

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF AND REPLY APPENDIX OF APPELLANT,
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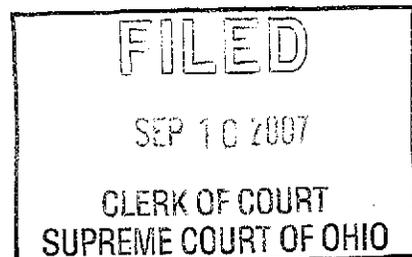
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I. INTRODUCTION

In their briefs, appellee the Public Utilities Commission of Ohio (“PUCO”) and intervening appellee Cincinnati Bell Telephone Company LLC (“CBT”) repeat a fundamental misstatement in the PUCO’s ruling below regarding the argument of appellant the Office of the Ohio Consumers’ Counsel (“OCC”). The PUCO misstates OCC’s argument as being that R.C. 4927.03(A) (OCC Appx. at 000593) requires CBT to prove that competing or alternative services to CBT’s stand-alone basic service¹ are “identical to” or “exactly like” stand-alone basic service, in order for the PUCO to grant alternative regulation.² In fact, that is not and never has been OCC’s position. Similarly, the PUCO asserts that OCC’s position is that the services from alternative providers must be at or near the same price as CBT’s stand-alone basic service in order to be considered.³ Again, that is not and never has been OCC’s position. Yet the PUCO continues to assert these claims, to the detriment of CBT’s customers who have been denied the statutory protection against rate increases.

As support for its arguments, the PUCO asserts that “OCC’s ‘perfect substitute’ argument ignores the highly competitive marketplace that exists in CBT’s Cincinnati and Hamilton exchanges * * *.”⁴ The PUCO cites to its statements in the rulemaking.⁵ Yet the PUCO overlooks (again) OCC’s showing that the record in the rulemaking (cited specifically in the

¹ That is, basic service offered as a separate service to consumers and not as part of a bundle of services.

² See Merit Brief Submitted on Behalf of Appellee, Public Utilities Commission of Ohio (“PUCO Brief”) at 9, 20, 21; Merit Brief of Intervening Appellee Cincinnati Bell Telephone Company LLC (“CBT Brief”) at 12.

³ See PUCO Brief at 21.

⁴ Id. at 12.

⁵ Id. at 13.

rulemaking order but not in CBT's case) lacks any support for the conclusions drawn by the PUCO.⁶ And again, the PUCO has not responded to this argument.

OCC's position -- as expressed below and in its brief here -- is that the services offered by the alternative providers identified by CBT and endorsed by the PUCO in its orders below are **so substantially different from** CBT's stand-alone basic service -- in nature and in price -- that they are not functionally equivalent and substitute services readily available at competitive rates, terms and conditions, as required by the statute.⁷ CBT's stand-alone basic service includes no features beyond those required by the statutory definition.⁸ CBT's stand-alone basic service is priced at \$16.95 per month and \$17.95 per month, depending on the location within the exchange, plus a non-bypassable subscriber line charge, for a total of \$22.19 or \$23.19 per month for customers.⁹ Neither the PUCO nor CBT disputes these facts.

By contrast, the alternative wireline providers identified by CBT and endorsed by the PUCO offer only one-size-fits-all bundles that include flat-rate local service, flat-rate long distance calling, and multiple vertical calling features.¹⁰ In terms of price, the wireless carriers' service is priced 159% to 260% higher for customers than CBT's stand-alone basic service¹¹ and

⁶ See Merit Brief of Appellant The Office of the Ohio Consumers' Counsel ("OCC Brief") at 22.

⁷ R.C. 4927.03(A)(2)(c) (OCC Appx. at 000593).

⁸ Basic service is defined as "end user access to and usage of telephone company-provided services that enable a customer, over the primary line serving the customer's premises, to originate or receive voice communications within a local service area * * *." R.C. 4927.01(A) (OCC Appx. at 000590). The sub-parts of the statute make clear that basic service does not include the other services that telephone companies provide in their bundles. *Id.*

⁹ Roycroft Affidavit, ¶71 (OCC Supplement ["OCC Supp."] at 000030).

¹⁰ Roycroft Affidavit, ¶46 (OCC Supp. at 000027); Williams Affidavit, ¶54 (OCC Supp. at 000065).

¹¹ Roycroft Affidavit, ¶74 (OCC Supp. at 000031).

the wireline carriers' service is priced from 52-72% higher for customers than CBT's stand-alone basic service.¹² Neither the PUCO nor CBT attempts to address, much less deny, these facts. These are not competitive rates for Ohio customers who seek the lower-priced option of stand-alone basic service.

Based on this "competition" and these "alternatives," the PUCO granted alt. reg. for CBT's stand-alone basic service in its two largest exchanges. And on the basis of that grant of authority, CBT increased basic service rates in those two exchanges by \$1.25 a month.¹³

CBT "nominated," and the PUCO endorsed, alternative providers to meet the second prong of the PUCO's competitive test 4, which merely requires that an applicant show "the presence of at least five unaffiliated facilities-based alternative providers serving the residential market."¹⁴ The PUCO asserts, over and over again, that this test meets the statutory requirements of R.C. 4927.03(A) (OCC Appx. at 000593).¹⁵ Yet merely stating it does not make it so. The fact that there are providers in the market says nothing about the ability of any one of those providers to contribute to a "**healthy, sustainable** competitive market," consistent with the State's telecommunications policy as amended by H.B. 218.¹⁶ This Court recently reversed a PUCO decision for failure to follow the General Assembly's electricity policy for Ohio; the Court should reverse here for failure to follow Ohio telecommunications policy.¹⁷

¹² Williams Affidavit, ¶59 (OCC Supp. at 000066); *id.*, ¶48 (OCC Supp. at 000062).

¹³ See CBT tariff filing (January 4, 2007) (OCC Supp. at 000080).

¹⁴ Ohio Adm. Code 4901:1-4-10(C)(4) (OCC Appx. at 000608).

¹⁵ See, e.g., PUCO Brief at 5, 7, 13.

¹⁶ R.C. 4927.02(A)(2) (OCC Appx. at 000592).

¹⁷ *Elyria Foundry Company et al., v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007 Ohio 4164, ¶¶ 58, 70 ("*Elyria Foundry*").

The first prong of competitive test 4 used by CBT requires CBT to show that it has lost 15% of its access lines since 2002.¹⁸ Yet despite its continuing assertions, the PUCO has never shown that the line loss test considers the statutory factors.

The PUCO asserts that “[t]he tests consider the number and size of alternative providers, the ready availability of substitute services and technologies at competitive rates and terms, and provider market share in the CBT service area as required under R.C. 4927.03(A)(2).”¹⁹ The alternative providers prong (requiring only the showing of “the **presence** of five * * * alternative providers serving the residential market”²⁰) says nothing about the size of those providers, or about whether their services are readily available, or about provider market share. Neither does the line loss prong give any indication of those factors. The PUCO also asserts that “[g]enerally, this test gauges the sustainability of competing residential providers in the subject market area.”²¹ Neither the line loss prong or the alternative providers prong provide any information about sustainability. The PUCO’s decision should be reversed as contrary to the law.

II. STANDARD OF REVIEW

CBT acknowledges that this Court uses a *de novo* standard of review to decide matters of law.²² The PUCO does not mention this standard.

¹⁸ Ohio Adm. Code 4901:1-4-10(C)(4) (OCC Appx. at 000608).

¹⁹ PUCO Brief at 5; see also *id.* at 11 (“CBT’s facts establish both its loss of market share and easy customer accessibility to multiple alternative providers.”)

²⁰ Ohio Adm. Code 4901:1-4-10(C)(4) (OCC Appx. at 000608) (emphasis added).

²¹ PUCO Brief at 5.

²² CBT Brief at 2.

Indeed, the only discussion of the standard of review in the PUCO's brief repeats the long-standing proposition that, as to evidentiary matters, the Court will give deference to the PUCO's determinations.²³

But more importantly, there are few facts here that are in dispute.²⁴ OCC does not dispute that CBT has lost 15% of its access lines in the two exchanges since 2002. Likewise, OCC does not dispute that there at least five unaffiliated facilities-based alternative providers serving the residential market in the Cincinnati and Hamilton exchanges. What OCC does dispute is the *legal significance* of those facts, in the context of R.C. 4927.03(A) (OCC Appx. at 000593). As argued below and in OCC's initial brief, those facts do not show that CBT's stand-alone basic service is subject to competition in the two exchanges, or that customers of CBT's stand-alone basic service in those exchanges have reasonably available alternatives; or that there are no barriers to entry for stand-alone basic service in those exchanges; or that the grant of alternative regulation for stand-alone basic service in those exchanges is in the public interest. Thus the PUCO's orders below fail to meet the statute.

CBT attempts to assist the PUCO, citing cases for the general proposition of deference to administrative agencies.²⁵ The key to this proposition is that deference to the agency's

²³ PUCO Brief at 13-14, citing *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007 Ohio 53; *Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006 Ohio 2988; *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 2007 Ohio 53.

²⁴ See PUCO Brief at 20 ("Unable to credibly challenge the facts, OCC chooses instead to rail against the test requirements.")

²⁵ See CBT Brief at 10-11, citing *State, ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151, 155; *Swallow v. Indus. Comm.* (1988), 36 Ohio St.3d 55, 57; *Northwestern Ohio Building & Construction Trades Council v. Conrad* (2001), 92 Ohio St.3d 282, 287 (citing *Swallow*). Notably, many of CBT's argumentative statements lack citation to authority.

interpretation of statute is appropriate “so long as it is reasonable.”²⁶ Here, as detailed in OCC’s initial brief, the PUCO’s interpretation of this new version of the statute is not reasonable.²⁷ The Court should use a de novo standard of review for OCC’s propositions of law.

III. ARGUMENT

A. Proposition of Law No. 1: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for CBT’s stand-alone basic service based on a finding that there are competition and alternatives for basic service that is part of a service bundle. Rules that permit such a grant are invalid as contrary to the statute.

As discussed in the Introduction, the PUCO persists in its claim that OCC’s position is that only products that are exactly the same should be considered in the competitive analysis under the alternative providers’ prong of Test 4.²⁸ The PUCO has never provided a citation to an expression of that supposed position. None exists.

The PUCO also asserts that customers who subscribe to bundled offerings “are by definition BLES customers.”²⁹ That is true, but irrelevant here, because the PUCO previously determined that the basic service contained in such bundles is subject to alt. reg.³⁰ Thus the

²⁶ *Northwestern Ohio Building & Construction Trades Council*, 92 Ohio St.3d at 289; See *Arth Brass & Aluminum Castings, Inc. v. Conrad*, 104 Ohio St.3d 547, 2004 Ohio 6888, ¶ 37; *State, ex rel. Clark v. Indus. Comm.* (2001), 92 Ohio St.3d 455, 458-459.

²⁷ H.B. 218 for the first time allowed alt. reg. for basic service, required analysis of barriers to entry, and adopted as state telecommunications policy the principle that the PUCO is to “[r]ely on market forces, where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market * * *.” R.C. 4927.02(A)(2) (OCC Appx. at 000592) (the emphasized language was the H.B. 218 amendment).

²⁸ See PUCO Brief at 9.

²⁹ *Id.*

³⁰ See OCC Brief at 24. The PUCO’s dismissal of that finding (see PUCO Brief at 10, n.4) obscures the legal and practical implication of the earlier decision. See also CBT Brief at 13.

focus of the proceedings below was on whether basic service **offered on its own** is subject to alt. reg.

Incredibly, in supposed counter to OCC's arguments, despite having newly adopted rules that exclusively consider alt. reg. for stand-alone basic service, the PUCO also asserts that "R.C. 4927.03 nowhere mentions 'stand-alone' basic service."³¹ The PUCO disregards the criteria imposed by R.C. 4927.03(A) (OCC Appx. at 000593) that a service is subject to alt. reg. only if

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

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

(Emphasis added.)³² "Such telecommunications service," in the context of consideration of alt. reg. for stand-alone basic service, refers to stand-alone basic service, even if it is not literally in the statute.

Neither the PUCO nor CBT make any argument that any of the alternative providers offer stand-alone basic service. Their assertions are that the bundles of service offered by these carriers are the competition or reasonably available alternatives required by the statute. These arguments are made without any discussion of the features of those bundles, or of the prices charged for those bundles,³³ or of the alt. reg. already granted to CBT's bundles,³⁴ as discussed in the Introduction.

³¹ PUCO Brief at 9.

³² Basic service is defined as "end user access to and usage of telephone company-provided services that enable a customer, over the primary line serving the customer's premises, to originate or receive voice communications within a local service area * * *." R.C. 4927.01(A) (OCC Appx. at 000590). The sub-parts of the statute make clear that basic service does not include the other services that telephone companies provide in their bundles.

³³ CBT does assert that it "identified prepaid wireless services that cost less than CBT's BLES, some as low as \$10 per month." CBT Brief at 25. The \$10 was for a calling card that included 30 minutes of calling, not nearly the same as CBT's unlimited local calling for its basic service. See Response of Cincinnati Bell Telephone Company LLC to the Office of the Ohio Consumers'

As discussed in OCC's Merit Brief, the PUCO has never justified its use of bundles as competition for CBT's stand-alone basic service.³⁵ The PUCO's brief here does not overcome that failure. Neither does CBT's brief overcome that failure.

The PUCO and CBT both cite to information provided by CBT indicating that former CBT customers have switched -- to wireless providers and to Current and Time Warner.³⁶ This information obscures the key issue here: If residential customers with bundles switch to alternative providers' bundles, this says nothing about competition or alternatives for **CBT's stand-alone basic service**.

Yet CBT also put forth information "that standalone BLES customers were leaving for alternative providers who were not providing stand alone BLES" and asserts that "[t]hese customers found the competitors' bundled services to be competitive with CBT's BLES."³⁷ Here again, the assertions do not support the conclusions the PUCO and CBT need to draw. Just as some customers move from CBT's stand-alone basic service to CBT's bundles, and have done since CBT introduced those bundles, other customers may move from CBT's stand-alone basic service to alternative providers' bundles. This does not make the bundles, whether offered by CBT or by an

Counsel's Opposition to Its Application for Basic Local Exchange Service Alternative Regulation (October 6, 2006), Exhibit E. And the carrier that provided that service was disqualified by the PUCO. See *In the Matter of the Application of the Cincinnati Bell Telephone Company LLC For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code*, Case No. 06-1002-TP-BLS, Opinion and Order (November 28, 2006) ("06-1002 Order") at 28 (OCC Appx. at 000085).

³⁴ *In the Matter of the Application of Cincinnati Bell Telephone Company For Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 04-720-TP-ALT, Opinion and Order (June 30, 2004) (OCC Appx. at 000226).

³⁵ OCC Merit Brief at 20-27.

³⁶ PUCO Brief at 6, 19 (citing CBT Application at Ex. 3, Sec. Supp. at 4-18).

³⁷ CBT Brief at 13.

alternative provider, **competitive** to stand-alone basic service, or a reasonably available alternative to CBT's stand-alone basic service, especially for stand-alone basic service customers who do not want the additional services. The prices of the bundles must be considered, as must the functionalities provided by the bundles.

The PUCO is required to consider whether "functionally equivalent" services are available at "competitive" rates.³⁸ The record shows that the alternative providers' bundles are not functionally equivalent, and that they are not competitively priced, to CBT's stand-alone basic service. The PUCO's consideration of bundled services as competition for, or alternatives to CBT's stand-alone basic service was contrary to the statute and denies consumers the protection of the statute.

B. Proposition of Law No. 2: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic service throughout CBT's exchanges when competition and alternatives exist in only part of the exchange. Rules that permit such a grant are invalid.

OCC's brief -- and the record below -- showed that the PUCO had accepted, as alternative providers under the second prong of Test 4, Time Warner, which serves only parts of the Cincinnati and Hamilton exchanges, and Current Communications, which serves only a "small" part of the Cincinnati exchange.³⁹ OCC's brief -- and the record below -- also showed that the PUCO had accepted wireless providers under Test 4, despite the fact that wireless providers do not guarantee that their service is operative in any specific portion of the exchanges.⁴⁰

³⁸ R.C. 4927.03(A)(2)(d) (OCC Appx. at 000593).

³⁹ OCC Brief at 28-32.

⁴⁰ Id. at 33-34. This is apart from the other flaws in the PUCO's analysis.

In defense, the PUCO states that “[d]ating 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.”⁴¹ Regardless of the PUCO’s protestations, the limitations of Current’s and Time Warner’s facilities mean that there will be CBT customers in the CBT exchanges who cannot take advantage of this competition or do not have these alternatives “reasonably available.”

With regard to OCC’s position that all customers within an exchange should actually have a choice of the alternatives if CBT is granted the ability to increase its rates **because of the alternatives**, the PUCO claims that such a position would render its test “impractical to administer.”⁴² This PUCO argument sacrifices the consumer protections in the law for administrative expediency, and is as much an acknowledgement of the fatal flaw of its test as anything else.

The PUCO finds no requirement in the law “dictating that an alternative, competitive provider must serve 100 percent of CBT’s market area.”⁴³ But if “nothing requires that every residential customer in an exchange have access to all alternative providers and their services, or that all alternative providers offer ubiquitous service throughout the exchange,”⁴⁴ then residential customers will not be able to respond to CBT’s rate increase by switching their service. That undercuts the entire logic for alternative regulation. The law says that the policy of the state is to “[r]ely on market forces **where they are present**....”⁴⁵; the test in the law is that customers have

⁴¹ PUCO Brief at 22, citing 05-1305 Entry on Rehearing (May 3, 2006) at 19.

⁴² PUCO Brief at 22, quoting 06-1002 Opinion and Order at 28 (emphasis added in PUCO Brief).

⁴³ PUCO Brief at 22, citing 06-1002 Entry on Rehearing at 7-8.

⁴⁴ PUCO Brief at 22.

⁴⁵ R.C. 4927.02(A)(2) (OCC Appx. at 000592) (emphasis added).

“reasonably available alternatives”⁴⁶; the law requires the PUCO to consider “[t]he extent to which services are available from alternative providers in the relevant market”⁴⁷ and to consider the ability of alternative providers “to make services readily available.”⁴⁸ The General Assembly intended alt. reg. to apply where consumers have choices, not where they do not.⁴⁹

For its part, CBT says that “the rules do not impose a ubiquitous service requirement. The rules only require that the competitors have a *presence* in an exchange and that they are serving residential customers.”⁵⁰ Again, that is a flaw in the PUCO’s rules, because a “presence” -- however minimal, like Current’s⁵¹ -- does not provide a reasonably available alternative to the customers who have been and will be subject to CBT’s rate increases.

Specifically with regard to the wireless carriers, CBT argues that because “a consumer can, on any given day, walk into a wireless retail store, subscribe to service and have it virtually instantly -- hence, it is readily available.”⁵² Wireless service may be available for purchase *at the wireless store*, but consumers need a service that can be used once they arrive home. The availability of wireless service in consumers’ homes is not guaranteed, as the wireless carriers acknowledge in their service disclaimers.

⁴⁶ R.C. 4927.03(A)(1)(b) (OCC Appx. at 000593) (emphasis added).

⁴⁷ R.C. 4927.03(A)(2)(b) (OCC Appx. at 000593) (emphasis added).

⁴⁸ R.C. 4927.03(A)(2)(c) (OCC Appx. at 000593) (emphasis added).

⁴⁹ *Elyria Foundry*, *supra*.

⁵⁰ CBT Brief at 8.

⁵¹ See OCC Brief at 31 (“CBT’s application itself stated that Current ‘offers broadband over power line service in some areas of the Cincinnati exchange.’ Application, Exhibit 3 at 7 (emphasis added) (OCC Supp. at 000012A). Indeed, it appears that Current’s main base is ‘one of the small areas not currently served by Time Warner * * *.’ Id. at 8 (emphasis added) (OCC Supp. at 000012B)”).

⁵² CBT Brief at 18.

CBT correctly notes that the PUCO “rejected broader market definitions, such as a local service area or an MTA, as that might have enabled alternative regulation in an exchange with no competitive presence in that exchange.”⁵³ OCC is not arguing for a smaller unit for review, merely that the customers in the unit under review actually have competition or alternatives.

C. Proposition of Law No. 3: The Public Utilities Commission of Ohio erred as a matter of law when it adopted a rule that allows alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic service based on an incumbent telephone company’s line losses.

The line loss prong under Test 4 is simple: All an applicant telephone company like CBT is required to show is that it had 15% fewer residential access lines when it applies than it did in 2002. CBT’s application made that showing for the Cincinnati and Hamilton exchanges. The issue is whether this is dispositive of the statutory requirements.

According to the PUCO, this “line loss requirement measures market power, the level of competition that CBT currently faces from alternative providers, and the availability of competing alternative services for CBT residential customers in each telephone exchange.”⁵⁴ Likewise, the PUCO asserts that the line loss prong shows that “customers have readily-available service alternatives and are exercising their right to choose them.”⁵⁵ The PUCO has never shown (and does not do so now) how the simple numerical comparison of line losses can show so much,

⁵³ Id. at 18-19. CBT erroneously asserts that OCC suggested that markets be defined more narrowly at the wire center level. Id. As with much else in the PUCO’s and CBT’s briefs, this argument never appeared in OCC’s pleadings in either the rulemaking or in the CBT-specific proceeding.

⁵⁴ PUCO Brief at 15; see also id. at 16 (“This requirement measures customer migration, an indicium of market power, and whether substitute services are readily available at competitive rates, terms, and conditions.”).

⁵⁵ Id. at 16.

including that, as the PUCO claims, “each ‘lost’ customer formerly purchased CBT basic local service and now has chosen bundled service as a competitive substitute.”⁵⁶

The PUCO and CBT both correctly note that “much of the OCC's criticism of the line loss test is that there is no requirement for the applicant to demonstrate where the lost lines went.”⁵⁷ That is, in fact, the central problem with the PUCO’s line loss prong in the context of a statute **that requires a showing of competition or alternatives.**⁵⁸

CBT admits that “it has no basis to know where customers who cancelled residential access lines went, so there is no basis for requiring it to show that.”⁵⁹ Knowing where the lines went would establish that there was competition or alternatives. In isolation, the line loss prong establishes only that lines were lost, not that they were gained by a competitor or an alternative.

Both the PUCO and CBT ignore the fact -- set forth in OCC’s brief -- that the PUCO explicitly adopted a test that requires the incumbent telephone company to know where the access lines went, which is the market-share prong of Test 3.⁶⁰ As the case cited by CBT states, the rationality of interconnected provisions must be considered together, not separately.⁶¹ In the context of a test that actually shows market share, a test that ignores market share is irrational.

Two other points can be disposed of quickly: The PUCO says that “[t]he Commission rejected, for lack of evidence, OCC's contention that disconnected residential access lines were

⁵⁶ Id.; see OCC Brief at 35.

⁵⁷ CBT Brief at 19-20; see also PUCO Brief at 16.

⁵⁸ CBT in effect argues that the line loss prong is surplusage. CBT Brief at 19-20.

⁵⁹ CBT Brief at 19.

⁶⁰ Ohio Adm. Code 4901:1-10(C)(3) (OCC Appx. at 000608); see OCC Brief at 36.

⁶¹ *E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007 Ohio 3759, ¶ 27.

used for internet access rather than voice communications.”⁶² What the PUCO’s Order (as opposed to its brief) actually stated was that “that there is no data in the record to support OCC’s allegation that **all** disconnected residential access lines were used for Internet access, not for voice communications * * *.”⁶³ Neither the PUCO Order or its brief cites to the record; they could not, because OCC never argued that all disconnected lines were used for Internet access. Equally silly is the PUCO’s statement that “OCC also takes issue with use of the year 2002 as the beginning of the measurement period.”⁶⁴ That argument cannot be found in OCC’s brief here. Neither does OCC’s brief contain anything regarding DSL connections statewide.⁶⁵

D. Proposition of Law No. 4: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for CBT’s stand-alone basic service without a showing of a lack of barriers to entry for stand-alone basic service. Rules that permit such a grant are invalid.

Here, as in other areas, the PUCO merely repeats its earlier statements that had no support either in the rulemaking or in CBT’s proceeding. For example, the PUCO states:

The Commission’s market test evaluates the actual dynamics of this marketplace and provides a good indicator of the openness of this market:

The Commission finds significance in the facts that an ILEC experiences a threshold loss of at least 15 percent of the total residential access lines and that the relevant market (at the exchange level) has the presence of at least five unaffiliated facilities-based alternative providers serving residential customers * * *. The required presence of unaffiliated alternative providers combined with the requisite ILEC loss of residential access lines adequately establishes that there are no barriers to entry, thus satisfying Section 4927.03(A)(3), Revised Code.⁶⁶

⁶² PUCO Brief at 16.

⁶³ Id. at 17 (emphasis added).

⁶⁴ PUCO Brief at 15; see also id. at 17.

⁶⁵ Id. at 16-17.

⁶⁶ PUCO Brief at 23-24 (citations omitted).

The PUCO has never explained how line losses -- due to unidentified and unspecified causes -- and the mere presence of alternative providers of bundled residential service mean that there are no barriers to entry **for offering basic service**.

As with the false claims that OCC insisted on consideration of only services identical to basic service, the PUCO again repeats the false statement that OCC's position was that barriers to entry are any condition that makes entry more difficult.⁶⁷ The PUCO claims that "OCC proposes an insurmountable hurdle that renders R.C. 4927.03 unusable for its intended purpose -- alternative regulation of basic local exchange service."⁶⁸ All of this is exceedingly curious, because the PUCO's brief actually quotes OCC's proposed test:

The applicant must demonstrate that there are no barriers to entry associated with the provision of basic service. The applicant must provide evidence of the absence of factors which would inhibit timely, significant, and sustainable market entry. The applicant must present evidence, including market share evidence, that market entry in each exchange is resulting in the provision of basic service throughout the exchange, outside of packages or bundles, by unaffiliated [competitive local exchange carriers] CLECs and facilities-based CLECs.⁶⁹

The PUCO complains that "OCC requires CBT to prove a negative, while the statute and the Commission's test require CBT to make an affirmative showing of competition in the marketplace."⁷⁰ But the statute does require proof of a negative: that there are no barriers to entry.

The PUCO cannot keep its story straight. In the Entry on Rehearing, the PUCO described the "primary issue" as "an analysis of whether these difficulties can be overcome by some

⁶⁷ Id. at 24.

⁶⁸ Id.; see also CBT Brief at 22.

⁶⁹ See PUCO Brief at 10.

⁷⁰ Id. at 11-12.

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.”⁷¹ Now, however, the PUCO says it “considered, as the statute requires, only ‘barriers’ that **preclude** a would-be competitor from entering the market * * *.”⁷²

The PUCO also asserts that OCC’s argument (that the PUCO’s test is an ineffective indicator of barriers to entry for competing stand-alone basic service providers) “springs from the faulty premise that R.C. 4927.03 limits the Commission’s consideration to only alternative providers that offer residential service identical to that of CBT.”⁷³ The PUCO further argues that “[t]he availability of competing *substitute* services, not identical services, is what R.C. 4927.03 directs the Commission to consider, and that is what the Commission did.”⁷⁴

The PUCO confuses the R.C. 4927.03(A)(1) (OCC Appx. at 000593) tests of competition and alternatives with the separate directive of R.C. 4927.03(A)(3) (OCC Appx. at 000593), which requires the PUCO to “find that there are no barriers to entry” before granting alt. reg. to basic service. As noted in OCC’s initial brief, the General Assembly was aware at the time of the passage of H.B. 218 that the PUCO had already granted alt. reg. to basic service in bundles,⁷⁵ so this provision must have been focused on the only service that was not subject to alt. reg., that is, **stand-alone basic service**.

⁷¹ *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Companies*, PUCO Case No. 05-1305-TP-ORD, Entry on Rehearing (May 3, 2006) (“05-1305 Rehearing Entry”) at 17-18 (OCC Appx. at 000527-000528) (emphasis added).

⁷² PUCO Brief at 25 (emphasis added).

⁷³ *Id.* at 24; see also CBT Brief at 24.

⁷⁴ PUCO Brief at 24 (emphasis in original); see also CBT Brief at 24.

⁷⁵ OCC Brief at 16.

Similarly, the PUCO's argument that the "facts dispel any notion that there are barriers to entry for residential service in the competitive market area where CBT seeks alternative regulatory treatment"⁷⁶ and that the record shows "a vibrant marketplace for residential service that is free of barriers to entry"⁷⁷ assumes that the General Assembly intended the review of barriers to entry to concern residential service generally, rather than for basic service. The latter properly was the focus of OCC's proposed test for barriers to entry.

E. Proposition of Law No. 5: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) to CBT's stand-alone basic service without a showing that alternative regulation is in the public interest. Rules that permit such a grant are invalid.

The PUCO and CBT say that the rules do contain public interest benefits. First, they assert the fact that the basic service alt. reg. rules require applicants to be in compliance with their earlier elective alternative regulation plans and the commitments contained therein.⁷⁸ Given that compliance with the PUCO's earlier rules was already required of CBT, the PUCO's construct of redundant compliance does not meet the statute's requirement for showing that this new regulation and plan are in the public interest.⁷⁹

And then there is the supposed benefit of "approving a modest, capped rate increase for basic local service."⁸⁰ CBT has been allowed to increase those rates -- both for basic service and

⁷⁶ PUCO Brief at 26 (emphasis added).

⁷⁷ Id. at 27 (emphasis in original removed, emphasis added).

⁷⁸ PUCO Brief at 4 (stated twice), 30-31 (again stated twice); CBT Brief at 25-26.

⁷⁹ Ohio Adm. Code 4901:1-4-06 (OCC Appx. at 000598-000602).

⁸⁰ PUCO Brief at 29.

for basic Caller ID -- outside the traditional scrutiny of a rate case.⁸¹ And CBT will be allowed to unilaterally impose these increases every year to come. The fact that the increases have been limited -- where no increase was justified -- scarcely qualifies as a “benefit” to consumers.

Both the PUCO and CBT make much of the decision to isolate Lifeline customers from the impact of basic service rate increases.⁸² This requirement was a response to the General Assembly’s adoption, in H.B. 218, of a specific new provision of state telecommunications policy, to “[p]rotect the affordability of telephone service for low-income subscribers through the continuation of lifeline assistance programs.”⁸³ It would have been a violation of this policy for the PUCO to allow basic service alt. reg. to increase the burden on low-income customers.

In the end, the PUCO fails even to attempt to explain why it would not require public interest commitments under the statute for the case below but did require public interest commitments under the statute in 2002, in essentially the same circumstance, when it found that a “competitive environment”⁸⁴ required the adoption of commitments to grant pricing flexibility to the telephone companies. Similarly, the PUCO has not explained its ruling in the current situation that “the marketplace, and not administrative fiat, should dictate the level of public

⁸¹ The PUCO states that “[t]he pricing flexibility authorized by the Commission allows CBT to actually charge *less* to meet competition.” PUCO Brief at 29 (emphasis in original). Telephone companies have always had the ability to *decrease* their rates. And, clearly, CBT’s seemingly contradictory response to the supposed level of competition has been to **increase** its rates.

⁸² PUCO Brief at 29, 30; CBT Brief at 25-26.

⁸³ R.C. 4927.02(A)(8) (OCC Appx. at 000592).

⁸⁴ *In the Matter of the Application of the Cincinnati Bell Telephone Company LLC For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code*, Case No. 06-1002-TP-BLS, Entry on Rehearing (January 31, 2007) at 12, citing 05-1305 Rehearing Entry at 2 and 05-1305 Opinion and Order (March 7, 2006) at 11 (OCC Appx. at 000101).

benefits”⁸⁵ where in the earlier situation “administrative fiat” was necessary. This in the face of OCC’s raising the issue at every stage of the case.⁸⁶ As this Court has stated, “Although the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.”⁸⁷

IV. CONCLUSION

The PUCO states that “OCC’s shotgun approach alleges numerous errors to complicate and obfuscate what is a straightforward case.”⁸⁸ If there has been a shotgun used here, it is by the PUCO, which has gone off in every direction, arguing points never made by OCC either below or on brief here.

CBT asserts that “[t]he OCC’s criticisms of the line loss test standing alone is meaningless because the test is never applied in isolation. The OCC totally ignores the simultaneous requirement in Test 4 that there be at least five alternative providers serving the residential market.”⁸⁹ But the flaws in the line loss test are not cured by the simultaneous application of the alternative providers test: OCC’s has shown in its initial brief and in this reply brief that, contrary to the directives of R.C. 4927.03(A) (OCC Appx. at 000593), the PUCO had used bundles of services from the alternative providers and overlooked the limited availability of

⁸⁵ PUCO Brief at 28.

⁸⁶ See OCC Brief at 43-45; OCC Application for Rehearing at 37-38.

⁸⁷ *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49, 50-51; see also *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.2d 123, 128.

⁸⁸ PUCO Brief at 7.

⁸⁹ CBT Brief at 20.

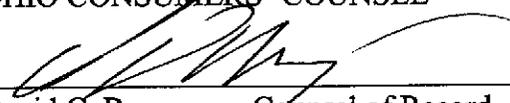
the bundled services as an excuse to justify alt. reg. for the single service at issue here. That single service is CBT's stand-alone basic service which is a lower-priced service available to all Ohio consumers in the CBT telephone exchanges at issue. And OCC's briefs have shown that the line loss prong of the PUCO's test cannot meet the requirements of the statute.

OCC's briefs also showed that neither the PUCO's tests nor its explanations for the tests met the condition added to the statute when the General Assembly authorized consideration of alt. reg. for basic service, that being the requirement of a showing of no barriers to entry. And the briefs also showed how the PUCO had failed to justify not requiring public interest commitments from telephone companies -- like CBT -- that now have the power to increase basic service rates without further PUCO oversight.

The PUCO asserts that the Court must choose "whether to retreat from the legislative mandate to encourage alternative regulation in a competitive marketplace" or to affirm the PUCO's decision.⁹⁰ OCC urges the Court to find the General Assembly did not allow -- much less mandate -- the PUCO's specific actions here. This Court should reverse, vacate or modify the PUCO's decision, pursuant to R.C. 4903.13 (Reply Appx.).

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⁹⁰ PUCO Brief at 13.

REPLY APPENDIX

4903.13 Reversal of final order - notice of appeal.

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

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

Effective Date: 10-01-1953

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief and Reply Appendix submitted on behalf of Appellant, the Office of the Ohio Consumers' Counsel was served by regular U.S. mail, postage prepaid upon the counsel listed below this 10th day of September, 2007.



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