

**In The
Supreme Court of Ohio**

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

Appellant,

v.

**The Public Utilities Commission of
Ohio,**

Appellee.

: Case No. 07-659
:
: On appeal from the Public Utilities
: Commission of Ohio, Case No. 06-
: 1013-TP-BLS, *In the Matter of the*
: *Application and Memorandum in*
: *Support of Application of The Ohio Bell*
: *Telephone Company dba AT&T Ohio*
: *for Approval of an Alternative Form of*
: *Regulation of Basic Local Exchange and*
: *Other Tier 1 Services Pursuant to*
: *Chapter 4901:1-4, Ohio Administrative*
: *Code.*

MERIT BRIEF

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

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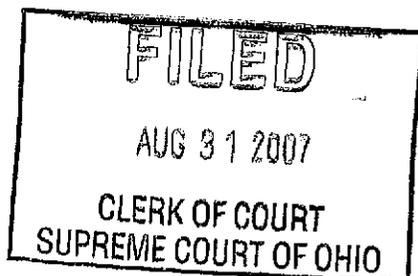
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Table of Contents

Page

Table of Authorities	iv
Introduction	1
Statement of the Facts and Case.....	2
Argument.....	8

Proposition of Law No. I:

R.C. 4927.03 requires that the Commission’s competitive analysis reflect actual marketplace dynamics and consider alternative providers who make functionally equivalent or substitute services available to residential customers at competitive rates, terms, and conditions.	8
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

Proposition of Law II.

The Court will not reverse Commission factual determinations where the record contains sufficient supporting evidence. <i>Discount Cellular, Inc. v. Pub. Util. Comm’n</i> , 112 Ohio St. 3d 360, 859 N.E.2d 957 (2007). The record supports the Commission finding that AT&T’s basic local service is subject to competition from a host of alternative providers and that its residential customers are switching their basic service to reasonably available substitute services from these providers.....	15
A. Based on the evidence of record the Commission properly determined that AT&T met the requisites of competitive test four in 118 of its exchanges.	17
1. AT&T demonstrated the requisite percentage loss of its residential access lines in each exchange.....	17
2. AT&T showed that there are more than the requisite five unaffiliated facilities-based alternative providers actually serving residential customers in each exchange.....	20
B. Based on the evidence of record the Commission properly determined that AT&T met the requisites of competitive test three in 18 of its exchanges.....	25

Table of Contents (Cont'd)

Page

1. AT&T demonstrated that at least 15 percent of total residential access lines in each exchange are provided by unaffiliated competitive local exchange carriers. 25

2. AT&T demonstrated at least two unaffiliated competitive local exchange carriers providing BLES to residential customers exist in the 18 exchanges that the Commission found satisfied the requirements of competitive test three. 27

3. AT&T demonstrated that at least five alternative providers serving the residential market exist in the 18 exchanges that the Commission found satisfied the requirements of competitive test three. 28

Proposition of Law No. III:

The Commission’s determination that there are no barriers to entry is supported by facts of the record and should be affirmed. 31

Proposition of Law No. IV:

Where the Commission’s decision implements and balances stated goals of the General Assembly, it promotes the public interest requirement under R.C. 4927.03. 36

Conclusion..... 40

Proof of Service..... 42

Appendix **Page**

Ohio Rev. Code Ann. § 4927.02 (Anderson 2007) 1

Ohio Rev. Code Ann. § 4927.03 (Anderson 2007) 1

Ohio Admin. Code § 4901:1-4-01 (Anderson 2007) 3

Ohio Admin. Code § 4901:1-4-02 (Anderson 2007) 5

Ohio Admin. Code § 4901:1-4-03 (Anderson 2007) 6

Ohio Admin. Code § 4901:1-4-04 (Anderson 2007) 8

Ohio Admin. Code § 4901:1-4-05 (Anderson 2007) 8

Table of Contents (Cont'd)

	Page
Ohio Admin. Code § 4901:1-4-06 (Anderson 2007)	8
Ohio Admin. Code § 4901:1-4-07 (Anderson 2007)	14
Ohio Admin. Code § 4901:1-4-08 (Anderson 2007)	15
Ohio Admin. Code § 4901:1-4-09 (Anderson 2007)	15
Ohio Admin. Code § 4901:1-4-10 (Anderson 2007)	17
Ohio Admin. Code § 4901:1-4-11 (Anderson 2007)	18
Ohio Admin. Code § 4901:1-4-12 (Anderson 2007)	20
<i>In re Basic Local Exchange Service</i> , Case No. 05-1305-TP-ORD (SBC Ohio's Initial Comments) (December 6, 2006) (EXCERPTS).....	21
<i>In re Basic Local Exchange Service</i> , Case No. 05-1305-TP-ORD (Transcript) (Cincinnati Public Hearing held January 20, 2006) (EXCERPTS).....	38
<i>In re Basic Local Exchange Service</i> , Case No. 05-1305-TP-ORD (Transcript) (Columbus Public Hearing held January 18, 2006) (EXCERPTS).....	55

Table of Authorities

Page

Cases

<i>Discount Cellular, Inc. v. Pub. Util. Comm'n</i> , 112 Ohio St. 3d 360, 859 N.E.2d 957 (2007).....	15, 17
<i>Payphone Ass'n v. Pub. Util. Comm'n</i> , 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006).....	17, 39
<i>State ex rel. Dispatch Printing Co. v. Wells</i> , 18 Ohio St. 3d 382, 481 N.E.2d 632 (1985).....	11
<i>Stephens v. Pub. Util. Comm'n</i> , 102 Ohio St. 3d 44, 806 N.E.2d 527 (2004).....	17
<i>Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm'n</i> , 113 Ohio St. 3d 180, 863 N.E.2d 599 (2007).....	17

Statutes

Ohio Rev. Code Ann. § 4927.02 (Anderson 2007).....	<i>passim</i>
Ohio Rev. Code Ann. § 4927.03 (Anderson 2007).....	<i>passim</i>

Other Authorities

<i>In re AT&T Ohio</i> , Case No. 06-1013-TP-BLS (Entry on Rehearing) (February 14, 2007).....	<i>passim</i>
<i>In re AT&T Ohio</i> , Case No. 06-1013-TP-BLS (Opinion and Order) (December 20, 2006).....	<i>passim</i>
<i>In re Basic Local Exchange Service</i> , Case No. 05-1305-TP-ORD (Entry on Rehearing) (May 3, 2006).....	<i>passim</i>
<i>In re Basic Local Exchange Service</i> , Case No. 05-1305-TP-ORD (Opinion and Order) (March 7, 2006).....	<i>passim</i>
WEBSTER'S NEW WORLD DICTIONARY (Second College Edition 1982).....	35

Rules

Ohio Admin. Code § 4901:1-4-01 (Anderson 2007).....	5
Ohio Admin. Code § 4901:1-4-02 (Anderson 2007).....	5
Ohio Admin. Code § 4901:1-4-03 (Anderson 2007).....	5
Ohio Admin. Code § 4901:1-4-04 (Anderson 2007).....	5
Ohio Admin. Code § 4901:1-4-05 (Anderson 2007).....	5
Ohio Admin. Code § 4901:1-4-06 (Anderson 2007).....	5, 42
Ohio Admin. Code § 4901:1-4-07 (Anderson 2007).....	5

Table of Authorities (cont'd)

	Page
Ohio Admin. Code § 4901:1-4-08 (Anderson 2007)	5, 41, 42
Ohio Admin. Code § 4901:1-4-09 (Anderson 2007)	5, 39, 42
Ohio Admin. Code § 4901:1-4-10 (Anderson 2007)	<i>passim</i>
Ohio Admin. Code § 4901:1-4-11 (Anderson 2007)	5, 42
Ohio Admin. Code § 4901:1-4-12 (Anderson 2007)	5

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Appellee.	:	

**MERIT BRIEF
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Introduction

The General Assembly, through R.C. 4927.03, has 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 evaluate the criteria enumerated in R.C. 4927.03(A)(2). AT&T Ohio (AT&T) has presented facts that fulfill the requirements of the Commission’s market tests and that show a marketplace where competition for residential service is strong and, under R.C. 4927.03, alternative regulation is proper. The Commission’s factual findings are supported by sufficient probative evidence and should be affirmed.

While the facts indicate that the Commission can and should lighten regulatory oversight, the Office of the Ohio Consumers' Counsel (OCC) seeks just the opposite result to thwart alternative regulation and undermine legislative intent. OCC attacks policy decisions made by the Commission under the enabling language of R.C. 4927.03. OCC wants *its own test* applied, a test that will virtually ensure that R.C. 4927.03 cannot be applied for its intended purpose. This case is entirely a policy dispute, and policy differences do not equate to 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 encourage competition in the residential market and ensure the continued availability of reasonably-priced basic local exchange 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 that was signed into law 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 3.¹ The Commission promptly opened a case and adopted rules, both procedural and substantive,

¹ References to appellee's appendix attached to this brief are denoted "App. at ____;" references to appellant's appendix are denoted "Appellant's App. at ____;" and references to appellant's supplement are denoted "Appellant's Supp. at ____."

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 444-514; *Rules Case* (Entry on Rehearing) (May 3, 2006), Appellant's App. at 515-564. The rules were adopted after notice to, and multiple rounds of comments by numerous industry and consumer interests, including appellant OCC. Public comments were elicited at seven public hearings held in various cities throughout Ohio. *Rules Case* (Opinion and Order at 2) (March 7, 2006), Appellant's App. at 445. The rules were subjected to the proper legislative review process and became effective on August 7, 2006.² The rules apply objective, measurable criteria that rigorously evaluate the level of competition and alternative providers and services in the marketplace. The rules balance customer and industry interests, and, consistent with the General Assembly's streamlined notice and comment process, are easy to understand and apply. An application that factually meets the market test requirements complies with R.C. 4927.03. By establishing a "safe harbor," the rules are intended to promote efficient, objective and consistent adjudication of applications filed under R.C. 4927.03 and thus encourage investment in and customer access to new telecommunications technologies and services.

AT&T filed an application on August 11, 2006, as amended on September 8 and 13, 2006, seeking alternative regulation for basic local exchange service it offers in the

²

There is no dispute that the Commission rules were lawfully promulgated.

145 exchanges. Its application was one of the earliest filed³ under amended R.C. 4927.03 and evaluated under the Commission's new alternative regulation standards for basic local exchange service. Procedurally, the statute requires notice of the application and a period for comment by the public and the affected telephone company. Ohio Rev. Code Ann. § 4927.03(A)(1) (Anderson 2007), App. at 1-2. There is no dispute that the statutory procedural requirements were met. Under the statute, a hearing is a discretionary matter and required only if the Commission "considers one necessary," which, in this instance, it did not. OCC has not alleged that the Commission abused its discretion in this regard. The statute requires the Commission to make certain factual findings to grant alternative regulatory treatment for basic local exchange service. AT&T bore the burden of presenting facts sufficient to support its application, and its factual submission was largely unchallenged by the OCC. The Commission made each of these findings based upon information provided by AT&T in its voluminous application.

As noted, R.C. 4927.03(D) empowers the Commission to adopt rules "as it finds necessary" to promote legislative intent and encourage alternative regulation in competitive market areas. 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 fulfillment of all *public interest* commitments under the plan. Ohio Admin. Code § 4901:1-4-08

³ AT&T's application was filed on the heels of a similar application filed by Cincinnati Bell Telephone Company (CBT) and was only the second seeking alternative regulation of BLES under amended R.C. 4927.03 and the Commission's market test rules. The CBT case, the subject of OCC appeal Case No. 07-570 pending before the Court, raises virtually identical issues to those advanced by OCC in this case.

(Anderson 2007), App. at 15. Additionally, the applicant must show that it is in full compliance with advanced services and residential lifeline (low-income) commitments. *Id.* The Commission's rules provide straightforward pricing constraints for basic local service, cap upward pricing flexibility at a \$1.25 on a monthly bill, and prohibit "banking" of increases. Basic local service rates of low-income lifeline customers cannot be increased. Ohio Admin. Code § 4901:1-4-11(D) (Anderson 2007), App. at 19. Thus, low-income customers are fully protected from rate changes that may occur as a result of alternative regulation pricing flexibility granted under R.C. 4927.03.

Codified as Ohio Administrative Code Chapter 4901:1-4-01, *et seq.*, the rules adopted by the Commission also include a series of market tests that establish the alternative regulatory requirements that must be met to obtain pricing flexibility for basic local exchange service under R.C. 4927.03. Like the statute, the "competitive tests" evaluate marketplace dynamics. The tests measure the number and size of alternative providers, the ready availability of substitute services and technologies at competitive rates and terms, and the market share of alternative providers in the AT&T 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 460-461.

AT&T's application proposed compliance with O.A.C. 4901:1-4-10(C)(3) and (4) (competitive market tests three and four) for 26 and 118 exchanges respectively. *In re*

AT&T Ohio, Case No. 06-1013-TP-BLS (hereinafter *In re AT&T*) (Opinion and Order at 2-3) (December 20, 2006), Appellant's App. at 101-102. Test three requires AT&T to satisfy three criteria. AT&T must demonstrate in each exchange evaluated under this test: that at least 15 percent of residential access lines are provided by unaffiliated competitive local exchange carriers; that at least two unaffiliated, facilities-based competitive local exchange carriers provide BLES service to residential customers; and, that at least five alternative providers serve the residential market. Ohio Admin. Code § 4901:1-4-10(C)(3) (Anderson 2007), App. at 18. Test four requires that AT&T satisfy two criteria. AT&T must demonstrate in each exchange under evaluation: that since 2002 it has lost at least 15 percent of total residential access lines; *and*, it must also show 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. Generally, these tests gauge the sustainability of competing residential providers within the subject market area.

AT&T presented supporting information and detailed analysis to demonstrate compliance with the requirements of test three in 18 exchanges and test four (118 exchanges). These are the only exchanges relevant to this appeal. *See, e.g., In re AT&T* (Opinion and Order at Attachments A & B) (December 20, 2006), Appellant's App. at 138-164. The Commission rejected alternative regulation for nine of the exchanges submitted by AT&T. *Id.* at Attachment C, Appellant's App. at 165. For the 18 exchanges satisfying the criteria of test three, AT&T showed at least 15 percent of the total residential access lines were provided by unaffiliated competitive local exchange

carriers. *Id.* AT&T also showed at least 2 unaffiliated, facilities-based competitive local exchange carriers present in each of those exchanges. *Id.* Finally, AT&T also showed at least five alternative providers serving the residential market in each of those exchanges. *Id.* For the 118 exchanges satisfying the criteria of test four, AT&T showed that it lost at least 15 percent of its residential access lines in each of those exchanges since 2002. *Id.* Further, AT&T established the presence of at least five unaffiliated, facilities-based providers in each exchange that compete with AT&T for basic local exchange service. *Id.* These included cable as well as wireless providers. *Id.* Significantly, appellant *OCC did not dispute the accuracy of AT&T's factual submission* that showed former AT&T stand-alone BLES customers seeking and selecting functionally-equivalent services from alternative providers.

On December 20, 2006, the Commission issued an order granting AT&T's application for alternative regulatory treatment in 136 exchanges. *In re AT&T* (Opinion and Order at 35) (December 20, 2006), Appellant's App. at 134. It did so after making all factual determinations required under the statute. It found that granting AT&T's application for alternative regulation of its basic local exchange service in the 136 exchanges promotes the public interest. It also found that AT&T residential service is subject to competition and that AT&T customers have reasonably available alternatives in those exchanges, and finally that there are no barriers to entry for residential service in those markets. *Id.*

Noting the close connection between the AT&T 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 AT&T's application case below. *Id.* at 6, Appellant's App. at 105. OCC sought rehearing which was denied by the Commission. *In re AT&T* (Entry on Rehearing) (February 14, 2007), Appellant's App. at 166-189.

This appeal ensued.

Argument

Proposition of Law No. I:

R.C. 4927.03 requires that the Commission's competitive analysis reflect actual marketplace dynamics and consider alternative providers who make functionally equivalent or substitute services available to residential customers at competitive rates, terms, and conditions.

Under R.C. 4927.03, to allow alternative regulation of basic local exchange service, the Commission must find:

- It to be in the public interest (R.C. 4927.03(A)(1));
- That the applicant's basic local exchange service is EITHER subject to competition (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)).

OCC argues that the Commission can only consider competing providers who sell stand-alone basic service identical to that provided by AT&T. Its "perfect substitute" argument ignores the competitive vibrancy of today's marketplace and the wide array of services, technologies, and providers that customers can and do choose as substitutes to AT&T basic local service. R.C. 4927.03 neither mentions nor contemplates "stand-alone" basic service and this is not surprising. The Commission found that more custom-

ers are substituting traditional basic local exchange service with competitive services from a variety of alternative providers, including wireline competitive local exchange carriers, wireless, VoIP (voice over internet protocol), and cable telephony providers. *Rules Case* (Opinion and Order at 25) (March 7, 2006), Appellant's App. at 468. While the highly competitive AT&T marketplace supports relaxed, alternative regulation, OCC advocates unnecessary regulation through a standard that virtually assures no application will ever be granted under the statute. The Commission noted, at length, that R.C. 4927.03 allows BLES alternative regulation if there are competing alternatives or *substitutes* to basic local service:

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. 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.

* * *

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 [competitive local exchange carriers], 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 AT&T (Opinion and Order at 12-13) (December 20, 2006) citing to *Rules Case* (Opinion and Order at 25) (March 7, 2006), Appellant's App. at 111-112.

OCC argues that the Commission should have applied OCC's overly restrictive 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.

OCC Brief at 36-37.

OCC's proposal is impractical and undermines legislative intent. R.C. 4927.02(B) dictates that the Commission reduce or eliminate regulation where a healthy marketplace exists. The Commission's straightforward market tests further this objective, while OCC's standard frustrates this goal. Rather than using objective, measurable factors as the Commission's tests do, OCC employs vague, subjective terms like "timely," "significant," and "sustainable" that invite prolonged argument and render OCC's test much more difficult to apply. OCC requires AT&T to prove a negative, while the statute requires 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 imple-

mented for its intended purpose even where, as here, a highly competitive marketplace is presented. 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).

OCC's test ignores the plain 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 not only the express language of R.C. 4927.03 but also the policies enunciated by the General Assembly in R.C. 4927.02. *See, e.g., In re AT&T* (Entry on Rehearing at 9) (February 14, 2007), Appellant's App. at 174. While the Commission's evaluation fully considers marketplace dynamics, OCC ignores the efforts of competitive service providers to naturally differentiate their products as a competitive marketing strategy. The Commission logically inquired whether bundled services offered by competing providers constitute acceptable equivalent or *substitute* services for AT&T residential BLES customers. The Commission found that whether one product *substitutes* for another does not turn on whether the product is exactly the same. *In re AT&T* (Opinion and Order at 12-13) (December 20, 2006), Appellant's App. at 111-112; *In re AT&T* (Entry on Rehearing at 15-16) (February 14, 2007), Appellant's App. at 180-181. The Commission observed that customers who subscribe to bundled offerings still remain, by definition, basic local service customers because that service forms the foundation or core of the bundle. *Id.* The Commission's market tests and its decision focus upon marketplace characteristics – that is, the presence of competing residential service providers and whether customers find their service offerings to be available and adequate substitutes. This is what the plain words of R.C. 4927.03 require.

In this same vein, OCC argues that substitute services must be similarly priced and have similar terms and conditions to AT&T'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. AT&T presented facts that show both its loss of market share and the presence of multiple alternative providers in the relevant market area. These facts demonstrate that alternative services are readily available from competing suppliers and that former AT&T stand-alone customers are selecting them because they view the rates and terms of alternative service bundles to be competitive. Otherwise they would not have switched in the first place. *In re AT&T* (Opinion and Order at 14) (December 20, 2006), Appellant's App. at 113; *In re AT&T* (Entry on Rehearing at 16) (February 14, 2007), Appellant's App. at 181. These alternative providers, services, and technology platforms are aimed at residential customers, and thus they compete with AT&T's basic residential service. The fact that there may be customers in the exchanges that want only basic local service does not negate the fact that AT&T faces competition for residential service in this marketplace. *In re AT&T* (Entry on Rehearing at 16) (February 14, 2007), Appellant's App. at 181. The Commission explained:

Each technology platform has its own unique characteristics that competitive providers utilize for the purpose of customizing their service offerings in order to be considered an alternative to BLES. Customers subscribing to services offered by various alternative providers, and not subscribing to AT&T Ohio's BLES, demonstrate that end users perceive the alternative providers' services to be a reasonable alternative and substitute for the ILEC's BLES offerings when considering factors such as

service quality, rates, terms, and conditions. Otherwise, it is reasonable to conclude that they would not have switched from AT&T Ohio's BLES.

In re AT&T (Opinion and Order at 13) (December 20, 2006), Appellant's App. at 112.

Moreover, the record supports the Commission's determination that customers are substituting basic service with competitive services offered by alternative technologies, contrary to OCC's assertion. Numerous witnesses at the Commission's local hearings testified that they either had substituted alternative services for basic local service or were considering doing so as the Commission noted. *Rules Case* (Opinion and Order at 25) (March 7, 2006), Appellant's App. at 468; *Rules Case* (Transcript of Columbus Public Hearing at 26-29, 36-40) (January 18, 2006), App. at 56-59, 60-64; *Rules Case* (Transcript of Cincinnati Public Hearing at 19-21, 32-40, 47-50) (January 20, 2006), App. at 39-41, 42-50, 51-54. The record in this case and the prior rulemaking support the Commission's factual determination.

OCC argues that a prior, unrelated case involving alternative regulation of telecommunications services shows the General Assembly focused on stand-alone BLES when adopting H.B. 218, allowing alternative regulation of BLES. There is no language in R.C. 4927.03 that supports OCC's claim. To the contrary, R.C. 4927.03 does not even mention stand-alone BLES; the statute identifies only BLES. Ohio Rev. Code Ann. § 4927.03 (Anderson 2007), App. at 1-3. This is particularly significant because BLES is defined by the General Assembly without reference to stand-alone BLES. *Id.* Under the General Assembly's definition, BLES is a bundle of services that is not limited to *stand-alone*. The prior case OCC relies on is much different than the present one and has no

relation to it. The Commission rejected OCC's claim, describing the differences in the two cases:

By suggesting that there was no reason to enact H.B. 218 because the Commission's 00-1532 orders already found competition exists for BLES, the Consumer Groups inaccurately portray our 00-1532 decision and the implications of H.B. 218's subsequent enactment. Prior to enactment of H.B. 218, BLES was beyond the scope of alternative regulation under Section 4927.03, Revised Code. Our decision in 00-1532 did not deregulate stand-alone BLES or otherwise provide regulatory exemptions applicable to stand alone BLES. Rather, in 00-1532, we made certain competitive findings applicable largely to discretionary services that extended to the entire state of Ohio. For example, we found that bundled service packages offered by the ILEC (including those containing BLES) are competitive with bundled service packages offered by CLECs. Therefore, pursuant to our Order in 00-1532, ILECs received relief limited to bundled service packages.

By contrast, in the current rulemaking under H.B. 218, we are creating an alternative regulatory framework applicable to BLES and imposing additional competitive market tests to be applied on a granular level. The competitive market tests in Rule 4901:1-4-10(C), O.A.C., are new and go well beyond the competitive findings in the 00-1532 rulemaking.

Rules Case (Entry on Rehearing at 19) (May 3, 2006), Appellant's App. at 533.

In sum, the requirements of the Commission's market tests and its decision give full effect to R.C. 4927.03 and lawfully 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 render Chapter 4927 a nullity, as OCC seeks to do, or to affirm the Commission's decision that promotes emerging technologies and new services that today's customers want, and facilitates continuing competition for residential service. The Commission applied R.C. 4927.03 as the General Assembly intended.

Proposition of Law 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). Here the facts show and the Commission found that AT&T's basic local service is subject to competition from a host of alternative providers that offer residential service under competitive rates, terms, and conditions.

As authorized under R.C. 4927.03, the Commission adopted alternative regulatory requirements by creating multiple competitive market tests that evaluate the criteria contained in the statute. Ohio Admin. Code § 4901:1-4-10(C)(1)-(4) (Anderson 2007), App. at 18. In adopting multiple tests, the Commission recognized that the continuously evolving nature of the telecommunications market place made one test for all situations, like that advocated by OCC, inappropriate. The Commission adopted four competitive tests that are sufficiently rigorous and granular “to support a finding that, consistent with H.B. 218, there are reasonably available alternatives to BLES in the affected exchange(s) or that BLES is subject to competition in the affected exchanges” and that demonstrate no barriers to entry for alternative BLES providers on the affected exchanges. *In re AT&T* (Entry on Rehearing at 4) (February 14, 2007), Appellant’s App. at 169. These tests evaluate, in an objective and meaningful way, the overall state of competition in each exchange by requiring AT&T to present facts that comport with the considerations enumerated in R.C. 4927.03.

AT&T chose to demonstrate compliance with two of these competitive tests: competitive tests three and four. AT&T demonstrated compliance in 18 exchanges under competitive test three that requires:

An applicant must demonstrate compliance in each requested exchange that at least fifteen percent of total residential access lines are provided by unaffiliated CLECs [competitive local exchange carriers]; 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.

Ohio Admin. Code § 4901:1-4-10(C)(3) (Anderson 2007), App. at 18. AT&T demonstrated compliance in 118 exchanges under competitive test four that requires:

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. AT&T bore the burden of showing that within its service area competition is real, sustainable and impacting upon its residential market share to satisfy the requirements of the two market tests.

Each of the Commission's factual determinations under R.C. 4927.03 is supported by largely uncontroverted facts submitted by AT&T. OCC's disagreements do not involve the existence of the facts or their accuracy. The facts the Commission acted upon are supported in the record and fully explained in its decisions. 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 does not reweigh the evidence nor does it substitute 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 Commission's factual findings are supported by probative record evidence and should be sustained.

A. Based on the evidence of record the Commission properly determined that AT&T met the requisites of competitive test four in 118 of its exchanges.

1. AT&T demonstrated the requisite percentage loss of its residential access lines in each exchange.

The Commission's line loss requirement measures market power and the level of competition AT&T faces in each exchange. *In re AT&T* (Entry on Rehearing at 7) (February 14, 2007), Appellant's App. at 172. The Commission designed this test with an eye to the practical because it can be easily implemented using data that are readily available to AT&T. AT&T's application presented sufficient information to show that it lost over 15 percent of its residential access lines in each exchange between 2002-2005. *In re AT&T* (Opinion and Order at Attachment A) (December 20, 2006), Appellant's App. at 138-161. Although OCC argues about what these losses mean, OCC did not dispute the actual percentages of residential access lines lost by AT&T in each exchange. 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 AT&T* (Opinion and Order at 19) (December 20, 2006), Appellant's App. at 118.

OCC challenges the line loss requirement. It argues that the standard is insufficient because AT&T cannot show that all these lines were actually lost to competition. OCC previously made a similar argument in the *Rules Case* where the Commission noted the impracticability of OCC's position. *In re AT&T* (Opinion and Order at 17-18) (December 20, 2006), Appellant's App. at 116-117. The Commission found that it is not possible for AT&T, or any other incumbent local exchange carrier (ILEC), to identify with precision, where "lost" residential lines went because AT&T does not have access to other competitor's *confidential* market share information. *In re AT&T* (Entry on Rehearing at 6) (February 14, 2007), Appellant's App. at 171. OCC misses the point by ignoring what the facts actually show. AT&T's line losses show that their customers have alternatives and are exercising their right to choose them. This test requirement measures competition for basic local service because each "lost" access customer previously purchased AT&T basic local service and has now chosen bundled service as a reasonable substitute to its former AT&T service. *Rules Case* (Entry on Rehearing at 17-18) (May 3, 2006), Appellant's App. at 531-532. Migration of AT&T customers to other services is an indicium of market power and the extent to which substitute services are readily available at competitive rates, terms, and conditions. The Commission rejected OCC's contention that disconnected residential access lines were used for internet access rather than voice communications. *In re AT&T* (Opinion and Order at 17-18) (December 20, 2006), Appellant's App. at 116-117. The Commission found irrelevant OCC's show-

ing of increased digital subscriber line connections *statewide* because AT&T's narrow application applied to a different area; that being a portion of AT&T's service territory rather than the entire state. *Id.* The Commission also expressed its belief that the line loss requirement fully captures movement of families in and out of the relevant exchanges. *Id.* at 18, Appellant's App. at 117.

In yet another challenge to the sufficiency of the facts, OCC argues that residential access lines lost to AT&T's wireless affiliate should not be included in the line loss calculation. OCC isolates one factor involved with one prong of a competitive test without looking at the overall effect of the test as the Commission intended. *In re AT&T* (Opinion Order at 19) (December 20, 2006), Appellant's App. at 118. As the Commission described:

The Commission exercised its expertise and judgment based on information on the record in 05-1305 and considered all possible causes for access line loss. In doing so, the Commission determined that for Rule 4901:1-4-10(C)(4), O.A.C., a minimum of 15 percent residential access line loss in a given exchange is appropriate provided that it is accompanied with the presence of at least five facilities-based alternative providers serving residential market in that exchange.

Id. The issue is not what is shown by the line-loss prong, alone. Both test requirements must be analyzed together to evaluate the real competitive vibrancy in the AT&T exchanges. *Id.* OCC's improper focus upon only one-half of the Commission's market test fails to yield the entire competitive market analysis intended by the Commission under the test.

AT&T 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

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

2. AT&T showed that there are more than the requisite five unaffiliated facilities-based, alternative providers actually 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 four does this by requiring a showing of at least five unaffiliated, facilities-based alternative providers serving the residential market in each exchange where 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 competitiveness of the market and independence of competitive providers. As the Commission noted, the required presence of multiple, facilities-based residential providers is probative evidence of a healthy, sustainable market. *Rules Case* (Entry on Rehearing at 15) (May 3, 2006), Appellant's App. at 529. 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. *Id.* That, in turn, coincides with greater market stability and sus-

tainability. 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.

The Commission determined that “alternative providers such as wireline CLECs [competitive local exchange carriers], wireless, VoIP, and cable telephony providers are relevant to our [the Commission’s] 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.” *Rules Case* (Opinion and Order at 25) (March 7, 2006), Appellant’s App. at 468. The Commission’s competitive evaluation of a market includes, as the statute says it should, all competitors of AT&T’s BLES regardless of the technology they use to compete. AT&T showed that a mix of alternative providers and technologies, including wireline competitive local exchange carriers, wireless providers, VoIP, and cable telephony currently compete with AT&T to provide residential service in the relevant exchanges. *In re AT&T* (Opinion and Order at 13, Attachment A) (December 20, 2006), Appellant’s App. at 112, 138-161. That mix included at least five alternative providers in each relevant exchange as required under the Commission’s test. *Id.* at Attachment A, Appellant’s App. at 138-161.

The Commission found, and OCC did not dispute, that Alltel Wireless, Cincinnati Bell Wireless, Verizon Wireless, and Sprint/Nextel wireless services are unaffiliated with AT&T, that each utilizes facilities they own, operate, manage, or control, and that they are “facilities-based providers that satisfy the second prong of Test 4” *In re AT&T*

(Opinion and Order at 22) (December 20, 2006), Appellant's App. at 121. There is no dispute that each is a large residential provider with significant market share.

The mix also includes 17 wireline providers that offer service through "Local Wholesale Complete" (LWC) or the unbundled network element platform (UNE-P). These are lease arrangements with AT&T and the Commission has long recognized that UNE-P and LWC facilities are jointly managed and controlled by the competitive local exchange carrier and the ILEC, AT&T. The competitive local exchange carrier controls the specific services offered over the facilities, the specific features activated, and the timing of when a service is commenced and terminated. *Id.* at 21, Appellant's App. at 120. Hence, the Commission determined these providers were *facilities-based alternative providers*. *Id.*

Other providers owned facilities in the relevant exchanges. *Id.* at 21-22, Appellant's App. at 120-121. Buckeye Telesystems, Comcast, and Insight each provide service using switching facilities they own and that each has ported telephone numbers in the exchanges to which they are relevant. Thus, the Commission determined they are classified as facilities-based alternative providers. *Id.* at 22, Appellant's App. at 121. The Commission evaluated all companies that AT&T proposed as facilities-based alternative providers. *Id.* at 19-22, Appellant's App. at 118-121. It identified as facilities-based alternative providers only those that met the requirements of the second prong of competitive test four. *Id.* at 22, Attachment A, Appellant's App. at 121, 138-161. These facts are not disputed.

Unable to credibly challenge the facts, OCC chooses instead to rail against the test requirements. OCC once again mistakenly asserts that competitive alternative services must be identical to AT&T basic local exchange service. OCC's position is unlawful and illogical because product and service variation and differentiation are the best evidence of intense 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 repeatedly 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 AT&T stand-alone BLES. *In re AT&T* (Opinion and Order at 12) (December 20, 2006), Appellant's App. at 111; *In re AT&T* (Entry on Rehearing at 15-16) (February 14, 2007), Appellant's App. at 180-181. 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 to new providers and services because they perceive greater value in other services and technology platforms as acceptable substitutes for AT&T BLES. 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 competitive providers must be at or near the same price as AT&T 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 AT&T customers are switching to them as acceptable substitutes

offered under competitive rates and terms. *In re AT&T* (Entry on Rehearing at 16) (February 14, 2007), Appellant's App. at 181.

Finally, OCC asserts that where an alternative service provider identified by AT&T does not serve the entirety of an exchange, its services cannot be readily available to AT&T 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.⁴ *Rules Case* (Entry on Rehearing at 19) (May 3, 2006), Appellant's App. at 533. The Commission fully explained the impracticality of OCC's argument:

The Commission finds that in order to satisfy Consumer Group's narrow interpretation . . . a market would have to be as small as a "city block" for wireline providers, or even as small as a "single residence" in order to guarantee that wireless service is reaching consumers indoors at their homes. Such an interpretation is contrary to the statutory intent of Section 4927.03, Revised Code, and would be *impractical, and extremely difficult to administer*.

In re AT&T (Opinion & Order at 23) (December 20, 2006) (emphasis added), Appellant's App. at 122 (emphasis added).

Simply put, there is no requirement that every customer in an exchange have access 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.

⁴ OCC and other consumer groups supported the Commission Staff's rule proposal for an *exchange-specific* application of the competitive market test. *Rules Case* (Opinion and Order at 17-18) (March 7, 2006), Appellant's App. at 460-461.

Rather than creating an overly 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, included in market test four, do this, and allow R.C. 4927.03 to be implemented as the General Assembly intended. The Commission’s judgment is sound and its factual determinations that AT&T met the requisites of competitive test four in 118 of its exchanges are supported and should be upheld.

B. Based on the evidence of record the Commission properly determined that AT&T met the requisites of competitive test three in 18 of its exchanges.

1. AT&T demonstrated that at least 15 percent of total residential access lines in each exchange are provided by unaffiliated competitive local exchange carriers.

Competitive test three requires AT&T to demonstrate that 15 percent of the total residential lines in an exchange are provided by unaffiliated competitive local exchange carriers. Ohio Admin. Code § 4901:1-4-10(C)(3) (Anderson 2007), App. at 18. Similar to the line-loss prong of the Commission’s competitive test four, this prong gauges the existence and extent of competition and, in so doing, it reflects the criteria of R.C. 4927.03. The Commission found that AT&T made this showing in 18 of its exchanges, when it presented facts demonstrating that more than 15 percent of total residential lines were provided by unaffiliated, competitive local exchange carriers in each of these exchanges. *In re AT&T* (Opinion and Order at 29-30, Attachment B) (December 20, 2006), Appellant’s App. at 128-129, 162-164. OCC neither disputes these facts nor that

these competitive local exchange carriers serve the residential market. Thus, this prong of test three is met.

OCC's dispute focuses upon which competitive local exchange carriers or "CLECs" who serve residential customers should be included in the calculation of aggregate competitive local exchange carrier residential market share. OCC seeks to unreasonably dilute the aggregate percentage of the residential market share served by CLECs by excluding those providers even though they currently serve residential customers in competition with AT&T. OCC advances an artificially depressed result that yields an erroneous view of actual competition in an exchange's residential market. The Commission rejected OCC's suggestion and properly included these competitive local exchange carriers. The Commission noted that the salient point in this regard is whether the competitive local exchange carrier exerts competitive pressure on AT&T by winning and keeping customers. *Id.* at 29, Appellant's App. at 128. That is consistent with the General Assembly's criteria prescribed in R.C. 4927.03. This prong shows AT&T is subject to competition and "[t]he fact that a competitive local exchange carrier is successful in winning and keeping customers is a clear signal of the competitive pressure the ILEC faces and to which it must respond." *Id.* Competitive local exchange carriers serving residential customers should be included in the calculation of aggregate competitive local exchange carrier residential market share. The Commission correctly refused OCC's attempt to unfairly skew the calculation. AT&T demonstrated this prong of competitive test three in all 18 exchanges.

2. **AT&T demonstrated at least two unaffiliated competitive local exchange carriers providing BLES to residential customers exist in the 18 exchanges that the Commission found satisfied the requirements of competitive test three.**

Competitive test three also requires AT&T to show that two unaffiliated competitive local exchange carriers provide BLES to residential customers in the exchanges for which it seeks alternative BLES regulation. Ohio Admin. Code § 4901:1-4-10(C)(3) (Anderson 2007), App. at 18. Like the similar second prong of the Commission's competitive test four, this test three requirement evaluates the overall vibrancy of the market. Because the presence of multiple providers is probative of a healthy, sustainable market, this prong reflects the criteria prescribed by the General Assembly in R.C. 4927.03. The Commission found that AT&T made this demonstration in 18 of its exchanges due to the presence of MCI/WorldCom and Sage in those exchanges. *In re AT&T* (Opinion and Order at 29-30, Attachment B) (December 20, 2006), Appellant's App. at 128-129, 162-164. There is no dispute that these two companies provide BLES to residential customers in the relevant exchanges.

OCC included MCI/WorldCom and Sage in a generic claim unrelated to the exchanges served. OCC questioned whether MCI/WorldCom and Sage, among others, should be included in competitive figures because they do not offer stand-alone BLES service. As discussed elsewhere, the law does not disqualify a carrier from consideration as a competitor on this erroneous basis.

The Commission's determination that MCI/WorldCom and Sage serve the 18 relevant exchanges is unquestioned. The Commission's determination that they are facilities-

based carriers is based on the facts surrounding the arrangements by which MCI/WorldCom and Sage provide service, and it is not disputed. The Commission's determination regarding this prong should be affirmed.

3. AT&T demonstrated that at least five alternative providers serving the residential market exist in the 18 exchanges that the Commission found satisfied the requirements of competitive test three.

Competitive test three also requires that AT&T show that at least five alternative providers serve the residential market in the exchanges for which it seeks alternative BLES regulation. Ohio Admin. Code § 4901:1-4-10(C)(3) (Anderson 2007), App. at 18. This prong offers further insight into the vibrancy and extent of competition in the residential market. It also reflects the criteria prescribed by the General Assembly in R.C. 4927.03. The Commission found that many alternative providers provide residential service in the 18 exchanges and at least five provide service in each of the exchanges. *In re AT&T* (Opinion & Order at 29-30, Attachment B) (December 20, 2006), Appellant's App. at 128-129, 162-164. The Commission found the wireline carriers providing service included: ACN, Budget Phone, Comcast, Insight, MCI, New Access, Revolution, Sage, Talk America, Trinsic, PNG, and LDMI. *Id.* The Commission also found wireless carriers provided service in the exchanges. They included: Alltel Wireless, Sprint/Nextel, and Verizon Wireless. *Id.* The fact that these carriers provided service in the relevant exchanges is not disputed. Instead, OCC questions *how* these providers provide service. In finding this prong of competitive test three satisfied by these providers, the Commis-

sion found that *how* the service was provided did not change the fact that these providers are serving residential customers.

The record supports the Commission's findings. In making the findings, the Commission relied upon: phone-book white page listings, local wholesale complete access line data, and 9-1-1 data. This data showed the following competitive local exchange carriers provided service in the relevant exchanges: ACN, Budget Phone, Comcast, First Communications, Insight, MCI, New Access, Revolution, Sage, Talk America, and Trinsic. *In re AT&T* (Opinion and Order at 24, 31-32) (December 20, 2006), Appellant's App. at 123, 130-131. These carriers' Commission-approved tariffs also supported the Commission's determination, as they show that these providers "make residential services available to current and prospective customers." *Id.* The Commission even reviewed these carriers' websites and found that the advertising supported its determinations as well. *Id.* The record supports the Commission's determination that these carriers serve the residential market in the relevant exchanges. OCC does not dispute these findings.

Likewise, the record also supports the Commission's determination that the wireless carriers serve the 18 exchanges that the Commission approved for alternative BLES regulation under competitive test three. These carriers include: Alltel Wireless, Sprint/Nextel, and Verizon Wireless. They "advertise the availability and coverage of their service offerings in the relevant exchanges." *Id.* at 26, 31-32, Appellant's App. at 125, 130-131. Their coverage maps show that their wireless service offerings are readily available to customers in the relevant exchanges. *Id.* at 23, 32, Appellant's App. at 122,

131. They also have residential customers who disconnected from AT&T's BLES services. *Id.* at 26, 31-32, Appellant's App. at 125, 130-131. The record amply supports the Commission's determination that these carriers offer residential service in the relevant exchanges.

The fact that the wireless carriers did not provide service throughout the exchange is not the test. The Commission applied its judgment and expertise in determining that the exchange area was the most appropriate market area for analysis;⁵ not a city block and not a single household area as OCC suggests. *Id.* at 23, Appellant's App. at 122. Thus, the provision of service in an exchange qualifies a carrier for consideration under the Commission's competitive tests and it is not necessary to show that the carrier provides service to each residence in the exchange. *Id.*

The Commission also found that PNG met this prong of competitive test three in three exchanges. *Id.* at 32, Appellant's App. at 131. By reselling AT&T's residential services, PNG provides residential services in competition with AT&T's BLES services. *Id.* Hence, the Commission found that PNG provided service in the residential market in the three exchanges. *Id.* How they obtained those services did not affect this prong of competitive test three.

Whatever policy issues may be debated, the existence of factual record support for the Commission's determinations shows the existence of competitors to AT&T's BLES service in the relevant exchanges and their aggregate market share in those exchanges.

⁵ OCC agreed in the *Rules Case* that this was appropriate.

As in the case of the exchanges involved with the Commission's competitive test four, the debate over competitive test three is about policy, not the record facts. OCC disagrees with the Commission's policy determinations but the General Assembly committed the policy to the Commission's discretion. The policy disagreements do not change the record and the Commission's determinations are supported by record facts.

Proposition of Law No. III:

The Commission's determination that there are no barriers to entry is supported by facts of the record and should be affirmed.

The facts support the Commission's finding that there are no barriers to entry for residential providers in the relevant AT&T exchanges. *In re AT&T* (Opinion and Order at 8-9) (December 20, 2006), Appellant's App. at 107-108; *In re AT&T* (Entry on Rehearing at 17-18) (February 14, 2007), Appellant's App. at 182-183. The Commission's market tests evaluate the actual dynamics and openness of this marketplace:

Relative to Rule 4901:1-4-10(C)(3), O.A.C., [competitive test 3] the Commission finds significance in the required demonstration that:

at least 15 percent of the total number of residential access lines in an exchange must be provided by unaffiliated CLECs [competitive local exchange carriers]; (2) there are two unaffiliated facilities-based CLECs providing BLES to residential customers; and (3) there are at least five alternative providers serving the residential market. ...

* * *

Similarly, with respect to Rule 4901:1-4-10(C)(4), O.A.C., [competitive test 4], the Commission finds significance in the required threshold loss of at least 15 percent of the total residential access lines tied with the presence of at least five unaffiliated facilities-based alternative providers serving residential customers in the relevant market 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 AT&T (Opinion and Order at 8-9) (December 20, 2006), Appellant's App. at 107-108. In the Commission's judgment, compliance with its market tests require facts that show ease of entry rather than barriers to it.

OCC argues that the Commission's tests are not effective indicators of barriers to entry for competing stand-alone BLES providers. This argument wrongly assumes that R.C. 4927.03 limits the Commission's consideration to only alternative providers that offer basic service identical to that of AT&T. As already shown, the availability of competing *substitute* services, not identical services, is what R.C. 4927.03 directs the Commission to consider. That is what the Commission did. OCC ignores the plain words of the statute, and instead advances a standard that defeats the intended purpose of R.C. 4927.03 – alternative regulation of basic local exchange service.

OCC was part of a larger group in the *Rules Case* that argued that barriers-to-entry must consider any condition that makes entry into a marketplace more difficult. This is an insurmountable hurdle. It fails to distinguish, as the Commission did, between conditions that may *affect* market entry and *barriers* that *preclude* such entry. *Rules Case* (Opinion and Order at 22) (March 7, 2006), Appellant's App. at 465. As 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 532 (emphasis added).

This distinction comports with the dictionary definition of "barrier" as that which "bars," "prevents," or "obstructs." WEBSTER'S NEW WORLD DICTIONARY (Second College Edition 1982). Any retail provider seeking to enter a competitive marketplace will face challenges that affect, but fall well short of barring, market entry. *Rules Case* (Opinion and Order at 22) (March 7, 2006), Appellant's App. at 465; *Rules Case* (Entry on Rehearing at 18-20) (May 3, 2006), Appellant's App. at 532-534. Further, the Commission determined that federal and state laws⁶ and rules exist to minimize the effects of such challenges and to prohibit incumbent providers, like AT&T, from exploiting them to create barriers to entry. *Id.* at 18-20, Appellant's App. at 532-534. R.C. 4927.03 cannot require that new market entry be totally free of conditions. Financial, geographic, and a host of other factors and circumstances will always exist. OCC's test 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's practical focus considers "barriers" to entry as only those conditions that *preclude* a would-be competitor from entering the market, rather than factors that tend to show how effectively an already successful entrant may

⁶ See, e.g., 47 U.S.C. Section 251, that requires incumbent local exchange carriers to negotiate in good faith with requesting competing telecommunications carriers the terms and conditions for interconnection to the local exchange network.

perform in that market. This critical distinction requires the Commission's judgment. As a safety net, the Commission further explained that an interested party can always file a complaint alleging barriers to entry in a specific factual setting. *Rules Case* (Entry on Rehearing at 19) (May 3, 2006), Appellant's App. at 533. Further, under R.C. 4927.03(C), the Commission has continuing authority to abrogate or modify any prior order granting alternative regulatory treatment if it finds such action to be in the public interest. The Commission sought balance by identifying factors significant for complying with H.B. 218, while not making the thresholds so onerous that few, if any, ILECs could meet them and obtain BLES alternative regulation benefits contemplated by H.B. 218." *In re AT&T* (Entry on Rehearing at 8) (February 14, 2007), Appellant's App. at 173.

Finally, 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. For example, AT&T presented facts showing the presence of competitive alternative providers serving residential customers in the relevant exchanges. The *active business presence* of multiple service providers and alternative technologies that compete for residential customers, coupled with AT&T's loss of residential customers to competitor market share, show that there are no barriers to entry in the relevant exchanges. *In re AT&T* (Opinion and Order at 13) (December 20, 2006), Appellant's App. at 112; *In re AT&T* (Entry on Rehearing at 18) (February 14, 2007), Appellant's App. at 183.

OCC simply chooses to ignore the facts. Customer switching, coupled with the product and service differentiation of the alternative competing providers listed above, show a dynamic marketplace for residential service in AT&T's service area 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 any of the 136 exchanges where the Commission granted AT&T's application. *In re AT&T* (Opinion and Order at 8) (December 20, 2006), Appellant's App. at 107. OCC witnesses identified only general types of barriers that *may* be associated with any marketplace, while they failed to identify a single barrier to entry that applies to the relevant AT&T exchanges. *Id* at 7, Appellant's App. at 106.

The Commission rejected OCC's interpretation of "barriers to entry" because it frustrates the statutory purpose and creates an insurmountable burden of proof for any applicant. Market tests three and four fully incorporate what, in the Commission's judgment, is the proper barriers-to-entry analysis contemplated under R.C. 4927.03. *In re AT&T* (Opinion and Order at 8-9) (December 20, 2006), Appellant's App. at 107-108. The Commission's standard is practical, measurable, and relevant – that is to say, it considers facts that bear directly on the issue. There can be no better indicator of a lack of barriers than the presence of numerous competitors and services that AT&T customers are choosing as substitutes for their former AT&T basic local exchange service. OCC's standard strangles the statute with a threshold so onerous that few, if any, can meet to avail themselves of alternative regulation. *Rules Case* (Entry on Rehearing at 17-18) (May 3, 2006), Appellant's App. at 531-532. This does not comport with the streamlined

process created by the General Assembly to facilitate alternative regulation where, as here, the marketplace supports it. Nor does the Commission's rationale treat the statutory "no barriers to entry" test as surplusage as OCC mistakenly asserts. The Commission created regulations that evaluate all criteria in R.C. 4927.03. The Commission can make multiple findings based upon the facts AT&T submitted to meet the Commission's market tests.

The General Assembly left the determination of barriers-to-entry to the Commission's judgment and expertise as the fact finder. Ohio Rev. Code Ann. § 4927.03 (Anderson 2007), App. at 1-3. The Commission considered the plain words of R.C. 4927.03 and applied its reasoned judgment to the facts to conclude that there are no barriers to entry for residential service in the already competitive, vibrant telephone exchanges that are the subject of this appeal. 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 and balances 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 determination by once again applying its reasoned judgment to the record before it. *In re AT&T* (Opinion and Order at 35) (December 20, 2006), Appellant's App. at 134; *In*

re AT&T (Entry on Rehearing at 19-20) (February 14, 2007), Appellant's App. at 184-185. OCC opposes this finding because OCC wanted AT&T to provide *additional* public commitments. OCC's position is not mandated by law and ignores public benefits that customers already enjoy under the Commission's elective alternative regulation rule.⁷ 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 in an already competitive marketplace:

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

In re AT&T (Entry on Rehearing at 20) (February 14, 2007) citing *Rules Case* (Entry on Rehearing at 2) (May 3, 2006), Appellant's App. at 185.

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 AT&T basic local service, the Commission has ensured its continued affordability for residential customers. The pricing flexibility approved by the Commission allows AT&T to actually charge *less* to meet competition. Over objections from incumbent providers like AT&T, the Commission adopted rules that insulate low-income, lifeline customers from any BLES rate increase

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This is found at Section 4901:1-4-09(B)(1) of the Ohio Administrative Code. Ohio Admin. Code § 4901:1-4-09(B)(1) (Anderson 2007), App. at 15.

even where alternative regulation is appropriate. *Rules Case* (Opinion and Order at 40-41, 48) (March 7, 2006), Appellant's App. at 483-484, 491; *Rules Case* (Entry on Rehearing at 25-26) (May 3, 2006), Appellant's App. at 539-540.

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 483. The Commission noted:

[I]n developing the rules for BLES alternative regulation, we sought to *strike a balance* between the important public policy of ensuring the availability of stand-alone BLES at just and reasonable rates, while at the same time recognizing the continuing emergence of a competitive environment through flexible regulatory treatment of ILEC services, where appropriate.

In re AT&T (Entry on Rehearing at 19-20) (February 14, 2007), Appellant's App. at 184-185 (emphasis added) citing *Rules Case* (Opinion and Order at 40) (March 7, 2006), Appellant's App. at 483.

R.C. 4927.02 requires that any "public interest" analysis balance customer and industry considerations. For example, while the Commission is to ensure widespread availability of reasonably-priced basic local exchange service and continuation of low-income telephone service programs, it is also directed by the General Assembly to encourage innovation and to promote diversity and supply options among providers under the statute. The Commission's correct 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 gave full effect and consideration to related statutes, including the policies in R.C. 4927.02 in its decision.

There are other customer benefits that OCC ignores. To even qualify for BLES alternative regulation treatment, AT&T must show that it is in full compliance with a Commission-approved elective alternative regulation plan. Ohio Admin. Code § 4901:1-4-08 (Anderson 2007), App. at 15. The Commission's rules require that AT&T demonstrate full compliance with all the public interest commitments of its existing plan. Ohio Admin. Code § 4901:1-4-09 (Anderson 2007), App. at 15-17. Low-income customers are protected; AT&T must show that it has fully complied with all advanced services and lifeline (low-income) program commitments, while further committing, in the relevant exchanges, to continue offering qualifying lifeline customers basic local exchange service at existing rate levels. Ohio Admin. Code §§ 4901:1-4-06; 4901:1-4-08; 4901:1-4-11, App. at 8-14, 15, 18-20; *Rules Case* (Opinion and Order at 46) (March 7, 2006), Appellant's App. at 489. The OCC and other consumer groups supported this proposed rate freeze as a necessary *public benefit* to offset the incumbent local exchange carrier's (*i.e.* AT&T) ability to implement measured increases in basic local service rates. *Rules Case* (Opinion and Order at 46) (March 7, 2006), Appellant's App. at 489.

The General Assembly vested the Commission with authority to make judgment calls like determining the "public interest." The Commission exercised its judgment reasonably and lawfully, balancing the importance of continued affordability and availability of adequate basic local service, with the goal of the General Assembly to promote a competitive marketplace with a large variety of providers and services for residential customers to choose from. OCC's "more strings attached" view of the public interest ignores existing customer benefits, rate ceilings for residential customers, and no rate increases

for low-income customers. OCC's attack is a misplaced challenge to the Commission's policy determinations and should be rejected.

Conclusion

R.C. 4927.03 expressly directs the Commission to establish regulations 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 tests apply the criteria in R.C. 4927.03 and implement the policies delineated in R.C. 4927.02.

AT&T submitted facts that satisfy the requirements of the Commission's competitive market tests three and four. It presented evidence regarding the size and number of alternative providers, the ready availability of substitute services, and loss of its residential access lines or market share in the competitive exchanges relevant to this appeal. These facts were largely unchallenged by the OCC. Instead, OCC complains about the quality or weight of the evidence – matters left for the Commission's determination. OCC seeks to supplant the Commission, and impose its own market test, that, if adopted, will thwart alternative regulation of basic local service.

The wisdom of the policy contained within R.C. 4927.03 is outside the scope of this appeal. OCC's arguments should be directed to the General Assembly and, in any event, are irrelevant to the factual issues at hand. Equally unpersuasive is OCC's attack on the policy judgments made by the Commission when it adopted its market test rules.

Whether OCC agrees with the law or not, the Commission must apply R.C. 4927.03 to promote the will of the General Assembly. The Commission's rules and its decision do this. The decision should be affirmed.

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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 31st day of August, 2007.



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APPENDIX

**APPENDIX
TABLE OF CONTENTS**

Page

Ohio Rev. Code Ann. § 4927.02 (Anderson 2007)	1
Ohio Rev. Code Ann. § 4927.03 (Anderson 2007)	1
Ohio Admin. Code § 4901:1-4-01 (Anderson 2007)	3
Ohio Admin. Code § 4901:1-4-02 (Anderson 2007)	5
Ohio Admin. Code § 4901:1-4-03 (Anderson 2007)	6
Ohio Admin. Code § 4901:1-4-04 (Anderson 2007)	8
Ohio Admin. Code § 4901:1-4-05 (Anderson 2007)	8
Ohio Admin. Code § 4901:1-4-06 (Anderson 2007)	8
Ohio Admin. Code § 4901:1-4-07 (Anderson 2007)	14
Ohio Admin. Code § 4901:1-4-08 (Anderson 2007)	15
Ohio Admin. Code § 4901:1-4-09 (Anderson 2007)	15
Ohio Admin. Code § 4901:1-4-10 (Anderson 2007)	17
Ohio Admin. Code § 4901:1-4-11 (Anderson 2007)	18
Ohio Admin. Code § 4901:1-4-12 (Anderson 2007)	20
<i>In re Basic Local Exchange Service</i> , Case No. 05-1305-TP-ORD (SBC Ohio's Initial Comments) (December 6, 2006) (EXCERPTS)	21
<i>In re Basic Local Exchange Service</i> , Case No. 05-1305-TP-ORD (Transcript) (Cincinnati Public Hearing held January 20, 2006) (EXCERPTS)	38
<i>In re Basic Local Exchange Service</i> , Case No. 05-1305-TP-ORD (Transcript) (Columbus Public Hearing held January 18, 2006) (EXCERPTS)	55

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.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

PUCO

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

SBC OHIO'S INITIAL COMMENTS

Table of Contents

Introduction	2
Background	3
The Staff's Proposal	6
Eligibility	7
The Application Process	7
The Competitive Tests	8
The Finding of "No Barriers to Entry"	23
The Pricing Freedoms and Constraints	23
Lifeline	25
Revocation of a Plan	27
Conclusion	27
Attachments	

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detailed analysis to demonstrate that the applicant meets, on an exchange basis, at least one of the competitive market tests. . . ." Proposed Rule 4901:1-4-09(B)(3). However, it is unclear how much information will constitute sufficient supporting information and what will be considered a "detailed analysis."

The Competitive Tests

The Staff proposal sets forth three competitive tests; an applicant must meet one of them in each exchange under the proposed rule. The tests are as follows:

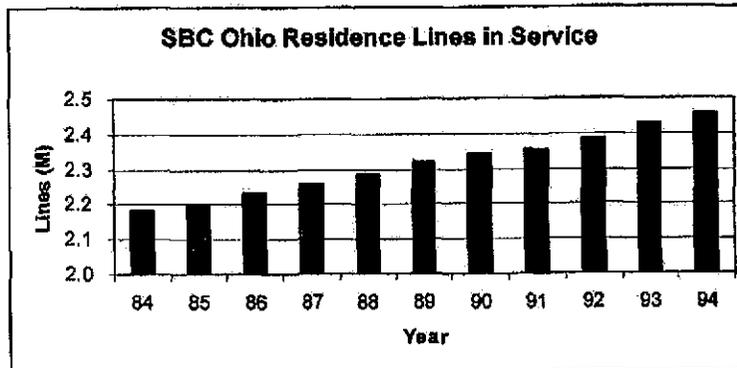
- (1) An applicant must demonstrate in each requested exchange that at least twenty-five percent of total residential access lines are provided by unaffiliated CLECs, and at least twenty percent of total company access lines have been lost since 1996;
- (2) An applicant must demonstrate in each requested exchange that at least twenty percent of total residential access lines are provided by unaffiliated CLECs, and the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers; or
- (3) An applicant must demonstrate in each requested exchange that at least fifteen percent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five intermodal carriers serving the residential market.

Such tests may have been appropriate just a few short years ago, but they do not appropriately reflect the more recent, significant and irreversible changes to the competitive landscape resulting from new and burgeoning telecommunications technologies. Competitive tests that significantly underestimate the impact of intermodal competition such as wireless, cable broadband, voice over internet protocol ("VoIP"), and broadband over powerline ("BPL") are simply inappropriate. The third test is the only one that even recognizes intermodal competition. The other two rely exclusively on "traditional" CLEC competition, a rapidly eroding competitive

factor, as explained below. The Staff's proposed tests must be revised to reflect current marketplace conditions.

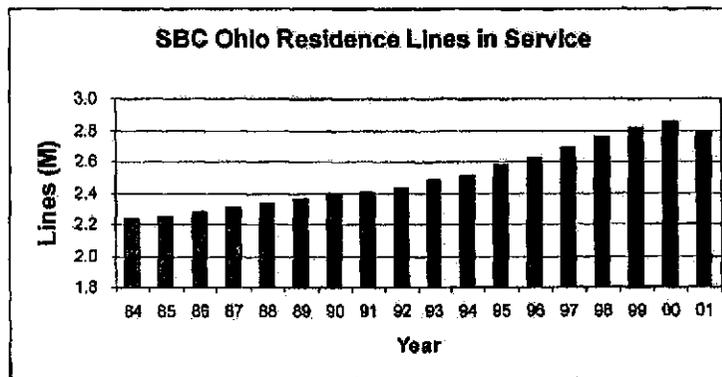
In terms of access line growth and competition, SBC Ohio's entire history – and that of most of the other incumbent local exchange carriers – can be divided into four phases.

Phase 1 essentially began with the invention and commercial availability of the telephone in the late 1800's and lasted until the passage of TA '96. Other than in some areas where there were competing local companies in the late 1800's and early 1900's, there was only limited competition. Because of the limited competition, the telephone companies were viewed as "natural monopolies," and were regulated as such in Ohio beginning in the early 1900's. During this period, ILECs' access line quantities generally increased. As shown below, SBC Ohio's residence access lines in service grew at a fairly consistent rate for the time period from 1984 – 1995:



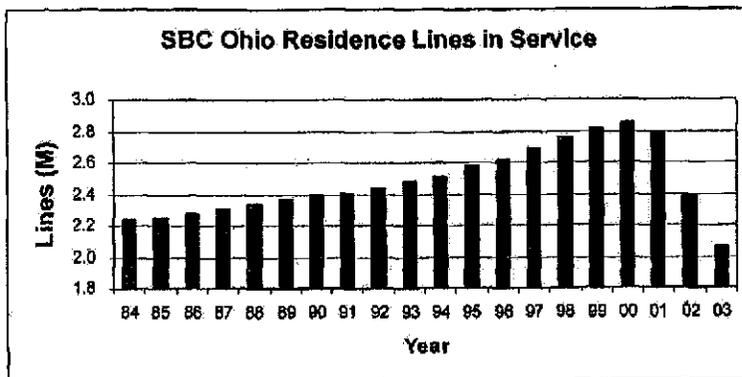
(Source: SBC Ohio's FCC ARMIS Report 43-08 and FCC Form M)

There were some competitive inroads before the passage of TA '96. But TA '96 broke down any remaining barriers to entry in the local exchange market and as a result, Phase 2 began in earnest. But Phase 2 lasted only about 5 years, from 1996 to approximately 2001. Even though there was competition, ILEC retail access lines continued to grow. The use of personal computers and fax machines (requiring second lines in previously single line premises) contributed to the increase in lines experienced in this Phase:



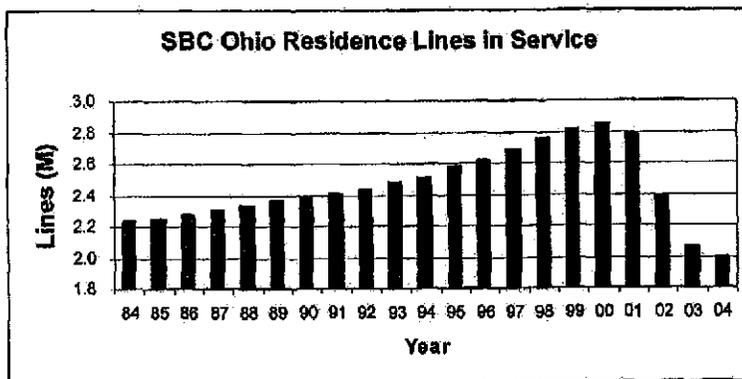
(Source: SBC Ohio's FCC ARMIS Report 43-08 and FCC Form M)

Phase 3, which lasted for only 2 years (2002 – 2003), is characterized by a significant loss of ILEC retail lines:



(Source: SBC Ohio's FCC ARMIS Report 43-08 and FCC Form M)

Phase 4 began in 2004, and appears to be very similar to Phase 3:



(Source: SBC Ohio's FCC ARMIS Report 43-08 and FCC Form M)

There are two striking aspects of these Phases. First is their duration: Phase 1 lasted for many decades. Phase 2 lasted 7 years, and Phase 3 lasted only 2 years. The second striking aspect is the loss of retail residential access lines. Not only does SBC Ohio have 23% fewer retail residential access lines at the end of 2004 (1.94 million) than it did in 1996 (which is a key

point in the first competitive test proposed in the draft rules), there are fewer residential lines in 2004 as compared to 1984. In fact, the last time prior to 2004 that SBC Ohio ended a year with fewer than 2 million retail residence lines was 1972. That fact alone demonstrates the pervasiveness of competition throughout SBC Ohio's territory.

But the loss in an ILEC's retail access lines only in part differentiates the Phases. These Phases are significantly different because of what has occurred in the wholesale market as well, which can be displayed as follows:

Phase	Retail Access Line Growth	Wholesale ¹ Access Line Growth
1	Yes	None, pre TA '96
2	Yes	Yes
3	No	Yes
4	No	No

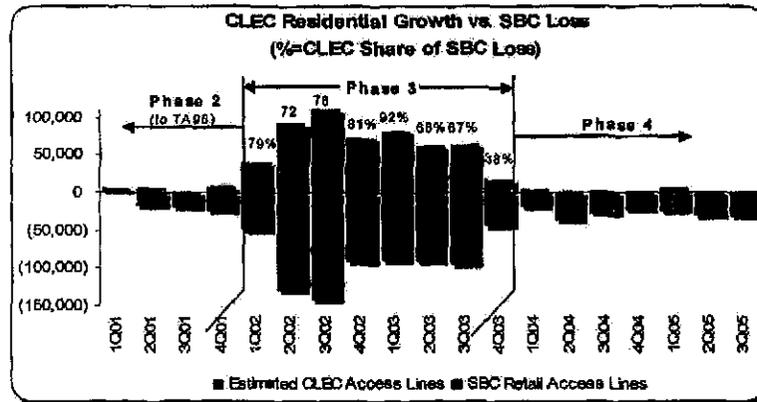
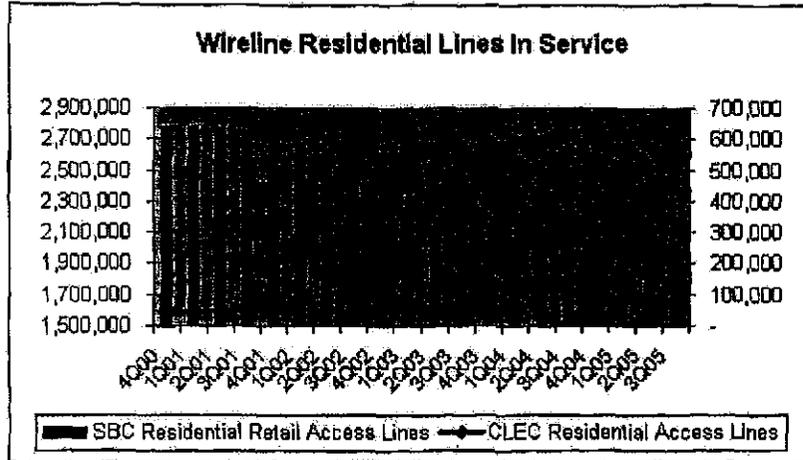
As stated above, in Phase 1 (up through TA '96), there was very limited competition, thus retail access lines grew with no significant increase in wholesale access lines. During Phase 2, triggered by TA '96 and through 2001, retail and wholesale lines generally increased. Phase 3, from 2002 – 2003, can be recognized by significant losses in retail access lines, but with concurrent increases in wholesale lines. During this time frame, the majority of the retail line losses were offset by wholesale line gains. In other words, over 70% of the retail line losses were offset by wholesale line gains. (Notably, the wholesale offset was in the number of access lines but was not reflected in revenues because of the disparity between retail and

¹ Wholesale includes UNE-P, UNE-L, and resale (i.e., the retail rate less the wholesale discount). It does not include intermodal competition nor facilities bypass. Thus, it underestimates the relevant market.

UNE-P pricing.) During this period, losses to intermodal competition (primarily wireless services in this Phase) are not readily apparent if one analyzes only ILEC data.

Although not an ideal tool to estimate a share of the entire telecommunications market, an understanding for this analysis may be gained by assessing both the retail and wholesale wireline market. The following charts depict SBC Ohio's retail and wholesale operations in terms of in-service access lines, and incremental quarter-over-quarter gains/losses.

SBC Ohio and CLEC Wireline Residential Access Lines



Note: CLEC access line estimates are based on estimated CLEC switch-based end user access lines + UNE-Platforms + resold access lines.

As seen in the previous charts, the market has dramatically changed in less than two years and SBC Ohio is clearly in Phase 4 of the market cycle. Since 2004, SBC has experienced decreases in both retail and wholesale access lines. These decreases have occurred in spite of numerous new and attractive retail product offerings and the availability of reasonable wholesale commercial agreements.

The significant losses experienced by SBC's retail and wholesale operations in this phase can only be attributed to one thing: intermodal competition. The intermodal competitors arose not primarily because of TA '96's removal of barriers to entry, but because of technological advances – improvements in wireless telephony and the phenomenal growth of the internet. In addition to being essentially free from any regulatory burden, these technologies also do not have the high fixed costs that ILEC legacy networks face, enabling relatively rapid deployment. Intermodal competition is irreversible and growing very rapidly.

Data compiled and reported by the FCC supports this claim. For example, the FCC recently reported that the quantity of wireless lines now exceeds the quantity of landlines.

		Landline Access Lines in Ohio	Cellular Access Lines in Ohio	Total Landline and Cellular Lines in Ohio
	ILEC	6,904,938		
12/99	CLEC	262,159		
	Total	7,167,097	3,237,786	10,404,883
		69%	31%	
	ILEC	5,596,876		
12/04	CLEC	963,330		
	Total	6,560,206	6,627,910	13,188,116
		50%	50%	

(Sources: Local Telephone Competition: Status as of December 31, 2004, Industry Analysis and Technology Division, FCC Wireline Competition Bureau, July 2005, pp. 15-16 and Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, 10th Report, Wireless Telecommunications Bureau, FCC 05-173, September 30, 2005, p. 81.)

The FCC also reported that:

Once solely a business tool, wireless phones are now a mass-market consumer device.

* * *

The overall wireless penetration rate in the United States is now at 62 percent, and more than 90 percent for the U.S. population between the ages of 20 and 49. According to one study, two-thirds of all U.S. households have at least one cell phone, with many having more than one.

* * *

Total wireless substitution has grown significantly in recent years. According to a 2004 survey . . . 5.5 percent of adults lived in households with only wireless phones in the second half of 2004, up from 4.4 percent in the first half of 2004. . . .

* * *

Even when not "cutting the cord" completely, consumers appear increasingly to choose wireless service over traditional wireline service, particularly for certain uses. A recent study showed that one-third of all households receive more than half of their calls on wireless phones, with 9 percent receiving almost all their calls wirelessly.

* * *

These trends appear to be due to the relatively low cost, widespread availability, and increased use of wireless service. As we discussed in past reports, a number of analysts have argued that wireless service is cheaper than wireline, particularly if one is making a long-distance call or when traveling. As one analyst put it more recently, "For many customers, wireless is cheaper with greater utility than wireline – in contrast to perceptions, wireless prices have indeed been falling, making it more competitive with wireline."

* * *

The number of mobile wireless carriers offering service plans designed to compete directly with wireline local telephone service continues to increase. These plans offer unlimited local calling for around \$30 to \$40 a month.

* * *

As discussed in the *Ninth Report*, such unlimited local wireless calling plans are now common. No fewer than 17 regional and local competitors offered similar plans in 41 states. In addition, in 2005, many national carriers expanded calling plans that are effectively unlimited, with 1,000 "anytime" minutes and unlimited night and weekend minutes for around \$40 - \$65 per month. One analyst commented on the recent addition of "bells and whistles," such as text messaging and long distance service, into these plans, "as carriers seek to provide customers a comprehensive alternative to wired service."

(Source: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, 10th Report, Wireless Telecommunications Bureau, FCC 05-173, September 30, 2005, pp. 72-75, footnotes omitted.)

The trend is clear: the overall market for telephony is growing. But, most critical for this analysis is that even though the overall market for telephony in Ohio is growing, the overall quantity of traditional landlines is decreasing among both ILECs and CLECs. The growth is not attributable to the ILECs and CLECs, but rather to the intermodal competitors.

The growth of cable telephony has also been documented, though not at the state level. The FCC publishes a report on the status of competition in the cable television market. Its latest report, released in February 2005, demonstrates the growth of cable telephone service and includes information of circuit switched and VoIP subscribers. While state-specific data is lacking, the national trend clearly demonstrates significant growth.

Cable Telephone Subscribership (Includes VoIP)

December 2002	2.5 M	
December 2003	2.7 M	Growth from 12/2002 = 8%
December 2004	3.5 M (projected)	Growth from 12/2003 = 30%

If Phase 3 had continued with declining ILEC lines, increasing CLEC lines, and no intermodal impacts, the Staff's proposed competitive tests might be appropriate. But because

the Staff's proposed criteria for the competitive tests do not properly reflect the impact of wireless, VoIP, cable telephony and other intermodal alternatives to traditional landline basic local exchange service that technological innovation has given rise to in Phase 4, the Staff's proposal does not square with the realities of today's competitive environment. This disparity will only increase in the near future because of the rapid growth of the intermodal alternatives. To this point, it was recently reported that VoIP subscriptions are up 33% just over the last *three months*. "Internet Phone Subscriptions Up by a Third in 3 Months," Washington Post, 11/15/05, see Attachment.

There can be no dispute that SBC Ohio faces more competition than any other ILEC in Ohio. Yet, because of Phase 4 phenomenon and the narrow definition of competition utilized by the Staff in its proposed competitive tests, the test results are skewed and an incomplete and thus inaccurate picture of the competitive landscape emerges. Indeed, using the most recent data available, there are only 11 SBC Ohio exchanges where more than 20% of the residential lines are provided by unaffiliated CLECs. Those 11 exchanges are certainly not the ones that someone would expect would be at the top of the list. In order, these exchanges are Leetonia, Atwater, Wellsville, Fostoria, Canal Fulton, Piqua, Rainsboro, Salineville, Trenton, Marlboro and Glenford. Each of these exchanges has fewer than 10,000 residence lines, and all are categorized in Access Area D, SBC Ohio's least dense area in terms of access lines per square mile.² See Attachments.

And surprisingly, in exchanges where common sense suggests that there are high levels of competition (for example, because of high densities, economies of scale, etc.), such as

² The data for the former AT&T CLEC was not included as competitive losses in this analysis. As the former AT&T CLEC is now an affiliate of SBC Ohio, the former AT&T CLEC data were counted as if they were SBC Ohio lines.

Columbus or Cleveland, SBC Ohio cannot meet the Staff's proposed test. For example, the Worthington and Hilliard exchanges have just over one-half of the wireline competitive losses of Leetonia. Many Cleveland exchanges have about one-third of the competitive wireline losses of Leetonia. No one could in earnest argue that there is more competition in Leetonia than Columbus or Cleveland. When such exchanges do not pass the Staff's proposed tests, the only logical conclusion is that the Staff's proposed tests are unreasonable.

The Staff's proposal, a CLEC line-loss based "metrics" test, clearly underestimates the impact of intermodal competition and therefore is simply not an adequate measure of assessing competition today. Thus, it is clear that the triggers set forth in the Staff's proposal do not capture the level or the nature of competition appropriately. Moreover, as intermodal competitors continue to gain market share from ILECs and CLECs, the three competitive tests proposed by the Staff will become even more difficult to pass to the extent they rely on losses to wireline competitors. This is simply counterintuitive. As competition will only continue to increase, any competitive test that becomes more difficult to pass as competition increases is obviously unreasonable.

It is difficult to ascertain the exact level of competition in the Ohio telecommunications market. In all fairness, it is likely that the Staff realized that it may be practically impossible to ascertain with much precision the level of competition. Information on the types of and the market penetration of the many providers of intermodal services is difficult to find. Even if such data is available in the public domain, it is either incomplete, dated, or lacks Ohio-market specificity. It is likely that these factors explain why the Staff proposal attempts to capture a snapshot of ILEC market losses, as opposed to a complete market share

analysis. Furthermore, the Staff may not fully understand the significant changes occurring in the marketplace in Phase 4. Nevertheless, assessing the competitiveness of the marketplace via an ILEC's losses to CLECs alone is an unreasonable approach. It is possible to develop and implement appropriate tests to fairly gauge competition and to appropriately relax regulation in light of that competition.

The Staff's first proposed trigger uses as a baseline the access line quantities from 1996. Other than the incidental connection to the passage of TA '96, there is no logical reason for using 1996 as a base year. It is likely that the Staff selected 1996 as the base year so that an ILEC could not "take advantage" of the increase in access lines that occurred in the mid and late 1990's due to the impact of fax machines and personal computers in order to pass the competitive test.

As SBC Ohio faces the most competition of any ILEC in Ohio, its data merits review if only to further underscore the extent to which the Staff's proposed competitive tests are unreasonable. One need only review what occurred in Phase 2, where the quantity of access lines increased for both SBC Ohio's retail and wholesale operations, to recognize that 1996 is not an appropriate base year. Using the access lines counts from the FCC filings referenced above, SBC Ohio had 23% fewer retail residence access at the end of 2004 than in 1996 (1.99M vs. 2.53M). SBC Ohio had 31% fewer retail residence access lines in 2004 than in 2000, which was its historical peak. And, as noted above, until 2004, SBC Ohio had not had fewer than 2 million retail residence access lines since 1972.

An example of a changing marketplace is what occurred to residential "dormitory Centrex." It, along with residential POTS lines, were retail products typically offered to students in college dormitories. For years, SBC Ohio experienced reasonably predictable seasonality in such services: large increases in lines commensurate with the beginning of the school year, and large decreases in lines commensurate with the end of the school year.

Such seasonality in dorm Centrex and POTS service is forever gone. Dorm Centrex has been replaced with wireless communications and broadband services. Students now live without being tethered to a landline during their college years, and it should be no surprise that they do not want to be tethered to a landline after graduation either. The FCC reported that the "rate [of total wireless substitution] among young users appears much higher, with roughly 14 percent of 18 – 24 year olds living in wireless-only households. According to one analyst, most wireless-only users do not actually cancel their wireline service; instead, they simply never sign up for wireline when making an initial phone service decision." Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, 10th Report, Wireless Telecommunications Bureau, FCC 05-173, September 30, 2005, p. 73.

In order to improve the Staff's proposal and to synchronize it with the competitive environment as defined by Phase 4 of the industry's business cycle, the thresholds for each competitive test must be changed by drastically reducing reliance on CLEC competition. This does not mean that the Commission would be accepting a lower threshold for competition. Rather, such a revision would recognize the changing dynamics of the marketplace and the fact

that intermodal competition is alive and growing, and has surpassed traditional wireline competition.

Further, the Commission should completely eliminate from the Staff proposal the competitive tests' requirement to demonstrate competitive losses on an exchange basis. Exchanges are antiquated remnants of an era long past. Carriers offer statewide averaged prices, if not nationally or internationally averaged prices. Number portability has further eroded the relevance of ILEC exchanges. Wireless and VoIP will cause further erosion. Exchanges were relevant when the ILECs built the legacy telephone network and to CLECs in the instances where CLECs purchase wholesale services from ILECs. But as noted above, wireline competition from CLECs is decreasing. Exchange boundaries are essentially irrelevant for intermodal competitors and their customers. Indeed, cable broadband facilities are deployed without regard to exchange boundaries. The same is true for wireless networks. The Commission should recognize that exchanges are not relevant for measuring competition for purposes of this analysis.

As to the Staff's three competitive tests, there is arguably sufficient information contained in the FCC's 10th Annual Report on CMRS providers to alone eliminate the need for any metrics tests. Indeed, this report alone documents the inroads that wireless service have made, proving without doubt that there are competitive alternatives and no barriers to entry throughout SBC Ohio territory, if not the entire state of Ohio. It also demonstrates that any metrics test with a high threshold for wireline competition is inherently unreasonable. The FCC report, coupled with SBC Ohio's retail and wholesale data provided above that demonstrates that

wireline competition is being displaced to intermodal providers, provides overwhelming evidence of competitive alternatives and no barriers to entry.

The Commission may believe it should rely on a metrics test of some sort. To that end, and to appropriately recognize the impact of intermodal competition and the irrelevance of exchange boundaries, SBC Ohio recommends that the Commission adopt only one competitive test, as follows:

(C) An applicant must demonstrate that it has at least five percent fewer retail residential access lines compared to a previous time period since 1996 (excluding the impact of line losses to affiliated CLECs), and the presence of at least five intermodal carriers serving the residential market.

The Finding of "No Barriers to Entry"

The Commission must address one important issue missing from the Staff's proposal. The new legislation requires that the Commission find that there are "no barriers to entry" in connection with its alternative regulation of basic local exchange service. R. C. § 4927.03(A)(3). The Commission should make this finding, either in its order or in its rules. Thus, if the competitive test (as it is finally adopted) is met, the Commission must find that, as a result, there are no "barriers to entry" as contemplated in the statute.

The Pricing Freedoms and Constraints

The Staff proposal offers a moderate degree of pricing flexibility in exchanges meeting one of the proposed competitive tests. Where one of the proposed competitive tests is met, an ILEC will be granted, only in those exchange areas meeting the test, Tier 2 pricing flexibility for all Tier 1 non-core services. For BLES and basic caller identification, the

1 deprive basic phone service to our most vulnerable
2 residents.

3 But I would go further, I would argue
4 that just because a poor family does not qualify for
5 Lifeline doesn't mean that they have other options
6 available to them that would protect them from
7 20 percent annual rate increases. Nor does it mean
8 they can afford such increases.

9 Certainly the phone companies can make
10 enough profit from those of us who have options to
11 survive without taking advantage of those who have no
12 options.

13 Thank you for your time and your
14 courtesy. I hope you'll continue to see to it that
15 our vulnerable residents are not left without basic
16 phone service at a price they can afford.

17 COMMISSIONER SCHRIEBER: Thank you,
18 Mr. Jewett.

19 Next we'll call Matthew Browning. I'm --
20 Bruning. Give your name, address, area code, first
21 three digits.

22 MR. BROOM: My name is Matthew Broom. I
23 live at 3519 Cornell Place, Apartment 3, Cincinnati,
24 Ohio 45220. My first three -- my area code is 513,

1 my first three digits of my phone number is 289.

2 I do not myself own a -- I don't have a
3 residential line. I do not have a business line. I
4 work downtown. I live in Cincinnati. I haven't had
5 a land-based line in almost, probably four years.

6 I pay maybe a little bit more for my cell
7 phone than I would maybe a residential line, but I
8 believe that the convenience and the, I would say the
9 convenience and the access that I have to having --
10 being able to get in touch with people and whatnot
11 and not having to be at home -- say there's an
12 emergency and my sister needs me to baby-sit her
13 kids, she's able to call me if I'm away, if I'm not
14 at home, I'm able to get ahold of her without having
15 to go home and maybe get a message that may be too
16 late to help her out.

17 I took a straw poll at work. I work with
18 a lot of 20- to 30-year-olds, probably close to 75 to
19 80 people that I work with, and 3/4 of them don't
20 have a landline. They rely on their cell phones to
21 be able to, you know, to get around, to call their
22 friends and not have to go home and use their
23 landline. It's so much more convenient, I think, for
24 myself and most of, I think, my younger generation

1 that I'm encompassed to have a cell phone and be able
2 to talk to friends, talk to family members.

3 My long distance is included. It's
4 actually free. I don't have to pay any more for my
5 long distance than I do. Let's say I go over my
6 minutes or whatnot in my cell phone, unlike a
7 land-based phone, I can still call 911, it doesn't --
8 I don't know if that's true or not, maybe you can't
9 call 911 from a land-based line if, let's say, you
10 get your phone turned off, but probably that's not
11 true.

12 I'm just saying I'm here to just put a
13 whole -- to put another spin on it I guess, to where
14 maybe my generation has a whole lot of, maybe just
15 looks at it differently than maybe some other
16 generations would.

17 That pretty much is what I have to say.

18 COMMISSIONER SCHRIBER: Concluded? Okay.

19 MR. BROOM: Thank you.

20 COMMISSIONER SCHRIBER: Thank you for
21 your testimony.

22 Roy Schmansky. I'm sorry, Schomaker. I
23 can't read it.

24 MR. SCHOMAKER: That's me.

1 important to Taft High School, other organizations
2 with similar missions such as the Marvin Lewis
3 Community Fund, among others.

4 And really I don't want to get into the
5 bill and the specifics of that, again, I'm here just
6 to speak of their importance to this community. And
7 like I said, any regulation that inhibits Cincinnati
8 Bell to compete on a level playing field I think is
9 not in our best interests.

10 Thank you.

11 COMMISSIONER SCHRIBER: Thank you,
12 Mr. Danner.

13 Next, Doug Moormann.

14 MR. MOORMANN: Good afternoon, Chairman
15 Schriber. My name's Doug Moormann. I'm here this
16 afternoon representing the Cincinnati USA Regional
17 Chamber of Commerce. Our mailing address is 441 Vine
18 Street, Cincinnati, Ohio 45202. The phone number is
19 area code 513, and the first three digits are 579.

20 The Cincinnati USA Regional Chamber is
21 the nation's fifth largest chamber and we represent
22 approximately 6,000 members in southwestern Ohio,
23 northern Kentucky, and southeastern Indiana. As you
24 can imagine, we're certainly focused on growing the

1 regional economy and capturing our place as one of
2 the world's bigger American business centers.

3 Today I'm here to speak about the rapidly
4 evolving telecommunications industry. Cincinnati USA
5 features a robust market, and through this proceeding
6 we hope that the PUCO will consider the wide and
7 varied availability of telecommunications services in
8 this region.

9 I'll start with the national. National
10 reports have found significant competition exists in
11 the telecommunications marketplace. A report
12 entitled "Cutting the Cord: Consumer Profiles and
13 Carrier Strategies for Wireless Substitution," found
14 data that confirms what an earlier witness testified
15 to, approximately 9.4 percent of wireless subscribers
16 already use a wireless phone as their primary
17 telephone.

18 Extrapolated for this region of about
19 2.1 million people that would indicate that about
20 1,200,000 people are using wireless phones as their
21 primary phone. That's more than the entire
22 population of Warren County. 8.4 percent of
23 respondents used Voice over Internet Protocol for
24 their calling.

1 Their resistance to wireless substitution
2 for landline service also appears to be declining.
3 In 2003 73.6 percent of the respondents would not be
4 willing to consider replacing their landline
5 telephone with a wireless phone. In 2005 that number
6 had been reduced or had fallen to 49 percent.

7 The Cincinnati USA region includes at
8 least eight wireless providers whose services include
9 pre- and post-paid wireless plans, their networks
10 carry local, long distance, and data traffic, and are
11 priced to compete not only against each other but
12 against landline service as well.

13 One of the more interesting local
14 businesses is Current Communications, a company that
15 provides broadband and VoIP service both over the
16 power lines. As a partner of Cinergy this company
17 has the potential to provide telephone service to
18 every resident and every business in this region.

19 Another way competition is advancing was
20 reported just last week in the *Wall Street Journal*.
21 Cordless phones that use a base station plugged into
22 a computer are now being made available in the
23 marketplace. These free callers to use a more
24 traditional handset and move away from the computer,

1 and it's anticipated that these devices will make
2 internet phone service more appealing to consumers.

3 Subscribers to Time Warner cable
4 television in this region are sure to be aware that
5 broadband and telecommunications are available to
6 them through the Time Warner service. In fact, both
7 Time Warner and Vonage are both aggressively pursuing
8 their services and marketing their services to
9 residential customers as well as small and mid size
10 businesses.

11 Beyond the newer technologies that have
12 fostered increased competition in this marketplace, a
13 number of local landline carriers continue to compete
14 for business in this area. Companies like MCI,
15 Global Crossing, and WinStar all use the existing
16 Bell infrastructure, if you will, to offer the same
17 services as the local Bell carrier.

18 As one would suspect, the Chamber
19 believes that robust competition is good for the
20 local business environment, however, it's important
21 to keep in mind that in a competitive environment all
22 providers need to have the business tools necessary
23 to compete and the flexibility to respond in an
24 evolving marketplace.

1 Businesses and consumers both benefit
2 when providers are willing to offer products,
3 services, and pricing structures that effectively
4 meet demands.

5 We appreciate the opportunity to offer
6 testimony this afternoon.

7 COMMISSIONER SCHRIBER: Thank you, Doug.

8 Next we'll call Mark Faulkner.

9 MR. FAULKNER: Thank you. My name is
10 Mark Faulkner, here speaking today on behalf of the
11 University of Cincinnati. Address, 2900 Reading
12 Road, zip code 45220, area code 513, and the
13 University has rights to both the 556 and 558
14 exchange.

15 My position at the University is
16 Assistant Vice President for Network and
17 Telecommunications, and I respectfully submit the
18 comments and observations and my position.

19 At the University of Cincinnati wireless
20 is becoming the preferred mode of digital device.
21 Connectivity is changing, there are multiple modes
22 for connectivity, and most organizations today still
23 rely on wired models for connectivity.

24 That said, the University's

1 infrastructure today consists of approximately 12,500
2 landlines, a thousand VoIP stations, Voice over
3 Internet Protocol, and 23,000 data lines.

4 To begin moving away from this
5 traditional infrastructure environment our vision is
6 to create a customized relationship with a cellular
7 carrier partner that establishes a mobile
8 connectivity cloud over the university which
9 integrates multiple devices and services allowing new
10 modes of connectivity and leading edge mobile
11 applications.

12 The University recently issued an RFP and
13 intends to accomplish this by forming a business cost
14 recovery model for cellular, voice, and data services
15 that fully and transparently integrate cellular and
16 traditional wire telephony services to the point
17 where the two systems functionally appear as one
18 service.

19 The University fully expects cellular
20 services to be a critical component to providing
21 next-generation voice services to its campus
22 communities. We envision eventually replacing most
23 of UC's landline phones with cell phones which
24 include data capability, thus, the smartphone

1 becoming the ubiquitous device for communications.

2 We believe that as smartphones become
3 smarter, gain extensibility and features, that we
4 will see a significant increase in mobile data
5 applications and services and a migration away from
6 today's landline services.

7 One of the first areas we anticipate such
8 a change is clearly the residence halls where
9 students today view landline phones as buggy whips.
10 While the University has a significant deployment of
11 Wi-Fi technology, we intend to work with a partner to
12 build a comprehensive advanced cellular
13 infrastructure to augment current WiFi deployments
14 for wireless, voice, data, and video needs.

15 In short, the University plans to create
16 an open architectural environment that permits an
17 end-user to select their mobile device while
18 providing an integrated infrastructure between
19 disparate wireless technologies.

20 Separately, we also view Voice over IP as
21 a critical component to next-generation voice
22 services. We anticipate this becoming the
23 telecommunications standard when implementing voice
24 services in new building construction and major

1 renovations.

2 In closing, I believe that voice services
3 will become a blend of services typically referred to
4 in the industry as a triple play. While landlines
5 are predominant today and will still have a place
6 over the coming decades, it is clear to me that there
7 will be a trend to migrate away from the traditional
8 technologies to the emerging technologies of Voice
9 over IP and cellular wireless services.

10 Thank you.

11 COMMISSIONER SCHRIBER: Thank you,
12 Mr. Faulkner.

13 I'll now call on Damon, I have no clue
14 how to pronounce that last name.

15 MR. McMAHON: McMahon.

16 COMMISSIONER SCHRIBER: McMahon, okay.

17 MR. McMAHON: My name's Damon McMahon. I
18 live at 7932 Burgundy in Finneytown. I work in Mount
19 Adams, and the first three digits of my phone are
20 706.

21 Like some of the people before me, I have
22 not had a landline for about two years, though I look
23 at it a little differently. Based on my current
24 situation -- being single, living by myself -- I

1 don't see a landline as a necessity. I have call
2 forwarding, call waiting, caller ID, paging,
3 voicemail, free long distance, and more minutes than
4 I could possibly ever use in a month at only \$30 a
5 month, and I don't see the need to pay an extra fee
6 for a landline.

7 That being said, that's not always going
8 to be the case, and as I get older and get married
9 I'm going to want a landline, but I'm going to make
10 sure that I research my possibilities to make sure
11 that I have the best model that fits my personal
12 needs, and cost is going to be included in it.

13 So, as a consumer, currently do I want to
14 see prices raise? No. But at the same time I can
15 understand why they would want to do that to stay
16 competitive. They're losing customers left and right
17 and, in a sense, they're having money taken away from
18 them all the time. But whether they raise the prices
19 or if they stay the same, I am going to still
20 research all my possibilities to make sure I get the
21 best deal for me.

22 COMMISSIONER SCHRIBER: Thank you very
23 much.

24 Laurence Clements, please.

1 current regulatory structure.

2 Thank you.

3 COMMISSIONER SCHRIEBER: Thank you for
4 your testimony.

5 Next we'll call Vincent Brown.

6 Good afternoon, Mr. Brown.

7 MR. BROWN: Good afternoon, Mr. Chairman.
8 Thank you so much for allowing me the opportunity to
9 speak. My name is Vincent Brown, 6753 East Farm
10 Acres Drive here in Cincinnati, Ohio. Area code 513,
11 351.

12 I'm talking today on two levels, one, as
13 a business owner, and the second, as a consumer. And
14 let me just first say as I thought about this
15 conversation real quickly, or my testimony, I thought
16 of two things that happened to me recently.

17 The first is my youngest son, 11 years
18 old, Adam, when I asked him, "Adam, pick up our
19 phone" in the house. He said "Why?" I said "What?"
20 He said, "Why, Dad? Why do we even have that phone?
21 You got a cell phone, I got a cell phone, your
22 brother's got a cell phone -- my brother's got a cell
23 phone, and mom's got a cell phone. Why do we have
24 it?" And I did the response that a father would do

1 which is "Pick it up because I said so." I thought
2 that was the right answer, and I exerted my authority
3 there.

4 The second thing I would bring up to you
5 is that my older son, Michael, is at Kentucky State
6 University, and I cannot have -- cannot connect with
7 Michael through the regular landline. He only picks
8 up if I text him from my Blackberry, period. I can't
9 get him any other way.

10 And so I say this to say that I think we
11 live in a new era, quite frankly, and I as a business
12 owner recognize that every one of our 50 employees
13 that are in three different cities across the
14 country, each one of them has internet, each one of
15 them has wireless, and many of our younger associates
16 in particular are actually talking about they don't
17 want a landline phone.

18 So when I think about this in the future,
19 it seems to me that it's pretty obvious that
20 companies that are regulated in Ohio will need the
21 ability to be competitive, or, perhaps they won't be
22 in Ohio, or maybe even worse, may not even exist.

23 And so I would suggest as you think about
24 this important issue is that it's very important for

1 companies to be competitive, but secondly I think
2 there's another aspect that I would be remiss to say
3 if I didn't think about the impact of Cincinnati Bell
4 in this community.

5 The Taft High School project, which is an
6 inner-city school project, is a turnaround story that
7 ought to be known by everyone, and it was a large
8 effort of Cincinnati Bell employees that got involved
9 on a day-to-day basis. Where do some of the profits
10 go? I think they go to places like that that are
11 very important.

12 So I would suggest to you that as you
13 think about this, you have a very important thing
14 that you're doing, I know it's important, it seems
15 like to me the options are kind of simple: One, you
16 provide the opportunity for companies to be
17 competitive; two, you come up with some kind of
18 incentive that will allow companies to be, especially
19 Ohio-based companies, to be competitive; or three,
20 look at sometime in the future maybe not even having
21 a role in the telecommunications industry and,
22 unfortunately, I think that's where we are.

23 So thank you so much for your time, I
24 really appreciate it very much.

1 COMMISSIONER SCHRIBER: Thank you for
2 your testimony, Mr. Brown.

3 Jim Tenhundfeld.

4 MR. TENHUNDFELD: Good afternoon,
5 Chairman. My name is Jim Tenhundfeld, and I
6 represent the Cincinnati/Hamilton County Community
7 Action Agency located at 1740 Langdon Farm Road,
8 45237. Our first three digits are 569.

9 The Community Action Agency serves over
10 20,000 people throughout Hamilton County, all low and
11 moderate income families, and a lot of our families
12 do qualify for the Lifeline.

13 But one in particular -- I brought my
14 mother-in-law home from the hospital today, she
15 doesn't qualify for the Lifeline because she's over
16 income on Social Security, but her phone is
17 definitely a necessity. She has the medic alert so
18 if something happens and she falls, she can just push
19 a button and somebody talks to her, but she has to
20 have a telephone for that.

21 And having the ability to raise rates
22 20 percent a year within four years, that means a
23 hundred percent increase in rates just, to me, first
24 of all, does not seem fair to the people that can

1 Our next witness is Bill Wooton.

2 MR. WOOTON: Morning.

3 COMMISSIONER FERGUS: Good morning.

4 Would you please state your name for the record,
5 spelling your last name, your address, and your area
6 code and first three digits of your phone number?

7 MR. WOOTON: Name is Bill Wooton,
8 W-o-o-t-o-n. I live at 3923 Chevington Road in Upper
9 Arlington, Ohio. My wireless phone number is
10 614-915, and my -- that's my hard-wire number. My
11 wireless number is 614-570.

12 COMMISSIONER FERGUS: Okay. And are you
13 here as a residential customer, business, or both?

14 MR. WOOTON: Both.

15 COMMISSIONER FERGUS: Okay. Go ahead.

16 MR. WOOTON: As I said, I'm a resident of
17 Upper Arlington. I am a civil engineer currently
18 self-employed. I work out of my residence and rely
19 on both wireless and voice-over-internet protocol
20 telephone service for personal and professional
21 services. I'm here to advocate in favor of equal
22 regulatory treatment for competitors in the
23 telecommunications field.

24 When competition exists in a particular

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1 utility service area, I strongly believe that
2 government should allow the free enterprise system to
3 work. A level playing field in the marketplace is
4 essential for quality improvement, increased value,
5 and innovation. No other approach makes sense.

6 I have practiced civil engineering in the
7 private sector for 27 years. I understand the
8 tremendous impact that competition has on product
9 delivery. My clients have included investor-owned
10 water utilities, so I understand that regulation of
11 utilities that have a monopoly within their service
12 area is an appropriate function. However, from my
13 perspective, the telecommunications industry is now
14 fully competitive.

15 Six years ago I cancelled my residential
16 telephone service from SBC in favor of wireless
17 telephone service from Verizon. My decision was
18 based on my need for mobile telephone service as well
19 as the value of the service provided by Verizon.

20 Three months ago I began to work out of
21 my residence, as a result, I needed a more reliable
22 telephone service option at home than my wireless
23 service could provide. To solve this problem I added
24 telephone service from Time Warner. Time Warner's

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1 voice-over-internet protocol, or VoIP, met my needs
2 for reliability and provided unlimited long-distance
3 service at an exceptional value. Time Warner's
4 competitive position was greatly enhanced due to the
5 fact that I was able to bundle the new VoIP service
6 with high-speed internet and cable TV service.

7 It is interesting to note that an
8 alternative internet provider, Wide Open West, offers
9 services very similar to those provided by Time
10 Warner for an identical price. While I am a
11 communications intensive user, I have not required
12 any services provided by SBC, or AT&T as they're now
13 known, during the past six years. When my telephone
14 needs changed recently, Time Warner and Wide Open
15 West both had a more competitive product offering
16 than AT&T.

17 Technology and competition have totally
18 reshaped the phone industry. Not too long ago I
19 would have had to have a business voice line, a
20 residence voice line, a fax line, and a computer line
21 all provided by the local telephone company in order
22 to operate my business at home. That's a total of
23 four phone lines. Today I use zero phone lines from
24 the phone company.

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1 It is not surprising that regulation in
2 the telecommunications industry is lagging behind
3 technology and competitive changes in the market.
4 Free enterprise will always adjust and advance faster
5 than government processes.

6 Fortunately, the legislature has moved to
7 update Ohio's telecommunications regulations to match
8 what's happening in the market. I agree with the
9 legislature's strategy of having utility experts at
10 the PUCO craft the detailed regulation changes. I do
11 not want Ohio to have a regulatory environment that
12 stifles potential innovation from AT&T or any other
13 company.

14 When one company is heavily regulated
15 while other companies are not, the heavily-regulated
16 company will undoubtedly fall behind. That would not
17 be a good result for Ohio consumers. Given a level
18 playing field to operate on I expect AT&T will expand
19 its product line, improve the value of its services,
20 and become fully competitive in the future. That
21 would be a good result for Ohio consumers.

22 Thank you for your time.

23 COMMISSIONER FERGUS: Thank you,
24 Mr. Wooton.

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1 The next witness is Susan Bogan. Good
2 morning.

3 MS. BOGAN: Good morning.

4 COMMISSIONER FERGUS: Would you please
5 state your name for the record, spell your last name,
6 state your address and your area code, and the first
7 three digits of your phone number?

8 MS. BOGAN: Certainly, Susan Bogan,
9 B-o-g-a-n, 4354 Jennydawn Place, Hilliard, 614-5237.
10 Good morning.

11 COMMISSIONER FERGUS: Are you here as a
12 residential customer or business?

13 MS. BOGAN: Both.

14 COMMISSIONER FERGUS: Both, okay.

15 MS. BOGAN: My name is Susan Bogan and I
16 come before you today speaking from actually three
17 perspectives: A consumer, small business customer,
18 and a formerly elected official in the city of
19 Hilliard. I'm a resident of Hilliard and I'm Vice
20 President of Business Operations for American
21 Strategies, which is a small political consulting,
22 public policy consulting firm located here in
23 downtown Columbus. And I am also a former city
24 council member.

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1 I've learned through my tenure on council
2 and my time with American Strategies that crafting
3 public policy can be very hard work, as I'm sure you
4 all would agree. What seems simple to the public is
5 often very complex for those who actually write the
6 laws and regulations. The decisions we make are
7 usually never black and white, but rather many shades
8 of gray.

9 There have been a few guidelines that
10 have helped me through the years when dealing with
11 issues that have very passionate arguments on both
12 sides of the fence.

13 I look for the greatest good since public
14 policymakers will never make everyone happy; I weigh
15 the pros and cons to determine on balance how policy
16 will impact the community at large; I look for
17 fairness and balance, no matter what the game is, the
18 rules and regulations must treat all players fairly
19 or the game is inherently unfair; and I look at
20 historic and past performance, a good track record is
21 an important consideration when making public policy
22 decisions.

23 When SBC came to the city of Hilliard
24 five years ago and said they needed to expand their

1 central office building in Hilliard's historic
2 district, I knew that their proposal would be
3 controversial and create a large amount of vocal
4 opposition, which it did. The expansion called for
5 the elimination of three historic homes in our
6 downtown district which angered many, many residents.
7 They voiced their opposition frequently and very
8 loudly at many public hearings because they didn't
9 want to see their historic homes or their
10 neighborhood demolished.

11 To make a long story short, SBC worked
12 with Old Hilliard Commission, the city
13 administration, the city council, but it went above
14 and beyond. It worked with the Northwest Franklin
15 County Historic Society along with the residents in
16 many, many meetings to come up with a plan that would
17 blend with the historic character of our
18 neighborhood, benefit the community, and provide the
19 land they needed to expand.

20 Today when you travel Norwich Street, you
21 see a very attractive brick building, a park, a
22 pavilion, a restored home which now houses the
23 Historic Society. SBC truly delivered on its
24 promise; the corner looks better than it ever has.

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1 I tell you this story simply because the
2 decisions that were made by the company, the city
3 council, and the Old Hilliard Commission to make the
4 expansion possible contributed to the good of our
5 community and they balanced the needs of the
6 community and the company fairly.

7 As a consumer I can tell you that my
8 family's use of local telephone service is
9 dramatically different now than it ever has been
10 before. Today we use our cell phones almost
11 exclusively. When I call -- we have at our home just
12 a basic land line actually, not even long distance;
13 helps with a teenager. Instead we use our cell
14 phones which we can control and we can track. There
15 was a time when we didn't receive a bill from SBC at
16 our home or even our work because we used our
17 competitors long distance and local services.

18 I tell you this because consumers have
19 more choices for long distance, high-speed internet,
20 and local service than ever before. It's clear to me
21 that all of these services are competitive and,
22 therefore, today it's important that Ohio's
23 regulatory system to be updated to reflect these
24 changes.

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1 Speaking from a business perspective, I
2 believe the rules and regulations governing business
3 must be fair and applied equally across the
4 marketplace. Having regulation in a competitive
5 marketplace can be inappropriate at best and, at
6 worst, distorts the market and harms the economy.

7 As you look to implement House Bill 218 I
8 would urge you that you look at the track record of
9 all of the players and you look at the fairness and
10 balance for the community and the state as a whole
11 and, finally, that you look for the greatest good.

12 Thank you for your time.

13 COMMISSIONER FERGUS: Thank you.

14 Now, I show no more witnesses. Is there
15 anyone in the audience who missed the opportunity to
16 sign up and would like to make a public statement
17 this morning?

18 (No response.)

19 COMMISSIONER FERGUS: Okay. Then we
20 appreciate all of your time in coming this morning,
21 and your participation. The Commission will take
22 under advisement all the comments that we've heard
23 this morning as well as the comments that we receive
24 from the other hearings, and the hearing is now

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