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ATT OHIO'S Application*

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of)
The Ohio Bell Telephone Company d/b/a)
AT&T Ohio for Approval of an) Case No. 07-1312-TP-BLS
Alternative Form of Regulation of Basic)
Local Exchange Service and Other Tier 1)
Services Pursuant to Chapter 4901:1-4,)
Ohio Administrative Code.)

**OPPOSITION TO AT&T OHIO'S APPLICATION
FOR BASIC LOCAL SERVICE ALTERNATIVE REGULATION
AND
DEMONSTRATION OF WHY THE APPLICATION
SHOULD NOT BE GRANTED
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

PUBLIC

*****REDACTED INFORMATION ASSERTED TO BE
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ATTACHMENTS:

AFFIDAVIT OF KAREN J. HARDIE

AFFIDAVIT OF PATRICIA A. TANNER

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I. INTRODUCTION AND SUMMARY

The Public Utilities Commission of Ohio ("PUCO" or "Commission") "believes that, by their very nature of encompassing basic local exchange services, residential Tier 1 services necessitate the need for a higher level of consumer protection and the corresponding Commission oversight."¹ This proceeding presents the Commission with another opportunity to give consumers of basic local exchange service ("BLES")² a higher level of protection.

On December 28, 2007, the Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio" or "the Company"), pursuant to Ohio Adm. Code 4901:1-4-09, filed an Application that would allow the Company to increase its monthly residential basic

¹ *In the Matter of the Review of Chapter 4901:1-6, Ohio Administrative Code*, Case No. 06-1345-TP-ORD, Opinion and Order (June 6, 2007) at 65 (prohibiting the provision of residential BLES by contract).

² BLES is defined in R.C. 4927.01(A).

service rates by up to \$1.25 and its monthly basic Caller ID rates by up to 50 cents every year,³ in eleven AT&T Ohio exchanges.⁴ AT&T Ohio's BLES rate is \$14.25 per month and its basic Caller ID rate is \$6.00. Thus, AT&T seeks the opportunity to increase the BLES rate for consumers in those exchanges by 8.8% and basic Caller ID rates by 8.3%. The eleven exchanges contain, in total, approximately 73,000 residential access lines.⁵

The Office of the Ohio Consumers' Counsel ("OCC"), an intervenor on behalf of residential telephone customers,⁶ files this Opposition to the Application. OCC's Opposition is supported by the affidavits of Karen J. Hardie and Patricia A. Tanner. Based on the requirements of the statute, the Commission's rules and the information in the Application, the discussion herein and the attached affidavits show good cause why the Application should not be granted pursuant to R.C. 4927.03(A)(1), (2) and (3).

R.C. 4927.03(A) allows alt. reg. for BLES if 1) the alt. reg. is in the public interest⁷; 2) BLES is subject to competition or BLES customers have reasonably available alternatives to BLES⁸; and 3) there are no barriers to entry.⁹ The Commission's rules for

³ Ohio Adm. Code 4901:1-4-11(A).

⁴ Five of the exchanges (Canal Winchester, Groveport, Murray City, New Albany and Somerton) were included in one or both of AT&T Ohio's previous BLES alternative regulation ("alt. reg.") applications in Case Nos. 06-1013-TP-BLS ("Case No. 06-1013") and 07-259-BLS ("Case No. 07-259"). The Commission denied AT&T Ohio BLES alt. reg. for those exchanges. See Case No. 06-1013, Opinion and Order (December 20, 2006) ("06-1013 Order"), Attachment C; Case No. 07-259, Opinion and Order (June 27, 2007) ("07-259 Order"), Attachment C. AT&T Ohio's latest BLES alt. reg. application involves six exchanges (Aberdeen, Mantua, Olmstead Falls, Philo, South Solon and Victory) that were not included in AT&T Ohio's other BLES alt. reg. applications.

⁵ See AT&T Ohio 2006 PUCO Annual Report, Schedule 28. OCC inquired of AT&T Ohio how many BLES-only customers and how many BLES plus basic Caller ID-only customers AT&T Ohio has in the target exchanges. AT&T Ohio would not answer these questions. AT&T Ohio's response to OCC Interrogatory No. 1.

⁶ OCC was granted intervention by Entry dated January 17, 2008 (at 2). OCC files this Opposition pursuant to Ohio Adm. Code 4901:1-4-09(F).

⁷ R.C. 4927.03(A)(1).

⁸ R.C. 4927.03(A)(1)(a) and (b).

⁹ R.C. 4927.03(A)(3).

processing incumbent local exchange carrier ("ILEC") applications for BLES alt. reg. contain so-called "competitive tests."

A review of the Exchange Summary Sheet ("ESS") for each exchange, found in Exhibit 3 to the Application, shows AT&T Ohio claims that each exchange meets either Ohio Adm. Code 4901:1-4-10(C)(3) ("Test 3") or Ohio Adm. Code 4901:1-4-10(C)(4) ("Test 4"). Test 3 has three prongs that must be met in each exchange: 15% of total residential access lines in the exchange are provided by unaffiliated competitive local exchange carriers ("CLECs"); **and** at least two unaffiliated facilities-based CLECs are providing BLES to residential customers in the exchange; **and** there are at least five alternative providers serving the residential market in the exchange. Under Test 4, an ILEC may receive BLES alt. reg. for an exchange if the ILEC shows it has lost 15% of its residential access lines in that exchange since 2002 **and** there are at least five unaffiliated facilities-based alternative providers serving the residential market in the exchange.

Although purporting to address the requirements of R.C. 4927.03(A) regarding alt. reg. for stand-alone BLES,¹⁰ the "competitive tests" do not meet the statutory requirements, as discussed herein. The tests do not show that there is competition for, or reasonably available alternatives to, stand-alone BLES.

Test 3 does not result in the showings required by the statute. Merely because CLECs – whether or not facilities-based – may serve an arbitrary percentage of residential access lines in an exchange, or that there are two CLECs providing BLES in the exchange, does not mean that there are no barriers to entry to providing residential

¹⁰ *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Case No. 05-1305-TP-ORD ("05-1305"), Opinion and Order (March 6, 2006) ("05-1305 O&O") at 22, 25. The Commission adopted its rules pursuant to R.C. 4927.03(D).

stand-alone BLES in that exchange. Similarly, the presence of an arbitrary number of “alternative providers” in an exchange also does not equate to the absence of entry barriers to providing residential stand-alone BLES in the exchange.

Test 4 has similar failings. The line loss prong of Test 4 does not show that the lines were lost to unaffiliated providers of stand-alone BLES. Instead, the “losses” may include customers who have switched second lines to the ILEC’s digital subscriber line (“DSL”) service or another carrier’s broadband service. The “losses” also may include lines that were switched to the ILEC’s affiliate wireless carrier or another wireless carrier, which does not represent competition for the ILEC’s stand-alone BLES. The line loss numbers may even include customers who have moved out of the ILEC’s service territory. Thus, the “lost access line” prong of Test 4 does not equate to the “no barriers to competition” and “subject to competition/reasonably available alternatives” showings required by the statute. Likewise, the alternative providers prong of Test 4 does not show that there is competition for, or alternatives to, stand-alone BLES.

This information does **not** show – and, indeed, cannot show – that, for stand-alone BLES in an exchange, 1) there are no barriers to entry and 2) the service is subject to competition or stand-alone BLES customers have reasonably available alternatives for the service, as required by the statute.¹¹ The Commission’s BLES alt. reg. rules are inadequate to make the showing required by law. Under these circumstances, it cannot be possible for BLES alt. reg. to be in the public interest.

In addition, under the Commission’s rules, AT&T Ohio must make the required showing for **all** prongs of a “competitive test” in an exchange in order to meet that test

¹¹ See Sections III., IV., and V. below.

for the exchange. AT&T Ohio has the burden of proof in this proceeding.¹² As OCC demonstrates, however, AT&T Ohio's showing fails the "competitive test" for each exchange in the Application. Thus, AT&T Ohio has failed to carry its burden of proof.

AT&T Ohio asserts that five exchanges meet Test 4.¹³ As discussed above, the "line loss" prong of Test 4 does not meet the statute. Regarding the alternative provider prong of Test 4, AT&T Ohio has failed to show that there are five unaffiliated facilities-based alternative providers of stand-alone BLES in each of these exchanges. AT&T Ohio has not shown that any (much less all) of the wireless carriers provide service comparable to stand-alone BLES throughout the exchanges in question, or even whether consumers can receive wireless services in their homes within an alleged wireless coverage area. With one exception, the alternative providers identified by AT&T Ohio also do not have a service comparable to the Company's stand-alone BLES available throughout the exchange. Therefore, AT&T Ohio fails Test 4 for these exchanges.

AT&T Ohio asserts that Test 3 is met in the other six exchanges.¹⁴ AT&T has not met its burden of showing that four of the CLECs included in its calculation of CLEC market share serve residential customers. Therefore, the Mantua, Olmsted Falls and Philo exchanges do not meet Test 3. In addition, AT&T Ohio asserts that MCI/WorldCom

¹² Ohio Adm. Code 4901:1-4-10(A).

¹³ Aberdeen, Groveport, Somerton, South Solon and Victory. In Case No. 06-1013, AT&T Ohio asserted that Groveport and Somerton met Test 3, but the Commission rejected that assertion. See 06-1013 Order, Attachment C. AT&T Ohio once again asserted that Groveport met Test 3 in Case No. 07-259, but the Commission again denied AT&T Ohio's claim. See 07-259 Order, Attachment C. After having twice failed to qualify Groveport and Somerton under Test 3, AT&T Ohio is now asserting that both exchanges meet the less-stringent requirements of Test 4.

¹⁴ Canal Winchester, Mantua, Murray City, New Albany, Olmstead Falls and Philo. AT&T Ohio asserted that Canal Winchester, Murray City, and New Albany met Test 3 in Case No. 06-1013. The Commission rejected that assertion. See 06-1013 Order, Attachment C. AT&T Ohio once again asserted that Canal Winchester and New Albany met Test 3 in Case No. 07-259. The Commission again rejected that assertion. See 07-259 Order, Attachment C.

("MCI") and Sage Telecom ("Sage") are the two unaffiliated facilities-based CLECs providing BLES to residential customers, needed to meet Test 3, for each of the six Test 3 exchanges.¹⁵ As shown in Ms. Tanner's affidavit¹⁶ and discussed in Section V.D.3., below, neither MCI nor Sage provides service comparable to stand-alone BLES to residential customers. Thus, AT&T Ohio fails to meet the CLEC prong of Test 3 for all six exchanges, and thereby fails Test 3 in its entirety.

As for alternative providers, unlike Test 4, Test 3 does not require the alternative providers to be unaffiliated or facilities-based.¹⁷ Under this test, providers who were disqualified in Test 4 because they were not facilities-based could be restored to the list if they otherwise qualify. As shown herein, however, even without the facilities-based criterion, only one of the Test 4 candidates qualifies under Test 3. Thus, AT&T Ohio does not meet this prong of Test 3.

Under these circumstances, thousands of AT&T Ohio customers in the eleven exchanges do not have the alternatives to the Company's stand-alone BLES required by the Commission's rules, much less by the statutes that permit the Commission to consider BLES alt. reg. Under these circumstances, the Commission cannot grant AT&T Ohio alt. reg. for stand-alone BLES in these exchanges. Indeed, the discussions herein and in the attached affidavits present clear and convincing evidence that extraordinary circumstances exist that necessitate a hearing on the Application before AT&T Ohio

¹⁵ See Application, Exhibit 3, the ESS for the Canal Winchester, Mantua, Murray City, New Albany, Olmstead Falls and Philo exchanges.

¹⁶ Affidavit of Patricia A. Tanner ("Tanner Affidavit"), ¶¶ 36-43.

¹⁷ AT&T Ohio has not put forth any affiliated provider as a Test 3 candidate.

would be granted stand-alone BLES alt. reg. for **any** exchange included in the Application.¹⁸

This pleading is organized as follows: First, there is a discussion of the operative law under which the Commission must review BLES alt. reg. applications. Second, there is a discussion of the standards the Commission has established to review BLES alt. reg. applications.

Third, there is a demonstration that Test 4 does not meet the terms of the statute.¹⁹ Fourth, there is a demonstration that even with the information it provides in the context of Test 4, AT&T Ohio's application does not meet the terms of the statute or the rules if they are interpreted consistent with the statute.

Fifth, there is a demonstration that Test 3 does not meet the terms of the statute. And sixth, there is a demonstration that even with the information it provides in the context of Test 3, AT&T Ohio's application does not meet the terms of the statute or the rules if they are interpreted consistent with the statute.

II. THE LAW AND THE COMMISSION'S IMPLEMENTATION OF THE LAW

In 2005, the General Assembly passed H.B. 218, which amended R.C. 4927.03(A) to allow alt. reg. for BLES. The statute now reads:

¹⁸ See Ohio Adm. Code 4901:1-4-09(G).

¹⁹ The arguments presented herein regarding Tests 3 and 4 meeting the statute are similar to those OCC has raised in previous BLES alt. reg. cases, and the Commission has rejected these arguments. Nevertheless, because those cases are on appeal to the Ohio Supreme Court, OCC must continue to raise these arguments. As the Commission noted, "[T]he Ohio Supreme Court has held that the validity of the Commission's rules can only be determined when a question arises in a matter that is justiciable. Because this proceeding is one of the first cases since the adoption of the BLES alt. reg. rules, this is OCC's first opportunity to raise, in a case where the rules are being applied, the validity of the BLES alt. reg. rules." See 06-1013, Entry (September 27, 2006) at 3, citing *Craun v. Pub. Util. Comm'n*, 162 Ohio St. 9.

(A)(1) The public utilities commission ... may, by order, exempt any such telephone company or companies, as to any public telecommunications service, including basic local exchange service, from any provision of Chapter 4905. or 4909., or sections 4931.01 to 4931.35 of the Revised Code or any rule or order adopted or issued under those provisions, or establish alternative regulatory requirements to apply to such public telecommunications service and company or companies; provided the commission finds that any such measure is in the public interest and either of the following conditions exists:

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

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

(Emphasis added.) "Such telecommunications service," in the context of consideration of alt. reg. for BLES, obviously refers to stand-alone BLES and no other service. In passing H.B. 218, the General Assembly was presumably aware that the Commission had already granted alt. reg. for BLES **when it is included in a package.**²⁰

The General Assembly imposed a specific additional condition on BLES alt. reg.:

(3) To authorize an exemption or establish alternative regulatory requirements under division (A)(1) of this section with respect to basic local exchange service, the commission additionally shall find that **there are no barriers to entry.**

(Emphasis added.) Again, in context, this would require a showing that there were no barriers to entry for the provisioning of stand-alone BLES.

In H.B. 218, the General Assembly did not alter the specific factors that the Commission is required to consider in granting alt. reg., found in R.C. 4927.03(A)(2):

²⁰ Under Ohio Adm. Code 4901:1-6-21(C)(1)(b), bundles of services are "Tier 2" services. Under Ohio Adm. Code 4901:1-4-5(C)(4), Tier 2 services have unrestrained pricing flexibility. AT&T Ohio was granted this elective alt. reg. authority in 2003. *In the Matter of the Application of SBC Ameritech Ohio for Approval of an Alternative Form of Regulation*, Case No. 02-3069-TP-ALT, Opinion and Order (January 6, 2003). At the time, AT&T Ohio was known as SBC Ameritech Ohio. Based on its tariff filings, AT&T Ohio has taken considerable advantage of its pricing freedom.

(2) In determining whether the conditions in division (A)(1)(a) or (b) of this section exist, factors the commission **shall** consider include, but are not limited to:

(a) The number and size of alternative providers of services;

(b) The extent to which services are available from alternative providers in the relevant market;

(c) **The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions;**

(d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(Emphasis added.) The General Assembly did, however, amend the state policy which the Commission must consider²¹ in implementing R.C. 4927.03(A):

It is the policy of this state to:

(1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;

(2) Rely on market forces, **where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market**, to maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications service;....²²

In adopting the BLES alt. reg. rules, the Commission has fallen far short of its duty under R.C. Chapter 4927. Granting BLES alt. reg. to AT&T Ohio based on the Company's submissions would be a further violation of the law.

R.C. 4927.03(A) requires the Commission to find that alt. reg. is in the public interest before it may approve an application. Unless there is real competition at comparable prices for AT&T Ohio's stand-alone BLES, or unless AT&T Ohio's stand-

²¹ R.C. 4927.02(B).

²² R.C. 4927.02(A) (emphasis added).

alone BLES customers have real alternatives to AT&T Ohio's BLES service, granting this application cannot possibly be in the public interest.²³

In implementing H.B. 218, the PUCO determined that an ILEC could satisfy the R.C. 4927.03(A) requirements for an exchange by meeting any one of four competitive tests, or through the ILEC's own alternative market test.²⁴ AT&T Ohio's Application relies on two of the tests in Ohio Adm. Code 4901:1-4-10(C) – Test 3 and Test 4:

(3) An applicant must demonstrate in each requested telephone exchange area that at least fifteen per cent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five alternative providers serving the residential market.

(4) An applicant must demonstrate that in each requested telephone exchange area that at least fifteen per cent of total residential access lines have been lost since 2002 as reflected in the applicant's annual report filed with the commission in 2003, reflecting data for 2002; and the presence of at least five unaffiliated facilities-based alternative providers serving the residential market.

The PUCO, in Ohio Adm. Code 4901:1-4-10(G), also adopted an automatic approval process for BLES alt. reg. applications, and provided for suspension of and a hearing on such applications:

With respect to the four tests identified in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, an ILEC's application shall be approved automatically and become effective on the one hundred twenty-first day after the initial filing, unless suspended by the commission, the legal director, or an attorney examiner. A suspension may be granted at any time if deemed appropriate. A hearing will not be held absent extraordinary circumstances established through clear and convincing evidence, satisfying the commission, that a hearing is needed. Where the commission

²³ Ms. Tanner and Ms. Hardie demonstrate their understanding of the statute. Tanner Affidavit, ¶¶ 4-7; Affidavit of Karen J. Hardie ("Hardie Affidavit"), ¶¶ 12-16.

²⁴ Ohio Adm. Code 4901:1-4-10(C).

determines a hearing is necessary and/or a suspension is ordered, the commission will render a decision on the application within two hundred seventy days of filing.

III. THE COMMISSION'S RATIONALE FOR ADOPTING COMPETITIVE TESTS 3 AND 4 DOES NOT SHOW COMPLIANCE WITH R.C. 4927.03(A).

In the 05-1305 Entry on Rehearing, the Commission justified the competitive market tests adopted there, as follows:

Realistically, 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.²⁵

The Commission thus interpreted "no barriers to entry" to mean "no barriers to entry sufficient to prevent or significantly impede market entry." In fact, if R.C. 4927.03(A)(3) is interpreted as the Commission would have it, the "additional" test from H.B. 218 is mere surplusage; if there were barriers to entry sufficient to prevent or significantly impede market entry for BLES, then BLES could not be subject to competition or have reasonably available alternatives, as R.C. 4927.03(A)(1) requires.²⁶

In the Entry on Rehearing, the Commission also stated:

As we explained in our Opinion and Order, the intent of the competitive market tests set forth in Rule 4901:10-4-10(C), O.A.C., is to require the applicant to demonstrate that that BLES is subject to competition or that reasonably available alternatives exist and that no barriers to entry exist for BLES. ... [T]he Commission, in its rules, focused on specific factors demonstrating for residential BLES customers that all of the statutory criteria found in Section 4927.03(A), Revised Code, have been satisfied. For example, to the extent that an ILEC can demonstrate that it has

²⁵ 05-1305, Entry on Rehearing (May 3, 2006) ("05-1305 Entry on Rehearing") at 17-18.

²⁶ The General Assembly is presumed to want all parts of a statute to be operative. R.C. 1.47. Surplusage is not to be found lightly. *East Ohio Gas v. Pub. Util. Comm'n.*, 39 Ohio St.3d 295, 299 (1988).

lost a "real" percentage of its residential customer base and that there are competitive alternatives available to BLES customers, the Commission is satisfied that barriers to entry are not restricting the ability of competitors to compete.²⁷

As to the line loss criterion of Test 4, the Commission also stated that "the test components measuring access line losses do measure BLES competition because each access line customer previously purchased BLES from the ILEC."²⁸ Both of these reasons ignore the fact that neither the Commission nor AT&T has any idea what portion of the "line loss" in Test 4 is attributable to competition from providers of "functionally equivalent or substitute services" and what is due to other causes, such as migration to the Company's own DSL service.²⁹

According to the Commission, it "previously noted that every customer subscribing to a bundled service which includes BLES is, by definition, also a BLES customer."³⁰ Yet as discussed above, **the Commission previously granted alt. reg. to BLES as part of bundles**, in its finding in 00-1532.³¹ Now the Commission states that "[p]rior to enactment of H.B. 218, BLES was beyond the scope of alternative regulation under Section 4927.03, Revised Code."³² Then how did the Commission place bundled BLES into the classification subject to alt. reg. in 00-1532? The Commission cannot explain how this was done.

²⁷ 05-1305 Entry on Rehearing at 18; see also 06-1310 Entry on Rehearing at 18.

²⁸ 06-1310 O&O at 18.

²⁹ See Section V.C, *infra*.

³⁰ 05-1305 Entry on Rehearing at 18.

³¹ Ohio Adm. Code 4901:1-04-6(C).

³² 05-1305 Entry on Rehearing at 19.

Based on the Commission's previous finding on bundles, this proceeding is limited to the question of alt. reg. for **stand-alone BLES** (given that bundled BLES has already been "alt. reg.'d"). Thus, the existence of competition for BLES in bundles cannot be used to determine whether there is competition or alternatives for stand-alone BLES. As Ms. Tanner states:

Although the Commission may regard BLES as a component of the bundled service packages offered by ILECs and alternative providers, the BLES-only service does not itself compete with the alternative providers' bundled service offerings because they are not functionally equivalent nor substitutes.³³

In the 05-1013 O&O, the Commission focused (again) on the fact that the statute does not require products to be "exactly like BLES."³⁴ The Commission, however, fails to grasp that these bundles are so different from stand-alone BLES as not to be functionally equivalent or substitutes. Likewise, the Commission's statement that consumers view the bundles as substitutes for BLES³⁵ is devoid of support in the record there or here, as far as stand-alone BLES is concerned.

In the 06-1013 Entry on Rehearing:

[T]he 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. 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.³⁶

³³ Tanner Affidavit, ¶ 51 (footnote omitted).

³⁴ 06-1013 O&O at 12, quoting 05-1305 O&O at 25. See also 06-1310 Entry on Rehearing at 10, 15.

³⁵ 06-1013 O&O at 13.

³⁶ 06-1013 Entry on Rehearing at 4 (citations omitted).

The circumstances of this case, with information capable of being grasped in detail, unlike 06-1310, with its multitude of exchanges and carriers, shows how wrong the Commission was.

Regardless of whether the competitive tests are viewed as independent gauges of whether the statute is met or as factors that must be reviewed in conjunction with the statutory criteria, one thing is clear: AT&T Ohio has the burden to show that the tests and the statute are met.³⁷ AT&T Ohio has not met that burden here.

IV. COMPETITIVE TEST 4 DOES NOT MEET THE STATUTE.

As demonstrated in Ms. Hardie's and Ms. Tanner's affidavits, Test 4 does not meet either of the statutory requirements. First, neither prong of the test addresses market power.³⁸ Second, neither the line loss prong nor the alternative providers prong effectively measures the lack of barriers to entry.³⁹ This is especially true if the analysis focuses – as it must, under the statute – on barriers to entry **for the provision of stand-alone BLES**.⁴⁰ Under Test 4 as written, the alternate providers need not explicitly be providing BLES.⁴¹ This is the factor that has been consistently ignored by the Commission.⁴²

³⁷ Ohio Adm. Code 4901:1-4-10(A).

³⁸ Hardie Affidavit, ¶¶ 15, 31.

³⁹ Id., ¶¶ 15, 45.

⁴⁰ R.C. 4927.03(A)(3) states that “[t]o authorize an exemption or establish alternative regulatory requirements under division (A)(1) of this section **with respect to basic local exchange service**, the commission additionally shall find that there are no barriers to entry.” (Emphasis added.) The General Assembly was clearly not asking the Commission to find that there are no barriers to entry in the ice cream sandwich market, or even the market for advanced telecommunications services. The context requires the Commission to find that there are no barriers to entry **for providers of BLES**. R.C. 1.47.

⁴¹ As discussed in Section V. below, however, if the Commission were to follow the statute in conjunction with Test 4, it would find that AT&T Ohio has not met its burden under the statute.

⁴² 06-1013 O&O at 9; 06-1310 Entry on Rehearing at 6.

In the end, as Ms. Hardie states, “Unfortunately, Test 4 fails to include **any** criteria which are consistent with the statutory requirement that the Commission make findings regarding the absence of entry barriers for BLES.”⁴³ This is particularly true given the clear evidence of entry barriers for CLECs.⁴⁴

The line loss test obscures the fact that line losses can be caused by a wide variety of factors that have nothing to do with the statutory criteria or with competitive entry. For example, the “loss” of lines can result from customers switching to AT&T Ohio’s own services, such as DSL service for Internet access,⁴⁵ or AT&T Ohio’s affiliated wireless service.⁴⁶ It is also problematic that Test 4 takes as its starting point 2002, when broadband connections began to significantly increase.⁴⁷ As Ms. Hardie states, “This makes line loss ... a meaningless measure of market power.”⁴⁸ The Commission is required to consider market power in determining whether a service meets the statute.⁴⁹ And Ms. Hardie points out: “A simple comparison of total residential access lines at two points in time would count these disconnected lines as being “lost” – *and represent that “loss” as evidence of competition for the ILEC’s BLES* – when that is plainly not the case.”⁵⁰

Test 4’s alternative provider test also does not measure whether the carriers in question can act to restrain the ILEC’s prices. Market share (and growth in market share)

⁴³ Hardie Affidavit, ¶ 42 (emphasis in original).

⁴⁴ Id., ¶¶ 42-44.

⁴⁵ See id., ¶ 29.

⁴⁶ Id.

⁴⁷ Id., ¶ 32.

⁴⁸ Id., ¶ 31.

⁴⁹ R.C. 4927.03(A)(2)(d).

⁵⁰ Hardie Affidavit, ¶ 36 (emphasis in original).

gives an indication of such capabilities.⁵¹ An alternate provider's longevity in the market is also crucial. As Ms. Tanner states:

A carrier that is "here today" but may be "gone tomorrow" should not be counted as a provider for use in satisfying any of the competitive market tests for BLES alt. reg. because it will not be able to exert competitive market pressure on the ILEC's BLES service offering.⁵²

Those flaws in Test 4 aside, Ms. Hardie states that, with regard to the alternative providers test:

[I]n a third important area identified by the statute, i.e., issues associated with alternative providers **making functionally equivalent or substitute services readily available at competitive rates, terms, and conditions**, I believe that Test 4 enables the Commission to make findings consistent with the statute, if the Commission thoroughly evaluates the services offered by the alternative providers.⁵³

The service under examination here is stand-alone BLES. As Ms. Hardie notes, "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."⁵⁴ This is discussed in the next section. Ms. Tanner correctly points out that although the Commission noted that the various alternative providers are relevant to the Commission's consideration, "the Commission did not automatically confer 'alternative provider' status on any non-ILEC...."⁵⁵ Thus, the Commission must critically analyze each alternative

⁵¹ Tanner Affidavit, ¶ 56.

⁵² Id., ¶ 32.

⁵³ Hardie Affidavit, ¶ 15 (emphasis added).

⁵⁴ Id., ¶ 91.

⁵⁵ Tanner Affidavit, ¶ 47.

provider identified by AT&T in order to determine whether each provider qualifies under the statute and the Commission's rules.

Overall, as Ms. Hardie notes:

It is useful to recall that the Commission's Test 4 was added to the Staff's initial list of three competitive tests, and is similar to a test proposed by the Ohio Telecom Association ("OTA") in ... the Consumer Groups ... noted that adding a test like OTA's, which the Commission has done, would open the possibility for gaming, as the structure of the overall test would become distorted toward the very low threshold provided by a test like Test 4. It is clear from AT&T Ohio's applications in each of its BLES alt. reg. proceedings that [this] observation regarding the impact of including an unbalanced "weak link" in the overall group of competitive tests has been borne out. The weak Test 4 tends to moot the other competitive tests included in 4901:1-4-10(C), i.e., Test 4 is the "logical choice" for an applicant incumbent local exchange carrier ("ILEC") given the relatively more rigorous nature of the other tests.⁵⁶

These considerations should be the cornerstone of the Commission's evaluation of the information that AT&T Ohio has presented on Test 4. Once again, for each exchange in the Application, AT&T Ohio should be held strictly to its burden under the rules and the statute to justify BLES alt. reg.

V. AT&T OHIO'S INFORMATION ON TEST 4 DOES NOT MEET THE STATUTE.

A. The Flaws in AT&T Ohio's Application.

The Commission must understand that AT&T Ohio's Application fails to support its request and is seriously flawed. The Commission should not allow AT&T Ohio to evade its burden of proof here through obfuscation and intentional vagueness. The Commission should send a clear message to applicants for BLES alt. reg. that the

⁵⁶ Hardie Affidavit, ¶ 7 (footnotes omitted).

application is required to provide the explanations necessary to interpret the application and that any shortcomings in the application will not be taken lightly.

B. AT&T Ohio's Documentation Does Not Meet the Requirements of the Statute.

Ms. Hardie states, with regard to AT&T Ohio's support for its application:

AT&T Ohio's Exhibit 3 identifies the criteria which AT&T Ohio apparently believes are relevant for satisfying Tests 3 and 4. These criteria are provided in summary presentation in the ESS which AT&T Ohio has supplied for the 11 exchanges in its application. AT&T Ohio's focus, as shown in each ESS in its Exhibit 3, is misplaced in general, and especially so with regard to wireless carriers. Exhibit 3 provides no evidence that any carrier provides services which are competing with AT&T Ohio's BLES offering, nor does it provide evidence of reasonably available alternatives to BLES. The information conveyed in each ESS has little relevance to the key findings that the Commission must make in this proceeding.⁵⁷

AT&T Ohio's submission specifically falls well short on the statutory factor of showing "[t]he ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions...."⁵⁸

C. The Line Loss Prong.

As discussed above, the line loss prong does not show **any** of the information that the Commission is required to consider under R.C. 4927.03(A). AT&T Ohio has presented residential line numbers for each exchange based on the line count reported in the Company's 2002 Annual Report and calculations made by the Company as of September 30, 2007.⁵⁹ Yet that information does not make AT&T Ohio eligible for BLES alt. reg. **under the statute**. In particular, as Ms. Hardie states:

⁵⁷ Id., ¶ 93.

⁵⁸ R.C. 4927.03(A)(2)(c).

⁵⁹ Application, Memorandum in Support at 4.

[L]ine loss, as opposed to market share [is] a meaningless measure of market power. Market share, by identifying the percentage of the overall market supplied by various firms, will provide critical information regarding the relative position of market participants, and it is only when market shares indicate that market concentration has substantially declined that the Commission can safely rely on market forces to balance the interests of buyers and sellers of BLES.⁶⁰

As Ms. Hardie states: “[L]ines that have simply migrated to another service offering by the applicant ILEC or an ILEC affiliate are not ‘lost’ to a competitor of any kind ... as the customer remains under the umbrella of the parent company.”⁶¹

AT&T Ohio has not excluded from its calculation of “line loss” the lines “lost” to its own DSL,⁶² or its affiliated wireless carrier.⁶³ Indeed, AT&T Ohio has not excluded lines that are **totally** lost, i.e., those abandoned by the customer and not migrated to any other service or carrier.

In previous cases, the Commission attempted to salvage the line loss test by noting that it is accompanied by the alternative providers test.⁶⁴ Yet all this does is to allow alt. reg. in an exchange where lines have been lost – **for whatever reason** – because of the presence of alternative providers that do not provide functionally equivalent services at competitive rates, terms and conditions. Overall, as Ms. Hardie states:

[T]he question of whether the Test 4 exchanges pass or fail the first prong of Test 4 can only be answered after revising the Company’s calculation to exclude: (1) lines transferred to the Company’s DSL

⁶⁰ Hardie Affidavit, ¶ 31.

⁶¹ Id., ¶ 29.

⁶² AT&T Ohio would not provide information on how many access lines were lost due to residential customers switching their second or third line to the Company’s DSL service. See Hardie Affidavit, ¶ 38.

⁶³ Id.

⁶⁴ See, e.g., 06-1013 Order at 19.

service, its DSL affiliate or its wireless affiliates; (2) lines transferred to other broadband providers; (3) lines disconnected and not reconnected with an alternative provider within the Company's service area.⁶⁵

Thus, given the myriad of reasons for the line losses that may have nothing whatsoever to do with competition, and given AT&T Ohio's failure to draw the nexus between the lost lines and competition, it would be incorrect to conclude that AT&T Ohio has satisfied Test 4.

In addition, the test should exclude AT&T Ohio's lost lines that are not stand-alone BLES lines. For example, the loss of an AT&T Ohio bundled line to a wireless carrier or to a CLEC does not show that there is competition for AT&T Ohio's stand-alone BLES. AT&T Ohio's information does not allow this analysis. Thus, it cannot be said that AT&T Ohio has passed the line loss test consistent with the statute in any of the exchanges proposed for Test 4.

D. The Alternative Provider Prong.

Test 4 requires that the applicant demonstrate "the presence of at least five facilities-based alternative providers serving the residential market" in the exchange. AT&T Ohio has not demonstrated that it meets the statute with the information it provides.

"Facilities-based alternative provider" is defined in Ohio Adm. Code 4901:1-4-01(G) as:

[A] provider of competing service(s) to the basic local exchange service offering(s) using facilities that it owns, operates, manages or controls to provide such services, regardless of the technology and facilities used in the delivery of the services (wireline, wireless, cable, broadband, etc.).

⁶⁵ Hardie Affidavit, ¶ 37.

(Emphasis added.) Further, the statute requires that the Commission consider “[t]he ability of providers to make functionally equivalent or substitute services readily available to customers at competitive rates, terms, and conditions.”⁶⁶ As Ms. Hardie states, with regard to issues associated with alternative providers making functionally equivalent or substitute services readily available at competitive rates, terms, and conditions, this prong of “Test 4 enables the Commission to make findings consistent with the statute, if the Commission thoroughly evaluates the services offered by the alternative providers.”⁶⁷

Ms. Hardie discusses in detail what makes a service functionally equivalent to another.⁶⁸ Further, Ms. Hardie notes that “[t]he ready availability of functionally equivalent or substitute services specified by the statutory language directs that the services in question should be substitutable for a broad portion of the population.”⁶⁹

In the end:

If the Commission does not establish that facilities-based competition for BLES is ubiquitous in each requested exchange area, including evidence that other facilities-based firms are actually supplying BLES, then AT&T Ohio will be able to gain regulatory relief in the face of clear evidence of continuing entry barriers. But absent facilities-based alternative providers for BLES, consumers will not experience market forces which are capable of constraining the market power possessed by AT&T Ohio.⁷⁰

In the previous BLES alt. reg. cases, the Commission rejected a requirement that an applicant “verify that an identified alternative provider makes the service available to

⁶⁶ R.C. 4927.03(A)(2)(c). See also 05-1305 O&O at 25.

⁶⁷ Hardie Affidavit, ¶ 15 (emphasis added); see R.C. 4927.03(A)(2)(c).

⁶⁸ Hardie Affidavit, ¶¶ 17-24; see also Tanner Affidavit, ¶¶ 50-51.

⁶⁹ Hardie Affidavit, ¶ 20.

⁷⁰ Id., ¶ 43.

the entirety of a market” because that would be difficult for an applicant to prove.⁷¹ Of course, that is a problem caused by the Commission’s choice of test, and cannot justify not following the statute. But the truth is that AT&T Ohio has not shown that the alternative providers’ services are available even to a majority of the customers in an exchange. The bottom line is that under the Commission’s test, there will be customers – perhaps many customers – who do not have the competition or alternatives required by the statute.

Ms. Tanner sets out the basic conditions under which alternative providers must be evaluated:

Alternative providers that are “relevant to [the Commission’s] consideration” must satisfy three conditions, according to the language in the Test and in the aforementioned definition. *First*, the provider must be “a provider of competing service(s) to the basic local exchange service offering(s)” of the ILEC in question, per 4901:1-4-01(B), O.A.C. *Second*, the provider must have a “presence” in the market, per 4901:1-4-10(C)(3), O.A.C. *Third*, the provider must be “serving the residential market,” per 4901:1-4-10(C)(3), O.A.C.⁷²

Ms. Tanner discusses in detail the meaning and implications of these three conditions.⁷³

A “provider of competing services” must make services available in the relevant market⁷⁴ and must provide services that are reasonably similar to stand-alone BLES in order to be functional equivalents or substitutes for BLES.⁷⁵ Further, the services must be

⁷¹ See 06-1013 Order at 15; see also 06-1013 Entry on Rehearing at 13.

⁷² Tanner Affidavit, ¶ 47 (emphasis in original).

⁷³ Ms. Tanner’s discussion is made in the context of the use of “alternative providers” under Test 3. The issues are identical under Test 4, however.

⁷⁴ Id., ¶ 49.

⁷⁵ Id., ¶¶ 50-51. Ms. Tanner discusses numerous aspects of BLES that determine whether an alternative provider’s service is reasonably similar to BLES. Id., ¶ 51.

“readily available”⁷⁶ and must be available at “competitive rates, terms and conditions” to stand-alone BLES.⁷⁷ Further, the Commission must consider market power issues when considering whether an alternative provider’s service is functionally equivalent to or a substitute for an ILEC’s BLES.⁷⁸ The Commission’s argument that functionally equivalent services need not be similarly priced to stand-alone BLES in order to be competitively priced⁷⁹ ignores economic reality. Likewise the statement that “factors like longevity in the market, while somewhat noteworthy, do not have a direct bearing on the state of the competitive market at any given point in time”⁸⁰ is divorced from economic reality.

The language of the second prong of Test 4 requires the Commission to assess whether an alternative provider has a “presence” in the market. In that regard, Ms.

Tanner asserts that:

An alternative provider with a “presence” in the market must be shown to be a viable competitive provider capable of exerting competitive market pressure on the ILEC’s BLES service offering. A carrier providing service to 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 were granted.⁸¹

And finally, the second prong of Test 4 requires that an alternative provider be “serving the residential market.” Ms. Tanner states that:

⁷⁶ Id., ¶¶ 52-53.

⁷⁷ Id., ¶¶ 54-55. Ms. Tanner discusses numerous factors that must be considered when comparing rates, terms and conditions. Id., ¶ 55.

⁷⁸ Id., ¶¶ 56-57.

⁷⁹ 06-1013 O&O at 14.

⁸⁰ 06-1310 Entry on Rehearing at 11.

⁸¹ Tanner Affidavit, ¶ 58.

The phrase “serving the residential market” must be interpreted in compliance with the language in the statute, which requires a showing that the ILEC’s BLES is subject to competition. The active nature of the phrase dictates that an alternative provider “serving the residential market” must be actively marketing its services to residential customers. Alternative providers that have customers but are not active market participants are *not* making “functionally equivalent or substitute services” to the ILEC’s BLES “readily available at competitive rates, terms and conditions,” and must be excluded from the list of alternative providers operating in a given exchange.⁸²

In the end, as Ms. Tanner states, “ignoring these three conditions would divorce the competitive market tests from the statutory requirements that were established by the Legislature for the purpose of determining whether an ILEC’s BLES is subject to competition or has reasonably available alternatives.”⁸³ The review of AT&T Ohio’s submission that follows is consistent with the statutory requirements.

1. AT&T Ohio’s submission.

The alternative providers identified by AT&T Ohio in the various exchanges for the second prong of Test 4 include ten wireline providers: ACN Communications Services (“ACN”), Comcast/Insight Phone (“Insight”), Cox Communications (“Cox”), First Communications (“FirstComm”), MCI, Revolution Communications (“Revolution”), Sage, Talk America, Time Warner Cable (“Time Warner”) and Trinsic Communications (“Trinsic”). AT&T also names five wireless providers – Alltel Wireless (“Alltel”), Cincinnati Bell Wireless (“Cincinnati Bell”), Sprint/Nextel (“Sprint”), T-Mobile and Verizon Wireless (“Verizon”) – as alternative providers for Test 4.

The following table shows the alternative providers that AT&T Ohio submits to meet the second prong of Test 4, on an exchange basis:

⁸² Id., ¶ 59 (emphasis in original; footnote omitted).

⁸³ Id., ¶ 60.

Exchange	Facilities-based providers asserted by AT&T Ohio to be serving the residential market in the exchange	Total
Aberdeen	FirstComm, Cincinnati Bell, MCI, Sage, Verizon	5
Groveport	ACN, FirstComm, Insight, MCI, Revolution, Sage, Sprint, Trinsic, Verizon	9
Somerton	Alltel, MCI, Sage, Sprint, Verizon	5
South Solon	ACN, MCI, Revolution, Sage, Sprint, T-Mobile, Time Warner, Verizon	8
Victory	ACN, Alltel, Cox, FirstComm, MCI, Revolution, Sage, Talk America, Trinsic, Sprint, Verizon	11

The following discussion evaluates the wireless providers first, and then the wireline providers, and shows that AT&T Ohio has not met the test in the rules when the test is interpreted consistent with the governing statute.

2. Wireless alternative providers.

In light of AT&T Ohio's implicit claim that its five designated wireless alternative providers supply a readily available and functional equivalent to BLES, Ms. Hardie offers a valuable analogy: that although some individuals may drive automobiles, and others may ride motorcycles, this does not mean that motorcycles are necessarily functional equivalents or substitutes for automobiles.⁸⁴ The relevance here is that "while it might be the case that we observe that a small number of individuals 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."⁸⁵

⁸⁴ Hardie Affidavit, ¶¶ 22-23.

⁸⁵ Id., ¶ 24.

Likewise, automobiles of significantly differing prices are not competing and reasonably available alternatives for one another.⁸⁶ The relevance here is that careful consideration must be given to the rates, terms, and conditions associated with the offerings of the alternative providers that have been identified by AT&T Ohio to meet Test 4.⁸⁷ If these differ significantly from the rates, terms and conditions associated with BLES, then the services cannot be viewed as competing with BLES, and the wireless carriers cannot be considered alternative providers that satisfy the Commission's Test 4.⁸⁸

As Ms. Hardie states:

The Commission has thus established a threshold criterion associated with the specific services offered by an alternative provider, i.e., they must be *competing service(s)* to the applicant ILEC's *basic local exchange service offering(s)*. Given the statutory requirement of a Commission finding of either competition for BLES, or reasonably available alternatives for BLES, *competing services* under Test 4 must encompass one or the other of these alternatives.⁸⁹

a. Functionally equivalent services.

The candidate wireless alternative providers identified by AT&T Ohio do not offer functional equivalents to BLES, as BLES is defined by R.C. 4927.01(A).⁹⁰ This is because wireless phones do not offer a functional equivalent or substitute for dial tone,⁹¹

⁸⁶ Id., ¶ 26.

⁸⁷ As discussed below, these issues also impact whether AT&T Ohio meets Test 3, which also includes a prong dealing with alternative providers.

⁸⁸ Id., ¶ 27.

⁸⁹ Id., ¶ 17; see also Tanner Affidavit, ¶ 48.

⁹⁰ Ohio Adm. Code 4901:1-04-01(C) defines BLES as the statute does.

⁹¹ Hardie Affidavit, ¶¶ 53-56; see Ohio Adm. Code 4901:1-04-01(C)(1).

do not yet offer a functional equivalent or substitute for E9-1-1,⁹² and miss the definition in other ways.⁹³

AT&T Ohio claims that wireless providers are alternative providers in all eleven exchanges included in the Application. A review of the PUCO's wireless E9-1-1 map shows that wireless is not functionally equivalent to BLES in many of these exchanges. The Application includes exchanges serving Cuyahoga,⁹⁴ Greene,⁹⁵ Madison,⁹⁶ Perry,⁹⁷ Pickaway⁹⁸ and Portage⁹⁹ counties. As of January 28, 2008, none of those counties had implemented any portion of their wireless E9-1-1 plans.¹⁰⁰ Thus, wireless is not functionally equivalent to BLES in exchanges located in these counties.

Further, as Ms. Hardie shows, wireless is "a poor substitute for wireline services in general, including BLES."¹⁰¹ The reasons include lack of a practical means for Internet access and other services,¹⁰² and the fact that "for a family to replace a wireline telephone with a wireless alternative, multiple wireless telephones will be required,

⁹² Hardie Affidavit, ¶¶ 57-58; see Ohio Adm. Code 4901:1-04-01(C)(3).

⁹³ Hardie Affidavit, ¶¶ 59-61.

⁹⁴ Olmstead Falls and Victory.

⁹⁵ South Solon.

⁹⁶ South Solon.

⁹⁷ Murray City.

⁹⁸ Canal Winchester and Groveport.

⁹⁹ Mantua.

¹⁰⁰ See PUCO map "Ohio Wireless Enhanced 9-1-1 January 28, 2008," available at <http://www.puc.state.oh.us/pucogis/E911Wireless.pdf> (accessed January 30, 2008). The map also showed that Franklin County had not implemented a wireless E9-1-1 plan as of January 28, 2008. Franklin County, however, apparently has implemented parts of its plan, with the City of Columbus scheduled to implement wireless E9-1-1 by early March 2008. See "City to roll out 911 service upgrade," Columbus Dispatch (February 5, 2008) at 2B. A search of the PUCO's docket for amending countywide 9-1-1 plans (05-1114-TP-EMG) shows that Greene and Perry counties apparently have not yet even filed for approval of an amended 9-1-1 plan to include wireless E9-1-1.

¹⁰¹ Hardie Affidavit, ¶ 62.

¹⁰² Id., ¶ 63.

increasing the cost and complexity of the replacement for BLES.”¹⁰³ In addition, wireless service quality is an impediment to replacing a wireline phone.¹⁰⁴ These service quality problems lead, perforce, to wireless carriers’ disclaimers about the ability of the service to be available **indoors**, rather than outdoors.¹⁰⁵ Indeed, Verizon’s CEO, Ivan Seidenberg, has publicly stated that people have unrealistic expectations about a wireless service working everywhere. He is reported to have said, “Why in the world would you think your (cell) phone would work in your house? The customer has come to expect so much. They want it to work in the elevator; they want it to work in the basement.”¹⁰⁶

Thus, as Ms. Hardie states:

[I]t is not surprising to find the results of a TNS Telecoms Survey released in June of 2006 reporting that the wireline phone is the most important communications product in the household, as compared to wireless services and broadband Internet access. This is an important result for the Commission to consider. It shows that consumers identify distinct characteristics associated with wireless and wireline services, and continue to identify the wireline phone connection as the most important.¹⁰⁷

These distinctions also are shown by Ms. Hardie’s analysis of the characteristics of those who have “cut the cord” (or never had a cord to begin with).¹⁰⁸ Wireless-only

¹⁰³ Id., ¶ 64. This means that “with wireless only, ‘calling home’ becomes a hit or miss proposition.” Id.

¹⁰⁴ Id., ¶¶ 66-70.

¹⁰⁵ Id., ¶ 66.

¹⁰⁶ “Verizon CEO sounds off on Wi-Fi, customer gripes. Seidenberg also explains phone company’s reasons for wanting to buy MCI,” *San Francisco Chronicle*, April 16, 2005, at C1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/04/16/BUGJ1C9R091.DTL&hw=seidenberg&sn=001&sc=1000> (accessed April 9, 2007).

¹⁰⁷ Hardie Affidavit, ¶ 65, citing “Wired Line Phone Considered Most Important Household Communications Product,” TNS Telecoms (June 22, 2006), available at <http://www.tnstelecoms.com/press-6-22-06.html>.

¹⁰⁸ Id., ¶ 72. Ms. Hardie notes that “[i]t is likely that wireless-only consumption is, for a portion of the population, part of a telecommunications-demand life-cycle, where consumers may find it difficult to afford both wireline and wireless when they are young, and do not have a family, and adjust consumption to include wireline services as they age.” Id. at 74.

customers represent a niche market, like motorcycle-only owners. Further, a table in Ms. Hardie's affidavit showing the results of a survey of wireless users who have no plans to cut the cord shows the "lack of functional equivalency between wireless and wireline services."¹⁰⁹

AT&T Ohio also presents information on the porting of wireline numbers to various of the so-called alternatives.¹¹⁰ As Ms. Hardie points out, this information not only includes both residential and business numbers,¹¹¹ but also shows that the porting of wireline numbers to wireless phones is limited.¹¹²

Ms. Hardie states:

The statutory provisions regarding exemption for BLES require that the Commission find that competition exists and/or that consumers have reasonably available alternatives. When considering whether alternative providers meet these requirements, it is clear that wireless firms do not provide functionally equivalent services for BLES, nor do wireless services provide a reasonable and readily available substitute for Ohio consumers who subscribe to BLES.¹¹³

Thus, in this respect, AT&T Ohio's submission on Test 4 does not meet the terms of the statute.

b. Competitive rates.

Ms. Hardie notes that:

Within the context of alternative regulation for BLES, the statutory provisions indicate that findings of competition and reasonably available alternatives should be based on, among other factors, the

¹⁰⁹ Id., ¶ 70, citing responses to Forrester Research, "Cord Cutting Grows into the U.S. Mainstream" (March 30, 2006); available for purchase at <http://www.forrester.com/Research/Document/Excerpt/0,7211,39170,00.html>.

¹¹⁰ Via the "Ported Numbers" sheets in Exhibit 3. See id., ¶¶ 97, 107.

¹¹¹ Id., ¶ 107.

¹¹² Id., ¶¶ 97, 107.

¹¹³ Id., ¶ 71.

services available from alternative providers having competitive rates. This provision of the statute reflects the fact that prices of alternatives must be similar for competition to place any constraint on market power. If the services offered by alternative providers have prices which are significantly above those associated with BLES, then the services do not place a competitive constraint on the incumbent BLES provider.¹¹⁴

AT&T Ohio's flat rate residential BLES is \$14.25 per month,¹¹⁵ plus \$5.77 for the monthly federal subscriber line charge ("SLC"),¹¹⁶ for a total of \$20.02, exclusive of other taxes and fees. Wireless service is not available at rates that are competitive to AT&T Ohio's BLES rate.

Ms. Hardie provides a comparison of the cost of various wireless rate plans to AT&T Ohio's BLES rate.¹¹⁷ This analysis shows that, for the wireless carriers claimed by AT&T Ohio in both Test 3 and Test 4, wireless service comes at a premium price:

For an AT&T Ohio BLES customer, the price *increase* associated with substituting wireless for AT&T Ohio's BLES ranges from \$20.35 to \$60.35 (representing percentage increase amounts ranging from 200% to 400% per month). The wireless plans rates are 3 to 4 times as costly as AT&T Ohio's BLES. A price point 3 to 4 times BLES does not provide a competing price. Thus, the rates shown above for AT&T Ohio's candidate wireless alternative providers are not competitive with AT&T Ohio's BLES. Competitive rates are rates that allow the consumer's choice to be unhindered by a significant price differential. Experiencing a price increase of 200% or more does not present the consumer with a "competitively priced" service. Such a price differential also does not provide much (if any) of a pricing constraint on AT&T Ohio. Thus AT&T Ohio's candidate wireless alternative providers do not, on the basis of price, provide a competing service with BLES.¹¹⁸

¹¹⁴ Id., ¶ 74.

¹¹⁵ SBC Ohio PUCO No. 20, Part 4, Section 2, Original sheet No. 2.2, effective January 9, 2003 and Sixth revised sheet No. 19, effective January 9, 2003.

¹¹⁶ Ameritech Operating Companies Tariff F.C.C. No. 2, 42nd revised page 79, effective October 1, 2007.

¹¹⁷ Hardie Affidavit, ¶ 77.

¹¹⁸ Id. (emphasis in original).

Ms. Hardie performed a similar analysis for households that currently have wireline and wireless service, to see whether expanding an already existing wireless service to replace BLES is competitive with the wireline service.¹¹⁹ These results also show that “AT&T Ohio’s candidate wireless alternative providers do not, on the basis of price, provide a competing service with BLES, even if a consumer already purchases wireless service.”¹²⁰

In addition to the price differentials, there are “other characteristics of wireless plans prevent them from offering a competing service to BLES.”¹²¹ Primarily, there is the fact that the wireless carriers claimed by AT&T Ohio require consumers to enter into long-term contracts in order to get service that includes usage similar to that seen for customers of AT&T Ohio’s stand-alone BLES.¹²² These contracts include early termination fees.¹²³ Wireless services also must be purchased as part of a bundle.¹²⁴ Other significant factors include the night/weekend calling distinction that is not present for AT&T Ohio BLES,¹²⁵ and the “tying” with wireless handsets.¹²⁶

All these factors certainly contribute to the fact that these wireless carriers position their products as competitive with each other, not with wireline service.¹²⁷

Ms. Hardie demonstrates that, overall, based on the wireless carriers submitted by AT&T Ohio, “for AT&T Ohio BLES customers, functionally equivalent or substitute

¹¹⁹ Id., ¶¶ 78-79.

¹²⁰ Id.

¹²¹ Id., ¶¶ 80-85.

¹²² Id., ¶¶ 80, 90.

¹²³ Id. ¶¶ 83, 90

¹²⁴ Id., ¶ 84.

¹²⁵ Id., ¶ 81.

¹²⁶ Id., ¶ 82.

¹²⁷ Id., ¶¶ 86-90.

wireless services are not readily available at competitive rates, terms, and conditions.”¹²⁸

Thus, AT&T Ohio’s proof on the wireless providers included in its “alternative providers” prong of Test 4 fails.

c. Readily available.

The “alternative providers” prong of Test 4 requires the “presence of at least five facilities-based alternative providers” in the exchange. The rules do not define “presence.” AT&T Ohio has defined the term as “providing service,”¹²⁹ which is not very helpful. As Ms. Tanner states:

[T]his term must be interpreted by applying the statutory language appearing in R.C. 4927.03(A) regarding whether a public telecommunications service is “subject to competition” or has “reasonably available alternatives.” Specifically, R.C. 4927.03(A)(2) requires the Commission to consider the “size of alternative providers of services” and “other indicators of market power, which may include market share....” The size of the carrier speaks to its ability to serve customers throughout the exchange, both today and on a going-forward basis. Similarly, assessing market share assists in determining whether the carrier has a true “presence” in the market.¹³⁰

The Commission has noted that “the law provides that the Commission consider the ability of providers to make functionally equivalent or substitute services readily available to customers....”¹³¹ Ms. Hardie notes that “ready availability ... directs that the services in question should be substitutable for a broad portion of the population.”¹³² Further, Ms. Tanner notes that “[b]ecause the statute requires the Commission to evaluate ‘the extent to which service is available from the alternative provider’ in the exchange, an

¹²⁸ Id., ¶ 91.

¹²⁹ AT&T Ohio Response to OCC Interrogatory 3.b.

¹³⁰ Tanner Affidavit, ¶ 32 (footnotes omitted); see also id., ¶ 58.

¹³¹ 05-1305 O&O at 25 (emphasis in original).

¹³² Hardie Affidavit, ¶ 20.

alternative provider that is unable to provide service in certain parts of an exchange would not satisfy this portion of the statute.”¹³³ Thus the issue is whether the wireless alternative providers claimed by AT&T Ohio make their services “readily available” throughout the exchanges submitted by the Company. As shown here, they do not.

AT&T Ohio has presented five wireless carriers as alternative providers. There is substantial question about whether the wireless carriers’ services are available throughout many of these exchanges. AT&T Ohio uses coverage maps retrieved from the carriers’ websites as proof.¹³⁴ Yet as Ms. Hardie states, “The coverage maps ... provide no evidence that consumers are capable of utilizing wireless services in any specific location, and do not demonstrate that wireless services are capable of reaching consumers indoors at their homes, that would be a reasonable prerequisite for BLES substitution.”¹³⁵

First, there is the fact that the coverage maps do not include any objective information regarding signal strength in an indoor environment.¹³⁶ In fact, the disclaimers that accompany coverage maps show their limited reliability. The disclaimer that accompanies Verizon’s coverage maps is the most extensive of those:

The maps that display within the Coverage Locator Tool are not a guarantee of coverage and contain areas with no service. The maps rendered show only approximations (based on our internal data) of where rates and coverage apply.

- Verizon Wireless coverage depictions in the rate and coverage maps are based on generally accepted engineering predictive and modeling tools, used to measure radio frequency transmissions from cell towers. Our rate and coverage maps depict wireless coverage based on predictive modeling parameters determined by our network engineers.

¹³³ Tanner Affidavit, ¶ 49.

¹³⁴ See Application, Exhibit 3, the ESS for each exchange.

¹³⁵ Hardie Affidavit, ¶ 108.

¹³⁶ Id., ¶ 87.

- Since wireless service is transmitted on a radio signal over the airways, it is subject to network and transmission limitations such as cell site availability (particularly near boundaries and in remote areas).
- Your wireless equipment, weather, topography and other environmental considerations associated with radio technology, also affects wireless service. For example, your wireless phone may work perfectly driving home one night, but then not work as well driving in the same place the next night during a thunderstorm. Additionally, service may vary significantly within buildings.
- Some coverage information on service outside the Verizon Wireless proprietary network, although depicted as America's Choice, is based on information from other carriers (roaming partners) or publicly available information, and we cannot vouch for its accuracy.
- With "all-digital" devices you can only make and receive calls when digital service is available. When digital service is not available, your device will not operate or be able to make 911 calls.
- The rate and coverage maps also show approximately where the calling plan home airtime rates apply.

We advise you to check the roaming indicator on your wireless phone to determine actual areas where rates are available. When the phone's roam indicator is not displayed, or the banner display reads "Verizon Wireless Network," home airtime rates apply. When the digital indicator is on, digital features and services are available. When the roam indicator is flashing or the banner display reads "Extended Network" home airtime rates still apply, but additional features and services may not be available. When the roam indicator is solid or the banner display reads "Roaming," roam rates apply and digital features and services are not available.¹³⁷

¹³⁷ See <http://www.verizonwireless.com/b2c/coveragelocator/mapInformation.jsp> (emphasis in original).

Notably, AT&T Ohio does not even mention these substantial disclaimers, which appear on the websites of all of the carriers it claims to be providing service in the target Test 4 and Test 3 exchanges.¹³⁸

AT&T Ohio also presents results of searches of “WirelessAdvisor.com” it performed, using a single Zip Code from each exchange.¹³⁹ Although “[i]nformation from the WirelessAdvisor.com web site indicates that it is a *possibility* that certain wireless firms may be providing general wireless services in a particular Zip-Code area,”¹⁴⁰ the WirelessAdvisor.com site includes a very careful disclaimer for its information.¹⁴¹ AT&T Ohio did not include this disclaimer with its Application. Further, a vague indication of service in one Zip Code in an exchange says nothing about the other Zip Codes in that exchange.

Clearly, these maps do not show that the designated wireless carriers provide service throughout the target exchanges, much less provide “functionally equivalent or substitute services readily available to customers....”¹⁴² Thus the wireless carriers cannot qualify under the statute.

d. Summary on wireless alternative providers.

Ms. Hardie summarizes her findings on the characteristics of wireless providers compared to AT&T Ohio’s BLES.¹⁴³ Overall, “for AT&T Ohio BLES customers

¹³⁸ See www.sprintpcs.com, PCS terms and conditions; <http://alltel.com>, Alltel Wireless National Freedom Coverage Map.

¹³⁹ Hardie Affidavit, ¶ 103.

¹⁴⁰ Id., ¶ 104 (emphasis in original).

¹⁴¹ Id., ¶ 105.

¹⁴² 05-1305 O&O at 25 (emphasis in original).

¹⁴³ Hardie Affidavit, ¶ 91.

functionally equivalent or substitute wireless services are **not** readily available at competitive rates, terms and conditions.”¹⁴⁴ Thus the wireless carriers cannot help AT&T Ohio meet this prong of Test 4 consistent with the statute.

3. Wireline alternative providers.

In its effort to meet the second prong of Test 4, AT&T Ohio submits ten wireline providers: ACN, Cox, FirstComm, Insight, MCI, Revolution, Sage, Talk America, Time Warner and Trinsic. As shown herein, almost all of these wireline providers do not meet the rule or the statute, in terms of being a facilities-based provider of a service that competes with AT&T Ohio’s stand-alone BLES. The companies’ qualifications under the rule and the statute are discussed here in alphabetical order.

a. ACN

ACN is identified as a facilities-based alternative provider for the Groveport, South Solon and Victory exchanges. ACN’s service does not include unlimited local calling, and thus is not a functional equivalent to BLES.¹⁴⁵ Further, ACN’s rate for this lesser service is 22% more than AT&T Ohio’s BLES rate.¹⁴⁶ This indicates that the “few residential lines ACN does serve ... are not likely to be lines subscribing to residential stand-alone BLES.”¹⁴⁷ ACN also serves few customers in two of the three Test 4 exchanges in which it is identified as an alternative provider.¹⁴⁸ Thus ACN can hardly be said to have a “presence” in those exchanges. ACN does not qualify as a facilities-based alternative provider for the second prong of Test 4.

¹⁴⁴ Id. (emphasis added).

¹⁴⁵ Tanner Affidavit, ¶ 62.

¹⁴⁶ Id.

¹⁴⁷ Id., ¶ 63.

¹⁴⁸ Id., ¶ 122.

b. Cox

Cox is identified as a facilities-based alternative provider for the Victory exchange. Cox is a cable operator that offers digital telephone service over its own network facilities in limited areas of Cuyahoga County.¹⁴⁹ Cox's service and its rate are comparable to AT&T Ohio's BLES.¹⁵⁰ There are concerns, however, regarding the ability of customers to access 911 service and the ability of Cox's service to operate during power outages.¹⁵¹ In addition, Cox's service apparently is not available throughout the Victory exchange. Therefore, Cox should not be counted as an alternative provider of residential service for the Victory exchange.

c. FirstComm

AT&T Ohio identifies FirstComm as a facilities-based alternative provider for the Aberdeen, Groveport and Victory exchanges. Although FirstComm does not offer a stand-alone BLES service, it does have limited packages priced at \$19.95, which would appear to qualify it as a competing service under the statute and the rules.¹⁵² In addition, FirstComm appears to have established a "presence" in the Groveport and Victory exchanges, but not in the Aberdeen exchange.¹⁵³ Thus, FirstComm may be counted as an alternative provider of residential service for the Groveport and Victory exchanges.¹⁵⁴

¹⁴⁹ Id., ¶ 66.

¹⁵⁰ Id., ¶ 68.

¹⁵¹ Id., ¶¶ 69-70.

¹⁵² Id., ¶ 74.

¹⁵³ Id., ¶ 127.

¹⁵⁴ Id., ¶ 125.

d. Insight

Insight is identified as a facilities-based alternative provider for the Groveport exchange. Insight's service bundle of local and long distance, plus voice mail, Caller ID, and 12 other features,¹⁵⁵ and thus is not functionally equivalent to or a substitute for AT&T Ohio's BLES.

The service is available for a promotional price of \$35.39 or \$45.39, subscriber line charge included, for one year¹⁵⁶ – approximately double the price of AT&T Ohio's BLES. Thus, Insight's service is not readily available at rates, terms, and conditions comparable to AT&T Ohio's BLES. Insight's tariff filed with the PUCO includes a stand-alone BLES service called "Local Only Offer," priced at \$18.04, subscriber line charge included.¹⁵⁷ The "Local Only Offer" would be comparable to AT&T Ohio's BLES offering, but is not being marketed by Insight.¹⁵⁸ It is likely that customers would not know that such a service is available, and thus it should not be considered as an alternative to AT&T Ohio's BLES.

Because the only Insight service being marketed to residential customers is functionally equivalent to or a substitute for AT&T Ohio's BLES and is not readily available at rates, terms, and conditions comparable to AT&T Ohio's BLES, Insight should be excluded as an alternative provider.

e. MCI

AT&T Ohio has nominated MCI as a facilities-based alternative provider in all

¹⁵⁵ Id., ¶ 84.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ Id.

five Test 4 exchanges. However, as Ms. Tanner notes, "MCI does not provide BLES to residential customers outside of bundles and packages which include other features and services. MCI, therefore, does not offer a functionally equivalent or substitute service to AT&T Ohio's BLES."¹⁵⁹

In addition, the cheapest MCI plan costs nearly twice as much as AT&T Ohio's BLES rate.¹⁶⁰ Thus, "[t]he gulf that exists between the rate for AT&T Ohio's BLES and MCI's cheapest local service offering is further evidence that the services are not functional equivalents or substitutes, and in any case MCI's services are certainly not available at 'competitive rates, terms and conditions' as compared to AT&T Ohio's BLES."¹⁶¹ Thus, MCI should not be counted as a facilities-based alternative provider for Test 4 purposes.

f. Revolution

Revolution is asserted as a facilities-based alternative provider for the Groveport, South Solon and Victory exchanges. Revolution, which does business as 1-800-4-A-PHONE, has a tariffed BLES-only rate of \$26.33; the price increases to \$29.83 when the subscriber line charge is added.¹⁶² Thus, Revolution's BLES rate is 1.5 times the price of AT&T Ohio's BLES.¹⁶³ This is hardly a "competitive rate" to AT&T Ohio's BLES rate.¹⁶⁴

¹⁵⁹ Id., ¶ 36.

¹⁶⁰ Id., ¶ 38.

¹⁶¹ Id.

¹⁶² See Revolution Tariff P.U.C.O. No. 1 at First Revised Page 57.

¹⁶³ Tanner Affidavit, ¶ 90.

¹⁶⁴ Id.

Revolution has a miniscule market share in each exchange, and thus does not have a presence in the exchanges.¹⁶⁵ In addition, Revolution, through 1-800-4-A-PHONE, provides service only on a prepaid basis. But prepaid services do not compete with ILECs for customers.¹⁶⁶ They also certainly do nothing to constrain the ILEC's prices. Revolution should be disqualified.

g. Sage

AT&T Ohio claims Sage as a facilities-based alternative provider for all five Test 4 exchanges. Sage, however, does not offer stand-alone BLES.¹⁶⁷ Its simplest package includes 90 minutes of long distance and three vertical features,¹⁶⁸ at a rate 66% higher than AT&T Ohio's BLES.¹⁶⁹ Sage thus does not offer "functionally equivalent or substitute services" at "competitive rates, terms and conditions" as required by R.C. 4927.03(A)(2)(c) when compared to AT&T's BLES.¹⁷⁰ Sage should be disqualified.

h. Talk America

Talk America is claimed as a facilities-based alternative provider for the Victory exchange. Talk America does not qualify to be an alternative provider for the purpose of satisfying Test 4.

Talk America serves only a total of ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** customers in the Victory exchange, therefore its presence is

¹⁶⁵ Id., ¶ 132.

¹⁶⁶ See id., ¶ 77.

¹⁶⁷ Id., ¶ 40.

¹⁶⁸ Id.

¹⁶⁹ Id., ¶ 41.

¹⁷⁰ Id.

minimal.¹⁷¹ In addition, Talk America has a BLES product that is priced 1.7 times AT&T Ohio's BLES.¹⁷² Thus, Talk America would be not able to provide market discipline in the exchange. Talk America should be disqualified.

i. Time Warner

AT&T Ohio asserts that Time Warner is a facilities-based alternative provider for the South Solon exchange. Time Warner's "Digital Phone" service is a bundled service offering that is not competitively priced with AT&T Ohio's BLES.¹⁷³ Time Warner does have a tariffed "Basic Local Exchange Service," which appears to be a service of similar scope to AT&T Ohio's BLES.¹⁷⁴ But it appears that this *circuit-switched* offering is no longer marketed by Time Warner in Ohio, now that its *IP-based* voice service is available.¹⁷⁵ Thus, neither "Digital Phone" nor Time Warner's BLES offering can be considered functionally equivalent to or substitutes for AT&T Ohio's stand-alone BLES. The lack of an independent power source and its impact on E9-1-1 service further indicates that these services are not functionally equivalent to AT&T Ohio's BLES-only service.¹⁷⁶ And, although AT&T Ohio claims that residential consumers in the South Solon exchange subscribe to Time Warner service, AT&T Ohio provided no line count data for Time Warner for the exchange.¹⁷⁷ Thus, Time Warner does not provide a

¹⁷¹ Id. ¶ 134.

¹⁷² Id., ¶ 94.

¹⁷³ Id., ¶ 134.

¹⁷⁴ Time Warner Cable Information Services (Ohio), LLC d/b/a Time Warner Cable PUCO No. 1, Original Page 44, effective August 23, 2005.

¹⁷⁵ Tanner Affidavit, ¶ 95. Time Warner Cable indicated through contact with OCC representatives that this service is not available in Ohio.

¹⁷⁶ Id., ¶ 94.

¹⁷⁷ See ¶ 100.

functional equivalent or substitute service for AT&T Ohio's stand-alone BLES, as required by statute, and does not meet the Commission's definition of alternative provider of residential service for the South Solon exchange. Time Warner should be disqualified.

j. Trinsic

AT&T Ohio has identified Trinsic as a facilities-based alternative provider for the Groveport and Victory exchanges. Trinsic has a BLES-equivalent service: "Stand-Alone Local Service."¹⁷⁸ This service, however, is priced at \$53.06, more than two-and-a-half times AT&T Ohio's BLES rate.¹⁷⁹ Thus, Trinsic's BLES rates are not competitive with those of AT&T Ohio's BLES.

In addition, Trinsic has a minimal market presence in the two Test 4 exchanges in which it has been nominated by AT&T Ohio. Trinsic serves a collective ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential access lines in the two exchanges.¹⁸⁰ Trinsic's share of the residential market in those two exchanges is only ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***.¹⁸¹ Thus, Trinsic cannot qualify as an alternative provider under the statute and the rules.

¹⁷⁸ Id., ¶ 101.

¹⁷⁹ Id.

¹⁸⁰ Id., ¶ 89.

¹⁸¹ Id., Attachment PAT-4.

4. The results show that AT&T Ohio has not met the alternative providers prong of Test 4.

As shown above, the vast majority of the alternative providers asserted by AT&T Ohio do not meet the requirements of the statute in order to allow BLES alt. reg. The reasons why the providers do not qualify are summarized in the table on the next page:

EXCLUDING PROVIDERS IN TEST 4

Provider	Number of Exchanges	Reasons for Excluding the Provider							Service not ubiquitously available	Number of reasons for exclusion
		Rates not competitive with BLES	Not functional or equivalent or substitute for BLES	Limitations of service compared to BLES ¹⁸²	Not actively offered or marketed to residential customers	Limited market presence	Facilities not ubiquitous in the exchange			
ACN	3	✓	✓			✓				3
Cox	1			✓				✓	✓	3
FirstComm	3							✓ ¹⁸³		1 ¹⁸⁴
Insight	1	✓	✓	✓	✓ ¹⁸⁵				✓	6
MCI	6	✓	✓							2
Revolution	6	✓				✓				2
Sage	6	✓	✓							2
Talk America	6	✓				✓				2
Time Warner	1	✓			✓ ¹⁸⁶	✓				3
Trinsic	2	✓				✓				2

¹⁸² For example, E9-1-1 problems, limited or no operation during power outages, compatibility with alarm systems.

¹⁸³ This applies only to the Aberdeen exchange.

¹⁸⁴ Id.

¹⁸⁵ Has stand-alone BLES that is not marketed.

¹⁸⁶ Has stand-alone BLES that is not marketed.

AT&T Ohio has not shown that there are five unaffiliated facilities-based alternative providers serving the residential market in any of its Test 4 exchanges, when the rule is interpreted consistent with the statute. Cable-based providers Insight and Time Warner must be excluded in exchanges where their franchises and/or facilities do not cover the entirety of the exchange. Cox's service has several limitations compared to AT&T's BLES and is not available throughout the Victory exchange. ACN, Insight, MCI, Revolution, Sage, Talk America and Trinsic also must be disqualified because they do not have a service competitively priced to AT&T Ohio's BLES. FirstComm has a competitive service, but has a minimal facilities-based presence in the Aberdeen exchange.¹⁸⁷

In addition, the wireless carriers – Alltel, Cincinnati Bell, Sprint, T-Mobile and Verizon – do not meet the terms of the statute or the rule, and thus must be excluded from the exchanges in which they were nominated. Part of this is because AT&T Ohio has not shown that the wireless carriers provide service to all of the exchange, or even whether consumers can receive wireless services in their homes within a supposed wireless coverage area. Further, the wireless carriers do not provide competing services to AT&T Ohio's BLES.

Under these circumstances, there will be AT&T Ohio customers in these exchanges who do not have the alternatives to the Company's BLES required by the Commission's rules, much less by the statutes that permit the Commission to consider BLES alt. reg. Under these circumstances, the Commission cannot grant alt. reg. for BLES in these AT&T Ohio exchanges.

¹⁸⁷ FirstComm apparently does have a presence in the Groveport and Victory exchanges.

E. The Prongs combined.

Ohio Adm. Code 4901:1-4-10(C)(4) requires that an applicant for BLES alt. reg. show **both** line loss and the presence of five alternative providers. A failure of either part is a failure to meet the test. As shown here, **keeping the statutory requirements in mind**, the information provided by AT&T Ohio is insufficient to meet the statute or the rule. AT&T Ohio has failed to carry its burden of proof.

Fundamentally, the support provided with AT&T Ohio's application does **not** show that AT&T Ohio, in the guise of meeting Test 4, meets the statutory standards in the exchanges claimed by AT&T Ohio. As shown here and in the affidavits, this information does **not** show that, for BLES in these exchanges, 1) there are no barriers to entry; and 2) BLES is subject to competition or BLES customers have reasonably available alternatives to BLES.¹⁸⁸ Clearly, granting alt. reg. for AT&T Ohio's stand-alone BLES, with the corresponding opportunity to increase consumers' rates, in these exchanges cannot be in the public interest.

VI. COMPETITIVE TEST 3 DOES NOT MEET THE STATUTE.

Test 3 has three prongs, all of which must be met in each exchange: (1) 15% of total residential access lines in the exchange are provided by unaffiliated CLECs; (2) at least two unaffiliated facilities-based CLECs are providing BLES to residential customers in the exchange; and (3) at least five alternative providers are serving the residential market in the exchange. This test comes closer to meeting the statutory criteria than does Test 4, but still allows BLES alt. reg. where the statute is not met.

¹⁸⁸ See Sections III, IV and V.

The alternative provider prong of Test 3 resembles the similar prong in Test 4, but the “facilities-based” and “unaffiliated” criteria have been deleted. This means that the prong in Test 3 suffers from all of the infirmities of Test 4 set out in Sections III and IV above, especially given that the providers do not need to offer stand-alone BLES. Yet the providers do not even need to have made an investment in facilities.¹⁸⁹ This makes them less qualified under the statute.

The “facilities-based CLECs providing residential BLES” prong of Test 3 probably comes closest to the statute. But allowing BLES alt. reg. merely because two CLECs are providing residential BLES in an exchange ignores the market share and market power issues for **stand-alone BLES** that the Commission is directed to consider.¹⁹⁰ It also ignores the statutory requirements of comparable services and competitive rates.

A 15% CLEC residential market share for CLECs that are active in the residential market, on the other hand, might be indicative of competition for residential service, but not necessarily competition for stand-alone BLES.¹⁹¹ As discussed in Section III above, however, the provision of bundled services does not represent competition for stand-alone BLES, which is what is required by the statute. Thus the market share of CLECs supplying only bundles does not meet the statute’s requirements. In addition, the share could consist of “legacy” customers for many CLECs that are no longer marketing to residential customers, and thus would not be indicative of present, or even future,

¹⁸⁹ As noted above, AT&T Ohio has not proposed any affiliated providers as candidates for Test 3.

¹⁹⁰ See Hardie Affidavit, ¶ 48 (“The mere presence of two or three facilities-based CLECs, while showing that entry barriers can be overcome, is not a strong indicator of the lack of such barriers.”)

¹⁹¹ To the extent that a CLEC market share includes “legacy” customers of CLECs that are no longer active participants in the residential market, it is not an accurate picture of sustainable competition for any residential service.

competition. In addition, “[i]n order to comply with the statute and the rules, the carriers included in AT&T Ohio’s calculation of ‘CLEC Residential Market Share’ must be providers of residential service.”¹⁹² If the lines of CLECs that do not provide residential service are included in the market share calculation, then the market share calculation, which requires CLECs serving residential lines, will be overstated.

The CLEC market share prong of Test 3 does not satisfy the statute. Of the numerous factors identified at R.C. 4927.03(A)(2) that the Commission “shall consider,” this prong of Test 3 adequately addresses only one, “the affiliation of providers of services,” by excluding ILEC affiliates from the test. Ostensibly, the first prong of Test 3 also tries to address “indicators of market power...includ[ing] market share.” This test, however, provides for a calculation of total residential lines provided by unaffiliated CLECs, rather than total residential stand-alone BLES lines provided by unaffiliated CLECs; it therefore offers little useful information as to whether standalone BLES is subject to competition or has reasonably available alternatives.¹⁹³ For example, information about CLECs serving 15% of the entire residential market with “all in one” local/toll packages does not demonstrate any competitive impact on the market for BLES-only services (as is required by the statute) because these two services are not functionally equivalent or substitutes, as required by R.C. 4927.03(A)(2)(c).¹⁹⁴

VII. AT&T OHIO’S INFORMATION ON TEST 3 DOES NOT MEET THE STATUTE.

¹⁹² Tanner Affidavit, ¶ 18.

¹⁹³ See id., ¶ 10.

¹⁹⁴ Id., ¶ 11.

It should be noted that AT&T Ohio has admitted that the six exchanges it submitted for Test 3 could not meet Test 4.¹⁹⁵ (Not coincidentally, as discussed above, Test 4 is the farthest from the considerations required by the statute.) There is much the same failure of proof for Test 3 as discussed above for Test 4.

A. The CLEC Market Share Prong of Test 3.

As noted above, because the statute *requires* the Commission to find that an ILEC's stand-alone BLES is subject to competition or has reasonably available alternatives, the Commission's evaluation of Test 3 should focus on information that relates to the provision of stand-alone BLES, rather than packages of services that include BLES.¹⁹⁶ Yet as Ms. Tanner asserts:

Even if the first prong of Test 3 addressed stand-alone BLES residential access lines provided by CLECs, such a static picture of the market might be deceiving. R.C. 4927.03(A)(2)(d) requires the Commission to consider "growth in market share," when assessing competition for BLES. Growth in market share is of particular relevance when examining CLEC market share, due to the dramatic changes that have taken place in the supply market for wireline basic local exchange service over the past four years. ... As such, a "snapshot" of competitive activity as the basis for granting BLES alternative regulation may produce an extremely misleading picture of the actual competitive significance of unaffiliated CLECs providing residential services in a given exchange on an ongoing basis.¹⁹⁷

In this light, AT&T Ohio's submission for the first prong of Test 3 is examined.

¹⁹⁵ Hardie Affidavit, ¶ 7, citing Roycroft Affidavit in 05-1305 regarding the likelihood of an applicant "gaming" Test 4. This calls the line loss prong of Test 4 starkly into question, and also requires consideration of the fact that because "[t]he weak Test 4 tends to moot the other competitive tests included in 4901:1-4-10(C), i.e., Test 4 is the 'logical choice' for an applicant ILEC given the relatively more rigorous nature of the other tests." *Id.*

¹⁹⁶ Tanner Affidavit, ¶ 9.

¹⁹⁷ *Id.*, ¶ 14.

AT&T Ohio asserts that, in each of the Test 3 exchanges, 15% of the access lines are provided by unaffiliated CLECs serving residential customers. In discovery, AT&T Ohio indicated that "CLEC Residential Market Share" is calculated by aggregating total AT&T residential access lines and CLEC residential access lines based upon counts of E911 listings, LWC lines, UNE-P lines and resold lines, and dividing that number into the total of alleged CLEC residential access lines.¹⁹⁸

However, as Ms. Tanner demonstrates:

AT&T Ohio has overstated the "CLEC Residential Market Share" in three Test 3 exchanges (Mantua, Olmsted Falls and Philo) by relying upon E911 listings for CLECs that do not appear to provide residential service. Thus, even if one were to assume the first prong of Test 3 satisfies the statutory requirements (which it does not) AT&T Ohio's calculation of "CLEC Residential Market Share" is not supported in three of the six Test 3 exchanges. Thus, AT&T Ohio fails Test 3 for those exchanges.¹⁹⁹

AT&T Ohio has included in the supposed residential CLEC share for the Test 3 exchanges four carriers that do not provide residential service: ***BEGIN

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CONFIDENTIAL ***.²⁰⁰ In the 06-1013 O&O, the Commission excluded carriers for this reason.²⁰¹

AT&T Ohio asserts that the Commission should include the offering of wholesale services to VoIP providers for Test 3 purposes.²⁰² AT&T Ohio cites to the Commission's

¹⁹⁸ Id., ¶ 15.

¹⁹⁹ Id., ¶ 17 (footnote omitted).

²⁰⁰ Id., ¶ 18.

²⁰¹ 06-1013 O&O at 29.

²⁰² Memorandum in Support of Application at 4.

recent decision in the Embarq application to support this assertion.²⁰³ In that proceeding, which is still on rehearing, OCC pointed out that the Commission's decision is contrary to the Commission's own rules and is fundamentally wrong.²⁰⁴ A similar analysis should apply to AT&T Ohio's claim.

In order to determine whether a carrier qualifies under the line loss prong of Test 3, several definitions come into play. First, the carrier must be a CLEC. The Commission's alt. reg. rules define CLEC as "any facilities-based and nonfacilities-based local exchange carrier that was not an incumbent local exchange carrier on the date of the enactment of the Telecommunications Act of 1996 (1996 Act) or is not an entity that, on or after such date of enactment, became a successor, assign, or affiliate of an incumbent local exchange carrier."

The alt. reg. rules, however, do not include a definition of "local exchange carrier." The Commission's rules governing local exchange carriers, however, define a "local exchange carrier" as, in relevant part, "any facilities-based and nonfacilities-based ILEC and CLEC that provides basic local exchange services to the public on a common carrier basis."²⁰⁵ Thus, in order for the lines of a VoIP provider to be included in the line loss prong of Test 3, the provider must provide BLES to residential customers on a common carrier basis. AT&T Ohio has not established that this occurs. Although the wholesaler may offer service as a common carrier to VoIP providers, there is nothing in the

²⁰³ Id., citing *In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Opinion and Order (December 19, 2007) at 26-27.

²⁰⁴ Case No. 07-760-TP-BLS, OCC Application for Rehearing (January 18, 2008) at 16-17.

²⁰⁵ Ohio Adm. Code 4901:1-7-01(L). See also Ohio Adm. Code 4901:1-5-01(T).

Application showing that VoIP providers offer BLES to residential customers as common carriers.

And, under Test 3, the CLEC must be providing “residential access lines.”²⁰⁶ As the Commission has conceded, CLECs such as ***BEGIN CONFIDENTIAL <<

>>END CONFIDENTIAL*** that do not themselves serve the residential market should not be included in the calculation of CLEC market share.²⁰⁷ Thus, neither the wholesalers nor any VoIP provider using the wholesalers’ facilities qualifies as a provider of “residential access lines” under the CLEC market share prong of Test 3.

The following table shows the failure of AT&T Ohio’s Application on this prong of Test 3: ***BEGIN CONFIDENTIAL<<

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AT&T Ohio thus fails this prong of Test 3 in the Mantua, Olmsted Falls, and Philo exchanges.

**B. The Facilities-Based CLECs Providing Residential BLES
Prong of Test 3.**

The second prong of Test 3 requires the presence of at least two unaffiliated

²⁰⁶ Ohio Adm. Code 4901:1-4-10(C)(3).

²⁰⁷ See 06-1013, Opinion and Order at 29.

facilities-based CLECs providing BLES to residential customers. AT&T Ohio asserts that MCI and Sage are the two unaffiliated facilities-based CLECs providing BLES to residential customers for each of the six Test 3 exchanges. As shown in Ms. Tanner's affidavit and discussed in Section V.D above, however, neither MCI nor Sage provides stand-alone BLES to residential customers. **Thus AT&T Ohio fails to meet the second prong of Test 3 for all 6 exchanges, and thereby fails Test 3 in its entirety.**

C. The Five Alternative Providers Prong of Test 3.

The third prong of Test 3 requires the presence of at least five alternative providers serving the residential market. The difference between the Test 3 and the Test 4 alternative provider prongs is that under Test 3, the alternative providers are not required to be facilities-based and are not required to be unaffiliated.²⁰⁸ Under this test, providers who were disqualified in Test 4 because they were not facilities-based could be restored to the list if they otherwise qualify. As shown above, however, of the Test 4 candidates, only FirstComm in five of the six exchanges qualify even if the facilities-based criterion is removed.²⁰⁹ The following table shows AT&T Ohio's allegations, including 10 wireline providers and three wireless provider candidates, for the six Test 3 exchanges. The table shows the variety among the Test 3 exchanges, in terms of the candidate alternative providers.

²⁰⁸ AT&T Ohio has not put forth any affiliated provider as a Test 3 candidate.

²⁰⁹ Ms. Hardie notes that her discussion regarding the existence of Test 4 alternative providers as inadequate for measuring their market power applies to Test 3 as well. Hardie Affidavit, ¶ 47.

Exchange	Alternative providers asserted by AT&T Ohio to be serving the residential market in the exchange		
	Non-wireless	Wireless	Total
Canal Winchester	ACN, Insight, FirstComm, Global Connection, PNG, Revolution, Talk America, Trinsic	Sprint, Verizon	10
Mantua	ACN, FirstComm, Revolution, Talk America, Trinsic	Alltel, Sprint, Verizon	8
Murray City	FirstComm, Revolution, Talk America, Time Warner	Alltel	5
New Albany	ACN, Insight, FirstComm, PNG, Revolution, Talk America, Trinsic	Sprint, Verizon	9
Olmstead Falls	ACN, Cox, FirstComm, Revolution, Talk America, Trinsic	Alltel, Sprint, Verizon	9
Philo	ACN, FirstComm, Revolution, Talk America, Time Warner	Alltel, Sprint	7

1. The Providers That Were Eliminated In Test 4.

Most of the wireline carriers listed were disqualified as "alternative providers" under the Commission's definition in the discussion of the second prong of Test 4 above. This includes ACN, Insight, Revolution, Talk America, Time Warner and Trinsic. All of these providers should be disqualified in the third prong of Test 3 as well, except FirstComm in the Canal Winchester, Mantua, New Albany, Olmsted Falls and Philo exchanges. FirstComm would qualify for the third prong of Test 3 in the Murray City exchange, but its market presence is insufficient for it to have established a presence in that exchange.

Alltel, Sprint and Verizon are candidate wireless carriers in both Test 4 and Test 3. The disqualification of these wireless carriers as alternative providers of BLES was discussed at length in Section V.D.2., above. This disqualification applies equally for Test 3.

2. The New Alternative Providers.

AT&T Ohio has included two new wireline carriers for the Test 3 list that were not included in Test 4. They are Global Connection and PNG. For the reasons set forth here, they do not qualify as alternative providers.

a. Global Connection

Global Connection is listed as an alternative provider in only the Canal Winchester exchange. Global Connection should be disqualified for at least three reasons. First, its rate for its BLES-equivalent service is more than double AT&T Ohio's BLES rate.²¹⁰ Second, Global Connection is a prepaid service provider, focusing on consumers with poor credit histories.²¹¹ As Ms. Tanner notes, "Customers without credit issues would not likely consider switching from their current service to a prepaid offering."²¹² Third, Global Connection's presence in the exchange is questionable.²¹³

b. PNG

PNG is listed an alternative provider for the Canal Winchester and New Albany exchanges. PNG's lack of presence in the two exchanges, however, disqualifies it as an alternative provider. AT&T Ohio acknowledged the meager presence held by PNG in the two exchanges; the carrier serves a total of only ***BEGIN CONFIDENTIAL<<

>>END CONFIDENTIAL*** in each exchange.²¹⁴ PNG "does not have a

²¹⁰ Id., ¶ 78.

²¹¹ Id., ¶ 77.

²¹² Id.

²¹³ Tanner Affidavit, ¶ 71.

²¹⁴ Id.

'presence' in the market capable of constraining AT&T Ohio's BLES prices, either today or on a going-forward basis.²¹⁵

In addition, according to the ESS in AT&T Ohio's Application, PNG provides service as a reseller. As Ms. Tanner notes,

Resale providers obtain wholesale services from an ILEC at a discount off of the retail rate, and then "resell" the identical service to the retail customer. There is no opportunity for service differentiation for a resale CLEC, since the service they resell is not their own. Resale CLECs also have limited opportunities for financial gain. The difference between the wholesale price paid to the ILEC and the retail price at which the service is offered (the CLEC's "gross margin") is typically *less* than the "resale discount," because the CLEC typically must offer its service at a discount to that of the ILEC in order to lure customers away. The remaining margin must cover the remaining administrative costs of the CLEC, as well as provide for some level of profit. ... [C]ompetition from resale CLECs is generally regarded as inferior to competition from CLECs who use their own facilities to offer services.²¹⁶

Perhaps for this reason, PNG does not offer a service that is competitively priced to AT&T Ohio's stand-alone BLES.²¹⁷ PNG should be disqualified.

3. The Results of the Third Prong of Test 3.

The only alternative provider that meets the third prong of Test 3 is FirstComm in the Canal Winchester, Mantua, New Albany, Olmsted Falls and Philo exchanges. All of the other providers (including FirstComm in the Murray City exchange) fail in various ways. AT&T Ohio has not shown that it meets the third prong.

D. The Test 3 Prongs Combined.

²¹⁵ Id., ¶ 88.

²¹⁶ Id., ¶ 86.

²¹⁷ Id., ¶ 87.

Taking together the failures on the first, second and third prongs of Test 3, AT&T Ohio definitively fails to carry its burden regarding Test 3. BLES alt. reg. cannot be granted for these six exchanges.

VIII. CONCLUSION

Ms. Hardie sums up the key issues in this proceeding for Test 4:

An application under Test 4, to be consistent with the statute, must demonstrate that the services offered by the candidate alternative providers satisfy the statutory criteria. To this end, the applicant must demonstrate that alternative providers are making functionally equivalent or substitute services readily available at competitive rates, terms, and conditions. No information supplied by AT&T Ohio supports the proposition that functionally equivalent or substitute wireless services are available to BLES customers. The only conclusion that can be drawn from this lack of evidence is that AT&T Ohio BLES customers do not have the benefit of competition or reasonably available alternatives to BLES. AT&T Ohio's application does not carry its burden on this point. Given this critical lack of evidence on these key statutory provisions, the Commission should deny AT&T Ohio's Application.²¹⁸

Ms. Hardie also states:

AT&T Ohio's candidate wireless firms do not satisfy either the Commission's definition of facilities-based alternative provider or alternative provider, nor do they meet statutory requirements with regard to the provision of functionally equivalent or substitute services readily available at competitive rates, terms, and conditions. AT&T Ohio's Application is not supported by the inclusion of wireless providers in each exchange submitted under Test 3 or Test 4.²¹⁹

As shown here, under Test 4, the services provided by wireless carriers are not functionally equivalent to or substitutes for BLES. Likewise, the services offered by the

²¹⁸ Hardie Affidavit, ¶ 28.

²¹⁹ Id., ¶ 114.

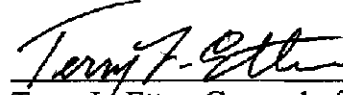
wireline carriers identified by AT&T Ohio are not functionally equivalent to or substitutes for BLES, are not provided by carriers that have a sufficient presence in the exchange, and are not readily available to customers throughout the five exchanges submitted by AT&T Ohio. In addition, AT&T Ohio's calculation of the line losses under Test 4 is flawed and thus it fails to meet this prong of Test 4. AT&T Ohio fails Test 4 for all five exchanges.

Test 3 is also inadequate to meet the demands of the statute. The three prongs of this test dance around the key factors that the statute requires the PUCO to examine. But AT&T Ohio fails the "facilities-based CLEC providing residential BLES" prong, as well as falling short on the other prongs. AT&T Ohio fails Test 3 for all six exchanges.

Tests 3 and 4 as adopted by the Commission do not show that the statutory requirements have been met. Even if the information provided by AT&T Ohio is included in the mix, the statutory requirements have not been met. And, assuming arguendo that Tests 3 and 4 are valid, AT&T Ohio has not shown that it meets the tests. AT&T Ohio's application for BLES alt. reg. must be denied in its entirety, to give customers the protection intended in R.C. 4927.02(A)(2) for "just and reasonable" rates.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

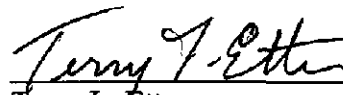


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to AT&T Ohio's
Application for Basic Local Exchange Service Alternative Regulation and Demonstration
Why the Application Should Not Be Granted by the Office of the Ohio Consumers'
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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Ohio Bell Telephone Company d/b/a)	
AT&T Ohio for Approval of an)	Case No. 07-1312-TP-BLS
Alternative Form of Regulation of Basic)	
Local Exchange Service and Other Tier 1)	
Services Pursuant to Chapter 4901:1-4,)	
Ohio Administrative Code.)	

Affidavit

Of

Karen J. Hardie

On behalf of

The Office of the Ohio Consumers' Counsel

February 11, 2008

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Attachment KJH-1 AT&T Ohio Responses to OCC Discovery

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Ohio Bell Telephone Company d/b/a)	
AT&T Ohio for Approval of an)	Case No. 07-1312-TP-BLS
Alternative Form of Regulation of Basic)	
Local Exchange Service and Other Tier 1)	
Services Pursuant to Chapter 4901:1-4,)	
Ohio Administrative Code.)	

AFFIDAVIT OF KAREN J. HARDIE

I. INTRODUCTION

1. My name is Karen J. Hardie. I am employed by the Office of the Ohio Consumers' Counsel ("OCC") as a Principal Regulatory Analyst. I am the leader of the Telecommunications Industry Team at OCC.
2. I participated in the Public Utilities Commission of Ohio's ("PUCO" or "Commission") basic local exchange service ("BLES") alternative regulation ("alt. reg.") case, *In the Matter Of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Companies*, Case No. 05-1305-TP-ORD ("05-1305"). I also participated in AT&T Ohio's first and second BLES alt. reg. cases, *In the Matter of the Application of The Ohio Bell Telephone Company d/b/a AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 06-1013-TP-BLS ("06-1013") and *In the Matter of the*

Application of The Ohio Bell Telephone Company d/b/a AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 07-259-TP-BLS ("07-259"). I filed an affidavit in the latter case regarding many of the issues I address here.

3. This affidavit addresses AT&T Ohio's Application and my analysis of the wireless carriers that AT&T Ohio has identified as unaffiliated competitive local exchange carriers ("CLECs"), unaffiliated facilities-based CLECs, alternative providers, and/or unaffiliated facilities-based alternative providers. I describe the manner in which the Commission's 4901:1-4-10(C)(3) and (4) competitive tests (hereinafter, Test 3 and Test 4, respectively) must be applied in order to meet the statutory requirements outlined at R.C. 4927.03(A). I also address the statutory requirement of a showing of no barriers to entry for BLES alt. reg. applications. I also focus on the deficiencies of the line loss prong of Test 4. The results of my analysis are set forth in this affidavit.¹
4. As set forth below AT&T Ohio's application for BLES alt. reg. in the requested 11 exchanges should be denied.

II. AT&T OHIO'S APPLICATION OF COMPETITIVE TEST 4

5. First, it should be noted that when I refer to "BLES," I am referring to "stand-alone BLES," i.e., BLES that is not part of a bundle of services, such as long distance and/or features or with vertical features. Pricing constraints have already

¹ My analysis and opinion are focused solely on Tests 3 and 4 because AT&T Ohio relied solely upon these two Tests in its current Application.

been lifted for services other than BLES, including bundles that contain stand-alone BLES.² Especially because the statute requiring the Commission to develop BLES alt. reg. rules was enacted more than four years after the 00-1532 Order, BLES alt. reg. obviously applies only to stand-alone BLES. Thus the focus of the Commission's analysis must be on stand-alone BLES.

6. In its application in this docket, AT&T Ohio has used Test 3 and Test 4. It applies Test 4 in five exchanges,³ with the remaining six exchanges presented under Test 3.⁴
7. It is useful to recall that the Commission's Test 4 was added to the Staff's initial list of three competitive tests, and is similar to a test proposed by the Ohio Telecom Association ("OTA") in 05-1305.⁵ In an affidavit submitted in 05-1305 on behalf of the Consumer Groups,⁶ Dr. Trevor R. Roycroft noted that adding a

² *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*, Case No. 00-1532-TP-COI, Opinion and Order at 17 (December 6, 2001) ("00-1532 Order").

³ Aberdeen, Groveport, Somerton, South Solon and Victory. AT&T Ohio had asserted that Groveport and Somerton met Test 3 in 06-1013. See 06-1013, Opinion and Order (December 20, 2006) ("06-1013 O&O"), Attachment C. The Commission rejected that assertion. See *id.* AT&T Ohio once again asserted that Groveport met Test 3 in 07-259. See 07-259, Opinion and Order (June 27, 2007) ("07-259 O&O"), Attachment C. The Commission rejected that assertion. See *id.* As discussed later in my affidavit, after having failed to qualify Groveport and Somerton under Test 3, AT&T Ohio is now asserting that both exchanges meet the requirements of Test 4.

⁴ Canal Winchester, Mantua, Murray City, New Albany, Olmsted Falls and Philo. AT&T Ohio had also asserted that Canal Winchester, Murray City, and New Albany met Test 3 in 06-1013. The Commission rejected that assertion. See 06-1013 O&O at Attachment C. AT&T Ohio once again asserted that Canal Winchester and New Albany met Test 3 in 07-259. The Commission rejected that assertion. See 07-259 O&O at Attachment C.

⁵ OTA's Test 4 stated: "An applicant must demonstrate in each requested market area the presence of at least five unaffiliated Alternative Providers, and at least five percent of total company access lines have been lost since the year in which the applicant served the greatest number of access lines." 05-1305, OTA Comments (December 6, 2005), Exhibit OTA-1 at 17. The Commission's Test 4 modifies the OTA test to include a threshold of 15% of access lines lost since 2002.

⁶ The Consumer Groups were comprised of 15 consumer organizations that included OCC, local government bodies and other advocates for consumers. See 05-1305, Consumer Groups' Comments (December 6, 2005) at 1.

test like OTA's, which the Commission has done, would open the possibility for gaming, as the structure of the overall test would become distorted toward the very low threshold provided by a test like Test 4.⁷ It is clear from AT&T Ohio's applications in each of its BLES alt. reg. proceedings that Dr. Roycroft's observation regarding the impact of including an unbalanced "weak link" in the overall group of competitive tests has been borne out. The weak Test 4 tends to moot the other competitive tests included in 4901:1-4-10(C), i.e., Test 4 is the "logical choice" for an applicant incumbent local exchange carrier ("ILEC") given the relatively more rigorous nature of the other tests. This fact should be kept in mind by the Commission as it evaluates applications that use tests other than Test 4. It is very likely that the selection of, for example, the more stringent Test 3 indicates that the applicant believes that for the exchanges in question, the easier Test 4 cannot be passed. Thus, it would be reasonable to expect that an attempt by an applicant to pass Test 3 would require some creativity on the applicant's part. The same sort of creativity is seen here for the Groveport and Somerton exchanges.

8. In its Application, AT&T Ohio offers no explanation as to why it has selected Test 4 for some exchanges, and Test 3 for other exchanges, even though the alternative providers identified by AT&T Ohio are similar across the exchanges, regardless of the test used.
9. The bulk of AT&T Ohio's documentation is contained in Exhibit 3 of its Application. Exhibit 3 consists of, for each exchange where exemption is sought,

⁷ 05-1305, Roycroft Reply Affidavit (December 22, 2005) at ¶¶ 49-56.

an exchange summary sheet ("ESS") that shows a set of candidate unaffiliated facilities-based alternative providers (in the exchanges where Test 4 is applied), and candidate unaffiliated facilities-based CLECs and alternative providers (in the exchanges where Test 3 is applied). In addition, a collection of documents is supplied with the ESS for each exchange. I discuss these documents and other aspects of AT&T Ohio's filing as they apply to AT&T Ohio's candidate wireless alternative providers, below.

10. I focus first on AT&T Ohio's Application under Test 4, including a discussion of the line loss prong of that Test. I then turn to AT&T Ohio's Application under Test 3. Regardless of the test used, however, AT&T Ohio does not carry its burden with regard to wireless carriers as alternative providers and its request for exemption for BLES. I show that neither test meets the statutorily required demonstration of a lack of barriers to entry in the 11 exchanges covered by the Application.

A. The Statutory Criteria

11. 4927.03(A)(1) Revised Code allows the Commission to grant an exemption from any of its rules or establish alternative regulation for a telephone company's BLES if the Commission finds that doing so is in the public interest and that either of two conditions exists:

- (a) The telephone company or companies are subject to competition with respect to such public telecommunications service; or
- (b) The customers of such public telecommunications service have reasonably available alternatives.

To direct the Commission in its evaluation of these factors with regard to

exemptions for BLES, the statute identifies information that the Commission *shall* consider in determining whether either of the two conditions quoted above are satisfied:

- (a) The number and size of alternative providers of services;
- (b) The extent to which services are available from alternative providers in the relevant market;
- (c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions;
- (d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.⁸

Any Application submitted under the Commission's rules will require the Commission, at a minimum, to consider these factors for BLES.

12. For determining whether competition or reasonably available alternatives exist for BLES, the statute requires an evaluation of indicators of market power, including market share, growth in market share, ease of entry, and the affiliation of the alternative providers.
13. The statute also requires consideration of the nature of alternative providers. For example, what is the number and size of the alternative providers? Also, are alternative providers making services available in the relevant market? Importantly, the statute requires consideration of whether the alternative providers are making, for BLES, functional equivalent or substitute services readily available at competitive rates, terms, and conditions.
14. The statute separately requires a Commission finding that "there are no barriers to

⁸ R.C. 4927.03(A)(2).

entry" to providing BLES in the relevant market in order to grant alternative regulation to BLES.⁹ In the rulemaking, the Consumer Groups proposed a competitive market test that identified measurable criteria to demonstrate the absence of entry barriers:

The applicant must demonstrate that there are no barriers to entry associated with the provision of BLES. The applicant must provide evidence of the absence of factors which would inhibit timely, significant, and sustainable market entry. The applicant must present evidence, including market share evidence, that market entry in each exchange is resulting in the provision of BLES throughout the exchange, outside of packages or bundles, by unaffiliated CLECs, and facilities-based CLECs.¹⁰

Under this test, it would be reasonable to conclude that entry barriers for BLES are absent if it is shown that multiple facilities-based providers of BLES are making this service readily available in the market areas in question. If entry barriers are absent, then the policy objective stated in 4927.02(A)(2) Revised Code is more likely to be satisfied, as the absence of entry barriers will enable market forces capable of supporting healthy and sustainable competition for BLES.

15. My analysis leads me to conclude that Test 4 is structured so as to preclude satisfaction of the statutory requirements in two important areas. Specifically, telephone companies using Test 4 will not have to provide: (1) an evaluation of market power, including the market power indicators of the size of alternative providers, ease of entry, market share and growth in market share, and

⁹ R.C. 4927.03(A)(3).

¹⁰ 05-1305, Consumer Groups' Comments (December 6, 2005) at 10. The Consumer Groups' definition of CLEC was broad enough to include any firm providing BLES, regardless of technology.

(2) evidence on the existence of entry barriers. Thus, the Commission will not have evidence on market power and the existence of entry barriers. However, in a third important area identified by the statute, i.e., issues associated with alternative providers making functionally equivalent or substitute services readily available at competitive rates, terms, and conditions, I believe that Test 4 enables the Commission to make findings consistent with the statute, if the Commission thoroughly evaluates the services offered by the alternative providers.

B. Application of Competitive Test 4

16. AT&T Ohio has selected Test 4 for five of the exchanges for which it seeks exemption. Thus, Test 4 will be the basis for the Commission's determination as to whether the statutory requirements associated with exempting BLES have been satisfied in those five exchanges. As discussed above, the statutory requirements fall into three general categories: (1) issues related to functionally equivalent or substitute services; (2) measures of market power; and (3) the absence of entry barriers. I discuss each of these areas in general below, beginning with the issue of functionally equivalent or substitute services.

**i Competitive Test 4 and Functionally Equivalent or
Substitute Services for BLES**

17. Test 4 reads as follows:

An applicant must demonstrate in each requested telephone exchange area that at least fifteen per cent of total residential access lines have been lost since 2002 as reflected in the applicant's annual report filed with the commission for 2002; and the presence of at least five unaffiliated facilities-based alternative providers serving the residential market.

Test 4 uses an important term that is defined in 4901:1-4-01(G) of the
Commission's rules:

"Facilities-based alternative provider" means a provider of competing service(s) *to the basic local exchange service offering(s)* using facilities that it owns, operates, manages or controls to provide such services, regardless of the technology and facilities used in the delivery of the services (wireline, wireless, cable, broadband, etc.).

(Emphasis added.) The Commission has thus established a threshold criterion associated with the specific services offered by an alternative provider, i.e., they must be *competing service(s)* to the applicant ILEC's *basic local exchange service offering(s)*. Given the statutory requirement of a Commission finding of either competition for BLES, or reasonably available alternatives for BLES, *competing services* under Test 4 must encompass one or the other of these alternatives.

18. A critical component of Test 4's ability to address competing or reasonably available alternatives is associated with the consideration that the Commission must give to "the ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions."¹¹ As the Commission has stated:

Section 4927.03(A), Revised Code, compels the examination of whether customers have reasonably available alternatives to BLES. 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 customers....¹²

¹¹ R.C. 4927.03(A)(2)(c).

¹² 05-1305 Order, p. 25, emphasis in original.

The Commission has also indicated that when evaluating an application, "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."¹³ The Commission, while identifying a variety of potential alternative providers, indicated that it would "consider" these alternatives in making its determination regarding competition or reasonably available alternatives. The Commission *did not* state that the presence of wireline CLECs, wireless, VoIP or cable telephony automatically guarantees that competition is present, or that reasonable alternatives are available at competitive rates, terms and conditions. Thus, the applicant should have been required to offer sufficient evidence to demonstrate that any candidate facilities-based alternative provider satisfies the statutory criteria referenced by the Commission. Unfortunately, in the cases decided to date, the Commission went to great lengths to accept alternative providers, regardless of their services, pricing, terms and conditions, and level of presence.

19. For Test 4, a critical component of the evaluation of AT&T Ohio's Application will necessarily focus on whether the candidate facilities-based alternative providers make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions.¹⁴ This portion of Test 4 has the potential

¹³ Id., emphasis added. "VoIP" refers to Voice over Internet Protocol service.

¹⁴ Likewise for alternative providers under Test 3.

to partially satisfy the statutory criteria discussed above, but only if the Commission properly evaluates the candidate alternative providers and the services that they offer. As I discuss in detail below, with regard to the wireless alternative providers identified in AT&T Ohio's filing, AT&T Ohio fails to demonstrate that the candidate wireless facilities-based alternative providers offer any service that is functionally equivalent or a substitute for BLES. Therefore, the Commission must reject AT&T Ohio's application as being inconsistent with the Commission's rules and the statutory requirements.

ii. Functionally Equivalent or Substitute Services

20. When determining whether services are functionally equivalent or capable of substituting for one another, and are readily available, care should be taken to prevent the behavior of niche market actors from being interpreted as representative of widespread behavior in the marketplace. The ready availability of functionally equivalent or substitute services specified by the statutory language directs that the services in question should be substitutable for a broad portion of the population.
21. The statutory requirement will not be satisfied if a functionally equivalent service is not readily available to a wide section of the population. For example, few would dispute that in the market for motor vehicles, four-door sedans offered by Ford and General Motors are functionally equivalent and substitute vehicles. Consumers can easily switch between these two automobile brands, with specific models, e.g., the Ford 500 and the Chevrolet Impala, offering very similar characteristics and prices. If a consumer does not like Ford's products or prices,

other providers (beyond General Motors) have readily available, functionally equivalent, and substitute automobiles, both from new-car dealers and a well-developed aftermarket providing used vehicles.

22. But functional equivalency and substitution must be carefully considered. For example, it is an indisputable fact that some individuals are observed to ride *motorcycles* instead of driving an automobile. Does this fact indicate that motorcycles are functionally equivalent or substitutes for automobiles? Clearly, automobiles and motorcycles can be interchangeable substitutes in use – one can ride a motorcycle or drive an automobile to work or to the store. This could also be interpreted as evidence of functional equivalency. Likewise, the price of a Chevy Impala and a Honda Goldwing are each about \$22,000. Does this indicate a competitive price for the two vehicles?
23. The substitutability or functional equivalency of a car and a motorcycle is not as pure as the case between a Ford and General Motors automobile. If I need to purchase groceries, should I desire to transport more than one passenger, or if the weather is threatening, a motorcycle is a decidedly inferior choice – it is no longer a good substitute for the transportation function that I can obtain from an automobile. Likewise, motorcycle riding is not for the faint of heart. Thus, even on a pleasant day, most individuals do not ride motorcycles. Following a proper evaluation of the relationship between motorcycles and automobiles, a reasonable conclusion would be that: (1) for a very small segment of the market it is possible that automobiles and motorcycles are substitutes (i.e., rugged individuals who reside in more temperate climates, and who do not have the need to transport

many other individuals); (2) for a larger segment of the market, automobiles and motorcycles display a complementary role (i.e., recreational motorcycle riders also own and use an automobile); and, (3) for the overwhelming majority of consumers, the goods are unrelated (i.e., most people do not own or ride motorcycles, and would never consider substituting motorcycle transportation for automobile transportation). Thus, in the market for motor vehicles, it may be the case that automobiles and motorcycles provide similar functions, and also can be substituted in use, however, when considering this market, it is clear that motorcycles do not provide a functional equivalent or substitute alternative that is readily available for consumers to utilize, even if their prices are comparable.

24. Similarly, while it might be the case that we observe that a small number of individuals 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. As will be discussed in more detail below, there is substantial evidence that wireless telephones have significant functional deficiencies when compared to wireline phones. It would be a serious error to conclude, because a small subset of the overall population uses a wireless phone exclusively, that wireless telephones are a substitute or functionally equivalent service readily available to the overall population. What the evidence indicates, as will be discussed in more detail below, is: (1) for a large segment of consumers, wireless is used in a complementary fashion with wireline, and (2) for the overwhelming majority of consumers the outright replacement of a wireline phone with only a wireless phone would cause substantial difficulties, and increased expense, associated with

satisfying the communication functions currently achieved with BLES.

iii. Competitive Rates, Terms, and Conditions

25. As discussed in more detail below, AT&T Ohio provides no documentation in its Application comparing its BLES rates, terms, and conditions with those of its candidate wireless alternative providers. The statutory criterion specifies that the services offered by alternative providers of the functionally equivalent or substitute services must be at *competitive rates, terms, and conditions*. This statutory requirement acknowledges that for consumer choice to be possible, it must be the case that consumers find similar rates, terms, and conditions for the alternatives. This component of the statutory requirement also contributes to the requirement of an economically reasonable approach to the evaluation of market alternatives, i.e., price plays a critical role in evaluating consumers' ability to substitute. Price is also a critical consideration with regard to whether services compete, and whether consumers can take advantage of reasonably available alternatives.
26. For example, both the Ford Focus and the BMW 760Li are four-door sedans. It would be hard to dispute that these vehicles are not functionally equivalent and could be substituted in use. Both have automatic transmissions with forward and reverse gears, a steering wheel, seats, brakes, safety equipment, and a spare tire. However, do these vehicles compete in the new vehicle market, and would consumers find them to be reasonably available alternatives? The statutory criteria regarding competitive rates, terms, and conditions would lead to a definitive conclusion that these motor vehicles are not competing or reasonable

alternatives. The starting list price of the Ford Focus is \$14,075.¹⁵ The starting list price of the BMW 760Li is \$122,600,¹⁶ almost ten times the price of a Focus. This represents a pair of price points that are not comparable. Thus, the statutory requirements would protect the Commission from the pitfall of concluding that there is competition between the Ford Focus – a “basic” transportation service – and the BMW 760Li, a “high-end” service providing much more than transportation. Likewise, given that most consumers cannot afford a BMW 760Li, the statutory criteria would not allow the Commission to conclude that the BMW 760Li provides a reasonable alternative to the Ford Focus. Certainly, some people will drive the BMW 760Li, but this fact does not make the vehicle a reasonable alternative for the majority of automobile drivers. Rather, a reasonable conclusion, based on both the evaluation of price and functionality, would lead to the conclusion that a Toyota Corolla is an alternative to the Ford Focus. The Corolla has a starting list price of \$14,405.¹⁷ Similar prices result in reasonable alternatives as consumer choice is unhindered by a significant price differential.

27. In examining whether AT&T Ohio has satisfied Test 4, careful consideration must be given to the rates, terms, and conditions associated with the offerings of the wireless providers that it has identified. If these differ significantly from those associated with BLES, then the services cannot be viewed as competing with

¹⁵ <http://www.ford.com/vehicles/vehicle-showroom#/ford/ford-focus-2008> (accessed January 15, 2008).

¹⁶ <http://www.bmwusa.com/vehicles/7/760lisedan/default> (accessed January 15, 2008).

¹⁷ <http://www.toyota.com/byt/pub/setStartOptions.do?seriesCategory=5&zipHolder=&modelId=&zipCode=43215> (accessed January 15, 2008).

BLES, and the wireless carriers cannot be considered alternative providers that satisfy Test 4.

28. An application under Test 4, to be consistent with the statute, must demonstrate that the services offered by the candidate alternative providers satisfy the statutory criteria. To this end, the applicant must demonstrate that alternative providers are making functionally equivalent or substitute services readily available at competitive rates, terms, and conditions. No information supplied by AT&T Ohio supports the proposition that functionally equivalent or substitute wireless services are available to BLES customers. The only conclusion that can be drawn from this lack of evidence is that AT&T Ohio BLES customers do not have the benefit of competition or reasonably available alternatives to BLES. AT&T Ohio's application does not carry its burden on this point. Given this critical lack of evidence on these key statutory provisions, the Commission should deny AT&T Ohio's Application.

C. Test 4 and Measures of Market Power and Line Loss

29. The competitive tests that the Commission has adopted raise the issues of line loss and CLEC market shares. However, the multiple tests from which the applicant ILECs will choose do not consistently address these issues. Test 4 is especially problematic. Unlike Tests 1, 2 and 3,¹⁸ that identify CLEC market share as a required showing, Test 4 requires only that the applicant show "that at least fifteen per cent of total residential access lines have been lost since 2002 as reflected in the applicant's annual report filed with the commission for 2002."

¹⁸ 4901:1-4-10(C)(1), (2), and (3) O.A.C.

This requirement is troublesome for numerous reasons. First, the lines in question need not be stand-alone BLES lines. Second, they may be lines that have simply migrated to another service offering by the applicant ILEC or an ILEC affiliate and thus are not "lost" to a competitor of any kind, as the customer remains under the umbrella of the parent company. Thus, the appropriate calculation of "lost" residential access lines since 2002 must exclude any residential landlines that migrated from the ILEC to (a) its own digital subscriber line ("DSL") service, (b) an affiliated provider of DSL, or (c) an affiliated wireless carrier. DSL adoption has affected subscription to second lines.

30. Alternatively, wireless substitution for second lines, or a small number of cord cutters who are wireless only, has resulted in some consumers using an AT&T wireless (formerly known as Cingular) telephone instead of AT&T Ohio wireline service. Transfer of consumers from AT&T Ohio's switched services to AT&T's broadband or wireless services is not a competitive loss for AT&T Ohio, and should not be counted in the 15% line-loss standard adopted by the Commission in Test 4.
31. There are other factors that have nothing to do with competition that may contribute to line loss. This makes line loss, as opposed to market share, a meaningless measure of market power. Market share, by identifying the percentage of the overall market supplied by various firms, will provide critical information regarding the relative position of market participants, and it is only when market shares indicate that market concentration has substantially declined that the Commission can safely rely on market forces to balance the interests of

buyers and sellers of BLES.¹⁹ Test 4 does not require any showing of CLEC market share, or the market shares of alternative providers. It is unreasonable for the Commission to draw conclusions regarding market power, the absence of entry barriers, and the extent of competition for BLES without having any information on market shares of alternative providers of BLES. Test 4 fails to require reasonable showings relating to market share and market power in the exchange areas where exemption is sought, and sheds no light on the issue of entry barriers.

i. DSL Migration and Line Loss

32. There are several factors that, in general, will affect the demand for switched access lines and could result in line loss; a number of these factors bear no relationship to the erosion of AT&T Ohio's market power for stand-alone BLES. It is also important, when evaluating trends associated with the growth in switched access lines, to consider whether the overall period under evaluation exhibits any unusual characteristics. Test 4 is particularly problematic in this respect, as it singles out the reference year of 2002 for the evaluation of residential access lines lost. The period beginning in 2002 is precisely the period when broadband connections in Ohio began to be more widely adopted, thus contributing to a decline in switched lines, especially residential second lines that were being used for dial-up Internet access.
33. With regard to line loss experienced by AT&T Ohio, it is very clear that AT&T's broadband migration strategies have contributed to significant declines in

¹⁹ The Commission should also not rely on "snapshots" but should look at sustainable trends. See R.C. 4927.02(A)(2).

switched access lines, while resulting in robust growth in AT&T's broadband connections. For example, AT&T Ohio's corporate parent indicates in its fourth quarter 2006 Investor *Briefing*:

Traditional primary consumer lines declined by 227,000 in the fourth quarter, reflecting continued competition. This compares with declines of 242,000 in the third quarter of 2006 and 129,000 in the fourth quarter of 2005. Additional lines declined by 105,000 in the fourth quarter, *consistent with results over the past several quarters, reflecting migration from dial-up Internet access to high speed service.*

AT&T's high speed Internet connections – including DSL, AT&T U-verse high speed Internet and satellite broadband services – increased by 383,000 in the fourth quarter to 8.5 million, up 1.6 million or 23.4 percent over the past year. *More than 90 percent of AT&T's fourth-quarter high speed Internet net adds were consumer.* High speed Internet penetration of consumer primary lines reached 33.3 percent at the end of the fourth quarter, up from 25.5 percent a year earlier and 17.7 percent at the end of 2004.²⁰

This broadband growth continued in 2007.²¹ This migration of switched residential lines to DSL and other high capacity circuits says nothing about the existence of entry barriers and competition for stand-alone BLES. OCC attempted to obtain information from AT&T Ohio regarding line counts for primary and non-primary switched lines, and DSL line counts in the residential market, but AT&T Ohio refused to provide the requested information.²²

34. Test 4 inappropriately focuses on the period beginning in 2002, a period characterized by increased broadband adoption, with AT&T Ohio continuing to

²⁰ AT&T Fourth Quarter 2006 Investor *Briefing* at 8 (emphasis added). Available at: http://www.att.com/Investor/Financial/Earning_Info/docs/4Q_06_IB_FINAL.pdf.

²¹ "Total high speed Internet connections, which include DSL, AT&T U-verse high speed Internet and satellite broadband services, increased by 396,000 in the [fourth] quarter to reach 14.2 million, up 2.0 million, or 16.3 percent, over the past year." AT&T press release, January 24, 2008. Available at: <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25073>.

²² AT&T Ohio responses to OCC's 1st Set, Interrogatories 100 and 101.

serve, via DSL, many of the lines supposedly "lost." Thus, the line loss criterion in Test 4 results in a standard that is inconsistent with important provisions of R.C. 4927.03, especially with regard to matters relating to "market share, growth in market share ... and the affiliation of providers of services." The inappropriate "residential lines lost" focus of Test 4 overlooks market share, and the fact that observed line loss is partially a matter of consumers switching from dial-up connections to broadband provided, in part, by AT&T Ohio.

ii. Other Line Loss Issues

35. Alternatively, to the extent that "cord cutting" is a factor in a decline in residential access lines, some of the cord cutters may simply migrate service to the AT&T wireless affiliate. That again does not represent a competitive loss or a shift in AT&T Ohio's market share.
36. Finally, any calculation of "lost" residential access lines must account for those lines that have been disconnected outright; that is, without being migrated to any other provider whatsoever. The fact that a former ILEC customer takes *no* service is in no way demonstrative of the existence of functionally equivalent or substitute services for BLES. For example, a customer in an ILEC's service area may disconnect ILEC-provided telephone service because the household is moving to a different part of the state (or even out of state) served by a different ILEC. Or, a customer may simply disconnect ILEC-provided service without changing location and without subscribing to another type of service for other reasons, such as affordability. Similarly, counts of residential access lines that are gathered during different months of the year may misrepresent "short-term"

disconnections, such as those occurring at the end of the college academic year. A simple comparison of total residential access lines at two points in time would count these disconnected lines as being "lost" – *and represent that "loss" as evidence of competition for the ILEC's BLES* – when that is plainly not the case. As such, the calculation of "lost" lines per the first prong of Test 4 must exclude and/or adjust for disconnected lines represented by customers who did not migrate their ILEC access line to another provider.

37. Clearly, the first prong of Test 4 as applied by AT&T Ohio does not satisfy the statute, because AT&T Ohio's calculation of the decrease in residential access lines between year-end 2002 and September 30, 2007 includes disconnected residential access lines that cannot, for the reasons described above, be considered "lost" to competition or alternatives. In order to meet the statute, the question of whether the Test 4 exchanges pass or fail the first prong of Test 4 can only be answered after revising the Company's calculation to exclude: (1) lines transferred to the Company's DSL service, its DSL affiliate or its wireless affiliates; (2) lines transferred to other broadband providers; and (3) lines disconnected and not reconnected with an alternative provider within the Company's service area. The data that is required to provide that exact calculation has not been provided through discovery,²³ so I have been unable to provide a revised calculation of residential access lines "lost" in the Test 4

²³ See, e.g., AT&T Ohio responses to OCC Interrogatories 7, 8, 9 and 101 where the Company objected to providing the number of DSL subscribers in any of the exchanges for which it is seeking BLES alt. reg. and objected to providing information regarding non-primary line migration to AT&T's DSL service. See also AT&T Ohio's response to OCC Interrogatory 100 where the Company objected to providing information regarding the quantity of non-primary residential lines in each exchange.

exchanges. However, AT&T Ohio bears the burden of proof in its Application,²⁴ unless and until AT&T Ohio demonstrates that it has actually "lost" 15% of its residential lines *consistent with the statute* in these exchanges, the Company has not satisfied the first prong of Test 4, and thus fails the entire test.

D. Test 4 and Entry Barriers

38. Section 4927.03(A)(3) of the Revised Code states:

To authorize an exemption or establish alternative regulatory requirements under division (A)(1) of this section with respect to basic local exchange service, the commission additionally shall find that there are no barriers to entry....

This component of the statute requires that the Commission thoroughly evaluate the structure of the market for BLES and make a determination that barriers to entry do not exist.

39. There are a number of factors that can contribute to the existence of entry barriers for BLES. These include economies of scale and scope, network effects, first mover advantages, control over key inputs, and factors that contribute to strategic entry barriers, such as long-term contracts, product bundling, and the existence of sunk costs. Dr. Roycroft included an extensive discussion of these entry barriers in an Appendix to his affidavit in 06-1013.²⁵

²⁴ 4901:1-4-10(A), O.A.C.

²⁵ 06-1013, Roycroft Affidavit at Section VII. Appendix: Additional Discussion of Entry Barriers (October 16, 2006).

i. Test 4 Allows the Applicant to Ignore Conventional CLECs and Avoids an Examination of Entry Barriers That Affect the CLEC Sector.

40. Federal Communications Commission ("FCC") reversals of previous rules associated with opening local markets have resulted in a much more restrictive provisioning of Unbundled Network Elements ("UNEs"). UNE switching is no longer available at Total Element Long-Run Incremental Cost ("TELRIC") rates, UNE loops are available on a more limited basis, and commercial agreements with rates set by the incumbent have typically replaced TELRIC-based unbundled network element platform ("UNE-P") arrangements that served as a vehicle for entry for many CLECs.
41. The impact of the elimination of UNE-P on CLECs that served residential customers has been highly negative, creating a substantial barrier to entry. Legacy AT&T and a host of smaller CLECs, curtailed operations in the residential marketplace, with legacy AT&T seeking refuge through merger. The market exit of the largest CLEC that served residential customers is a strong indicator of the existence of entry barriers in the provision of residential services in general, and residential BLES in particular. Given the reversals associated with the market-opening provisions of the Telecommunications Act, for a host of conventional CLECs the entry barriers rise even to the level of "barriers *that prevent a carrier from even being able to compete in that market.*"²⁶

²⁶ 05-1305 Opinion and Order, p. 22, emphasis added.

ii. The Presence of Multiple Facilities-Based Firms Supplying BLES Could Provide Evidence that Entry Barriers Have Been Overcome, and Could Provide Evidence of Sustainable Competition.

42. Although none of the Commission's competitive tests go far enough to guarantee sufficient evidence regarding the absence of entry barriers, two of the tests (i.e., Tests 2 and 3) at least open the door for the Commission to make the required finding that no entry barriers exist, as they require a showing that two facilities-based CLECs are providing BLES to residential customers. The presence of facilities-based CLECs providing BLES to residential customers provides some evidence that, even though entry barriers exist, they may be overcome. These tests fail, however, to require that these facilities-based CLECs provide stand-alone BLES. Unfortunately, Test 4 fails to include any criteria that are consistent with the statutory requirement that the Commission make findings regarding the absence of entry barriers for BLES.
43. If the Commission does not establish that facilities-based competition for BLES is ubiquitous in each requested exchange area, including evidence that other facilities-based firms are actually supplying BLES, then AT&T Ohio will be able to gain regulatory relief in the face of clear evidence of continuing entry barriers. Absent facilities-based alternative providers for BLES, consumers will not experience market forces that are capable of constraining the market power possessed by AT&T Ohio. Given the structure of Test 4, the only link between the test and BLES arises through the Commission's definition of *alternative provider*. The presence of alternative providers could only rise to the level of

demonstrating that there are no entry barriers with regard to the provision of BLES if it is shown that facilities-based alternative providers are providing BLES to residential customers. However, Test 4 does not require this and is unlikely to elicit sufficient evidence regarding entry barriers because applicants will probably attempt to demonstrate that alternative providers are supplying "competing services," such as VoIP, wireless bundles, or high-end wireline bundles, that are poor substitutes for BLES, and do not demonstrate that stand-alone BLES is being provided.

44. As discussed above, the statute clearly prohibits the granting of alternative regulation for BLES unless the Commission finds that there are no entry barriers for BLES. A mere showing of the existence of "competing services," of some sort, does not rise to the level of the statutory requirement that there be no entry barriers. AT&T Ohio makes no showing with regard to either the supply of competing services, or to the provision of BLES, by its candidate alternative providers. Thus, the Commission does not have sufficient evidence in this case to make a finding that there are no entry barriers to the provision of BLES. Absent this evidence, the Commission also cannot reach the conclusion that entry is sustainable.

E. Test 4 Summary

45. In summary, Test 4, by itself, does not require sufficient information to satisfy all of the statutory criteria. Test 4 is particularly deficient with regard to the required examination of market power and entry barriers. On the other hand, application of Test 4 can be consistent with the findings needed regarding reasonably

available alternatives, where alternative providers are shown to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions.

III. AT&T OHIO'S APPLICATION OF COMPETITIVE TEST 3

A. Test 3 and Indicators of Market Power

46. Test 3 states as follows:

An applicant must demonstrate in each requested telephone exchange area that at least fifteen per cent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five alternative providers serving the residential market.

OCC Affiant Ms. Tanner addresses the market share criterion contained in Test 3 in more detail. Test 3's focus on market share, as opposed to lines lost, establishes a superior basis for evaluating market power, compared to Test 4. But the structure of the test allows AT&T Ohio to be awarded alternative regulation while maintaining an 85% market share for BLES. This market share threshold, which leaves AT&T Ohio with a very large share of the market, contributes to the conclusion that AT&T Ohio continues to be the dominant carrier in its service territory, and undermines the potential for a finding that BLES is subject to competition. Test 3 also requires the presence of at least five alternative providers serving the residential market. This requirement is similar to, but weaker than, the Test 4 requirement of "at least five *unaffiliated facilities-based* alternative

providers serving the residential market.”²⁷

47. As AT&T Ohio does not distinguish between the alternative providers when applying Test 3 and Test 4 (i.e., generally, the same firms are identified as “alternative providers” when Test 3 is applied and “unaffiliated facilities-based providers” when Test 4 is applied), the discussion in the previous section of the limitations of alternative providers with regard to measuring market power applies to Test 3 as well. This discussion indicates that in an evaluation of market power, the mere presence of alternative providers is not a meaningful condition, as there is no requirement that the alternative providers are selling BLES or a substitute service that is functionally equivalent at competitive rates, terms and conditions. If BLES or a BLES equivalent is not being sold by the alternative providers, then market conditions indicate that the incumbent provider of BLES will continue to exercise market power. The lack of substitutability of services offered by alternative providers, especially wireless providers, indicates that AT&T Ohio could increase BLES prices significantly, because consumers would have significant difficulty in finding alternatives to BLES, at competitive rates, terms, and conditions. In addition, the degree of presence of the alternative providers is relevant; if they serve only a handful of residential customers, it is clear that the incumbent retains substantial market power.

²⁷ 4901:1-4-10(C)(3) and (4), O.A.C. (emphasis added). Test 3, however, by requiring, in addition, that CLEC market share be examined, and that two unaffiliated facilities-based CLECs be shown to be providing BLES to residential customers provides a more rigorous test overall when compared to Test 4.

B. Test 3 and Entry Barriers

48. As discussed above, the best evidence of the lack of entry barriers in the provision of BLES is the presence of sustainable facilities-based entry associated with the provision of BLES. Test 3 opens the door to analysis that would allow the Commission to draw conclusions regarding the existence of entry barriers. If it can be shown that facilities-based providers are selling BLES in an exchange, and it is reasonable to expect that such activity will be ongoing, then entry barriers are less likely to exist. However, it is important to note that Test 3 requires only the presence of two unaffiliated facilities-based CLECs providing BLES to residential customers. The mere presence of two or three facilities-based CLECs, while showing that entry barriers can be overcome, is not a strong indicator of the lack of such barriers. The issue of sustainability is important here. If Test 3 can be satisfied on this point, the result is a situation where price competition among the small number of firms is unlikely. It is widely recognized that market structures with only two providers are more likely to generate collusion rather than the type of robust competition that will benefit consumers. For example, the cellular duopoly that existed prior to the expansion of the number of wireless licenses is widely recognized as having resulted in an inferior market outcome. After the expansion, wireless prices declined and subscriptions increased once the duopoly was broken.²⁸ There is no reason to expect that a small number of facilities-based providers for BLES would perform differently: A total of three providers – the

²⁸ See, for example, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Condition With Respect to Commercial Mobile Services*, Fifth Report, FCC 00-289 (rel. August 18, 2000), pp. 4-5.

incumbent and two competitors with small market shares – is not much of an improvement over a duopoly.

49. In addition, the Test 3 provision with regard to facilities-based CLECs requires no showing regarding whether or not the observed entry is sustainable. R.C.

4927.02(A)(2) establishes that it is the policy of the state to:

Rely on market forces, where they are present and capable of supporting a *healthy and sustainable*, competitive telecommunications market, to maintain just and reasonable rates, rental, tolls and charges for public telecommunications service.²⁹

Given the limited focus of the Commission's Test 3 on two facilities-based CLECs, it is important to evaluate whether the candidate firms present a sustainable alternative to the incumbent. Given the experience of the CLEC industry in the past five years, whether a firm identified by the Applicant is likely to be in business for more than a fleeting period is a valid consideration, but one which the design of Test 3 does not encourage.

50. In summary, although Test 3 opens the door for some consideration of whether entry barriers are present, as compared to Test 4 that has no explicit connection to the statutory requirement regarding the absence of entry barriers, Test 3 does not go far enough. Test 3's focus on a small number of candidate CLECs and the absence of any requirement that even this small number of BLES providers has a reasonable chance of continuing to operate, results in a test that is inconsistent with the statutory provisions.

²⁹ R.C. 4927.02(A)(2), emphasis added.

IV. AT&T OHIO'S CANDIDATE WIRELESS ALTERNATIVE PROVIDERS AND COMPETING SERVICES FOR BLES

51. In the sections that follow, I will first examine issues surrounding the ability of consumers to substitute between BLES and wireless services offered by AT&T Ohio's candidate wireless alternative providers, i.e., whether they are functionally equivalent or substitute services. I will then examine whether BLES and wireless services offered by AT&T Ohio's candidate wireless alternative providers are competitively priced.
52. AT&T Ohio has identified Alltel Wireless,³⁰ Cincinnati Bell Wireless,³¹ Sprint/Nextel,³² T-Mobile³³ and Verizon Wireless³⁴ as alternative providers under both Test 3 and Test 4. The differences between the two Tests are not relevant to the following discussion. To determine whether these wireless providers offer competing or reasonably available alternative services to BLES, it is first important to consider the characteristics of BLES. If the wireless offerings do not provide similar functionality to BLES, then it is less likely that consumers will find wireless service as a reasonable substitute for BLES. The Commission's rule, that follows the statute in this respect, identifies specific characteristics associated with basic local exchange service:

³⁰ In the Mantua, Murray City, Olmsted Falls, Philo, Somerton and Victory exchanges.

³¹ In the Aberdeen exchange.

³² In the Canal Winchester, Groveport, Mantua, New Albany, Olmsted Falls, Philo, Somerton, South Solon and Victory exchanges.

³³ In the South Solon exchange.

³⁴ In the Aberdeen, Canal Winchester, Groveport, Mantua, New Albany, Olmsted Falls, Somerton, South Solon and Victory exchanges.

"Basic Local exchange service (BLES)" means end user access to and usage of telephone company-provided services that enable a customer, over the primary line serving the customer's premises, to originate or receive voice communications within a local service area, and that consist of the following:

- (1) Local dial tone service.**
- (2) Touch tone dialing service.**
- (3) Access to and usage of 9-1-1 services, where such services are available.**
- (4) Access to operator services and directory assistance.**
- (5) Provision of a telephone directory and listing in that directory.**
- (6) Per call, caller identification blocking services.**
- (7) Access to telecommunications relay services.**
- (8) Access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies.**

BLES also means carrier access to and usage of telephone company-provided facilities that enable end user customers originating or receiving voice grade, data or image communications, over a local exchange telephone company network operated within a local service area, to access interexchange or other networks.³⁵

A. Wireless Does Not Provide a Functional Equivalent or Substitute for BLES Dial-Tone.

53. Given the Commission's definition of BLES, it is first reasonable to evaluate whether AT&T Ohio has identified alternative providers that sell services that have characteristics similar to BLES. With regard to wireless carriers, there are a number of differences in their service offerings that make them inconsistent with BLES as defined by the statute and the Commission.
54. It is important to note that wireless service providers offer no assurance that consumers, should they subscribe, will be able to actually use the service at any specific location, including their homes. This is a critical distinction between

³⁵ 4901:1-4-01(C), O.A.C. See R.C. 4927.01(A).

wireless and BLES. BLES offers consumers highly reliable service in their homes. Wireless carriers acknowledge that the unreliable network characteristics of their networks may have adverse effects on services they offer. For example, Alltel Wireless cautions its customers that "Alltel does not guarantee coverage or service availability."³⁶ Verizon Wireless counsels its customers:

Wireless phones use radio transmissions, so we can't provide service when your phone isn't in range of a transmission site used to provide service. Even within a coverage area, there are many factors, including network capacity, your phone, terrain, proximity to buildings, foliage, and weather that may impact availability and quality of service.³⁷

Indeed, Verizon's CEO, Ivan Seidenberg, publicly stated that people have unrealistic expectations about a wireless service working everywhere. He is reported to have said, "Why in the world would you think your (cell) phone would work in your house? The customer has come to expect so much. They want it to work in the elevator; they want it to work in the basement."³⁸

Additionally, Verizon Wireless's web site states that "[s]ervice may vary

³⁶ Wireless Plans Terms & Conditions available at:
http://www.alltel.com/wps/portal/AlltelPublic/Content?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/Personal/home/p/wirelessplans/individual/dindividualplans#default (accessed January 15, 2008).

³⁷ Verizon Wireless Customer Agreement, available at:
http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp&textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp&textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp (accessed January 15, 2008).

³⁸ "Verizon CEO sounds off on Wi-Fi, customer gripes. Seidenberg also explains phone company's reasons for wanting to buy MCI," *San Francisco Chronicle*, April 16, 2005, at C1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/04/16/BUGJ1C9R091.DTL&hw=seidenberg&sn=001&sc=1000> (accessed January 15, 2008).

significantly within buildings.”³⁹ Sprint/Nextel warns its customers:

[n]either we nor our vendors, suppliers or licensors are responsible for any damages resulting from: ... (b) providing or failing to provide Services, including but not limited to, deficiencies or problems with a Device or network coverage (for example, dropped, blocked, interrupted calls/messages, etc.);... (e) an interruption or failure in accessing or attempting to access emergency services from a Device, including through 911, Enhanced 911 or otherwise...⁴⁰

These disclaimers identify significant limitations on wireless service that make the service non-comparable to the more reliable dial-tone service provided by BLES. As discussed further below, wireless service providers do not even offer assurance that their services will function indoors, a characteristic that further undermines the ability of wireless to substitute for BLES.

55. Further, from a technical standpoint, wireless phones do not offer dial-tone service. Dial-tone provides a signal to a BLES user that the network is willing to accept a call. With BLES, consumers enjoy high levels of dial-tone availability and the inability of the wireline network to transmit or receive local calls is a rare experience. Wireless networks do not provide the high-level of reliability associated with BLES. Rather, the wireless customer discovers whether or not the network is capable of transmitting a call only after hitting the “send” key on the telephone. This technical difference between BLES and wireless indicates that

³⁹ Verizon Wireless Coverage Locator: Important Map Information, found at <http://www.verizonwireless.com/b2c/coveragelocator/mapInformation.jsp> (accessed January 15, 2008) (emphasis added).

⁴⁰ Sprint/Nextel Terms and Conditions, available at: http://www1.sprintpcs.com/explore/ueContent.jsp?FOLDER%3C%3Efolder_id=1491973&CURRENT_USER%3C%3EATR_SCID=ECOMM&CURRENT_USER%3C%3EATR_PCode=None&CURRENT_USER%3C%3EATR_cartState=group&bmUID=1153861090608&scTopic=whySprint (accessed January 15, 2008).

consumers will not know in advance whether the local network is capable of accepting their call, and contributes to differing consumer experiences with regard to the reliability of service.

56. Thus, the nature of wireless service is fundamentally different from BLES. Wireless does not provide a service that is equivalent to the dial-tone offered by AT&T Ohio. Wireless technology is much less reliable than the wireline technology associated with BLES, and the security of highly reliable dial-tone service is not present with wireless. This lack of comparability contributes to the conclusion that wireless is not a functional equivalent or substitute for BLES.

B. Wireless Does Not Provide a Functional Equivalent or Substitute for BLES E911.

57. The warnings regarding service reliability provided by Sprint/Nextel quoted above highlight another difference between wireline and wireless service, i.e., the ability to utilize 911 services, including E911.
58. This lack of E911 compatibility marks another area where the wireless carriers identified by AT&T Ohio are not providing a service with characteristics similar to stand-alone BLES, thus limiting the functional equivalence and substitutability of wireless service for BLES.

C. Wireless Is Not Functionally Equivalent or Capable of Substituting for BLES in Other Ways.

59. Wireless service is also dissimilar to wireline service in other respects. For example, wireless providers are not required to enable consumer access to third-party long distance providers. On this point, AT&T Ohio simply states that it is "unknown" whether wireless providers offer access to toll presubscription,

- interexchange or toll providers.⁴¹ In fact, wireless telephony does not allow consumers to choose their long-distance provider. Wireless consumers must take the long-distance service offered by their wireless provider. Nor do wireless services provide a practical or a comparable means to BLES of accessing the Internet, or other enhanced service providers. Internet access and BLES will be discussed in more detail below.
60. Further, it is important to recognize the essential complementary role⁴² that BLES plays with a variety of technologies that rely on the functionality provided by BLES to enable consumer use of enhanced services.⁴³ Other technologies and services that can be utilized or enhanced through use of BLES, but that may be unusable with wireless service, include:
- » Healthcare monitoring devices,
 - » Alarm services,
 - » Personal safety devices that might be used by the elderly or disabled⁴⁴
61. Thus, BLES provides consumers with features and functions that may not be available to a wireless-only user. The Commission has observed that "[w]hether a product substitutes for another product does not turn on whether the product is

⁴¹ For example, see AT&T Ohio responses to OCC 1st Set, Interrogatories 15, 31 and 39.

⁴² These technologies are complementary to BLES in the sense that although they do not provide voice communications, they do require a "hard wired" telephone line.

⁴³ For further discussion, see "Choosing Cell Over Landline Can Bring Unexpected Pain," *The Wall Street Journal Online*, July 9, 2004 available at http://online.wsj.com/article_print/0,,SB108921367434057319,00.html.

⁴⁴ In response to discovery, AT&T Ohio stated that it is "unknown" whether wireless service can be used for alarm monitoring, for personal safety and medical alarms, or for dial-up Internet access. See, e.g., AT&T Ohio responses to OCC 1st Set, Interrogatories 16 and 32.

exactly the same.”⁴⁵ However, to be consistent with the statute, the Commission must not interpret possible substitutes so broadly as to include alternatives so dissimilar to BLES that most consumers do not have the ability or inclination to switch. Doing so will prevent substitution capable of constraining an ILEC's market power for BLES.

D. Significant Additional Functional Differences Between Wireline and Wireless Inhibit Substitution.

62. The discussion above focused on specific differences between BLES as defined by the Commission and wireless services. There are a number of other factors that make wireless a poor substitute for wireline services in general, including BLES. First, flat rate local calling is not available with wireless service. For example, wireless telephone plans bill for usage for both incoming and outgoing calls. Wireless plans may offer “buckets” of minutes that can be used at any time, however, exceeding a plan's limit may result in charges as much as \$0.40 per minute.⁴⁶ Consumer aversion to measured local calling is one barrier to the outright replacement of a wireline telephone with a wireless phone.
63. Second, wireless telephones do not provide practical Internet access or Internet access comparable to BLES. Wireless companies are offering telephones that are capable of providing some basic Internet-related functions, like e-mail and “web browsing,” however, the “Internet” that is provided through these plans is not the open Internet that is available from competitive Internet service providers.

⁴⁵ 05-1305 Opinion and Order, p. 25.

⁴⁶ As discussed below, wireless plans typically also require substantial penalties for termination of service before the end of the “contract.”

Furthermore, these phone-based "wireless Internet" plans impose additional fees, including charges for downloads, based on the number of kilobytes transferred.⁴⁷

64. Third, for a family to replace a wireline telephone with a wireless alternative, multiple wireless telephones will be required, increasing the cost and complexity of the replacement for BLES. Keeping track of cell phones may be a challenge, which makes their use as a wireline replacement more risky. Wireline telephone service, as associated with BLES, enables calls to be made to a specific *place*, which contributes to the unique characteristics of wireline phones. Wireless phones are primarily associated with a single person. If a family were to cut the cord, this would replace the current single main number for reaching a residence with multiple numbers. In addition to the increased expense associated with multiple wireless handsets, wireless service lacks an important feature for households with more than one individual – the ability to "call home." With wireless only, "calling home" becomes a hit or miss proposition.
65. Given these limitations, it is not surprising to find the results of a TNS Telecoms Survey released in June of 2006 reporting that the wireline phone is the most important communications product in the household, as compared to wireless services and broadband Internet access.⁴⁸ This is an important result for the

⁴⁷ See, for example:

<http://www.verizonwireless.com/b2c/store/controller?item=planFirst&action=viewPlanList&sortOption=priceSort&typeId=3&subTypeId=49&catId=448> (accessed January 22, 2008).

⁴⁸ "Wired Line Phone Considered Most Important Household Communications Product," TNS Telecoms, June 22, 2006. Available at: <http://www.tnstelecoms.com/press-6-22-06.html> (accessed January 15, 2008).

Commission to consider. It shows that consumers identify distinct characteristics associated with wireless and wireline services, and continue to identify the wireline phone connection as the most important.

E. Wireless Service Quality is Another Functional Difference That Inhibits Substitution.

66. Wireless service quality is an impediment to replacing a wireline phone. Wireless coverage areas do not provide uniform signal strength and may have "dead zones," where either no signal or a very weak signal can be received. If a consumer's home is in a dead zone, it is extremely unlikely that a consumer would substitute wireless service for wireline service. Furthermore, receiving a wireless signal within a building may be difficult even when a signal is available out-of-doors. Thus, a wireless phone may not provide a very good alternative to a wireline phone when indoors, or when walking from room to room in a home or apartment. Wireless calls made from a dwelling are more subject to trouble than those made outdoors, thus inhibiting wireless for wireline substitution. A paper presented at an Institute of Electrical and Electronics Engineers conference stated:

Ubiquitous wireless service coverage indoors poses a challenge for cellular service providers. Many subscribers find that there are areas within their residences or offices which have no coverage or poor coverage, leading to dissatisfaction with their service, and a reluctance to "cut the cord" on the wireline phone in favor of wireless service only.⁴⁹

⁴⁹ "Indoor Wireless Service Signal Distribution via Broadband", Janet R. Dianda, Innovative Technologies, Sprint/Nextel (November 2006), available at http://www.ieeeexplore.ieee.org/xpl/freeabs_all.jsp?isnumber=4117911&arnumber=4146395&count=393&index=136 (accessed January 15, 2008).

67. During peak calling periods, overwhelmed wireless networks have difficulty meeting user demand, leading to blocked and dropped calls. The FCC cautions consumers about wireless “dead zones” and other wireless networks shortcomings:

A number of factors can prevent the commencement or completion of a call from a wireless phone. Even when a carrier publishes maps showing coverage in a certain geographic area, a subscriber may not be able to complete a call due to limitations in *topography* (the surroundings), *capacity* (how many callers are communicating with the same cell site at a given time), and *network architecture* (where antennas are located). A dropped call usually occurs when you are on the move and there are too few (or no) cell sites in the area where you are traveling. A dropped call also could result from a weakening of the signal from the cell site that carries your call and/or the failure of the call in progress to be handed off to another cell site. For example, the communication signal between your wireless phone and the cell site could fade significantly and end your call as you drive into a tunnel or walk into a building. The structure blocks the signal. The locations where you cannot make or receive calls due to these limitations are sometimes referred to as “dead zones,” “coverage holes,” “dead spots,” or “obstructed areas.”

When many people use a wireless service provider's network at the same time and its *capacity* is strained, other customers trying to connect may hear a “busy signal” instead of being able to complete their calls.⁵⁰

68. Disclaimers from wireless providers regarding use of their product indoors, discussed elsewhere in this affidavit, indicates that no wireless carrier designs its network so as to guarantee indoor use of the wireless product.
69. Even when wireless service can be used indoors, service quality is inferior to wireline. The *Wall Street Journal* points to continuing coverage gaps as

⁵⁰ <http://www.fcc.gov/cgb/consumerfacts/cellcoverage.html> (accessed January 16, 2008), emphasis in original.

a major problem for wireless consumers.⁵¹

70. These disadvantages regarding wireless service are reflected in a survey of wireless users who indicate that they have no plans to cut the cord. I have reproduced Table 4 from Dr. Roycroft's affidavit in 06-1013. This table summarizes factors discouraging consumers from cutting the cord and shows the lack of functional equivalency between wireless and wireline services.⁵²

Factors Inhibiting Wireless Users from Cutting the Cord	
Factor	Percentage of Respondents Indicating Factor (Multiple Responses Allowed)
Wouldn't feel secure without a local phone line	49%
Need the local phone line for Internet access	37%
Cellular quality at home is not good enough	33%
Using only a cell phone would be too costly	25%
Other family members need the local phone line	15%
Need the local phone line for my satellite or other TV service (TiVo)	12%
Need the local phone line for my security system	12%

F. Summary

71. The statutory provisions regarding exemption for BLES require that the Commission find that competition exists and/or that consumers have reasonably

⁵¹ "Why You Still Can't Hear Me Now: Mergers, Years of Investments Fail to Fix Dropped Calls; Silence on Lake Shore Drive," *Wall Street Journal*, May 25, 2005.

⁵² Roycroft Affidavit at 43 citing to Forrester Research, "Cord Cutting Grows into the U.S. Mainstream" March 30, 2006.

available alternatives. When considering whether alternative providers meet these requirements, it is clear that wireless firms do not provide functionally equivalent services for BLES, nor do wireless services provide a reasonable and readily available substitute for Ohio consumers who subscribe to BLES. In addition to these limitations associated with the ability of consumers to substitute wireless for wireline services, the rates, terms, and conditions associated with wireless offerings are not competitive with BLES rates, terms, and conditions. AT&T Ohio has not met its burden under Test 3 or Test 4 to demonstrate, on the basis of its candidate wireless alternative providers, that competing or reasonably available alternative services to BLES are readily available in any of the exchanges where it seeks exemption.

G. Those Who Cut the Cord Exhibit Specific Characteristics, Indicating a Lack of Functional Equivalency and Substitutability for the Overall Population.

72. There is no question that a subset of the population has “cut the cord,” and relies on wireless service alone. Recent surveys estimate that the number of wireless-only households in the United States is approximately 14%. Preliminary data for the first half of 2007 from the National Center for Health Statistics identified 13.6% of adults living in households with only wireless telephones.⁵³ Another survey found that the wireless-only segment is 14.0%.⁵⁴ However, this does not

⁵³ “Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January – June 2007.” Stephen J. Blumberg, Ph.D. and Julian V. Luke, Division of Health Interview Statistics. National Center for Health Statistics, December 2007.
<http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200712.pdf> (accessed January 16, 2008).

⁵⁴ “The Birth of a Cellular Nation.” Andy Arthur, Mediamark Research Inc., October 9, 2007.
[http://www.mediamark.com/PDF/WP%20The%20Birth%20of%20a%20Cellular%20Nation%20Revised.p](http://www.mediamark.com/PDF/WP%20The%20Birth%20of%20a%20Cellular%20Nation%20Revised.pdf)
df (accessed January 16, 2008).

demonstrate that wireless phones provide an alternative to BLES for most consumers. In fact, as discussed above, there are numerous characteristics of wireless phones, when compared to BLES, that substantially limit a consumer's ability to substitute.

73. It is likely that wireless-only consumption is, for a portion of the population, part of a telecommunications-demand life-cycle, where consumers may find it difficult to afford both wireline and wireless when they are young, and do not have a family, and adjust consumption to include wireline services as they age. A report in the *Wall Street Journal* illustrates this type of life-cycle consumption:

Two years ago, when Frank Roberts moved into a new home in Somerville, Mass., he figured his family no longer would need a traditional fixed-line phone. He thought the cellphones he and his wife used all the time would be more than sufficient.

He guessed wrong. The couple, who have an 18-month-old son, quickly ran over their monthly allotment of cellphone minutes. Worse, their grandparents could never understand them when they called, because of echoes and choppy connections on the cellular network.

"The landline comes in handy for a bunch of things, it turns out," says Mr. Roberts, a 36-year-old bartender. Several months later, he had a phone line hooked up to his house.

While the number of wireless-only households is increasing – close to 6% of all U.S. homes at the end of last year, according to Forrester Research Inc. – the trend isn't accelerating as quickly as many experts predicted. And some consumers are reconsidering their decision to go wireless and are reconnecting to a landline.

Consumers cite a variety of reasons for needing a fixed line: poor cellular coverage, the sense of security a home line provides and the fact that many people still rely on landlines for Internet service.⁵⁵

Thus, the lifestyle demands associated with having a family may make wireless-only a poor alternative for a significant portion of the population.

H. Rates, Terms, and Conditions for the Five Wireless Carriers Identified by AT&T Ohio.

74. The discussion below will review the rates, terms, and conditions for wireless offerings associated with AT&T Ohio's candidate wireless alternative providers. While I have discussed the functional limitations of wireless above, here I will focus on price-related issues. Within the context of alternative regulation for BLES, the statutory provisions indicate that findings of competition and reasonably available alternatives should be based on, among other factors, the services available from alternative providers having competitive rates. This provision of the statute reflects the fact that prices of alternatives must be similar for competition to place any constraint on market power. If the services offered by alternative providers have prices that are significantly above those associated with an ILEC's BLES, then the services do not place a competitive constraint on the ILEC.

⁵⁵ "Cutting the Phone Cord Isn't as Popular as Once Predicted," *Wall Street Journal*, June 2, 2005. http://online.wsj.com/article_print/SB111766944518948757.html (subscription required).

i. Representative Wireless Plans Capable of Replacing BLES Minutes.

75. Wireless plans are sold in a variety of configurations. For example, basic wireless plans are available that provide few "anytime" minutes, and charge for each additional minute. Given the very high expense of replacing flat-rate BLES usage with such a plan, for a comparison with BLES rates one could conservatively focus on lower-overall-cost wireless plans, even though most of these plans have terms and conditions that are much more restrictive than those associated with BLES. Alternatively, consumers could consider prepaid plans, that require up-front payments, typically through a "recharge" card that may be purchased at retail outlets. Most of these prepaid plans are also more expensive than post-paid term contract plans, and are designed to provide a limited number of minutes. I have not included prepaid prices in my analysis due to their higher expense.
76. As I discussed earlier, replacing BLES with a single wireless phone is likely to be an unrealistic proposition, especially for families. The risk of a phone "walking away" would provide incentives for a family to purchase plans with multiple phones to replace BLES.
77. In the following chart, I compare wireless carriers' prices to AT&T Ohio's BLES price (currently \$19.64).⁵⁶ To evaluate wireless prices, it is first necessary to evaluate local usage associated with wireline services. I adopted the methodology described by Dr. Roycroft in his 06-1013 affidavit that concludes that an average

⁵⁶ Flat rate without taxes and surcharges; \$6.70 (line charge) + 7.55 (unlimited usage) + 5.39 (subscriber line charge) = \$19.64.

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consumer would need to replace about 1,000 minutes of local voice calling per month with minutes counted by a wireless plan, thus indicating the size of "anytime" minutes needed.⁵⁷ Since wireless carriers do not allow customers to specify the number of anytime minutes that they include in their plan, I have provided multiple quotes from each wireless carrier identified by AT&T Ohio.⁵⁸

Individual Wireless Rate Plans				
	"Anytime" Minutes	Additional Minutes Cost	Plan Cost ^a	Premium above AT&T BLES
Alltel Wireless	900	\$0.40	\$59.99	\$40.35
Alltel Wireless	1,400	\$0.35	\$79.99	\$60.35
Cincinnati Bell Wireless	1,000	Unlimited Everyday Calling = \$10.00/month	\$49.99	\$30.35
Cincinnati Bell Wireless ^b	2,000	n/a	\$59.99	\$40.35
Sprint/Nextel	900	\$0.40	\$59.99	\$40.35
Sprint/Nextel	1,350	\$0.35	\$79.99	\$60.35
T Mobile ^b	1,000	\$0.40	\$39.99	\$20.35
T Mobile	1,500	\$0.40	\$59.99	\$40.35
Verizon Wireless	900	\$0.40	\$59.99	\$40.35
Verizon Wireless	1,350	\$0.35	\$79.99	\$60.35
^a Taxes and fees not included				
^b Promotional offer				

For an AT&T Ohio BLES customer, the price *increase* associated with substituting wireless for AT&T Ohio's BLES ranges from \$20.35 to \$60.35

⁵⁷ 06-1013, Roycroft affidavit at 48-50.

⁵⁸ This is the approach used by Dr. Roycroft in his 06-1013 affidavit. Id. at 52-53.

(representing percentage increase amounts ranging from 200% to 400% per month). The wireless plans are 2 to 4 times as costly as AT&T Ohio's BLES. A price point 2 to 4 times BLES does not provide a competing price. Thus, the rates shown above for AT&T Ohio's candidate wireless alternative providers are not competitive with AT&T Ohio's BLES. Competitive rates are rates that allow the consumer's choice to be unhindered by a significant price differential.

Experiencing a price increase of 200% or more does not present the consumer with a "competitively priced" service. Such a price differential also does not provide much (if any) of a pricing constraint on AT&T Ohio. Thus AT&T Ohio's candidate wireless alternative providers do not, on the basis of price, provide a competing service with BLES.

ii. Consideration of Existing Wireless Subscribers.

78. It is also fair to consider whether a BLES customer who already subscribes to wireless service might find a different price point for expanding their wireless plan to replace BLES. In this scenario, I assume that a household subscribes to AT&T Ohio's BLES and has one wireless line. To conduct this analysis, I again developed a conservative approach to the price-point analysis. For example, I assume that only one additional wireless line is required to replace BLES. Given that households with multiple residents would likely require multiple wireless lines if BLES were to be abandoned entirely, my assumption that only two lines are required will provide a conservative price-point threshold. If more lines are required, then both usage and additional line fees would need to be increased accordingly, raising the price of substitution further. Thus, I believe that the

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values shown below identify a bare-minimum increase in costs associated with replacing wireline with wireless for this scenario where existing wireless service exists. The analysis also does not address the replacement of dial-up Internet access, should the household not have broadband service, further contributing to the conservative nature of the assumptions.

79. To evaluate the scenario where a BLES user who is also a wireless user would abandon wireline, in addition to the number of wireline minutes in need of replacement, I had to account for existing wireless usage. According to the most recent information available from the FCC, average wireless usage is about 820 minutes per month per subscriber.⁵⁹ This would indicate a rate plan with at least 800 minutes would be needed for the average customer to cover existing wireless usage. Adding to that the 1,000 minutes of landline usage I estimate would be needed indicates that a plan offering *at least* 1,800 anytime minutes would be appropriate.

⁵⁹ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993. Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services.* WT Docket No. 06-17, Eleventh Report, September 29, 2006, ¶168.
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-142A1.pdf (accessed on January 23, 2008).

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Family Wireless Rate Plans (2 Lines)					
	Anytime Minutes	Additional Minutes Cost	Plan Cost ^a	Price of 800 Minute Wireless Plan and AT&T BLES	Price Increase For Replacing BLES and Upgrading Existing Wireless
Alltel Wireless	1,400	\$0.35	\$79.99 Plus \$10/month for each additional user	\$69.63	\$20.36
Alltel Wireless	2,100	\$0.25	\$99.99 Plus \$10/month for each additional user	\$69.63	\$40.36
Cincinnati Bell Wireless	1,500	Unlimited Everyday Calling = \$10.00/month	\$89.99 Plus \$10/month for each additional user	\$69.63	\$20.36
Cincinnati Bell Wireless	2,200	Unlimited Everyday Calling = \$10.00/month	\$109.99 Plus \$10/month for each additional user	\$69.63	\$40.36
Sprint/Nextel	1,400	\$0.40	\$89.99	\$79.63	\$10.36
Sprint/Nextel	2,100	\$0.35	\$109.99	\$79.63	\$30.36
T Mobile	2,000	\$0.35	\$99.99	\$59.63	\$40.36
Verizon Wireless	1,400	\$0.40	\$89.99	\$79.63	\$10.36
Verizon Wireless	2,100	\$0.35	\$109.99	\$79.63	\$30.36
^a Taxes and fees not included.					

Given the expense associated with purchasing minutes beyond the wireless plan's bucket of anytime minutes, consumers would have the incentive to purchase plans with larger numbers of anytime minutes as insurance against costly overages.

The results in the table above show that AT&T Ohio's BLES rates and the prices of services offered by AT&T Ohio's candidate wireless alternative providers are not comparable, even if the consumer already subscribes to wireless. The price *increase* associated with substituting wireless for AT&T Ohio's BLES ranges between \$10.36 and \$40.36 (representing percentage increase amount ranging from 110% to 170%). These rates are not competitive since competitive rates are rates that make the consumer's choice unhindered by a significant price differential. AT&T Ohio's candidate wireless alternative providers do not, on the basis of price, provide a competing service with BLES, even if a consumer already purchases wireless service.

I. Terms and Conditions for Wireless Plans Are Not Comparable with BLES Terms and Conditions.

80. The discussion above has focused on the significant differences in rates between AT&T Ohio's candidate wireless alternative providers and AT&T Ohio's BLES. However, the rate differences reflect just one of the limiting factors associated with wireless plans. Other characteristics of wireless plans prevent them from offering a competing service to BLES. For example, each of the wireless providers requires that consumers enter into a long-term contract to receive the best rates, especially plans that include "unlimited" night/weekend minutes. Long-term contracts are an impediment to consumer choice, and to market forces,

- a fact that this Commission has recognized.⁶⁰ In fact, the Commission does not allow contracts for residential stand-alone BLES, which is a Tier 1 service.⁶¹
81. Although many wireless plans offer “unlimited night/weekend minutes,” the definition of nights/weekends is, in fact, highly limiting. Alltel and Verizon begin nights at 9 p.m., and end nights at 6 a.m. Sprint/Nextel offers the most liberal “nights,” with certain plans offering night periods running from 7 p.m. to 7 a.m. The “unlimited night/weekend” provision of some plans is another limiting condition of service when compared with AT&T Ohio’s BLES, which imposes no such restrictions.
82. Unlike wireline service, where there is a competitive market for customer premise equipment, wireless providers typically tie the purchase of wireless service with wireless handsets.⁶² Consumers can transfer their wireless phone numbers, but carriers typically restrict the ability of consumers to transfer phones from other providers. This aspect of wireless telephony inhibits customer choice, and reflects another condition of wireless service that limits its comparability to BLES.
83. Another significant difference between wireless service and BLES is the existence of early termination fees. The candidate wireless alternative providers identified by AT&T Ohio impose significant penalties for early termination. For example,

⁶⁰ Case No. 95-845-TP-COI, Opinion and Order (June 12, 1996).

⁶¹ 4901:1-6-17(A), O.A.C.

⁶² A petition filed with the FCC requests that the FCC apply and enforce its *Carterfone* principles to the wireless industry. *In the Matter of Skype Communications S.A.R.L. Petition to Confirm A Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks*, RM-11361/WBC 07-16, dated February 20, 2007.

Alltel Wireless imposes an early termination fee of \$200 per line.⁶³ Verizon Wireless imposes an early termination fee of \$175 per number.⁶⁴ Sprint/Nextel identifies a termination fee of up to \$200 for each line of service.⁶⁵ These early termination fees tie consumers to their wireless provider for an extended period and make the prospect of replacing wireline with wireless risky. If the wireless service does not function properly, or if the consumer is not happy with their wireless carrier's billing practices, the consumer will be required to pay a significant penalty to revert to BLES.⁶⁶

84. To purchase wireless services at the best rates, the services must also be purchased as part of a bundle. A BLES customer may not want to purchase bundled service offerings, especially if they include features that the customer does not need.⁶⁷ The requirement that vertical features and unlimited long distance calling be purchased along with wireless airtime is a condition of service that makes wireless plans less desirable for some consumers.

⁶³ http://www.alltel.com/wps/portal/AlltelPublic/Content?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/Alltel/alltel.com/footer/termsandconditions/terms.html (accessed January 15, 2008).

⁶⁴ Verizon Wireless does offer a break to its customers. The \$175 early termination fee will be reduced by \$5 for each full month toward the minimum term that the customer completes. However, this is little benefit to a customer who discovers that his phone does not work satisfactorily in his home during the first month of his contract term. See http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp (accessed January 15, 2008).

⁶⁵ Sprint/Nextel subscriber agreement, available at: <http://www.sprintpcs.com/common/popups/popLegalTermsPrivacy.html> (accessed January 15, 2008).

⁶⁶ While some wireless carriers may offer a brief "trial" period, these periods are not sufficiently long enough to allow a consumer to experience service under various weather conditions, or peak calling periods, which may be seasonally related. The trial periods, which are typically 15 to 30 days, also do not give the consumer experience with the carriers' billing practices.

⁶⁷ OCC attempted to identify the number of AT&T Ohio customers who purchase BLES alone, or who purchase BLES and Caller ID alone. AT&T Ohio refused to respond. See AT&T Ohio response to OCC 1st Set, Interrogatory 1.

85. The discussion above points to additional aspects of wireless services that undermine consumer's ability to find, for BLES, functionally equivalent or substitute services readily available at competitive rates, terms, and conditions.

J. Wireless Providers Do Not Position Their Product as a Competitor to Wireline Products.

86. When considering whether wireless firms offer a competing service to BLES, it is important to consider whether wireless providers are designing products that are easy to substitute for wireline BLES. As illustrated above, wireless companies identified by AT&T Ohio as candidate alternative providers do not offer services that are structured like BLES.

87. As discussed above, one critical difference between wireless and wireline networks is the ability of the services to function indoors, such as in a home or apartment, as wireless carriers make no claims regarding the ability of their service to function indoors. Coverage maps, to the extent that they represent the ability to receive a signal at all, are oriented toward the receipt of a signal in an outdoor environment. If wireless firms were targeting the wireline market or the market for BLES, they would need to upgrade their networks to increase signal strength and coverage to ensure that coverage would extend indoors. The inability of wireless service providers to guarantee service availability indoors is a strong indicator that their product is not being positioned as a wireline competitor.
88. It is also important to consider the financial interdependency of wireless and wireline carriers. Wireline carriers AT&T and Verizon are the first and second largest wireless providers. These firms have a vested interest in managing the

consumption of wireless and wireline service that they offer. Suggestions that wireless could replace wireline are completely absent from these carriers' marketing messages. The integration of wireless and wireline marketing discourages wireless firms from actively trying to displace wireline with wireless. Thus, wireless providers do not have an incentive to "compete" for wireline business, and AT&T Ohio provides no evidence of any wireless provider in its exchanges encouraging consumers to drop AT&T Ohio wireline for wireless service.

89. Companies like AT&T that have combined wireless and wireline operations do not encourage their customers to abandon wireline for wireless. These companies have a vested interest in their subscribers' continued use of both wireline and wireless services. Thus, these companies are very careful to avoid marketing messages that might lead customers to think about abandoning their wireline connection. Since AT&T and Verizon are the industry leaders their actions (or lack of action) have an impact on the practices associated with smaller or non-integrated wireless providers.
90. Finally, wireless provider marketing practices will discourage consumers from experimenting with replacing a wireline phone with wireless. As discussed above, to replace a wireline phone with a wireless offering will likely require the purchase of a contract-based calling plan. Wireless calling plans require long-term contracts, rather than the month-to-month service agreements associated with a wireline telephone. These long-term wireless service contracts have high fees for early termination. Long-term contracts with high early termination fees

present a barrier for residential subscribers who might consider trying to switch away from wireline service. If the wireless replacement did not work out, and wireline service needed to be restored, not only would the consumer face the prospect of a service establishment charge from the wireline provider, but a hefty service termination fee from the wireless provider. As discussed above, wireless carriers identified by AT&T Ohio impose termination fees as high as \$200 *per wireless line* associated with wireless accounts. Thus, the prospect of experimentation with abandoning wireline becomes highly risky.

K. Summary – Wireless Is Not a Functional Equivalent or Substitute for BLES Readily Available at Competitive Rates, Terms and Conditions.

91. In summary, AT&T Ohio's BLES has critical characteristics, in addition to its price, that will influence whether consumers can respond to alternatives in the marketplace. 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 that are capable of constraining AT&T Ohio's market power. I have reproduced Table 9 from Dr. Roycroft's 06-1013 affidavit⁶⁸ below. This table provides a summary of characteristics of AT&T Ohio's BLES, and the services offered by its candidate wireless alternative providers, that are relevant to consumers' decision making process. These characteristics are important considerations for the Commission as it evaluates whether wireless carriers are providing services that are competing with AT&T Ohio's BLES.

⁶⁸ Roycroft Affidavit at 62.

Characteristics of Residential Basic Local Exchange Service Provided by AT&T Ohio Compared to Services Provided by Alltel, Cincinnati Bell Wireless, Sprint/Nextel, T Mobile and Verizon		
Characteristic	AT&T Ohio's BLES	Wireless Service
Price	\$19.64 ^a	\$39.99 to \$119.99 per month ^b
Satisfies each component of the Commission and Statutory Definitions of BLES?	Yes	No
Local usage characteristics.	Unlimited local calling	Measured usage plans
E911 available to all subscribers?	Yes	No
Provided outside of bundle?	Yes	No
Can be used for fax/internet access/satellite TV?	Yes	No
High level of service reliability?	Yes	No
Long-term contract required?	No	Yes
Penalties for early termination of service?	No	Yes
^a Including the subscriber line charge, excluding taxes and fees. ^b Excluding taxes and fees.		

The discussion above, as summarized in the table above, shows that for AT&T Ohio BLES customers functionally equivalent or substitute wireless services are not readily available at competitive rates, terms and conditions.

V. AT&T OHIO'S DOCUMENTATION IN SUPPORT OF ITS CANDIDATE ALTERNATIVE PROVIDERS

92. According to AT&T Ohio's Memorandum in Support of Application, it has provided "supporting information and detailed analysis" that AT&T Ohio alleges shows that AT&T Ohio satisfies either Test 3 or Test 4 in each of the 11 exchanges where it is requesting alternative regulation. AT&T Ohio's "supporting information and detailed analysis" is presented by AT&T Ohio in the following fashion, with the pattern of information presentation repeated for each exchange under consideration. The discussion that follows describes key components of Exhibit 3:

- (1) Exchange Cover Sheet – Identifies the exchange.
- (2) Exchange Summary Sheet – The ESS identifies the Competitive Test selected by AT&T Ohio for the exchange under consideration. For Test 3 exchanges, the ESS provides the market share summary. For Test 4 exchanges, the ESS shows the residential line counts as of December 31, 2002 and September 30, 2007.
- (3) Exchange Summary of CLEC lines in service that shows whether the alternative provider has numbers appearing in the E911 database; whether the alternative provider uses AT&T Ohio's Local Wholesale Complete to serve customers in an exchange; and whether the alternative provider uses UNE-P to serve residential customers in the exchange.
- (4) WirelessAdvisor.com printout – For exchanges with a wireless provider, a printout from the WirelessAdvisor.com web site. The printout shows the results of carrier search results for a Zip Code in the county associated with the exchange in question.
- (5) Residence White Page Listings – Shows the number of white pages directory listings by carrier.

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- (6) Ported Numbers – Shows AT&T Ohio numbers that have been ported to other carriers, including both business and residential numbers ported.
- (7) Web site materials – Various print-outs from web sites.

The ESS shows, by way of a “check-off” matrix, AT&T Ohio’s claims as to whether each carrier identified has met certain criteria identified by AT&T Ohio.

These criteria are shown in the table below.

AT&T Ohio Criteria Identified Shown in ESS	
AT&T Ohio Criteria	Explanation From AT&T Ohio <i>Memorandum in Support of Application</i>
CLEC Cert. #	CLEC’s PUCO Certification Number.
ICA Case #	The proceeding/docket in which the PUCO approved the interconnection agreement between the carrier and AT&T Ohio.
Own Facilities	Whether the alternative provider is facilities-based and provides its own switching.
Lease AT&T Facilities	Whether the alternative provider leases facilities from AT&T Ohio.
Tariff Authority	Whether the alternative provider has PUCO tariff authority and that tariff includes BLES for residence customers.
Licensed Wireless Providers?	Whether the alternative provider is a licensed wireless provider in that exchange.
Carrier Website?	Whether the alternative provider has a web site that indicates that they provide residence service in that exchange.
White Pages Listing?	Whether the alternative provider has published white pages listings for its customers in AT&T directories.
Ported Telephone Numbers?	Whether the alternative provider has ported telephone numbers.

**A. Evaluation of Exhibit 3 – Focus on Wireless Carriers –
Relevance of Criteria in Exchange Summary Sheet**

93. AT&T Ohio's Exhibit 3 identifies the criteria that AT&T Ohio apparently believes are relevant for satisfying Tests 3 and 4. These criteria are provided in summary presentation in the ESS that AT&T Ohio has supplied for the 11 exchanges in its application. AT&T Ohio's focus, as shown in each ESS in its Exhibit 3, is misplaced in general, and especially so with regard to wireless carriers. Exhibit 3 provides no evidence that any carrier provides services that are competing with AT&T Ohio's BLES offering, nor does it provide evidence of reasonably available alternatives to BLES. The information conveyed in each ESS has little relevance to the key findings that the Commission must make in this proceeding. These findings would include, for example, for the Test 4 exchanges, that AT&T Ohio has shown that unaffiliated facilities-based alternative providers, including wireless carriers, provide services that compete with BLES. For the Test 3 exchanges, the Commission must find that at least two unaffiliated facilities-based CLECs are providing BLES to residential customers and that five alternative providers are serving the residential market.
94. Each ESS contains a table with various subject headings. "Check marks" appear in the various columns where AT&T Ohio indicates AT&T Ohio's criteria have been documented to AT&T Ohio's satisfaction. If these check marks are significant from the standpoint of providing a demonstration of factors that support the satisfaction of Test 3 or Test 4, it is notable that for wireless carriers check marks are missing from several columns. For example, for the first

category in AT&T Ohio's ESS, "CLEC Certificate number," each wireless carrier shows "n/a". This indicates that no wireless carrier is a certificated CLEC. The column for "Tariff Authority" is also shown as "n/a" for each wireless carrier. In addition, other criteria are consistently not checked for AT&T Ohio's candidate wireless alternative providers in each ESS – no "checks" appear in the categories "Lease AT&T Facilities" and "White Page Listings."

95. If the "check marks" in these categories purport to show criteria that support AT&T Ohio's claims regarding the existence of alternative providers, then the absence of "check marks" indicates that even AT&T Ohio's own criteria have not been satisfied. The absence of "check marks" associated with "Tariff Authority" and "White Page Listings" reflect the separate market and national orientation of wireless carriers, an orientation that has a distinct impact on wireless service offerings, and on the ability of consumers to substitute wireless services for BLES. As discussed above, wireless carriers, by promoting nationally-oriented services, that have lower service quality and other inferior aspects when compared to BLES, provide a service that is not a functional equivalent or substitute for BLES and is not readily available at competitive rates, terms, and conditions.
96. With regard to the wireless carriers shown in Exhibit 3, all are shown to "Own Facilities," be "Licensed Wireless Providers," and most have a "Carrier Website."⁶⁹ While I do not dispute that these criteria may be satisfied as AT&T Ohio indicates in Exhibit 3, these factors are irrelevant to the threshold question

⁶⁹ For some unexplained reason, Verizon Wireless in the Somerton exchange does not have a check-mark in the Carrier Website category.

of whether these carriers provide services that compete with BLES, as the statute requires. The fact that wireless carriers own facilities to provide wireless services does not indicate that these carriers offer any services that compete with AT&T Ohio's BLES. Similarly, the fact that they are licensed wireless providers does not show any evidence of the provision of services competing with BLES. While the existence of a carrier website provides an opportunity to examine the services offered by the wireless provider, and to compare these services with AT&T Ohio's BLES offering, as explained above, wireless rate plans – as shown on the carriers' websites – do not provide a readily available alternative at competitive rates, terms, and conditions.

97. AT&T Ohio's ESS also indicates whether any telephone numbers have been ported. AT&T Ohio indicates that this box is checked where an AT&T Ohio wireline customer's number has been ported to another carrier's switch. As I discuss further below, AT&T Ohio's "Ported Telephone Numbers" statistic fails to identify whether the customer was substituting another carrier's service for AT&T Ohio BLES. However, it is notable that for wireless carriers, AT&T Ohio has not consistently shown that even this flawed measure is satisfied, because several exchanges show the "Ported Telephone Numbers" box missing the check mark.⁷⁰ In addition to low numbers of wireline to wireless number porting, which I discuss further below, AT&T Ohio has not shown that wireline-to-wireless number porting has occurred in *each* exchange.

⁷⁰ Verizon Wireless and Cincinnati Bell Wireless in the Aberdeen exchange; Alltel Wireless in the Murray City and Philo exchanges; Alltel Wireless, Sprint/Nextel and Verizon Wireless in the Somerton exchange; and Sprint/Nextel, T-Mobile and Verizon Wireless in the South Solon exchange.

98. In AT&T Ohio's first BLES alt. reg. case, the Commission excluded wireless carriers in specific exchanges where AT&T Ohio did not show that the carrier was providing residential service within the exchange (based on a lack of evidence of white page listings or ported numbers).⁷¹ Unfortunately, the Commission – without explanation even though the evidence was identical – changed its correct exchange-by-exchange analysis in 06-1013 to an improper analysis of the exchanges in the aggregate in 07-259.⁷² The ESS sheets in each case – and in the instant case – are identical in that wireless carriers are not shown to have white page listings or ported telephone numbers.
99. The importance of an exchange-by-exchange analysis is shown by looking at the wireline-to-wireless porting on each ESS sheet. AT&T Ohio nominates wireless carriers in each of the 11 exchanges. The ESS for each of those exchanges shows that *no* wireline-to-wireless number porting has occurred in four of the 11 exchanges (approximately 35%).
100. The ESS sheets in the instant application also show that none of the wireless carriers have white page listings. Whatever else the Commission does, it should apply the same rationale in this case as it did in the 06-1013 case. Thus, since none of the wireless carriers are shown by AT&T Ohio as having white page listings, none of the wireless carriers should be counted for the exchanges.

⁷¹ 06-1013 O&O at 32. In the Belfast exchange, Verizon Wireless was not accepted as an alternative provider. In the Lewisville and Murray City exchanges, Alltel Wireless and Sprint/Nextel were excluded. In the Salineville exchange the Commission did not accept Alltel Wireless and Sprint/Nextel as alternative providers.

⁷² 07-259 O&O at 25 (“[t]here are residential customers who did in fact disconnect AT&T’s BLES service in exchanges identified in Attachments A and B....”)

Regarding ported telephone numbers, as noted above, the following wireless companies in these exchanges are not shown as having ported numbers: Verizon Wireless and Cincinnati Bell Wireless in the Aberdeen exchange; Alltel Wireless in the Murray City and Philo exchanges; Alltel Wireless, Sprint/Nextel and Verizon Wireless in the Somerton exchange; and Sprint/Nextel, T-Mobile and Verizon Wireless in the South Solon exchange. Thus, since these wireless carriers are not shown by AT&T Ohio as having ported numbers in these exchanges these wireless carriers should not be counted for these exchanges.

101. As noted above, the Commission rejected some wireless carriers as alternative providers in the 06-1013 case due AT&T Ohio's failure to show that they had white page listings or ported telephone numbers. It should return to the exchange-by-exchange analysis performed in that case. Under that analysis, the wireless carriers for the exchanges listed above should be excluded as alternative providers.

**B. Evaluation of Exhibit 3 – Focus on Wireless Carriers –
Relevance of “CLEC Lines in Service” Sheet**

102. The “CLEC Lines in Service” information provided by AT&T Ohio for each exchange plays no role in AT&T Ohio's filing with regard to wireless providers simply because no wireless carriers are shown in these sheets. For each exchange, wireless providers are absent from the “CLEC Lines in Service” data provided, thus AT&T Ohio's case draws no support from this component of their filing. Rather, even if AT&T Ohio believed that this data showed information lending support to the proposition that its candidate alternative providers are

competing for BLES, which the data does not, the information provided by AT&T Ohio does not indicate that wireless carriers have even met this flawed criterion.

**C. Evaluation of Exhibit 3 – Focus on Wireless Carriers –
Relevance of “WirelessAdvisor.com” Search Results Sheets**

103. AT&T Ohio has provided, for each exchange where it identifies a wireless carrier as qualifying under either Test 3 or Test 4, a printout showing the results from a WirelessAdvisor.com Zip-Code search. AT&T Ohio states that the WirelessAdvisor.com Web site was consulted to show that wireless carriers “had a license to operate in the specific exchange area.”⁷³ I have evaluated the WirelessAdvisor.com web site, and I do not believe that it offers any support for AT&T Ohio’s claim that wireless providers offer services that compete with AT&T Ohio’s BLES.
104. Information from the WirelessAdvisor.com web site indicates that it is a *possibility* that certain wireless firms may be providing general wireless services in a particular Zip-Code area. Otherwise, the information provided by AT&T Ohio offers no data regarding whether the wireless providers shown offer services that are competing with AT&T Ohio’s BLES. It is notable how the WirelessAdvisor.com web site frames the service that it provides as being related to consumer decisions regarding wireless telephony:

WirelessAdvisor.com was started as a free web site to help consumers conquer the Wireless, Cellular, and PCS phone service confusion that has come with the introduction of new types of wireless service and the increasing diversity of companies providing those services. WirelessAdvisor.com is meant to be a comprehensive, up-to-date, and unbiased source for wireless

⁷³ Memorandum in Support of Application at 7.

communication service information. WirelessAdvisor.com will help you find the best wireless service, whether it is Cellular, PCS or any other technology, from the many choices available.⁷⁴

This strict focus on wireless is indicative of a market analysis that separates consumer decisions regarding wireless from decisions regarding wireline.

105. The WirelessAdvisor.com web site funds its operations by selling advertising to wireless providers.⁷⁵ WirelessAdvisor.com offers the following disclaimer regarding the information contained on its web site:

Once you have searched the database using your ZIP code, WirelessAdvisor.com will provide you with a list of companies that are presently licensed to provide wireless services in your area. It is not necessarily true that each of the listed companies is now providing service to your location, or that there are not additional companies that can provide the same wireless services. **To determine the exact service coverage area of any listed company it is highly recommended that you contact the listed company directly using the contact information provided.**⁷⁶

Thus, although AT&T Ohio has provided a snapshot of the information shown in various Zip Codes that it has searched, there is no guarantee that this information accurately reflects whether the wireless firms shown are actually providing service. Furthermore, as discussed in more detail in my affidavit, even if a wireless firm is in fact providing service in a particular area, there is no guarantee that the provider is capable of or is actually offering and providing service that might be useful to a consumer as a substitute for BLES. As noted by WirelessAdvisor.com in a "frequently asked question" section, with the question

⁷⁴ <http://www.wirelessadvisor.com/company.cfm> (accessed January 15, 2008).

⁷⁵ <http://wirelessadvisor.com/advertising.cfm> (accessed January 15, 2008).

⁷⁶ <http://wirelessadvisor.com/about-us> (accessed January 15, 2008), emphasis in original.

shown in bold face:

I have been told in the past that my area has no wireless coverage, but the Wireless Advisor lists several companies that are licensed to provide wireless service to my ZIP code. What does this mean?

The list provided by Wireless Advisor for your ZIP code is a list of companies who are now or were at one time licensed by the FCC to provide wireless service in your area. This does not mean that the company is required to provide such service or that the company does provide such service or that there are not other companies who can provide the same service. It is always necessary to contact each company directly for exact coverage areas and other service details.⁷⁷

Thus, WirelessAdvisor.com recognizes that the claim of service, or of coverage, does not guarantee that a usable service is being provided by the wireless firm.

106. In summary, the WirelessAdvisor.com information supplied by AT&T Ohio is not capable of lending any support to the threshold question that AT&T Ohio must address in this proceeding, i.e., whether the wireless providers identified by AT&T Ohio are in fact providing services that compete with AT&T Ohio's BLES. The WirelessAdvisor.com information shows the weakness of the information supplied by the Company. AT&T Ohio has clearly failed to carry its burden on this issue in all respects.

D. Evaluation of Exhibit 3 – Focus on Wireless Carriers – Relevance of “Ported Numbers”

107. The Company admits two shortcomings with the ported numbers data.⁷⁸ The first issue with this data is that it is irrelevant for whether wireless carriers qualify

⁷⁷ <http://www.wirelessadvisor.com/resources/faqs> (accessed January 15, 2008).

⁷⁸ See Memorandum in Support of Application at 8-9.

under either Test 3 or Test 4. As AT&T Ohio states "While some customers have disconnected their wireline connection and ported their wireline number to a wireless phone, this arrangement is an exception rather than the rule."⁷⁹ Second, AT&T Ohio cannot distinguish between residential and business numbers in the ported number database.⁸⁰ Thus, ported telephone numbers, as presented by the Company, do not correctly address the issue before the Commission, i.e., the existence of alternative providers for residential BLES.

**E. Evaluation of Exhibit 3 – Focus on Wireless Carriers –
Relevance of Other Print-Outs from Wireless Carrier Web
Sites**

108. A primary factor in determining whether AT&T Ohio has carried its burden with regard to Tests 3 and 4 is the ability of consumers to substitute wireless for BLES. AT&T Ohio's attempts to demonstrate wireless coverage in the exchanges where it has filed for BLES exemption do not answer that question. The coverage maps generated by AT&T Ohio and provided in Exhibit 3 provide no evidence that consumers are capable of utilizing wireless services in any specific location, and do not demonstrate that wireless services are capable of reaching consumers indoors at their homes – which is a reasonable prerequisite for BLES substitution.
109. The coverage maps provided by AT&T Ohio do not provide any information regarding the actual ability of a consumer to receive a wireless signal in any specific area. Generally, wireless carriers show only limited information in coverage maps, such as which general areas are the "home" calling area, and

⁷⁹ Id. at 9.

⁸⁰ Id.

which areas are associated with "roaming." The point being, however, that the information conveyed in coverage maps is not necessarily accurate, and may not even accurately convey the limited information that any map purports to show.

F. Summary

110. As discussed in detail above, the threshold issue under the third prong of Test 3 and the second prong of Test 4 is whether the alternative providers identified by the applicant are providing competing service(s) to AT&T Ohio's BLES offering(s). For AT&T Ohio's candidate wireless alternative providers, AT&T Ohio's application is entirely deficient with regard to this issue. AT&T Ohio's filing provides limited information, and does not address the issue of whether competing services are being provided. AT&T Ohio's application is also insufficient with regard to the statutory criteria, and does not provide evidence that AT&T Ohio's BLES is either facing competition or that consumers have reasonably available alternatives. AT&T Ohio's application does not address the key statutory criteria of the ability of alternative providers to make functionally equivalent or substitute service readily available at competitive rates, terms, and conditions. Within the overall count of alternative providers under Test 3 and Test 4, the Commission should reject, in each exchange area, all wireless carriers identified. The table shown below provides a summary of the Test 3 and Test 4 exchanges where wireless providers should be subtracted from the number of providers identified by AT&T Ohio.
111. Based on the foregoing discussion, in the exchanges where AT&T Ohio has identified wireless carriers as alternative providers, these firms must be removed

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from the overall count. The table below shows which wireless carriers should be removed from the alternative provider count for each exchange and the resulting number of alternative providers.

Test	Exchange	Wireless Carrier(s) Identified as an Alternative Provider	Number of Alternative Providers Excluding Wireless Carriers
3	Canal Winchester	Sprint/Nextel, Verizon Wireless	10
3	Mantua	Alltel Wireless, Sprint/Nextel, Verizon Wireless	7
3	Murray City	Alltel Wireless	6
3	New Albany	Sprint/Nextel, Verizon Wireless	9
3	Olmsted Falls	Alltel Wireless, Sprint/Nextel, Verizon Wireless	8
3	Philo	Alltel Wireless, Sprint/Nextel	7
4	Aberdeen	Cincinnati Bell Wireless, Verizon Wireless	3
4	Groveport	Sprint/Nextel, Verizon Wireless	7
4	Somerton	Alltel Wireless, Sprint/Nextel, Verizon Wireless	2
4	South Solon	Sprint/Nextel, T-Mobile, Verizon Wireless	5
4	Victory	Alltel Wireless, Sprint/Nextel, Verizon Wireless	8

The removal of wireless carriers on its own causes AT&T Ohio to fail the alternative providers prong for the Aberdeen and Somerton exchanges. OCC affiant Ms. Tanner will be discussing her recommendations regarding the relevance of wireline carriers in AT&T Ohio's application. It is my understanding that her evaluation of AT&T Ohio's candidate wireline alternative

providers and facilities-based CLECs leads her to conclude that only one company meets the threshold criteria associated with Tests 3 and 4 in seven of the 11 exchanges.⁸¹

VI. CONCLUSION

112. AT&T Ohio's application completely overlooks the underlying statutory requirements for BLES alt. reg. With regard to its candidate wireless alternative providers, the information that AT&T Ohio provides does not address the critical issues of whether alternative providers offer competing services to the Company's BLES or make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions.
113. AT&T Ohio's application is also insufficient for the Commission to evaluate whether AT&T Ohio continues to possess market power for stand-alone BLES, or whether entry barriers continue to exist for stand-alone BLES. Test 4 requires that the applicant demonstrate that five facilities-based alternative providers are serving the residential market. In each Test 4 exchange, the overall number of candidate facilities-based alternative providers must be reduced by the number of wireless alternative providers utilized by AT&T Ohio.
114. Likewise, in each Test 3 exchange, the overall number of candidate alternative providers must be reduced by the number of wireless alternative providers utilized by AT&T Ohio. AT&T Ohio's candidate wireless firms do not satisfy either the Commission's definition of facilities-based alternative provider or alternative

⁸¹ First Communications in the Canal Winchester, Mantua, New Albany, Olmsted Falls and Philo exchanges for Test 3. First Communications in the Groveport and Victory exchanges for Test 4.

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provider, nor do they meet statutory requirements with regard to the provision of functionally equivalent or substitute services readily available at competitive rates, terms, and conditions. AT&T Ohio's application is not supported by the inclusion of wireless providers in each exchange submitted under Test 3 or Test 4.

115. For all of the foregoing reasons, AT&T Ohio's application for BLES alt. reg. in the 11 requested exchanges should be denied.

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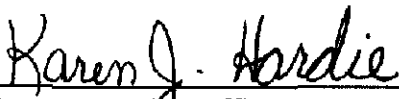
STATE OF OHIO

COUNTY OF FRANKLIN

The undersigned, being of lawful age and duly sworn on oath, hereby certifies, deposes and stated the following:

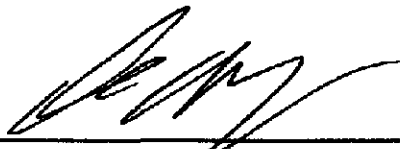
I have caused to be prepared the attached written affidavit in support of the Office of the Ohio Consumers' Counsel in the above referenced docket. This affidavit is true and correct to the best of my knowledge, information, and belief.

Further Affiant sayeth not.



Karen J. Hardie, Affiant

Subscribed and sworn to before me this 8th day of February 2008.



DAVID C. BERENSON, ATTORNEY AT LAW
Notary Public, State of Ohio
Commission #1111 No Expiration Date

**Public Utilities Commission of Ohio
Case No. 07-1312-TP-BLS
AT&T OHIO'S RESPONSE TO
Ohio Consumers' Counsel 1st Set of Data Requests**

INTERROGATORIES

Request # 1:

For each exchange identified in the Application, how many of the Company's residential access lines were subscribed to only the following Tier 1 core services, as defined in Ohio Adm. Code 4901:1-6-20(A)(1)(a) as of the date of the Application:

- a. Basic local exchange service?
- b. Basic local exchange service and basic caller identification (number delivery only services)?

Response:

AT&T Ohio objects to this request on the ground that it requires the production of information that is neither relevant nor material to the subject matter of this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Ohio Admin. Code § 4901-1-16(B). In addition, AT&T Ohio objects on the basis that the requested discovery requires burdensome data compilation and detailed research and analysis and is unknown and not readily available. Seff v. General Outdoor Advertising Co., 11 F.R.D. 598 (N.D. Ohio 1951); In re Columbus Gas of Ohio, Inc., PUCO Case No. 81-1024-GA-AIR (August 5, 1982); Ohio Admin. Code § 4901-1-19(B).

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Request # 7:

How many residential billing addresses, for each exchange identified in the Company's Application, subscribed to the Company's DSL or broadband service:

- a. As of December 31, 2002?
- b. As of September 30, 2007?

Response:

AT&T Ohio objects on the basis that the requested discovery is irrelevant and not reasonably calculated to lead to discovery of admissible evidence. Ohio Admin. Code § 4901-1-16(B). AT&T Ohio further objects on the basis that the discovery request is vague, unclear, overly broad, or unduly burdensome. Mort v. A/S D/S Svendborg, 41 F.R.D. 225 (E.D. Pa. 1966); Boyden v. Troken, 60 F.R.D. 625 (N.D. Ill. 1973); In re Cleveland Electric Illum. Co., PUCO Case No. 78-677-EL-AIR, pp. 6, 10 (Entry, January 26, 1979). Without waiving its general and specific objections, AT&T Ohio states that this application is related to basic local exchange service and that it did not rely on its DSL broadband service to demonstrate that the Commission's tests were satisfied.

Responsible Person: Daniel R. McKenzie
Director - Regulatory

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Request # 8:

Since 2002, for each exchange identified in the Company's Application, how many access lines were lost due to residential customers switching their second and/or third line to the Company's DSL or broadband service?

Response:

See the response to Interrogatory #7.

Responsible Person: Daniel R. McKenzie
Director - Regulatory

**Public Utilities Commission of Ohio
Case No. 07-1312-TP-BLS
AT&T OHIO'S RESPONSE TO
Ohio Consumers' Counsel 1st Set of Data Requests**

Request # 9:

Since 2002, for each exchange identified in the Company's Application, how many access lines were lost due to residential customers switching their second and/or third line to a competitor's broadband service?

Response:

See the response to Interrogatory #7.

Responsible Person: Daniel R. McKenzie
Director - Regulatory

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Request # 15:

The Company makes reference to Alltel Wireless as a provider satisfying the Commission's Rule 4901:1-4-10(C). Does the Company believe that the competing services of Alltel Wireless have the ability to provide the following functions:

- a. Local Dial Tone Service?
- b. Touch tone dialing service?
- c. Access to and usage of 9-1-1 services?
- d. Access to operator services and directory assistance?
- e. Provision of a telephone directory and listing in that directory?
- f. Per call, caller identification blocking services?
- g. Access to telecommunications relay service?
- h. Access to toll presubscription, interexchange or toll providers or both?

If the answer to any of a. through h. is affirmative, what is the basis for that belief?

Response:

- a-d. Based upon general knowledge of wireless services, yes.
- e-h. Unknown.

Responsible Person: Daniel R. McKenzie
Director - Regulatory

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Ohio Consumers' Counsel 1st Set of Data Requests

Request # 16:

The Company makes reference to Alltel Wireless as a provider satisfying the Commission's Rule 4901:1-4-10(C). Does the Company believe that the competing services of Alltel Wireless have the ability to provide the following capabilities:

- a. The ability to send and receive a fax?
- b. The ability to dial-up an Internet Service Provider?
- c. The ability to use an alarm monitoring service?
- d. The ability to use a personal safety or medical alarm service?

If the answer to any of a. through d. is affirmative, what is the basis for that belief?

Response:

- a. Based upon general knowledge of wireless services, yes.
- b-d. Unknown.

Responsible Person: Daniel R. McKenzie
Director - Regulatory

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Request # 31:

The Company makes reference to Sprint/Nextel as a provider satisfying the Commission's Rule 4901:1-4-10(C). Does the Company believe that the competing services of Sprint/Nextel have the ability to provide the following functions:

- a. Local Dial Tone Service?
- b. Touch tone dialing service?
- c. Access to and usage of 9-1-1 services?
- d. Access to operator services and directory assistance?
- e. Provision of a telephone directory and listing in that directory?
- f. Per call, caller identification blocking services?
- g. Access to telecommunications relay service?
- h. Access to toll presubscription, interexchange or toll providers or both?

If the answer to any of a. through h. is affirmative, what is the basis for that belief?

Response:

- a-d. Based upon general knowledge of wireless services, yes.
- e-h. Unknown.

Responsible Person: Daniel R. McKenzie
Director - Regulatory

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Request # 32:

The Company makes reference to Sprint/Nextel as a provider satisfying the Commission's Rule 4901:1-4-10(C). Does the Company believe that the competing services of Sprint/Nextel have the ability to provide the following capabilities:

- a. The ability to send and receive a fax?
- b. The ability to dial-up an Internet Service Provider?
- c. The ability to use an alarm monitoring service?
- d. The ability to use a personal safety or medical alarm service?

If the answer to any of a. through d. is affirmative, what is the basis for that belief?

Response:

- a. Based upon general knowledge of wireless services, yes.
- b-d. Unknown.

Responsible Person: Daniel R. McKenzie
Director - Regulatory

Public Utilities Commission of Ohio
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Request # 39:

The Company makes reference to Verizon Wireless as a provider satisfying the Commission's Rule 4901:1-4-10(C). Does the Company believe that the competing services of Verizon Wireless have the ability to provide the following functions:

- a. Local Dial Tone Service?
- b. Touch tone dialing service?
- c. Access to and usage of 9-1-1 services?
- d. Access to operator services and directory assistance?
- e. Provision of a telephone directory and listing in that directory?
- f. Per call, caller identification blocking services?
- g. Access to telecommunications relay service?
- h. Access to toll presubscription, interexchange or toll providers or both?

If the answer to any of a. through h. is affirmative, what is the basis for that belief?

Response:

- a-d. Based upon general knowledge of wireless services, yes.
- e-h. Unknown

Responsible Person: Daniel R. McKenzie
Director - Regulatory

**Public Utilities Commission of Ohio
Case No. 07-1312-TP-BLS
AT&T OHIO'S RESPONSE TO
Ohio Consumers' Counsel 1st Set of Data Requests**

Request # 100:

For each exchange for which AT&T Ohio seeks alternative regulation for basic local exchange service, what is the number of nonprimary residential lines at year-end 2002, year-end 2005, year-end 2006 and year-end 2007?

Response:

AT&T Ohio objects to this request on the ground that it requires the production of information that is neither relevant nor material to the subject matter of this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Ohio Admin. Code § 4901-1-16(B). The relevant rules do not require the Commission to distinguish between primary and nonprimary residential lines.

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AT&T OHIO'S RESPONSE TO
Ohio Consumers' Counsel 1st Set of Data Requests

Request # 101:

For each exchange for which AT&T Ohio seeks alternative regulation for basic local exchange service, what is the number of residential digital subscriber lines at year-end 2002, year-end 2005, year-end 2006 and year-end 2007?

Response:

AT&T Ohio objects on the basis that the discovery request is vague, unclear, overly broad, or unduly burdensome. *Mort v. A/S D/S Svendborg*, 41 F.R.D. 225 (E.D. Pa. 1966); *Boyden v. Troken*, 60 F.R.D. 625 (N.D. Ill. 1973); *In re Cleveland Electric Illum. Co.*, PUCO Case No. 78-677-EL-AIR, pp. 6, 10 (Entry, January 26, 1979). AT&T Ohio further objects on the basis that the requested discovery is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Ohio Admin. Code § 4901-1-16(B).