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Douglas E. Hart
Attorney at Law

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VIA FEDERAL EXPRESS

Ms. Renee Jenkins
Chief, Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43266-0573

Re: In the Matter of the Application of the Cincinnati Bell Telephone Company LLC For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code, Case No. 06-1002-TP-BLS

Dear Ms. Jenkins:

Enclosed please find an original and 18 copies of the Memorandum of Cincinnati Bell Telephone Company LLC in Opposition to the Application for Rehearing by the Office of the Ohio Consumers' Counsel. Please file the original and 17 copies in the above referenced proceeding and please date stamp and return the additional copy to me in the enclosed self-addressed stamped envelope.

Very truly yours,

Douglas E. Hart

DEH
Enclosures

441 Vine Street Suite 3108 Cincinnati, Ohio 45202
Ph: (513) 621-6709 Fax: (513) 621-6981
dhart@douglasehart.com

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Cincinnati Bell Telephone Company LLC For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code.	))))))	Case No. 06-1002-TP-BLS

MEMORANDUM OF CINCINNATI BELL TELEPHONE COMPANY LLC IN OPPOSITION TO THE APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

On November 28, 2006, the Commission issued its Opinion and Order granting the application of Cincinnati Bell Telephone Company LLC ("CBT") for alternative regulation of its basic local exchange service ("BLES") in the Cincinnati and Hamilton exchanges. On December 28, 2006, the Office of the Ohio Consumers' Counsel ("OCC") applied for rehearing of that decision.

The OCC asserts thirty-two separate grounds for rehearing, but none of them provides a basis for disturbing approval of CBT's application for alternative regulation of BLES. Because none of these assertions of error are valid, the Opinion and Order should be affirmed in its entirety.

I. INTRODUCTION

The OCC's Application for Rehearing does not present a valid basis for the Commission to change its decision approving alternative regulation of CBT's BLES. Instead, it merely presents differences in opinion between the OCC and the Commission with respect to the policy choices the Commission made in its interpretation of the enabling legislation. These issues are not new – the OCC has been advocating the same positions since its initial comments in Case 05-1305,[1] in its request for rehearing of the Commission's rules established in that case, and in its opposition to CBT's application in this case. Because it presents nothing new, the Commission should simply deny the Application for Rehearing.

The OCC commences its filing by commenting on the number of customers affected by BLES alternative regulation. While the OCC complains that CBT's request for confidential treatment of the number of BLES customers is "ludicrous," the OCC did not oppose CBT's request for confidential treatment of that information, nor has it sought rehearing on that issue. The November 28, 2006 Opinion and Order approved CBT's request for confidential treatment. Having failed to oppose CBT's October 6, 2006 Motion for Protective Order and having failed to raise the granting of that motion as an issue for rehearing, the OCC has no basis for complaining. It is not unusual for a business to guard as a trade secret the number of customers it has for a particular product. Regardless, the number of subscribers to BLES is not relevant to whether CBT has satisfied the requirements for BLES alternative regulation.

The General Assembly authorized alternative regulation of BLES by amending R.C.

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[1] *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 ("Case 05-1305"), Opinion and Order (March 7, 2006), Entry on Rehearing (May 3, 2006), adopting revised Ohio Admin. Code Ch. 4901:1-4.

§ 4927.03(A) in H.B. 218. The General Assembly directed the Commission to adopt "such rules as it finds necessary to carry out this section."[2] The Commission promptly opened Case 05-1305 in which it proposed, modified and then adopted the BLES alternative regulation rules.

Those rules created four competitive tests, compliance with which is deemed full compliance with R.C. § 4927.03(A).[3] Competitive Test 4 is met in an exchange if an ILEC has lost 15% of its residential access lines in that exchange since 2002, and at least five unaffiliated facilities-based alternative providers serving the residential market are present in the exchange.[4] Because CBT's application met Competitive Test 4 as written in the rules, the Commission appropriately granted CBT BLES alternative regulation.

The OCC has listed thirty-two individual assertions of error, but addresses them with only eight sections of their Memorandum in Support.[5] CBT has attached in an Addendum a counterstatement of each assignment of error. CBT has rephrased each issue to express its contrary view on each issue. Because the OCC's brief does not otherwise subdivide its argument according to each individual assignment of error, the remainder of this Memorandum in Opposition will follow the same broad organization as the OCC's document.

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[2] Revised Code § 4927.03(D).

[3] Ohio Admin. Code § 4901:1-4-10(C).

[4] Ohio Admin. Code § 4901:1-4-10(C)(4).

[5] The footnotes attached to each section heading cite to a group of assignments of error to which the argument supposedly relates, but the numbering sequence does not appear to match the substance of each assignment of error.

II. THE LAW

In 2005, the General Assembly amended R.C. § 4927.03 to allow alternative regulation of BLES.[6] In determining whether the conditions required by R.C. § 4927.03(A)(1)(a) or (b) exist, the General Assembly directed the Commission to consider the factors found in R.C. § 4927.03(A)(2). The ability of the Commission to offer alternative regulation of BLES was not limited to a company specific or company-initiated proceeding. Revised Code § 4927.03(A)(1) authorized the Commission to act on its own initiative, after public notice and comment, and allowed the Commission to establish alternative regulatory requirements to apply to a company or companies.

In adopting the BLES alternative regulation rules in Case 05-1305, the Commission exercised its powers granted by R.C. § 4927.03(A) and (D). The Commission provided public notice of proposed rules and invited comment by numerous affected parties. The Commission received comments and evidence on each of the factors it was directed to consider in R.C. § 4927.03(A)(2). As the Commission is fully aware, the OCC participated significantly in Case 05-1305. The Commission accepted some and rejected some of the OCC's ideas in the final BLES alternative regulation rules. The Commission fully complied with its statutory duties in establishing the BLES alternative regulation rules.

The rules established in Case 05-1305 were designed to be self-executing. The Commission established four alternative competitive tests and determined that compliance with any one of those tests with respect to a given exchange would be compliance with the statutory requirements in R.C. § 4927.03(A)(1) for that exchange. The rules wisely created objective tests and provided standardized means of demonstrating entitlement to alternative regulation of BLES.

[6] H.B. 218.

The rules negated any requirement to independently establish compliance with the subjective standards in the statute.[7]

OCC obviously disagrees with the manner in which the Commission chose to implement BLES alternative regulation, including the decision to make the competitive tests self-executing. But those disagreements are essentially differences of policy as to how the Commission chose to implement the statute. There is no question that the Commission had the legal authority to devise such tests. And there is no question that the General Assembly entrusted the Commission to determined how important to make each of the factors identified in R.C. § 4927.03(A)(2), or whether they are important at all. The statute only required the Commission to consider those topics – it did not specify any particular outcome or threshold criteria that would be necessary to justify alternative regulation.

It is a long-accepted principle of Ohio law that considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer.[8] An administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter.[9] Where a challenge to an agency construction of a statutory provision really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within the authority conferred by the

[7] However, the Commission did preserve the right of any ILEC to attempt to show compliance with the statute independent of the pre-established competitive tests by proposing its own competitive test and demonstrating how compliance with that test would satisfy the statutory requirements. The OCC would reinvent all of the competitive tests and require an ILEC to independently prove that the test complies with the statute.

[8] *See State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151, 155, 438 N.E.2d 120, 123.

[9] *Youngstown Sheet & Tube Co. v. Lindley* (1988), 38 Ohio St.3d 232, 234, 527 N.E.2d 828, 830.

legislative body, the challenge must fail. The responsibility for assessing the wisdom of such a policy choice and resolving the struggle between competing views of the public interest are political questions, not legal ones.

It is axiomatic that if a statute provides the authority for an administrative agency to perform a specified act, but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme.[10] A court must give due deference to the agency's reasonable interpretation of the legislative scheme.[11] When agencies promulgate and interpret rules to fill these gaps, as they must often do in order to function, "courts * * * must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command."[12]

While the OCC may (and obviously does) disagree with the policy choices made by the Commission in Case 05-1305, it cannot legitimately claim that the Commission did not consider all of the issues identified in the statute. The OCC's comments alone addressed all of the statutory factors and the Commission's order implementing the rules, as well as its order on rehearing, addressed each and every issue raised by the OCC. By definition, the Commission considered each of the required matters, so the OCC has no legal basis for challenging the rules established in Case 05-1305.

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[10] *See Swallow v. Indus. Comm.* (1988), 36 Ohio St.3d 55, 57, 521 N.E.2d 778, 779.

[11] *Id. See also, Northwestern Ohio Building & Construction Trades Council v. Conrad*, 92 Ohio St.3d 282, ¶ 45, *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), 467 U.S. 837, 843, 104 S.Ct. 2278, 2782, 81 L.Ed.2d 694, 703.

[12] *Swallow* at 57, 521 N.E.2d at 779.

III. THE COMMISSION HAS BROAD DISCRETION AS TO HOW TO INTERPRET THE ALTERNATIVE REGULATION STATUTE, AS REPRESENTED BY THE BLES ALTERNATIVE REGULATION RULES.

The OCC continues to reiterate the same arguments it made in Case 05-1305, despite the Commission's rejection of those arguments in that case. The Opinion and Order recognized this repetition, so it incorporated by reference the record from Case 05-1305 and the Commission's discussion of each of OCC's arguments therein. The OCC contends that it is compelled to repeat those arguments in order to preserve a possible appeal from the rules established in Case 05-1305. The Commission properly incorporated the entire record from Case 05-1305 into the record of this case in response to OCC's repetitious arguments, so it is not necessary to say anything new to refute them now.

The OCC makes the specious argument that the BLES alternative regulation rules do not actually "implement" the H.B. 218 amendments, because the rules allegedly do not follow the statute. This attempt to undermine the rules carries no traction because the Commission clearly followed the statutory mandate in Case 05-1305. The statute authorized and, in fact, directed the Commission to promulgate rules "as it finds necessary" to implement BLES alternative regulation.[13] The Commission devised rules which, if followed, satisfy all of the statutory requirements. The Commission considered all of the required factors in R.C. § 4927.03(A)(2) when it established the BLES alternative regulation rules in Case 05-1305 and determined that compliance with one of the four competitive tests would be a sufficient showing that the conditions in R.C. § 4927.03(A)(1)(a) or (b) existed. The OCC's effort to require the Commission to revisit each statutory issue in each individual BLES alternative regulation case is unfounded. It is clearly the intent of the pre-established competitive tests in the BLES

[13] Revised Code § 4927.03(D).

alternative regulation rules to create a "safe harbor" such that compliance with one of those tests will result in automatic approval of an application.[14] Efficiency, objectivity and consistency are all served by having fixed rules for BLES alternative regulation.

OCC's disagreement notwithstanding, the Commission was charged with adopting rules to implement the BLES alternative regulation statute[15] and the competitive tests reflect the policy choices made by the Commission as to how to do so. The competitive tests established by the Commission avoid the need to interpret the numerous subjective matters addressed by the statute in each individual case by creating simple objective criteria to be met. OCC would discard the objective tests so that it can endlessly argue subjective issues. That is counter-productive and entirely inapposite to the Commission's purpose in creating the rules as it found necessary.

The Commission has disposed of the OCC's "barriers to entry" arguments multiple times now. The Commission determined that market factors that might present difficulties for a new entrant, but which did not prevent the new entrant from providing competitive service, were not barriers to entry. The Commission concluded in Case 05-1305 that if one of the competitive tests is satisfied, then the applicant ILEC has demonstrated that there are no barriers to entry. In accordance with Competitive Test 4, CBT demonstrated the presence of at least five alternative providers in each of the applicable exchanges, which is sufficient to satisfy the no barriers to entry test.

OCC has argued several times previously that the Commission's interpretation of "no barriers to entry" would make that so-called "additional" test from H.B. 218 "mere surplusage."

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[14] "If the applicant can demonstrate that at least one of the following competitive market tests is satisfied in a telephone exchange area, the applicant will be 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." Ohio Admin. Code § 4901:1-4-10.

[15] Revised Code § 4927.03(D).

That, of course, is merely the OCC's opinion of what the statute means. Under Ohio law, as the agency entrusted with implementing H.B. 218 "as it deems necessary," the Commission is delegated the power to interpret the statute. The Commission properly determined that the OCC's interpretation of the statute would render it impossible to satisfy, which would impermissibly defeat the purpose of the legislation.

In attempting to discern the intentions of the General Assembly, a strong presumption exists against any construction which produces unreasonable or absurd consequences.[16] The General Assembly is presumed not to have enacted legislation in vain, but for a real purpose. "A result feasible of execution is intended."[17] If the statute is deemed ambiguous, in determining the intent of the legislature, the Commission would have to consider the consequences of a particular construction.[18] OCC's interpretation of "no barriers to entry" would preclude the Commission from ever making that finding, rendering execution of the statute infeasible, with the consequence that the statute was a nullity from the time it was passed. The General Assembly had to have intended for it to be possible for there to be a finding of "no barriers to entry" so it could not have intended the kinds of inherent economic factors identified by Dr. Roycroft to control that determination.

The Commission explained how the competitive market tests satisfy the "no barriers to entry" portion of the statute.[19] The Commission rejected the OCC's position that any condition

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[16] *State ex rel. Belknap v. Lavelle* (1985), 18 Ohio St.3d 180, 181-82; R.C. § 1.47(C).

[17] R.C. § 1.47(D).

[18] R.C. § 1.49(E).

[19] Opinion and Order, Case 05-1305, pp. 19-22.

which makes entry more difficult constitutes a barrier to entry.[20] The factors identified by the OCC are inherent in almost any market, so the General Assembly could not have meant for them to be impediments to alternative regulation of BLES because that would make alternative regulation of BLES impossible to achieve.

The statute does not require that there be no challenges to entry and challenges that face a new entrant are not the same as barriers that prevent a carrier from being able to compete in a market. The Commission expressly determined that the competitive tests were designed to establish that there were no barriers to entry:

> On balance, we find that if the ILEC satisfies one of the competitive market tests adopted by the Commission in Rule 4901:1-1-10(C), in a given telephone exchange area, this presents sufficient evidence that competitors for BLES are able to enter the market and compete with the ILEC in that market.[21]

The OCC made the same arguments on rehearing in Case 05-1305 that it makes here and they have already been rejected.[22] OCC's interpretation of "no barriers to entry" is "unreasonable and impractical."[23] OCC's interpretation of H.B. 218 would "create an insurmountable burden of proof for an ILEC to satisfy."[24] The Commission found the competitive tests sufficiently rigorous and granular to support a finding, consistent with H.B. 218, that no barriers to entry exist.[25] The competitive market tests expressly satisfy all of the

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[20] *Id.*, p. 22.

[21] Opinion and Order, p. 22.

[22] Entry on Rehearing, p. 17, ¶ 30.

[23] *Id.*, p. 18.

[24] *Id.*

[25] *Id.*, p. 19.

requirements found in R.C. § 4927.03(A):

> If the applicant can demonstrate that at least one of the following competitive market tests is satisfied in a telephone exchange area, the applicant will be 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.[26]

The OCC contends that it did not take as extreme a position as the Commission claims. Still, the OCC's proposed test would have required a finding that there were no barriers to entry with respect to the provision of standalone BLES. As the Commission has stated repeatedly, services that compete with ILEC BLES are not limited to standalone BLES. Therefore, the OCC's proposed market test on barriers to entry would not allow an ILEC to obtain alternative regulation of BLES based upon any other type of services except for standalone BLES, regardless of whether there were any barriers to entry for other competitive services not identical to standalone BLES. This difference in opinion is a policy choice over which the Commission has control, not the OCC.

The OCC also continues to pick at individual elements of the competitive tests to argue that, standing alone, such element does not demonstrate compliance with the statutory criteria. The tests cannot be so dissected, but must be considered as a whole. The Commission has never claimed that the line loss test, by itself, demonstrates no barriers to entry, so to attack that proposition is not a fair criticism. Obviously, it is the line loss test coupled with the presence of five alternative providers that is intended to demonstrate the absence of barriers to entry, not line loss alone.

With respect to the alternative providers portion of Competitive Test 4, the OCC protests that the test is not limited to providers of standalone BLES. Since that is clearly not a requirement of the statute, the OCC has no legal basis for contending that the competitive tests

[26] Ohio Admin. Code § 4901:1-4-10(C).

must include such a requirement. The "no barriers" test applies to services that *compete* with ILEC BLES, and does not limit those competitive services to standalone BLES only.

IV. THE COMMISSION DID NOT ERR BY TREATING BUNDLES AS COMPETITION FOR STAND-ALONE BLES.

The OCC continues to confuse the issue of whether the products that are competitive to standalone BLES must be standalone BLES or whether they can be bundled services. In 2001, the Commission allowed alternative regulation of bundles of services that include BLES – but not stand-alone BLES – because that is how the statute read at that time. The General Assembly amended R.C. § 4927.03 through H.B. 218 in 2005, authorizing the Commission to also apply alternative regulation to BLES. Contrary to OCC's contentions though, the General Assembly did not limit the Commission's alternative regulation powers to direct competition between standalone BLES and standalone BLES. The statute authorizes alternative regulation of BLES if *it* is subject to competition. It did not specify what services could be deemed competitive to BLES. Had the General Assembly wished to limit the competitive services to standalone BLES only, it could have easily said so, but did not. The General Assembly left it to the Commission to determine which services would be deemed competitive with standalone BLES. That was one of the topics addressed in the Commission's rulemaking in Case 05-1305. The OCC simply has a policy disagreement with the decisions made by the Commission.

Because standalone BLES is not the only service that can be considered competitive to BLES, CBT was not required to show that a competitor is providing standalone BLES or that there are no barriers to entry for stand-alone BLES.

A. The Alternative Regulation Plan Allowed By H.B. 218 Is Not Limited To Stand-Alone BLES Competition.

While the purpose of Case 05-1305 was to develop rules for determining when to allow alternative regulation of an ILEC's BLES (as bundles were already afforded

alternative regulation through the rules devised in Case 00-1532), nothing can be found in the statute to limit what services the Commission could consider as being competitive to BLES. The two conditions required by R.C. § 4927.03(A)(1) were that:

> a) The telephone company or companies are subject to competition with respect to such public telecommunications service; and
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> (b) the customers of such public telecommunications service have reasonably available alternatives.[27]

This simply requires that the ILEC's BLES ("such public telecommunications service") be subject to competition and have reasonably available alternatives. The statute does not require, in any way, shape or form, that the service that competes with BLES or which comprises the "reasonably available alternative" itself be BLES. That flaw in the OCC's logic dooms its entire statutory argument.

The Commission did not merely consider competition between ILEC bundles containing BLES and competitors' bundles. It also considered competition between ILEC BLES and competitors' bundles. CBT provided substantial evidence that many of its standalone BLES customers had switched to competitive services. The OCC has consistently ignored this point and has totally failed to refute this evidence.

B. There Is No Requirement That Alternative Providers Offer Stand-Alone BLES.

The OCC is factually correct that none of the alternative providers identified by CBT in its application are providing standalone BLES as defined by the Commission's regulations. But, that is a meaningless observation when the legal standard does not require provision of standalone BLES by competitors. Because it does not like the answer, the OCC attempts to change the question. All that is required is that the competitors provide services that compete

[27] Revised Code § 4927.03(A)(2).

with CBT's BLES and which are reasonably available to consumers. The Commission determined in Case 05-1305 that cable telephony, VoIP and wireless services were competitive with BLES as well as that bundled services would be considered competitive to BLES. CBT's evidence of customer behavior supported both of those conclusions.

C. Alternative Providers' Services Are Competitive With CBT's Stand-Alone BLES.

OCC just repeats the same arguments it made in Case 05-1305 and in opposition to CBT's Application, which were already rejected by the Commission. The Commission determined that cable telephony, wireless and VoIP service are competitive with ILEC BLES in Case 05-1305:

> Although the products offered by those alternative providers [wireline CLECs, wireless, VoIP and cable telephony providers] may not be exactly the same as the ILECs' BLES offerings, those customers view them as substitutes of the ILECs' BLES. Thus, the alternative providers compete against the ILECs' provision of BLES.[28]

The Commission was familiar with the features of these services and their capabilities and shortcomings from the various comments and evidence presented in that case. OCC has shown no reason why the alternative providers identified in CBT's application were qualitatively or quantitatively any different from those types of providers the Commission considered competitive to BLES in the course of the rulemaking. The Commission determined that an alternative provider need not provide service that is identical to BLES for that service to be competitive with BLES because consumers find these services close enough that they are willing to substitute one for the other. The minor feature-based differences between CBT's BLES and the alternative providers' telephone service are insufficient to eliminate them as competitive

[28] Opinion and Order, p. 25.

services. The BLES features that competitors' services may lack are obviously not deemed that important by consumers who choose them.

D. The Commission's Decision To Treat Bundles As Competition For Or Alternatives To Stand-Alone BLES Was Fully Supported In Case 05-1305.

The OCC raised all of the same issues it raises here in its application for rehearing in Case 05-1305. CBT responded to all of those points in the rulemaking case and the Commission dismissed all of the OCC's concerns in its Order on Rehearing. Nothing new is being said here that has not already been addressed before. The Commission determined in Case 05-1305 that the law does not restrict the analysis of competition and reasonably available alternatives "to the competitive products that are *exactly like* BLES."[29] It found that "customers that leave an ILEC's BLES offering to subscribe to another alternative provider's bundled service offering view such bundled service offerings as a reasonable alternative service, and a substitute to the ILEC's BLES."[30]

The Commission came to the same conclusions in this case, based on the evidence CBT provided in this proceeding:

> [T]o the extent that CBT is losing BLES customers and the requisite number of alternative providers are present, it is evident that functionally equivalent or substitute services are readily available. The customers CBT loses must find the other providers' rates, terms and conditions to be competitive to what they received from CBT's BLES service. Otherwise, it is reasonable to assume that they would not have switched from CBT's BLES service.[31]

Because customers move from CBT's stand-alone BLES service to alternative providers'

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[29] Opinion and Order, p. 13, citing Case 05-1305, p. 25.

[30] *Id.*

[31] Opinion and Order, p. 14.

services, the Commission drew the reasonable conclusion that the alternative providers' bundles are competitive to CBT's standalone BLES.

V. THE COMMISSION'S INTERPRETATION OF THE STATUTE WAS REASONABLE.

A. There Is No Requirement That Alternative Providers Provide Ubiquitous Service Throughout An Exchange.

The OCC criticizes the Commission's acceptance of Time Warner Cable and Current Communications as alternative providers because they do not offer service to every customer location in CBT's Cincinnati or Hamilton exchanges. There is nothing in the statute to require such ubiquitous service for a competitor to qualify. The Commission appropriately found that there was a sufficient presence of these competitors to offer meaningful competition to CBT's service. To not require that alternative providers serve the entirety of the exchange does not negate the Commission's decision to analyze competition at the exchange level:

> The Commission rejects OCC's narrow interpretation that the facilities-based alternative provider's service has to be available in the entirety of the market area. The Commission, in selecting an "exchange" as the market where competition for an ILEC's BLES can be evaluated under any of the four predefined competitive market tests, clearly stated that an exchange would: a) exhibit similar market conditions within its boundary; b) provide an objective definition that would allow for evaluation of competition on a reasonable granular level; and c) be practical to administer as ILECs collect and report data at the exchange level in their annual reports that are submitted to the Commission. (05-1305, Opinion and Order at 18-19.) To meet OCC's narrow interpretation of the statutory requirement, the market would need to be defined as small as a "city block," which is clearly without merit and impractical to administer, otherwise such a provision cannot be satisfied. The Commission, being mindful of the market realities, and to ensure that an ILEC would only attain BLES pricing flexibility in markets where it faces competition for BLES or where BLES customers have reasonably available alternatives, reasonably selected an exchange as a market definition. The Commission also rejects OCC's requirement for an ILEC to verify that its competitor makes the service available to 100 percent of the customer base to demonstrate that the alternative provider's service offering is available in the relevant market. We find that such information is likely confidential and available only to the alternative provider, not the ILEC, and, more importantly, that information is not required by either the statute or our rules.[32]

[32] Opinion and Order, pp. 27-28 (footnote omitted).

That competitors do not serve 100% of the customers in an exchange does not make CBT's service not "subject to competition." Telephone companies do not price services at a block by block level. When the ILEC is subject to competition in a significant portion of one of its geographic service areas, to the extent it uniformly prices its services, even those customers who reside in areas that the competitor does not serve will reap the benefit of price competition in areas where both providers do offer service. Thus, CBT is "subject to competition" from Time Warner and Current even in parts of the Cincinnati exchange that they do not serve.

The OCC wrongly accuses the Commission of setting up a straw man argument – instead, the OCC gets to the answer it wants by changing the question: it invents a requirement that alternative providers serve 100% of a market in order to dismiss those competitors who do not. Having failed to establish that its market premise is valid, the OCC has essentially created its own strawman argument, instead of finding any legitimate fault with the Commission's reasoning.

The Commission has not redefined the geographic market away from the exchange – Competitive Test 4 still requires that alternative providers have a presence in the exchange. The OCC and the Commission simply differ on what it means to have a presence in an exchange. "Presence" does not demand ubiquity, so the Commission's test need not require any more granularity than an exchange. The Commission rejected broader market definitions, such as a local service area or an MTA, as that might have enabled alternative regulation in an exchange with no competitive presence. Conversely, the Commission rejected suggestions that markets be defined at narrower levels, such as wire centers. The OCC is now trying to impose a much smaller market area definition through the guise of requiring 100% coverage of a particular exchange. The Commission should reject this ground for rehearing.

CBT demonstrated that a sufficient number of alternative providers were actually providing residential service in both of the subject exchanges. The OCC offered nothing to refute that evidence. Thus, when the Commission observed that the OCC had failed to dispute that the alternate providers had subscribers and were viable providers, it was justified in finding that those carriers had a presence in the market. The Commission did not erroneously place the burden on OCC to disprove the basis for BLES alternative regultation – it merely found that CBT had made its *prima facie* case for alternative regulation and that the OCC had not presented any credible evidence to refute it. The OCC was not held to any burden of proof, it was found to have failed to come forward with evidence to rebut the case that CBT had made.

B. The Commission Was Justified In Finding That Wireless Service Is Readily Available In CBT's Exchanges.

The Commission was justified in relying on the wireless carriers' coverage maps submitted by CBT for its finding that wireless service is reasonably available to customers of the Cincinnati and Hamilton exchanges. This is the same material these carriers use to market their service to retail customers. The fact that wireless carriers issue disclaimers that their service may not work in all locations does not diminish the fact that a consumer can, on any given day, walk into a wireless retail store, subscribe to service and have it virtually instantly – hence, it is readily available. The Commission received substantial evidence and commentary in Case 05-1305 about the widespread availability – and popularity – of wireless service. More and more consumers are choosing wireless service as their *only* telephone service. CBT demonstrated that this is actually occurring in the Cincinnati and Hamilton exchanges. The OCC's concerns were raised, and addressed, in Case 05-1305. Nothing new is said here.

VI. THE OCC IMPROPERLY ISOLATES ON THE LINE LOSS PRONG OF COMPETITIVE TEST 4.

The OCC attacks the line loss prong of Competitive Test 4 as if it, alone, was the basis for allowing alternative regulation of BLES. Satisfying the 15% line loss by itself does not allow an ILEC any relief. Only by coupling the line loss with a showing that there are multiple alternative providers serving the residential market can an ILEC obtain regulatory relief with respect to BLES. The OCC always seems to forget that fact.

The Commission thoroughly explained in Case 05-1305 how and why it developed the line loss test. The OCC raised all of the same arguments on rehearing in that case as it does here. CBT addressed them in Case 05-1305 and it addressed them in response to the OCC's objections to its application in this case. The Commission addressed them in the original 05-1305 order, in its order on rehearing in Case 05-1305, and in its Opinion and Order in this case. There really is not anything more to say. The Commission should reject the OCC's arguments for the same reasons, again.

Much of OCC's criticism of the line loss test is that there is no requirement for the ILEC to demonstrate where the lines went. Nor should there be. As CBT showed, it has no basis to know where customers who cancelled residential access lines went, so there is no basis for requiring it to show that. In any event, for purposes of Competitive Test 4, it is not important where those lines went. The fact that at least five alternative providers are serving the residential market is sufficient, in and of itself, to demonstrate that CBT's service is subject to competition, regardless of the number of lines CBT lost. Perhaps CBT has more reason to complain about the 15% line loss requirement than does the OCC. For example, the line loss test does not account for new line growth that the ILEC never had in its customer base. Every new cable line used for telephone service or new wireless handset represents a line "lost" by the ILEC, but it is not

counted towards the 15% threshold if that customer did not take telephone service from the ILEC in 2002.

All of the OCC's criticisms of the line loss test go to the test itself, not CBT's compliance with it. It has presented no reason why the Commission's finding that CBT has lost at least 15% of its residential access lines in the Cincinnati and Hamilton exchanges since 2002 is incorrect. CBT's evidence was undisputed. Having complied with the line loss test (coupled with the showing of five alternative providers), CBT was entitled to alternative regulation of its BLES in those two exchanges.

VII. THE ALTERNATIVE PROVIDERS PRONG OF COMPETITIVE TEST 4 SATISFIES THE REQUIREMENTS OF R.C. § 4927.03(A).

The OCC's criticisms of the alternative providers test are likewise ill-founded. As CBT has said several times before, the Commission considered all of the required statutory factors in Case 05-1305 in developing clear, objective competitive tests. There is no aspect of the statutory list of considerations that the Commission did not address. *How* the Commission chose to implement those considerations in the actual rules it wrote were a policy determination for it alone to make. The General Assembly entrusted the Commission, based on its longstanding experience with the telecommunications industry, to devise appropriate rules for alternative regulation of BLES. In doing so, the Commission made numerous policy decisions about what type of competition would be accepted and what kind of proof would be required. Obviously, the OCC and its witness Dr. Roycroft do not agree with the Commission's policy choices. But the OCC has presented no proper basis for depriving the Commission of its right to make those policy choices. The OCC and CBT would both have made different policy choices than the Commission did, but the statute gives the Commission that power, not the parties before it. The

OCC's application for rehearing should be denied.

VIII. THERE ARE NO BARRIERS TO COMPETITIVE ENTRY IN THE CINCINNATI AND HAMILTON EXCHANGES.

CBT presented evidence establishing that all of the conditions set forth in Competitive Test 4 exist in its Cincinnati and Hamilton exchanges. Because compliance with any one of the four pre-established competitive tests is automatically deemed compliance with the statutory requirements for granting alternative regulation for stand-alone BLES, there are no barriers to entry.[33] There is no point in further repeating the responses to the OCC's "barriers to entry" arguments, which have been thoroughly addressed multiple times.

IX. THE COMMISSION CORRECTLY GRANTED ALTERNATIVE REGULATION FOR CBT'S BLES, WHICH IS IN THE PUBLIC INTEREST.

The OCC continues to request that ILECs be forced to make additional social commitments as part of alternative regulation of BLES. This issue was thoroughly vetted in Case 05-1305 and the Commission properly rejected the idea.[34] The commitments the OCC desires do not come without a cost and competitors are not required to make the same commitments, so ILECs would be placed at a competitive disadvantage as the price of obtaining alternative regulation of BLES. The Commission acted properly by not adding additional commitments as a prerequisite for alternative regulation of BLES.[35]

In arguing for additional commitments, such as were required in the elective alternative regulation plan ("EARP") rules, the OCC appears to forget that one of the prerequisites for alternative regulation of BLES is that the company be in compliance with all EARP

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[33] Ohio Admin. Code § 4927:1-04-10(C).

[34] Case 05-1305, Opinion and Order, pp. 8-11, Entry on Rehearing, p. 2.

[35] 05-1305 O&O at 11.

commitments.[36] BLES alternative regulation does not reduce the commitments required by EARP. In addition, the BLES alternative regulation rules require that Lifeline rates be frozen, even if regular BLES rates are increased. CBT provided the requisite affidavit with its Application, attesting that it is in compliance with the EARP commitments. The OCC offered no evidence to the contrary, so the Commission had no basis to find otherwise.

The Commission appropriately dismissed OCC's public interest arguments in this case because the issue is not unique to CBT's application. As with most of its assertions of error, the OCC's complaint is primarily with the BLES alternative regulation rules, as opposed to CBT's specific application. The issue was properly addressed in the general BLES alternative regulation rulemaking proceeding in Case 05-1305.

Revised Code § 4927.03(A)(1) authorized the Commission to exempt BLES from various regulatory requirements "provided the Commission finds that any such measure is in the public interest." In Case 05-1305, the Commission concluded that, if an ILEC satisfied the requirements of one of the pre-established competitive market tests, alternative regulation of that ILEC's BLES would be in the public interest.[37] Thus, there is already a generic finding that alternative regulation of BLES is in the public interest if one of the tests is met. There is no requirement to independently make the same public interest determination in every individual case. Nevertheless, the Commission did made a finding in this case that alternative regulation was in the public interest.[38]

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[36] Ohio Admin. Code § 4901:1-4-09(B)(1)

[37] Case 05-1305, Opinion and Order, p. 40.

[38] Opinion and Order, p. 33.

X. THE COMMISSION ADEQUATELY EXPLAINED THE REASONS FOR ITS DECISION.

The OCC contends that the Commission did not comply with R.C. § 4903.09 in this case. Even assuming the statute applies to this case, which is by no means certain, the Commission has complied. All of the information considered by the Commission is on file, either in this case or in Case 05-1305, so there is a full record to support the findings in this proceeding. The Commission fully documented its decisionmaking process and provided a thoroughly reasoned thirty-two page decision which recites all of its findings and conclusions.

The OCC has selectively quoted from *MCI Telecommunications Corp. v. Pub. Util. Comm.* [39] to support its position. After the *dicta* quoted by the OCC, the Court went on to state:

> [W]here there was enough evidence and discussion in an order to enable the PUCO's reasoning to be readily discerned, this court has found substantial compliance with R.C. 4903.09, and held that the lack of specific findings may be simply a technical defect which would not result in the invalidation of the order.[40]

The actual holding in *MCI* was:

> In order to meet the requirements of R.C. 4903.09, therefore, the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion.[41]

The Court so found in *MCI*:

> We find that the PUCO's February 11, 1986 order clearly sets forth the PUCO's reasoning in support of its actions, and that the totality of the record in PUCO No. 83-464-TP-COI contains ample support for that order. The PUCO had before it all the various comments submitted by participating parties, the record from the 1983 hearings and the PUCO's cumulative experience in implementing the deregulation of the telecommunications industry during the past few years. The PUCO's order satisfies the requirements of R.C. 4903.09 for a reasoned decision

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[39] 32 Ohio St.3d 306 (1987) ("*MCI*").

[40] *Citing Consumers' Counsel v. Pub. Util. Comm., supra* (58 Ohio St.2d 108); *Braddock Motor Freight, Inc. v. Pub. Util. Comm.* (1963), 174 Ohio St. 203, 22 O.O. 2d 173, 188 N.E. 2d 162.

[41] 32 Ohio St.3d at 312.

based on a factual record. MCI's second argument is rejected.[42]

The Ohio Supreme Court has since repeated that strict compliance with the terms of the statute is not required.[43] The detail need be sufficient only for the court to determine the basis of the Commission's reasoning.[44] The Commission is required only to set forth "some factual basis and reasoning based thereon in reaching its conclusion."[45]

In the instant case, the Commission clearly explained why it approved CBT's application. The OCC criticizes the Commission's reliance on the rules adopted in 05-1305, however, the Commission "incorporate[d] into the record in this case the entire record from Case 05-1305, including but not limited to all of the Commission's orders as well as the evidence submitted by the parties in that case."[46] There is no doubt how the BLES alternative regulation rules were developed or why the Commission approved the application. Nothing would be gained by literally forcing the Commission to refile an entire copy of the record from Case 05-1305 in this case, when that record is readily available to everyone to see.

The Ohio Supreme Court has expressly approved incorporation of the record from one case to another as meeting the requirements of R.C. § 4903.09. "Furthermore, PUCO orders which incorporate testimony from the proceeding or incorporate the entire record from a related

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[42] *Id.*.

[43] *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 89, 706 N.E.2d 1255.

[44] *Allnet Communications Serv., Inc. v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 202, 209, 638 N.E.2d 516.

[45] *Id. See Ohio Domestic Violence Network v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 311, 323, 638 N.E.2d 1012.

[46] Opinion and Order, p. 8.

investigative PUCO case have been upheld as reasonable and lawful."[47]

XI. CONCLUSION

The OCC's arguments on rehearing are the same things it has been saying since its initial comments in Case 05-1305. The arguments are no more valid today. By meeting Competitive Test 4 of the Commission's rules, CBT has met all of the statutory requirements of R.C. § 4927.03(A). For the reasons set forth herein, the Commission's grant of alternative regulation for CBT's BLES was appropriate. The OCC's Application for Rehearing should be rejected in its entirety.

Respectfully submitted,

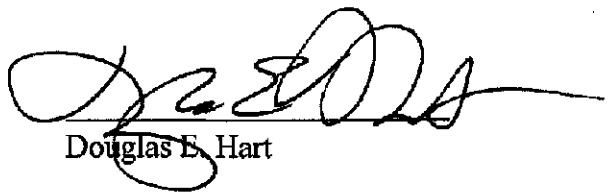
Douglas E. Hart
441 Vine Street
Suite 3108
Cincinnati, OH 45202
(513) 621-6709
(513) 621-6981 fax
dhart@douglasehart.com

Attorney for Cincinnati Bell Telephone Company LLC

[47] *MCI*, 32 Ohio St.3d at 311-12, *citing County Commissions' Assn. v. Public Util. Comm.* (1980), 63 Ohio St.2d 243, 17 O.O.3d 150, 407 N.E.2d 534; *General Motors Corp. v. Pub. Util. Comm.* (1976), 47 Ohio St.2d 58, 1 O.O3d 35, 351 N.E.2d 183.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Cincinnati Bell Telephone Company LLC in Opposition to the Application for Rehearing of the Office of the Ohio Consumers' Counsel was provided to the persons listed below via e-mail and first class U.S. Mail, postage prepaid, this 8th day of January 2007.



Douglas E. Hart

Duane Luckey
Ohio Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, OH 432 15-3793

David C. Bergmann
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215

ADDENDUM

COUNTERSTATEMENT OF CLAIMED ASSIGNMENTS OF ERROR

1. The Commission did not err in finding that compliance with Competitive Test 4, Ohio Admin. Code 4901:1-4-10(C)(4), permits alternative regulation of BLES under R.C. § 4927.03(A).

2. The Commission did not err in finding that compliance with Competitive Test 4 demonstrates that there are no barriers to entry for BLES.

3. The Commission did not err in finding that compliance with Competitive Test 4 demonstrates that BLES is subject to competition or that customers have reasonably available alternatives.

4. The Commission did not err in adopting rules for BLES alternative regulation that meet the requirements of R.C. § 4927.03(A).

5. The Commission did not err in finding that bundles offered by alternate providers are competition or alternatives to BLES.

6. The Commission did not err in granting alternative regulation for CBT's stand-alone BLES because services available from alternative providers are functionally equivalent or substitute services available at competitive rates, terms and conditions.

7. The Commission did not err by not requiring that services be exactly the same to qualify as competition or alternatives to stand-alone BLES.

8. The Commission did not err in relying on customers that leave an ILEC's stand-alone BLES offering to subscribe to an alternative provider's bundled service as evidence that such bundled service offerings are a reasonable alternative service to BLES.

9. The Commission did not err in relying on the lack of a statutory requirement that services be similarly priced and have similar terms and conditions to allow bundles to qualify as competition or alternatives to stand-alone BLES.

10. The Commission did not err in finding that Time Warner Cable and Current Communication's services are competitive with or provide reasonably available alternatives to CBT's BLES.

11. The Commission did not err in finding that wireless service is competitive with or provides a reasonably available alternative to CBT's BLES.

12. The Commission did not err in granting alternative regulation for CBT's BLES because the services of alternative providers act to restrain CBT's prices for stand-alone BLES.

13. The Commission did not err in finding that the line loss prong of Competitive Test 4 satisfies the requirements of R.C. § 4927.03(A).

14. The Commission did not err in finding that the line loss prong satisfies the requirements of R.C. § 4927.03(A), even though it would be impossible for an ILEC to identify where the lost access lines went.

15. The Commission did not err in finding that the line loss prong satisfies the requirements of R.C. § 4927.03(A), even if there are noncompetitive reasons for line loss.

16. The Commission did not err in finding that the line loss prong addresses barriers to entry.

17. The Commission did not err in using a 2002 start date for the line loss prong.

18. The Commission did not err by asserting that OCC argued that all line losses were due to Internet switching.

19. The Commission did not err in finding that statewide digital subscriber line ("DSL") substitution numbers were irrelevant.

20. The Commission did not err in finding that line losses to CBT's wireless affiliate are relevant to a finding that CBT's standalone BLES has competition or reasonably available alternatives.

21. The Commission did not err in finding that the presence of several facilities-based providers is a more significant factor than longevity in the market for supporting a healthy sustainable market.

22. The Commission did not err in finding that the presence of Time Warner and Current in an exchange qualify CBT for BLES alternative regulation throughout the entire exchange even though they serve only part of the exchange.

23. The Commission did not err in finding that Current's presence in the Cincinnati exchange was sufficient to justify BLES alternative regulation throughout the exchange.

24. The Commission did not err in finding that when an alternate provider has subscribers and is a viable provider, that carrier has a "presence" in the market.

25. The Commission did not err in finding that the services provided by wireless carriers are readily available alternatives to CBT's BLES.

26. The Commission did not err in finding that the rates for services provided by wireless carriers make those services readily available alternatives to CBT's BLES.

27. The Commission did not err in finding that meeting Competitive Test 4 shows that there are no barriers to entry for BLES.

28. The Commission did not err in finding that CBT, by meeting Competitive Test 4, had shown that there are no barriers to entry for BLES in the Cincinnati and Hamilton exchanges.

29. The Commission did not err in dismissing the claims of barriers to entry asserted by OCC's witness Dr. Roycroft.

30. The Commission did not err in finding that Dr. Roycroft failed to identify any Cincinnati and Hamilton exchange-specific barriers to entry.

31. The Commission's decision to grant alternative regulation to CBT's BLES was not contrary to the public interest.

32. The Commission did not err in failing to adequately explain the reasons for its decision.