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Application*

**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 Alternative)	Case No. 07-1312-TP-BLS
Form of Regulation of Basic Local)	
Exchange Service and Other Tier 1)	
Services Pursuant to Chapter 4901:1-4,)	
Ohio Administrative Code.)	

Affidavit

Of

Patricia A. Tanner

On behalf of

The Office of the Ohio Consumers' Counsel

PUBLIC

*****REDACTED INFORMATION ASSERTED TO BE**

PROPRIETARY***

February 11, 2008

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AFFIDAVIT OF PATRICIA A. TANNER

I. INTRODUCTION

1. My name is Patricia Tanner. I am employed by the Office of the Ohio Consumers' Counsel ("OCC") as Utility Rate Analyst Coordinator. During my tenure at OCC, my responsibilities have ranged from research and analysis in cases involving gas, electric, water and telecommunications companies to policy analysis and implementation. I currently specialize in telecommunications.
2. I am providing this affidavit in response to the Application filed in this proceeding on December 28, 2007 ("Application") by the Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio" or "the Company"). For the reasons set forth in this affidavit and the affidavit of Karen J. Hardie, the Public Utilities Commission of Ohio ("PUCO" or "Commission") should deny AT&T Ohio's Application for all 11 exchanges for which it is requesting alternative regulation.

II. BACKGROUND

3. House Bill 218 ("HB 218") authorized the Commission to allow alternative regulation of basic local exchange service ("BLES")¹ provided by incumbent local exchange telephone companies ("ILECs"). The Commission subsequently established rules, set forth in Chapter 4901:1-4, Ohio Administrative Code, in Case No. 05-1305-TP-ORD ("BLES alt. reg. rules" or "rules").² The rules became effective on July 17, 2006. On August 11, 2006, AT&T Ohio filed its first application for approval of alternative regulation for BLES and other Tier 1 services in 145 of its 192 Ohio exchanges.³ OCC intervened in that case and filed objections to the Company's application. On December 20, 2006, the Commission issued an Opinion and Order in the case granting alternative regulation for BLES in 136 exchanges.⁴ The Commission granted BLES alternative regulation for 18 exchanges using the competitive test contained in Rule 4901:1-4-10(C)(3) ("Test 3") and 118 exchanges using the competitive test contained in Rule 4901:1-4-10(C)(4) ("Test 4"). The remaining nine exchanges were denied for various reasons. Based on the denial of its Application for Rehearing, OCC filed an appeal on April 13, 2007.⁵ On March 7, 2007, AT&T Ohio filed its second application for approval of alternative regulation for

¹ As used in this affidavit, BLES means stand-alone flat rate local exchange service, with no bundled or packaged features or toll calling. See paragraph 5, below.

² *In the Matter of the Application of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Case No. 05-1305-TP-ORD ("05-1305"), Entry on Rehearing (May 3, 2006).

³ *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 and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 06-1013-TP-BLS ("06-1013").

⁴ 06-1013, Opinion and Order (December 20, 2006).

⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, Sup. Ct. Case No. 07-0659 (filed April 13, 2007).

BLES and other Tier 1 services in 11 exchanges.⁶ As in 06-1013, OCC intervened and filed objections in 07-259. On June 27, 2007, the Commission issued an Opinion and Order in the case granting alternative regulation for BLES in eight exchanges.⁷ The Commission granted BLES alternative regulation for three exchanges using the competitive test contained in Test 3 and five exchanges using the competitive test contained in Test 4. The remaining three exchanges were denied for various reasons. OCC has also appealed that decision. AT&T Ohio's latest application is, therefore, its third application for approval of alternative regulation for BLES and other Tier 1 services in 11 exchanges. AT&T Ohio is now requesting alternative regulation of BLES for six exchanges using Test 3 and five exchanges using Test 4. This Application includes five exchanges that were denied by the Commission in 06-1013 and/or 07-259 and six additional exchanges.⁸ This Affidavit is focused only on Tests 3 and 4 because AT&T Ohio relied on only these two Tests in its Application.

⁶ *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 and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-259-TP-BLS ("07-259")

⁷ 07-259, Opinion and Order (June 27, 2007).

⁸ The PUCO previously denied AT&T Ohio BLES alt. reg. in Canal Winchester, Groveport, Murray City, New Albany and Somerton. The Aberdeen, Mantua, Olmstead Falls, Philo, South Solon and Victory exchanges were not included in either of AT&T Ohio's two previous applications.

III. THE COMPETITIVE MARKET TESTS ESTABLISHED IN RULE 4901:1-4-10(C)(3) AND (4), O.A.C. MUST BE INTERPRETED AND APPLIED IN CONNECTION WITH THE REQUIREMENTS OF R.C. 4927.03(A)(1) AND (2).

4. R.C. 4927.03(A) was amended by HB 218 to include basic local exchange service as a public telecommunications service for which ILECs can seek alternative regulation due to the presence of competition or alternatives. The language appearing in R.C. 4927.03(A)(1)(a) and (b), which was left untouched by HB 218, allows the Commission to establish alternative regulation for any public telecommunications service if it is in the public interest and for which:

- (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.⁹

5. R.C. 4927.03(A) now allows an ILEC to apply for alternative regulation for BLES, something that was not possible prior to the enactment of HB 218. Applications for BLES alternative regulation pursuant to 4901:1-4, O.A.C. are necessarily focused on stand-alone BLES, because ILEC bundles of services that include BLES were already deemed eligible for alternative regulation in 00-1532.¹⁰ (AT&T Ohio's predecessor, SBC Ohio, was granted alt. reg. for BLES in bundles in Case No. 02-3069-TP-ALT.)¹¹

⁹ R.C. 4927.03(A)(1)(a) and (b) (emphasis added).

¹⁰ *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, Entry on Rehearing (April 25, 2002).

¹¹ *In the Matter of the Application of Ameritech for Approval of an Alternative Form of Regulation*, Case No. 02-306-TP-ALT and *In the Matter of SBC Ameritech Ohio to Amend the Title Page of its Tariff*, Case No. 02-3392-TP-UNC. Finding and Order (January 6, 2003).

Therefore, when an ILEC applies for BLES alternative regulation, “such public telecommunications service” in R.C. 4927.03(A) refers to stand-alone BLES. The statute requires the Commission to find stand-alone BLES, the “public telecommunications service” in question, to be “subject to competition” or that customers have “reasonably available alternatives” to stand-alone BLES before an application for alt. reg. can be granted.¹²

6. In order to determine whether the conditions in R.C. 4927.03(A)(1)(a) or (b) exist, the statute states that the factors the Commission “*shall consider*” include, but are not limited to:

- (a) The number and size of alternative providers of service;
- (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.¹³

HB 218 added a new section (3) to R.C. 4927.03(A), which requires an *additional finding* by the Commission:

To authorize an exemption or establish alternative regulatory requirements under division (A)(1) of this section with respect to basic local exchange

¹² R.C. 4927.03(A)(1)(a) and (b).

¹³ R.C. 4927.03(A)(2) (emphasis supplied). None of the quoted language was altered by HB 218.

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service, the commission additionally shall find that there are no barriers to entry.¹⁴

Barriers to entry are addressed in Ms. Hardie's affidavit, filed concurrently with this affidavit.

7. According to the Commission's BLES alt. reg. rules, an ILEC will be deemed to have met the criteria in R.C. 4927.03(A) if it can demonstrate that it has satisfied at least one of four "competitive market tests" in each exchange for which the ILEC is requesting alternative regulation for BLES and other Tier 1 services or has satisfied an alternative competitive market test of its own choosing.¹⁵ Thus, the Commission's interpretation and application of the competitive market tests are essential for ensuring that BLES alternative regulation complies with R.C. 4927.03(A). In this Affidavit, I address how the Commission should apply Tests 3 and 4 in order to comply with the statutory requirements contained in R.C. 4927.03(A)(1) and (2). I also examine whether AT&T Ohio's information regarding Tests 3 and 4 satisfies the statute and the Commission's BLES alt. reg. rules. My examination addresses whether the wireline providers identified by AT&T Ohio meet the statute and rules.¹⁶

¹⁴ R.C. 4927.03(A)(3).

¹⁵ 4901:1-4-10(C), O.A.C.

¹⁶ Ms. Hardie's affidavit addresses the method by which the Commission should apply Tests 3 and 4 in order to comply with R.C. 4927.03(A)(3) regarding barriers to entry. Ms. Hardie's Affidavit also addresses the wireless providers identified by AT&T Ohio.

IV. COMPETITIVE MARKET TEST 3

8. AT&T Ohio has applied for BLES alternative regulation in six exchanges using Test 3; Canal Winchester, Mantua, Murray City, New Albany, Olmsted Falls, and Philo. In order to satisfy Test 3 in a given telephone exchange area, an ILEC must demonstrate:

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.¹⁷

There are three "prongs" in Test 3, which must each be satisfied for the granting of alternative regulation for BLES in each requested exchange. If any prong is not met, the applicant has failed the Test for that exchange.

A. Test 3, Prong 1: "[A] least 15% of total residential access lines are provided by unaffiliated CLECs...."

1. The requirements of the Test

9. To satisfy the first prong of Test 3, an ILEC must show that "unaffiliated CLECs" serve 15% of total residential access lines in an exchange. (AT&T has not nominated any affiliated CLECs for this Test or Test 4.) Because the statute *requires* a Commission finding 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 regarding stand-alone BLES, rather than packages of services that include BLES.
10. The first consideration under Test 3 is whether at least fifteen per cent of total residential access lines are provided by unaffiliated CLECs. By failing to focus

¹⁷ 4901:1-4-10(C)(3), O.A.C. A CLEC is a "competitive local exchange carrier."

on residential access lines used for stand-alone BLES, this prong does not satisfy the statute. Numerous factors are identified in R.C. 4927.03(A)(2) that the Commission *shall consider*, however, the first prong only considers one of these, "the affiliation of providers of services,"¹⁸ by excluding ILEC affiliates from the test.¹⁹ Although the first prong of Test 3 appears to attempt to address "market power, which may include market share,"²⁰ it fails to achieve its purpose because the Test provides only for a calculation of total residential lines provided by unaffiliated CLECs. In order to properly address the requirements of the statute, the calculation should include the total residential stand-alone BLES lines provided by unaffiliated CLECs. Otherwise, an ILEC's satisfaction of the prong in Test 3 provides no useful information about whether the ILEC's stand-alone BLES is subject to competition or has reasonably available alternatives, including whether the ILEC has market power for stand-alone BLES.

11. CLECs serving 15% of the residential market with packages and bundles of services including local, toll, and/or other services do not demonstrate a competitive impact on the stand-alone BLES market (as required by the statute) because stand-alone BLES and bundled/packaged services are not functionally equivalent or substitutes, as required by R.C. 4927.03(A)(2)(c).

¹⁸ R.C. 4927.03(A)(2)(d).

¹⁹ The following factors from 4927.03(A)(2) are not considered in the first prong of Test 3: number and size of alternative BLES providers; the extent to which BLES services are available throughout the exchange; whether services provided by CLECs are functional equivalents or substitutes for BLES; whether those services are readily available at competitive rates, terms and conditions as compared to the ILEC's BLES; market share, and growth in market share.

²⁰ R.C. 4927.03(A)(2)(d).

12. The scope of calling services between a package of local/long distance/vertical services and BLES is significant, and places these two offerings in different product markets. BLES provides unlimited flat-rate calling within a local calling area, and allows the consumer the option to purchase toll service and any desired vertical services. Bundled and packaged service offerings typically include unlimited local, in-state and interstate toll calling, and a variety of vertical features. Such bundled and packaged offerings of CLECs are therefore functionally equivalent to or substitutes for the **bundled and packaged offerings** of the ILEC, rather than the **stand-alone BLES offering** of the ILEC.
13. As I demonstrate later in this affidavit, many alternative providers offer only bundled and packaged services, and the price for those bundles and packages typically exceeds the ILEC's stand-alone BLES price (plus the unavoidable subscriber line charge) by a substantial margin. This disparity in prices demonstrates that bundles and packages of services offered by CLECs are not available at competitive rates, terms and conditions compared to the ILEC's stand-alone BLES, further substantiating the conclusion that these service offerings are not functionally equivalent or substitutes for one another.
14. 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. The

D.C. Circuit Court of Appeals overturned the FCC's *Triennial Review Order* in the spring of 2004,²¹ and the Bush Administration and the FCC decided not to appeal that decision to the Supreme Court.²² As a result of the FCC's *Triennial Review Remand Order*, ILECs are no longer required to offer unbundled local switching at TELRIC-based rates,²³ so CLECs must engage in so-called "commercial negotiations"²⁴ with the incumbent carriers to set "market-based" prices for services utilizing what was formerly known as the unbundled network element-platform ("UNE-P"). This one-sided negotiation between ILECs and the CLECs that need to use the ILECs' essential network facilities most likely increased wholesale costs to competitors requiring those inputs, which should have come as no surprise since ILECs (including AT&T Ohio) have long proclaimed that TELRIC-based UNE prices were set too low.²⁵ Additionally, the former AT&T Corp., one of the two most significant and nationally prominent CLECs providing local service to residential customers in Ohio, was subsumed within SBC, now doing

²¹ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

²² See FCC News Release, "Office of Solicitor General Will Not Appeal DC Circuit Decision" (June 9, 2004) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248220A1.pdf.

²³ *Unbundled Access to Network Elements*, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Order on Remand*, rel. February 4, 2005 ("*Triennial Review Remand Order*"), at ¶199.

²⁴ "Negotiations" occur when stakeholders each have the ability to walk away from the potential transaction; in this situation, CLECs who desire to continue providing service to their customers in the absence of UNE-P have no choice but to accept the terms as dictated by the ILEC for the commercially available alternative offering, or cease offering service.

²⁵ *Review of SBC Ohio's TELRIC Costs for Unbundled Network Elements*, Case No. 02-1280-TP-UNC ("02-1280"), Direct Testimony of Dr. Debra J. Aron (March 19, 2004) ("Aron Direct") at 5.

business as AT&T Ohio.²⁶ Furthermore, the PUCO initiated an interim increase in UNE loop rates in March 2004,²⁷ and a permanent increase of those rates in November 2004.²⁸ In the wake of this activity, CLEC market share for residential services has been on the decline: the FCC reports that the percent of CLEC lines that serve residential customers fell by more than one-third between June 2004 and June 2006 alone.²⁹ 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.

2. Even if Test 3, Prong 1 complied with the statute, AT&T Ohio does not carry its burden of proof and thus three of AT&T Ohio's Test 3 exchanges fail this test.

15. AT&T Ohio, in its Application at 4, states that CLEC line counts were obtained from billing data for each central office switch. This includes CLEC lines served via Local Wholesale Complete (“LWC”),³⁰ CLEC lines still provided via UNE-P, and lines served

²⁶ See *Joint Application of SBC Communications Inc. and AT&T Corporation for Consent and Approval of a Change in Control*, Case No. 05-0269-TP-ACO, Opinion and Order, (November 4, 2005) (“SBC/AT&T Merger Order”). In addition, AT&T Communications of Ohio, Inc. (a company now owned by AT&T Ohio) recently filed a notice to withdraw tariffs under which it provides local service to residential customers as a CLEC in Case No. 07-231-TP-ATW, March 1, 2007.

²⁷ 02-1280, Finding and Order (March 11, 2004).

²⁸ 02-1280, Opinion and Order (November 3, 2004).

²⁹ See FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Local Telephone Competition: Status as of December 31, 2006” (December 2007) at Table 2. Nationwide, the number of CLEC residential lines dropped from 20.9 million in June 2004 to 12.2 million in December 2006. Residential customers accounted for 65% of CLECs’ lines in June 2004, but only 43% in December 2006. Indeed, ILECs also lost residential lines during the same period, but the effect was less stunning than for CLECs; residential customers accounted for 77% of ILECs’ lines in June 2004, but 64% in December 2006. The loss in residential lines for ILECs and CLECs was mitigated somewhat by increases in business lines for both.

³⁰ LWC is AT&T Ohio’s “market-based” offering that replaced its UNE-P offering.

via resale. In addition, AT&T Ohio states that E911 data was used to provide CLEC lines counts that are served by CLEC-owned switches. The "summary sheets" for each exchange report "CLEC Residential Lines," "AT&T Residential Lines," and "CLEC Residential Market Share."³¹ In discovery, AT&T Ohio divulged its method for calculating these values:

The number of CLEC lines was determined by adding the total number of residence E-911 listings established by the CLECs themselves to the number of residence lines provided by AT&T Ohio on the CLECs' behalf. The CLEC total was then divided by the sum of the number of CLEC residential lines and the number of AT&T residential lines to determine the percentage of total lines served by unaffiliated CLECs.³²

16. Details of the CLEC lines are shown on the "CLEC Lines in Service" sheet for each Test 3 exchange.
17. Based upon my review of AT&T Ohio's information as well as other sources of public information regarding the CLECs identified by AT&T Ohio within its calculation of "CLEC Residential Market Share," as discussed further below, 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 provide residential service.³³ 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

³¹ Application at Exhibit 3. Ms. Hardie's affidavit includes a detailed description of the content of AT&T Ohio's application.

³² AT&T Ohio Response to OCC Interrogatory No. 2a.

³³ AT&T Ohio also includes LWC, resale and UNE-P line counts for CLECs that do not actively market to residential customers or that do not serve residential customers. However, the impact of including these lines on the market share calculations is very small and therefore excluding these lines does not bring any of the six exchanges below the 15% threshold.

Residential Market Share" is not supported in three of the six Test 3 exchanges. Thus, AT&T Ohio fails Test 3 for those exchanges.

18. In 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. As indicated above, AT&T Ohio relied in part on the count of residential E911 listings when making this calculation. I examined the data in AT&T Ohio's Application containing CLEC line count information for the Test 3 exchanges and found that four carriers reported by AT&T Ohio to have residential listings in the E911 database do not provide residential service, those being ***BEGIN CONFIDENTIAL<<

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19. AT&T Ohio did not independently verify whether the E911 carriers that are utilized in the calculation of "CLEC Residential Market Share" but that are not specifically identified as "unaffiliated facilities-based CLECs" or "alternative providers" per the second and third prongs of Test 3, actually provide residential service.³⁴ AT&T Ohio failed to conduct even the most basic analysis to confirm that these carriers currently

³⁴ AT&T Ohio Response to OCC Interrogatory No. 133.

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provide residential services, like that appearing on its exchange summary sheets (e.g., whether the CLEC has tariff authority; whether the carrier self-declares itself a residential carrier on the PUCO's website; and what the CLEC declares on its own website).

20. The aforementioned carriers are known providers of business or wholesale services, not residential local services.

21. ***BEGIN CONFIDENTIAL<<

.³⁷>>END CONFIDENTIAL***

³⁵ ***BEGIN CONFIDENTIAL<<
CONFIDENTIAL***

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³⁶ ***BEGIN CONFIDENTIAL<<See P.U.C.O. Tariff No. 3, 1st Revised Sheet No. 83 and Original Sheet No. 83.1>>END CONFIDENTIAL***.

³⁷ See ***BEGIN CONFIDENTIAL<<
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22. On its web site page referencing its "Profile," ***BEGIN CONFIDENTIAL<<

23.

³⁸ ***BEGIN CONFIDENTIAL<<

>>END CONFIDENTIAL***

³⁹ ***BEGIN CONFIDENTIAL<<
CONFIDENTIAL***

>>END

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⁴⁰ ***BEGIN CONFIDENTIAL<<

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⁴¹ Id.

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⁴²>>END CONFIDENTIAL***

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CONFIDENTIAL

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25. In the 06-1013 O&O, the Commission excluded carriers from the CLEC market share calculation because they did not provide residential service.⁴⁸ In 07-259, AT&T Ohio again included in the supposed residential CLEC market share ***BEGIN
CONFIDENTIAL<< >>END
CONFIDENTIAL***.⁴⁹ These carriers' lines were included in the Canal Winchester, Groveport and New Albany exchanges. The Commission excluded these carriers' lines again in the 07-259 O&O.⁵⁰ The Commission should also do so here.
26. In the recent order in the Embarq case, the Commission counted Level 3 as an alternative provider for the second prong of Test 4, in conjunction with an unnamed Voice over Internet Protocol ("VoIP") provider.⁵¹ This decision was in error, and OCC has applied for rehearing from that error.⁵² AT&T Ohio raises this issue in its application.⁵³ The combination of Level 3 and the unnamed VoIP provider in the Embarq case was not shown to make a "facilities-based alternative provider[] serving the residential market." Likewise, it has not been shown that the combination of ***BEGIN CONFIDENTIAL<<
>>END CONFIDENTIAL*** or another non-residential carrier with unnamed

⁴⁸ 06-1013 O&O at 29. ***BEGIN CONFIDENTIAL<<
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⁴⁹ OCC Opposition at 56-57, citing Hagans Affidavit, ¶ 18.

⁵⁰ 07-259 O&O at 28.

⁵¹ 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 ("07-760"), Opinion and Order (December 20, 2007) at 26-27.

⁵² 07-760, OCC Application for Rehearing (January 18, 2008) at 14-17.

⁵³ Application at 4-5.

VoIP or other providers in this proceeding meets the Commission's definition of a CLEC. The Commission's rules define a 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."⁵⁴ The BLES 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."⁵⁵ Thus, in order for the lines of a VoIP provider to be included in the market share 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. ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** or other carriers may be CLECs, but do not serve residential customers. And the VoIP or other providers may serve residential customers, but AT&T Ohio has not shown that they provide service as common carriers and thus may not be CLECs under the Commission's definition of the term in 4901:1-4-01(E), O.A.C. and elsewhere.

27. Accordingly, the residential E911 lines for the carriers described above should be excluded from the calculation of "CLEC Residential Market Share" for those exchanges in which they were identified. As demonstrated in Attachment PAT-2, by making this

⁵⁴ 4901:1-4-01(E), O.A.C.

⁵⁵ 4901:1-7-01(L), O.A.C. See also 4901:1-5-01(T), O.A.C.

adjustment, the Mantua, Olmsted Falls, and Philo exchanges no longer satisfy the first prong, and thus fail Test 3.

B. Test 3, Prong 2: “[T]he presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers....”

1. The requirements of the Test

28. The second prong of Test 3 seeks to establish that residential BLES is “subject to competition” or has “reasonably available alternatives,” in accordance with R.C. 4927.03(A)(1), by demonstrating “the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers.”⁵⁶ In its evaluation of an application for BLES alternative regulation under Test 3, the Commission must conclude that the *application* of the second prong of Test 3 conforms to the statute. In so doing, the Commission must carefully review the language it adopted in Test 3 and in the “Definitions” section of the BLES alt. reg. rules, and interpret that language in accordance with the relevant factors enumerated at R.C. 4927.03(A)(2).

a. Defining “unaffiliated facilities-based CLEC”

29. The Commission defined the term “facilities-based CLEC” in the BLES alt. reg. rules as:

any local exchange carrier that uses facilities it owns, operates, manages or controls to provide service(s) subject to the commission evaluation; and that was not an incumbent local exchange carrier in that exchange on the date of the enactment of the 1996 Act. Such carrier may partially or totally own, operate, manage or control such facilities. Carriers not included in this classification are carriers providing service(s) solely by resale of the incumbent local exchange carrier’s local exchange services.⁵⁷

⁵⁶ 4901:1-4-10(C)(3), O.A.C.

⁵⁷ 4901:1-4-01(H), O.A.C.

b. Identifying “unaffiliated facilities-based CLECs”

30. When identifying carriers for the purpose of satisfying the second prong of Test 3, the ILEC and the Commission must utilize the definition of “unaffiliated facilities-based CLECs” appearing in 4901:1-4-01(H), O.A.C. In order to be counted toward meeting the second prong of Test 3, a carrier must “own, operate, manage or control” the facilities used to provide local exchange service, then the carrier must also be found to have a “presence” in the market, and must also satisfy the condition that it “provid[es] BLES to residential customers.”

i) Facilities owned, operated, managed or controlled

31. The Commission states its position that a “facilities-based” carrier, whether it is a CLEC or an “alternative provider,” must use facilities that it “owns, operates, manages or controls” to provide services.⁵⁸ The Commission has determined that carriers using UNE-P or LWC are “facilities-based.”⁵⁹

ii) Presence in the Market.

32. The term “presence” is not defined by the Commission in the BLES alt. reg. rules; therefore this 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.”⁶⁰ Specifically, R.C. 4927.03(A)(2) requires the Commission to consider the “size of alternative providers of

⁵⁸ 4901:1-4-01(G) and (H), O.A.C.

⁵⁹ 06-1013 O&O at 21.

⁶⁰ R.C. 4927.03(A)(1).

services”⁶¹ and “other indicators of market power, which may include market share....”⁶²

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. For a carrier to have a “presence” in the market there must be some indication that the carrier is a viable, rather than fleeting, competitive provider within an exchange. Serving a mere handful of customers in a given exchange via resale, UNE-P, LWC, or even with its own facilities speaks to the carrier’s ability to maintain its presence in the market. 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.

iii) Providing BLES to residential customers.

33. The second requirement for identifying unaffiliated facilities-based CLECs for the purpose of satisfying the second prong of Test 3 could not be expressed any more clearly in the rules: the ILEC must demonstrate that the facilities-based CLEC is “providing BLES to residential customers.” Similar to the discussion above with regard to the first prong of Test 3, R.C. 4927.03(A)(1) allows for BLES alt. reg. to be granted if it is subject to competition or if customers have reasonably available alternatives. I previously established that stand-alone BLES and packages of calling services that include BLES are *not* functionally equivalent or substitute services readily available at competitive rates,

⁶¹ R.C. 4927.03(A)(2)(a).

⁶² R.C. 4927.03(A)(2)(d).

terms and conditions.⁶³ Therefore, facilities-based CLECs that satisfy the second prong of Test 3 must provide BLES as a stand-alone service offering, without packaging it together with long distance and/or vertical features.

34. Due to the active nature of the phrase “providing BLES to residential customers,” an unaffiliated facilities-based CLEC that is “providing BLES to residential customers” must be actively marketing its services to residential customers. Carriers having a “presence” in the market based solely upon the fact that they *currently* serve some quantity of residential customers *even though they are not pursuing new customers* would give the Commission a false sense of hope that these carriers are exerting competitive pressure on the ILEC’s BLES service offering. Many CLECs have ceased marketing services to mass market consumers in recent years due to changes in regulation and in the market, even though some of these carriers continued to serve existing customers. Although a carrier may on its face appear to be active in the market (by having, for example, a CLEC certification number and up-to-date interconnection agreement, a tariff, numbers ported from the ILEC, residential directory listings, and/or a website), if that carrier is not actively marketing its services to residential customers it will play no role in disciplining the ILEC’s prices; likewise, it cannot be found to be making “functionally equivalent or substitute services readily available at competitive rates, terms and conditions.”⁶⁴ For example, in the SBC/AT&T merger case before this Commission,

⁶³ See ¶¶ 12-14.

⁶⁴ R.C. 4927.03(A)(2)(c) (emphasis added).

AT&T acknowledged its irreversible retreat from the mass market⁶⁵ and the price *increases* that were imposed by the AT&T CLEC subsequent to that decision.⁶⁶ AT&T attributed those price increases to the increase in prices paid for the ILEC's network facilities necessary to provide mass market services.⁶⁷ In fact, AT&T Communications of Ohio filed notice that it was withdrawing provision of local service to residential customers.⁶⁸ Such notices automatically take effect within 60 days. Therefore, as of December 28, 2007, AT&T Communications no longer provides service to residential customers as a CLEC in Ohio. All similarly situated CLECs who have ceased serving new residential customers must be excluded from the list of unaffiliated facilities-based CLECs used to satisfy the second prong of Test 3 in a given exchange.

⁶⁵ *In the Matter of the Joint Application of SBC Communications, Inc. and AT&T Corporation for Consent and Approval of a Change of Control*, Case No. 05-269-TP-ACO ("05-269"), Direct Testimony of David J. Krantz (June 1, 2005) ("Krantz Direct") at 12.

⁶⁶ *Id.* at 16-17. In his rebuttal testimony, Mr. Krantz explained the significance of carriers who raise rates in the face of "competition": "It stands to reason that an active competitor for customers who use these services is unlikely to engage in pricing actions that increasingly place its rates above most other market participants." 05-269, Rebuttal Testimony of David J. Krantz (July 29, 2005) at 8. The point being, carriers who raise rates in an allegedly competitive market are going to be unable to discipline the incumbent carrier's prices.

⁶⁷ Krantz Direct at 16.

⁶⁸ Case No. 07-231-TP-ATW, filed March 1, 2007. On July 31, 2007, AT&T Communications made a filing to extend the effective date for the withdrawal of Tier 2 consumer services to December 28, 2007. Per Exhibit C of the December 28, 2007 filing, "Customers that were purchasing services associated with these tariffs have been migrated to the SBC platform or left AT&T to purchase services from other providers."

2. The two providers identified by AT&T Ohio do not qualify as "CLECs providing BLES to residential customers" as defined and interpreted in compliance with the statutory requirements of R.C. 4927.03(A).

35. AT&T Ohio has identified MCI/WorldCom ("MCI") and Sage Telecom ("Sage") as the two unaffiliated facilities-based CLECs for all of its Test 3 exchanges.⁶⁹ Neither carrier satisfies the requirements of Test 3 for stand-alone BLES as it should be applied to meet the statute because neither carrier provides a functionally equivalent or substitute service readily available at competitive rates, terms, and conditions.⁷⁰

a. MCI

36. MCI does not provide BLES to residential customers outside of bundles and packages that include other features and services. MCI, therefore, does not offer a functionally equivalent or substitute service to AT&T Ohio's BLES.

37. Copies of the web pages submitted by AT&T Ohio in Exhibit 3 to its Application show clearly that MCI provides only packages of local and long distance calling with vertical services. MCI's "Neighborhood Unlimited" offers unlimited local and long distance calling with Call Waiting, Caller ID and Voicemail. The "Neighborhood Connect 500" plan is similar, but caps long distance calling at 500 included minutes. The most basic package offered by MCI on its website is the "Neighborhood Connect 200," which is identical to the "Neighborhood Connect 500" plan but with 200 included long distance

⁶⁹ Application, Exhibit 3. Although Test 3 specifies "unaffiliated facilities-based CLECs," AT&T Ohio uses the term "Unaffiliated Facilities-Based Providers" on its summary sheets when identifying MCI and Sage in the Test 3 exchanges.

⁷⁰ R.C. 4927.03(A)(2)(c).

minutes. In addition to the documentation submitted by AT&T Ohio in support of its Application, a review of MCI's local service tariff indicates that MCI offers a package called "Neighborhood Basic Service Plus" (referred to as "Residential RLD-4 Service" in the tariff), which includes unlimited local calling and three vertical services.⁷¹ None of these packages of services is comparable in scope to the stand-alone flat rate local service offered by AT&T Ohio; thus, MCI's service offerings are not functionally equivalent to or substitutes for AT&T Ohio's stand-alone BLES.

38. The disparity in rates charged by MCI for these packages and AT&T Ohio's BLES offering substantiates this position. AT&T Ohio's flat rate residential BLES is \$14.25 per month,⁷² plus \$5.39 for the monthly federal subscriber line charge,⁷³ for a total of \$19.64, exclusive of other taxes and fees.⁷⁴ The *cheapest* tariffed MCI plan ("Neighborhood Basic Service Plus"), not marketed on MCI's website, is \$27.99 per month,⁷⁵ plus a "network access surcharge" of \$6.50 and a "carrier access charge-B" of \$4.49.⁷⁶ Thus, the lowest-priced MCI tariffed rate is \$38.98 per month, which is almost

⁷¹ MCImetro Access Transmission Services, Inc. P.U.C.O. No. 4, 1st Revised Sheet No. 141.12.4, effective May 1, 2005. Of course, since this package is not identified on MCI's website and is cryptically named in the tariff, it is unlikely that consumers are aware of its existence.

⁷² The Ohio Bell Company, AT&T Tariff PUCO No. 20, Part 4, Section 2, 2nd Revised Sheet 2.2, effective November 15, 2007 and 8th Revised Sheet No. 19, effective November 15, 2007.

⁷³ Ameritech Operating Companies Tariff F.C.C. No. 2, 42nd Revised page 79, effective October 1, 2007.

⁷⁴ Throughout my affidavit, I will be comparing pricing plans for AT&T Ohio's BLES and other providers. For these comparisons, I will only be considering the cost of the service/package plus the federal subscriber line charge (if applied by the CLEC). All prices referenced from this point forward, therefore, exclude other taxes and fees.

⁷⁵ MCImetro Access Transmission Services LLC P.U.C.O. No. 4 Price List, 10th Revised Sheet No. 50.3, effective August 1, 2007.

⁷⁶ See http://consumer.mci.com/TheNeighborhood/res_local_service/jsps/default.jsp. (accessed January 22, 2008). This site also refers to a "carrier cost recovery charge" of 1.4%.

double the cost of AT&T Ohio's BLES. The lowest-priced offering on MCI's website is its "Neighborhood Connect 200," which runs \$33.99 per month,⁷⁷ or \$44.98 with the network and carrier access charges. That is more than double the rate of AT&T Ohio's BLES. The 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.

39. MCI does not provide a service that is functionally equivalent to or a substitute for AT&T Ohio's BLES. In addition, MCI's services are not available at "competitive rates, terms and conditions" as compared to AT&T Ohio's BLES.

b. Sage

40. Likewise, Sage does not offer a service that is functionally equivalent to or a substitute for AT&T Ohio's stand-alone BLES. Sage does *not* offer stand-alone BLES, as the web pages provided in AT&T Ohio's Application indicate and as Sage's tariff confirms.⁷⁸ Sage offers residential customers only packages of services including unlimited local usage, some quantity of long distance usage and some vertical features. The "Simply

⁷⁷ See http://consumer.mci.com/TheNeighborhood/res_local_service/jsps/default.jsp (accessed January 22, 2008).

⁷⁸ Sage Telecom, Inc. PUCO Tariff No. 1, 1st Revised Page No. 29.7, effective August 14, 2006; 1st Revised Page No. 29.8, effective August 14, 2006; Original Page No. 29.9, effective August 1, 2006; and Original Page No. 29.11, effective August 14, 2006. This tariff does include a rate for "Basic Local Exchange Service," but Sage indicates that "Basic Local Exchange Service will be used only for determining the amount to be paid by residential customers to avoid disconnection of the basic service listed here or for the amount to be paid for reconnection of basic services." *Id.*, 8th Revised Page No. 31, effective September 22, 2006. This is required by Ohio rules, per Ohio Adm. Code 4901:1-6-21(C)(2). Thus, Sage does not actually offer "Basic Local Exchange Service" on a stand-alone basis.

Savings Essentials" package is the least costly, yet it still requires the customer to buy 90 minutes of long distance and 3 vertical features in addition to unlimited local usage.

41. Sage's rates also separate its service offerings from AT&T Ohio's BLES. Sage offers "Simply Savings Essentials" for \$24.99 per month,⁷⁹ but a subscriber line charge of \$8.38 is added on,⁸⁰ bringing the total price tag up to \$33.37 per month, or 66% higher than AT&T Ohio's stand-alone BLES rate. 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 Ohio's BLES.
42. Sage does not provide a service that is functionally equivalent to or a substitute for AT&T Ohio's BLES. In addition, Sage's services are not available at "competitive rates, terms and conditions" as compared to AT&T Ohio's BLES.
43. In summary, neither MCI nor Sage "provide[s] BLES to residential customers," or offers a functionally equivalent or substitute service to AT&T Ohio's stand-alone BLES at competitive rates, terms and conditions, as required by the statute. AT&T Ohio has failed to satisfy the second prong of Test 3 in each of the six exchanges for which it seeks BLES alt. reg. under 4901:1-4-10(C)(3), O.A.C.

C. Test 3, Prong 3: "[T]he presence of at least five alternative providers serving the residential market...."

1. The requirements of the Test.

44. The third prong of Test 3 seeks to establish that residential BLES is "subject to

⁷⁹ Id., Original Page No. 56.1, effective November 20, 2006.

⁸⁰ Sage Telecom, Inc. FCC Tariff No. 4, 2nd Revised Page No. 64, effective April 1, 2006.

competition” or has “reasonably available alternatives,” as required by R.C.

4927.03(A)(1), by demonstrating “the presence of at least five alternative providers serving the residential market.”⁸¹

45. As was the case for the second prong of Test 3, the Commission must conclude that the *application* of the third prong of Test 3 conforms to the statute when conducting its evaluation of an application for BLES alt. reg. In so doing, as previously discussed, the Commission must carefully review the language it adopted in Test 3 and in the “Definitions” section of the BLES alternative regulation rules, and interpret that language in accordance with the relevant factors enumerated at R.C. 4927.03(A)(2).

a. Defining “alternative providers”

46. The Commission defined “alternative provider” in its BLES alt. reg. rules:

“Alternative provider” means a provider of competing service(s) to the basic local exchange service offering(s), regardless of the technology and facilities used in the delivery of the services (wireline, wireless, cable, broadband, etc.).⁸²

The third prong of Test 3 has no restrictions as to the affiliation of the alternative provider, although AT&T Ohio has not identified any affiliated alternative providers for its attempt to satisfy Test 3.

b. Identifying “alternative providers”

47. In its 05-1305 Opinion and Order, the Commission determined that:

[W]ith technology advancements, alternative providers such as wireline CLECs, wireless, VoIP and cable telephony providers are *relevant to our consideration* in determining whether an ILEC is subject to competition or

⁸¹ 4901:1-4-10(C)(3), O.A.C.

⁸² 4901:1-4-01(B), O.A.C.

customers have reasonably available alternatives to the ILECs' BLES offering at competitive rates, terms and conditions."⁸³

By making this statement, the Commission did not automatically confer "alternative provider" status on any non-ILEC; rather, the Commission determined that it would *consider* "alternative providers such as wireline CLECs, wireless, VoIP and cable telephony providers" when determining whether the statutory requirements for granting BLES alt. reg. have been met. 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.

i) "Provider of competing services"

48. In order to satisfy the first condition, an alternative provider must provide "competing service(s) to the basic local exchange offering(s)" provided by the ILEC. The Commission did not adopt a definition of "competing services to the basic local exchange offering" in its BLES alt. reg. rules. Hence, as was the case with regard to the second prong of Test 3, the *only* method by which this phrase can be interpreted is 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

⁸³ 05-1305 Opinion and Order at 25 (emphasis added).

alternatives.”⁸⁴ In order to assess whether the service offerings of an alternative provider compete with BLES or are reasonably available alternatives to BLES in accordance with R.C. 4927.03(A)(1), the Commission “shall consider” the relevant factors from R.C. 4927.03(A)(2).⁸⁵

a) Service available in the relevant market

49. The Commission must assess the extent to which service is available from the alternative provider in the relevant market.⁸⁶ The Commission’s BLES alt. reg. rules established that the competitive tests would be applied by telephone exchange area, as this would “allow ... for the evaluation of competition in the marketplace on a granular level that exhibits similar market conditions within its boundary.”⁸⁷ Nonetheless, this is not a “rubber-stamp” procedure: Because the statute requires the Commission to evaluate “the extent to which service is available from the alternative provider” in the exchange, an alternative provider that is unable to provide service in certain parts of an exchange would not satisfy this portion of the statute. For example, a cable television operator whose network covers only a portion of a particular exchange would be unable to provide its service in those parts of the exchange where it does not have facilities. Similarly, a CLEC with its own facilities in an urban center within an exchange might be able to economically provide residential service to one or several multi-dwelling units (like a large apartment

⁸⁴ R.C. 4927.03(A)(1).

⁸⁵ The language describing the third prong of Test 3 addresses only one of these factors: the number of alternative providers (five), per R.C. 4927.03(A)(2)(a).

⁸⁶ 4927.03(A)(2)(b).

⁸⁷ 05-1305 Opinion and Order at 18.

building or condominium complex), but would not be able to offer service throughout the exchange.

b) “Functionally equivalent or substitute services”

50. The Commission must assess whether such services provided by alternative providers are “functionally equivalent or substitute services” to the ILEC’s BLES.⁸⁸ By including alternative providers within the competitive market tests established in the BLES alt. reg. rules, the Commission has established that the manner in which “competing service(s) to the [ILEC’s] basic local exchange service offering(s)” are provided – whether by wireline, wireless, cable, broadband, or some other technology – is irrelevant.⁸⁹ Nonetheless, in order to qualify as an alternative provider for the purpose of satisfying the competitive market tests, the service(s) offered by the alternative provider must be “competing service(s) to the [ILEC’s] basic local exchange service offering(s)” in accordance with the statute, which requires a demonstration that the services are functionally equivalent to or substitutes for the ILEC’s BLES. If a company offers services that are *not* functionally equivalent to or substitutes for BLES, those services would not be “competing services” and the company would not be an alternative provider capable of satisfying the 4901:1-4-10(C), O.A.C. competitive market tests.

⁸⁸ R.C. 4927.03(A)(2)(c).

⁸⁹ 4901:1-4-01(B), O.A.C.

51. Although competitive products do not have to be “exactly like BLES” in order to be considered functional equivalents of or substitutes for BLES,⁹⁰ the services do need to be reasonably similar in order to satisfy the statute. Factors that must be considered when assessing whether a service offered by wireless carriers,⁹¹ VoIP providers, and cable operators are functionally equivalent to BLES or substitutes for BLES must include:

- *Comparability in services provided.* BLES provides unlimited flat-rate calling within a local calling area, and allows the consumer to purchase toll service and desired vertical calling features. Most alternative providers only offer bundles of local, toll and vertical features, yet these packages are functional equivalents to or substitutes only for the bundled service packages offered by the ILEC, as opposed to its BLES service offering. Although the Commission may regard BLES as a component of the bundled service packages offered by ILECs and alternative providers,⁹² the BLES-only service does not itself compete with the alternative providers' bundled service offerings because they are not functionally equivalent nor substitutes.
- *Service quality.* VoIP services are recognized as having inferior service quality as compared to BLES. VoIP service is marked by dropped calls, echo, and dialing irregularities, particularly when obtained from a “pure-

⁹⁰ 05-1305 Opinion and Order at 25.

⁹¹ Ms. Hardie addresses the wireless carrier issues. I will therefore discuss the service limitations of VoIP providers and cable operators.

⁹² Id.

play” or stand-alone provider (e.g., Vonage).⁹³ Congestion over the Internet can also disrupt VoIP communications.

- *Broadband service requirement.* VoIP requires a broadband connection to the Internet, regardless of whether the broadband service provider requires the consumer to purchase a high-speed data service (such as cable modem).⁹⁴ The current addressable VoIP market is thus limited to those customers with a broadband connection. Those customers who do not subscribe to broadband or do not have access to broadband services do not have access to VoIP services.
- *Is stand-alone or “naked” digital subscriber line (“DSL”)⁹⁵ available?*
Most ILECs currently do not allow customers to buy DSL without also buying wireline voice service. So long as these two services are “tied” together, customers who subscribe to DSL have “no logical reason ... to purchase VoIP service.”⁹⁶ The FCC agrees: In its *Triennial Review Remand Order*, the FCC concluded that the bundling of voice service with DSL renders VoIP service “a supplement to, rather than a substitute for,

⁹³ <http://www.consumersearch.com/www/internet/voip/index.html> (accessed February 8, 2008).

⁹⁴ In other words, while it may be obvious that a consumer must have a high-speed data service (like DSL or cable modem) in order to subscribe to “pure-play” VoIP, it is less obvious yet also true that the consumer must have broadband connectivity to a cable company in order to subscribe to that cable company’s VoIP service, even if the customer does not purchase high-speed data services from the cable company. Consumers who are not able to obtain high-speed data from a particular cable operator are likewise unable to subscribe to that operator’s VoIP service.

⁹⁵ “Naked” DSL means that DSL is offered on a stand-alone basis, and does not require the purchase of basic telephone service.

⁹⁶ SBC/AT&T Merger Order at 73.

traditional local exchange service.”⁹⁷ The FCC and the PUCO conditioned approval of the SBC/AT&T merger upon the provision of “naked” DSL, but only for a period of two years.⁹⁸ In addition, in the AT&T/Bellsouth merger, the FCC conditioned approval on the extension of this provision for an additional 30 months.⁹⁹

- *E911 services.* E911 service works for wireline service, but is not as reliable for some alternative providers. VoIP service providers have problems providing E911 services due to the lack of direct association between the customer's location and his connectivity to the Internet. The reliability of E911 service is an important consideration for consumers seeking to replace their wireline BLES with service from an alternative provider,¹⁰⁰ and must be considered when assessing whether the alternative provider offers service that is functionally equivalent to or a substitute for an ILEC's BLES.

⁹⁷ *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338. *Triennial Review Remand Order* (released February 4, 2005) at footnote 118. The FCC went on to state that, “[a]lthough we recognize that limited intermodal competition exists due to VoIP offerings, we do not believe that it makes sense at this time to view VoIP as a substitute for wireline telephony.” *Id.*

⁹⁸ *SBC/AT&T Merger Order* at 74.

⁹⁹ See *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, Appendix F, (Released March 26, 2007).

¹⁰⁰ Apparently in recognition of this fact, Cincinnati Bell (“CBT”) devotes an entire webpage to E911 problems of Internet and cable-based phone service and the reasons why CBT's home phone service is “a more reliable choice.” See http://www.cincinnati-bell.com/consumer/home_phone/internet_based_phones_cause_some_911_headaches/ (accessed January 23, 2008). AT&T also sells VoIP; its website contains no such examination.

- *No association between the phone and the called location.* “Nomadic” VoIP service can be used anywhere a broadband Internet connection is obtained, so it may not be a location-based service in some cases.¹⁰¹ BLES, on the other hand, is always associated with a specific location.¹⁰² In order for pure-play VoIP subscribers to avoid this problem, they must rewire the network interface device at their home in order to utilize the home’s inside wiring, or pay extra for a third party to do it for them.
- *No operator services.* The definition of BLES includes “access to operator services,”¹⁰³ and ILECs who provide BLES also provide operator services. Many VoIP providers, however, do not support 0+ or operator assisted calling, including collect calls, third party billing calls or calling card calls. For example, Section 1 of the subscriber agreement for AT&T’s CallVantage Service states: “The Service cannot be used to make operator-assisted or collect calls.”¹⁰⁴

¹⁰¹ For example, Vonage sells the “V-Phone,” which “turns any PC or laptop into a fully functional Vonage telephone.” The “phone” is a small USB “thumb drive,” pre-loaded with “Vonage Talk” software, and comes with an earpiece microphone, thus making it very portable. Vonage markets the “phone” as “a great solution for people on the go, the Vonage V-Phone fits on your keychain and can be used anywhere there’s a high-speed Internet connection!” See <http://www.vonage.com/device.php?type=VPHONE> (accessed January 23, 2008). Notably, Vonage acknowledges that “[b]ecause Vonage V-Phone phone usage is a mobile activity, it is not compatible with E911 or Basic 911.” *Id.*

¹⁰² That location can be changed if the end user utilizes a call-forwarding service, but the service is not portable in the same sense that wireless and VoIP can be.

¹⁰³ 4901:1-4-01(C)(4), O.A.C.; see also R.C. 4927.03(A)(1)(d).

¹⁰⁴ See <https://www.callvantage.att.com/cvterms>. See also Vonage, Terms of Service at section 2.14 (updated January 26, 2007), available at http://www.vonage.com/features_terms_service.php (“Vonage Terms of Service”) (accessed January 23, 2008).

- *Lack of directory or directory listing.* The definition of BLES includes “provision of a telephone directory and listing in that directory;”¹⁰⁵ subscribers to an ILEC’s BLES automatically receive a white pages directory and a listing in that directory, unless they choose to pay for unlisted numbers. VoIP phones do not have standard listings in the “white pages,” on-line directories, or even in a carrier’s directory assistance database.
- *Power issues and broadband service disruptions.* Wireline BLES service still works when the power is out, provided the customer maintains use of a phone that is not dependent upon household wiring for its electric power (i.e., a traditional corded telephone). Because VoIP service is dependent upon modem-based broadband connections, any disruption in power will render the modem, and consequently the VoIP service, useless unless a battery backup is provided.¹⁰⁶ In addition, any disruption in the broadband service itself will render VoIP service useless, regardless of the existence of battery-powered backup.

¹⁰⁵ 4901:1-4-01(C)(5), O.A.C.; see also R.C. 4927.03(A)(1)(e).

¹⁰⁶ Comcast, a facilities-based provider using VoIP technology, provides a battery backup for its Digital Voice (CDV) service customers. See Comcast Agreement for Residential Services, available at http://www.comcast.com/MediaLibrary/1/1/About/PhoneTermsOfService/PDF/DigitalVoice/SubscriberAgreement/UnifiedLegal_Std_18.pdf (accessed January 23, 2008). Comcast, however, warns customers: “You also understand and acknowledge that the performance of the battery backup is not guaranteed. If the battery backup does not provide power, CDV will not function until normal power is restored.” *Id.*, Section 11e.

c) "Readily available"

52. Even if an alternative provider's service is considered to be functionally equivalent to or a substitute for an ILEC's BLES, the Commission must determine whether the service is "readily available" within an exchange.¹⁰⁷ A provider's services might not be "readily available" for a variety of reasons, including but not limited to: (1) the lack of network facilities within a part of the exchange, such as a cable operator whose franchise only covers a portion of a telephone exchange area; (2) network facilities, such as those owned by cable operators, that have not yet been upgraded to enable the provision of a "competing service to the [ILEC's] basic local exchange service;" or (3) the lack of availability of broadband Internet connections in or throughout a given exchange, such as would be necessary to provide VoIP service. If a provider's service is not "readily available" to consumers in the exchange, the service can not be considered a "competing service" to the ILEC's BLES and the alternative provider must be excluded from satisfying any competitive market tests. Further, a carrier that does not market its services is not making the services "readily available."
53. The "readily available" requirement is similar to the issue discussed above regarding "the extent to which services are available" from the alternative provider, which serves to underscore its importance. By raising this issue twice within the statute, the legislature clearly expresses its intent that services from alternative providers need to be available to

¹⁰⁷ R.C. 4927.03(A)(2)(c).

all consumers within a given market, regardless of how the Commission chooses to define that market, in order for the statute to be satisfied.

d) "Competitive rates, terms and conditions"

54. The statute requires that functionally equivalent or substitute service be readily available "at competitive rates, terms and conditions" to the ILEC's stand-alone BLES.¹⁰⁸ As the statute recognizes, functional equivalency and substitutability are insufficient for finding an alternative provider's service to be a "competing service" to the ILEC's BLES. A comparison of rates, terms and conditions between two services will provide a further indication of whether the services are in the same product market, which provides a better indication as to whether the alternative provider is offering a "competing service."
55. When assessing whether alternative providers offer competitive rates, terms and conditions comparable to the ILEC's BLES, factors that must be considered are:
- *Equivalent service options with respect to calling areas and usage plans.*
- Not all customers need or want unlimited any-distance calling packages with countless features, nor are they willing to pay for it. BLES allows the consumer to pay for only those features the customer demands. Most alternative providers, however, provide only bundled packages of local, toll and vertical features that are not comparable in nature or scope to BLES services recognized by Ohio residential customers, at prices that are much higher than BLES-only service offerings.

¹⁰⁸ R.C. 4927.03(A)(2)(c).

- *The total cost to the consumer for the opportunity to place and receive calls.* Due to the need to purchase a broadband connection in order to have VoIP service, the total cost to the customer is the combined cost of the broadband and VoIP services, if the VoIP service is to substitute for BLES.
- *Introductory rates may dramatically increase following the promotional period.* Promotional service rates apply only for a specified period of time, at which time the price reverts to the normal rate – which may be much higher than the promotional rate.
- *The use of term contracts.* BLES is a month-to-month service, and the customer is free to cancel service at any time, with no financial penalty. Many broadband service providers offer discounts only for defined periods.
- *Penalties for terminating contracts.* Steep termination liability assessments can effectively hold a broadband consumer hostage until the expiration of the contract. Consumers' inability to shift between providers due to term contracts and cancellation penalties may have the effect of overstating the actual competitiveness of the market.

e) Market power issues

56. Finally, the Commission must consider market power issues, including market share and growth in market share, when considering whether an alternative provider's service is

functionally equivalent to or a substitute for an ILEC's BLES.¹⁰⁹ Market share is a useful measure of whether the alternative provider is in fact offering a competing service to the ILEC's BLES. Carriers with barely more than a toehold in a given residential market twelve years after passage of the Telecommunications Act of 1996 would clearly not be able to exert competitive pressure on an ILEC's BLES prices if the ILEC were granted alternative regulation. As referenced earlier, change (growth or decline) in market share is actually a better indicator of whether a provider satisfies the statute with regard to competing with the ILEC or providing reasonably available alternatives. This is especially given Ohio telecommunications policy's emphasis on a "healthy and sustainable competitive telecommunications market..."¹¹⁰

57. As I discussed above,¹¹¹ regulatory changes in the market have had a dramatic impact on the make-up of the competitive landscape. The demise of UNE-P and the increase in costs associated with commercially-negotiated network facility lease arrangements ultimately drove significant national CLECs like AT&T from the market, only to watch it be quickly subsumed within SBC. The percentage of CLEC lines that serve residential customers has dropped significantly since June 2004, and the ability of smaller, less popular and lesser financed CLECs to succeed where these massive, well-branded carriers failed is anything but guaranteed. Accordingly, assessing changes in market

¹⁰⁹ R.C. 4927.03(A)(2)(d) also directs the Commission to consider "ease of entry" and "the affiliation of providers of services." Ms. Hardie addresses "ease of entry" in her affidavit, but the language in Test 3 ignores the affiliation of alternative providers.

¹¹⁰ R.C. 4927.02(A)(2).

¹¹¹ See ¶14.

share over time would be useful and necessary in order to ensure that alternative providers are able to offer competing services to an ILEC's BLES today *and going forward*.

ii) Presence in the market

58. The second condition¹¹² for identifying alternative providers that can count in Test 3 is that the provider must have a "presence" in the market, per the language of the third prong of Test 3.¹¹³ 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. Importantly, just because a carrier has a "presence" teaches little about whether the ILEC's BLES service offering is subject to competition or has reasonably available alternatives from that alternative provider.

iii) Serving the residential market

59. The third condition for determining whether an alternative provider should be utilized in Test 3 is that the provider must be "serving the residential market."¹¹⁴ 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.

¹¹² See ¶46 where I identify the three conditions.

¹¹³ 4901:1-4-10(C)(3), O.A.C.

¹¹⁴ 4901:1-4-10(C)(4), O.A.C.

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,"¹¹⁵ and must be excluded from the list of alternative providers operating in a given exchange.

60. In sum, in order for a carrier to be considered an alternative provider in compliance with the statute for the purpose of satisfying Test 3, it must (1) 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.; (2) have a "presence" in the market, per 4901:1-4-10(C)(3), O.A.C.; *and* (3) be "serving the residential market," per 4901:1-4-10(C)(3), O.A.C. Even assuming that Test 3 meets the statutory requirement, 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.

2. Only one of the ten wireline providers identified by AT&T Ohio in the Test 3 exchanges qualifies as an "alternative provider" as defined and interpreted in compliance with the statutory requirements of R.C. 4927.03(A).

61. AT&T Ohio has identified the following ten wireline providers as "alternative providers" for the purpose of satisfying the third prong of Test 3: ACN Communications Services ("ACN"), Comcast/Insight Phone of Ohio ("Insight"), Cox Communications ("Cox"),

¹¹⁵ R.C. 4927.03(A)(2)(c).

First Communications, Global Connection of America ("Global Connection"), PNG Telecom ("PNG"), Revolution Communications ("Revolution"), Talk America (Cavalier) ("Talk America"), Time Warner Cable ("Time Warner") and Trinsic Communications ("Trinsic"). In order to satisfy the statute, the Commission must analyze each carrier and the services it makes available to residential customers in the manner described above, so that an accurate assessment can be made as to whether the carrier qualifies as an "alternative provider." As described herein, only one carrier, First Communications, (in five of the six exchanges) satisfies the three conditions required to be qualified as an "alternative provider" for the purpose of satisfying the third prong of Test 3.¹¹⁶

a. ACN

62. As demonstrated on the exchange summary sheets in its Application, AT&T Ohio has identified ACN as an alternative provider in five of the six Test 3 exchanges.¹¹⁷ ACN offers a service that is similar to, but not a functional equivalent to, stand-alone residential BLES. The "Residential Stand-Alone Local Exchange Service" offered by ACN appears to incorporate all of the functions of BLES except one: It does not include unlimited local calling. Rather, the ACN offering includes only 1000 local usage minutes per month (about 30 minutes per day) with additional minutes being billed on a per-minute basis as incurred.¹¹⁸ ACN also fails to qualify as an alternative provider offering

¹¹⁶ Cox might qualify, if it served the entirety of the exchanges for which it is nominated.

¹¹⁷ Application, Exhibit 3.

¹¹⁸ ACN Communications Inc. P.U.C.O. Tariff No. 2, Section 5, First Revised Page 10, effective January 3, 2003 and Section 12, Original Page 4.2, effective January 3, 2003.

"competing services" to AT&T Ohio's BLES because it charges *more* than AT&T Ohio even though it provides *less* local usage. ACN's monthly rate for "Residential Stand-Alone Local Exchange Service" is \$18.00 per month.¹¹⁹ ACN also levies a \$6.00 "Federal Access Charge",¹²⁰ bringing the total rate to \$24.00, which is 22% above the \$19.64 rate charged by AT&T Ohio.

63. While not an enormous difference (and a much smaller difference than most other wireline carriers that I analyzed, as discussed below), ACN still charges \$4.36 per month *more* than AT&T Ohio for service that is *inferior* to that offered by AT&T Ohio (with regard to the amount of usage included for the price). Even if the two services were identical with regard to the local usage component, if the market for stand-alone BLES were truly competitive, one would anticipate competitors' rates to be *lower*, not higher, than those of the ILEC, since a lower price is likely to be the primary motivating factor for a residential customer to consider switching away from the ILEC for local exchange service. By charging more than AT&T Ohio, ACN is demonstrating that it is not a price leader in the market for residential stand-alone BLES; this in turn is an indication that the few residential lines ACN does serve in the Test 3 exchanges are not likely to be lines subscribing to residential stand-alone BLES.
64. The information provided on the website for ACN appears to demonstrate that the company is "providing residential service." However, ACN's "presence" in the majority of the five Test 3 exchanges in which it operates is minimal. ACN has been operating in

¹¹⁹ Id., Section 12, Original Page 4.2, effective January 3, 2003

¹²⁰ See http://www.acninc.com/images/us/822_tcm29-2808.pdf (accessed January 23, 2008).

Ohio since July 2000,¹²¹ yet in two of the five exchanges it provides ***BEGIN
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three exchanges where ACN serves more than ***BEGIN CONFIDENTIAL<<
>>END CONFIDENTIAL*** residential lines, its serves ***BEGIN
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>>END CONFIDENTIAL***.¹²³ All together, ACN serves just ***BEGIN
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lines in the five Test 3 exchanges in which it has been identified as an alternative
provider.¹²⁴ ACN clearly does not have a “presence” in the market such that it would be
capable of constraining AT&T Ohio’s BLES prices – and in fact it does not, as evidenced
by ACN charging \$4.36 more than AT&T Ohio for what appears to be an inferior
service.

65. All told, ACN must be eliminated from consideration as an alternative provider for the
purpose of satisfying Test 3 as it does not offer functionally equivalent or substitute
services at competitive rates, terms and conditions to AT&T Ohio’s BLES, and it does

¹²¹ 2006 Annual Report of ACN Communications at 2.

¹²² Attachment PAT-3.

¹²³ Id.

¹²⁴ Id.

not have a "presence" in the residential BLES market sufficient to constrain AT&T Ohio's pricing power.

b. Cox

66. AT&T Ohio has identified Cox as an alternative provider in the Olmsted Falls exchange. Cox is a cable operator that offers digital telephone service over its own cable network facilities in limited areas of Cuyahoga County. According to its website, Cox is "a full-service provider of telecommunications products. Cox offers an array of advanced digital video, high-speed Internet and telephony services over its own nationwide IP network."¹²⁵
67. In some regards, telephone services provided by cable operators over their own networks are equivalent to BLES services provided by wireline ILECs: Directory listings are provided, operator and directory services are available, the line is typically associated with a fixed location, and service quality is not a significant issue.¹²⁶
68. Although Cox has tariffs on file with the Commission, the tariffs are for "Private Line Service," offered on a business basis, and do not include information on the Cox residential telephone services. However, according to its website, Cox offers residential customers a "Digital Basic Telephone Line"¹²⁷ service that provides unlimited local calling for \$12.99 per month which is cheaper in price than AT&T Ohio's BLES. To that

¹²⁵ See <http://www.cox.com/about/> (accessed January 25, 2008).

¹²⁶ The quality of a cable operator's VoIP services is often superior to "pure-play" VoIP providers, because the cable operator utilizes its own IP network, so the transmission of the call does not "touch" the public Internet.

¹²⁷ See <http://www.cox.com/cleveland/telephone/pricing-telephone.asp>.

amount must be added the \$5.38 Cox Federal Access Charge¹²⁸, for a total monthly charge of \$18.37, which is cheaper than AT&T Ohio's BLES.

69. As with other telephone services offered via cable facilities, the ability to operate during a power outage is of major concern. According to Cox, if there is an electrical power outage, battery back-up power is provided at the residential customer's home.¹²⁹ When digital telephone service is provided, a "modem with battery backup will be provided and installed by Cox."¹³⁰
70. Another issue of major concern is access to E911 services. An exhaustive search of Cox's website provides no information on the provision of E911 services. However, contact with company personnel confirmed that E911 is available to its customers. The ability of customers to have access to the emergency services of E911 is of critical importance. To be considered as an alternative provider to the AT&T Ohio's BLES, there must be the ability to offer E911 services. While the Cox E911 service may not be reflected on its web site, company personnel did confirm that the service is available and comparable to the AT&T Ohio E911 service. I believe the rate is "competitive" and the service is "substitutable" with AT&T Ohio's BLES and therefore Cox should be considered to offer "competing services" to AT&T Ohio's BLES.
71. Nevertheless, in order to assess "the extent to which service is available" from Cox in a given exchange, there must be some representation that the cable operator provides

¹²⁸ Provided by Cox Customer Service Representative on February 5, 2008.

¹²⁹ See <http://www.cox.com/telephone/faqs.asp> (accessed January 25, 2008).

¹³⁰ See <http://www.cox.com/cleveland/specialoffers/> (accessed January 25, 2008).

service throughout the exchange. A review of the "Map of Ohio Cable Franchise Areas" for Cox reveals that it appears to have full coverage in the Olmsted Falls exchange.¹³¹ However, using the zip codes supplied by AT&T Ohio in response to OCC Interrogatory No. 116 to check availability on the Cox website, of the four zip codes serving residential customers provided by AT&T Ohio for the Olmsted Falls exchange, only three of the zip codes returned available calling plans information. Per the website, when entering the zip code 44028, the following response is received, "We're sorry, but we could not locate the ZIP Code you entered."¹³² Thus, based on the zip code information supplied by AT&T Ohio, Cox apparently does not serve throughout the Olmsted Falls exchange.

72. To summarize, although Cox provides an unlimited basic local calling service comparable in price and service to AT&T Ohio's BLES, based on zip code information provided by AT&T Ohio, the Cox service is not offered throughout the Olmsted Falls exchange. I believe, therefore, Cox does not satisfy the three conditions necessary for qualifying as an alternative provider for the purpose of the third prong of Test 3 and should be removed from the list of candidate alternative providers for the purpose of satisfying Test 3.

c. First Communications

73. AT&T Ohio identifies First Communications as a candidate alternative provider in all six Test 3 exchanges.¹³³ As discussed below, First Communications appears to satisfy the

¹³¹ Map of Ohio Cable Franchise Areas, Data Mapping Inc., Printed June 2006 ("Cable Franchise Map").

¹³² See <http://www.cox.com/navigation/error/zip.asp>.

¹³³ Application, Exhibit 3.

three conditions necessary for qualifying as an alternative provider for the purpose of the third prong of Test 3 in all but one of these exchanges.

74. First Communications does not offer a pure stand-alone BLES service. The only residential flat-rate local services offered in its tariff are "Optional Residential Packages," which are comprised of BLES plus additional included long distance minutes or vertical features.¹³⁴ However, First Communications does offer some very simple packages that are very close in price to AT&T Ohio's BLES. "FirstVoice," with 60 minutes of long distance calling is available out of the tariff for \$19.95 per month.¹³⁵ Also available out of the tariff are two "FirstVoice" offers with either Caller ID or Call Waiting included, each for \$19.95 per month.¹³⁶ To that amount one must add the subscriber line charge levied by First Communications, which is \$5.99,¹³⁷ for a total monthly charge of \$25.94, which is 32% higher than AT&T Ohio's BLES rate. Even though "FirstVoice" is priced above AT&T Ohio's BLES and includes one additional feature, I believe the rate is "competitive" and the service is "substitutable" with AT&T Ohio's BLES, and therefore First Communications should be considered to offer "competing services" to AT&T Ohio's BLES.¹³⁸

¹³⁴ First Communications, LLC PUCO Tariff No. 3, Section 10.7.

¹³⁵ Id., Original Page 102f, effective November 5, 2007.

¹³⁶ Id.

¹³⁷ First Communications, LLC F.C.C. Tariff No. 3, Original Page No. 75, effective November 5, 2005.

¹³⁸ This distinguishes First Communications' service from ACN's which, as discussed in ¶¶ 62-65 above, is inferior to AT&T Ohio's service.

75. Although First Communications has not made a dramatic impact on the local exchange market in Ohio, it has managed to acquire customers in all six of the Test 3 exchanges. First Communications serves anywhere from ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines in the Test 3 exchanges, and its market share of total residential lines by exchange ranges from ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***¹³⁹ and overall it has acquired approximately ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** of the residential market in all six exchanges.¹⁴⁰ First Communications has an established "presence" in the Canal Winchester, Mantua, New Albany, Olmsted Falls, and Philo exchanges due to the fact that it provides service to as many as ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines in those exchanges, with ***<<BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL of the total residential lines in the Mantua exchange, such that the Commission can be reasonably confident that First Communications will continue "serving the residential market" (as it does today) by providing services that compete with AT&T Ohio's BLES in that exchange. In the Murray City exchange, however, First Communications' ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL residential lines do not give it enough

¹³⁹ Attachment PAT-3.

¹⁴⁰ See id. I would note that the data provided by AT&T Ohio does not describe the types of services to which First Communications' customers are subscribing, so there is no way of knowing whether many, or even any, subscribe to the services that compete with AT&T Ohio's BLES.

of a presence to qualify as an alternative provider for purposes of satisfying the third prong of Test 3.

d. Global Connection

76. Global Connection is identified as an alternative provider in the Canal Winchester exchange. Global Connection is a prepaid provider. On its summary sheet for Canal Winchester, AT&T Ohio has included check-marks in the White Page Listings and Lease AT&T Facilities columns.¹⁴¹
77. Prepaid residential telephone services like those provided by Global Connection (and Revolution, discussed below) are not functionally equivalent to an ILEC's BLES. Prepaid services are generally offered to customers who have poor credit history and are unable to obtain service from other providers, and Global Connection is no different. The company's website states "Global Connection is quickly becoming a leader in the prepaid telephone service industry. With our no hassle service we can get anyone connected regardless of his or her credit history."¹⁴² Customers without credit issues would not likely consider switching from their current service to a prepaid offering. The vast majority of telephone customers do not require nor desire to purchase prepaid service; this is apparent even in the one exchange where AT&T Ohio has identified Global Connection as an alternative provider; the Canal Winchester exchange. Global Connection has only ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** in the exchange, which equates to only ***BEGIN

¹⁴¹ Application, Exhibit 3.

¹⁴² See <http://ireenish.myweb.uga.edu/aboutus.htm> (accessed January 24, 2008).

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CONFIDENTIAL***of the total residential lines in the Canal Winchester exchange.¹⁴³

This extremely small number does not justify Global Connection as having a "presence" in the market that would have any effect in terms of disciplining the prices of AT&T Ohio's BLES.

78. Global Connection appears to have a basic local service offering. As indicated on its website and in its PUCO tariff, however, Global Connection offers its Basic service for \$39.95 per month.¹⁴⁴ When the federal subscriber line charge of approximately \$5.00 is added,¹⁴⁵ the monthly total climbs to \$44.95, which is more than double the rate for AT&T Ohio's BLES. Thus, although Global Connection offers a service that is comparable to AT&T Ohio's BLES in terms of the scope of services, its service is neither functionally equivalent to nor substitutable for AT&T Ohio's BLES for the vast majority of customers due to the prepaid nature of the service. In addition, the excessively high rates charged by Global Connection clearly indicate that the service is not "readily available at competitive rate, terms, and conditions" as compared to AT&T Ohio's BLES. For these reasons, Global Connection does not qualify as an alternative provider for the purpose of satisfying the third prong of Test 3.

¹⁴³ Attachment PAT-3.

¹⁴⁴ See <http://ireenish.myweb.uga.edu/product.htm> (accessed January 24, 2008) and Global Connection, Inc. of America Ohio Tariff No. 1, Original Page 9, Section 2 – Regulations, issued April 22, 2004 and effective August 25, 2004.

¹⁴⁵ Global Connections website indicate customers monthly service fee does not include an additional \$10.00 for "telecom taxes and fees." See <http://ireenish.myweb.uga.edu/product.htm> (accessed January 24, 2008). For illustration purposes, I have assumed 50% of that amount represents a charge similar to AT&T Ohio's subscriber line charge.

e. Insight¹⁴⁶

79. AT&T Ohio has identified Insight as an alternative provider in two of the six Test 3 exchanges.¹⁴⁷ Insight is a cable operator that also offers residential telephone service over its own cable network facilities with serving areas in Ohio, Kentucky, Illinois and Indiana.
80. As a cable operator like Cox, Insight appears to provide service via its own facilities. In order to assess “the extent to which service is available” from Insight in a given exchange, there must be some representation that the cable operator provides local exchange telephone service throughout the exchange. AT&T Ohio has provided no such information. However, a review of the coverage area of Insight reveals that it appears to have full coverage in the Canal Winchester and New Albany exchanges.¹⁴⁸
81. The Insight web site lookup tool, which utilizes zip codes, show that Insight does not guarantee telephone service availability throughout the zip code. Insight’s website offers the opportunity to “Enter your zip code to learn about products in your area.”¹⁴⁹ The following statement also appears on the same web page: “Actual Insight services and offerings may vary.”¹⁵⁰ Entering the zip codes of the two exchanges in which AT&T

¹⁴⁶ According to an April 2, 2007 Insight and Comcast joint Press Release, “Insight and Comcast Agree to Divide Insight Midwest Partnership. Insight will own 100% of the cable systems serving Kentucky customers in Louisville, Lexington, Bowling Green and Covington, and customers in Evansville, Indiana and Columbus, Ohio.” See http://www.insight-com.com/documents/insight_04022007.pdf.

¹⁴⁷ Application, Exhibit 3.

¹⁴⁸ Map of Ohio Cable Franchise Areas, Data Mapping Inc., Printed June, 2006.

¹⁴⁹ See <http://www.insight-com.com/ziplookup.asp> (accessed January 24, 2008).

¹⁵⁰ Id.

Ohio identifies Insight as an alternative provider results in a new page stating: "Multiple service areas found. Your zip code is serviced by more than one Insight market. Please select the option that is most related to your area."¹⁵¹ Two options are provided to choose from. One option is "Central Ohio" and the other is "Central Ohio Digital Area."¹⁵² Choosing the Central Ohio option moves to a page that indicates "Local Availability" of "Basic and Classic Cable."¹⁵³ Choosing the Central Ohio Digital Area option moves to a page that indicates "Local Availability" of "Road Runner," "Insight Digital 3.0," and "Insight Phone."¹⁵⁴ Therefore, Insight apparently provides phone service in only certain areas of each zip code.

83. The Insight service is only available in the digital area of each zip code and is a VoIP-based service. Therefore, as discussed above, there are important functional differences between it and AT&T Ohio's BLES relating to E911 services and back-up power. With regard to E911, Insight acknowledges the differences and limitations of its E911 service as compared to that of AT&T Ohio's BLES:

4. Limitations of 911/E911.

(a) CAREFULLY READ THE INFORMATION BELOW.

By utilizing the Services, Customer acknowledges and accepts any and all limitations of 911/E911 and agrees to convey these limitations to all persons who may have occasion to utilize the Services. As a condition of receiving the Services, you will be required to affirm that you have been informed of these

¹⁵¹ See <http://www.insight-com.com/ziplookup-multi.asp?z=43110&destination=/local.asp> (accessed January 24, 2008).

¹⁵² Id.

¹⁵³ See <http://www.insight-com.com/local.asp?z=43110&ssid=8.01> (accessed January 24, 2008).

¹⁵⁴ Id.

limitations. If you have additional questions about 911/E911, call Insight at 1 800 956-4401.

(b) LIMITATIONS OF 911/E911. Customer acknowledges that the Services include 911/E911 functionality that may differ from the 911/E911 functionality provided by other providers and therefore may have certain limitations. These limitations include, but are not limited to, relocation of the Service, the EMTA [embedded media terminal adapter] or Insight Equipment by Customer without prior approval of Insight, use by the Customer of a telephone number that does not correspond to Customer's geographic location, Internet or broadband connection failure, loss of electrical power, and delays in placing Customer's location information in the appropriate 911/E911 databases.

(c) In order for your 911/E911 calls to be properly directed to emergency services, Insight must have your correct Service address. Customer agrees that they shall not, nor shall any other person, move the EMTA, the Insight Equipment and/or the Services to a different address without Insight's prior approval. Customer acknowledges that if they move the Insight Equipment, the EMTA, and/or Services to a different address without Insight's prior approval 911/E911 calls may be directed to the wrong emergency authority, may transmit the wrong address, and/or the Services (including 911/E911) may fail altogether. Therefore, you must call 1 800 956-4401 before you move the Services and/or the EMTA to a new address. Insight will need several business days to update your Service address in the E911 system so that your 911/E911 calls can be properly directed. Please be aware that all changes in Service address require Insight's prior approval.

(d) As discussed in Section 5 below, Insight Phone 2.0 uses the electrical power in your home. If there is an electrical power outage, 911 calling may be interrupted if the battery backup in the associated EMTA is not installed, fails, or is exhausted after several hours. Furthermore, calls, including 911 calling, may not be completed if there is a problem with network facilities, including network congestion, network/equipment/power failure, or another technical problem.

(e) Insight will provide you with a sticker regarding the limitations of 911/E911 that must be placed on or near the EMTA and telephone handsets used to access the Service. By utilizing the

Service, Customer acknowledges that it has received the sticker and placed them in the appropriate locations.

(f) YOU ACKNOWLEDGE AND AGREE THAT INSIGHT AND ITS DESIGNATED AGENTS WILL NOT BE LIABLE FOR ANY SERVICE OUTAGE, INABILITY TO DIAL 911 USING THE SERVICES, AND/OR INABILITY TO ACCESS EMERGENCY SERVICE PERSONNEL. YOU AGREE TO DEFEND, INDEMNIFY, AND HOLD HARMLESS INSIGHT AND ITS DESIGNATED AGENTS FROM ANY AND ALL CLAIMS, LOSSES, DAMAGES, FINES, PENALTIES, COSTS, AND EXPENSES (INCLUDING BUT NOT LIMITED TO REASONABLE ATTORNEY FEES) BY, OR ON BEHALF OF, YOU OR ANY THIRD PARTY OR ANY USER OF THE SERVICES RELATING TO THE FAILURE OR OUTAGE OF THE SERVICES, INCLUDING THOSE RELATED TO 911/E911.¹⁵⁵

84. As addressed in the foregoing passage, a power outage can cause service disruptions for cable-based VoIP services like that of Insight. Even though Insight offers a battery backup unit that lasts for "several hours," Insight acknowledges its shortcomings:

5. Service Interruptions.

(a) Customer acknowledges that Insight Phone 2.0 does not have its own power source and will not be available without an independent power supply. Customer also acknowledges that, under certain circumstances, including if the electrical power and/or Insight's cable network or facilities are not operating, Insight Phone 2.0 Service, including the ability to access emergency services, will not be available.

(b) Customer acknowledges that the performance of the battery backup is not guaranteed for, but not limited to, the following reasons: (i) the battery may not have been properly installed in the EMTA; (ii) the battery may have been removed from the EMTA;

¹⁵⁵ "Insight Phone 2.0 Residential Service Agreement, Effective October 1, 2006" ("Insight Phone Agreement") at section 4, available at <http://www.insight-com.com/documents/InsightPhone2.0ServiceAgreement.pdf> (accessed January 24, 2008) (emphasis in original).

(iii) the battery may fail; (iv) the battery may provide power for only a limited time; or (v) the battery may be exhausted. If the battery backup does not provide power, the Services will not function until normal power is restored. You also understand and acknowledge that you will not be able to use online features of the Services, to the extent available, under certain circumstances including, but not limited to, the interruption of your Internet or broadband connection.¹⁵⁶

85. Insight's website indicates that the Insight service consists of unlimited local and long distance and includes voice mail, Caller ID, and 12 other features.¹⁵⁷ This bundle of services is not functionally equivalent to nor a substitute for AT&T Ohio's BLES. Although Insight's website does not indicate a price for the Insight service, to the extent the service is available at a particular address, according to Insight's tariff, the service referenced on the website is available for a promotional price of \$40.00 plus a \$5.39 subscriber line charge¹⁵⁸ for one year. Also available under a year-long promotion is the same package with 180 minutes of long distance. The promotional price for this package is \$30.00 plus the \$5.39 subscriber line charge. The total prices for these packages are 2.3 and 1.8 times, respectively, the price of AT&T Ohio's BLES, making them not readily available at rates, terms, and conditions comparable to AT&T Ohio's BLES. Insight maintains a tariff at the PUCO that contains a stand-alone BLES service called "Local Only Offer" priced at \$12.65.¹⁵⁹ The total monthly fee including the \$5.39

¹⁵⁶ Insight Phone Agreement at section 5.

¹⁵⁷ See <http://www.insight-com.com/SelectMyOptions.aspx> (accessed January 25, 2008).

¹⁵⁸ Insight Midwest Holdings, LLC d/b/a Insight Phone Tariff FCC No. 1, 1st Revised Page 5-10, effective September 25, 2005.

¹⁵⁹ Insight Phone of Ohio LLC PUCO No. 1, Price List, 2nd Revised Sheet 2, effective June 29, 2007.

subscriber line charge for this service is \$18.04, making it quite comparable and even a little cheaper than AT&T Ohio's BLES offering. However, because the Local Only Offer is not included or referenced on Insight's website, and is therefore not being marketed by Insight, and AT&T Ohio does not include any material indicating Insight's marketing of this offer, it is likely that customers would not know that such a service is available in order to consider it as an alternative to AT&T Ohio's BLES.

86. To summarize, it appears that the Insight service is not available throughout zip code areas of both the exchanges because it depends on which "area" the zip code falls into; the "Central Ohio" area or the "Central Ohio Digital Area." In addition, although Insight has a service offering that is comparable to AT&T Ohio's BLES in terms of both the nature of the service and the price, it is not marketed to customers and therefore customers would have no way of knowing such a service is available. The prices for the services marketed on Insight's website are not comparable in price to AT&T Ohio's BLES and the packages of services are not functionally equivalent to AT&T Ohio's BLES. These issues combined with the limitations of the VoIP-based service compared to AT&T Ohio's BLES, demonstrate that Insight should be removed from the list of candidate alternative providers for the purpose of satisfying Test 3.

f. PNG

87. AT&T Ohio named PNG as an alternative provider in two of the six Test 3 exchanges. PNG provides residential service via resale. 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. Thus although the Commission's rules do not require the Test 3 alternative providers to be facilities-based, competition from resale CLECs is generally regarded as inferior to competition from CLECs who use their own facilities to offer services.¹⁶⁰

88. PNG indicates on its website that it offers three "Local Service Bundles" to residential customers.¹⁶¹ The "Call to Connect Simple" package, the lowest priced of three packages offered, includes unlimited local calling and 30 minutes of domestic long distance for \$28.99.¹⁶² With a \$6.50 subscriber line charge added,¹⁶³ the total price for this package is \$35.49, which is 1.8 times the price of AT&T Ohio's BLES. This rate is not "competitive" with AT&T Ohio's BLES rate, therefore PNG should not be considered to

¹⁶⁰ AT&T Ohio's own economic policy witness in 02-1280 stated that "CLECs that rely on the incumbent's network do not, by definition, provide any innovation in the provision of the underlying facilities. Accordingly, UNE-P and resale providers have fewer avenues by which to make contributions to the marketplace. The result is not only less investment, but also, very fundamentally, less competition." Aron Direct at 43.

¹⁶¹ See <http://ecare.pngcom.com/site/productlinks/residential/localpackages.php> (accessed January 24, 2008).

¹⁶² PNG Telecommunications, Inc. d/b/a PowerNet Global Communications PUCO No. 1A, Original Sheet No. 3, effective March 5, 2007.

¹⁶³ Id., Original Sheet No. 2, effective March 5, 2007.

offer a service that is "readily available at competitive rate, terms, and conditions" and therefore is not "substitutable" with AT&T Ohio's BLES.

89. In addition, PNG does not have a "presence" in the residential market, because it serves only ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** in each of the Canal Winchester and New Albany exchanges.¹⁶⁴ This is precisely the type of situation that requires a thorough assessment of the candidate alternative provider's "presence" in the market.
90. Based upon all of this information, the price for PNG service is not comparable, nor does PNG have a "presence" in the market capable of constraining AT&T Ohio's BLES prices, either today or on a going-forward basis. Accordingly, PNG must be disregarded as an alternative provider for the purpose of satisfying Test 3.

g. Revolution

91. AT&T Ohio has identified Revolution as an alternative provider in all six Test 3 exchanges.¹⁶⁵ Like Global Connection, Revolution is a prepaid provider. As such, for the same reasons stated previously with regard to Global Connection, Revolution's services are not functionally equivalent to AT&T Ohio's BLES. The rates charged by Revolution also distinguish its products from AT&T Ohio's BLES service offering. According to its tariff, Revolution offers "Basic Local Service," which appears to be a BLES-only service similar to that of AT&T Ohio, for \$26.33 per month,¹⁶⁶ plus \$3.50 for the subscriber line

¹⁶⁴ Attachment PAT-3.

¹⁶⁵ Application, Exhibit 3.

¹⁶⁶ Revolution Communications Company LLC Ohio Local Exchange Tariff PUCO No. 1, First Revised Page 57, effective February 14, 2006.

charge,¹⁶⁷ or \$29.83 in total. This is 1.5 times the price of AT&T Ohio's \$19.64 BLES offering. Revolution therefore does not offer a service comparable to AT&T Ohio's BLES "at competitive rates, terms and conditions," and so does not offer a "competing service" as required of all identified alternative providers.

92. Revolution also does not have a "presence" in the residential market, because in five of the six exchanges in which it is identified as an alternative provider, it only serves between ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***.¹⁶⁸ In the remaining exchange, it serves ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***¹⁶⁹ yet this equates to a market share in that exchange of only ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***.¹⁷⁰ In terms of overall market share, Revolution serves only ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** of the residential market in all six exchanges.¹⁷¹
93. For these reasons, Revolution does not satisfy the criteria for being considered an alternative provider for the purpose of satisfying the third prong of Test 3.

¹⁶⁷ Id.

¹⁶⁸ Attachment PAT-3.

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Id.

h. Talk America

92. AT&T Ohio identifies Talk America as an alternative provider in all six Test 3 exchanges.¹⁷² Talk America, however, has a tenuous market position in these exchanges, despite the fact that the company has been acquired by Cavalier, which now boasts that it has "become the largest full service competitive communications provider in the country."¹⁷³ In total, in the six test three exchanges Talk America serves just ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential access lines, or ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** of the overall market for residential lines.¹⁷⁴ It serves between ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***¹⁷⁵ in the six exchanges. With regard to total market share held in each exchange, Talk America's highest is ***BEGIN CONFIDENTIAL >>END CONFIDENTIAL*** in just one exchange while its presence in another exchange dips to ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***.¹⁷⁶ A carrier with such a limited presence in the market will be unable to constrain an ILEC's prices. It should be noted that, using the zip codes supplied by AT&T Ohio in response to OCC Interrogatory No. 116 to check availability on the Talk America website, of the six exchanges that AT&T Ohio lists as

¹⁷² Application, Exhibit 3.

¹⁷³ See <http://www.cavtel.com/company/index.shtml?tabid=ata&tabid2=company&tabid3=overview> (accessed January 25, 2008).

¹⁷⁴ Attachment PAT-3.

¹⁷⁵ Id.

¹⁷⁶ Id.

serving residential customers, Olmsted Falls is the only exchange in which every zip code returned available calling plans. Per the website, no service is available in the Philo and Murray City exchanges, and there is limited availability in the other three exchanges.

93. The services offered by Talk America are comparable in scope to AT&T Ohio's BLES. On its website, Talk America offers the "Unlimited Local Calling" plan that is tariffed under the name "Flex Basic," for \$24.95, which includes certain features.¹⁷⁷ Talk America also includes a federal subscriber line charge in the amount of \$8.00,¹⁷⁸ bringing the rate to \$32.95, which is 1.7 times AT&T Ohio's BLES rate. The difference in price is significant; hence, Talk America does not offer "competing services" at competitive rates, terms and conditions as compared to AT&T Ohio's BLES. This conclusion, coupled with the market share data and the information regarding service availability on Talk America's website discussed above, provides a clear indication that Talk America does not qualify to be an alternative provider for the purpose of satisfying Test 3.

i. Time Warner

94. AT&T Ohio identified Time Warner as an alternative provider in the Murray City and Philo exchanges.¹⁷⁹ However, although AT&T Ohio lists Time Warner as an alternative provider serving residential customers in the two exchanges, it has not provided

¹⁷⁷ See http://www.cavtel.com/forhome/phone_local.php (accessed January 25, 2008).

¹⁷⁸ Talk America dba Cavalier Telephone, FCC Tariff No. 10, Second Revised Page 71.1, effective March 30, 2007.

¹⁷⁹ Application, Exhibit 3.

supporting data in the "Residence White Page Listings" or the "Ported Numbers" documents.¹⁸⁰

95. The service that Time Warner offers to residential consumers is not a functional equivalent or substitute for AT&T Ohio's stand-alone BLES. Time Warner offers "Digital Phone," which is an IP-based telephony service provided over the carrier's private IP network. "Digital Phone" is only available as a one-size-fits-all bundled service offering that includes flat-rate local service, unlimited long distance calling in the U.S. and Canada, and five additional vertical features.¹⁸¹ The fact that Time Warner's "Digital Phone" and AT&T Ohio's BLES are comprised of very different service components is a clear indication that the services are in different product markets, and as a result are not functional equivalents or substitutes for one another.
96. There is also a significant functional difference between Time Warner's "Digital Phone" service and BLES provided by AT&T Ohio. Unlike AT&T Ohio's BLES, Time Warner's telephone service does not have its own power source, so in the event of a power failure, "Digital Phone" will not be available.¹⁸² Consumers without another form of communication (such as a wireline phone) will be unable to contact anyone, even the electric company, to report the outage. Worse, Time Warner acknowledges that its E911 service also requires an outside source of power, so consumers will be unable to utilize the E911 service that Time Warner makes available to them in the event of a power

¹⁸⁰ Id.

¹⁸¹ See <http://www.timewarnercable.com/Cincinnati/Products/DigitalPhones/faqs.html> (accessed January 28, 2008).

¹⁸² See <http://www.timewarnercable.com/CustomerService/FAQ/TWCFaqs.ashx?faqMap=26332&MarketID=124> (accessed January 28, 2008).

failure.¹⁸³ These are critically important distinctions between the two services in terms of functional equivalence; indeed, many VoIP providers recommend that consumers retain an alternative means (i.e., landline service) of reaching 911 from another provider for their own protection.¹⁸⁴

97. 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.¹⁸⁵ 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.¹⁸⁶ Thus, even though an offering similar to AT&T Ohio's BLES is referenced in Time Warner's tariff, it is not a service that Ohio consumers have available to them. Time Warner therefore does not provide a service that is functionally equivalent or a substitute for AT&T Ohio's standalone BLES.
98. AT&T Ohio has not demonstrated that Time Warner's "Digital Phone" residential service offerings are available at "competitive rates, terms and conditions" compared to AT&T Ohio's BLES.¹⁸⁷ The price for the "Digital Phone" local/long distance/vertical feature package, as marketed on Time Warner's website, is \$49.95 if the customer only

¹⁸³ Id.

¹⁸⁴ Further, *Consumer Reports*, in its February 2008 issue, advises: "If you're switching to cable telephone service . . . consider spending about \$20 a month to retain basic landline service. A landline is more reliable for 911 calls and will continue to work in power outages." "Internet, TV, phone bundling can cut bills," *Consumer Reports* (February 2008), at 34.

¹⁸⁵ Time Warner Cable Information Services (Ohio), LLC d/b/a Time Warner Cable PUCO No. 1, Original Page 44, effective August 23, 2005.

¹⁸⁶ Time Warner Cable indicated through contact with OCC representatives that this service is not available in Ohio.

¹⁸⁷ R.C. 4927.03(A)(2)(c).

subscribes to voice service,¹⁸⁸ \$44.95 per month if the customer subscribes to either cable or high-speed Internet service,¹⁸⁹ or \$39.95 per month if the customer subscribes to both of those services.¹⁹⁰ Therefore, Time Warner's "Digital Phone" BLES offering is not "competitive" with the \$19.64 rate AT&T Ohio charges for BLES.

99. The difference in price for these services helps underscore why they are not substitutes for AT&T Ohio's BLES. Indeed, Time Warner's "Digital Phone" service comes with a higher price tag because its scope of services is much wider than AT&T Ohio's BLES. AT&T Ohio offers a similar package of services to compete with Time Warner's "Digital Phone" service, and charges a monthly rate of \$40.00.¹⁹¹ The fact that Time Warner charges substantially higher rates for stand-alone BLES as compared to AT&T Ohio demonstrates that it does not provide substitute service at competitive rates, terms and conditions, as required by statute.
100. Further, when assessing "the extent to which service is available from the alternative provider in the relevant market"¹⁹² and whether services are "readily available" from the alternative provider,¹⁹³ it is necessary for AT&T Ohio to demonstrate that a cable operator makes residential BLES available throughout the exchanges in which it is identified as an

¹⁸⁸ See <http://www.timewarnercable.com/CustomerService/FAQ/TWCFaq.ashx?faqMap=26322&MarketID=124> (accessed January 28, 2008).

¹⁸⁹ Id.

¹⁹⁰ Id.

¹⁹¹ Rate is for AT&T Ohio's All Distance Online Select which includes local, long distance and ten vertical features. See <https://swot.sbc.com/swot/bundleProductDetail.do?prodOfferId=158479> (accessed January 28, 2008).

¹⁹² R.C. 4927.03(A)(2)(b).

¹⁹³ R.C. 4927.03(A)(2)(c).

alternative provider, due to the fact that it provides service over its own network facilities. In order for a cable operator to qualify as an alternative provider, "similar market conditions" must exist *throughout* the exchange.

101. It is clear from a review of the Cable Franchise Map that while Time Warner does appear to serve the entire Philo exchange, it does not appear to serve the entirety of the Murray City exchange. Furthermore, using the zip codes supplied by AT&T Ohio in response to OCC Interrogatory No. 116 to check availability on the Time Warner web site, all of the seven zip codes provided for the Philo exchange returned available calling plans, while only one of the four zip codes provided for Murray City returned available calling plans. Thus, the Commission cannot ensure that Time Warner will be able to constrain AT&T Ohio's pricing power throughout the Murray City exchange. For this reason, Time Warner must be eliminated from consideration as an alternative provider in the Murray City exchange for the purpose of satisfying Test 3.
102. In summary, the scope of services provided with Time Warner's "Digital Phone" service places it in the same product market as AT&T Ohio's own local/long distance/vertical features package, as opposed to its BLES-only service offering. Time Warner's "Digital Phone" packages are priced well above AT&T Ohio's BLES service; hence, Time Warner does not offer "competing services" at competitive rates, terms and conditions as compared to AT&T Ohio's BLES. In addition, although Time Warner has a tariffed stand-alone BLES offering, the offering is no longer marketed by Time Warner in Ohio. 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 E911 service further indicates that these services are not functionally equivalent to AT&T Ohio's BLES-only service. Although AT&T Ohio claims that residential consumers in the Murray City and Philo exchanges subscribe to Time Warner service, AT&T Ohio provided no line count data for the two exchanges. Finally, there is no evidence that Time Warner's "Digital Phone" service is available throughout the Murray City exchange, which does not allow for an assessment of "the extent to which services are available from an alternative provider." Accordingly, consistent with the statute and the definitions established in the BLES alt. reg. rules, Time Warner is not a "provider of competing service(s) to [AT&T Ohio's] basic local exchange service offering(s)" per the definition of "facilities-based alternative provider,"¹⁹⁴ and therefore it cannot be identified as such for the purpose of satisfying Test 3.

j. Trinsic

103. AT&T Ohio identified Trinsic¹⁹⁵ as an alternative provider in four of the six Test 3 exchanges.¹⁹⁶ Despite the fact that it has a tariffed "Stand-Alone Local Exchange Service," Trinsic does not offer "competing services" to AT&T Ohio's BLES. While the scope of services for "Stand-Alone Local Exchange Service" is similar to AT&T Ohio's

¹⁹⁴ 4901:1-4-01(G), O.A.C.

¹⁹⁵ Matrix Business Technologies acquired Trinsic's assets and customer base, and continues to provide telecommunications services to former Trinsic residential customers under the Trinsic name. On April 12, 2007, Trinsic Communications filed an Application for approval of a proposed transfer of Trinsic's assets used to provide local and long distance services to Matrix Telecom, Inc. See Case No. 07-411-TP-ATR. See also "Asset liquidation proposed as Trinsic's reorganization alternative" Tampa Bay Business Journal, April 20, 2007.

¹⁹⁶ Application, Exhibit 3.

BLES, the prices are not. Trinsic charges \$46.56 for its stripped-down primary line residential service,¹⁹⁷ plus another \$6.50 for the federal subscriber line charge for a total of \$53.06, which is nearly three times the price of AT&T Ohio's BLES-only service.¹⁹⁸

104. Although Trinsic is named as an alternative provider in four of the six Test 3 exchanges, it serves a collective ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential access lines in those exchanges, thus accounting for only ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** of the overall residential market in those four exchanges.¹⁹⁹ Within the individual exchanges, Trinsic serves as few as ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** and no more than ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** of total residential lines.²⁰⁰ This market share data, even though it is static in nature, speaks to the fact that Trinsic has a limited "presence" in each Test 3 exchange in which it operates. Because Trinsic offers service at rates that are not competitive with those of AT&T Ohio's BLES, and has such a limited and unsure presence in the market, Trinsic must be removed from the list of alternative providers for the purpose of satisfying Test 3.

V. SUMMARY CONCLUSION FOR TEST 3

105. With regard to the first prong of Test 3, I have demonstrated that AT&T Ohio's calculation of CLEC market share must be adjusted in order to satisfy the requirements of

¹⁹⁷ Trinsic Communications P.U.C.O. Tariff No. 5, Section 10, 1st Revised Page 6, effective December 1, 2006.

¹⁹⁸ Trinsic Communications Tariff FCC No. 4, Original Sheet 54, effective January 1, 2005.

¹⁹⁹ Attachment PAT-3.

²⁰⁰ Id.

the Test by excluding carriers identified as having E911 listings that do not provide service to residential customers. When this adjustment is made, the Mantua, Olmsted Falls and Philo exchanges fail Test 3.

106. With regard to the second prong of Test 3, I have demonstrated that neither of the CLECs identified as being facilities-based CLECs, MCI and Sage Telecom, offers a service that is functionally equivalent to or a substitute for AT&T Ohio's stand-alone BLES because they provide only bundled services and at prices that are not comparable to AT&T Ohio's BLES price. Thus all the exchanges fail this prong.

Affidavit of Patricia A. Tanner
On Behalf of the Office of the Ohio Consumers' Counsel
Case No. 07-1312-TP-BLS

Table 1
Test 3 Prong 3: Qualifying Alternative Providers
Summary of Conclusions

AT&T Ohio Proposed Alternative Providers	Offering a Competing Service?				Presence?	Coverage?		Alternative Provider?
	Rates Not Competitive with BLES	Not Functional Equivalent or Substitute to BLES	Service Offered has Limitations Compared to BLES	Not Actively Offered or Marketing to Residential	Limited Market Share	Geograph- ic Coverage of Facilities is Not Ubiqui- tous	Service Coverage is Not Ubiqui- tous	
ACN	X	X			X			NO
Cox Comm							X	NO
First Communica- tions					X in Murray City			YES except Murray City
Global Connection	X	X			X			NO
Insight	X	X	X				X	NO
PNG	X				X			NO
Revolution	X	X			X			NO
Talk America	X				X		X except Olmsted Falls	NO
Time Warner	X	X	X			X in Murray City	X except Murray City	NO
Trinsic	X				X			NO

107. Finally, with regard to the third prong of Test 3, I have established a necessary set of conditions for determining whether candidate wireline carriers qualify as "alternative providers" in accordance with the R.C. 4927.03(A), the definitions set forth in 4901:1-4-01, O.A.C., and the language of the Tests themselves appearing in 4901:1-4-10(C), O.A.C. A summary of those conditions and the results of my analysis appear in Table 1.

Only First Communications, in all but the Murray City exchange, appears to have satisfied the necessary conditions to qualify as an alternative provider.

108. Based on the conclusions and analysis in both my and Ms. Hardie's affidavits, Table 2 below illustrates that AT&T Ohio has satisfied its burden with regard to only one qualifying alternative provider, First Communications in the Canal Winchester, Mantua, New Albany, Olmsted Falls and Philo exchanges. However, AT&T Ohio has failed to satisfy its burden that at least five alternative providers are present and are serving residential customers in the six Test 3 exchanges. Ms. Hardie's affidavit shows that none of the wireless providers qualify. AT&T Ohio's application for BLES alt. reg. in all six Test 3 exchanges must therefore be denied.

<p style="text-align: center;">Table 2 Test 3 Exchange 3: Alternative Providers Final Tally of Alternative Providers</p>			
Exchange Name	Wireline Providers Not Meeting the Criteria of the Statute and the Rules	Providers Meeting the Criteria of the Statute and the Rules	Number of Alternative Providers
Canal Winchester	ACN, Global Connection, Insight, MCI, PNG, Revolution, Sage, Sprint/Nextel, Talk America(Cavalier), Trinsic, Verizon Wireless	First Communications	1
Mantua	ACN, Alltel Wireless, MCI, Revolution, Sage, Sprint/Nextel, Talk America (Cavalier), Trinsic, Verizon Wireless	First Communications	1
Murray City	Alltel Wireless, First Communications, MCI, Revolution, Sage, Talk America (Cavalier), Time Warner	NONE	0
New Albany	ACN, Insight, MCI, PNG, Revolution, Sage, Sprint/Nextel, Talk America (Cavalier), Trinsic, Verizon Wireless	First Communications	1
Olmsted Falls	ACN, Alltel Wireless, Cox Communications, MCI, Revolution, Sage, Sprint/Nextel, Talk America (Cavalier), Trinsic, Verizon Wireless	First Communications	1
Philo	ACN, Alltel Wireless, MCI, Revolution, Sage, Sprint/Nextel, Talk America (Cavalier), Time Warner	First Communications	1

VI. COMPETITIVE MARKET TEST 4

109. In its Application, AT&T Ohio has applied for BLES alternative regulation in five exchanges utilizing Test 4. In order to satisfy Test 4 in a given telephone exchange area, an ILEC must demonstrate:

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.²⁰¹

Test 4 is comprised of two distinct "prongs," each of which must be satisfied in order for BLES alt. reg. to be granted in a given exchange. See the affidavit of Ms. Hardie for a discussion of Prong 1 of Test 4.²⁰²

A. Test 4, Prong 2: "[T]he presence of at least five unaffiliated facilities-based alternative providers serving the residential market...."

1. The requirements of the test

110. The second prong of Test 4 seeks to establish that residential BLES is "subject to competition" or has "reasonably available alternatives," as required by R.C. 4927.03(A)(1), by demonstrating "the presence of at least five unaffiliated facilities-based alternative providers serving the residential market."²⁰³ This test adds the characteristics of being "unaffiliated" and being "facilities-based" to the third prong of Test 3. As was the case in Test 3, however, the Commission must carefully review the language it adopted in Test 4 and in the "Definitions" section of the BLES alternative

²⁰¹ 4901:1-4-10(C)(4), O.A.C.

²⁰² Hardie Affidavit ¶¶ 29-37.

²⁰³ 4901:1-4-10(C)(4), O.A.C.

regulation rules,²⁰⁴ and interpret that language in accordance with the relevant factors enumerated at R.C. 4927.03(A)(2).

a. Defining “unaffiliated facilities-based alternative provider”

111. To begin, the Commission must consider what it means to be a “facilities-based alternative provider.” The Commission defined both “alternative provider” and “facilities-based alternative provider” in the BLES alt. reg. rules:

“Alternative provider” means a provider of competing service(s) to the basic local exchange service offering(s), regardless of the technology and facilities used in the delivery of the services (wireline, wireless, cable, broadband, etc.).²⁰⁵

“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.).²⁰⁶

As is evident from the definitions, the only distinction between these two types of carriers is that a facilities-based alternative provider “us[es] facilities that it owns, operates, manages or controls to provide such services.”

112. The second prong of Test 4 also requires these facilities-based alternative providers to be unaffiliated with the ILEC seeking BLES alternative regulation. The term “affiliate” was defined by the Commission in the BLES alt. reg. rules:

“Affiliate” means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with

²⁰⁴ 4901:1-4-01, O.A.C.

²⁰⁵ 4901:1-4-01(B), O.A.C.

²⁰⁶ 4901:1-4-01(G), O.A.C.

another person. For purposes of these rules, the term "own" means to own an equity interest (or the equivalent thereof) of more than ten per cent.²⁰⁷

113. Thus, an "unaffiliated facilities-based alternative provider" would be any facilities-based alternative provider that the ILEC seeking BLES alternative regulation does not directly or indirectly own or control, is not owned or controlled by, or is not under common ownership or control with the ILEC seeking BLES alternative regulation.

b. Identifying "alternative providers"

114. AT&T Ohio has not identified any "affiliated" providers in applying Test 4, so that aspect of identifying alternative providers for the purpose of the second prong of Test 4 is satisfied. In my discussion of Test 3, prong 3 above,²⁰⁸ I addressed at length the requirements for identifying a provider as an "alternative provider" in compliance with the statute. Those requirements do not vary with regard to whether the provider is facilities-based or not; hence, the same requirements discussed above with regard to identifying an "alternative provider" in Test 3 apply for identifying a "facilities-based alternative provider" in Test 4, and I incorporate them here by reference. Those requirements, while not repeated in their entirety, are summarized as follows.
115. *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) and (G), O.A.C. A "provider of competing services" must provide functionally equivalent or substitute services to the ILEC's BLES to customers throughout the exchange, and make

²⁰⁷ 4901:1-4-01(A), O.A.C.

²⁰⁸ See ¶¶ 44-60.

those services readily available at competitive rates, terms and conditions, in accordance with R.C. 4927.03(A)(2)(b) and (c). The Commission should also evaluate market share and growth in market share, in accordance with R.C. 4927.03(A)(2)(d) when evaluating whether a carrier qualifies as a "provider of competing services."

116. *Second*, the provider must have a "presence" in the market, per 4901:1-4-10(C)(4), O.A.C., and thus must be seen as a viable competitor to the ILEC for the provision of BLES on a going-forward basis.
117. *Third*, the provider must be *actively* "serving the residential market," per 4901:1-4-10(C)(4), O.A.C., because a carrier "present" in the market but not trying to acquire residential customers will not exert competitive market pressure on the ILEC's BLES service offering.

2. Only one of the ten wireline alternative providers identified by AT&T Ohio in its Test 4 exchanges definitively qualifies as a "facilities-based alternative provider" as defined and interpreted in compliance with the statutory requirements of R.C. 4927.03(A).

118. In its Application, AT&T Ohio identifies ten wireline carriers as unaffiliated facilities-based providers serving the residential market for Test 4.²⁰⁹ Those carriers include: ACN, Cox, First Communications, Insight, MCI, Revolution, Sage, Talk America, Time Warner and Trinsic. Unfortunately, the Company has failed to apply the rigorous analysis required by the statute, as I outlined above, to identify alternative providers that provide competing services to its BLES. When the appropriate information is examined,

²⁰⁹ Application, Exhibit 3.

it is evident that only one of these wireline carriers, First Communications in two exchanges, meets the standard of being an “unaffiliated facilities-based alternative provider” for the purpose of satisfying Test 4.

a. ACN, Cox, First Communications, Insight, Revolution, Talk America, Time Warner and Trinsic

119. Of the ten individual carriers identified by AT&T Ohio as “unaffiliated facilities-based providers” for the purpose of satisfying the second prong of Test 4, eight were identified as “alternative providers” for the purpose of satisfying the third prong of Test 3. I analyzed these eight carriers in the context of the third prong of Test 3, and concluded that, with the exception of First Communications in the Canal Winchester, Mantua, New Albany, Olmsted Falls, and Philo exchanges, the other seven carriers do not qualify as an alternative provider within the context of Test 3.²¹⁰ If the carrier does not qualify as a Test 3 “alternative provider” because it does not offer competitive services, for example, then it automatically is disqualified as a Test 4 “facilities-based alternative provider,” because the latter is a subset of the former. On that basis, ACN, Insight, Revolution, Talk America, Time Warner, and Trinsic must be excluded from consideration as unaffiliated facilities-based providers for the purpose of satisfying Test 4. However, a carrier’s presence and coverage in Test 3 exchanges is not determinative for the Test 4 exchanges. Under this consideration, however, Cox must also be disqualified.

²¹⁰ See ¶106.

i) ACN

117. AT&T Ohio has identified ACN as an alternative provider in three of the five Test 4 exchanges.²¹¹ ACN has also been identified as an alternative provider in five of the Test 3 exchanges. As was demonstrated above, while ACN offers a service that is similar to AT&T Ohio's stand-alone residential BLES, it is not a functional equivalent to and does not have rates that are competitive with AT&T Ohio's BLES.
118. ACN's "presence" in two of the three Test 4 exchanges in which it operates is minimal. In those two exchanges it provides ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines in one exchange and only ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***²¹² residential line in the other exchange. In the third exchange, ACN serves ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines. All together, ACN serves just ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** of the total residential lines in the three Test 4 exchanges in which it has been identified as an alternative provider.²¹³ ACN does not have a "presence" in the market such that it would be capable of constraining AT&T Ohio's BLES price.
119. ACN must be eliminated from consideration as an alternative provider for the purpose of satisfying Test 4 as it does not offer functionally equivalent or substitute services at competitive rates, terms and conditions to AT&T Ohio's BLES, and it does not have a

²¹¹ Application, Exhibit 3.

²¹² Attachment PAT-3.

²¹³ Id.

"presence" in the residential BLES market sufficient to constrain AT&T Ohio's pricing power.

ii) Cox

120. AT&T Ohio has identified Cox as an alternative provider in the Victory exchange for Test 4. As stated in the discussion of Cox under Test 3, Prong 3, Cox is a cable operator that offers digital telephone service over its own cable network facilities in limited areas of Cuyahoga County.
121. In order to assess "the extent to which service is available" from Cox in a given exchange, there must be some representation that the cable operator provides service throughout the exchange. Using the zip codes supplied by AT&T Ohio in response to OCC Interrogatory No. 116 to check availability on the Cox website, of the five provided zip codes for the Victory exchange that AT&T Ohio lists as serving residential customers, only four of the zip codes returned available calling plans information. Per the website, when entering the zip code 44144, the following response is received, "We're sorry, but we could not locate the ZIP Code you entered."²¹⁴
122. Thus, based on the information supplied by AT&T Ohio, it appears that Cox does not have full geographic coverage in the Victory exchange. Therefore, Cox must be removed from the list of candidate alternative providers for the purpose of satisfying Test 4.

²¹⁴ See <http://www.cox.com/navigation/error/zip.asp>.

iii) First Communications

123. AT&T Ohio has identified First Communications as an alternative provider in the Aberdeen, Groveport and Victory exchanges for Test 4. First Communications has managed to acquire customers in many of AT&T Ohio's exchanges. First Communications appears to satisfy the three conditions necessary to qualifying as an alternative provider for the purpose of the second prong of Test 4 in all but one of these exchanges. In the three Test 4 exchanges, it serves anywhere from ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines and its market share is ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***²¹⁵ First Communications has acquired approximately ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** of the overall residential market in the three exchanges.²¹⁶ I believe that First Communications has an established "presence" in the Groveport and Victory exchanges with ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines in the Groveport exchange, and ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines in the Victory exchange, such that the Commission can be reasonably confident that First Communications will continue "serving the residential market" (as it does today) by providing services that compete with AT&T Ohio's BLES in those exchanges. In the Aberdeen exchange, however, First Communications' ***BEGIN

²¹⁵ Attachment PAT-4.

²¹⁶ Id.

CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines do not give it enough of a presence to qualify under the statute.

iv) Insight

124. AT&T Ohio has identified Insight as an alternative provider in the Groveport exchange for Test 4.²¹⁷ Insight is a cable operator that offers residential telephone service over its own cable network facilities. As I discussed in my Test 3 analysis above, however, Insight's service is not comparable to or priced competitively with AT&T Ohio's stand-alone BLES.
125. In order to assess "the extent to which service is available" from Insight in a given exchange, there must be some representation that the cable operator provides local exchange telephone service throughout the exchange. AT&T Ohio has provided no such information. However, using the Insight zip code lookup tool, I input the zip codes provided by AT&T Ohio in response to OCC Interrogatory No. 116, and only three of the four provided zip codes confirmed that Insight phone service is offered in the Groveport exchange in which Insight is identified as an alternative provider. Zip code 43207 returned, "We're sorry. You have entered a zip code that is not serviced by Insight."²¹⁸
126. In summary, it appears that Insight does not have full service coverage in the Groveport exchange. Therefore, Insight should be removed from the list of candidate alternative providers for the purpose of satisfying Test 4.

²¹⁷ Application, Exhibit 3. According to an April 3, 2007 article in Business First of Columbus, "Insight Communications Company Inc. and Comcast Corp. have agreed to split their joint venture, leaving the Columbus market under Insight's ownership."

²¹⁸ See <http://www.insight-com.com/nozip.asp?destination=SelectMyProducts.aspx>

v) Revolution

127. AT&T Ohio has identified Revolution as an alternative provider in three of the Test 4 exchanges.²¹⁹ Revolution is a prepaid provider. As discussed above, Revolution's services are not functionally equivalent to nor are its rates comparable to AT&T Ohio's BLES.
128. Revolution also does not have a "presence" in the residential market, because in two of the three exchanges in which it is identified as an alternative provider, it only serves a total of ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***,²²⁰ and in the remaining exchange, it serves ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL.***²²¹ This equates to a total market share of only ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL***.²²²
129. For these reasons, Revolution does not satisfy the criteria for being considered an alternative provider for the purpose of satisfying the second prong of Test 4.

vi) Talk America

130. AT&T Ohio identifies Talk America as an alternative provider in the Test 4 Victory exchange.²²³ Talk America serves a miniscule number of lines in the Victory exchange. In total, Talk America serves just ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential access lines, or ***BEGIN

²¹⁹ Application, Exhibit 3.

²²⁰ Attachment PAT-3.

²²¹ Id.

²²² Id.

²²³ Application, Exhibit 3.

CONFIDENTIAL<< >>END CONFIDENTIAL*** of the overall market for residential lines.²²⁴ A carrier with such a limited presence in the market will be unable to constrain an ILEC's prices.

131. In addition to the reasons I discuss under Test 3 above, Talk America's market share data show that Talk America does not have the presence and thus, provides a clear indication that Talk America does not qualify to be an alternative provider for the purpose of satisfying Test 4.

vii) Time Warner

132. AT&T Ohio identified Time Warner as an alternative provider in the South Solon exchange.²²⁵ However, as was stated previously with regard to the Test 3 exchanges in which AT&T Ohio identified Time Warner as an alternative provider. The service that Time Warner offers to residential consumers has limitations and is not a functional equivalent or substitute compared to AT&T Ohio's stand-alone BLES. In addition, its rates are not competitive with AT&T Ohio's BLES rates.
133. Using the Time Warner zip code lookup tool, I input the zip codes provided by AT&T Ohio in response to OCC Interrogatory No. 116, and all four of the provided zip codes confirmed that Time Warner service is offered in the South Solon exchange in which Time Warner is identified as an alternative provider.
134. In summary, although Time Warner's service appears to be offered throughout the South Solon exchange, as noted in detail above, the service that Time Warner offers to

²²⁴ Attachment PAT-3.

²²⁵ Application, Exhibit 3.

residential consumers is not competitively priced with AT&T's BLES rate, has service limitations and is not a functional equivalent or substitute for AT&T Ohio's stand-alone BLES.

viii) Trinsic

135. AT&T Ohio identified Trinsic as an alternative provider in the Groveport and Victory Test 4 exchanges.²²⁶

136. Trinsic has acquired ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines in the Groveport exchange, and ***BEGIN CONFIDENTIAL<< >>END CONFIDENTIAL*** residential lines in the Victory exchange. Overall, Trinsic serves ***BEGIN CONFIDENTIAL<<

>>END CONFIDENTIAL>>***residential lines in the two exchanges. Because Trinsic offers service at rates that are not competitive with those of AT&T Ohio's BLES, and has such a limited and unsure presence in the market, Trinsic must be removed from the list of alternative providers for the purpose of satisfying Test 4.

ix) MCI/WorldCom and Sage Telecom

137. As was discussed in detail under Test 3, Prong 2, where they were disqualified as CLECs providing BLES, MCI and Sage must be excluded from consideration as unaffiliated facilities-based providers for the purpose of satisfying Test 4. Neither MCI nor Sage "provide[s] BLES to residential customers," or offers a functionally equivalent or

²²⁶ Application, Exhibit 3.

substitute service to AT&T Ohio's stand-alone BLES at competitive rates, terms and conditions, as required by the statute.

B. Summary Conclusion for Test 4

138. Similar to the third prong of Test 3, for the second prong of Test 4, I have established a necessary set of conditions for determining whether candidate facilities-based carriers qualify as "alternative providers" in accordance with the R.C. 4927.03(A), the definitions set forth in 4901:1-4-01, O.A.C., and the language of the Tests themselves appearing in 4901:1-4-10(C), O.A.C. A summary of those conditions and the results of my analysis appear in Table 3.
139. As demonstrated in Table 3, only First Communications in the Groveport and Victory exchanges satisfies the conditions required to qualify as an "unaffiliated facilities-based alternative provider" for the purpose of satisfying prong two of Test 4.

Affidavit of Patricia A. Tanner
On Behalf of the Office of the Ohio Consumers' Counsel
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Table 3
Test 4 Prong 2: Qualifying Facilities-Based Alternative Providers
Summary of Conclusions

AT&T Ohio Proposed Alternative Providers	Offering a Competing Service?				Presence?	Coverage?		Alternative Provider?
	Rate Not Competitive with BLES	Not Functional Equivalent or Substitute to BLES	Service Offered has Limitations Compared to BLES	Not Actively Offered or Marketing to Residential	Limited Market Share	Geographic Coverage of Facilities is Not Ubiquitous	Service Availability is Not Ubiquitous	
ACN	X	X			X			No
Cox Comm							X	No
First Communication					X in Aberdeen			Yes except Aberdeen
Insight	X	X	X				X	No
MCI/ WorldCom	X	X						No
Revolution	X	X			X			No
Talk America	X				X			No
Sage Telecom	X	X						No
Time Warner	X	X	X					No
Trinsic	X				X			No

140. Based on the conclusions and analysis in both my and Ms. Hardie's affidavits, Table 4 below illustrates that AT&T Ohio has satisfied its burden with regard to only one qualifying alternative provider, First Communications in the Groveport and Victory exchanges. However, AT&T Ohio has failed to satisfy its burden that the presence of at least five unaffiliated facilities-based alternative providers the five Test 4 exchanges. Ms. Hardie's affidavit shows that none of the wireless providers qualify. AT&T Ohio's application for BLES alt. reg. in all five Test 4 exchanges must therefore be denied.

Table 4 Test 4 Prong 2: Facilities-Based Alternative Providers Final Tally of Facilities-Based Alternative Providers			
Exchange Name	Providers Not Meeting the Criteria of the Statute and the Rules	Providers Meeting the Criteria of the Statute and the Rules	Number of Alternative Providers
Aberdeen	Cincinnati Bell Wireless, First Communications, MCI, Sage, Verizon Wireless		0
Groveport	ACN, Insight, MCI, Revolution, Sage, Sprint/Nextel, Trinsic, Verizon Wireless	First Communications	1
Somerton	Alltel Wireless, MCI, Sage, Sprint/Nextel, Verizon Wireless		0
South Solon	ACN, MCI, Revolution, Sage, Sprint/Nextel, T-Mobile, Time Warner, Verizon Wireless		0
Victory	ACN, Alltel Wireless, Cox Communications, MCI, Revolution, Sage, Sprint/Nextel, Talk America (Cavalier), Trinsic, Verizon Wireless	First Communications	1

VII. CONCLUSION

141. In order for the Commission to grant an ILEC's application for BLES alt.reg., the ILEC must demonstrate that its stand-alone BLES service is subject to competition, or that customers have reasonably available alternatives to the ILEC's BLES, in accordance with 4927.03(A)(1) and (2), and that there are no barriers to entry, in accordance with 4927.03(A)(3). When assessing whether the ILEC has satisfied one of the 4901:1-4-10(C) competitive market tests for a given exchange, the Commission must interpret those tests, and the definitions of the language appearing in the rules, in accordance with R.C. 4927.03(A).
142. As established in Ms. Hardie's and my affidavits, AT&T Ohio has failed to meet Tests 3 and 4 in accordance with the statute. With regard to Test 3, AT&T Ohio has (1) improperly calculated CLEC residential market share and (2) failed to identify two

facilities-based CLECs that provide a functional equivalent or substitute service for AT&T Ohio's BLES at competitive rates, terms and conditions as comparable to AT&T's BLES. With regard to Test 4, AT&T Ohio has (1) failed to calculate residential lines that have been "lost" since 2002. For both Tests 3 and 4, AT&T Ohio identified numerous carriers "alternative providers." As discussed above, only carrier First Communications qualify as "alternative providers." The other carriers do not qualify as an "alternative provider" because they (1) do not provide a functional equivalent or substitute service for AT&T Ohio's BLES; (2) do not provide a BLES-equivalent service at competitive rates, terms and conditions as compared to AT&T Ohio's BLES; (3) do not provide residential service throughout the exchange; (4) do not provide residential service at all; and/or (5) lack enough presence in the designated exchanges to enable the carrier to constrain AT&T Ohio's BLES prices.

143. The fact that AT&T Ohio has failed to meet the statutory requirements through compliance with the competitive market tests set forth at 4901:1-4-10(C) is a reflection on the fact that it is not easy to meet the standards for obtaining BLES alt. reg., nor should it be easy. Few carriers offer a service that is comparable in function and in scope to BLES, at prices that are competitive with AT&T Ohio's BLES. *AT&T Ohio already has the regulatory flexibility to establish bundles of service and adjust prices for those bundles of services in order to compete with the providers that offer similar bundles.* Evaluating whether "alternative providers" offer services that compete with AT&T Ohio's *bundles* is not the goal of HB 218. Granting AT&T Ohio's Application in the absence of competition for stand-alone BLES will result in one out come: higher rates

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for consumers who subscribe to stand-alone BLES. Such a result runs counter to the policy of the state of Ohio as set forth at R.C. 4927.02(A), and is certainly not in the public interest as required by R.C. 4927.03(A). AT&T Ohio's Application 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.


Patricia A. Tanner, Affiant

Subscribed and sworn to before me this 11th day of February, 2008.





Bonnie Morava
Notary Public, State of Ohio
My Commission Expires 09-18-2011

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

Questions 2-4 refer to those exchanges to which the Company applied the market test as set forth in O.A.C. 4901:1-4-10(C)(3).

Request # 2:

For each exchange identified in the Company's Application, in order to determine that at least 15% of total residential access lines are provided by unaffiliated CLECs:

- a. How did the Company determine that at least 15% of total residential access lines are provided by unaffiliated CLECs?
- b. To what date(s) and/or time period(s) do the total residential access lines used in the Company's analysis relate? (Please indicate the date(s) and/or time period(s) for each unaffiliated CLEC's access line count and the Company's access line count, if different.)
- c. What is the Company's definition of "unaffiliated CLEC"?
- d. List each unaffiliated CLEC identified by the Company in its determination that those CLECs provide at least 15% of total residential access lines and what is the basis upon which the Company has identified each as an unaffiliated CLEC?
- e. How many residential access lines did each unaffiliated CLEC identified in the Company's response to OCC Interrogatory No. 2d serve on the date(s) and/or time period(s) identified in the Company's response to OCC Interrogatory No. 2b?
- f. How did the Company determine the number of residential access lines served by each unaffiliated CLEC as set forth in the Company's response to OCC Interrogatory No. 2e?
- g. What is the source of information the Company used to make the determinations in the Company's response to OCC Interrogatory No. 2e?
- h. How many residential access lines did the Company serve on the date(s) and/or time period(s) identified in the Company's response to OCC Interrogatory No. 2b?

Response:

- a. See AT&T Ohio's Application summary sheet for each exchange. The number of CLEC lines was determined by adding the total number of residence E-911 listings established by the CLECs themselves to the number of residence lines provided by AT&T Ohio on the CLECs' behalf. The CLEC total was then divided by the sum of the number of CLEC residential lines and the number of AT&T residential lines to determine the percentage of total lines served by unaffiliated CLECs.

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- b. See AT&T Ohio's Application – September 30, 2007 for all carriers.
- c. Ohio Admin. Code § 4901:1-4-01 defines the terms "Affiliate" and "Competitive local exchange carrier (CLEC)" in sections (A) and (E) respectively. The company defines "unaffiliated CLEC" as a CLEC which is NOT an affiliate, as those separate terms are defined in the administrative rules.
- d. See AT&T Ohio's Application, confidential CLEC Lines in Service sheets for each exchange. See also the responses to Interrogatories 2a and 2c.
- e. See AT&T Ohio's Application, confidential CLEC Lines in Service sheets for each exchange.
- f. See the response to Interrogatory 2a.
- g. Company records.
- h. See AT&T Ohio's Application – Exhibit 3, summary page for each exchange.

Responsible Person: Daniel R. McKenzie
Director - Regulatory

**Public Utilities Commission of Ohio
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Request # 116:

For each exchange which is shown in Exhibit 3 of AT&T's Application, what is each and every Zip Code which falls within the exchange boundary?

Response:

See the attached spreadsheet.
OCC RFI #116.xls

Responsible Person: Daniel R. McKenzie
Director - Regulatory

Zip Code	Exchange
45101	Aberdeen
45144	Aberdeen
43068	Canal Winchester
43102	Canal Winchester
43103	Canal Winchester
43105	Canal Winchester
43110	Canal Winchester
43112	Canal Winchester
43125	Canal Winchester
43130	Canal Winchester
43147	Canal Winchester
43232	Canal Winchester
43103	Groveport
43110	Groveport
43125	Groveport
43207	Groveport
43232	Groveport
44202	Mantua
44234	Mantua
44241	Mantua
44255	Mantua
44266	Mantua
43730	Murray City
43766	Murray City
45732	Murray City
45764	Murray City
43004	New Albany
43031	New Albany
43054	New Albany
43062	New Albany
43081	New Albany
43082	New Albany
43230	New Albany
44017	Olmsted Falls
44028	Olmsted Falls
44070	Olmsted Falls
44138	Olmsted Falls
43701	Philo
43720	Philo
43727	Philo
43734	Philo
43756	Philo
43771	Philo
43777	Philo
43713	Somerton
43716	Somerton
43747	Somerton
43128	South Solon
43153	South Solon
45314	South Solon
45335	South Solon

44129	Victory
44130	Victory
44133	Victory
44134	Victory
44144	Victory

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Ohio Consumers' Counsel 2nd Set of Data Requests**

Request # 133:

Referring to the response to OCC Request No. 124(a), did AT&T independently verify that the E911 data provided by Intrado are in fact residential lines that are still in service?

Response:

No. The E911 database is the foundation of a critical public emergency service and the accuracy of the data is assumed. Each carrier is responsible for maintaining the accuracy of the listings they contribute to the database.

Responsible Person: Daniel R. McKenzie
Director - Regulatory

ATTACHMENT PAT – 2

**TEST 3, PRONG 1: ADJUSTMENTS TO CALCULATION OF CLEC MARKET
SHARE**

PUBLIC VERSION

REDACTED

*****INFORMATION ASSERTED TO BE
PROPRIETARY HAS BEEN REDACTED*****

ATTACHMENT PAT – 3

**TEST 3, PRONG 3: LINE COUNT AND MARKET SHARE CALCULATIONS
FOR WIRELINE CARRIERS IDENTIFIED AS ALTERNATIVE PROVIDER (1)**

PUBLIC VERSION

REDACTED

*****INFORMATION ASSERTED TO BE
PROPRIETARY HAS BEEN REDACTED*****

ATTACHMENT PAT – 4

**TEST 4, PRONG 2: LINE COUNT AND MARKET SHARE CALCULATIONS
FOR WIRELINE CARRIERS IDENTIFIED AS FACILITIES-BASED
ALTERNATIVE PROVIDERS (1)**

PUBLIC VERSION

REDACTED

*****INFORMATION ASSERTED TO BE
PROPRIETARY HAS BEEN REDACTED*****