

IN THE SUPREME COURT OF OHIO

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

**REPLY BRIEF OF APPELLANT,
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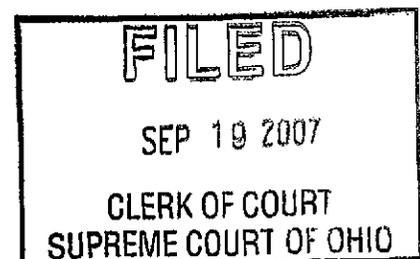
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I. INTRODUCTION

The appellees' briefs in this proceeding highlight the similarities and the differences between this appeal and the appeal in *Office of the Ohio Consumers' Counsel v. Pub. Util. Comm.*, Case No. 07-570 ("07-570"). The appeal in 07-570 also challenges the Public Utilities Commission of Ohio's ("PUCO's") grant of alternative regulation ("alt. reg.") for stand-alone basic local telephone service,¹ purportedly pursuant to R.C. 4927.03(A) (OCC Appx. at 000648). Both cases involve the same rulemaking and similar erroneous determinations of law by the PUCO.

This case, however, is inherently more complex. This case involves 136 AT&T Ohio ("AT&T") exchanges serving more than 1.5 million residential access lines (as opposed to 07-570, which involves two Cincinnati Bell Telephone Company ("CBT") exchanges serving 340,000 residential access lines) and a total of 21 alternative providers (as opposed to six alternative providers in 07-570). In addition, AT&T applied for basic service alt. reg. using two of the PUCO's competitive tests, rather than the single test used by CBT.² Because of the PUCO's granting alt. reg., AT&T will be free to increase its stand-alone basic service rates in those 136 exchanges by \$1.25 a month each year, and will be able to increase basic Caller ID by \$0.50 each month, without scrutiny or justification.

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

² Test 3, used by AT&T, requires an applicant to demonstrate in each requested telephone exchange that unaffiliated competitive local exchange carriers ("CLECs") provide at least fifteen per cent of total residential access lines; at least two unaffiliated facilities-based CLECs provide basic service to residential customers; **and** at least five alternative providers serve the residential market. Test 4, used by CBT and AT&T, requires that an applicant demonstrate that in each requested telephone exchange at least fifteen per cent of total residential access lines have been lost since 2002; **and** that at least five unaffiliated facilities-based alternative providers serve the residential market. Ohio Adm. Code 4901:1-4-10(C) (3), (4) (OCC Appx. at 000664).

As in 07-570 and the rulings below, the PUCO and AT&T misrepresent the position of the Office of the Ohio Consumers' Counsel ("OCC"). They claim that OCC argues that R.C. 4927.03(A) (OCC Appx. at 000648) requires AT&T to prove that competing or alternative services to AT&T's stand-alone basic service are "identical to" or "exactly like" AT&T's stand-alone basic service, in order for the PUCO to grant alt. reg.³ That is not and never has been OCC's position. Similarly, the PUCO asserts that OCC argues that the services from alternative providers must be at or near the same price as AT&T's stand-alone basic service in order to be considered.⁴ Again, that is not and never has been OCC's position. Yet the PUCO continues to assert these claims, to the detriment of AT&T's residential customers who have been denied the statutory protections against rate increases.

OCC's position (as expressed below and in OCC's Merit Brief) is that the services offered by the alternative providers identified by AT&T and endorsed by the PUCO in its orders below are **so substantially different from** AT&T'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 directed by the statute.⁵

AT&T's stand-alone basic service includes no features beyond those required by the statutory definition.⁶ AT&T's stand-alone basic service is priced at \$14.25 per month; when the non-bypassable subscriber line charge is included, AT&T's wireline basic service rate is \$20.02

³ See Merit Brief Submitted on Behalf of Appellee, Public Utilities Commission of Ohio ("PUCO Brief") at 8, 11, 23; Merit Brief of Intervening Appellee, AT&T Ohio ("AT&T Brief") at 6, 8, 10, 13.

⁴ See PUCO Brief at 23; see also AT&T Brief at 10.

⁵ R.C. 4927.03(A)(2)(c) (OCC Appx. at 000648).

⁶ Basic service is defined in R.C. 4927.01(A) (OCC Appx. at 000645). Basic service does not include the other services that telephone companies provide in their bundles. *Id.*

per month.⁷ By contrast, some of the alternative wireline providers AT&T identified and the PUCO endorsed as meeting the competitive tests offer only one-size-fits-all bundles that include flat-rate local service, flat-rate long distance calling, and multiple vertical calling features, at prices 100%-175% above AT&T's stand-alone basic service.⁸ Others offer a service similar to stand-alone basic service, but priced at non-competitive rates.⁹ One carrier offers a lesser service than stand-alone basic service, at higher rates.¹⁰ And the wireless carriers' bundled service is priced 199% to 299% higher than AT&T's stand-alone basic service.¹¹ Neither the PUCO nor AT&T attempts to address, much less deny, these facts. These are not competitive rates, and these are not functionally equivalent services, for the Ohio residential consumers who seek the lower-priced option of stand-alone basic service.

Only **one** carrier offers a stand-alone basic service at competitive rates, in only **three** of the AT&T exchanges.¹² **One** other carrier offers a bundle at competitive rates, in 119 of the exchanges.¹³ Based on this "competition" and these "alternatives," the PUCO granted alt. reg.

⁷ See Roycroft Affidavit, ¶ 41 (OCC Supplement ("OCC Supp.") at 000044).

⁸ These include Comcast (175% higher than AT&T basic service, in 11 exchanges) and New Access (100% higher, in 26 exchanges); Williams Affidavit, ¶¶ 181, 114 (OCC Supp. at 160, 127). One carrier, CBET, offers a bundle in 15 exchanges that is priced 25% higher than AT&T's basic service. *Id.*, ¶ 175 (OCC Supp. at 156).

⁹ Budget Phone (twice the price, in one exchange); Revolution (49% higher, in 4 exchanges); Talk America (57% higher, in 102 exchanges); Trinsic (2.5 times AT&T's price, in 34 exchanges). *Id.*, ¶¶ 85, 121, 126, 130 (OCC Supp. at 112, 132, 136, 138).

¹⁰ ACN (does not include flat-rate local calling, price 20% higher than AT&T stand-alone basic service). *Id.*, ¶ 80 (OCC Supp. at 109).

¹¹ Roycroft Affidavit, ¶84 (OCC Supp. at 53).

¹² Insight; Williams Affidavit, ¶ 103 (OCC Supp. at 109).

¹³ First Communications; *id.*, ¶ 99 (OCC Supp. at 120).

for AT&T's stand-alone basic service in 136 of its 192 exchanges,¹⁴ representing some 1.5 million residential access lines as of 2005.¹⁵ Combined, these exchanges serve almost 90% of AT&T's residential access lines.¹⁶

The PUCO asserts that its “tests measure 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 AT&T service area as required under R.C. 4927.03(A)(2).”¹⁷ The alternative providers prongs of Test 3 and Test 4 (requiring only the showing of “the **presence** of five * * * alternative providers serving the residential market”) and the CLEC prong of Test 3 (requiring only the presence of two CLECs providing basic service) say nothing about the size of those providers, or about whether their services are readily available, or about provider market share.¹⁸ Test 4's line loss prong (requiring a 15% line loss since 2002) also gives no such indication, despite the PUCO's claim that it “measures market power and the level of competition AT&T faces in each exchange.”¹⁹

The PUCO also asserts that “[g]enerally, these tests gauge the sustainability of competing residential providers in the subject market area.”²⁰ Neither test, however, says anything about the ability of any of those providers to contribute to a “**healthy, sustainable** competitive market,”

¹⁴ See AT&T Brief at 5.

¹⁵ See OCC Brief at 12.

¹⁶ Id.

¹⁷ PUCO Brief at 5; see also id. at 7, 13.

¹⁸ Ohio Adm. Code 4901:1-4-10(C)(3), (4) (OCC Appx. at 000664) (emphasis added).

¹⁹ PUCO Brief at 17.

²⁰ Id. at 6.

consistent with the State's telecommunications policy as amended by H.B. 218.²¹ This Court recently reversed a PUCO decision that failed to follow the Ohio's statutory electricity policy.²² The Court should reverse here for failure to follow Ohio statutory telecommunications policy.

AT&T states, "This Court should not engraft onto the statute a requirement that the Commission examine only competitive or alternative stand-alone basic local exchange service, as OCC suggests. To do so would be to erect an impenetrable barrier to any semblance of regulatory relief."²³ OCC's true position is that because stand-alone basic service is under review, the PUCO should examine only competition for or alternatives to stand-alone basic service. The PUCO should not examine competition for or alternatives to bundles of services that include basic service. Under the tests that AT&T characterizes as "rigorous,"²⁴ AT&T passed the tests in 136 of the 145 exchanges (93.8%) for which AT&T sought basic service alt. reg., including 118 of the 119 exchanges (99.2%) examined under the company-friendly Test 4. The "competitive" tests erect few, if any, barriers for companies to obtain "regulatory relief," even though residential consumers may have few, if any, choices for stand-alone basic service.

Because the PUCO had already allowed alt. reg. for basic service included in bundles before H.B. 218 was enacted, the PUCO should have examined only competition for, or alternatives to, stand-alone basic service, **not** for bundles of services that include basic service. And when residential consumers have competition for or alternatives to stand-alone basic

²¹ R.C. 4927.02(A)(2) (OCC Appx. at 000647) (emphasis added).

²² *Elyria Foundry Company et al., v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 317, 319, 2007 Ohio 4164, ¶¶ 58, 70.

²³ AT&T Brief at 6.

²⁴ *Id.* at 5, 7.

service, then “regulatory relief” will be appropriate. The PUCO’s decision should be reversed as contrary to the law.

II. STANDARD OF REVIEW

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.²⁵ There are few facts here that are in dispute, however.²⁶

What OCC does dispute is the *legal significance* of facts such as the percentage of access lines lost or the number of alternative providers, in the context of R.C. 4927.03(A) (OCC Appx. at 648). As shown below and in OCC’s Merit Brief, those facts do **not** demonstrate that in the designated exchanges AT&T’s **stand-alone** basic service is subject to competition, or that residential customers of AT&T’s **stand-alone** basic service have reasonably available alternatives; or that there are no barriers to entry for **stand-alone** basic service; or that granting alt. reg. for **stand-alone** basic service is in the public interest. Thus the PUCO’s orders below fail to meet the statute. Although “AT&T bore the burden of presenting facts sufficient to support its application * * *” under the PUCO’s rules,²⁷ the facts AT&T presented were **insufficient under the statute** for AT&T’s stand-alone basic service to be granted alt. reg.

AT&T cites cases where the Court has deferred to the PUCO’s judgment when the record supports either of two opposing positions.²⁸ Matters like those addressed in those cases --

²⁵ PUCO Brief at 16-17, 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.

²⁶ See PUCO Brief at 23.

²⁷ *Id.* at 4.

²⁸ AT&T Brief at 14, citing *Payphone Ass’n. and Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (2001), 92 Ohio St.3d 177, 180.

whether a finding of eighty percent business loops and twenty percent residential loops in carrier-to-carrier pricing was supported by the manifest weight of the evidence, and whether a particular cost test had to be applied to the rates charged to independent payphone providers -- are one thing. The PUCO's findings in those cases did not have to comport with specific statutory criteria. Here the matter is much more fundamental: whether AT&T should be granted the freedom to increase its stand-alone basic service rates based on the existence of other providers' services that are not functionally equivalent to stand-alone basic service, and are not competitively priced to stand-alone basic service, in contravention of a statute. Deference to an agency's interpretation of statute is appropriate "so long as it is reasonable."²⁹ As detailed in OCC's initial brief, the PUCO's interpretation of the statute in this case is unreasonable. The PUCO's rulings here violate the fundamental law on which they are supposed to be based.

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 AT&T's stand-alone basic service based on a finding that there are competition and alternatives for basic service that is part of a service bundle. Rules that permit such a grant are invalid as contrary to the statute, and a Commission order that follows such rules must be reversed.**

As discussed in the Introduction, the PUCO persists in its claim that OCC's position is that only alternative providers' services that are exactly the same as stand-alone basic service should be considered in the competitive analysis.³⁰ The PUCO has never provided a citation to an expression of that supposed position. None exists.

²⁹ *Northwestern Ohio Building & Construction Trades Council v. Conrad* (2001), 92 Ohio St.3d 282, 289.

³⁰ See PUCO Brief at 9.

The PUCO also asserts that customers who subscribe to bundled offerings “are by definition BLES customers.”³¹ That is irrelevant here, because the PUCO previously determined that the basic service contained in such bundles is subject to alt. reg.³² Thus the focus of the proceedings below was necessarily on whether basic service **offered on its own** is subject to alt. reg. The PUCO also states, “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.”³³ But competition for residential service in general is not important here; competition for stand-alone basic service is being examined.

Despite having adopted these rules that exclusively consider alt. reg. for stand-alone basic service, the PUCO asserts that “R.C. 4927.03 neither mentions nor contemplates ‘stand-alone’ basic service * * *.”³⁴ The PUCO disregards the criteria in R.C. 4927.03(A) (OCC Appx. at 000648) 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.) Because bundled basic service was already granted alt. reg., “such telecommunications service” in the context of the proceeding below refers specifically to stand-alone basic service, even if it is not literally in the statute.

³¹ Id. at 11.

³² See OCC Brief at 24.

³³ PUCO Brief at 12.

³⁴ Id. at 8; see also id. at 14; AT&T Brief at 6.

The PUCO asserts that the case that granted alt. reg. to bundled basic service was “unrelated” to the case below³⁵ and “much different than the present one,”³⁶ despite the fact that the PUCO’s testimony on H.B. 218 specifically informed the General Assembly about the results of the prior case.³⁷ Both the PUCO and AT&T fail to rationalize the differences between the “unrelated” prior case and this one. The PUCO’s Brief quotes its finding in the rulemaking, which acknowledges that the prior case granted alt. reg. to bundles that include basic service.³⁸

Neither the PUCO nor AT&T asserts that any of the alternative providers offer stand-alone basic service, arguing that these carriers’ bundled service offerings are the competition or alternatives required by the statute. But like the PUCO rules, these arguments disregard the features of those bundles, the prices charged for those bundles, and the alt. reg. already granted to AT&T’s bundles. The PUCO has never justified its use of bundles as competition for stand-alone basic service.³⁹ Neither the PUCO’s nor AT&T’s Briefs here overcome that failure.

Indeed, in this case, for the exchanges examined under Test 4, AT&T provided no information to show that any AT&T residential customer -- whether or not a stand-alone basic service customer -- had switched to any of the alternative providers.⁴⁰ For the few exchanges examined under Test 3, the market share demonstration shows that some residential customers have switched. Yet this obscures the key issue here: Even if residential customers with bundles switch

³⁵ PUCO Brief at 14.

³⁶ Id.

³⁷ See OCC Brief at 20, n.91.

³⁸ PUCO Brief at 14; see also AT&T Brief at 11.

³⁹ OCC Brief at 20-27.

⁴⁰ The PUCO states that AT&T provided information indicating such switching. PUCO Brief at 7. There is no citation to the record. There was no such information.

to alternative providers' bundles, this says nothing about competition or alternatives for AT&T's **stand-alone basic service**.

The PUCO's Brief states, "Numerous witnesses at the Commissions' [sic] local hearings testified that they either had substituted alternative services for basic local service or were considering doing so as the Commission noted."⁴¹ The transcript citations in the PUCO's Brief are slightly different from those in the rulemaking order, but again, none of the cited material discussed customers substituting other providers' bundled services **for the incumbent telephone company's stand-alone basic service**.⁴² Indeed, as OCC's Brief noted, the public testimony was exactly the opposite: Residential customers throughout the state who want only stand-alone basic service have few or no alternatives to the incumbents' basic service.⁴³

The PUCO erred by counting bundles as generic competition for or alternatives to stand-alone basic service. On this ground alone, the decision below must be reversed.

- B. Proposition of Law No. 2: The Public Utilities Commission of Ohio erred as a matter of law when it allowed the establishment of alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic local service without a demonstration that stand-alone basic service is subject to competition or that stand-alone basic service customers have reasonably available alternatives. Rules that allow alternative regulation in the absence of such a demonstration are invalid, and a Commission order that follows such rules must be reversed.**

OCC's Brief on this Proposition of Law focused on the flaws in the PUCO's Test 4 line loss prong, which AT&T used for more than 80% of the exchanges for which it applied for alt. reg. OCC showed that the prong lacked probative value for the factors the statute requires to be

⁴¹ Id. at 13; see also id. at 8.

⁴² See OCC Brief at 24-25.

⁴³ Id. at 25.

considered for alt. reg.,⁴⁴ and pointed out the weaknesses of the PUCO's orders regarding the line loss prong.⁴⁵ The Test 4 line loss prong is simple: All an applicant telephone company like AT&T is required to show is that it had 15% fewer residential access lines when it applies than it did in 2002. This does not comport with the statutory requirements.

According to the PUCO, the "line loss requirement measures market power and the level of competition that AT&T faces in each exchange."⁴⁶ Likewise, the PUCO asserts that the line loss prong shows that "customers have alternatives and are exercising their right to choose them."⁴⁷ The PUCO has never shown (and does not do so now) how the simple numerical line loss comparison can reveal so much, especially that (as the PUCO now claims) "each 'lost' customer formerly purchased AT&T basic local service and now has chosen bundled service as a reasonable substitute to its former AT&T service."⁴⁸ The PUCO has not, and cannot, point to anything in this record or the record of the rulemaking that demonstrates those claims.

AT&T asserts that "the Commission need not determine where lost lines 'went' in order to use the line loss metric."⁴⁹ But the line loss prong is used in the context of a statute **requiring a showing of competition or alternatives**, so it is necessary to know where the lines went.

The PUCO states that it "found that it is not possible for AT&T * * * to identify, with precision, where 'lost' lines went because AT&T does not have access to other competitor's [sic]

⁴⁴ R.C. 4927.03(A)(2) (OCC Appx. at 000648).

⁴⁵ OCC Brief at 29-31.

⁴⁶ PUCO Brief at 17; see also AT&T Brief at 18.

⁴⁷ PUCO Brief at 18.

⁴⁸ Id.

⁴⁹ AT&T Brief at 18.

confidential market share information.”⁵⁰ But three of the four tests adopted by the PUCO require the incumbent telephone company to know where the access lines went, including Test 3’s market-share prong used by AT&T for some of its exchanges in the case below.⁵¹ Tests 1 and 2 also contain CLEC market share prongs.⁵²

The line loss prong does not show what the PUCO claims it does. The Court should reverse the PUCO’s grant of alt. reg. to AT&T stand-alone basic service.

C. Proposition of Law No. 3: The Public Utilities Commission of Ohio erred as a matter of law when it allowed the establishment of alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic local service based on alternative services that are not readily available at rates, terms, and conditions that are competitive with stand-alone basic local service. Rules that allow alternative regulation in those circumstances are invalid, and a Commission order that follows such rules must be reversed.

On this proposition of law, OCC’s Brief focused on the fact that alternative providers’ services were not functionally equivalent to or competitively priced to the stand-alone basic service provided by AT&T.⁵³ The PUCO and AT&T merely repeat the false assertion that OCC’s position requires services to be “exactly like” AT&T’s stand-alone basic service.⁵⁴ The Introduction lays out the substantial differences between the nature and prices of the alternative providers’ services and AT&T’s stand-alone basic service.

The PUCO states that the “facts demonstrate that alternative services are readily available from competing suppliers and that former AT&T stand-alone customers are selecting them

⁵⁰ PUCO Brief at 18 (emphasis in original).

⁵¹ Ohio Adm. Code 4901:1-10(C)(3) (OCC Appx. at 000664); see OCC Brief at 30.

⁵² Ohio Adm. Code 4901:1-10(C)(1) and (2) (OCC Appx. at 000663).

⁵³ OCC Brief at 31-34.

⁵⁴ See PUCO Brief at 11.

because they view the rates and terms of alternative service bundles to be competitive. Otherwise they would not have switched in the first place.”⁵⁵ But the record here is devoid of any evidence that AT&T stand-alone basic service customers have switched to any of the alternative providers’ services.

As discussed in the Introduction, despite the PUCO’s claims, the tests in the rules do not meet the statutory directives. The PUCO claims that, by focusing on which CLECs should be included under the competitive tests, “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.”⁵⁶ But the point is not whether the CLECs compete with AT&T⁵⁷; the statute requires a review of whether the CLECs compete with **AT&T’s stand-alone basic service**. Excluding CLECs that do not so compete is not “an artificially depressed result,”⁵⁸ but a result that is required by the statute.

Finally, AT&T provides a long list of what its “thousands of pages of data” showed.⁵⁹ Most of that list, however, says nothing about whether AT&T’s stand-alone basic service is subject to competition, or whether AT&T’s stand-alone basic service customers have reasonably available alternatives to that service. The Court should reverse the PUCO’s grant of alt. reg. to AT&T’s stand-alone basic service.

⁵⁵ Id. at 12.

⁵⁶ Id. at 26.

⁵⁷ Id. at 28.

⁵⁸ Id.

⁵⁹ AT&T Brief at 20-21.

D. Proposition of Law No. 4: The Public Utilities Commission of Ohio erred as a matter of law when it allowed the establishment of alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic local service where there has been no demonstration of a lack of barriers to entry for stand-alone basic service. Rules that allow alternative regulation in the absence of such a demonstration are invalid, and a Commission order that follows such rules must be reversed.

Here, as in other areas, the PUCO merely repeats its earlier statements, which themselves had no support either in the rulemaking or in AT&T's proceeding. For example, the PUCO states that "[t]he 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."⁶⁰ 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 stand-alone basic service**.

As with the false claims that OCC insists on consideration of only services identical to basic service, the PUCO again repeats the falsehood that OCC views barriers to entry as any condition that makes entry more difficult.⁶¹ The PUCO claims, "OCC proposes an insurmountable hurdle that renders R.C. 4927.03 unusable for its intended purpose -- alternative regulation of basic local exchange service."⁶² But the PUCO's Brief actually quotes OCC's proposed test, which was hardly "insurmountable."⁶³ The PUCO complains that "OCC requires AT&T to prove a negative, while the statute and the Commission's test require AT&T to make an

⁶⁰ PUCO Brief at 31-32, quoting 06-1013 Opinion and Order at 9 (OCC Appx. at 000018).

⁶¹ PUCO Brief at 32.

⁶² Id. at 33, quoting 05-1305 Entry on Rehearing at 18 (OCC Appx. at 000532).

⁶³ PUCO Brief at 10.

affirmative showing of competition in the marketplace.”⁶⁴ Yet the statute does require proof of a negative: that there are **no** barriers to entry.

OCC argued that the PUCO’s tests do not effectively address barriers to entry for competing stand-alone basic service providers. The PUCO asserts that this “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 AT&T”⁶⁵ and argues that, in the context of barriers to entry, “[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.”⁶⁶ The PUCO confuses the R.C. 4927.03(A)(1) (OCC Appx. at 000648) criteria of competition and alternatives with the separate directive of R.C. 4927.03(A)(3) (OCC Appx. at 000648), which requires a finding that “there are no barriers to entry” before granting alt. reg. for basic service. As OCC’s Brief noted, the General Assembly was aware when it passed H.B. 218 that the PUCO had already granted alt. reg. to basic service in bundles.⁶⁷ The General Assembly would not have applied the “no barriers to entry” requirement to services that were already subject to alt. reg. Thus this provision must have been focused on barriers to entry for the only service that was not yet subject to alt. reg., that is, **stand-alone basic service**. The PUCO’s orders must be reversed for failure to follow the statute.

⁶⁴ Id.

⁶⁵ Id. at 24.

⁶⁶ Id. (emphasis in original).

⁶⁷ OCC Brief at 16.

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

OCC's Brief -- and the record below -- showed that the PUCO had accepted cable companies that serve only parts of the designated exchanges as alternative providers.⁶⁸ OCC's Brief -- and the record below -- also showed that the PUCO had accepted wireless providers that would not guarantee that their service would work in any specific portion of the exchanges.⁶⁹ Neither the PUCO nor AT&T dispute these facts.⁷⁰

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.”⁷¹ Regardless of the PUCO's protestations, the limitations of these carriers' facilities mean that there will be AT&T customers in the AT&T exchanges who cannot take advantage of this competition or do not have these alternatives “reasonably available.”

The PUCO claims OCC's position -- that all customers within an exchange should be able to take advantage of the alternatives if AT&T is granted the ability to increase its rates **because of the alternatives** -- is impractical.⁷² This is an acknowledgement of the weaknesses of the test, where the PUCO sacrifices the consumer protections in the law for administrative

⁶⁸ Id. at 28-32.

⁶⁹ Id. at 33-34.

⁷⁰ AT&T assertion regarding CLECs (AT&T Brief at 17) is off-base: OCC's objection did not concern CLECs; it addressed the wireless carriers and the cable-based providers.

⁷¹ PUCO Brief at 24, citing 05-1305 Entry on Rehearing at 19 (OCC Appx. at 000533).

⁷² PUCO Brief at 24, quoting 06-1013 Opinion and Order at 23 (OCC Appx. at 000032).

expediency. If “there is no requirement that 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,”⁷³ then residential customers will not be able to respond to AT&T rate increases by switching their service. That undercuts the entire logic behind alternative regulation.

The law states that the policy of Ohio is to “[r]ely on market forces **where they are present**”⁷⁴; the test in the law is that customers have “competition” or “**reasonably available alternatives**”⁷⁵; the law requires the PUCO to consider “[t]he extent to which services are **available** from alternative providers in the relevant market”⁷⁶ and to consider the ability of alternative providers “to make services **readily available.**”⁷⁷ This hardly sounds like the General Assembly intended alt. reg. to apply where consumers do not have those choices. The PUCO’s grant of alt. reg. where customers lack choices should be reversed.

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

The PUCO states that its rules do contain public interest benefits.⁷⁸ First, it asserts that the basic service alt. reg. rules require compliance with applicants’ elective alt. reg. plans and the

⁷³ PUCO Brief at 24.

⁷⁴ R.C. 4927.02(A)(2) (OCC Appx. at 000647) (emphasis added).

⁷⁵ R.C. 4927.03(A)(1) (OCC Appx. at 000648) (emphasis added).

⁷⁶ R.C. 4927.03(A)(2)(b) (OCC Appx. at 000648) (emphasis added).

⁷⁷ R.C. 4927.03(A)(2)(c) (OCC Appx. at 000648) (emphasis added).

⁷⁸ AT&T discusses this subject only briefly. See AT&T Brief at 17-18.

commitments contained therein.⁷⁹ Given that compliance with the PUCO's earlier rules was already required of AT&T, the PUCO's construct of redundant compliance does not meet the statute's requirement for showing that this **new alt. reg. plan** is in the public interest.⁸⁰

And then there is the supposed benefit of "approving a modest, capped rate increase for basic local service."⁸¹ AT&T's current stand-alone basic service rates are already capped.⁸² Under the ruling below, AT&T will be allowed to increase those rates -- both for basic service and for basic Caller ID -- every year, without scrutiny.⁸³ A "limited" increase -- where no increase was justified -- is hardly a "benefit" to consumers.

The PUCO makes much of the decision to isolate Lifeline customers from the impact of basic service rate increases.⁸⁴ 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."⁸⁵ 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.

⁷⁹ PUCO Brief at 4-5 (stated twice), 37, 39 (again stated twice).

⁸⁰ Ohio Adm. Code 4901:1-4-06 (OCC Appx. at 000653-000659).

⁸¹ PUCO Brief at 29.

⁸² Ohio Adm. Code 4901:1-4-06(C)(3)(a)(iii) (OCC Appx. at 000657).

⁸³ The PUCO states that "[t]he pricing flexibility authorized by the Commission allows AT&T to actually charge *less* to meet competition." PUCO Brief at 37 (emphasis in original). Telephone companies have always had the ability to *decrease* their rates. AT&T asserts that its "rates have been substantially reduced over the 22 years since they were last increased in 1985." AT&T Brief at 1. AT&T neglects to mention that the reductions came about as the result of a settlement of a previous alt. reg. case. *In the Matter of the Application of Ameritech Ohio (Formerly known as The Ohio Bell Telephone Company) For Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Opinion and Order (November 23, 1994) (OCC Appx. at 000310).

⁸⁴ PUCO Brief at 37, 39; see also AT&T Brief at 18.

⁸⁵ R.C. 4927.02(A)(8) (OCC Appx. at 000647).

In the end, the PUCO fails even to attempt to explain why, in a competitive environment in 2002, public interest commitments were necessary under the statute, but now they are not. Similarly, the PUCO has not explained why in the current situation “the marketplace, and not administrative fiat, should dictate the level of public benefits”⁸⁶ where in the earlier situation “administrative fiat” was necessary. This in the face of OCC’s raising the issue at every stage of the process.⁸⁷ 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.”⁸⁸ The PUCO’s order should be reversed for failure to provide the required explanation of the change.

IV. CONCLUSION

The PUCO states that “OCC wants *its own test* applied, a test that will virtually ensure that R.C. 4927.03 cannot be applied for its intended purpose.”⁸⁹ To the contrary, OCC seeks a process that will find competition and/or alternatives to stand-alone basic service that are functionally equivalent to stand-alone basic service, and that are competitively priced to stand-alone basic service. OCC also seeks a process that will grant alt. reg. to stand-alone basic service only where competition or alternatives exist, and denies alt. reg. where they do not. OCC seeks

⁸⁶ PUCO Brief at 37.

⁸⁷ See OCC Brief at 43-45; OCC Application for Rehearing at 46-49 (OCC Appx. at 000253-000256).

⁸⁸ *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.

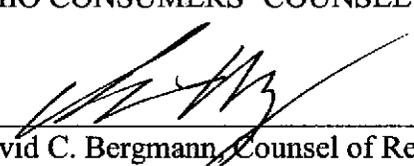
⁸⁹ PUCO Brief at 2 (emphasis in original); see also *id.* at 9, 14; see also AT&T Brief at 3, 19.

to avoid the result that the PUCO's rules and their application to AT&T have allowed: the ability for AT&T to impose increases to its stand-alone basic service rates where there are no alternatives except high-priced bundles, and sometimes where those bundles are not even available. The General Assembly did not intend such a result.

The PUCO also states, "Frustration of legislative intent is never a legitimate statutory goal."⁹⁰ OCC agrees, and also agrees that it is never a legitimate **administrative agency** goal. The PUCO's rulemaking and its implementation of those rules have frustrated legislative intent. The PUCO's decision should be reversed.

Respectfully submitted,

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⁹⁰ PUCO Brief at 11.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant, the Office of the Ohio Consumers' Counsel was served by regular U.S. mail, postage prepaid, upon the counsel listed below this 19th day of September, 2007.



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