider to respond at that location.

(C) "Enhanced 9-1-1" means a 9-1-1 system capable of providing both enhanced wireline 9-1-1 and wireless enhanced 9-1-1.

(D) "Enhanced wireline 9-1-1" means a 9-1-1 system in which the wireline telephone network, in providing wireline 9-1-1, automatically routes the call to emergency service providers that serve the location from which the call is made and immediately provides to personnel answering the 9-1-1 call information on the location and the telephone number from which the call is being made.

(E) "Wireless enhanced 9-1-1" means a 9-1-1 system that, in providing wireless 9-1-1, has the capabilities of phase I and, to the extent available, phase II enhanced 9-1-1 services as described in 47 C.F.R. 20.18 (d) to (h).

(F)(1) "Wireless service" means federally licensed commercial mobile service as defined in 47 U.S.C. 332(d) and further defined as commercial mobile radio service in 47 C.F.R. 20.3, and includes service provided by any wireless, two-way communications device, including a radio-telephone communications line used in cellular telephone service or personal communications service, a network radio access line, or any functional or competitive equivalent of such a radio-telephone communications or network radio access line.

(2) Nothing in sections 4931.40 to 4931.70 of the Revised Code applies to paging or any service that cannot be used to call 9-1-1.

(G) "Wireless service provider" means a facilities-based provider of wireless service to one or more end users in this state.

(H) "Wireless 9-1-1" means the emergency calling service provided by a 9-1-1 system pursuant to a call originating in the network of a wireless service provider.

(I) "Wireline 9-1-1" means the emergency calling service provided by a 9-1-1 system pursuant to a call originating in the network of a wireline service provider.

(J) "Wireline service provider" means a facilities-based provider of wireline service to one or more end-users in this state.

(K) "Wireline service" means basic local exchange service, as defined in section 4927.01 of the Revised Code, that is transmitted by means of interconnected wires or cables by a wireline service provider authorized by the public utilities commission.

(L) "Wireline telephone network" means the selective router and data base processing systems, trunking and data wiring cross connection points at the public safety answering point, and all other voice and data components of the 9-1-1 system.

(M) "Subdivision" means a county, municipal corporation, township, township fire district, joint fire district, township police district, joint ambulance district, or joint emergency medical services district that provides emergency service within its territory, or that contracts with another municipal corporation, township, or district or with a private entity to provide such service; and a state college or university, port authority, or park district of any kind that employs law enforcement officers that act as the primary police force on the grounds of the college or university or port authority or in the parks operated by the district.

(N) "Emergency service" means emergency law enforcement, firefighting, ambulance, rescue, and medical service.

(O) "Emergency service provider" means the state highway patrol and an emergency service department or unit of a subdivision or that provides emergency service to a subdivision under contract with the subdivision.

(P) "Public safety answering point" means a facility to which 9-1-1 system calls for a specific territory are initially routed for response and where personnel respond to specific requests for emergency service by directly dispatching the appropriate emergency service provider, relaying a message to the appropriate provider, or transferring the call to the appropriate provider.

(Q) "Customer premises equipment" means telecommunications equipment, including telephone instruments, on the premises of a public safety answering point that is used in answering and responding to 9-1-1 system calls.

(R) "Municipal corporation in the county" includes any municipal corporation that is wholly contained in the county and each municipal corporation located in more than one county that has a greater proportion of its territory in the county to which the term refers than in any other county.

(S) "Board of county commissioners" includes the legislative authority of a county established under Section 3 of Article X, Ohio Constitution, or Chapter 302. of the Revised Code.

(T) "Final plan" means a final plan adopted under division (B) of section 4931.44 of the Revised Code and, except as otherwise expressly provided, an amended final plan adopted under section 4931.45 of the Revised Code.

(U) "Subdivision served by a public safety answering point" means a subdivision that provides emergency service for any part of its territory that is located within the territory of a public safety answering point whether the subdivision provides the emergency service with its own employees or pursuant to a contract.

(V) A township's population includes only population of the unincorporated portion of the township.

(W) "Telephone company" means a company engaged in the business of providing local exchange telephone service by making available or furnishing access and a dial tone to persons within a local calling area for use in originating and receiving voice grade communications over a switched network operated by the provider of the service within the area and gaining access to other telecommunications services. "Telephone company" includes a wireline service provider and a wireless service provider unless otherwise expressly specified. For purposes of sections 4931.52 and 4931.53 of the Revised Code, "telephone company" means a wireline service provider.