FILE

27

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	)	
The Ohio Bell Telephone Company d/b/a AT&T Ohio	)	
For Approval of an Alternative Form of	)	
Regulation of Basic Local Exchange	)	Case No. 08-107-TP-BLS
And other Tier 1 Services Pursuant to	)	
Chapter 4901:1-4, Ohio Administrative	)	
Code.	)	

AT&T OHIO'S MEMORANDUM CONTRA THE OHIO CONSUMERS' COUNSEL'S OPPOSITION

Table of Contents

AT&T OHIO'S MEMORANDUM CONTRA THE OHIO CONSUMERS' COUNSEL'S OPPOSITION

Introduction

AT&T Ohio[1], by its attorneys and pursuant to the Entry adopted on February 27, 2008, opposes the opposition to its application filed by the Ohio Consumers' Counsel ("OCC") on March 24, 2008. Many of OCC's arguments, repeated from Case Nos. 06-1013-TP-BLS, 07-259-TP-BLS, and 07-1312-TP-BLS, were recently rejected by the Ohio Supreme Court. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, Slip Opinion No. 2008-Ohio-861, March 6, 2008. Those arguments must, of course, be rejected here in light of the Court's decision. OCC recognizes that the Court upheld the basic local exchange service ("BLES") alternative regulation rules and the initial Cincinnati Bell and AT&T Ohio applications filed under those rules. OCC, p. 2, note 6. OCC also recognizes the broad impact of the Court's decision on its now-familiar arguments because it dismissed its pending appeal in Case No. 07-259-TP-BLS. But even where new issues are raised now, such as OCC's challenges to the Company's proof offered in this case, they are without merit and should also be rejected. OCC raises no new arguments here that would form a proper basis for the Commission to revisit the policy decisions it made in adopting its rules implementing the enabling legislation or its decisions in the previous cases filed under those rules.

And, despite all of OCC's rhetoric, it is clear that the Company's application should be approved in its entirety because the Company complied with the applicable rules and

[1] The Ohio Bell Telephone Company uses the name AT&T Ohio.

has met its burden of proof.[2] Apart from the fact of such compliance, there are other public policy reasons that support the granting of the application: 1) the Company has not increased, but has substantially reduced, the rates for residential basic local exchange service ("BLES") since 1985; 2) the competitive marketplace and the current limitations on rate increases set forth in the rules will keep rates in check; and 3) there are many competitors and alternative providers from which customers can purchase services.

At bottom, OCC argues that there is insufficient competition to justify regulatory relief for BLES. The technological, marketplace, and legal developments over the past ten years, advances made in other states and countries to address competition, and common sense all demonstrate otherwise. These factors also led the General Assembly to enact the enabling legislation that is now being implemented. In order for OCC to achieve its objective, it would have the Commission so narrowly define BLES (and thus the competitors and alternative providers that provide it) and would subject it to such unreasonably rigid tests that no ILEC would qualify for any regulatory relief. That is not what the General Assembly intended in enacting the enabling legislation, and it is not what the Commission intended in adopting its rules to implement that legislation. The Ohio Supreme Court has validated the Company's position in its recent decision. There, it said:

> We find that the commission appropriately relied on the statutory amendments and created lawful and reasonable tests to effectuate those changes. Likewise, we affirm the commission's factual determinations in approving AT&T's application.

[2] The rules governing the Company's application were adopted by the Commission in Case No. 05-1305-TP-ORD (hereinafter referred to as "05-1305" or "the rules docket"). AT&T Ohio's first application under those rules was approved in part in Case No. 06-1013-TP-BLS (hereinafter referred to as "06-1013"). Its second application was approved in part in Case No. 07-259-TP-BLS (hereinafter referred to as "07-259"). Its third application is pending in Case No. 07-1312-TP-BLS (hereinafter referred to as "07-1312"). AT&T Ohio requests that the Commission take administrative notice of its entire record in 05-1305, 06-1013, and 07-259. It should consider doing so in 07-1312 after it renders a decision in that case.

Ohio Consumers' Counsel v. Pub. Util. Comm., Id., ¶2.

It should be clear - - yet again - - that OCC's many arguments against AT&T Ohio's application represent an effort to undo both the work done by the General Assembly in enacting the enabling legislation and the work the Commission has done to implement it, both with substantial input from OCC and extensive hearings.[3] Contrary to OCC's beliefs, the Commission carefully and faithfully implemented that legislation in the rules it adopted after exhaustive consideration of its Staff's proposal, input from various parties (including OCC), and extensive local public hearings. The rules also passed scrutiny in the legislative rule review process. In turn, the Company has fully complied with the requirements of the rules the Commission adopted in preparing and filing its application. The Company's application satisfies the competitive tests identified in the rules and, therefore, meets the requirements of the statute for obtaining rate relief for BLES.

OCC attempts to recast some of its old arguments in light of the Ohio Supreme Court's broad decision. For example, it focuses on the "public interest" test in the statute and the customers of AT&T Ohio's Tier 1 core services. OCC, p. 11. It even asserts - - without any support - - that the issue of the application of the public interest criterion was "not presented to the Ohio Supreme Court." OCC, p. 3, note 9. But the Court clearly concluded that the competitive tests that the Commission adopted in its rules meet the statutory criteria. It stated:

> Ultimately, OCC is appealing the rules that the commission adopted to streamline its review for alternative treatment under the statute. *The rules*, as applied to the facts in this case, *satisfy the statutory factors* needed to award alternative treatment. The commission made appropriate factual determinations. OCC's arguments to the contrary are rejected, and the commission's order is affirmed.

[3] Any failure by the Company to respond to an argument raised by OCC should not be interpreted as its agreement with the position expressed.

Ohio Consumers' Counsel v. Pub. Util. Comm., Id., ¶52 (emphasis added). OCC is simply wrong on this point.

Once again, OCC's narrow view of BLES and its extreme self-serving interpretations of the statute and the rules would frustrate the goals of the General Assembly and the Commission in reforming the regulation of BLES to meet drastically changed marketplace conditions. As they have been before, those narrow views and extreme interpretations must be rejected and the Company's application should be approved in its entirety. In so doing, the Commission should apply the rules it carefully crafted based on the evidence of compliance as filed by the Company, and reject the irrational and unsupported interpretations and outcomes proposed by OCC. The arguments against the rules have been repeatedly rejected by the Commission and have now been firmly rejected by the Ohio Supreme Court. They should be rejected again.

As to OCC's desired focus on the Company's Tier 1 core services, the Commission has a more expansive and appropriate view of the competitive landscape. It has held as follows:

> In reviewing the record, the Commission finds that some of the comments filed, as well as testimony from several customers at the local public hearings, indicate that consumers' perception of BLES is changing. More customers are substituting their traditional BLES with competitive service offered by alternative providers such as wireline CLECs, wireless, VoIP and cable telephony providers (Columbus Tr. at 27, 39; Cincinnati Tr. at 20, 33, 37, 39, 48; AT&T Initial Comments at 15-17). Although the products offered by those alternative providers may not be exactly the same as the ILECs' BLES offerings, those customers view them as substitutes for the ILECs' BLES. Thus, the alternative providers compete against the ILECs' provision of BLES. We also note that Section 4927.03(A), Revised Code, compels the examination of whether customers have reasonably available alternatives to BLES. *The law does not restrict the "analysis of competition" and "reasonably available alternatives" to competitive products that are exactly like BLES.* Indeed, the law provides that the Commission consider the ability of providers to make functionally equivalent or substitute services readily available to

> consumers (emphasis added). Whether a product substitutes for another product does not turn on whether the product is exactly the same. Clearly, customers that leave an ILECs' BLES offering to subscribe to another alternative provider's bundled services offering view such bundled services offering as a reasonable alternative service, and a substitute to the ILECs' BLES. Additionally, customers which subscribe to these bundled offerings are by definition BLES customers. Accordingly, we find that, with technology advancements, alternative providers such as wireline CLECs, wireless, VoIP and cable telephony providers are relevant to our consideration in determining whether an ILEC is subject to competition or customers have reasonably available alternatives to the ILECs' BLES offering at competitive rates, terms and conditions.

05-1305, Opinion and Order, March 7, 2006, p. 25 (emphasis added). In the case involving the Company's first application filed under those rules, the Commission stated:

> Further, although each substitute service to BLES will not attract (or meet the needs of) an entire LEC customer base, this does not exclude the substitute service as a reasonable alternative to BLES.

06-1013, Entry on Rehearing, February 14, 2007, p. 14 (citation omitted). These holdings undercut OCC's claim that "the statutory public interest requirement should also not be met unless there are multiple providers of Tier 1 core services in an exchange." OCC, p. 11. Here, OCC has simply recrafted its time-worn "perfect substitutes" and "stand-alone BLES" arguments, which have been rejected and discredited by the Court.[4]

Notably, the Court held as follows:

> OCC's argument fails to recognize the legislative guidance provided by the changes to the policy section of the chapter in R.C. 4927.02. The General Assembly provided the commission with new standards to consider when determining eligibility for alternative regulation, and those standards included the consideration of the larger environment of voice communication providers.
>
> The commission established that bundled services provide competition to basic phone service. The commission determined that customers are switching service in the presence of competitors and that those customers find the alternative services to be adequate substitutes for AT&T's services. The court will not reverse or modify a commission decision as to questions of fact in cases in which the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of

[4] Ms. Hagans backs away from the "perfect substitutes" argument by acknowledging that the competitive products need only be considered "functional equivalents of or substitutes for BLES . . . ." Hagans, p. 8.

> the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. Monongahela Power Co. v. Pub. Util. Comm., 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. OCC has demonstrated that the alternative providers' services are different and offered at a variety of prices, but that showing does not overcome the commission's finding that those services are providing reasonable, competitive substitutes for basic local exchange service. We defer to the commission's expertise on this matter. Accordingly, we reject OCC's argument.

Ohio Consumers' Counsel v. Pub. Util. Comm., Id., ¶¶ 21-22.

While OCC would continue to divert the Commission's attention to a reexamination of the statute and the rules, there is no good reason to rehash issues that were already considered in the rules docket, in 06-1013, in 07-259, and most recently by the Ohio Supreme Court. The only issue in this case is whether AT&T Ohio's application complies with the rules. The validity of the rules was established in 05-1305 and was reaffirmed in both 06-1013 and 07-259 and in the Cincinnati Bell and Embarq cases, Case Nos. 06-1002-TP-BLS and 07-760-TP-BLS. Moreover, the Court has upheld the rules in all significant respects as relevant to this case.

OCC argues that the public interest requires competing services in the AT&T Ohio exchanges "sufficient to discipline AT&T Ohio's prices." OCC, p. 4. In the same vein, OCC also contends that the services provided by the alternative providers named by AT&T Ohio are "not competitively priced" and "have service deficiencies." OCC, p. 12. We have heard these arguments before and the Commission and the Court have properly rejected them. The statutory criteria are met by the evidence that one of the competitive tests is met. This the Court has made clear.[5]

[5] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, Id., ¶ 38.

OCC's disagreement notwithstanding, the Commission was charged with adopting rules to implement the BLES alternative regulation statute and the competitive tests reflect the policy choices made by the Commission to carry this through. The competitive tests established by the Commission, scrutinized in the legislative rule review process, and recently upheld by the Ohio Supreme Court, avoid the need for the applicant to demonstrate compliance with each aspect of the statutory criteria by creating objective criteria to be met by an applicant. This approach was reasonable and proper. OCC would discard the objective tests so it can endlessly argue subjective issues. That is counter-productive and would defeat the General Assembly's intent in enacting the enabling legislation and the Commission's purpose in adopting the rules implementing that legislation.

While OCC criticizes some of the Company's discovery responses (OCC, p. 2, note 4), it did not pursue the matter in discovery. Therefore, OCC cannot be heard to complain at this juncture. Lastly, it should be noted that OCC did not request a hearing pursuant to Ohio Admin. Code 4910:1-4-09(G).[6] No hearing should be held in this case.

The Rules Comply With The Statute

OCC criticizes Test 4, on which the Company relied for all eight exchanges in this case. OCC, p. 3. It argues that the test is "weak" and not "rigorous" and that it "provides a very low threshold for basic service alt. reg. approval." OCC, p. 3. Test 4, according to OCC, relies on line losses that are "undifferentiated and unscrutinized." OCC, p. 3. But the

[6] OCC says only that " . . . extraordinary circumstances exist that necessitate a hearing . . . ." OCC, p. 4.

competitive tests (including Test 4) have been upheld by the Court as meeting and properly fulfilling the statutory criteria.[7]

OCC again offers criticism of the rules, which it believes do not carry out the language of the statute. OCC, pp. 4-6. These arguments were heard before and rejected in the rules docket, 06-1013, and 07-259, and ultimately by the Ohio Supreme Court. OCC's opposition is based on its own proposed criteria which are not part of the statute or the rules. Its opposition fails to demonstrate any legitimate flaws in AT&T Ohio's application.

Given the Ohio Supreme Court's decision, it is astonishing that OCC is still wedded to the notion of "stand-alone" BLES as the only appropriate comparison for purposes of obtaining relief under the statute. OCC, p. 5. OCC argues that because BLES, when it is part of a package, has already been granted alternative regulation, the analysis here must be limited to competition for stand-alone BLES. OCC, p. 6. These arguments have been made and rejected before; the same result should obtain here. Moreover, OCC's argument that the Commission has "fallen far short of its duty under R. C. Chapter 4927" (OCC, p. 7) is clearly contradicted by the Ohio Supreme Court's recent decision.

The major flaw in the OCC's argument in this regard is that the statute does not define "stand-alone" BLES, nor does it require stand-alone BLES to be offered by any competing carrier. The statute requires the commission to *consider* "the *ability* of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions." R. C. § 4927.03(A)(2) (emphasis added). The statute does not call for perfect

[7] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, Id., ¶ 52.

substitutes for stand-alone BLES. Rather, it allows non-traditional alternatives to be considered. That is what the Commission's rules contemplate, consistent with the statute.

All LECs are required to provide BLES. Ohio Admin. Code § 4901:1-6-01(K). That rule defines "local exchange carrier" as any facilities-based and nonfacilities-based ILEC and CLEC that provides basic local exchange services to consumers on a common carrier basis. BLES is defined as:

> (1) End user access to and usage of telephone company-provided services that enable a customer, over the primary line serving the customer's premises, to originate or receive voice communications within a local service area, and that consist of the following:
> (a) Local dial tone service;
> (b) Touch tone dialing service;
> (c) Access to and usage of 9-1-1 services, where such services are available;
> (d) Access to operator services and directory assistance;
> (e) Provision of a telephone directory and a listing in that directory;
> (f) Per call, caller identification blocking services;
> (g) Access to telecommunications relay service; and
> (h) Access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies.
> (2) Carrier access to and usage of telephone company-provided facilities that enable end user customers originating or receiving voice grade, data, or image communications, over a local exchange telephone company network operated within a local service area, to access interexchange or other networks.

R. C. § 4927.01(A). Under a Commission rule, only the ILECs have an obligation to provide a stand-alone basic local exchange service within their traditional service territory. Ohio Admin. Code § 4901:1-6-09(A).[8] The disparate treatment that the rules extend to ILECs and CLECs is an important consideration in implementing the BLES alternative regulation statute relative to determining the need for alternate providers to make functionally equivalent or substitute services readily available. As there is no requirement for CLECs or any of the intermodal competitors to offer "stand alone" BLES, few, if any, do. The Commission was well aware of

[8] This requirement previously appeared in Ohio Admin. Code § 4901:1-6-09(M)(2), repealed effective September 18, 2007.

this fact when it devised the competitive tests. To have adopted rules using OCC's absurdly narrow view of the term "functionally equivalent" would have been contrary to the legislative intent. It is self-evident that the services offered by CLECs and the various alternative providers are not only functionally equivalent to BLES, but are also substitutes for BLES.

The Commission has addressed this issue before and decided it properly. In so doing, it said:

> Another objection to the staff proposed competitive market tests is raised by the Consumer Groups and AARP. They argue that the criteria included in these tests could include CLECs' lines as part of a bundled service or high-speed Internet service, which are not BLES-only lines, and accordingly fails to measure effective competition for BLES. As previously stated, H.B. 218 does not restrict the "analysis of competition" and "reasonable available alternatives" to competitive products that are exactly like BLES. We found in the prior section of this order that alternative providers such as wireline CLECs, wireless, VoIP and cable telephone companies are relevant to our consideration in determining whether an ILEC is subject to competition or customers have reasonable available alternatives. Accordingly, we find the staff's proposed criteria of using CLEC-provided residential access lines to be reasonable regardless of whether the customer is subscribing to BLES only or bundled services.

05-1305, Opinion and Order, March 7, 2006, p. 34. More recently, the Commission stated:

> Further, as we discussed in the 05-1305 Opinion and Order, more customers are substituting their traditional BLES with competitive services offered by alternative providers such as CLECs, wireless carriers, Voice over Internet Protocol (VoIP) and cable telephony providers (05-1305 Opinion and Order at 25). We recognize that, although the products offered by those alternative providers may not be exactly the same as the ILEC's BLES offerings, those former ILEC customers viewed them as substitutes for the ILEC's BLES.

06-1013, Entry on Rehearing, February 14, 2007, p. 10.

In addition, the disparate treatment that results from the rules does not alter the analysis whether BLES service is subject to competition or whether BLES customers have reasonably available alternatives under the statutory tests. All CLECs *must* provide BLES and it is indisputable that it is the CLECs' BLES offerings that are purchased in lieu of, and therefore

compete with, the BLES offerings of the ILECs in whose exchanges the CLECs operate. These facts - - and the fact that intermodal competitors do not offer stand-alone BLES but are nevertheless very successful at attracting customers- - serve to rebut the OCC's claim that BLES must be analyzed on a stand-alone basis.

On a related issue, OCC questions how many BLES-only and BLES plus basic caller ID-only customers AT&T Ohio has in the target exchanges. OCC, p. 2, note 4. It criticizes the Company for not answering that question in discovery, but fails to mention how it is relevant to this case and that it did not challenge the Company's lack of a response or seek a motion to compel.[9] The Commission has already assessed the possible impact of BLES alternative regulation, has determined that it is in the public interest, and that it can be achieved on an automatic basis under the objective tests the Commission has developed. This is one of the many areas in which OCC would impose additional requirements on an applicant that do not appear in the rules and that are not required by the statute.

OCC retraces the history of AT&T Ohio's elective alternative regulation plan, but for what reason is not clear. OCC, pp. 10-11. It seems to be arguing that the Company has adequate pricing flexibility without resorting to the additional relief now afforded qualifying Companies for their Tier 1 core services. OCC affiant Hagans emphasizes that "*AT&T Ohio already has the regulatory flexibility to establish bundles of services and adjust prices for those bundles of services in order to compete with the providers that offer similar bundles.*" Hagans, p. 24 (emphasis in original). Here, OCC is seeking to nullify H. B. 218 and the rules implementing that enabling statute. This effort should be rejected.

[9] The Company fully cooperated in the extensive discovery undertaken by OCC in this case. The Company does not compile a report identifying these categories of customers and therefore did not provide one in discovery.

OCC argues that customers in the eight exchanges included in this application have "few choices" and that granting the application would be a "public detriment." OCC, p. 12. But the Company's proof meets the requirements of test 4 and that, in turn, meets the public interest criterion of the statute. OCC's view is contrary to that of the Ohio Supreme Court. The latter, and not the former, is the controlling authority on this point.

One of OCC's recurring themes is that some of the Company's nominees as alternative providers do not have a sufficient "presence" in the exchange in question. OCC's arguments have been consistently rejected by the Commission and have now been rejected by the Ohio Supreme Court. In discussing the "presence" argument, the Court stated:

> We affirm the commission's finding that alternative providers have services readily available in AT&T's exchanges. The commission established the exchange area to judge the overall presence in that area, not a subset of that area. The commission found no requirement in the law or in its rules that an alternative provider must serve 100 percent of the relevant market. The commission points out that OCC supported using the telephone exchange as the relevant market in the 05-1305 rulemaking case. The area is small enough to share common characteristics while still providing years of historical data. Thus, it is reasonable to accept the commission's determination to judge the area as a whole.

Ohio Consumers' Counsel v. Pub. Util. Comm., Id., ¶26.

The Commission need not revisit every statutory factor in order to determine if a competitor has a "presence." "Presence" is a simple English word that has a common meaning and is easily understood. The dictionary defines it as "the fact or condition of being present."[10] In this context, it means the carrier is present in the market, providing its service to customers. A carrier is either present or absent. All of the alternative providers in AT&T Ohio's application are providing service and have residential customers. OCC does not refute these facts other than

[10] http://www.m-w.com/dictionary/presence

through a misinterpretation of supporting data included in AT&T Ohio's application. Nothing in the statute or the Commission's rules requires that each and every residential customer within a given exchange have five or more alternative providers available to them. Even so, the fact is that resellers, physically and virtually collocated CLECs, and carriers purchasing AT&T Ohio's wholesale commercial offering, Local Wholesale Complete™, have access to each and every residential customer in a given wire center. It is also the case that VoIP providers and wireless carriers are not constrained by exchange boundaries. The rules reflect these circumstances.

Nothing in the rules requires that all of the alternative providers offer a perfect substitute for stand-alone BLES in a ubiquitous manner throughout an exchange. Moreover, it would be unreasonable to require any applicant to prove that each and every one of its competitors offers service to each and every customer residing in an exchange; the standard must be interpreted in a reasonable manner based on the information that would be available to an applicant. The Commission recognized these facts in denying the Consumer Groups' application for rehearing in 06-1013 on the "presence" argument. 06-1013, Entry on Rehearing, February 14, 2007, pp. 11-12. Here, too, the Commission should reject OCC's approach to determining whether an alternative provider has a "presence" in a given exchange.

Competitive Test 4 Meets The Statutory Requirements

OCC affiant Hardie criticizes test 4 as the "weakest of all the competitive tests." Hardie, p. 4. She claims that it tends to "moot" the other tests. Id. OCC's criticisms of competitive test 4 have been heard and rejected before. Competitive test 4 has now been validated by the Ohio Supreme Court. In finding test 4 to be reasonable, the Court stated:

> The commission's finding that Test 4 adequately judges alternative competition by combining two criteria, the presence of at least five unaffiliated facilities-based competitors and a significant loss of access lines, is reasonable. The test incorporates the market reality that there are some forms of competition that the commission has no power to regulate or formally review. The commission interpreted the intent of the General Assembly and developed a test to determine the level of competition and the availability of alternative providers regardless of regulatory oversight. This court may rely on the expertise of a state agency in interpreting a law where "highly specialized issues" are involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." Consumers' Counsel v. Pub. Util. Comm. (1979), 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.
>
> * * *
>
> We affirm the commission's finding that Test 4 meets statutory requirements and that AT&T satisfied the line-loss portion of that test. Accordingly, we reject OCC's proposition of law.

Ohio Consumers' Counsel v. Pub. Util. Comm., Id., ¶¶ 36, 38.

As if that holding were not enough, OCC's arguments were already considered and rejected by the Commission in the rules docket and in the previous BLES alternative regulation cases. *See, e.g.*, 06-1013, Entry on Rehearing, February 14, 2007, pp. 17-18. In the rules docket, the Commission explained:

> As we explained in our Opinion and Order, the intent of the competitive market tests set forth in Rule 4901:10-4-10(C), O.A.C., is to require the applicant to demonstrate that that *[sic]* BLES is subject to competition or that reasonably available alternatives exist and that no barriers to entry exist for BLES. Inasmuch as the telecommunications market is continuously evolving, the Commission cannot pigeonhole a competitive market analysis via one specific test. Rather, the Commission, in its rules, focused on specific factors demonstrating for residential BLES customers that all of the statutory criteria found in Section 4927.03(A), Revised Code, have been satisfied. For example, to the extent that an ILEC can demonstrate that it has lost a "real" percentage of its residential customer base and that there are competitive alternatives available to BLES customers, the Commission is satisfied that barriers to entry are not restricting the ability of competitors to compete. As part of its analysis, the Commission previously noted that every customer subscribing to a bundled service which includes BLES is, by definition, also a BLES customer. Similarly, contrary to the Consumer Groups' argument, the test components measuring access line losses do measure BLES competition because each access line customer previously purchased BLES from the ILEC. In this regard, Consumer Groups' position also ignores Section 4927.03(A)(2)(c), Revised Code, which requires the Commission to consider the availability of "functionally equivalent or substitute services." Further, as

> additional protection, the Commission's Rule 4901:1-4-10(C), O.A.C., requires that an ILEC satisfy both criteria of a single competitive market test rather than just one of the established criteria or the other.

05-1305, Entry on Rehearing, May 3, 2006, pp. 18-19. OCC's argument fails in light of the Commission's conclusions, which have been unanimously upheld by the Ohio Supreme Court.

OCC's Criticisms Of The Company's Application Are Unfounded

OCC offers little in the way of new criticism of the wireless and wireline competitors. Not surprisingly, they find fault with each and every wireless carrier relied upon in the application (Alltel Wireless, Cincinnati Bell Wireless, Sprint/Nextel and Verizon Wireless). OCC reiterates the same arguments that have failed in the past: (1) that wireless service is more expensive than and not functionally equivalent to Tier 1 Core services (a/k/a stand-alone BLES) and (2) that no wireless carrier can be considered unless it has white page listings and has ported AT&T Ohio telephone numbers onto its wireless network. The Commission and the Court have put the pricing and functional equivalency arguments to rest.

In addition, OCC is simply wrong on the facts. Ms. Hardie claims that Alltel Wireless does not provide service in the Christiansburg Exchange. Hardie, pp. 9-10. But, as shown in the attachment, Alltel Wireless offers service in Zip Code 45317, one of the Zip Codes in the Christiansburg Exchange. This confirms the Company's reliance on Alltel Wireless as an alternative provider in this exchange.

As for OCC's white page and porting requirements, neither are required for a wireless carrier to provide service and any such "requirements" ignore the reality of the marketplace. As OCC noted, AT&T Ohio did not demonstrate the presence of wireless white

page listings. As in previous cases, AT&T did not do so because wireless listings are not included in AT&T Ohio's traditional white page directories. Wireless directory listings are not a component of the competitive tests. And, as the Federal Trade Commission notes, industry practice calls for not including wireless listings in wireless directories unless the end user customer specifically opts-in and such directories would not be available in printed, electronic or internet list form that could be accessed by telemarketers.[11]

As for ported numbers, while it is possible for landline customers to disconnect their landline and port the telephone number to a wireless device, such porting is done very infrequently. AT&T Ohio estimates that less than one-half of one percent (0.44%) of the wireless devices in use in its service territory are using ported telephone numbers. Therefore, while the presence of ported numbers is a clear indication that service is being provided, the converse is not true.

The Commission was correct in its evaluation of wireless carriers in Case No. 07-259-TP-BLS and should not change course here. OCC's arguments are misplaced and should be rejected.

Similarly, OCC's criticism of landline competitors offers nothing which has not been considered and denied in prior proceedings. OCC criticizes ACN, Budget Phone, Cox, First Communications, MCI, Revolution, Sage, Talk America and Trinsic, focusing on four generic arguments:

[11] http://www.ftc.gov/opa/2007/10/dnccellphones.shtm

1. Some CLEC services are not equivalent (prepaid services and one carrier that does not offer flat rate local service);
2. Some CLEC rates are higher;
3. Some CLECs have relatively few customers; and
4. One CLEC (Cox) does not serve every customer location in an exchange.

None of these arguments has merit. The one specific criticism that is new involves Talk America in the Uhrichsville exchange. Talk America is now part of Cavalier and it appears that OCC's criticism stems from their inability to locate evidence on the Cavalier web site regarding the offering of new service. AT&T Ohio did not rely on the web site (the Carrier Web Site box was not checked on the Exchange Summary Sheet), but instead pointed to the presence of leased facilities and residential white page listings as evidence of the carrier's presence. OCC's criticism falls short and should be disregarded.

AT&T Ohio's Application Complies With The Statute And The Rules

Much of the advocacy set forth by OCC is directed toward establishing that AT&T Ohio's application does not meet the three criteria of the statute. The statute requires the Commission to find that the proposed alternative regulation is in the public interest and that either of the following conditions exists:

> The telephone company or companies are subject to competition with respect to such public telecommunications service;
>
> **OR**
>
> The customers of such public telecommunications service have reasonably available alternatives.

R. C. § 4927.03(A)(1)(a)-(b). Additionally, with respect to basic local exchange service, the commission must additionally find that there are no barriers to entry. R. C. § 4927.03(A)(3). With substantial evidence in its application, AT&T Ohio demonstrated that:

- Many CLECs have Commission-approved interconnection agreements with AT&T Ohio
- Many CLECs have Commission-approved tariffs for providing BLES
- Many CLECs are serving residential customers via their own facilities (including but not limited to UNE-P, UNEs, and/or LWC)
- Many CLECs are serving residential customers via resale
- Many customers have ported their numbers to CLECs
- Many customers have ported their numbers to wireless providers
- Many customers have ported their numbers to VoIP providers
- AT&T Ohio's retail residential line quantities have significantly decreased
- Alternative providers have significant residential market share

Given all these facts, OCC's arguments that AT&T Ohio has not met the statutory criteria must fail.

AT&T Ohio's Application Satisfies The Requirements Of Competitive Test 4

OCC affiant Hardie is tasked with supporting OCC's challenge to the wireless "candidates" offered in the application. Hardie, p. 3. She complains that "in the cases decided to date, the Commission accepted alternative providers, regardless of their services, pricing, terms and conditions, and level of presence." Hardie, p. 6. Here, OCC acknowledges the precedent the Commission has established which have now been affirmed by the Ohio Supreme Court.

Ms. Hardie concludes that the wireless carriers identified as alternative provides "should be removed from the overall count." Hardie, p. 14. As shown above, though, she is wrong about Alltel Wireless, at least in the Christiansburg Exchange. Suffice it to say that the

Commission has already rejected the arguments against the use of wireless carriers to demonstrate competition for BLES.[12] It should reject those arguments again here.

For her part, Ms. Hagans attempts to support OCC's challenge to the wireline "candidates" in the application. Ms. Hagans, like her predecessors, embellishes the "alternative provider" prong of test 4 with additional requirements that are neither logical nor called for by the statute. The Commission has addressed and rejected these arguments before:

> The Commission fully considered the Consumer Groups' arguments concerning the alternative providers prongs in 05-1305 and also raised here in opposition to AT&T Ohio's application for BLES alternative regulation. We find that the Consumer Groups have raised no new arguments for the Commission's consideration. Therefore, the Consumer Groups' application for rehearing on the Commission's use of the alternative providers prongs of Competitive Tests 3 and 4 is denied.

06-1013, Entry on Rehearing, p. 9. OCC has offered no argument in this case that would justify changing the Commission's sound conclusions here.

OCC's arguments about the reliance on wireless and wireline alternative providers in meeting competitive test 4 are simply a rehash of the time-worn and discredited "perfect substitutes" argument made by the Consumer Groups in the rules docket. The Commission has properly recognized that the law does not restrict the analysis of competition and reasonably available alternatives to competitive products that are perfect substitutes for BLES.[13] The Commission therefore concluded that alternative providers such as wireline CLECs, wireless, VoIP, and cable telephony providers are relevant to its consideration in determining whether an ILEC is subject to competition or whether customers have reasonably available alternatives to

[12] Case No. 00-1532-TP-COI, Opinion and Order, December 6, 2001, pp. 17-18 (" . . . it is also clear that Ohio consumers have access to an ever increasing array of wireless providers that operate as an alternative to wireline providers."); 05-1305, Opinion and Order, March 7, 2006, pp. 6, 25.
[13] 05-1305, Opinion and Order, March 7, 2006, p. 25.

the ILECs' BLES offering at competitive rates, terms and conditions.[14] The Commission also properly noted that just because there is a customer segment that wants nothing other than the most basic of services, this does not alter the competitive analysis or conclusions.[15]

On the issue of the use of wireline and wireless alternatives, it should also be noted that in assessing competition, it is not necessary for all customers to view the services as reasonably interchangeable. What is critical in determining whether services are competitive substitutes is whether they "have the ability—actual or potential—to take significant amounts of business away from each other."[16] When a significant number of consumers actively choose among reasonable alternatives, firms must compete with each other for these customers. This is true today of mobile wireless and wireline services.

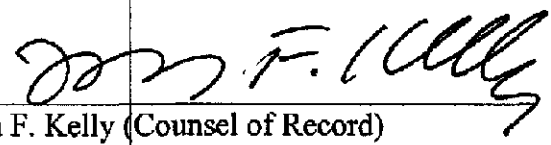
Conclusion

For all of the foregoing reasons, and especially in light of the Ohio Supreme Court's recent decision, OCC has presented no rational basis for the Commission to deny the Company's application or to set this matter for hearing. The Commission's rules comply with the statute and the Company's application complies with - - and meets the tests required by - - the rules in all respects. The Commission should either permit the application to be approved automatically, as provided for in Ohio Admin. Code § 4901:1-4-09(G), or issue an appropriate order approving the application in its entirety.

[14] Id.
[15] Id.
[16] *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), cert. denied, 439 U.S. 838 (1978).

Respectfully submitted,

AT&T Ohio

By: 

Jon F. Kelly (Counsel of Record)
Mary Ryan Fenlon
AT&T Ohio
150 E. Gay St., Rm. 4-A
Columbus, Ohio 43215

(614) 223-7928

Its Attorneys

08-107.memo contra

ATTACHMENT

Plans

Pick a plan that gives you the freedom and flexibility you want and need.

Shopping Steps

1 PLANS > 2 PHONES > 3 PLAN ADD-ONS & ACCESSORIES > 4 CHECKOUT

Products and services for: Conover, OH, 45317

All Plans | National Plans | Local Plans | Family Plans | Prepaid Plans | Wireless Plans

COMPARE

5 my circle members | 10 my circle members | 20 my circle members

Compare Now ☐

National Freedom 900
- 900 Anytime Minutes
- Unlimited Night and Weekend Minutes
- Unlimited Mobile to Mobile Minutes
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-Per-Use-Messaging

Monthly Fee**
$59.99

ADD TO CART

my circle 10

View Coverage

Compare Now ☐

National Freedom 500
- 500 Anytime Minutes
- Unlimited Night and Weekend Minutes
- Unlimited Mobile to Mobile Minutes
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use Text

Monthly Fee**
$39.99

ADD TO CART

my circle 1

View Coverage

Compare Now ☐

National Freedom 750
- 750 Anytime Minutes
- Unlimited Night and Weekend Minutes
- Unlimited Mobile to Mobile Minutes
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-Per-Use-Messaging

Monthly Fee**
$49.99

ADD TO CART

my circle 5

View Coverage

North American Freedom 450
- 450 Anytime Minutes

- 1000 Offpeak Minutes (roaming and toll-free calling to Canada, Mexico, Puerto Rico and the US Virgin Islands)
- Unlimited Mobile to Mobile Minutes (U.S. only)
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use Text Messaging

Compare Now

Monthly Fee**
$59.99

ADD TO CART

my circle 10

View Coverage

Smart Choice 500

- Unlimited E-mail and Internet Access on Primary Line
- 500 National Freedom minutes
- Unlimited Mobile to Mobile Minutes
- Unlimited Night and Weekend Minutes
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting

Compare Now

Monthly Fee**
$69.99

ADD TO CART

my circle 5

View Coverage

North American Freedom 900

- 900 Anytime Minutes
- 1000 Offpeak Minutes (roaming and toll-free calling to Canada, Mexico, Puerto Rico and the US Virgin Islands)
- Unlimited Mobile to Mobile Minutes (U.S. only)
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use Text Messaging

Compare Now

Monthly Fee**
$79.99

ADD TO CART

my circle 10

View Coverage

National Freedom 1400

- 1400 Anytime Minutes
- Unlimited Night and Weekend Minutes
- Unlimited Mobile to Mobile Minutes
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use Text

Compare Now

Monthly Fee**
$79.99

ADD TO CART

my circle 10

View Coverage

Smart Choice 500

- Unlimited E-mail and Internet Access on Primary Line
- 500 National Freedom minutes
- Unlimited Mobile to Mobile Minutes
- Unlimited Messaging
- 7PM Unlimited Off-Peak
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting

Compare Now

Monthly Fee**
$89.99

ADD TO CART

my circle 10

View Coverage

National Freedom 2100

- 2100 Anytime Minutes

- Unlimited Night and Weekend Minutes
- Unlimited Mobile to Mobile Minutes
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use Text

Compare Now ☐

my circle 20

View Coverage

Monthly Fee**
$99.99

ADD TO CART

North American Freedom 1350

- 1350 Anytime Minutes
- 1000 Offpeak Minutes (roaming and toll-free calling to Canada, Mexico, Puerto Rico and the US Virgin Islands)
- Unlimited Mobile to Mobile Minutes (U.S. only)
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use Text Messaging

Compare Now ☐

my circle 20

View Coverage

Monthly Fee**
$99.99

ADD TO CART

Smart Choice 1200

- Unlimited E-mail and Internet Access on Primary Line
- 1200 National Freedom minutes
- Unlimited Mobile to Mobile Minutes
- Unlimited Messaging
- 7PM Unlimited Off-Peak
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting

Compare Now ☐

my circle 10

View Coverage

Monthly Fee**
$109.99

ADD TO CART

Smart Choice 2000

- Unlimited E-mail and Internet Access on Primary Line
- 2000 National Freedom minutes
- Unlimited Mobile to Mobile Minutes
- Unlimited Messaging
- 7PM Unlimited Off-Peak
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting

Compare Now ☐

my circle 20

View Coverage

Monthly Fee**
$139.99

ADD TO CART

National Freedom 4000

- 4000 Anytime Minutes
- Unlimited Night and Weekend Minutes
- Unlimited Mobile to Mobile Minutes
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use Text

Compare Now ☐

my circle 20

View Coverage

Monthly Fee**
$149.99

ADD TO CART

North American Freedom 2500

- 2500 Anytime Minutes

Compare Now

- 1000 Offpeak Minutes (roaming and toll-free calling to Canada, Mexico, Puerto Rico and the US Virgin Islands)
- Unlimited Mobile to Mobile Minutes (U.S. only)
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use Text Messaging

Monthly Fee**
$149.99

View Coverage

Smart Choice 5500

- Unlimited E-mail and Internet Access on Primary Line
- 5500 National Freedom minutes
- Unlimited Mobile to Mobile Minutes
- Unlimited Messaging
- 7PM Unlimited Off-Peak
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting

Compare Now

Monthly Fee**
$189.99

View Coverage

National Freedom 6000

- 6000 Anytime Minutes
- Unlimited Night and Weekend Minutes
- Unlimited Mobile to Mobile Minutes
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use Text

Compare Now

Monthly Fee**
$199.99

View Coverage

National Freedom Unlimited

- Unlimited Anytime Minutes
- Unlimited Night and Weekend Minutes
- Unlimited Mobile to Mobile Minutes
- Domestic Long Distance and Free Roaming on the National Freedom Network
- Includes: Basic Voice Mail, Caller ID, 3-Way Calling, No Answer Transfer, Call Forwarding, Call Waiting, Pay-per-use-messaging

View Coverage

Compare Now

Monthly Fee**
$99.99

**Alltel may impose additional charges on top of this monthly fee, including Federal, State and Local Taxes and Universal Service Charges, or a Regulatory Cost Recovery Fee. See rate plan for specific fee. My Circle not available in Connecticut.

Certificate of Service

I hereby certify that a copy of the foregoing has been served by first class mail, postage prepaid, and by e-mail this 3rd day of April, 2008 on the following parties:

Ohio Consumers' Counsel

Terry Etter (Counsel of Record)
David C. Bergmann
Office of the Ohio Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215

etter@occ.state.oh.us
bergmann@occ.state.oh.us

Staff of the Public Utilities Commission of Ohio

Stephen A. Reilly (Counsel of Record)
Thomas Lindgren
Office of the Attorney General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Stephen.reilly@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us.

Jon F. Kelly