

IN THE SUPREME COURT OF OHIO

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The Office of the Ohio Consumers'
Counsel,

Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee

07 - 0659

Case No. _____

Appeal from the Public Utilities Commission
of Ohio

Public Utilities Commission of Ohio
Case No. 06-1013-TP-BLS

NOTICE OF APPEAL
OF APPELLANT

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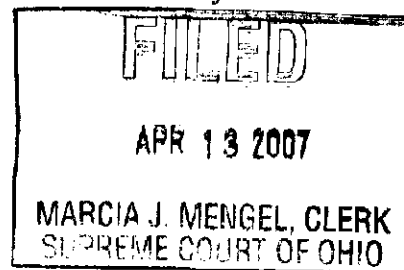
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PUCO

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Notice of Appeal of Appellant the Office of the Ohio Consumers' Counsel

Appellant, the Office of the Ohio Consumers' Counsel, pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal to the Supreme Court of Ohio from Appellee's Opinion and Order entered in its Journal on December 20, 2006 and Entry on Rehearing entered in its Journal on February 14, 2007 in Case No. 06-1013-TP-BLS before the PUCO.

Pursuant to R.C. Chapter 4911, Appellant is the statutory representative of the residential customers of The Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio" or the "Company"). Appellant is and was a party of record in the case below before the PUCO. On January 19, 2007, pursuant to R.C. 4903.10, Appellant timely filed an Application for Rehearing from the December 20, 2006 Opinion and Order. Appellant's Application for Rehearing was denied in its entirety by an Entry on Rehearing entered in Appellee's Journal on February 14, 2007.

Appellant files this Notice of Appeal, complaining and alleging that Appellee's December 20, 2006 Opinion and Order and February 14, 2007 Entry on Rehearing resulted in a final order that is unlawful, unjust, and unreasonable, and that Appellee erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

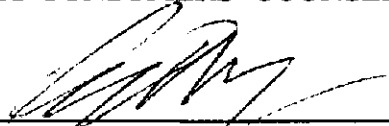
- I. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone (non-bundled) basic local service based on the existence of alternatives to bundled local service, in violation of R.C. 4927.03(A).
- II. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone basic local service throughout a telephone exchange based on alternatives that are available in only part of the exchange, in violation of R.C. 4927.03(A).

- III. The PUCO erred when it allowed the establishment of alternative regulation 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, in violation of R.C. 4927.03(A).
- IV. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone basic local service where there has been no demonstration of a lack of barriers to entry for stand-alone basic service, in violation of R.C. 4927.03(A). 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.
- V. The PUCO erred when it allowed the establishment of alternative regulation 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, in violation of R.C. 4927.03(A). 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.
- VI. The PUCO erred when it allowed the establishment of alternative regulation for stand-alone basic service that was not in the public interest, in violation of R.C. 4927.03(A). The public interest requirement is not met when consumers may be harmed or receive no benefit from the alternative regulation.

WHEREFORE, Appellant respectfully submits that the Appellee's December 20, 2006 Opinion and Order and February 14, 2007 Entry on Rehearing are unlawful, unjust, and unreasonable and should be reversed or vacated pursuant to R.C. 4903.13. The case should be remanded to the Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
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OHIO CONSUMERS' COUNSEL

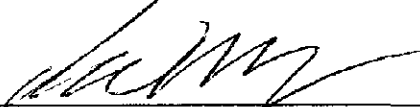


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of the proceedings before the Public Utilities Commission and pursuant to section 4903.13 of the Ohio Revised Code by regular U.S. Mail this 13th day of April, 2007.



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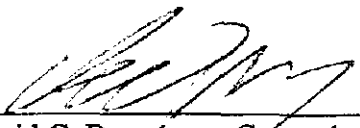
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CERTIFICATE OF FILING

I hereby certify that this Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code on April 13, 2007.

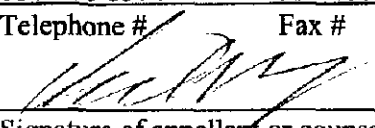


David C. Bergmann, Counsel of Record
Counsel for Appellant
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**APPENDIX E. CASE INFORMATION STATEMENT
IN THE SUPREME COURT OF OHIO**

Case Information Statement

Case Name: The Office of the Ohio Consumers' Counsel v. Pub. Util. Comm.	Case No.: On Appeal from PUCO Case No. 06-1013-TP-BLS
I. Has this case previously been decided or remanded by this Court? No <input checked="" type="checkbox"/> Yes <input type="checkbox"/> If so, please provide the Case Name: _____ Case No.: _____ Any Citation: _____	
II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If so, please provide the Case Name and Citation: <u>See attached</u> Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows: U.S. Constitution: Article _____, Section _____ Ohio Revised Code: <u>See attached</u> Ohio Constitution: Article _____, Section _____ Court Rule: _____ United States Code: Title _____, Section _____ Ohio Adm. Code: <u>See attached</u>	
III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.): 1) <u>Regulatory law (esp. R.C. Chapter 4927)</u>	
IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If so, please identify the Case Name: <u>Ohio Consumers' Counsel v. Public Utilities Comm.</u> Case No.: <u>07-570</u> Court where Currently Pending: <u>Supreme Court of Ohio</u> Issue: <u>Same as this case</u>	

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Appendix E, Section II

Ohio Supreme Court Cases:

Discount Cellular v. Pub. Util. Comm'n, 112 Ohio St.3d 360, 2007-Ohio-53

Stephens v. Pub. Util. Comm'n, 102 Ohio St.3d 44, 2004-Ohio-1798.

Time Warner v. Pub. Util. Comm. (1996), 75 Ohio St.3d 229, 661 N.E.2d 1097.

Ohio Revised Code Sections:

4927.01

4927.02

4927.03

Ohio Administrative Code Sections:

4901:1-4-09

4901:1-4-10

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of AT&T)
Ohio for Approval of an Alternative Form of)
Regulation of Basic Local Exchange Service) Case No. 06-1013-TP-BLS
and Other Tier 1 Services Pursuant to Chapter)
4901:1-4, Ohio Administrative Code.)

OPINION AND ORDER

The Commission, coming now to consider the submitted application and other evidence and arguments presented in these proceedings, hereby issues its opinion and order.

I. BACKGROUND

On August 5, 2005, Governor Bob Taft signed into law House Bill 218 (H.B. 218). This bill, which took effect November 4, 2005, amends various provisions of the Ohio Revised Code for the purpose of revising state telecommunications policy, including Sections 4905.04, 4927.02, 4927.03, and 4927.04, Revised Code. Among other things, Section 4927.03(A)(1), Revised Code, now authorizes the Commission to allow for alternative regulation of basic local exchange service (BLES) offered by incumbent local exchange companies (ILECs) in those telephone exchanges where competition exists and there are no barriers to entry.

On March 7, 2006, the Commission, pursuant to Case No. 05-1305-TP-ORD (05-1305), *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, established rules for the alternative regulation of basic local exchange service. These rules were subjected to the legislative rule review process and became effective on August 7, 2006. Consistent with these rules, ILECs with an approved elective alternative regulation plan can apply for pricing flexibility of BLES and other Tier 1 services. Applications for alternative regulation of BLES and basic caller ID will be approved provided the applicant satisfies one of the competitive market tests identified in Rule 4901-1-4-10, Ohio Administrative Code (O.A.C.). Pursuant to Rule 4901:1-4-09(G), O.A.C., an ILEC's application for BLES alternative regulation will become effective on the one hundred and twenty-first day after the filing of the application unless the application is suspended by the Commission. Pursuant to the Attorney Examiner Entry of December 4, 2006, this matter was suspended until December 29, 2006.

On August 11, 2006, as amended on September 8 and 13, 2006, AT&T Ohio filed an application for approval of an alternative form of regulation of BLES and other Tier 1 service. The company represents that it published legal notice in each of the counties corre-

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sponding to the 145 exchanges covered under its application. The following entities have been granted intervention in this proceeding:

Office of the Ohio Consumer's Counsel (OCC)
Appalachian People's Action Coalition (APAC)
City of Cleveland (Cleveland)
Northwest Ohio Aggregation Coalition (NOAC)
Edgemont Neighborhood Coalition (Edgemont)

Consistent with Rule 4901:1-6-09(F), O.A.C., any party who can show why such an application should not be granted must file a written statement detailing the reasons within forty-five calendar days after the application is docketed. Pursuant to the attorney examiner's Entry of September 21, 2006, the deadline for the filing of oppositions to AT&T Ohio's application was extended to October 16, 2006. AT&T Ohio's memorandum contra oppositions were to be filed within ten days of an opposition and any objecting party could file a reply within five days of AT&T Ohio's memorandum contra.

On October 16, 2006, an opposition to AT&T Ohio's application was jointly filed by OCC, Edgemont, APAC, Cleveland, the cities of Toledo, Holland, Maumee, Northwood, Sylvania, and Lucas County (collectively, Consumer Groups). On October 26, 2006, AT&T Ohio filed a Memorandum Contra Consumer Groups' Opposition. On October 31, 2006, Consumer Groups filed a reply to AT&T Ohio's Memorandum Contra.

II. SUMMARY OF THE APPLICATION

AT&T Ohio states that it fully complies with the elective alternative regulation commitments set forth in Rule 4901:1-4-06, O.A.C., consistent with the company's approved existing alternative regulation plan pursuant to Case No. 02-3069-TP-ALT, *In the Matter of the Application of Ameritech for Approval of an Alternative Form of Regulation* (Application at 1).

In its application, AT&T Ohio identifies 145 exchanges throughout its Ohio service territory for which it asserts that it satisfies at least one of the competitive tests identified in Rule 4901:1-4-10, O.A.C. For 26 of the identified exchanges, AT&T Ohio relies on the competitive test set forth in Rule 4901:1-4-10(C)(3), O.A.C (Test 3). For 119 of the identified exchanges, AT&T Ohio relies on the competitive test set forth in Rule 4901:1-4-10(C)(4), O.A.C. (Test 4).

As part of its application, AT&T Ohio filed proposed tariff amendments for the purpose of identifying those exchanges included as part of its application. While the tariff amendments denote that the identified exchanges would be subject to pricing flexibility, the tariff amendments do not reflect the company has actually exercised this pricing flexibility at this time.

AT&T Ohio represents that in collecting information on competitive local exchange company (CLEC) and alternative provider activity in its exchanges, it first reviewed and documented publicly available data, such as websites, carrier tariff filings, information on wireless licenses and Commission certification cases and interconnection agreement filings (Application at 3). To confirm the information available from publicly available sources, AT&T Ohio states that it reviewed internal data from billing and E9-1-1 records, white pages listings, and ported telephone number information (*Id.* at 4). AT&T Ohio states that in some cases it has identified more competitors than the minimum required by the Commission rules.

Specific to Test 4, AT&T Ohio explains that it examined its own line loss since 2002, relying on the annual report information for that year and performing a comparison on an exchange-specific basis to comparable data for June 30, 2006 (*Id.* at 3).

A. Test 3

Pursuant to Rule 4901:1-4-10(C)(3), O.A.C., this test requires the applicant to demonstrate in each requested telephone exchange area: (1) that at least fifteen percent of the total residential access lines are provided by unaffiliated CLECs; (2) the presence of at least 2 unaffiliated facilities-based CLECs providing BLES to residential customers; and (3) the presence of at least five alternative providers serving the residential market.

A CLEC is defined as any facilities-based and nonfacilities-based local exchange carrier that was not an ILEC 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 ILEC. Alternative providers are defined as providers of competing services to BLES offerings regardless of the technology and facilities used in the delivery of the services (wireline, wireless, cable, broadband, etc.).

AT&T Ohio represents that the following exchanges satisfy the criteria of Test 3:

Beallsville	Belfast	Bethesda
Canal Winchester	Conesville	Danville
Glenford	Graysville	Groveport
Guyan	Leetonia	Lewisville
Marshall	Murray City	New Albany
Newcomerstown	Rainsboro	Rio Grande
Salineville	Shawnee	Somerset
Somerton	Vinton	Walnut
Wellsville	Winchester	

B. Test 4

Pursuant to Rule 4901:1-4-10(C)(4), O.A.C., this test requires that an applicant demonstrate that in each requested telephone exchange area that at least fifteen percent of the total residential access lines have been lost since 2002 as reflected in the applicant's annual report filed with the Commission in 2003, based on data for 2002; and demonstrate the presence of at least five unaffiliated facilities-based alternative providers serving the residential market. AT&T Ohio represents that the following exchanges satisfy the criteria of Test 4:

Akron	Alliance	Alton
Atwater	Barnesville	Beavercreek
Bellaire	Bellbrook	Belpre
Berea	Bloomington	Burton
Canal Fulton	Canfield	Canton
Carroll	Castalia	Cedarville
Centerville	Cheshire	Chesterland
Cleveland	Columbus	Coshocton
Dalton	Dayton	Donnelsville
Dublin	East Palestine	Enon
Fairborn	Findlay	Fletcher-Lena
Fostoria	Franklin	Fremont
Gahanna	Gates Mills	Girard
Greensburg	Grove City	Hartsville
Hilliard	Hillsboro	Holland
Hubbard	Ironton	Jamesstown
Jeffersonville	Kent	Kirtland
Lancaster	Lindsey	Lisbon
Lockbourne	London	Louisville
Lowellville	Magnolia-Waynesburg	Manchester
Marietta	Marlboro	Martins Ferry-Bridgeport
Massillon	Maumee	Medway
Mentor	Miamisburg-West Carrollton	Middletown
Milledgeville	Mingo Junction	Mogadore
Monroe	Montrose	Navarre
Nelsonville	New Carlisle	New Lexington
New Waterford	Niles	North Canton
North Hampton	North Lima	North Royalton
Perrysburg	Piqua	Ravenna
Reynoldsburg	Ripley	Rogers
Rootstown	Salem	Sandusky
Sebring	Sharon	South Charleston
South Vienna	Spring Valley	Springfield
Steubenville	Strongsville	Terrace

Thornville	Tiffin	Toledo
Toronto	Trenton	Trinity
Uniontown	Upper Sandusky	Vandalia
West Jefferson	Westerville	Wickliffe
Worthington	Xenia	Yellow Springs-Clifton
Youngstown	Zanesville	

III. SUMMARY OF CONSUMER GROUPS' OPPOSITION AND AT&T OHIO'S RESPONSE TO THE FILED CONSUMER GROUPS' OPPOSITION

A. Generic Issues Regarding BLES Alternative Regulation Rules

1. General Discussion

Consumer Groups' Position

While recognizing that they reiterate arguments previously raised in 05-1305, Consumer Groups aver that a party must address a rulemaking in the particular case in which the rules are applied. Consumer Groups observe that, although the arguments now being raised are consistent with the arguments made in 05-1305, the positions that they are now taking are based on the real-world situation presented by AT&T Ohio's application.

Consumer Groups assert that as a result of the Commission's BLES alternative regulation rules and the alleged inherent flaws contained within such rules (as described in more detail in the subsections below), to the extent that AT&T Ohio's application is granted, some AT&T Ohio customers will experience BLES rate increases while not having alternatives to AT&T Ohio's BLES.

AT&T Ohio's Position

AT&T Ohio considers the arguments raised by Consumer Groups to be nothing more than an effort to undo the intent of the General Assembly's H.B. 218 and the Commission's efforts to implement the legislation (AT&T Ohio's Memorandum Contra at 3). In particular, AT&T Ohio submits that Consumer Groups' narrow view of BLES and their extreme interpretations of H.B. 218 and the Commission's rules would frustrate the goals of the General Assembly and the Commission in reforming the regulation of BLES to meet drastically changed market conditions. AT&T Ohio views Consumer Groups' arguments to be merely a rehashing of issues that were already considered and rejected in 05-1305 (*Id.* at 5).

Commission Conclusion

The Commission recognizes that Consumer Groups are raising many of the same arguments to challenge AT&T Ohio's application in this case as were raised by Consumer

Groups in challenging the rules approved in 05-1305. While we will again address some of these issues in the following sections, we believe that the Commission's order in 05-1305 fully addresses the arguments being reiterated in this proceeding and, therefore, there is no reason for the Commission to fully repeat the same analysis and conclusions set forth in those orders. Likewise, there is no reason to discuss and reevaluate the evidence submitted on the record in 05-1305 for the purpose of addressing Consumer Groups' same arguments raised here.

Accordingly, the Commission hereby incorporates into the record in this case the entire record from 05-1305, including, but not limited to, all of the Commission's orders as well as the evidence submitted by the parties in that case. Therefore, the record from that case should be considered as part of the record in this case and the Commission reiterates its prior determination that the record in 05-1305 supports its prior orders in that proceeding and the resulting rules adopted in Chapter 4901:1-4, O.A.C.

2. Barriers to entry

Consumer Groups' Position

Consumer Groups assert that the Commission's rationale for adopting Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., does not comply with the Section 4927.03(A)(3), Revised Code, provision that there be no barriers to entry for stand-alone BLES. Consumer Groups contend that, consistent with Section 4927.03(A)(3), Revised Code, the presence of competition does not obviate the Commission's consideration of the issue of entry barriers (Consumer Groups' Opposition at 16, 17; Roycroft Affidavit at ¶¶37-44). Additionally, Consumer Groups aver that the presence of an arbitrary number of alternative providers in an exchange does not equate to the absence of entry barriers to providing stand-alone residential BLES in the exchange (Consumer Groups' Opposition at 8; Consumer Groups' Reply at 8). Similarly, Consumer Groups opine that simply because one or more CLECs serve an arbitrary percentage of residential access lines in an exchange does not signify that there are no barriers to entry to providing residential stand-alone BLES in that exchange.

Consumer Groups believe that the Commission's interpretation regarding the significance of the reference to barriers to entry in Section 4927.03(A)(3), Revised Code, is too narrow in scope (Consumer Groups' Opposition at 13). Consumer Groups submit that a barriers to entry analysis should include all aspects of entry, including technical, economic, and geographic (Consumer Groups' Reply at 21, 22). Consumer Groups advocate that the Commission should rely more on market forces, where they are present and capable of supporting a healthy and sustainable competitive telecommunications market, rather than the competitive market tests found in Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C. (Consumer Groups' Opposition at 18, 41, 42; Williams Affidavit at ¶¶ 43, 68).

AT&T Ohio's Position

Relative to the Consumer Group's contention that AT&T Ohio is required to establish that there are no barriers to entry for carriers to provide stand-alone BLES in the selected exchanges, AT&T Ohio first asserts that the competitive tests established by the Commission have already been scrutinized by the legislative rule review process. To the extent that one of the tests is satisfied, AT&T Ohio submits that such a showing demonstrates compliance with the underlying statutory provisions. Therefore, AT&T Ohio insists that it is not necessary for it to have to demonstrate compliance with each aspect of the statutory criteria (AT&T Ohio Memorandum Contra at 6). Specific to the arguments presented by Consumer Groups related to barriers to entry, AT&T Ohio claims that the Commission, in 05-1305, already considered and rejected the arguments raised by the Consumer Groups (*Id.* at 13-15 citing to 05-1305, Entry on Rehearing at 17-19). While acknowledging that there is no independent requirement in the BLES alternative regulation rules that an applicant establish that there are "no barriers to entry," AT&T Ohio posits that the Commission has determined that the presence of multiple competitors in a market is sufficient evidence that there are no such barriers (*Id.* at 16).

As support for its contention that there are no barriers to entry, AT&T Ohio focuses on the fact that, in the context of its application for relief pursuant to Section 271 of the Telecommunications Act of 1996 (1996 Act), the Commission and the Federal Communications Commission (FCC) both found that there were no barriers to entry in AT&T Ohio's local exchanges (*Id.* at 19 citing to *In the Matter of the Investigation Into SBC Ohio's Entry Into In-Region InterLATA Services Under Section 271 of the Telecommunications Act of 1996*, Case No. 00-942-TP-COI, Order, June 26, 2003, p. 6; *In the Matter of the Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167, Memorandum Opinion and Order, FCC 03-243, rel. October 15, 2003). As further support for its contention that there are no barriers to entry, AT&T Ohio believes that the FCC, in its *Triennial Review Remand Order*, determined that there are no barriers to entry for BLES (*Id.* at 21 citing to *In the Matter of Unbundled Access to Network Elements*, Order on Remand, FCC 04-290, rel. February 4, 2005, ¶204).

Commission Conclusion

As discussed above, Consumer Groups reiterate their prior contentions from 05-1305, that, consistent with Section 4927.03(A)(3), Revised Code, the presence of competition does not obviate the Commission's consideration of the issue of barriers to entry. In raising this argument, Consumer Groups' focus is generic in nature and fails to specifically focus on any of the exchanges identified by AT&T Ohio in this proceeding. Therefore, Consumer Groups' argument relative to this issue should be denied inasmuch as Consumer Groups have failed to raise any new arguments from those previously considered and rejected in

05-1305 relative to the issue of barriers to entry. Further, the Commission does not find evidence in the record of any barriers to entry present in any of the exchanges in which the Commission grants AT&T Ohio's application as delineated in Attachments A and B of this opinion and order.

As stated above, Consumer Groups assert that, rather than focusing on the presence or absence of competitors, a barrier to entry analysis should include all aspects of entry barriers including technical, economic, and geographic factors. In rejecting Consumer Groups' arguments pertaining to this issue, the Commission believes that its BLES alternative regulation rules already address the element of barriers to entry consistent with the Section 4927.03(A)(3), Revised Code. The Commission also recognized that:

All 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.

(05-1305, Entry on Rehearing at 18).

In establishing the criteria to be incorporated in its BLES alternative regulation rules, the Commission identified those factors that it believes are significant for the purpose of complying with the intent of H.B. 218, while at the same time not making the thresholds so onerous that few if any ILECs could avail themselves of the BLES alternative regulation benefits contemplated by H.B. 218. Additionally, the Commission highlights the fact that, although the legislature provided general guidance to the Commission regarding the establishment of alternative BLES regulation, the ultimate decision-making authority regarding the implementation of this authority was left to the Commission.

With respect to Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., the Commission disagrees with Consumer Groups' contention that the Commission's rules fail to properly address the absence of barriers to entry. Relative to Rule 4901:1-4-10(C)(3), O.A.C., the Commission finds significance in the required demonstration that: (1) at least 15 percent of the total number of residential access lines in an exchange must be provided by unaffiliated CLECs; (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. The Commission notes that all of the barriers to entry factors outlined by Consumer Groups in this case are identical to those raised in 05-1305. These factors were fully considered in that

case. Specifically, the Commission stated that "federal and state laws and rules exist to minimize the effect of such challenges and to prohibit ILECS from using such issues as barriers to entry" (05-1305, Opinion and Order at 22).

Similarly, with respect to Rule 4901:1-4-10(C)(4), O.A.C., 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 the residential customers in the relevant market. Satisfying the criteria outlined in Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., allows for the conclusion that there are a reasonable number of providers offering competing services in the relevant market and that a significant number of residential subscribers in an exchange now perceive such offerings as a reasonably available substitute offering that competes with the ILEC's BLES. The required presence of unaffiliated facilities-based 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.

3. Functionally Equivalent or Substitute Services

Consumer Groups' Position

Consumer Groups contend that the Commission's rationale for adoption of Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C., does not comply with the specific provisions of Section 4927.03(A)(1)(a) and (b), Revised Code, which require a finding that either the telephone company is subject to competition with respect to stand-alone BLES or that AT&T Ohio's BLES customers have reasonably available alternatives. Consumer Groups believe that AT&T Ohio's application fails to establish the ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions in accordance with Section 4927.03(A)(2)(c), Revised Code. Specifically, Consumer Groups opine that the requisite showing in this proceeding should be a comparison of alternative providers' stand-alone BLES offerings to AT&T Ohio's stand-alone BLES in order to ensure that functionally equivalent or substitute services are readily available at competitive rates, terms, and conditions (Consumer Groups' Opposition at 14, 15).

Consumer Groups submit that if functionally equivalent or substitute services are not readily available at competitive rates, terms, and conditions, then consumers will not be able to make choices in the marketplace which are capable of constraining AT&T Ohio's market power (Roycroft Affidavit at ¶101). Consumer Groups contend that if the rates, terms, and conditions associated with the alternative providers' services differ significantly from those of BLES, then the alternative providers should not be relied upon for the purpose of satisfying Rule 4901:1-4-10(C), O.A.C. (Consumer Groups' Opposition at 35; Roycroft Affidavit at ¶25).

In order for services to be considered functionally equivalent, Consumer Groups argue that the services should be substitutable for a wide section of the residential population (Consumer Groups' Opposition at 26; Roycroft Affidavit at ¶18). While Consumer Groups do not believe that there has to be the existence of the "perfect substitute" in order to warrant the granting of BLES alternative regulation, they do believe that the services should be similarly priced to AT&T Ohio's stand-alone BLES and have terms and conditions similar to the company's BLES, including the ubiquitous availability of service across the exchange (Consumer Groups' Reply at 16, 17).

Specific to wireless service being a reasonable substitute to BLES, Consumer Groups posit that, while a small number of subscribers have "cut the cord and gone wireless," it does not follow that wireless telephony is a readily available functional equivalent to, or a substitute for BLES (Consumer Groups' Opposition at 35; Roycroft Affidavit at ¶22). Consumer Groups distinguish wireless from BLES providers for numerous reasons, including the fact that wireless providers do not offer a functional substitute to dial tone service quality, E9-1-1, a directory listing, or a reasonable means for Internet access. Additionally, Consumer Groups aver that wireless service would require multiple wireless telephones to replace a wireline phone for a family (Consumer Groups' Opposition at 36, 37; Roycroft Affidavit ¶¶57-59, 60, 63-65, 67-70; Consumer Groups' Reply at 17, 18).

Consumer Groups also distinguish AT&T Ohio's BLES service from wireless alternative service by pointing out that wireless service is not available at rates, terms, and conditions that are comparable to AT&T Ohio's BLES rate (Consumer Groups' Opposition at 38-41; Roycroft Affidavit at ¶¶ 77-80, 100; Consumer Groups' Reply at 17-19). Additionally, to the extent that AT&T Ohio has presented data regarding the porting of wireline numbers to wireless carriers, Consumer Groups argue that the low levels of telephone number porting from wireline to wireless carriers support their contention that wireless carriers should not be considered as an alternative provider to BLES (Consumer Groups' Opposition at 38; Roycroft Affidavit at ¶117). Consumer Groups also contend that AT&T Ohio has not established that consumers can receive the identified wireless services in their homes or whether the wireless carriers' services are available throughout the exchanges identified in AT&T Ohio's application (Consumer Groups' Opposition at 41-45).

Consumer Groups dismiss voice over Internet protocol (VoIP) as an alternative for BLES due to the added expense for obtaining a broadband connection, concerns regarding the availability of VoIP during power outages, and concerns regarding the availability of 9-1-1 service (Consumer Groups' Reply at 18; Williams Affidavit at ¶67).

Consumer Groups also dispute AT&T Ohio's inclusion of companies offering service bundles, which include BLES, as an alternative to BLES. In support of their argument, Consumer Groups argue that inasmuch as the Commission, in Case No. 00-1532-TP-COI, *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*, previously granted alternative regulation to bun-

dles containing BLES, the Commission's BLES alternative regulation rules should be limited to consideration and alternatives for stand-alone BLES (Consumer Groups' Opposition at 15, Consumer Groups' Reply at 4, 5). In support of their position, Consumer Groups argue that BLES-only service does not compete with the alternative providers' bundled service offerings because they are neither functionally equivalent nor substitutes for such service (Williams Affidavit at ¶67). Consumer Groups also raise the issue that local/long distance bundles cost considerably more than the stand-alone BLES rate (Consumer Groups' Reply at 19). Consumer Groups believe that if a competitor does not offer a service equivalent in scope to AT&T Ohio's BLES at a price that is competitive with BLES, then AT&T Ohio has no reason to need pricing flexibility for stand-alone BLES (*Id.* at 5).

AT&T Ohio's Position

In response to Consumer Groups' contentions regarding "functionally equivalent or substitute services" for BLES, AT&T Ohio points out that the Commission has previously rejected such arguments in 05-1305. Specific to the arguments raised by Consumer Groups, AT&T Ohio reiterates its contention that services do not have to be perfect substitutes in order for competition to flourish (AT&T Ohio's Memorandum Contra at 4 citing AT&T Ohio's Reply Comments in 05-1305, December 22, 2005, at 7). AT&T Ohio highlights the fact that the Commission agreed with its position and found that:

Although the products offered by those alternative providers may not be exactly the same as the ILECs' BLES offerings, those customers view them as substitutes for the ILECs' BLES. Thus, the alternative providers compete against the ILECs' provision of BLES.

(*Id.* at 5 citing 05-1305, Opinion and Order, March 7, 2006, at 25).

In regard to Consumer Groups' contention that stand-alone BLES is the only appropriate comparison for the purpose of obtaining relief pursuant to H.B. 218, AT&T Ohio calls attention to the fact that H.B. 218 neither defines stand-alone BLES nor requires that stand-alone BLES be offered by any carrier. Rather, AT&T Ohio points out that the statute simply requires that the commission consider "the ability of alternative providers to make functionally equivalent or substitute services available at competitive rates, terms, and conditions [*Id.* at 9 citing Section 4927.03(A)(2)]. AT&T Ohio identifies the fact that, while the statute allows for alternative regulation of BLES based on the demonstration of functionally equivalent or substitute services, only ILECs are required to provide stand-alone BLES. Further, AT&T Ohio notes that, although few CLECs or intermodal carriers provide stand-alone BLES, their BLES offerings are purchased in lieu of and compete with, the ILECs' BLES offerings. Therefore, AT&T Ohio submits that to adopt Consumer Groups' narrow interpretation would be contrary to the legislative intent. AT&T Ohio submits that the services offered by CLECs and the various alternative providers are functionally equivalent to and a substitute for BLES (*Id.* at 10).

In response to Consumer Groups' stated concern that the Commission should consider the number of stand-alone customers for the purpose of assessing the impact of BLES alternative regulation in the context of an individual application, AT&T Ohio responds that the only relevant issue is whether an applicant has satisfied one of the competitive market tests (*Id.* at 11). While Consumer Groups advocate that resellers should be excluded from a Test 3 (Rule 4901:10-4-10(C)(3), O.A.C.) analysis, AT&T Ohio recognizes that the term "alternative provider" (Rule 4901:1-4-01(B), O.A.C.) includes resellers (*Id.*).

Commission Conclusion

We first address Consumer Groups' argument that AT&T Ohio has failed to meet its burden of proof required by Section 4927.03, Revised Code, due to the fact that, it did not establish that alternative providers have stand-alone BLES offerings that are available at competitive rates, terms, and conditions. The Commission notes that Consumer Groups have reiterated the same arguments that they previously raised and the Commission considered in 05-1305 relative to this issue. Consistent with our prior determinations in 05-1305, the Commission finds that Consumer Groups' argument with respect to this contention should be denied. Specifically, the Commission previously found that:

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

(05-1305, Opinion and Order at 25).

Further, we have already concluded that:

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

...

Accordingly, we find that, with technology advancements, alternative providers such as wireline CLECs, wireless, VoIP, and cable telephony providers are relevant to our consideration in determining whether an ILEC is subject to competition or customers have reasonably available alternatives to the ILECs' BLES offering at competitive rates, terms, and conditions.

(*Id.*).

Based on the record, we find that the substitution by end users of AT&T Ohio's BLES with wireless, VoIP, cable and CLEC wireline services demonstrates that these providers customize their service offerings in order to be able to meet different customers' needs and lifestyles. As a result, these service offerings are viewed by consumers as substitutes for BLES (AT&T Ohio Application, Ex. 3; AT&T Ohio Supplement to Application; AT&T Ohio's Memorandum Contra, Attachments 3 through 5). Although not each of the substitute services for BLES will meet the needs of AT&T Ohio's BLES customer base, this does not negate the consideration of a particular service as being a reasonable alternative to BLES. 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 as 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 ILECs' 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.

Consistent with this determination, we reject the Consumer Groups' argument that wireless providers should not be considered as alternative providers for BLES based on the contention that only a small subset of the population actually replaces their BLES service with wireless providers. The Commission recognizes that a specific segment of the population does select wireless service in lieu of BLES and, therefore, such service should be included amongst the acceptable alternatives for BLES. The Commission notes that this point was not disputed by Consumer Groups (Roycroft Affidavit at 12, 43). We find that the record in this instant proceeding demonstrates that customers in the exchanges listed in Attachments A and B substitute their AT&T Ohio service with various services offered by the wireless providers identified in the relevant exchanges (AT&T Ohio Application, Ex. 3, AT&T Ohio Supplement to Application, AT&T Ohio's Memorandum Contra at Attachments 1-6).

In reaching the aforementioned decision, the Commission rejects Consumer Groups' position that in order to justify the granting of BLES alternative regulation, the functionally equivalent services must be similarly priced to AT&T Ohio's stand-alone BLES and have terms and conditions similar to AT&T Ohio's BLES, including the ubiquitous availability of service across the exchange. Although alternative services may not be offered pursuant to identical terms and conditions as AT&T Ohio's BLES, Section 4927.03(A)(2)(c), Revised Code, requires only that the functionally equivalent or substitute services be readily available at competitive rates, terms, and conditions. Consistent with the criteria set forth in Rule 4901:1-4-10, O.A.C., to the extent that AT&T Ohio is losing BLES customers and the requisite number of alternative providers are present, it is evident that functionally equivalent or substitute services are readily available.

4. Market Share

Consumer Groups' Position

Consumer Groups assert that "a carrier providing service to only a handful of customers does not have a presence in the market sufficient to conclude that the carrier would be capable of disciplining the ILEC's BLES prices if alternative regulation is granted (Consumer Groups' Opposition at 28; Williams Affidavit at ¶92). Consumer Groups assert that to the extent that alternative providers have customers, but are not active market participants, they should be excluded from a competitive market test since they are not making functionally equivalent or substitute services to the ILEC's BLES readily available at competitive rates, terms, and conditions (Consumer Groups' Opposition at 28; Williams Affidavit at ¶75; Consumer Groups' Reply at 14). Consumer Groups further elaborate this point by stating that consumers cannot consider a particular provider as an option if the company has ceased marketing the service. Consumer Groups aver that many of the providers identified by AT&T Ohio do not have the provision of stand-alone BLES in their business plans and do not market the availability of the service (*Id.* at 15, 16).

AT&T Ohio's Position

In response to Consumer Groups' assertion that, in order for an alternative provider to have a presence, it must be serving a minimum number of the customers and must be actively marketing in the specific exchange, AT&T Ohio simply focuses on whether an alternative provider is actually providing service in the exchange. The company rejects any belief that each and every residential customer within a given exchange must have five alternative providers available to them in order to satisfy the competitive market tests (*Id.* at 12). Notwithstanding its position on this issue, AT&T Ohio notes that resellers and all collocated CLECs have access to each residential subscriber in an exchange and that VoIP and wireless carriers are not constrained by exchange boundaries.

Commission Conclusion

The Commission rejects Consumer Groups' contention that an alternative provider must be serving a minimum number of customers in an exchange in order to be considered for the purpose of a competitive market test. In establishing the specific criteria for the competitive market tests in 05-1305, the Commission properly considered all relevant factors and attempted to establish a balanced approach for determining if the statutory intent of Section 4927.03, Revised Code, has been satisfied.

The Commission also rejects the Consumer Groups' requirement that AT&T Ohio verify that an identified alternative provider makes the service available to the entirety of a market in order to demonstrate that the alternative provider's service offering is available within the relevant market. We find that such requirement would be extremely difficult to enforce inasmuch as the relevant information is available only to the alternative provider, and not the ILEC. The fact that an alternative provider may not be directly marketing its service is not relevant to the Commission's evaluation. Rather, the important factor for consideration is whether the alternative provider's service is available to residential customers pursuant to its tariff and whether it is currently serving residential customers.

As discussed above, Consumer Groups assert that the Commission should rely on market forces and consider as part of the competitive market tests the size of alternative providers, their market shares, and their longevity in market. First, the Commission points out that, pursuant to Section 4927.03(A)(2)(d), Revised Code, consideration of criteria such as market share is permissive, but is not mandatory. Additionally, the Commission agrees with AT&T Ohio's contentions that an ILEC is not always able to identify where the lost lines have migrated and that an ILEC does not have access to other competitors' market data in order to calculate the competitor's market share. The Commission recognizes that an access line can be lost to an unregulated competitor (such as a VoIP provider), lost to an affiliated or unaffiliated wireless provider, disconnected due to a move, converted to digital subscriber loop (DSL) provided by an ILEC affiliate or an unaffiliated provider, or converted to cable modem service provided by an unregulated entity. The only scenarios under which an ILEC would be able to identify where the lost residential access line migrated is when it is transferred to a CLEC that either utilizes the ILECs unbundled network element (UNE) or when it ports the telephone number associated with the lost residential access line.

As a result of this identified difficulty, the Commission requires a demonstration of a competitor's market share as a measure of market power only with respect to Test 3. The Commission also finds that a market share criteria would not be appropriate in those exchanges/markets where competitors have elected different technologies for their market entry strategies. Therefore, the percentage of residential access lines lost incorporated as a requirement in Rule 4901:1-4-10(C)(1) and (C)(4), O.A.C., is a more reasonable method of assessing market power and the level of competition that an ILEC faces in a given exchange

when the main competitors are not CLECs. This is due to the fact that the ILEC does not have to rely on customer-specific migration information under these tests.

B. Actual Competitive Market Test Analysis

1. Test 4

a. Access Line Loss

Consumer Groups' Position

Specific to Rule 4901:1-4-10(C)(4), O.A.C., Consumer Groups focus on the requirement that an applicant must demonstrate that for each requested telephone exchange, there has been a loss of more than fifteen percent of the residential access lines. Consumer Groups question the significance of the fifteen percent threshold. Consumer Groups believe that the criteria such as size of the alternative providers, market shares and longevity provide a better measure of whether a provider can truly exert competitive pressure on the ILEC's service offering. Consumer Groups believe that such factors assist in determining the carrier's presence in an exchange and its ability to serve customers throughout the exchange (Consumer Groups' Opposition at 18, 41, 42; Williams Affidavit at ¶¶43, 68).

Consumer Groups also assert that this prong of the test does not satisfy Section 4927.03(A)(1), Revised Code, because AT&T Ohio has not demonstrated that stand-alone BLES lines were lost to unaffiliated providers of BLES as a result of competitive reasons (Consumer Groups' Opposition at 14, 17; Consumer Groups' Reply at 27, 28). Instead, Consumer Groups submit that AT&T Ohio's data includes customers who have switched second lines to AT&T Ohio's DSL service, customers that migrated to AT&T Ohio's own wireless affiliate, as well as customers who have moved from AT&T Ohio's service territory (Consumer Groups' Opposition at 15, 17, 23). Consumer Groups also attribute some of the alleged loss of access lines to the decline in population and income in certain portions of AT&T Ohio's service territory (*Id.* at 23, 24). Consumer Groups consider these reasons to have nothing to do with the issue of competitive entry for BLES (*Id.* at 17, 23, 24; Roycroft Affidavit at ¶34; Williams Affidavit at ¶148). Rather than focusing on lost access lines in the aggregate, Consumer Groups opine that, in order to truly comply with Section 4927.03, Revised Code, the Commission should have adopted a competitive market test that was limited to only those access lines lost to stand-alone BLES competition (Consumer Groups' Opposition at 1-6, 15).

AT&T Ohio's Position

In response to Consumer Groups' claim that the competitive market test set forth in the Rule 4901:1-4-10(C)(4), O.A.C., does not satisfy the statutory criteria for the purpose of granting alternative regulation. AT&T Ohio opines that, consistent with Rule 4901:1-4-

10(C), O.A.C., the satisfaction of the competitive market tests properly demonstrates compliance with the statutory criteria. In support of its contention, AT&T Ohio states that its application depicts the following:

- (1) Many CLECs have approved interconnection agreements with AT&T Ohio,
- (2) Many CLECs have Commission approved tariffs for BLES,
- (3) Many CLECs are serving residential customers with their own facilities or via resale,
- (4) Many customers have ported their numbers to CLECs, wireless, or VoIP providers.
- (5) The number of AT&T Ohio residential access lines have significantly decreased while the alternative provider residential market share has increased.

In response to Consumer Groups' assertion that AT&T Ohio's application reflects obfuscation and intentional vagueness, the applicant states that it filed an extensive application, supplemented it with additional information, responded to two Commission staff data requests and numerous discovery requests. AT&T Ohio considers Consumer Groups' dissatisfaction to be more related to their unhappiness with what the application demonstrates rather than with the level of detail of information provided in this case (AT&T Ohio Memorandum Contra at 17).

Commission Conclusion

As noted above, Consumer Groups argue that the Commission's adopted competitive market test in Rule 4901:1-4-10(C)(4), O.A.C., does not comport with Section 4927.03(A)(2), Revised Code, as the residential access line loss criteria under that test can result from a wide variety of factors; some of which have nothing to do with the statutory criteria set forth in Section 4927.03(A), Revised Code. These include: customers switching to DSL or cable modem and disconnecting the second line; customers switching to AT&T Ohio's wireless affiliate service; or decline in a number of households in the market test area.

First, the Commission notes that this same argument was raised by Consumer Groups in the rehearing phase of the 05-1305 rulemaking proceeding. The Commission was mindful of the concerns now raised again by Consumer Groups and fully considered them in adopting the requirements of Rule 4901:1-4-10(C)(4), O.A.C.

Specifically, the Commission purposely established the 15 percent residential access line loss criteria in conjunction with the year 2002 residential access line count of the ILEC. The Commission utilized this time frame as the starting point of the calculation in order to exclude the data distortion concerns expressed by Consumer Groups (05-1305, Entry on Re-hearing at 13, 14). The Commission also finds that the record in this case is void of any data to support the allegation that all disconnected residential second lines were being used for Internet access and not for voice communications. We further point out that witness Williams's generic analysis of the overall increase in DSL connections in the state of Ohio between 2002 and 2005 (Williams Affidavit at ¶142), is not dispositive of the evaluation of AT&T Ohio's application for BLES alternative regulation specific to the individual exchanges identified by AT&T Ohio in its application in this proceeding.

While Consumer Groups argue that the Commission erred by selecting the year 2002 as the starting point for measuring the residential access line loss for an ILEC under Rule 4901:1-4-10(C)(4), O.A.C., the Commission believes that the data contained in Table 1 of witness Roycroft's filed affidavit supports the Commission's adoption of 2002 as the starting point for measuring the residential access line loss for an ILEC in Test 4. Specifically, Table 1 demonstrates that between the years 2002-2005, on a statewide-basis there was a:

- (1) Significant decline in the number of ILECs' switched access lines.
- (2) Significant increase in the number of CLECs' switched access lines.
- (3) Significant decline in the growth rates of DSL line in Ohio.

(Roycroft Affidavit at Table 1, Rows 1, 2, and 5).

As discussed above, Consumer Groups also argue that the competitive market test in Rule 4901:1-4-10(C)(4), O.A.C., does not account for the possibility that there are a declining number of households in the identified AT&T Ohio exchanges and that this reduction may be distorting AT&T Ohio's analysis of the competitive market test. In dismissing this argument, the Commission highlights the fact that Consumer Groups have failed to recognize that the Commission's requirement of at least a 15 percent total residential access line loss in an exchange fully captures the impact of families moving out of a specific exchange as well as families moving into that exchange.

With respect to Consumer Groups' argument that lines lost to AT&T Ohio's wireless affiliate should be excluded for the purposes of the 15 percent line loss calculation, the Commission notes that, while the Commission did not specifically require a demonstration that the access lines were lost to a particular provider, the rule recognizes the importance of unaffiliated alternative providers by requiring the presence of at least five unaffiliated facilities-based alternative providers serving the residential market. The Commission emphasizes that, in developing the competitive market tests in Rule 4901:1-4-10, O.A.C., we

considered the statutory factors outlined in Section 4927.03(A)(2) and(A)(3), Revised Code, and all of the arguments and concerns raised in the rulemaking proceeding and raised here again. The goal of the Commission is to have administratively practicable tests using the most objective criteria to comply with the statute. The Commission exercised its expertise and judgment based on the 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 unaffiliated facilities-based alternative providers serving residential market in that exchange. Accordingly, the Commission finds that the arguments and data presented by Consumer Groups fail to demonstrate that the Test 4 requirement of a minimum of 15 percent of total residential access line loss since year 2002, in a given exchange does not satisfy the statutory criteria of Section 4927.03, Revised Code.

Based on the data presented by AT&T Ohio (Application, Ex. 3; AT&T Ohio Memorandum Contra, Attachment 5), for all of the 119 exchanges specific to Test 4, we find that AT&T Ohio's application satisfies the criteria that "at least 15 percent 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."

b. Facilities-based Alternative Provider

Consumer Groups' Position

With respect to Test 4, Consumer Groups assert that AT&T Ohio has failed to demonstrate that the companies relied upon for the purpose establishing the presence of facilities-based providers actually own, operate, manage, or control the facilities utilized for the provision of service (Consumer Groups' Opposition at 25, 47-68).

In regard to the facilities-based, alternative provider prong for Test 4, Consumer Groups believe that AT&T Ohio has not shown that there are five unaffiliated facilities-based alternative providers serving the residential market in any of the exchanges identified for Rule 4901:1-4-10(C)(4), O.A.C. (*Id.* at 66). In particular, Consumer Groups do not consider ACN Communications Services (ACN), Budget Phone, Bullseye Communications (Bullseye), Cinergy Communications (Cinergy), Comcast, Insight, MCI, New Access Communications (New Access), Revolution Communications, Sage Telecom (Sage), Talk America, Time Warner Cable (Time Warner), Trinsic Communications (Trinsic), and VarTec Telecom (VarTec) to be facilities-based providers (*Id.*; Williams Affidavit at ¶196, Table 2; Consumer Groups' Reply at 30-34). Consumer Groups also exclude Cincinnati Bell Extended Territories (CBET) in six exchanges and First Communications in 111 exchanges due to the fact that they do not own, operate, manage, or control network facilities in those exchanges (Consumer Groups' Opposition at 55, Williams Affidavit at ¶198).

Additionally, in an effort to disqualify some of the 17 wireline providers identified in AT&T Ohio's application, Consumer Groups argue that any CLEC providing residential service via "Local Wholesale Complete" (LWC) or the unbundled network element platform (UNE-P) does not satisfy the Rule 4901:1-4-01(G), O.A.C., definition of facilities-based provider and, therefore, should be excluded from the analysis in Test 4. Specifically, Consumer Groups allege that AT&T Ohio, and not the identified carriers, owns, operates, manages, or controls the network facilities used by the carrier providing residential service via LWC or UNE-P (Consumer Groups' Opposition at 25, 26, Williams Affidavit at ¶¶ 39-42).

Based on these concerns, Consumer Groups argue that UNE-P and LWC fail to satisfy the intent of the state's telecommunications policy as delineated in Section 4927.02(A)(2), Revised Code (Consumer Groups' Opposition at 24, 25). Therefore, Consumer Groups assert that all of the CLECs that utilize UNE-P and LWC arrangements, and are relied upon by AT&T Ohio in its application, are not actually facilities-based CLECs as defined by Rule 4901:1-4-01(H), O.A.C. (Consumer Groups' Opposition at 7; Consumer Groups' Reply at 23; Williams Affidavit at ¶152).

AT&T Ohio Position

Regarding Consumer Groups' contention that certain providers should not be considered for the purposes of the competitive market tests due to the fact that they are not facilities-based, AT&T Ohio contends that Consumer Groups have failed to recognize that, in accordance with Rule 4901:1-4-01(H), O.A.C., only resellers of the ILEC's local exchange services are not to be included in the classification of a facilities-based provider (AT&T Ohio Memorandum Contra at 22 citing Rule 4901:1-4-01(H), O.A.C.). Therefore, inasmuch as providers of BLES provision service pursuant to LWC and UNE-P, AT&T Ohio asserts that they should be considered as facilities-based carriers (*Id.*).

Regarding Consumer Groups' criticism that AT&T Ohio has relied on alternative providers in Test 4 that are not offering perfect substitute services, the company agrees with the Commission's prior determination that the law does not restrict the analysis of competition and reasonably available alternatives for BLES (*Id.* at 27 citing 05-1305, Opinion and Order at 25). AT&T Ohio considers wireless and VoIP providers to be alternatives to wireline BLES service (*Id.* at 28). AT&T Ohio opines that the important factor for determining whether a service is a competitive substitute for BLES is whether the service has the potential to take significant amounts of business away from BLES (*Id.* at 29).

Commission Conclusion

As discussed below, we find that, based on the data in the record, 13 of the 17 wireline providers identified by AT&T Ohio satisfy the facilities-based criteria of Test 4 (AT&T Ohio Application, Ex. 3; AT&T Ohio Supplement to Application). These carriers are deline-

ated on Attachment A of this opinion and order. Specific to Consumer Groups objections to the consideration of providers utilizing UNE-P and LWC facilities, the Commission has long recognized that UNE-P and LWC facilities are jointly managed and controlled by the CLEC and the ILEC. In support of this position, the Commission considers the fact that CLECs offering service pursuant to LWC or UNE-P are able to control the specific services that are offered over these facilities, the specific features that are activated, and the timing of when a service is commenced and terminated. On the other hand, a carrier providing service solely by resale of the ILEC's local exchange service does not qualify as a facilities-based CLEC.

Recognizing such distinctions, the Commission has defined a facilities-based CLEC as:

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 such classification are carriers providing service(s) solely by resale of the incumbent local exchange carrier's local exchange services (Emphasis added).

(Rule 4901:1-01(G), O.A.C.).

As to the Consumer Groups' contention that AT&T Ohio has acknowledged that CLECs do not own, operate, manage, or control the facilities that they lease from AT&T Ohio under UNE-P and LWC arrangements, we conclude that Consumer Groups' claim is unsupported inasmuch as Consumer Groups failed to inquire as to whether the CLECs leasing facilities from AT&T Ohio under UNE-P and LWC arrangements also manage and control these facilities as contemplated in the definition of facilities-based CLECs pursuant to Rule 4901:1-4-01(G), O.A.C. Therefore, the Commission finds that CLECs leasing facilities in a given exchange from AT&T Ohio pursuant to UNE-P and LWC arrangements, partially manage and control such facilities and are, therefore, facilities-based alternative providers, as well as facilities-based CLECs, pursuant to the definitions in Rule 4901:1-4-01(G) and (H), O.A.C., respectively.

Accordingly, for the purposes of satisfying the requirements of the second prong of Test 4, we determine that the following carriers are facilities-based, alternative providers: ACN, Budget Phone, CBET, First Communications, MCI, New Access, Revolution, Sage, Talk America, and Trinsic.

Although we note that Buckeye Telesystems, Comcast and Insight do not lease UNE-P or LWC arrangements from AT&T Ohio, the record demonstrates that they use their own

switching facilities and has ported telephone numbers in specific exchanges identified in Attachment A to this opinion and order (AT&T Ohio Supplement to Application). Accordingly, we find that Buckeye Telesystems, Comcast, and Insight are facilities-based, alternative providers for the purposes of satisfying the requirements of the second prong of Test 4.

With respect to the issue of unaffiliated providers and the identification of unaffiliated, facilities-based alternative providers, the Commission notes that AT&T Ohio has not identified any affiliated provider in its application. Therefore, we find that the identified alternative providers listed in Attachment A of this opinion and order satisfies the requisite "unaffiliated" criteria of Test 4.

With respect to the remaining four wireline providers (Bullseye, Cinergy, Time Warner, and VarTec), we find that, based on the data on the record, for all of the exchanges for which these carriers were identified, the wireline providers meet some, but not all, of the requirements of the second prong of Test 4. Therefore, these carriers should not be considered for the purpose of satisfying Test 4 (*Id.*).

With respect to Alltel Wireless, Cincinnati Bell Wireless, Verizon Wireless, and Sprint/Nextel, we find these wireless providers are facilities-based providers that satisfy the second prong of Test 4 as discussed in detail elsewhere in this opinion and order. The Commission notes that Consumer Groups do not dispute this determination.

c. Market Presence

Consumer Groups' Position

As discussed above, Consumer Groups reject all of the wireless carriers proposed by AT&T Ohio, partially due to the contention that they do not serve all of the identified exchanges in their entirety. With respect to cable-based providers, Consumer Groups did not include entities for those exchanges in which they do not serve the entire exchange (Consumer Groups' Opposition at 66). Although Consumer Groups acknowledge that both Insight and Comcast utilize their own facilities to provide services, they posit that Insight and Comcast should be disqualified as facilities-based alternative providers because their service offerings are not readily available in the relevant market (Williams Affidavit at ¶¶ 95, 96, 164). Specifically, Consumer Groups argue that there is no evidence to demonstrate that Insight and Comcast provide service or have cable facilities throughout the entire exchanges where they have been identified as facilities-based alternative providers (*Id.*).

AT&T Ohio's Position

AT&T Ohio opines that for the purpose of satisfying the criteria of market presence, the essential issue to be determined is whether a carrier is present or absent in an exchange. With respect to the alternative providers identified in its application, AT&T Ohio asserts

that they are all present, providing service, and have residential customers (AT&T Ohio's Memorandum Contra at 12).

Commission Conclusion

We reject the Consumer Groups' narrow interpretation of Section 4927.03, Revised Code, inasmuch as it is overly restrictive in scope. In previously selecting an exchange as the market¹ for which competition for an ILEC's BLES can be evaluated, the Commission articulated that an exchange would:

- (1) Exhibit similar market conditions within its boundary.
- (2) Provide an objective definition that would allow for evaluation of competition on a reasonable granular level.
- (3) Be practical to administer as ILECs collect and report data at the exchange level.

(05-1305 Opinion and Order at 18, 19).

Additionally, being mindful of the market realities, and to ensure that an ILEC would only attain BLES pricing flexibility in markets where it faces competition for BLES or where BLES customers have reasonably available alternatives, the Commission selected an exchange as a market definition.

The Commission finds that in order to satisfy Consumer Groups' narrow interpretation of the statutory provisions, 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. The Commission finds that the coverage maps and data provided by AT&T Ohio for the four aforementioned wireless providers demonstrate that their wireless service offerings are readily available to customers of the exchanges identified in Attachment A of this opinion and order, and, therefore, satisfy the second prong of Rule 4901:1-4-10(C)(4), O.A.C.

Specifically, the Commission finds that in the relevant exchanges listed in Attachment A of this opinion and order, AT&T Ohio's application demonstrates, that Alltel Wireless, Cincinnati Bell Wireless, Sprint/Nextel, and Verizon Wireless advertise the availability and coverage of their service offerings in the relevant exchanges on their websites. The

¹ One of the few issues that Consumer Groups supported in 05-1305 was the selection of an exchange as the market definition.

Commission notes that Consumer Groups do not dispute this determination. Therefore, we find that these four wireless providers meet the "presence in the market" requirement of the second prong of Test 4 and Test 3 in the relevant exchanges identified in Attachments A and B of this opinion and order. Similarly, the Commission finds that the coverage areas of Insight and Comcast satisfy the market presence criteria for the purpose of being considered as alternative providers.

We also note, and Consumer Groups do not dispute, that:

- (1) Subscribers of CLECs utilizing LWC arrangements are in fact customers of those CLECs, and not customers of AT&T Ohio BLES.
- (2) CLECs providing residential service via LWC arrangements are in fact offering their services via their current tariffs.

We find that the residential white pages listing, LWC access line data, and 9-1-1 data provided in the record demonstrates that the identified CLECs offer service to residential customers in the relevant exchanges, as denoted in Attachment A to this opinion and order. Also, the record demonstrates that those CLECs maintain current tariffs on record with the Commission in which they make residential services available to current and prospective customers, with no grandfathering provisions in the relevant exchanges. Additionally, the record demonstrates that most of the CLECs providing residential service via LWC arrangements are in fact advertising their offerings on their respective websites in the relevant exchanges. Accordingly, we find that the following facilities-based CLECs offering service to residential subscribers satisfy the market presence requirement of the second prong of Test 4 in the relevant exchanges identified in Attachment A to this opinion and order: ACN, Budget Phone, CBET, Comcast, First Communications, Insight, MCI, New Access, Revolution, Sage, Talk America, and Trinsic.

The Commission believes that factors like longevity in the competitive market, while somewhat noteworthy, do not have a direct bearing on the state of the competitive market at any given point in time. Rather, the Commission believes that criteria such as the required presence of several unaffiliated, facilities-based providers is a more significant factor for supporting a healthy sustainable market, because this criteria demonstrates a greater commitment of a carrier to remain in the market as a competitor. The Commission believes that the more appropriate measure for consideration is the overall state of the competitive market demonstrated by the presence of a significant number of competitive providers in the relevant market and an analysis of whether AT&T Ohio has lost a considerable share of its access lines in a specific exchange. Through such an examination, there will be better assurance that there is a reasonable level of BLES alternatives to warrant the granting of BLES alternative regulation. Further, to the extent that the state of the competitive market were to significantly change in a negative direction, the Commission notes that, under the authority

granted by Section 4927.03(C), Revised Code, and by Rule 4901:1-4-12, O.A.C., the Commission may, within five years, modify any order establishing alternative regulation.

e. Serving the Residential Market

Consumer Groups' Position

Consumer Groups argue that in order for carriers to be considered as facilities-based alternative providers for the purpose of Test 4, AT&T Ohio needs to make a showing that they serve the residential market by actively marketing service to residential customers (Williams Affidavit at ¶ 75).

AT&T Ohio Position

AT&T Ohio asserts that for the purpose of identifying those alternative providers that are serving the residential market, it relied on criteria identified on the exchange summary sheet for each exchange (AT&T Ohio Application, Ex. 3). As an example, AT&T Ohio represents that for each CLEC listed on the summary sheet, the CLEC's tariff was reviewed to be sure that a tariff for residential BLES was on file with the Commission (AT&T Ohio's Memorandum Contra, Attachment 1, at 5, 7, 8).

Commission Conclusion

As to Consumer Groups' argument that in order for carriers to be considered as facilities-based alternative providers under Test 4, AT&T Ohio needs to make a showing that they serve the residential market, we find that Consumer Groups do not dispute that, with the exception of Buckeye Telesystem, the 13 identified carriers addressed herein, provide services to the residential market pursuant to tariffs on file with the Commission, have residential listings in the white pages, and maintain a website that advertises the residential service offering in the relevant exchange (AT&T Ohio Application, Ex. 3; AT&T Ohio Supplement to Application). With respect to Buckeye Telesystem, we find that the company provides local residential service as demonstrated by its tariffs and residential white page directory listings (*Id.*).

With respect to Consumer Groups' contention that there is no evidence that CBET serves residential lines in the Middletown and Monroe exchanges, we find that the data in the record (including residential white page listings) demonstrates that, in those two exchanges, CBET provides local residential service as described in CBET's tariffs (AT&T Ohio Supplement to Application; AT&T Ohio Memorandum Contra at Attachments 1 and 2). Therefore, we find that CBET serves residential lines in the Middletown and Monroe exchanges.

Accordingly, we determine that the following facilities-based alternative providers provide their services to residential customers in the relevant exchanges as identified in Attachment A of this opinion and order: ACN, Buckeye Telesystem, Budget Phone, CBET, First Communications, MCI, New Access, Revolution, Sage, Talk America, and Trinsic.

Relative to wireless providers identified in AT&T Ohio's application, we find that Alltel Wireless, Cincinnati Bell, Verizon Wireless, and Sprint-Nextel advertise the availability and coverage of their service offerings in the relevant exchanges and have residential customers who did in fact disconnect AT&T Ohio's BLES service in exchanges identified in Attachment A to this opinion and order (Roycroft Affidavit at ¶116). We also dismiss Consumer Groups' argument that the wireline-to-wireless number porting data provided by AT&T Ohio reflects that residential cord-cutting behavior in AT&T Ohio's service area is very limited² and, therefore, does not support AT&T Ohio's use of wireless carriers as alternative providers (*Id.* at ¶¶73-76). Accordingly, we find that Alltel Wireless, Cincinnati Bell Wireless, Sprint/Nextel, and Verizon Wireless are unaffiliated, facilities-based, providers which have established their presence and serve residential customers in the exchanges identified in Attachment A of this opinion and order for the purpose of satisfying the second prong of Test 4.

g. Exchanges Requiring Special Consideration Due to Unique Circumstances

Consumer Groups' Position

Consumer Groups allege that inadequacies exist with respect to the data associated with those AT&T Ohio exchanges in which two exchanges share one switch.³ Due to this sharing arrangement, AT&T Ohio is unable to separately identify the competitive lines served by wireline carriers in each exchange. As a result, Consumer Groups submit that AT&T Ohio cannot separately identify the competitive lines served by the wireline carriers in the affected exchanges, thus, adversely impacting the ability to effectively apply the competitive market tests in accordance with Rule 4901:1-4-10(C)(3) and (C)(4), O.A.C. (Consumer Groups' Opposition at 21, 22; Williams Affidavit at ¶¶79, 159).

Specifically, Consumer Groups recommend that the Commission reject AT&T Ohio's application for BLES alternative regulation for the following four exchanges: Gates

² Dr. Roycroft, in conducting his analysis, recognized that while the ported numbers data includes both residential and business lines, wireless substitution for wireline is not a widespread occurrence for medium or large businesses.

³ The Gates Mills/Chesterland and Cleveland/Wickliffe exchanges relate to Rule 4901:1-4-10(C)(4), O.A.C. The Canal Winchester/Groveport exchanges relate to Rule 4901:1-4-10(C)(3), O.A.C., and are discussed *infra*. The Barnesville/Somerton exchanges relate to Rule 4901:1-4-10(C)(4) and 4901:1-4-10(C)(3), O.A.C., respectively, and are discussed *infra*.

Mills/Chesterland and Cleveland/Wickliffe. Consumer Groups identify specific problems related to the fact that each pair of exchanges is served by one switch (*Id.* at 122).

First, Consumer Groups assert that inasmuch as each pair of exchanges is only served by one switch, the requirement that the competitive market test be performed on a telephone exchange area basis cannot be satisfied. Second, Consumer Groups point out that the identified facilities-based CLEC or alternative provider may serve one exchange but not the other, which may present a "false positive" for meeting the competitive market test (*Id.* at 67, 122).

AT&T Ohio's Position

AT&T Ohio discusses Consumer Groups' objections related to the scenarios described *supra*, in which a paired analysis was performed for those exchanges in which a single central office serves two different exchanges. AT&T Ohio believes that, rather than dismissing these exchanges, the Commission should recognize that AT&T Ohio used the most precise information available. Additionally, AT&T Ohio states that this combined analysis was only performed for the purpose of calculating CLEC market share pursuant to Rule 4901:1-4-10(C)(3), O.A.C., and for attempting to demonstrate the presence of individual CLECs using line and ported number information (AT&T Ohio Memorandum Contra at 29). AT&T Ohio notes that the CLEC line and ported number information represents only a portion of the competitive information presented for each exchange (*Id.* at 30).

Commission's Conclusion

Notwithstanding the fact that one switch served two exchanges, the Commission finds that AT&T Ohio has submitted data on an individual exchange basis demonstrating that the first prong of Rule 4901:1-4-10(C)(4), O.A.C., has been satisfied for the Gates Mills, Chesterland, Cleveland, and Wickliffe exchanges (AT&T Ohio Application, Ex. 3; AT&T Ohio Memorandum Contra, Attachment 5). As a result, AT&T Ohio has demonstrated that at least 15 percent of total residential access lines have been lost since 2002 for each of the four exchanges on an individual exchange basis.

The sharing of a switch between two exchanges only impacts the second prong of Rule 4901:1-4-10(C)(4), O.A.C., which requires "the presence of at least five unaffiliated facilities-based alternative providers serving the residential market." Examining the data filed in this proceeding, we find that Wickliffe is a small exchange, adjacent to the Cleveland Exchange, and is served by a switch located in the Cleveland Exchange. Similarly, Gates Mills is a small exchange, adjacent to the Chesterland Exchange, and is served by a switch located in the Chesterland Exchange (AT&T Ohio Supplement to Application 4; AT&T Ohio Memorandum Contra at Attachment 2).

Once a CLEC establishes interconnection at a specific ILEC's switch, the CLEC can serve any ILEC-customer served by that switch using a UNE-P or LWC arrangement, regardless of where the customer is located. The Commission recognizes that the CLEC information (i.e. UNE-P lines, LWC lines, ported telephone numbers, residential white pages listings and residential E911 listings) used to demonstrate the CLEC's nature of operation is only available on the switch level and, therefore, AT&T Ohio is unable to separate such data to an individual exchange.

Accordingly, we find on our own motion that, inasmuch as these four exchanges individually satisfy the first prong of Rule 4901:1-4-10(C)(4), O.A.C., the demonstration of significantly more than five unaffiliated facilities-based alternative providers serving the residential market on a combined basis for Gates Mills/Chesterland exchanges and for Cleveland/Wickliffe exchanges satisfies the spirit of Section 4927.03, Revised Code. As discussed above, the Commission recognizes that once a CLEC establishes interconnection at a specific ILEC switch, the CLEC can serve any ILEC customer served by that switch. In reaching this determination, the Commission also notes that the data filed in this case with respect to these shared switch exchange pairings significantly exceeds the minimum required threshold of five alternative providers and, therefore, provides additional assurance that this criteria is satisfied for both exchanges in the pairing. Therefore, based on the record in this proceeding, we find that AT&T Ohio has satisfied Test 4 in the specified exchanges and shall be granted alternative regulation treatment for its Tier 1 core and noncore services pursuant to Rule 4901:1-4-11, O.A.C., in the exchanges identified in Attachment A to this opinion and order.

2. Test 3

a. CLECs' Market Share

Consumer Groups' Position

Consumer Groups assert that Test 3 does not satisfy the statutory requirements of Section 4927.03(A), Revised Code, inasmuch as it allows for a calculation of total residential lines served by unaffiliated CLECs rather than limiting the focus to the total residential stand-alone BLES lines provided by unaffiliated CLECs (Consumer Group Consumer Groups' Opposition at 70; Williams Affidavit at ¶11). Specifically, Consumer Groups argue that evidence of CLECs serving 15 percent of the residential market via local/toll packages does not demonstrate the competitive impact on the market for BLES-only services inasmuch as the services are not functionally equivalent or substitutes (Consumer Groups' Opposition at 69-71). Additionally, Consumer Groups contend that some of the identified CLECs do not serve residential customers (Consumer Groups' Opposition at 7, 72). Further, Consumer Groups reference the fact that, rather than specifically identifying those CLECs operating pursuant to resale, AT&T Ohio provided CLEC data in the aggregate for each

exchange; thus, preventing the ability to verify the appropriateness of including specific unaffiliated providers in the 15 percent market share analysis (Williams Affidavit at ¶33).

AT&T Ohio

AT&T Ohio contends that its application satisfies the requirement that at least 15 percent of the total residential lines are provided by unaffiliated CLECs (AT&T Ohio's Memorandum Contra at 22; Application, Attachment 3).

Commission Conclusion

The first prong of Test 3 requires that, for each requested telephone exchange, an applicant must demonstrate that at least fifteen percent of total residential access lines are provided by unaffiliated CLECs. In regard to Consumer Groups' argument that evidence of CLECs serving 15 percent of the entire residential market with local/toll packages fails to demonstrate any competitive impact on the market for BLES-only services, we find that the alternative providers set forth on Attachment B identify those CLECs that are competing with AT&T Ohio's BLES offerings and have succeeded to win at least 15 percent of the residential customers who otherwise would subscribe to AT&T Ohio's BLES.

With respect to Consumer Groups' contention that two of the identified alternative providers⁴ do not serve residential customers, the Commission finds that a review of the specific carriers' tariffs reflect that neither CLEC provides residential services. Accordingly, we shall exclude the access lines attributed to each of the two carriers from the relevant exchanges to calculate the percentage of residential access lines served by unaffiliated CLECs. This determination impacted only one exchange (New Albany Exchange) resulting in the percentage of residential access lines served by unaffiliated CLECs to be less than the 15 percent threshold required by Test 3. Accordingly, the New Albany Exchange is not eligible for BLES alternative regulation treatment as it does not meet one of the Test 3 requirements.

As to the Consumer Groups' argument that AT&T Ohio overstated the CLECs' residential market share by relying upon carriers that are not actively marketing residential service, similar to our discussion regarding Test 4 *supra*, we reject this argument. We find it unreasonable to exclude the market share of a given CLEC based on its marketing activity, which may change from time-to-time. The fact that a CLEC is successful in winning and keeping customers is a clear signal of the competitive pressure the ILEC faces and to which it must respond. We also find that none of the CLECs identified by Consumer Groups (namely, MCI, New Access, and VarTec) has grandfathered their tariff offering(s). Rather, the record demonstrates that these companies continue to make their residential service(s) available to prospective customers. Finally, we are not convinced by Consumer Groups'

⁴ Due to proprietary concerns, the specific identity of these carriers will remain confidential in the context of their respective access line counts.

argument that we should exclude the market share of CLECs engaged in resale solely because AT&T Ohio provided aggregated data for CLECs providing services on resale basis. Specifically, the Commission notes that Consumer Groups' witness Williams recognizes that resold lines account for less than one-half of one percent of total residential access lines reported by AT&T Ohio (Williams Affidavit at ¶34).

b. Facilities-based Providers

Consumer Groups' Position

In regard to the requirement that there be a presence of at least two unaffiliated, facilities-based CLECs serving residential customers, Consumer Groups contend that AT&T Ohio does not satisfy this prong of Test 3. Specifically, Consumer Groups assert that the two unaffiliated facilities-based CLECs (MCI and Sage) that AT&T Ohio identified as providing BLES in each of the 26 exchanges relative to Test 3 are not actually facilities-based CLECs and are not providing BLES to residential customers (Consumer Groups' Opposition at 7, 74).

AT&T Ohio's Position

In response to Consumer Groups' contention that MCI and Sage are not facilities-based providers, AT&T Ohio submits that these entities provision residential service pursuant to LWC or UNE-P and, as such, are still considered facilities-based CLECs (AT&T Ohio's Memorandum Contra at 22).

Commission Conclusion

The second prong of Test 3 requires that the applicant demonstrate that there are at least two unaffiliated, facilities-based CLECs providing BLES to residential customers in each requested exchange. Similar to our discussion regarding Test 4 *supra*, we find that those CLECs leasing facilities from AT&T Ohio under UNE-P and LWC arrangements are facilities-based providers. Specifically, MCI and Sage are leasing facilities in this manner and, therefore, are facilities-based CLECs for the purpose of Test 3. Pursuant to our discussion regarding Test 4, we also conclude that MCI and Sage are unaffiliated, facilities-based CLECs providing BLES services to residential customers in the relevant exchanges as listed in Attachment B of this opinion and order for the purposes of meeting Test 3.

c. Presence of Alternative Providers Serving the Residential Market

Consumer Groups' Position

The third prong of Test 3 requires that the applicant demonstrate that in each requested exchange, there is the presence of at least five alternative providers serving the residential market. Consumer Groups analyzed the operations of 13 wireline and 3 wireless providers in the 26 exchanges identified specific to Test 3 (Consumer Groups' Opposition at 74-80). Upon their review, Consumer Groups conclude that First Communications is the only provider that satisfies the third prong of Test 3 (*Id.* at 77, 78, 80).

Consumer Groups opine that, as discussed *supra*, most of the identified wireline carriers do not qualify as alternative providers under the Commission's definition applicable to the second prong of Test 4 and should, therefore, be disqualified from this prong of Test 3 as well. These include: ACN, Budget, Comcast, Insight, MCI, New Access, Revolution, Sage, Talk America, Trinsic, and VarTec (*Id.* at 77, 78).

With respect to LDMI, Consumer Groups assert that the company's website describes its services as being limited to business customers. While acknowledging that LDMI does have a residential tariff, Consumer Groups contend that it relates to a tariffed package that is neither functionally equivalent to BLES, nor provided at competitive rates, terms, and conditions (*Id.* at 78, 79). With respect to PNG and Telecom Ventures, Consumer Groups do not consider these companies' presence in the market as resellers of the ILEC's retail services to be sufficient enough to constrain AT&T Ohio's BLES prices (*Id.* at 79, 80).

AT&T Ohio's Position

AT&T Ohio dismisses Consumer Groups' arguments relative to this prong of the test and considers the positions advocated by Consumer Groups to reflect a strained and unreasonable interpretation of the statute and the Commission's rules (AT&T Ohio AT&T Ohio's Memorandum Contra at 24).

Commission Conclusion

We note that the majority of wireline and wireless alternative providers identified by AT&T Ohio relative to the third prong of Test 3, have already been discussed in our evaluation of the presence of at least five unaffiliated facilities-based alternative providers serving the residential market under the second prong of Test 4. Therefore, we find that the following alternative providers meet the third prong of Test 3 (the presence of at least five alterna-

tive providers serving the residential market): ACN, Budget Phone, Comcast, First Communications, New Acces, Revolution, Talk America, and Trinsic.

Specific to PNG, we find that, based on the data in the record, the company meets all of the requirements of the third prong of Test 3. Specifically, we evaluated PNG's operations in the three exchanges for which it was identified in AT&T Ohio's application. The record demonstrates that through resale of AT&T Ohio's residential services, PNG provides residential services that compete with AT&T Ohio's BLES in the Beallsville, Lewisville, and Walnut exchanges (AT&T Ohio's Supplement to Application). Therefore, we find that, based on the record, PNG should be considered for the purpose of satisfying the criteria outlined in the third prong of Test 3 in these three exchanges.

In regard to the wireless providers identified relative to Test 3 (Alltel Wireless, Sprint/Nextel, and Verizon Wireless), for the same reasons as stated in our discussion of Test 4 *supra*, we find that these wireless companies are facilities-based providers that satisfy the third prong of Test 3 regarding the presence of alternative providers in the applicable exchanges denoted on Attachment B.

We also determine that, based on the data in the record, the remaining exchanges identified by AT&T Ohio's application specific to Test 3 meet some, but not all, of the requirements of the third prong of Test 3 in the relevant exchanges, which requires a demonstration that at least five alternative providers serve the residential market. These exchanges and the corresponding data are summarized on Attachment C. The Commission notes that some of the rejected exchanges identified in Attachment C are addressed in the section below. The remaining Test 3 exchanges identified on Attachment C are addressed herein.

Specific to the Belfast Exchange, the Commission determines that, although AT&T Ohio identified ACN and Verizon Wireless as alternative providers, the record does not support the allegation that the carriers are providing residential service within the exchange (i.e., no evidence of white pages listings or ported numbers). Specific to the Lewisville and Murray City exchanges, the Commission determines that, although AT&T Ohio identified Alltel Wireless and Sprint/Nextel as alternative providers, the record does not support the allegation that the carriers are providing residential service within the exchanges (i.e., no evidence of ported numbers). Specific to the Salineville Exchange, the Commission determines that, although AT&T Ohio identified Alltel Wireless, Sprint/Nextel, and New Access as alternative providers, the record does not support the allegation that the carriers are providing residential services within the exchange (i.e., no evidence of white pages listings or ported numbers, respectively).

d. Exchanges Requiring Special Consideration Due to Unique Circumstances

Consumer Groups' Position

Consumer Groups urge the Commission to reject AT&T Ohio's application for BLES alternative regulation for the following four exchanges: Canal Winchester, Groveport, Barnesville, and Somerton. With respect to these exchanges, Consumer Groups identify three specific problems due to the fact that the Canal Winchester and Groveport exchanges share a switch and the Barnesville and Somerton exchanges share a switch. First, Consumer Groups argue that the sharing of a switch does not meet the requirement that the competitive market test has to be satisfied in a telephone exchange area. Second, the sharing of a switch may result in an overstating of the CLEC residential market share as required in the first prong of Test 3. Third, the identified facilities-based CLEC or alternative provider may serve one exchange but not the other, resulting in a "false positive" relative to the test.

AT&T Ohio's Position

AT&T Ohio explains that the paired analysis was only performed for the purpose of calculating CLEC market share in those exchanges that shared a switch. AT&T Ohio rejects Consumer Groups' request to dismiss all of the paired exchanges outright, despite the fact that the information does not precisely identify how many CLEC lines there are in each exchange. In support of its position, AT&T Ohio notes that it did not rely on Test 3 for many exchanges and where Test 3 was relied upon, the company used the most precise information available (AT&T Ohio Memorandum Contra at 29, 30).

Commission Conclusion

As stated in our discussion of Test 4 *supra*, we find that the scenario of two exchanges sharing one switch and the resulting limitation on data availability was never contemplated by Rule 4901:1-4-10, O.A.C., regardless of the competitive market test chosen by an ILEC (including self-defined alternative competitive market tests contemplated by Rule 4901:1-4-10(C), O.A.C.). However, unlike the scenario discussed with respect to Test 4, we recognize that all three of the prongs of Test 3 require CLEC information (to the extent that AT&T Ohio relies on CLECs for the third prong of Test 3), which is only available to AT&T Ohio at the switch level, and that AT&T Ohio is unable on its own to allocate the data to the individual exchange level.

Due to the significant reliance on CLEC-related data in Test 3, we are not convinced that the data on the record supports AT&T Ohio's claim that the Winchester and Groveport exchanges satisfy the Test 3 requirements on an individual exchange basis. Therefore, we

find that based on the record, AT&T Ohio's data does not satisfy the requirements of Rule 4901:1-4-10(C)(3), O.A.C., in the Winchester and Groveport exchanges.

With respect to the Barnesville and Somerton exchanges, we note that AT&T Ohio has relied on two different tests for the purpose of demonstrating the presence of competition in these exchanges (Test 4 for Barnesville and Test 3 for Somerton). While the sharing of a switch is by itself unique for the purpose of applying the "off the shelf" competitive market tests, the reliance on two different tests further impacts the Commission's confidence for the purpose of allocating the shared switch data between the two exchanges. Therefore, the Commission is unable to conclude that either of these exchanges satisfactorily meets the criteria of their respective competitive market tests. Notwithstanding this determination, the Commission notes that the unique circumstances of these exchanges may be more appropriately addressed in a specific company-defined test that may be filed in the future for the Commission's consideration.

IV. TARIFF AMENDMENTS

AT&T Ohio filed the proposed tariff modifications necessary to implement the pricing flexibility rules set forth in Rule 4901:1-4-09(A), O.A.C. The necessary tariff revisions include modifying the tariff structure to separate the competitive exchanges from the non-competitive exchanges. For tracking purposes, the exchanges have been placed in a matrix format. This format includes columns for tier classification, maximum rate, and the effective date of the proposed increase in the maximum rate. In exchanges that AT&T Ohio is requesting competitive treatment, the company is proposing to apply any allowable BLES increase to the access line portion of the monthly charge. The actual monthly charge has not been increased in this application. Pricing flexibility rules also allow certain other noncore Tier 1 services to receive Tier 2 pricing flexibility. AT&T Ohio's proposed tariff reflects these changes as well.

After a thorough review of the information provided by the applicant, the Commission believes that the tariff, as revised on September 8, 2006, is just and reasonable specific to those exchanges approved pursuant to this opinion and order.

V. OUTSTANDING PROCEDURAL MATTERS

In conjunction with their October 16, 2006, Consumer Groups' opposition to AT&T Ohio's application, Consumer Groups state that extraordinary circumstances exist that necessitate a hearing on AT&T Ohio's application before AT&T Ohio should be granted BLES alternative regulation for any exchange included in the application (Consumer Groups' Opposition at 8). In support of their request for a hearing, Consumer Groups state that the application raises serious questions regarding the validity of the rules, as well as whether the application should be granted pursuant to the rules (Consumer Groups' Reply at 14).

AT&T Ohio believes that Consumer Groups' request for a hearing should be denied inasmuch Rule 4901:1-4-09(G), O.A.C., has not been satisfied and because a hearing would only add unnecessary delay to a process that was intended to be expedited and automatic (AT&T Ohio's Memorandum Contra at 7).

Based on the discussion and determinations incorporated within this opinion and order, the Commission concludes that Consumer Groups' have not demonstrated through clear and convincing evidence that a hearing is needed. Therefore, we find that Consumer Groups' request for a hearing is denied.

On October 30, 2006, AT&T Ohio filed a motion for a protective order seeking confidential treatment of information designated as confidential and/or proprietary information included in its filing made on October 26, 2006. We find that the motion is reasonable and should be granted at this time.

VI. CONCLUSION

Upon a thorough review of the record in this proceeding, the Commission determines that, pursuant to Section 4927.03(A), Revised Code, AT&T Ohio has met its burden of proof for those exchanges identified in Attachments A and B of this opinion and order. Specifically, AT&T Ohio has demonstrated that the granting of the company's application for BLES and other Tier 1 service flexibility in the designated exchanges is in the public interest, that AT&T Ohio's BLES is subject to competition, that the company's customers have reasonably available alternatives, and that there are no barriers to entry with respect to BLES in those exchanges.

Moreover, as discussed in detail above, the Commission determines that AT&T Ohio's application is complete and meets the filing requirements of Rule 4901:1-4-09, O.A.C. The Commission recognizes that it needs to maintain a balance between 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.

Accordingly, based on the record in this proceeding, the Commission finds that the customers in exchanges listed in Attachments A and B of this opinion and order have readily available alternative services to AT&T Ohio's BLES which are offered by the alternative providers listed for the relevant exchange.

In accordance with Chapter 4901:1-4, O.A.C., the Commission determines that AT&T Ohio's application for alternative regulation of basic local exchange and other Tier 1 services should be approved consistent with the terms of this opinion and order, for those exchanges designated in Attachments A and B of this opinion and order. With respect to the

exchanges designated in Attachment C, the application is denied inasmuch as it does not meet all of the criteria set forth in the relevant competitive market tests.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On August 11, 2006, as amended on September 8, 2006, AT&T Ohio filed an application for approval of an alternative form of regulation of BLES and other Tier 1 service in 145 exchanges in its incumbent service territory. AT&T Ohio's application was filed pursuant to Sections 4927.03 and 4927.04, Revised Code.
- (2) Rule 4901:1-4-10(C), O.A.C., sets forth 4 competitive tests. In order to qualify for pricing flexibility for BLES and other Tier 1 services in a particular exchange, the applicant has the burden to demonstrate that it meets at least one of the competitive market tests set forth in the rule.
- (3) For 26 of the identified exchanges, AT&T Ohio relies on the competitive test set forth in Rule 4901:1-4-10(C)(3), O.A.C. For 119 of the identified exchanges, AT&T Ohio relies on the competitive test set forth in Rule 4901:1-4-10(C)(4), O.A.C.
- (4) Consumer Groups' Opposition to AT&T Ohio's application was filed on October 16, 2006.
- (5) AT&T Ohio's Memorandum Contra Consumer Groups' Opposition was filed by AT&T Ohio on October 26, 2006.
- (6) Consumer Groups filed a reply to AT&T Ohio's Memorandum Contra on October 31, 2006.
- (7) AT&T Ohio's application complies with the filing requirements of Rule 4901:1-4-09, O.A.C.
- (8) Consistent with the criteria set forth in Rule 4901:1-4-10(C)(4), O.A.C., AT&T Ohio satisfies the applicable test and is granted alternative regulation of basic local exchange and other Tier 1 services pursuant to Chapter 4901:1-4, O.A.C., for those exchanges identified in Attachment A of this opinion and order.
- (9) Consistent with the criteria set forth in Rule 4901:1-4-10(C)(3), O.A.C., AT&T Ohio satisfies the applicable test and is granted alternative regulation of basic local exchange and other Tier 1 ser-

vices pursuant to Chapter 4901:1-4, O.A.C., for those exchanges identified in Attachment B of this opinion and order.

It is, therefore,

ORDERED, That AT&T Ohio's application for alternative regulation of BLES and other Tier 1 services is granted in part and denied in part, as discussed above. It is, further,

ORDERED, That for those exchanges identified in Attachments A and B of this opinion and order, AT&T Ohio is granted Tier 2 pricing flexibility for all Tier 1 noncore services and BLES and basic caller ID will be subject to the pricing flexibility provided for pursuant to Rule 4901:1-4-11, O.A.C. It is, further,

ORDERED, That, consistent with Rule 4901:1-4-11, O.A.C., AT&T Ohio shall provide customer notice to affected customers a minimum of thirty days prior to any increase in rates. It is, further,

ORDERED, That the tariff amendments filed on September 8, 2006, are approved relative to the exchanges for which BLES alternative regulation is granted. It is, further,

ORDERED, That, for those exchanges for which AT&T Ohio's application is granted, AT&T Ohio is ordered to file, within ten calendar days of this opinion and order, the appropriate final tariff amendments. The tariff amendments are to be filed in this case, as well as AT&T Ohio's TRF docket. The effective date of the tariff sheets shall be a date no sooner than the date that the final tariff pages are filed with the Commission. It is, further,

ORDERED, That Consumer Groups' request for a hearing is denied. It is, further,

ORDERED, That, to the extent not addressed in this opinion and order, all other arguments raised are denied. It is, further,


ORDERED, That our approval of AT&T Ohio's application, to the extent set forth in this opinion and order, does not constitute state action for the purpose of antitrust laws. It is not our intent to insulate the company from the provisions of any state or federal law which prohibit the restraint of trade. It is, further,

ORDERED, That, except as specifically provided for in this opinion and order, nothing shall be binding upon the Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,


ORDERED, That the docketing division maintain for 18 months from the date of this entry, all documents that were filed under seal in conjunction with AT&T Ohio's Memorandum Contra of October 26, 2006. It is, further,

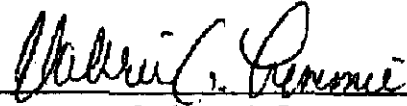
ORDERED, That a copy of this opinion and order be served upon all parties and interested persons of record.

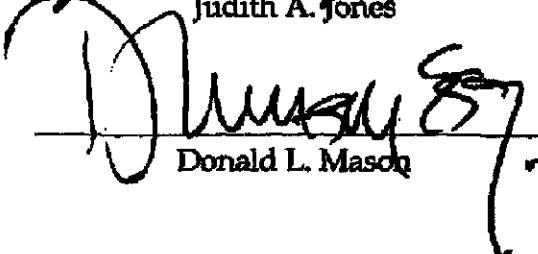
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus


Judith A. Jones


Valerie A. Lemmie


Donald L. Masch

JSA;geb

Entered in the Journal
DEC 20 2006



Renee J. Jenkins
Secretary

AT&T Ohio
Case No. 06-1013-TP-BLS
Test 4 Results

<u>Exchange Name</u>	<u>Test Used</u>	<u>% Access Lines Lost</u>	<u># of Unafflt. F.B. Alt. Providers</u>	<u>Names of Unaffiliated F.B. alt. providers</u>	<u>Test #4 Result</u>
1 Akron	4	23.89%	9	ACN Com. Svc. First Com. MCI/WorldCom Revolution Com. Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
2 Alliance	4	22.44%	8	ACN Com. Svc. First Com. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved
3 Alton	4	29.04%	7	ACN Com. Svc. First Com. MCI/WorldCom Sage Telecom Talk America Sprint /Nextel Verizon Wireless	Approved
4 Atwater	4	32.73%	6	ACN Com. Svc. First Com. MCI/WorldCom Sage telecom Talk America Verizon Wireless	Approved

5	Beavercreek	4	26.38%	7	ACN Com. Svc. CBET MCI/WorldCom Sage Telecom. Cin. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
6	Bellaire	4	17.89%	7	ACN Comm. Comcast Phone First Comm. New Access Sage Telecom. Talk America Alltel Wireless	Approved
7	Bellbrook	4	27.50%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
8	Belpre	4	17.97%	8	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Alltel Wireless Sprint/Nextel	Approved
9	Berea	4	21.65%	9	ACN Comm. First Comm. Sage telecom. MCI/WorldCom Talk America Trinsic Comm. Alltel Wireless Sprint /Nextel Verizon Wireless	Approved

10	Bloomington	4	27.11%	6	ACN Comm. Buckeye Tele. First Comm. Sage Telecom MCI/WorldCom Sprint/Nextel	Approved
11	Burton	4	18.32%	8	ACN Comm. First Comm. Sage telecom. New Access Com. MCI/WorldCom Talk America Alltel Wireless Verizon Wireless	Approved
12	Canal Fulton	4	25.55%	7	ACN Comm. Sage telecom. MCI/WorldCom Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
13	Canfield	4	21.55%	8	ACN Comm. First Comm. New Access Sage telecom. MCI/WorldCom Talk America Alltel Wireless Sprint/Nextel	Approved
14	Canton	4	23.55%	8	ACN Comm. First Comm. Sage Telecom. MCI/WorldCom Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	Approved

15	Carroll	4	15.69%	7	ACN Comm. First Comm. Sage Telecom. MCI/WorldCom Talk America Trinsic Comm. Sprint /Nextel	Approved
16	Castalia	4	27.35%	7	ACN Comm. Buckeye Tele. First Comm. Sage Telecom. MCI/WorldCom Talk America Verizon Wireless	Approved
17	Cedarville	4	18.61%	7	ACN Comm. First Comm. New Access Sage Telecom. MCI/WorldCom Talk America Verizon Wireless	Approved
18	Centerville	4	23.46%	8	ACN Comm. CBET First Comm. Sage Telecom. MCI/WorldCom Cin. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
19	Cheshire	4	18.81%	7	ACN Comm. First Comm. New Access Sage Telecom. MCI/WorldCom Talk America Trinsic Comm.	Approved

					ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	
20	Chesterland	4	18.20%	8		Approved
					ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint /Nextel Verizon Wireless	
21	Cleveland	4	18.33%	9		Approved
					ACN Comm. First Comm. Sage Telecom. MCI/WorldCom Talk America Trinsic Comm. Sprint/Nextel	
22	Columbus	4	34.01%	7		Approved
					ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel Verizon Wireless	
23	Coshocton	4	16.21%	8		Approved
					ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Trinsic Comm.	
24	Dalton	4	30.08%	7		Approved

25	Dayton	4	29.26%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cin. Bell Wireless Sprint /Nextel Verizon Wireless	Approved
26	Donnelsville	4	24.62%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Trinsic Comm.	Approved
27	Dublin	4	29.66%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint /Nextel Verizon Wireless	Approved
28	East Palestine	4	17.02%	8	ACN Comm. Comcast First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint /Nextel	Approved
29	Enon	4	25.57%	8	ACN Comm. First comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint /Nextel	Approved

30	Fairborn	4	34.69%	8	ACN Comm.	Approved
					CBET	
					First Comm.	
					MCI/WorldCom	
					Sage Telecom.	
31	Findlay	4	31.40%	7	Cinc. Bell Wireless	Approved
					Sprint /Nextel	
					Verizon Wireless	
					ACN Comm.	
					First Comm.	
32	Fletcher-Lena	4	18.37%	8	Sage Telecom.	Approved
					Talk America	
					Alltel Wireless	
					Sprint /Nextel	
					Verizon Wireless	
33	Fostoria	4	31.43%	8	Verizon Wireless	Approved
					ACN Comm.	
					First comm.	
					MCI/WorldCom	
					New Access	
34	Franklin	4	33.46%	8	Sage Telecom.	Approved
					Talk America	
					Alltel Wireless	
					Sprint/Nextel	
					Verizon Wireless	

35	Fremont	4	4	23.63%	8	ACN Comm.	Approved
						First Comm.	
						MCI/WorldCom	
						Sage Telecom.	
						Talk America	
36	Gahanna	4		27.77%	8	Alltel Wireless	Approved
						Sprint /Nextel	
						Verizon Wireless	
						ACN Comm.	
						First Comm.	
37	Gates Mills	4		21.66%	7	Insight	Approved
						MCI/WorldCom	
						Sage Telecom.	
						Talk America	
						Sprint/Nextel	
38	Girard	4		24.08%	8	Verizon Wireless	Approved
						ACN Comm.	
						First Comm.	
						MCI/WorldCom	
						Sage Telecom.	
39	Greensberg	4		24.19%	8	Talk America	Approved
						Trinsic Comm.	
						Alltel Wireless	
						Sprint/Nextel	
						Verizon Wireless	

40	Grove City	4	22.43%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved
41	Hartville	4	19.68%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
42	Hilliard	4	26.43%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved
43	Hillsboro	4	21.35%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved
44	Holland	4	21.60%	9	ACN Comm. Bukeye Telesys. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved

45	Hubbard	4	21.92%	8	ACN Comm.	Approved
					First Comm.	
					MCI/WorldCom	
					Sage Telecom.	
					Talk America	
46	Ironton	4	15.42%	8	Trinsic Comm.	Approved
					Alltel Wireless	
					Sprint/Nextel	
					ACN Comm.	
					First Comm.	
47	Jamestown	4	23.81%	8	MCI/WorldCom	Approved
					New Access	
					Sage Telecom.	
					Talk America	
					Sprint/Nextel	
48	Jeffersonville	4	18.76%	6	Verizon Wireless	Approved
					ACN Comm.	
					First Comm.	
					MCI/WorldCom	
					New Access	
49	Kent	4	29.04%	8	Sage Telecom.	Approved
					Talk America	
					Alltel Wireless	
					Sprint/Nextel	
					Verizon Wireless	

50	Kirtland	4	18.51%	8	ACN Comm.	Approved
					First Comm.	
					MCI/WorldCom	
					Sage Telecom.	
					Talk America	
51	Lancaster	4	26.56%	8	Alltel Wireless	Approved
					Sprint/Nextel	
					Verizon Wireless	
					ACN Comm.	
					First Comm.	
52	Lindsey	4	17.61%	5	MCI/WorldCom	Approved
					Sage Telecom.	
					Talk America	
					Trinsic Comm.	
					Sprint/Nextel	
53	Lisbon	4	18.34%	8	Verizon Wireless	Approved
					ACN Comm.	
					First Comm.	
					MCI/WorldCom	
					Sage Telecom.	
54	Lockbourne	4	22.19%	8	Talk America	Approved
					Trinsic Comm.	
					Alltel Wireless	
					Sprint/Nextel	
					Verizon Wireless	

					ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	
55	London	4	22.04%	8		Approved
					ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	
56	Louisville	4	16.23%	8		Approved
					ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel	
57	Lowellville	4	16.12%	7		Approved
					ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic comm. Sprint/Nextel	
58	Magnolia-Wayn	4	18.81%	7		Approved
					ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Verizon Wireless	
59	Manchester-Summit	4	22.88%	7		Approved

60	Marietta	4	15.41%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic comm. Alltel Wireless Sprint/Nextel	Approved
61	Marlboro	4	24.87%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic comm. Verizon Wireless	Approved
62	Martins Ferry	4	19.94%	8	ACN Comm. Comcast Phone First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Alltel Wireless	Approved
63	Massillon	4	19.39%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
64	Maumee	4	28.00%	9	ACN Comm. Buckeye Teles. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved

65	Medway	4	23.98%	8	ACN Comm.	Approved
					First Comm.	
					MCI/WorldCom	
					Sage Telecom.	
					Talk America	
66	Mentor	4	15.87%	8	Cinc. Bell Wireless	Approved
					Sprint/Nextel	
					Verizon Wireless	
					ACN Comm.	
					First Comm.	
67	Miamisburg-W. Carrollton	4	30.20%	8	MCI/WorldCom	Approved
					Sage Telecom.	
					Cin. Bell Wireless	
					Sprint/Nextel	
					Verizon Wireless	
68	Middletown	4	39.10%	8	Verizon Wireless	Approved
					ACN Comm.	
					CBET	
					First Comm.	
					MCI/WorldCom	
69	Milledgeville	4	16.01%	6	Sage Telecom.	Approved
					Cin. Bell Wireless	
					Sprint/Nextel	
					Verizon Wireless	
					First Comm.	
					Budget Phone	
					MCI/WorldCom	
					Sage Telecom.	
					Talk America	
					Revolution Com.	

70	Mingo Junction	4	28.37%	7	ACN Comm. Comcast First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved
71	Mogadore	4	20.54%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Verizon Wireless	Approved
72	Monroe	4	29.17%	7	ACN Comm. CBET First Comm. MCI/WorldCom New Access Sage Telecom. Verizon Wireless	Approved
73	Montrose	4	15.86%	9	ACN Comm. First Comm. MCI/WorldCom Revolution Comm. Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
74	Navarre	4	20.97%	6	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved

75	Nelsonville	4	19.12%	6	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved
76	New Carlisle	4	24.31%	8	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
77	New Lexington	4	20.45%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Sprint/Nextel	Approved
78	New Waterford	4	21.76%	6	ACN Comm. Comcast Phone First Comm. MCI/WorldCom Sage Telecom. Talk America	Approved
79	Niles	4	28.05%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Altel Wireless Sprint/Nextel Verizon Wireless	Approved
80	North Canton	4	23.85%	6	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	Approved

81	North Hampton	4	24.01%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Sprint/Nextel	Approved
82	North Lima	4	15.88%	8	ACN Comm. Comcast Phone First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel	Approved
83	North Royalton	4	16.59%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
84	Perrysburg	4	20.79%	9	ACN Comm. Buckeye Teles. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
85	Piqua	4	32.79%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved

86	Ravenna	4	26.00%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
87	Reynoldsburg	4	24.78%	8	ACN Comm. First Comm. Insight MCI/WorldCom Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	Approved
88	Ripley	4	22.21%	6	First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Trinsic Comm.	Approved
89	Rogers	4	16.06%	6	ACN Comm. Comcast Phone First Comm. MCI/WorldCom Sage Telecom. Talk America	Approved
90	Rootstown	4	23.67%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved

				ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel	
91	Salem	4	17.74%	8	Approved
				ACN Comm. Buceye teles. First Comm. Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	
92	Sandusky	4	28.78%	8	Approved
				ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America	
93	Sebring	4	15.25%	6	Approved
				ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Verizon Wireless	
94	Sharon	4	22.73%	7	Approved
				ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel	
95	South Charleston	4	24.22%	7	Approved
				First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Verizon Wireless	
96	South Vienna	4	22.56%	6	Approved

97	Spring Valley	4	20.17%	7	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Verizon Wireless	Approved
98	Springfield	4	27.66%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
99	Steubenville	4	24.60%	8	ACN Comm. Comcast First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel	Approved
100	Strongsville	4	18.83%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
101	Terrace	4	15.09%	9	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel Verizon Wireless	Approved

102	Thornville	4	17.32%	7	ACN Comm. First Comm. MCI/WorldCom New Access Sage Telecom. Talk America Verizon Wireless	Approved
103	Tiffin	4	25.66%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
104	Toledo	4	24.50%	9	ACN Comm. Buckeye Teles First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
105	Toronto	4	16.27%	7	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel	Approved
106	Trenton	4	30.56%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved

107	Trinity	4	19.44%	9	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
108	Uniontown	4	21.02%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
109	Upper Sandusky	4	16.49%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Alltel Wireless Sprint/Nextel Verizon Wireless	Approved
110	Vandalia	4	33.60%	8	ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint/Nextel Verizon Wireless	Approved
111	West Jefferson	4	16.11%	8	ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved

					ACN Comm. Comcast Phone First Comm. MCI/WorldCom Sage Telecom. Talk America Sprint/Nextel Verizon Wireless	
112	Westerville	4	27.57%	8		Approved
					ACN Comm. First Comm. MCI/WorldCom Sage Telecom. Talk America. Trinsic Comm. Alltel Wireless Sprint /Nextel Verizon Wireless	
113	Wickliffe	4	15.71%	9		Approved
					ACN Comm. First Comm. Insight MCI/WorldCom Sage Telecom. Talk America Sprint /Nextel Verizon Wireless	
114	Worthington	4	31.09%	8		Approved
					ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint /Nextel Verizon Wireless	
115	Xenia	4	25.52%	8		Approved
					ACN Comm. CBET First Comm. MCI/WorldCom Sage Telecom. Cinc. Bell Wireless Sprint /Nextel Verizon Wireless	
116	Yellow Springs-Clifton	4	21.03%	8		Approved

117	Youngstown	4	25.14%	8	ACN Comm.	Approved
					First Comm.	
					MCI/WorldCom	
					Sage Telecom.	
					Talk America	
					Alltel Wireless	
					Sprint /Nextel	
					Verizon Wireless	
118	Zanesville	4	24.59%	7	ACN Comm.	Approved
					First Comm.	
					MCI/WorldCom	
					Sage Telecom.	
					Talk America	
					Sprint /Nextel	
					Verizon Wireless	

AT&T Ohio
Case No. 06-1013-TP-BLS
Test 3 Results

<u>Exchange Name</u>	<u>Test Used</u>	<u>% CLEC Market Share</u>	<u># of Unafflt. F.B. CLECs</u>	<u>Name(s) of Unaffiliated F.B. CLECs</u>	<u># of alt. providers</u>	<u>Names of alt. providers</u>	<u>Test #3 Result</u>
1 Beallsville	3	16.86%	2	MCI/WorldCom Sage Telecom	5	ACN Comm. First Com. New Access Talk America PNG telecom.	Approved
2 Bethesda	3	20.07%	2	MCI/WorldCom Sage Telecom	6	ACN Comm. Comcast First Comm. New Access Talk America Trinsic Comm.	Approved
3 Conesville	3	15.49%	2	MCI/WorldCom Sage Telecom	5	ACN Comm. First Comm. Talk America Revolution Com. Verizon Wireless	Approved
4 Danville-Highland	3	17.02%	2	MCI/WorldCom Sage Telecom	5	Budget Phone First Comm. New Access Talk America Trinsic Comm.	Approved
5 Glenford	3	17.77%	2	MCI/WorldCom Sage Telecom.	6	First Comm. New Access Talk America Trinsic Comm. Sprint/Nextel Verizon Wireless	Approved

6	Graysville	3	17.09%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
7	Guyan	3	17.29%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
8	Leetonia	3	27.24%	2	MCI/WorldCom Sage Telecom.	5	Alltel Wireless Comcast First Comm. Talk America Trinsic Comm.	Approved
9	Marshall	3	17.67%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
10	Newcomerstown	3	16.50%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
11	Rainsboro	3	16.79%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. Revolution Comm. Talk America Trinsic Comm.	Approved
12	Rio Grande	3	15.96%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved

13	Shawnee	3	18.37%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
14	Somerset	3	16.05%	2	MCI/WorldCom Sage Telecom.	6	ACN Comm. First Comm. New Access Talk America Trinsic Comm. Sprint/Nextel	Approved
15	Vinton	3	17.95%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. First Comm. New Access Talk America Trinsic Comm.	Approved
16	Walnut	3	18.79%	2	MCI/WorldCom Sage Telecom.	5	First Comm. New Access PNG Telecom Talk America Trinsic Comm.	Approved
17	Wellsville	3	23.49%	2	MCI/WorldCom Sage Telecom.	5	ACN Comm. Comcast Phone First Comm. Talk America Trinsic Comm.	Approved
18	Winchester	3	17.84%	2	MCI/WorldCom Sage Telecom.	6	First Comm. New Access Revolution Comm Talk America Trinsic Comm. Verizon Wireless	Approved

AT&T Ohio
Case No. 06-1013-TP-BLS

Test 4 Results

<u>Exchange Name</u>	<u>Test Used</u>	<u>% Access Lines Lost</u>	<u># of Unafflt. F.B. Alt. Providers</u>	<u>Names of Unaffiliated F.B. alt. providers</u>	<u>Test #4 Result</u>
1 <u>Barnesville</u>	4		(note 1)		Denied

Test 3 Results

<u>Exchange Name</u>	<u>Test Used</u>	<u>% CLEC Market Share</u>	<u># of Unafflt. F.B. CLECs</u>	<u>Name(s) of Unaffiliated F.B. CLECs</u>	<u># of alt. providers</u>	<u>Names of alt. providers</u>	<u>Test #3 Result</u>
1 <u>Belfast</u>	3	17.29%	2	MCI/WorldCom Sage Telecom	4	First Comm. New Access Talk America Trinsic Comm.	Denied
2 <u>Canal Winchester</u>	3			(note 1)		(note 1)	Denied
3 <u>Groveport</u>	3			(note 1)		(note 1)	Denied
4 <u>Lewisville</u>	3	17.16%	2	MCI/WorldCom Sage Telecom.	4	ACN Comm. First comm. Talk America PNG Telecom	Denied
5 <u>Murray City</u>	3	17.01%	2	MCI/WorldCom Sage Telecom.	3	First Comm. Revolution Com. Talk America	Denied
6 <u>New Albany</u>	3	less than 15%	2	MCI/WorldCom Sage Telecom.	6	ACN Comm. First comm. New Access Talk America Trinsic Comm. Verizon Wireless	Denied
7 <u>Salineville</u>	3	19.12%	2	MCI/WorldCom Sage Telecom.	4	ACN Comm. First Comm. Talk America Trinsic Comm.	Denied
8 <u>Somerton</u>	3			(note 1)		(note 1)	Denied

note 1 : See Commission discussion on exchange pairs served by a single switch.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of AT&T)
Ohio for Approval of an Alternative Form)
of Regulation of Basic Local Exchange) Case No. 06-1013-TP-BLS
Service and Other Tier 1 Services Pursuant)
to Chapter 4901:1-4, Ohio Administrative)
Code.)

ENTRY ON REHEARING

The Commission finds:

- (1) On December 20, 2006, the Commission issued an Opinion and Order in this case finding, among other things, that based on the record in this proceeding, AT&T Ohio's application for alternative regulation of basic local exchange service (BLES) and other Tier 1 Services should be granted in part and denied in part, in accordance with Chapter 4901:1-4, Ohio Administrative Code (O.A.C.).
- (2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (3) On January 19, 2007, the office of the Ohio Consumers' Counsel (OCC), the Appalachian People's Action Coalition, the Edgemont Neighborhood Coalition, the city of Cleveland, the city of Toledo, the city of Holland, the city of Maumee, the city of Northwood, the city of Oregon, the city of Perrysburg, the city of Sylvania, and Lucas County (collectively, the Consumer Groups) timely filed an application for rehearing.

The Consumer Groups' application for rehearing asserts 11 general grounds for rehearing and 44 specific allegations of error, many of which were advanced by these entities and rejected by the Commission in Case No. 05-1305-TP-ORD (05-1305), *In the Matter of the Application of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Opinion and Order dated March 7, 2006 and Entry on

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Rehearing dated May 3, 2006. The Consumer Groups filed comments as well as an application for rehearing in 05-1305 and were active participants in the development of the rules for BLES alternative regulation. In short, the Consumer Groups contend that the entire December 20, 2006 Opinion and Order in this case should be rescinded. We disagree, for the reasons that will be discussed in the paragraphs below.

- (4) On January 29, 2007, AT&T Ohio filed a memorandum contra the Consumer Groups' application for rehearing. AT&T Ohio asserts that none of the Consumer Groups' allegations are valid and that the December 20, 2006 Opinion and Order should be affirmed in its entirety.
- (5) In their first general assignment of error identified in their memorandum in support, the Consumer Groups allege that the BLES rules adopted in 05-1305 do not comply with the statutory provisions of Section 4927.03(A), Revised Code, including the requirement of the Commission finding no barriers to entry and, therefore, the Commission erred in adopting Rules 4901:1-4-10(C)(3) (Competitive Test 3) and 4901:1-4-10(C)(4), O.A.C. (Competitive Test 4) (Consumer Groups' Memorandum in Support at 9-12).

Specifically, the Consumer Groups opine that the competitive local exchange company (CLEC) market share loss and the facilities-based CLEC/alternative providers prongs of Competitive Test 3 and the line loss and the facilities-based alternative providers prongs of Competitive Test 4 do not satisfy the statutory provisions of Section 4927.03(A), Revised Code (*Id.* at 13-15). Consumer Groups also assert that the Commission has erred by assuming that flaws in the prongs of Competitive Tests 3 and 4 are cured by use of the other prongs (i.e., allegation of error 7).

- (6) AT&T Ohio considers the Consumer Groups' challenges to be policy-related and not raising issues of legal error. AT&T Ohio asserts that the Commission clearly had the legal authority to adopt rules to implement Section 4927.03(A), Revised Code. AT&T Ohio submits that the General Assembly entrusted the Commission to determine the weight to be assigned to each of the factors identified in Section 4927.03(A)(2), Revised Code (AT&T Ohio Memorandum Contra at 6). AT&T Ohio further

submits that the statute only requires the Commission to consider such factors, and does not specify any particular result or threshold criteria that is necessary to approve BLES alternative regulation (*Id.*).

AT&T Ohio believes that the Commission's BLES alternative regulation rules were adopted consistent with the Commission's delegated authority and that the Commission properly determined that compliance with one of the four competitive tests in Rule 4901:1-4-10(C), O.A.C., is a sufficient showing that the conditions in Section 4927.03(A)(1)(a) or (b), Revised Code, exist (*Id.*). AT&T Ohio asserts that the rules established in 05-1305 are objective tests that provide a consistent means for an incumbent local exchange company (ILEC) to demonstrate whether it qualifies for BLES alternative regulation (*Id.* at 6, 7). AT&T Ohio argues that the Consumer Groups' position seeking to require the Commission to revisit each statutory issue in each individual BLES alternative regulation case is unfounded (*Id.* at 6).

- (7) The Commission has already fully considered the Consumer Groups' arguments concerning the adoption of the BLES alternative regulation rules in both 05-1305, and in our December 20, 2006 Opinion and Order in this proceeding. We find that Consumer Groups, in their application for rehearing, have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing pertaining to the Commission's adoption of the BLES rules, including Rule 4901:1-4-10, O.A.C., is denied.

Expanding upon this conclusion, the Commission notes that the Consumer Groups filed comments in 05-1305 and were active participants in the development of rules for BLES alternative regulation. As we stated previously in 05-1305, the intent of the competitive tests set forth in Rule 4901:1-4-10(C), O.A.C., is to require the applicant ILEC to demonstrate that BLES is either subject to competition or that reasonably available alternatives exist, and that no barriers to entry for BLES are present (05-1305 Entry on Rehearing at 18).

The Commission recognizes that the telecommunications market is continuously evolving and, therefore, it would not be appropriate to conduct a competitive market analysis via one specific test (*Id.*). Therefore, in developing the rules for BLES alternative regulation, the Commission focused on specific factors that would demonstrate that the Section 4927.03(A), Revised Code, criteria was satisfied with respect to residential BLES customers (*Id.*). Specifically, the Commission concluded that the four competitive tests adopted in 05-1305 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 (*Id.* at 19). The Commission determined that these same demanding test criteria also demonstrate that no barriers to entry exist for alternative BLES providers in the affected exchanges (*Id.*). Additionally, we noted that Rule 4901:1-4-10(C), O.A.C., requires that an ILEC satisfy all prongs of a single competitive market test, rather than just one of the established criteria or the other (*Id.*). This is due to the fact that different prongs within a single competitive test were designed to address certain provisions outlined in Section 4927.03(A) and (B), Revised Code. These prongs complement each other and were not intended to cure flaws of each other; just as the provisions of Sections 4927.03(A) and (B), Revised Code, complement each other.

- (8) Next, the Consumer Groups raise alleged assignments of error specific to AT&T Ohio's application in this proceeding. These arguments are intertwined with the Consumer Groups' repeated contentions related to the alleged unreasonableness of the Commission's BLES alternative regulation rules.

The pertinent arguments regarding these assignments of error are organized into the following categories and are discussed *infra*: residential access line loss, unaffiliated facilities-based alternative providers, stand-alone BLES/bundles that include BLES, barriers to entry, and the public interest.

Residential Access Line Loss

- (9) As noted above, the Consumer Groups claim that the line loss prong of Competitive Test 4 does not comport with the

statutory provisions of Section 4927.03(A), Revised Code (Consumer Groups Memorandum in Support at 13). Based on this premise, the Consumer Groups allege that the Commission's use of the line loss prong in evaluating AT&T Ohio's application for alternative regulation of its stand-alone BLES service is improper inasmuch as AT&T Ohio is unable to determine where the lost lines have gone (e.g., to an alternative provider or to an AT&T Ohio affiliate) (*Id.* at 13, 35).

In particular, the Consumer Groups assert that the line loss prong of Competitive Test 4 does not demonstrate that AT&T Ohio's stand-alone BLES is subject to competition, or that AT&T Ohio's stand-alone BLES customers have reasonably available alternatives to their service (*Id.*). Additionally, the Consumer Groups aver that the line loss reveals nothing about the number and size of the alternative providers, their market shares or the extent to which services are available from alternative providers in the relevant market (*Id.*).

Further, the Consumer Groups emphasize that the inability to determine where the lost residential access lines have gone undermines the use of the line loss test for satisfying Section 4927.03(A), Revised Code (*Id.* at 36). For example, the Consumer Groups submit that there is significance in identifying the level of DSL substitution in the context of access line loss (*Id.* at 39). To the extent that CLEC market share can be calculated in the context of Competitive Test 3, the Consumer Groups believe that a similar analysis should be performed for the purposes of Competitive Test 4 (*Id.* at 36). Otherwise, the Consumer Groups argue that there is no linkage to the individual requirements that an ILEC lose at least 15 percent of the total number of access lines since 2002 and the requirement that there be at least five unaffiliated facilities-based alternative providers serving the residential market (*Id.* at 37, 38).

- (10) AT&T Ohio objects to the Consumer Groups' arguments regarding the line loss prong. The company points out that customers are under no obligation to report to AT&T Ohio as to why they are terminating their service and ILECs are under no obligation to gather or maintain such information (AT&T Ohio Memorandum Contra at 19). AT&T Ohio opines that, rather than focusing on a significant level of detail (e.g., tracking what

level of line loss is attributable to competition from providers of functionally equivalent or substitute services), the rules are intended to incorporate measurements of competition that are objective, available, efficient, verifiable, and capable of being consistently applied to all ILECs (*Id.* at 20). AT&T Ohio also posits that in establishing the 15 percent line loss criterion, the Commission took into account the fact that there may be noncompetitive reasons for line loss (*Id.* citing 05-1305 Entry on Rehearing at 13, 14).

- (11) The Commission fully considered the Consumer Groups' arguments concerning the line loss prong in 05-1305 and also raised here in opposition to AT&T Ohio's application for BLES alternative regulation (06-1013 Opinion and Order at 17-19; 05-1305 Entry on Rehearing at 13, 18, 19). We find that the Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing regarding the Commission's use of the line loss prong of Competitive Test 4 is denied.

In reaching this decision, the Commission notes that the line loss prong of Competitive Test 4 requires that the ILEC applicant must demonstrate that in each requested telephone exchange area at least 15 percent of its 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). We also note that the Consumer Groups repeat their arguments, from 05-1305, that the competitive tests should measure the competitors' market power or market share.

As we stated in our December 20, 2006 Opinion and Order, it is clear from the record that it would be impossible for AT&T Ohio, or any ILEC, to identify where the lost residential lines have gone and, further, that the ILEC would not have access to other competitors' confidential market share information. The only circumstance under which the ILEC might be able to identify where the lost residential line went is when it goes to a CLEC that either utilizes the ILEC's unbundled network elements (UNEs) or ports the telephone number associated with the lost residential access line (06-1013 Opinion and Order at 15). Therefore, the Commission only required a competitor market share demonstration, as it relates to CLECs, in Competitive Test 3 of the rules. Accordingly, the Commission

determined that this type of measure would not be reasonable or practical in exchanges (markets) where competitors elect different methods of market entry, other than those used by CLECs as described above. Further, as we discussed in 05-1305, the percentage of total residential access lines lost, as used in Competitive Test 1 and Competitive Test 4 of the rules, is a different method of measuring the market power and the level of competition that an ILEC faces in a given exchange where the main competitors are not CLECs, as is the case of AT&T Ohio.

- (12) Next, the Consumer Groups assert that the Commission erred in its determination that the 2002 start date avoids any data distortion in residential access line losses resulting from causes other than the presence of competition for BLES or the availability of reasonable alternatives to BLES. Specifically, the Consumer Groups contend that the Commission never specified how the use of the 2002 starting point excludes residential line losses not attributable to competition for BLES (Consumer Groups' Memorandum in Support at 38).
- (13) AT&T Ohio responds that the Consumer Groups' arguments regarding the 2002 start date have already been fully considered and rejected by the Commission (AT&T Ohio Memorandum Contra at 21).
- (14) The Commission fully considered the Consumer Groups' arguments concerning the 2002 start date in 05-1305 and also raised here in opposition to AT&T Ohio's application for BLES alternative regulation (06-1013 Opinion and Order at 18; 05-1305 Entry on Rehearing at 13, 14). We find that the Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, Consumers' Groups' application for rehearing regarding allegation of error 23 is denied.

As we discussed previously in 05-1305, we believe that 2002 recognizes the substitution of second residential access lines to DSL and cable modem (for Internet access) and that this date excludes any data distortions resulting from causes other than the presence of competition for BLES or the availability of reasonable alternative to BLES. It is important to note that the unbundled network element platform (UNE-P) did not become a potential competitive offering to BLES until the January 22,

2001 decision in *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *cert. granted in part*, 531 U.S. 1124 (Jan. 22, 2001). Next, the Commission did not incorporate the requisite UNE-P offering until its October 4, 2001 decision in Case No. 96-922-TP-UNC, *In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Opinion and Order. Further, the actual implementation of UNE-P offerings did not occur until 2002 (05-1305 Entry on Rehearing at 13, 14).

- (15) Under allegation of error 22, the Consumer Groups argue that the Commission erred in finding that the line loss prong in Competitive Test 4 addresses barriers to entry (Consumer Groups' Memorandum in Support at 35, 36).
- (16) In regard to the Consumer Groups' contention that the line loss prong does not address barriers to entry, AT&T Ohio asserts that the Commission correctly recognized that the Consumer Groups raised the same arguments in the 05-1305 and that the Consumer Groups have raised no new arguments that were not already addressed in that docket (AT&T Memorandum Contra at 29).
- (17) The Commission fully considered the Consumer Groups' arguments raised in 05-1305 and also raised here in opposition to AT&T Ohio's application for BLES alternative regulation (06-1013 Opinion and Order at 9; 05-1305 Entry on Rehearing at 18; 05-1305 Opinion and Order at 22). We find that Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumers Groups' application for rehearing on allegation of error 22 is denied.

We note that, in establishing the criteria to be incorporated in its BLES alternative regulation rules (including the line loss prong of Competitive Test 4), the Commission identified those factors that it believes are significant for the purpose of complying with the intent of H.B. 218, while at the same time not making the thresholds so onerous that few, if any, ILECs could avail themselves of the BLES alternative regulation benefits contemplated by H.B. 218. Next, the Commission highlights the fact that, although the legislature provided general guidance to the Commission regarding the

establishment of alternative BLES regulation, the ultimate decision-making authority regarding that implementation was left to the Commission. Additional discussion of "barriers to entry" is provided below.

Alternative Providers

- (18) The Consumer Groups claim that the alternative provider prongs of Competitive Tests 3 and 4 do not incorporate the statutory provisions of Section 4927.03(A), Revised Code (Consumer Groups Memorandum in Support at 42, 43). Based on this premise, the Consumer Groups allege that the Commission's use of the alternative providers prongs in evaluating AT&T Ohio's application for alternative regulation of its stand-alone BLES service is improper (*Id.* at 42). Specifically, the Consumer Groups allege that, while Competitive Tests 3 and 4 require the showing of five alternative providers serving the residential market, the Commission, in its December 20, 2006 Opinion and Order in this proceeding, considered alternative providers that do not offer functionally equivalent or substitute services available at competitive rates, terms and conditions.
- (19) In response to the Consumer Groups' contention that the Commission's BLES alternative regulation rules allow for the consideration of alternative providers that provision services that are not functionally equivalent or substitute services available at competitive rates, terms, and conditions, AT&T Ohio responds that this argument has previously been rejected by the Commission and that the Consumer Groups offer nothing new to justify the Commission reexamining the issue at this time (AT&T Ohio Memorandum Contra at 17).
- (20) The Commission fully considered the Consumer Groups' arguments concerning the alternative providers prongs in 05-1305 and also raised here in opposition to AT&T Ohio's application for BLES alternative regulation. We find that the Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing on the Commission's use of the alternative providers prongs of Competitive Tests 3 and 4 is denied.

First, the Commission notes that the alternative providers prong of Competitive Test 4 requires that the ILEC applicant must demonstrate the presence of at least five unaffiliated facilities-based alternative providers serving the residential market. As we noted above, in establishing the criteria to be incorporated in its BLES alternative regulation rules (including the alternative providers prong of Competitive Test 4), the Commission identified those factors that it believes are significant for the purpose of complying with the intent of H.B. 218, while at the same time not making the thresholds so onerous that few, if any, ILECs could avail themselves of the BLES alternative regulation benefits contemplated by H.B. 218. Further, as we discussed in the 05-1305 Opinion and Order, more customers are substituting their traditional BLES with competitive services offered by alternative providers such as wireline CLECs, wireless carriers, Voice over Internet Protocol (VoIP) and cable telephony providers (05-1305 Opinion and Order at 25). We recognize that, although the products offered by those alternative providers may not be exactly the same as the ILEC's BLES offerings, those former ILEC customers viewed them as substitutes for the ILEC's BLES.

- (21) Next, under allegation of error 27, the Consumer Groups contend that the Commission erred in finding that:

[F]actors like longevity in the competitive market, while somewhat noteworthy, do not have a direct bearing on the state of the competitive market at any given time. Rather, the Commission believes that criteria such as the required presence of several unaffiliated facilities-based providers is a more significant factor for supporting a healthy sustainable market, because this criterion demonstrates a greater commitment of a carrier to remain in the market as a competitor.

(Consumer Groups Memorandum in Support at 43 citing 06-1013 Opinion and Order at 24).

Additionally, the Consumer Groups aver that the Commission erred in rejecting their recommendation that an alternative provider must be serving a minimum of subscribers in order to be considered for any of the prongs in Test 3 or Test 4 (i.e.,

allegation of error 9). The Consumer Groups contend that by requiring only "a presence in the market," the Commission has failed to consider the requisite criteria of Section 4927.03(A), Revised Code, including: the size of the alternative providers, indicators of market power such as market share, or that market forces are capable of supporting a healthy and sustainable, competitive telecommunications market. In support of its position, the Consumer Groups opine that a carrier that serves only a handful of customers or that has been in the market only a short time can contribute minimally to the existence of a healthy and sustainable, competitive telecommunications market (*Id.* at 43, 44). Further, the Consumer Groups believe that the Commission erred by not excluding from Competitive Test 3, the market shares of CLECs that are not actively marketing to residential customers and by not excluding the market shares of unidentified CLECs that are reselling AT&T Ohio services (i.e., allegations of error 33 and 34).

- (22) AT&T Ohio states that the Commission's BLES alternative regulation rules properly addressed the issue of sustainability of competition and, therefore, consideration of the issue of longevity is unnecessary. Further, AT&T Ohio questions how the Commission can assess or forecast longevity of a provider (AT&T Ohio Memorandum Contra at 23).
- (23) We find that the Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing under allegation of errors 27, 33 and 34 are denied.

As we discussed in our December 20, 2006 Opinion and Order, we believe that factors like longevity in the competitive market, while somewhat noteworthy, do not have a direct bearing on the state of the competitive market at any given point in time (06-1013 Opinion and Order at 24). Rather, the Commission believes that objective criteria, such as in the required presence of several facilities-based alternative providers, as required in Rule 4901:1-4-10(C)(4), O.A.C., is a more significant factor in supporting a healthy sustainable market, because the presence of facilities-based providers demonstrates a greater commitment, by those alternative providers, to remain in the market as a competitor (*Id.*).

Additionally, the Commission believes that the overall state of the competitive market is a significant factor when considering a request for BLES alternative regulation. The criteria of Competitive Tests 3 and 4 allow for such an examination by requiring the presence of a *significant number of competitive providers* in the relevant market, as well as by requiring a demonstration that either the competitive providers are serving a significant percentage of residential access lines (Competitive Test 3) or that the ILEC has lost a considerable share of its access lines (Competitive Test 4). Through this type of examination, there will be better assurance that there is a reasonable level of BLES alternatives to warrant the granting of BLES alternative regulation (*Id.*). Moreover, if the state of the competitive market were to significantly change in a negative direction, the Commission notes that, under the authority granted by Section 4927.03(C), Revised Code, and by Rule 4901:1-4-12, O.A.C., the Commission may, within five years, modify any order establishing alternative regulation (*Id.* at 25).

- (24) Under allegation of error 15, the Consumer Groups object to the Commission's determination that the telephone services of Insight, Comcast, and Buckeye Telesystem are competitive with and provide reasonably available alternatives to AT&T Ohio's stand-alone BLES. The Consumer Groups assert that these cable providers should not be considered in light of the fact that *the cable providers do not serve throughout AT&T Ohio's exchanges* (Consumer Groups Memorandum in Support at 29).
- (25) In response to the Consumer Groups' objection to the Commission's consideration of particular cable providers in the context of the competitive market tests, AT&T Ohio states that the Consumer Groups are looking for a ubiquitous service condition when it is not a requirement of the applicable statute or rules. AT&T Ohio opines that such a requirement may actually constitute an unlawful barrier to entry. AT&T Ohio represents that in no situation has a CLEC with facilities that can serve only one customer been used to meet any of the applicable tests. While recognizing that the identified cable providers do not serve all of the subscribers in an exchange, each of the customers in the exchanges served by the cable providers have an alternative provider in the respective cable companies. Additionally, AT&T Ohio notes that resellers and facilities-based CLECs have access to each and every residential

customer in a given wire center (AT&T Ohio Memorandum Contra at 23-25, 28).

- (26) The Commission fully considered the arguments raised by the Consumer Groups in opposition to AT&T Ohio's application for BLES alternative regulation specific to whether Insight and Comcast must provide service throughout the entire exchange (06-1013 Opinion and Order at 22-25). We find that the Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing relative to allegation of error 15 is denied.

In reaching this decision, we reference the fact that we previously rejected Consumer Groups' narrow interpretation that the facilities-based alternative provider's service has to be available in the entirety of the market area. We also rejected Consumer Groups' requirement that an ILEC demonstrate that the service provider's particular service offering is available in the relevant market by verifying that its competitor makes the service available to 100 percent of the ILEC's customer base. We determined that this information is likely available only to the alternative provider, and not the ILEC (*Id.* at 15). Further, we note that this information is not required by either statute or the Commission's rules.

- (27) Under allegations of error 16 and 17, the Consumer Groups argue that the Commission erred in finding that the wireless carriers provide readily available alternatives to AT&T Ohio's stand-alone BLES (Consumer Groups Memorandum in Support at 34, 35). The Consumer Groups again posit that the wireless carriers' services have limitations relative to whether the service will work at specific locations, including difficulty extending indoors (*Id.*).
- (28) In response to the Consumer Groups' assertions regarding the inappropriateness of considering wireless providers for the purpose of applying the competitive market tests, AT&T Ohio responds that the Commission has already considered these arguments in the context of 05-1305 and, therefore, they should again be rejected at this time (AT&T Ohio Memorandum Contra at 26-28).

- (29) The Commission fully considered the Consumer Groups' arguments concerning the wireless carriers in 05-1305 and also raised here in opposition to AT&T Ohio's application for BLES alternative regulation (06-1013 Opinion and Order at 12, 13, 23; 05-1305 Entry on Rehearing at 17-19; 05-1305 Opinion and Order at 25.) We find that the Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing under allegation of errors 16 and 17 is denied.

As we have stated previously, each technology platform, like wireless, has its own unique characteristics, and service providers using that technology will utilize those particular characteristics to customize their service offerings for use as an alternative to BLES. Further, although each substitute service to BLES will not attract (or meet the needs of) an entire ILEC customer base, this does not exclude the substitute service as a reasonable alternative to BLES (06-1013 Opinion and Order at 13).

Stand-alone BLES and Bundles

- (30) Next, under allegations of error 10 and 35 the Consumer Groups contend that the Commission erred in finding that bundles of service from alternative providers are competition for or alternatives to stand-alone BLES, as well as by finding that the corresponding alternative providers' presence permits the granting of alternative regulation for stand-alone BLES (Consumer Groups Memorandum in Support at 16). The Consumer Groups further opine, through their allegations of error 11-16, that the Commission erred in its determination that bundles (service packages) offered by the alternative service providers, as identified in AT&T Ohio's application, are competition for AT&T Ohio's stand-alone BLES service (*Id.* at 16-25). Specifically, the Consumer Groups assert that the existence of competition for BLES in bundles does not signify competition for consumers who subscribe only to stand-alone BLES (*Id.* at 19).
- (31) In response to the Consumer Groups' contentions regarding the need to focus on stand-alone BLES in the application of the competitive tests, AT&T Ohio contends that there are many entities competing in the marketplace providing a number of

services, including service packages and bundles. AT&T Ohio also points out that while all LECs are required to offer BLES, they are not required to offer stand-alone BLES. Additionally, AT&T Ohio emphasizes that Section 4927.03(A), Revised Code, does not require that stand-alone BLES be offered by all carriers being considered under a competitive market test. Rather, AT&T Ohio submits that the statute simply requires that the Commission consider the ability of alternative providers to make functionally equivalent or substitute services readily available (AT&T Ohio Memorandum Contra at 12, 13). AT&T Ohio opines that the phrase "functionally equivalent" signifies that stand-alone BLES itself does not have to be actually offered in order for a company to be considered as alternative provider for the purpose of a competitive market test (*Id.* at 12-19).

Finally, AT&T Ohio asserts that the Commission has previously considered and rejected the Consumer Groups' arguments specific to this issue (*Id.* at 14, 15 citing 05-1305 Opinion and Order at 25, 34).

- (32) The Commission fully considered Consumer Groups' arguments concerning the services offered by the unaffiliated facilities-based alternative providers in 05-1305 and also raised here in opposition to the alternative providers that are present in the AT&T Ohio exchanges identified in 06-1013 (06-1013 Opinion and Order at 12-14; 05-1305 Opinion and Order at 25). We find that Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups application for rehearing under allegations of error 10-16 is denied.

First, we note that Section 4927.03(A), Revised Code, compels the examination of whether customers have reasonably available alternatives to BLES. The law does not restrict, however, the "analysis of competition" and "reasonably available alternatives" to competitive products that are exactly like BLES. Whether a product substitutes for another product does not turn on whether the product is exactly the same. As we discussed previously, customers, who leave an ILEC's BLES offering to subscribe to another alternative provider's bundled service offering that includes BLES, view those bundled service offerings as a reasonable alternative service. Also, we

determined that customers who subscribe to these bundled service offerings that include BLES are by definition BLES customers because BLES is the foundation of that service package or bundle (05-1305 Opinion and Order at 25).

Further, although alternative BLES services may not currently be offered under identical terms and conditions, Section 4927.03(A)(2)(c), Revised Code, only requires that the functionally equivalent or substitute services be readily available at competitive rates, terms, and conditions. As to this requirement, the Commission determined that, consistent with the criteria set forth in Rule 4901:1-4-10(C), O.A.C., to the extent that AT&T Ohio is losing customers and the requisite number of alternative providers are present, it is evident that functionally equivalent or substitute services are readily available (06-1013 Opinion and Order at 14.) Last, the Commission fully considered the Consumer Groups' arguments concerning the services offered by the unaffiliated facilities-based alternative providers in 05-1305 and also raised here in opposition to the alternative providers that are present in the relevant AT&T Ohio exchanges (*Id.* at 12-14; 05-1305 Opinion and Order at 25).

While the Commission recognizes that there may be customers in the AT&T Ohio exchanges approved in 06-1013 who do not want or need to purchase anything more than BLES or BLES plus limited vertical features, such as call waiting or Caller ID, the existence of these customers does not negate the fact that AT&T Ohio is facing competition for BLES in these markets. Further, we note that AT&T Ohio's stand-alone BLES offering will continue to be available as an option. Lastly, for those customers who are "low-income," their basic local exchange service needs are already provided under the Lifeline program, which will not be impacted by the BLES pricing flexibility (05-1305 Opinion and Order at 25; 05-1305 Entry on Rehearing at 26; See Rule 4901:1-4-06(B), O.A.C.).

Barriers to Entry

- (33) Next, under allegations of error 3, 5, and 36-41, the Consumer Groups claim that the Commission erred in finding that satisfying Competitive Tests 3 and 4 results in the finding that there are no barriers to entry for stand-alone BLES and in

finding that, by satisfying Competitive Tests 3 and 4, AT&T Ohio has demonstrated that there are no barriers to entry for BLES in the exchanges identified for Competitive Tests 3 and 4 (Consumer Groups Memorandum in Support at 45). In support of their contention that AT&T Ohio has failed to establish that there are no barriers to entry for stand-alone BLES, the Consumer Groups aver that there are no providers of stand-alone BLES in nearly any of the 145 exchanges included in AT&T Ohio's application (*Id.* at 14).

- (34) AT&T Ohio asserts that the Commission has already addressed the Consumer Groups' "barriers to entry" arguments (AT&T Ohio Memorandum Contra at 29 citing 06-1013 Opinion and Order at 7, 8; 05-1305 Entry on Rehearing at 17-19). AT&T Ohio contends that the Consumer Groups have failed to establish that the Commission's understanding of the "barriers to entry" criterion is in error (*Id.* at 30). In response to the Consumer Groups' argument that the Commission's BLES alternative regulation rules are inconsistent with the barriers to entry criterion of Section 4927.03, Revised Code, AT&T Ohio submits that the Commission determined that if one of the four competitive tests is satisfied, the applicant has demonstrated that there are no barriers to entry (*Id.* at 32).

AT&T Ohio points out that its entry into the interLATA long distance market was premised on the finding by the Commission and the Federal Communications Commission (FCC) that there were no barriers to entry in AT&T Ohio's local exchanges (*Id.* at 31 citing *In the Matter of Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Inc., Ohio Bell Telephone Company, Wisconsin Bell Inc., and Southwestern Bell Communications Services Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167, Memorandum Opinion and Order, FCC 03-243, adopted October 14, 2003). Similarly, AT&T Ohio states that the FCC has determined that there are no barriers to entry for BLES. See *In the Matter of Unbundled Access to Network Elements*, Order on Remand, FCC 04-290, adopted December 15, 2004.

- (35) The Commission fully considered the Consumer Groups' arguments concerning "barriers to entry" in 05-1305 and also asserted here in Consumer Groups' opposition to AT&T Ohio's

application for BLES alternative regulation (06-1013 Opinion and Order at 8, 9; 05-1305 Entry on Rehearing at 17-19; 05-1305 Opinion and Order at 22). We previously determined that satisfying the established criteria of the competitive market tests (e.g., the required presence of unaffiliated facilities-based 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), Revised Code (06-1013 Opinion and Order at 8, 9, 12; 05-1305 Entry on Rehearing at 18). We find that the Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing under allegation of error 36 is denied.

- (36) Also, under allegations of error 37 and 38, the Consumer Groups claim that the Commission erred in finding that AT&T Ohio, in meeting Competitive Tests 3 and 4, has demonstrated that there are no barriers to entry for BLES in the exchanges identified for Competitive Tests 3 and 4. The Commission fully considered the Consumer Groups' arguments on this point which were asserted in their opposition to AT&T Ohio's application for BLES alternative regulation (06-1013 Opinion and Order at 8, 9). We find that the Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing under allegations of error 37 and 38 is denied.

Public Interest

- (37) Next, under allegation of error 42, the Consumer Groups assert that the Commission erred in granting alternative regulation to AT&T Ohio's stand-alone BLES, contrary to the public interest (Consumer Groups Memorandum in Support at 46). The Consumer Groups point out that in 05-1305, they proposed that the Commission require ILECs seeking BLES alternative regulation to make additional commitments to enhance the public interest. In this case, the Consumer Groups assert that AT&T Ohio has offered nothing in exchange for the anticipated rate increases (*Id.* at 48).
- (38) In response to the Consumer Groups' belief that additional commitments should be required in order for an ILEC to receive BLES alternative regulation, AT&T Ohio references the

fact that the Commission has rejected this argument twice before in 05-1305 (AT&T Ohio Memorandum Contra at 34 citing 05-1305, March 7, 2006, Opinion and Order, at 11; 05-1305, May 2, 2006, Entry on Rehearing at 3). AT&T Ohio states that such a requirement is not contemplated by Section 4927.03, Revised Code. AT&T Ohio submits that, rather than additional commitments, the BLES alternative regulation rules properly conclude that the public interest has been met provided that one of the Competitive Tests have been satisfied (*Id.* at 33, 34).

- (39) The Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing under allegation of error 42 is denied.

As we discussed previously in 05-1305, in order to establish alternative regulatory requirements for BLES and other Tier 1 services, the Commission must, under the law, not only find that the services are subject to competition or have reasonably available alternatives and that no barriers to entry exist, but we must also find that the alternative regulatory requirements are in the public interest. To guide us in determining whether alternative regulatory treatments are in the public interest, we look to the policy of the state, as set forth in Section 4927.02(A), Revised Code, to ensure the continued availability of adequate BLES to citizens throughout the state. The goal of ensuring that the largest number of residents possible have access to high quality telephone service regardless of income or geographic location remains an important policy objective of Ohio.

The Commission continues to believe that, at least for the near future, BLES, including basic caller ID, is an essential service for many Ohioans. On the other hand, we are fully aware that ILECs are facing increasing competition from alternative service providers that are not regulated by the Commission and, as AT&T Ohio noted in the 05-1305 proceeding, many of the ILECs have been charging the same rates for BLES since the early 1980s. Therefore, in 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 reaching our conclusion, we considered the regulatory treatment of competing alternative providers, including wireline CLECs, wireless carriers, VoIP, and cable telephone providers. After serious consideration of the issues raised by the parties, including the Consumer Groups, we determined that if an ILEC satisfies one of the four adopted competitive market tests in an exchange, the ILEC will be permitted upward pricing flexibility for BLES and other Tier 1 services (05-1305 Opinion and Order at 40.).

As we determined in our December 20, 2006 Opinion and Order, AT&T Ohio has met its burden of proof, in accordance with Section 4927.03(A), Revised Code, and that the granting of AT&T Ohio's application for the specified exchanges is in the public interest. 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 (05-1305 Entry on Rehearing at 2; 05-1305 Opinion and Order at 11).

Miscellaneous Issues

- (40) The Consumer Groups allege that the Commission, in its Opinion and Order of December 20, 2006, failed to adequately explain the reasons for its decision as required by Section 4903.09, Revised Code (Consumer Groups Memorandum in Support at 49, 50). The Consumer Groups opine that the approval of AT&T Ohio's application in this proceeding depends on the lawfulness of the rules adopted in 05-1305. They assert that, rather than showing the facts upon which its decisions in 05-1305 were based, the Commission has simply incorporated the entire record of 05-1305. Consumer Groups reference *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306 (1987) (MCI), in support of their contention that the Commission erred by incorporating the record from 05-1305 into this case, instead of setting forth, in detail, the facts from 05-1305 that supported the Commission's actions in this case (*Id.*).

- (41) AT&T Ohio responds that the Commission thoroughly explained its adoption of BLES alternative regulation rules in 05-1305 and thoroughly explained its conclusions reached in this case when applying those rules. Therefore, AT&T Ohio believes that the Commission has complied with Section 4903.09, Revised Code (AT&T Ohio Memorandum Contra at 35). With respect to the Consumer Groups' criticism of the Commission's action of incorporating the record of the rules docket into this case, AT&T Ohio asserts that given the close relationship between the rules and the company's BLES alternative regulation application, it was appropriate for the Commission to incorporate the record in 05-1305 into this case (*Id.* at 7).
- (42) We note that Section 4903.09, Revised Code, provides in pertinent part that: "In all contested cases . . . the commission shall file, with the record of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Ohio Supreme Court has observed that the purpose of this statute is to inform the interested parties as to the reasons for the Commission's actions and to provide the court with an adequate record so that it may determine whether the Commission's decision is lawful and reasonable. *Midgen-Ostrander v. Pub. Util. Comm.*, 102 Ohio St. 3d 451 at ¶17, 2004-Ohio 3924. We believe that, in 05-1305, the Opinion and Order and Entry on Rehearing fully described the basis for adopting the rules for BLES alternative regulation. The Ohio Supreme Court has approved incorporation of the record from one case into another. *MCI*, 32 Ohio St. 3d 311, 312. Also, as we noted in our December 20, 2006 Opinion and Order, the majority of the Consumer Groups' arguments were a repetition of the arguments that were raised in 05-1305. Therefore, it was reasonable to incorporate that record into this proceeding.

Further, the Commission highlights the fact that this case centers on the analysis of whether AT&T Ohio's application satisfies the designated competitive market tests, and not the lawfulness of the competitive market tests. To the extent that the Consumer Groups' reiterate arguments specific to the lawfulness of the BLES alternative regulation rules, these arguments were previously addressed in 05-1305. We believe that our December 20, 2006 Opinion and Order fully addressed

the Commission's analysis of the facts, under the applicable competitive test, in reaching the conclusion to approve AT&T Ohio's application for BLES alternative regulation in the identified exchanges. Therefore, the Consumer Groups' application for rehearing under allegation of error 43 is denied.

- (43) The Consumer Groups contend that the Commission erred by failing to hold a hearing on AT&T Ohio's BLES alternative regulation application (Consumer Groups Memorandum in Support at 50). The Consumer Groups argue that the Commission did not specifically explain the basis for its denial of the request for a hearing (*Id.*). In light of the Commission's refusal to hold a hearing, the Consumer Groups question what exactly constitutes clear and convincing evidence that a hearing is necessary, as contemplated by Rule 4901:1-4-09(G), O.A.C. Additionally, the Consumer Groups contend that they have raised numerous deficiencies in AT&T Ohio's application that can only be resolved pursuant to fact-finding in the context of a hearing (*Id.* at 51).
- (44) AT&T Ohio rejects the Consumer Groups' argument that a hearing was necessary in this proceeding. AT&T Ohio believes that the fact-finding and hearing contemplated by the Consumer Groups would be overly burdensome and would, at best, delay regulatory relief for the ILEC's BLES. Additionally, AT&T Ohio points out that the Commission conducted extensive statewide public hearings on the BLES alternative regulation rules before their adoption in 05-1305. AT&T Ohio notes that it is these same rules that are now simply being applied in this case (AT&T Ohio Memorandum Contra at 36).
- (45) Pursuant to Rule 4901:1-4-09(G), O.A.C., the determination as to whether a hearing should be held specific to a particular ILEC application is left to the discretion of the Commission upon the showing of clear and convincing evidence that a hearing is necessary. Upon its review of the record, the Commission determined that a hearing was not necessary inasmuch as clear and convincing evidence had not been presented establishing the need for a hearing. Rather, the Commission finds that a sufficient record had already been developed allowing for the application of the competitive tests in the identified exchanges without the need for a hearing.

Therefore, the Consumer Groups' application for rehearing with respect to allegation of error 44 is denied.

- (46) Finally, the Commission notes that any remaining assignments or allegations of error not specifically addressed in this Entry on Rehearing, including any new arguments specific to the rules that would have been more appropriately raised in the rulemaking proceeding (05-1305), rather than in response to AT&T Ohio's application, are denied.

It is, therefore,

ORDERED, That the Consumer Groups' application for rehearing is denied, as set forth above. It is, further,

ORDERED, That, consistent with our December 20, 2006 Opinion and Order, the record from Case No. 05-1305-TP-ORD should be considered as part of the record in this case, including but not limited to all of the Commission's orders as well as the evidence submitted by the parties in that case. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

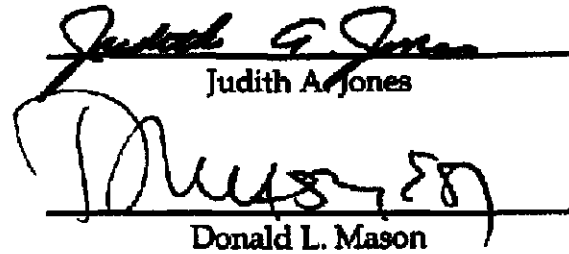
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



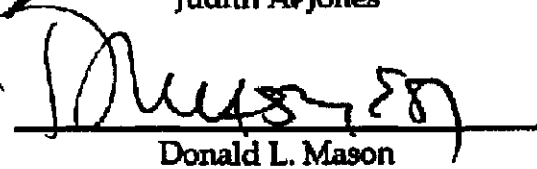
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Secretary