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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Application of AT&T )  
Ohio For Approval of an Alternative Form ) Case No. 06-1013-TP-BLS  
of Regulation of Basic Local Exchange )  
Service and Other Tier 1 Services ) Case No. 07-259-TP-BLS  
Pursuant to Chapter 4901:1-4 Ohio )  
Administrative Code. )

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**MOTION FOR AN ORDER REQUIRING AT&T OHIO TO SHOW CAUSE AS  
TO WHY ITS ALTERNATIVE REGULATION OF BASIC LOCAL EXCHANGE  
SERVICE IN ELEVEN EXCHANGES SHOULD NOT BE REVOKED  
PURSUANT TO R.C. 4927.03(C) AND OHIO ADM. CODE 4901:1-4-12(B)  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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March 13, 2008

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The Office of the Ohio Consumers' Counsel ("OCC"), an intervenor in the above-captioned cases on behalf of residential utility consumers,<sup>1</sup> moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to require The Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio") to show cause as to why alternative regulation ("alt. reg.") of the rates customers pay for basic local exchange service ("basic service" or "BLES") and other tier one services in eleven telephone exchange areas should not be revoked.<sup>2</sup> The alternative providers that the PUCO originally found to be available to customers in the eleven exchanges no longer meet the requirements of the

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<sup>1</sup> OCC was granted intervention in Case No. 06-1013 ("06-1013") by Entry dated September 1, 2006 and in Case No. 07-259 ("07-259") by Entry dated April 11, 2007.

<sup>2</sup> See Ohio Adm. Code 4901:1-4-12(B). The eleven exchanges are Beallsville, Belfast, Danville (Highland), Graysville, Guyan, Marshall, Newcomerstown, Rio Grande, Shawnee, Vinton and Walnut. The cases were closed, but were reopened by memoranda docketed on April 12, 2007 (06-1013) and on September 26, 2007 (07-259).

test under which basic service alt. reg. was approved and alt. reg. for the eleven exchanges is not in the public interest. OCC files its motion pursuant to Ohio Adm. Code 4901-1-12 and Ohio Adm. Code 4901:1-4-12(B). The attached Memorandum in Support sets forth reasonable grounds for issuing a show cause order, as required by Ohio Adm. Code 4901:1-4-12(B).

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

In December 2006, the Commission granted AT&T Ohio basic service alt. reg. under Ohio Adm. Code 4901:1-4-09 for 136 exchanges.<sup>3</sup> Approximately six months later, the Commission granted AT&T Ohio basic service alt. reg. for eight additional exchanges.<sup>4</sup> As a result of the Commission's decisions, AT&T Ohio's stand-alone basic service customers in those exchanges are subject to annual rate increases of up to \$1.25 per month, and AT&T Ohio's Caller ID customers in those exchanges are subject to annual rate increases of up to \$0.50 per month, at AT&T Ohio's discretion.

Among the exchanges for which AT&T Ohio was granted basic service alt. reg. in the two cases were Beallsville, Belfast, Danville (Highland), Graysville, Guyan, Marshall, Newcomerstown, Rio Grande, Shawnee, Vinton and Walnut.<sup>5</sup> AT&T Ohio

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<sup>3</sup> 06-1013, Opinion and Order (December 20, 2006) ("06-1013 Order").

<sup>4</sup> 07-259, Opinion and Order (June 27, 2007) ("07-259 Order").

<sup>5</sup> See 06-1013 Order, Attachment B; 07-259 Order, Attachment B. The Belfast exchange was included in the 07-259 proceeding and the other ten exchanges were included in the 06-1013 proceeding.

submitted these eleven exchanges under Ohio Adm. Code 4901:1-4-10(C)(3) ("Test 3"). Test 3, among other things, requires a showing that there are at least five alternative providers serving the residential market in the exchange. If fewer than five alternative providers serve the residential market in the exchange, the exchange does not meet the test. The Commission found that exactly five alternative providers serve the residential market in each of the eleven exchanges,<sup>6</sup> and ruled that the eleven exchanges met Test 3.

Two of the alternative providers the Commission found to be serving consumers in each of the eleven exchanges were First Communications ("First Comm") and New Access Communications ("New Access"). First Comm, however, has since acquired New Access's customer base and operations in Ohio. On October 25, 2007, New Access filed an application to abandon service in Ohio.<sup>7</sup> In its application, New Access stated that First Comm had purchased New Access's "entire customer base and related assets" effective March 1, 2007, and that "New Access ceased to provide services to customers on March 1, 2007."<sup>8</sup> This is particularly pertinent to consumers in the Belfast exchange because New Access stopped providing service in Ohio more than three months before the PUCO granted AT&T Ohio basic service alt. reg. in that exchange.

Because New Access is no longer providing service in Ohio, there are now only four alternative providers of basic service to residential customers under AT&T Ohio's submissions as approved by the PUCO in the eleven exchanges. Thus, AT&T Ohio no

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<sup>6</sup> See 06-1013 Order, Attachment B; 07-259 Order, Attachment B.

<sup>7</sup> *In the Matter of the Application of New Access Communications LLC to Rescind/Revoke the Certificate(s) That Authorized the Authority to Transact Telecommunications Business in the State of Ohio*, Case No. 07-1098-TP-ABN, Request for Withdrawal of Certificate (October 25, 2007) ("Request to Withdraw").

<sup>8</sup> *Id.* at 1.

longer meets the Commission's Test 3 in the eleven exchanges. There are reasonable grounds to order AT&T Ohio to show cause as to why its basic service alt. reg. should not be revoked in those exchanges. In order to protect the approximately 11,500 AT&T Ohio residential customers in the eleven exchanges from unlawful rate increases,<sup>9</sup> the Commission should issue such a show cause order.

## II. THE APPLICABLE LAW

The Commission's authority to abrogate or modify an alt. reg. plan is found in R.C. 4927.03(C), which states, in relevant part:

The public utilities commission has jurisdiction over every telephone company providing a public telecommunications service that has received an exemption or for which alternative regulatory requirements have been established pursuant to this section. As to any such company, the commission, after notice and hearing, may abrogate or modify any order so granting an exemption or establishing alternative requirements **if it determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest.**

(Emphasis added.)

Under this authority, the Commission adopted a revocation process to be used if there is a change in the market within an exchange for which an incumbent local exchange carrier ("ILEC") has been granted basic service alt. reg.<sup>10</sup> Ohio Adm. Code 4901:1-4-12(B) provides:

If the commission has reason to believe, based on a change in the telecommunications market in a telephone exchange area(s) or

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<sup>9</sup> See Schedule 28 of The Ohio Bell Telephone Company's 2006 Annual Report filed with the PUCO.

<sup>10</sup> *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Telephone Companies*, Case No. 05-1305-TP-ORD, Opinion and Order (May 7, 2006) ("05-1305 Order") at 51.

based on the motion of an interested stakeholder setting forth reasonable grounds, that the market in a telephone exchange area(s) has changed such that it may no longer meet one of the competitive market tests set forth in paragraph (C) of rule 4901:1-4-10 of the Administrative Code, the commission shall notice the ILEC and require it to show cause as to why alternative regulation for BLES and other tier one services in the involved telephone exchange area(s) should not be revoked. Based on that review, the commission will take whatever action it deems necessary, if any, including initiating an investigation or scheduling a hearing, to consider revocation of the alternative regulation for BLES and other tier one services in a telephone exchange area(s). Consistent with division (C) of section 4927.03 of the Revised Code, the commission may modify or revoke any order granting the ILEC alternative regulation for BLES and other tier one services in a telephone exchange area(s). Pending any review of alternative regulation of BLES, the ILEC will maintain the pricing flexibility previously granted until or unless otherwise modified by the commission.

As discussed below, AT&T Ohio no longer qualifies for basic service alt. reg. under Test 3 in the eleven exchanges and subjecting AT&T Ohio customers in the eleven exchanges to the price increases allowed under basic service alt. reg. is not in the public interest. The Commission should order AT&T Ohio to show cause as to why its basic service alt. reg. in those exchanges should not be revoked.

### **III. ARGUMENT**

The Commission's basic service alt. reg. rules contain four "competitive tests" that are meant to be a surrogate for the statutory criteria for determining whether to allow an ILEC the flexibility to increase rates under basic service alt. reg.<sup>11</sup> AT&T Ohio chose Test 3 for the Commission to use in determining whether stand-alone basic service customers in each of the eleven exchanges could be subjected to rate increases under the

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<sup>11</sup> OCC does not concede that the "competitive tests" substitute for the showing required by R.C. 4927.03.



PUCO's rules, and the Commission granted AT&T Ohio basic service alt. reg. for each of the eleven exchanges under Test 3. Test 3 requires a basic service alt. reg. applicant to "demonstrate in each requested telephone exchange area that at least fifteen per cent of total residential access lines are provided by unaffiliated CLECs, the presence of at least two unaffiliated facilities-based CLECs providing BLES to residential customers, and the presence of at least five alternative providers serving the residential market."<sup>12</sup> An ILEC must show that all the Test 3 criteria regarding service to customers are met in an exchange before basic service alt. reg. can be granted for that exchange under that test.

As the following chart shows,<sup>13</sup> the Commission counted First Comm and New Access as separate alternative providers of residential service, and found exactly five alternative providers of residential service in each of the eleven exchanges – the minimum needed for AT&T Ohio to meet Test 3 – in each exchange:

<b>Exchange Name</b>	<b>Alternative Providers Recognized by the Commission in the Exchange</b>	<b>Number of Alternative Providers</b>
Beallsville	First Comm, New Access, ACN Communications ("ACN"), PNG Telecom ("PNG"), Talk America	5
Belfast	First Comm, New Access, Revolution Communications, Talk America, Trinsic Communications ("Trinsic")	5
Danville (Highland)	First Comm, New Access, Budget Phone, Talk America, Trinsic	5
Graysville	First Comm, New Access, ACN, Talk America, Trinsic	5
Guyan	First Comm, New Access, ACN, Talk America, Trinsic	5
Marshall	First Comm, New Access, ACN, Talk America, Trinsic	5

<sup>12</sup> Ohio Adm. Code 4901:1-4-10(C)(3).

<sup>13</sup> Sources: 06-1013 Order, Attachment B; 07-259 Order, Attachment B.

Exchange Name	Alternative Providers Recognized by the Commission in the Exchange	Number of Alternative Providers
Newcomerstown	First Comm, New Access, ACN, Talk America, Trinsic	5
Rio Grande	First Comm, New Access, ACN, Talk America, Trinsic	5
Shawnee	First Comm, New Access, ACN, Talk America, Trinsic	5
Vinton	First Comm, New Access, ACN, Talk America, Trinsic	5
Walnut	First Comm, New Access, PNG, Talk America, Trinsic	5

The elimination of New Access as an alternative provider means that there are only four alternative providers of residential service identified by the Commission in each exchange, one fewer than required for basic service alt. reg. under Test 3.

**A. AT&T Ohio No Longer Qualifies for Alternative Regulation of Basic Service Under Ohio Adm. Code 4901:1-4-10(C)(3) in the Eleven Exchanges.**

In a letter dated October 17, 2007, New Access notified AT&T Ohio that it was discontinuing service in Ohio. The letter stated, in relevant part:

Please be advised that New Access Communications LLC [] has applied with the Ohio Public Utilities Commission to withdraw its certificate to provide telecommunications services in Ohio. This is due to the sale of substantially all assets, including the customer base to First Communications LLC, a licensed telecommunications provider in Ohio. From the sale, New Access ceased to provide billing, customer service, and related support to customers on March 1, 2007 and no longer owns the customers. It has discontinued its telecommunications business.

As of the date of this letter, New Access is no longer conducting any business in the State of Ohio. From this, we wish to notify you of the intent to withdraw at this time, and of the discontinuance of business operations with your company.<sup>14</sup>

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<sup>14</sup> Request to Withdraw at [7].

First Comm's website carries a similar message to New Access's former customers:

**New Access Communications Customers  
Welcome to First Communications**

**Introduction**

First Communications is proud to announce that is [sic] has entered an agreement with the Pittsburgh Division of New Access Communications to provide all telecommunications services to its customer base. In addition to acquiring New Access Communications customer base, First Communications has purchased their Nortel Passport Frame Relay/MPLS network.

**What does this mean?**

New Access Communications customers are now First Communications customers. First Communications is purchasing the proprietary rights to many of New Access Communications products, including long distance and circuits. The initial period of transition will involve your account migration to First Communications billing system. Therefore, once the migration is complete, First Communications will support your telecommunications needs.<sup>15</sup>

Thus, First Comm is serving all of New Access's Ohio customers and New Access is no longer providing telecommunications service in Ohio.<sup>16</sup> First Comm and New Access are no longer separate alternative providers for purposes of the "competitive tests."

Because of this change in the market conditions in the eleven exchanges, AT&T Ohio no longer qualifies for basic service alt. reg. in those exchanges under Test 3 – the test under which basic service alt. reg. was approved for those exchanges – based on AT&T Ohio's submission. Because New Access is no longer providing service, only four of the alternative providers submitted by AT&T Ohio and recognized by the Commission are serving residential customers in each of the eleven exchanges.

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<sup>15</sup> [http://www.firstcomm.com/newaccess\\_faq.asp](http://www.firstcomm.com/newaccess_faq.asp) (accessed February 19, 2008).

<sup>16</sup> AT&T Ohio did not list New Access as an alternative provider in either of its more recent applications in Case Nos. 07-1312-TP-BLS and 08-107-TP-BLS.

In fact, AT&T Ohio should never have qualified under Test 3 in the Belfast exchange. According to New Access's abandonment application, New Access ceased providing billing, customer service, and related support to customers on March 1, 2007. This was eight days **before** AT&T Ohio filed its 07-259 application (on March 9, 2007) and more than three months before the Commission issued the 07-259 Order (on June 27, 2007) granting AT&T Ohio basic service alt. reg. in the Belfast exchange. In addition, New Access notified its customers in December 2006 – more than three months before AT&T Ohio filed its 07-259 application – that First Comm would provide their service beginning in March 2007.<sup>17</sup> The transfer of New Access's assets was approved automatically on January 25, 2007<sup>18</sup> – more than one month before the 07-259 application was filed. Thus, the Commission should have found that only four alternative providers were serving residential customers in the Belfast exchange and should have denied AT&T Ohio basic service alt. reg. for the Belfast exchange in the 07-259 Order.

OCC raised this issue in its Opposition in 07-259. In her affidavit filed with OCC's 07-259 Opposition, Ms. Kathy Hagans noted that New Access's website stated that it was no longer accepting orders for new customers:

New Access Communications has ceased providing residential service to new customers in Ohio. A visit to the New Access website verifies this to be the case. In order to "explore what options are available" to customers from New Access Communications, the user enters an NPA-NXX code into the appropriate boxes. I tested this lookup function for the four Test 3 exchanges, and each time was brought to a new web page that listed the "Ohio Value Plus" and "Ohio Prime" plans as being

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<sup>17</sup> Request to Withdraw at [8]-[9]. The notice was dated December 5, 2006.

<sup>18</sup> *In the Matter of the Application of Acceris Management and Acquisition LLC, New Access Communications LLC and First Communications, LLC to Transfer Assets from Acceris Management and Acquisition LLC and New Access Communications, Inc. to First Communications, LLC*, Case No. 06-1500-TP-ATR.

available, and provided the price for each service package, with no other information.<sup>19</sup> AT&T Ohio provided a “screen shot” of this web page for each exchange in which it named New Access Communications as a provider that satisfied Test 3. However, when the link for either of these service options is selected, a notice appears at the top of the linked page that states, “We are no longer accepting orders for new service.” New Access Communications is not actively marketing its residential service in Ohio.<sup>20</sup>

The Commission ignored this detailed evidence, and instead followed the superficial data provided by AT&T Ohio.

In ruling on the Test 3 alternative providers, the Commission merely referred to its analysis of the alternative providers under Ohio Adm. Code 4901:1-4-10(C)(4) (“Test 4”).<sup>21</sup> In approving New Access as a Test 4 alternative provider, the Commission stated as to market presence:

We find that the residential White Pages listing, Local Wholesale Complete (LWC) access line data, and 9-1-1 data provided in the record demonstrates that the identified CLECs offer service to residential customers in the relevant exchanges.... Also, the record demonstrates that those CLECs maintain current tariffs on record with the Commission in which they make residential services available to current and prospective customers, with no grandfathering provisions in the relevant exchanges.... Additionally, the record demonstrates that most of the CLECs providing residential service via LWC arrangements are in fact advertising their offerings on their respective websites in the relevant exchanges.<sup>22</sup>

Because New Access has abandoned service in Ohio, the data regarding white pages listings, LWC access lines and 9-1-1 lines should no longer be valid for New Access. In

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<sup>19</sup> Id.

<sup>20</sup> 07-259, OCC Opposition (April 23, 2007), Affidavit of Kathy L. Hagans, ¶ 74. See also id. at 45.

<sup>21</sup> 07-259 Order at 30.

<sup>22</sup> Id. at 23. On rehearing, the Commission stated only that OCC raised no issues that had not been previously addressed. 07-259, Entry on Rehearing (August 22, 2007) at 11-12.

addition, New Access no longer has a current tariff at the Commission and New Access's website no longer is operational.

The findings upon which the Commission based its orders granting AT&T Ohio basic service alt. reg. in the eleven exchanges are no longer valid. In order to protect consumers, the Commission should begin the process to abrogate or modify these orders as they pertain to the eleven exchanges by ordering AT&T Ohio to show cause why basic service alt. reg. should not be revoked in the eleven exchanges.

**B. It Is Not in the Public Interest for AT&T Ohio's Customers in the Eleven Exchanges to Continue to Be Vulnerable to the Rate Increases That Are Allowed by the Commission's 06-1013 and 07-259 Orders.**

The Commission has recognized that "BLES, including Caller ID, is an essential service for many Ohioans."<sup>23</sup> In adopting the "competitive tests," including Test 3, for granting ILECs basic service alt. reg. in an exchange, the Commission stated that "[t]o guide us in determining whether alternative regulatory requirements are in the public interest, we look to the policy of the state, as set forth in 4927.02(A), Revised Code, to ensure the availability of adequate BLES to citizens throughout the state."<sup>24</sup>

For basic service alt. reg. proceedings, the relevant portions of R.C. 4927.02(A) provide that it is the state's policy to:

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

...

(5) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory

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<sup>23</sup> 05-1305 Order at 40.

<sup>24</sup> Id.

treatment of public telecommunications services **where appropriate....**

(Emphasis added.) The Commission stated that “in the final rules, we have attempted to strike a balance between the important public policy of ensuring the availability of stand-alone BLES at just and reasonable rates, while at the same time recognizing the continuing emergence of a competitive environment through flexible regulatory treatment of ILEC services, **where appropriate.**”<sup>25</sup>

The Commission has stated that satisfying the Test 3 criteria “allows for the conclusion that there are a reasonable number of providers offering competing services in the relevant market....”<sup>26</sup> Based on the Commission’s decisions in 06-1013 and 07-259, there is no longer a reasonable number of basic service providers for residential customers in the eleven exchanges under the Commission’s rules, and thus the balance that the Commission attempted to strike in the basic service alt. reg. rules does not exist in the eleven exchanges. It is no longer appropriate for AT&T Ohio to operate under basic service alt. reg. in the eleven exchanges.

It is irrelevant that AT&T Ohio has not invoked its ability to raise stand-alone customers’ rates in the eleven exchanges. A guiding principle for the basic service alt. reg. rules is “to ensure that an ILEC would only **attain** BLES pricing flexibility in markets where it faces competition for BLES or where BLES customers have reasonably available alternatives....”<sup>27</sup> It is the **ability** for AT&T Ohio to raise customers’ basic service rates that is in question.

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<sup>25</sup> Id. (emphasis added).

<sup>26</sup> 06-1013 Order at 9.

<sup>27</sup> Id. at 23 (emphasis added).

Under the elective alt. reg. rules that preceded basic service alt. reg., AT&T Ohio's customers in the eleven exchanges were protected by a cap on Tier 1 rates.<sup>28</sup> That protection was lost due to Commission decisions that no longer have a valid basis. If there ever was a time when subjecting consumers to alt. reg. in the eleven exchanges served the public interest, that time has passed.

**C. The Commission Should Order AT&T Ohio to Show Cause Why Its Alternative Regulation of Basic Service Should Not Be Revoked, Pursuant to R.C. 4927.03(C) and Ohio Adm. Code 4901:1-4-12(B).**

R.C. 4927.03(A) and (B) allow the Commission, under certain specified conditions, to exempt telephone companies' services from some regulations and to allow telephone companies to operate under alt. reg. The Ohio General Assembly also acted to protect consumers, under R.C. 4927.03(C) by granting the Commission the authority, upon notice and hearing, to "abrogate or modify any order so granting an exemption or establishing alternative requirements if it determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest."

As discussed above, the findings upon which the Commission granted AT&T Ohio basic service alt. reg. for the eleven exchanges are no longer valid. Further, because the Commission alleges that a basic service alt. reg. applicant meeting a "competitive test" is "deemed to have met the statutory criteria found in division (A) of section 4927.03 of the Revised Code for BLES and other tier one services in that telephone exchange area,"<sup>29</sup> AT&T Ohio no longer meets the statutory requirements for basic

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<sup>28</sup> Ohio Adm. Code 4901:1-4-06(C)(3)(A)(i).

<sup>29</sup> Ohio Adm. Code 4901:1-4-10(C). OCC does not concur with the Commission's viewpoint.



service alt. reg. in the eleven exchanges, even under the Commission's rules. The grant of basic service alt. reg. to AT&T Ohio in the eleven exchanges is unlawful, and therefore is not in the public interest. To protect AT&T Ohio's customers, the Commission should exercise its statutory authority to abrogate or modify the 06-1013 Order and the 07-259 Order by beginning the process for revoking AT&T Ohio's basic service alt. reg. in the eleven exchanges. That process for revoking alt. reg. should be conducted no less expeditiously than the expedited timeline for granting it in the first place.

The process for revoking the grant of basic service alt. reg. to an ILEC is set forth in Ohio Adm. Code 4901:1-4-12(B), which the Commission adopted pursuant to R.C. 4927.03(C). The rule provides that the Commission will issue an order requiring the ILEC to show cause as to why basic service alt. reg. should not be revoked in an exchange due to a change in the circumstances upon which the alt. reg. was granted. The basis for the order is that the market in the exchange has changed such that it may no longer meet one of the "competitive tests." The matter may be raised either by the Commission or an interested stakeholder through a motion setting forth reasonable grounds.

In this pleading, OCC has stated reasonable grounds for the issuance of a show cause order. To protect AT&T Ohio's customers from unlawful rate increases, the Commission should provide AT&T Ohio with notice pursuant to the rule and require AT&T Ohio to show cause why its basic service alt. reg. should not be revoked in the eleven exchanges.

**D. The Commission Should Promptly Establish a Procedural Schedule for Considering the Revocation of the Alternative Regulation to Which AT&T Ohio's Customers Should No Longer Be Subjected.**

The basic service alt. reg. rules do not specify the Commission's process for reviewing an ILEC's response to a show cause order under Ohio Adm. Code 4901:1-4-12(B). The rule states only that, based on the Commission's review of an ILEC's response to a show cause order, "the commission will take whatever action it deems necessary, if any, including initiating an investigation or scheduling a hearing, to consider revocation of the alternative regulation for BLES and other tier one services in a telephone exchange area(s)." In addition, the Commission has never issued a show cause order under that rule; thus, this is a case of first impression for the Commission.

AT&T Ohio's response to the show cause order should be limited to an attempt to demonstrate (somehow) that New Access still qualifies as an alternative provider in the eleven exchanges, despite the fact that New Access has ceased offering service in Ohio.<sup>30</sup> If AT&T Ohio cannot make such a showing, then its basic service alt. reg. authority for the eleven exchanges should be revoked.

If, however, AT&T Ohio wants to submit one or more additional alternative providers in order to bring the count up to five or more in any of the eleven exchanges under Test 3, AT&T Ohio should be required to show that it still meets **all** the criteria of Test 3. AT&T Ohio no longer meets one of the Test 3 criteria in the eleven exchanges; it should not be assumed that AT&T Ohio meets the other two criteria in the exchanges.

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<sup>30</sup> AT&T Ohio cannot be allowed to challenge the Commission's disqualification, in the 06-1013 Order or the 07-259 Order, of any of the other alternative providers AT&T Ohio originally submitted, because AT&T Ohio failed to challenge that disqualification in an application for rehearing.

AT&T Ohio should also be required to make a showing similar to the requisite demonstration for original applications under the basic service alt. reg. rules. Regarding the eleven exchanges, the Commission should require AT&T Ohio to submit:

- ▶ An identification of the telephone exchange area(s) for which AT&T Ohio seeks alt. reg. for basic service and other tier one services.
- ▶ Supporting information and detailed analysis demonstrating that AT&T Ohio meets Test 3 in each exchange, on a telephone exchange area basis. This information should be contained within an affidavit filed by an AT&T Ohio officer attesting to the veracity of the data.
- ▶ A proposed legal notice to notify the public of the filing of the response and stating that objections can be filed with the Commission consistent with Ohio Adm. Code 4901:1-4-10(F). The public notice should occur within seven days of the filing of the response and should be printed in the legal notice section of a newspaper of general circulation in each county corresponding to the exchanges for which basic service alt. reg. is being requested. AT&T Ohio should confer with the Commission staff regarding the content of the legal notice prior to commencing with the publication of the public notice.<sup>31</sup>

In addition, the Commission should establish a procedure similar to that found in Ohio Adm. Code 4901:1-4-10(F) and (I). Ohio Adm. Code 4901:1-4-10(F) allows interested persons to file with the Commission, within 45 days after a basic service alt. reg. application is docketed, a written statement detailing the reasons why the application should not be granted. In this instance, the filing opportunity for interested persons should allow for written statements detailing reasons why the ILEC's supporting information and "detailed analysis" is insufficient to allow the ILEC to continue having the ability to increase basic service rates in the affected exchanges. Ohio Adm. Code

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<sup>31</sup> See Ohio Adm. Code 4901:1-4-09(B).

4901:1-4-10(I) requires electronic service of discovery requests and electronic reply to discovery within ten days of the requests.

The statutory discovery rights found in R.C. 4903.082 have proven to be invaluable in previous basic service alt. reg. proceedings. In those proceedings, OCC has been able to bring to the Commission's attention facts regarding the type of service provided by candidate alternative providers, the extent of the presence of candidate alternative providers in each exchange and the validity of the supporting documentation submitted by the applicant.

If AT&T Ohio wishes to submit any of the eleven exchanges under for alt. reg. Test 4 or one of the other tests in the rules, then it should be required to submit an entirely new application for that exchange, just as it resubmitted exchanges in 07-259 that had been rejected by the Commission in 06-1013, and then again resubmitted exchanges in its 07-1312 application.<sup>32</sup> A change in which "competitive test" AT&T Ohio would use is substantial enough to require the process to start anew.<sup>33</sup>

The Commission should ensure that AT&T Ohio's response to the show cause order receives scrutiny similar to that given a basic service alt. reg. application. In order to protect the interests of AT&T Ohio's residential customers, the Commission should

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<sup>32</sup> Seven of the 07-259 exchanges (Barnesville, Belfast, Canal Winchester, Groveport, Lewisville, New Albany and Salineville) were included in AT&T Ohio's 06-1013 basic service alt. reg. application. AT&T Ohio resubmitted Canal Winchester, Groveport and New Albany, as well as Murray City and Somerton from 07-259, in the 07-1312 application.

<sup>33</sup> See *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, Entry (September 27, 2007) at 4 (allowing OCC to conduct discovery and to respond to a supplemental filing by which Embarq could have its application examined under additional "competitive test(s)").

adopt the process outlined above for reviewing any information submitted by AT&T Ohio in response to the show cause order.

**E. The Commission Should Require Applicants Seeking Alternative Regulation of Basic Service to Docket a Notification at the Commission and Serve Parties to the Proceeding When the Circumstances Surrounding the Application Have Changed.**

This proceeding has highlighted what apparently is an inadequacy in need of correction in the Commission's basic service alt. reg. application process. The Commission hopefully already expects applicants to be forthcoming with any uncontroverted facts that vary from those which the applicant presented for the Commission to rely upon in determining whether consumers have available to them the alternatives contemplated under the "competitive tests." Unfortunately, ascertaining whether key circumstances have changed seems to have become the responsibility of the PUCO staff or "interested persons" other than the ILEC.<sup>34</sup> That should not be the case.

While OCC believes that applicants are already obligated to present accurate information to the Commission before and after filing their application, such as when uncontroverted facts are inconsistent with their initial positions, that is not clearly stated in the basic service alt. reg. rules. The Commission should require basic service alt. reg. applicants to be more forthright in their applications with regard to facts such as the transfer of assets by a supposed alternative provider – which is what happened in the above-captioned cases with New Access's transfer of its assets.

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<sup>34</sup> Indeed, even after an ILEC has been granted basic service alt. reg., the Commission's rules appear to place the burden on the Commission or an "interested stakeholder" – and not the ILEC – to present information about changed circumstances in an exchange. See Ohio Adm. Code 4901:1-4-12(B).

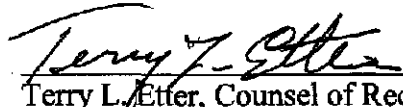
The applicants, after all, not only have the burden of proof, they generally also have the most up-to-date information concerning the status of alternative providers who are using the applicant's network. While it should be unnecessary to have to say this, the PUCO should require applicants to formally withdraw (or qualify characterizations of) proposed alternative providers when the applicants become aware that the alternative providers are no longer offering service in an exchange covered by a pending application or are imminently about to be no longer offering service. And there should be legal ramifications from the Commission for applicants that are not forthcoming with information about alleged competitors or alternative providers that contradicts their claims for alt. reg.

#### **IV. CONCLUSION**

The findings upon which the Commission granted AT&T Ohio the ability to raise customers' rates through basic service alt. reg. in the eleven exchanges are no longer valid. The public interest is disserved by continuing the authority for AT&T Ohio to increase customers' monthly bills by up to \$1.75 (basic service and Caller ID) each year based on circumstances that no longer exist. OCC has stated reasonable grounds for the Commission to grant OCC's Motion and to require AT&T Ohio to show cause why its basic service alt. reg. should not be revoked in the eleven exchanges. Pursuant to R.C. 4927.03(C) and Ohio Adm. Code 4901:1-4-12(B), the Commission should issue the show cause order for the protection of AT&T Ohio's stand-alone basic service customers in the eleven exchanges.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Terry L. Etter", is written over a horizontal line.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Motion for an Order Requiring AT&T Ohio to Show Cause as to Why Its Alternative Regulation of Basic Local Exchange Service in Eleven Exchanges Should Not Be Revoked Pursuant to R.C. 4927.03(C) and Ohio Adm. Code 4901:1-4-12(B) by the Office of the Ohio Consumers' Counsel was sent by First Class United States Mail, postage prepaid, to the persons listed below this 13<sup>th</sup> day of March 2008.

  
Terry L. Etter  
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