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matter, the relationship between the various Time Warner entities is as follows. Time Warner, Inc. (TWI) is a Delaware corporation. TWI's businesses are carried on in three principal groups: publishing music, and entertainment. The entertainment group businesses are operated through Time Warner Entertainment Company, L.P. (TWE), a Delaware limited partnership. TWE is owned in part by a subsidiary of TWI, U.S. West, Inc., ITOCHU Corporation, and Toshiba Corporation. TWE operates three principal businesses: filmed entertainment, programming-HBO, and cable. TWE's cable television operations are conducted through its Time Warner Cable division (Time Warner Cable). Time Warner Cable's telephony operations are conducted through Time Warner Communications (TWC), a partnership wholly owned and controlled by TWE. TWC is a Delaware partnership which has formed separate business entities to provide telephony services in various geographic areas. Time Warner Communications of Ohio, L.P. and Time Warner AxS are limited partnerships of which TWC is the general partner and TWE is the limited partner.

At the hearing in this matter, counsel for the applicants stated that Time Warner Communications of Ohio, L.P. would hold any certificate to be issued as a result of this proceeding. Consequently, the Commission construes the issues in this case as relating specifically to Time Warner Communications of Ohio, L.P. (Time Warner).

Through this application, Time Warner is seeking to provide local exchange services in all or parts of the 37 counties in Ohio where Time Warner Cable has facilities that provide cable television services. Specifically, Time Warner seeks authority to provide a full range of telecommunication services, including residence and business flat-rate, residence and business measured-rate, residence and business message rate, residence and business key lines, PBX, direct inward dial (DID), direct outward dial (DOD), private line, integrated services digital network lines (ISDN), basic rate interface (BRI), primary rate interface (PRI), switched access, Centrex lines, shared tenant services, and switched data service. Additionally, Time Warner seeks authority to provide various vertical services and supplementary services, including custom calling services, CLASS services, voice messaging, enhanced fax, integrated voice recognition, touchtone, multiline hunting, outgoing call screening, blocking, 911, operator services, directory assistance, calling card validation, 800 routing, special needs, six-way conference, make busy for key, and inside wire maintenance.

In anticipating the momentous task of moving this state from one of monopoly provision of basic local exchange service to one of customer choice, the Commission staff for some time has been working to identify generic issues surrounding local exchange competition that need to be addressed in order for any transition to occur in a manner fully consistent with the telecommunications policy stated in Chapter 4927, Ohio Revised Code, and in recognition of the varied interests of both incumbent and new local exchange companies (LECs) and their public service obligations to telephonic subscribers throughout the state of Ohio. At the same time, however, the Commission has been cognizant of the desires of potential new entrants to have the

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Commission consider their plans to enter the local exchange market in Ohio as evidenced by the filing of the certification cases.

Consequently, in an effort to proceed with Time Warner's application in the most efficient manner while ensuring proper consideration of all the issues raised by the application, we concluded that, initially, in the certification case itself, we would proceed to hearing on the company-specific issues of Time Warner's managerial, technical, and financial capabilities to provide its proposed services. Also, in our initial consideration of Time Warner's application in the certification proceeding, we concluded that we would address the legal issue of the Commission's authority to grant the application including whether the Commission's legal rationale in Time Warner AXS of Western Ohio, Case No. 93-1370-TP-ACE (Order on Rehearing, February 3, 1994) (93-1370), should be extended to this application.

This consideration of company-specific and legal issues within the context of the certification case permitted the Commission's staff to continue to address through an informal workshop process the generic issues surrounding local exchange competition with interested stakeholders in preparation for formal consideration of the generic issues through the opening of a docket. In fact, we specifically noted in our Entry of March 9, 1995, in this case in which we established the procedural framework for the consideration of Time Warner's application that, if specific issues surrounding the application were not covered within the context of the initial phase of this case, they would be addressed in a subsequent phase in this case or in a generic case.

As indicated above, one of the issues to be considered in this proceeding is that of the Commission's jurisdiction to certify additional providers of basic local exchange services. Given the nature of this issue, no testimony at hearing was directed to it. Rather, this issue was addressed at great length in the post hearing briefs and replies. The focus of this issue, as addressed in the briefs, has been on the proper interpretation of Section 4905.24, Revised Code, as it relates to two issues: 1) Whether incumbent LECs possess an exclusive right to provide basic local exchange service in their service areas and 2) The Commission's obligations with respect to a finding of whether the authority requested is proper and necessary for the public convenience. These elements of the Commission's authority have been characterized as "threshold" issues because they must be addressed before the Commission can address the company-specific issues of Time Warner's managerial, technical, and financial capabilities to provide its proposed services. The Commission agrees and, consequently, will consider these issues at the outset.

Exclusive Local Franchise Issue:

Introduction:

As noted above, in the Commission's view, the issue of the Commission's authority to grant this application included whether the

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Commission's legal rationale in 93-1370 should be extended to the instant case. The legal rationale set forth by the Commission in 93-1370 addresses the issue of whether Ohio law grants incumbent LECs exclusive local franchise rights and concludes, based upon a detailed analysis of relevant statutes, case law, and Commission precedent, that Ohio law does not confer such rights.

As noted in many of the briefs, the issue of the Commission's authority to authorize multiple providers of telecommunications services has been addressed numerous times by the Commission. In fact, we have examined the issue at some length in a number of recent Commission decisions in addition to 93-1370 including GTE North Inc. v. Ohio Bell Telephone Co., Case No. 88-1739-TP-CSS (March 10, 1994); In the Matter of the Application of TCG America, Inc. for Authority to Furnish IntraLATA Dedicated, Non-Switched Private Line Services Within the State of Ohio, Case No. 93-2080-CT-ACE (Entry on Rehearing May 4, 1994); and In the Matter of the Application of Time Warner AxS of Northeast Ohio, L.P. for Authority to Furnish High Capacity Fiber Transmission Services Within the State of Ohio, Case No. 93-2069-TP-ACE (Entry on Rehearing, May 4, 1994). In these cases, the Commission has consistently concluded that Ohio law does not grant exclusive local franchise rights to incumbent LECs.

The above cases, however, did not involve an application by a potential new entrant to provide switched basic local exchange service. Consequently, in the Commission's view, the focus of the exclusive local franchise issue in the context of this case is whether the Commission's analysis in the above cases should be extended to Time Warner's application to provide switched basic local exchange services. We directed the parties specifically to address this issue in their legal briefs.<sup>1</sup>

Arguments Presented:

Time Warner, and those entities supporting the granting of its application, cite the above Commission decisions and urge the application of the Commission's legal rationale in those cases to the present one. Additionally, various parties supported Joint Exhibit 1 submitted at the hearing which is a Stipulation and Recommendation (stipulation) providing, inter alia, that the signatory parties agree that the Commission has the jurisdiction and legal authority pursuant to Section 4905.24, Revised Code, to grant additional providers of telecommunications services authority to operate in the same territory as a provider that is currently rendering adequate service. The

<sup>1</sup> It is worth noting that none of the LECs affected by our prior decisions chose to appeal them. Ameritech and CBT each waived their right to do so as part of a stipulated agreement in their alternative regulation cases and GTE, despite having an opportunity to do so, did not appeal our decision in GTE North Inc. v. Ohio Bell Telephone Co., Case No. 88-1739-TP-CSS (March 10, 1994). The Commission's order in that latter case allowed the Davis Besse nuclear power station (located in GTE North service territory) to obtain local basic exchange Centrex service from Ameritech without having to proceed under the Henderson Act, Sections 4905.241 to 4905.244, Revised Code.

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signatory parties in addition to Time Warner include AT&T, OCC, Sprint, Columbus, and OCTVA.

CBT and those parties supporting its position, on the other hand, maintain that LECs have an exclusive franchise right to provide basic local exchange services and that this right is supported by the Ohio Revised Code, Ohio Supreme Court decisions, and the Commission's own precedent. In short, these entities have set forth positions regarding the exclusive local franchise issue that previously have been considered and rejected by the Commission in the above cases. Despite the Commission's solicitation of additional legal and policy arguments, very little in the way of new argument was presented in this case by either Time Warner or those opposing the application.

Edgemont, rather than simply reiterating previous arguments with respect to the local franchise issue, asserts that the Commission itself has recognized that the dedicated private line services authorized in 93-1370 are different from the switched services at issue in this case and, therefore, the legal rationale of 93-1370 is inapplicable to Time Warner's application. Cincinnati contends that, whatever action the Commission takes with respect to asserting its jurisdiction, the Commission should not transgress Cincinnati's authority over telephone companies desiring to operate within Cincinnati.

Because the arguments set forth by CBT and the other parties supporting its position have been considered at great length by the Commission in previous orders, they will not be set forth in great detail here. Briefly, the arguments set forth by these parties are as follows. First, they contend that the Commission is a creature of statute and has only that authority given to it by the General Assembly. According to these entities, the current regulatory policy concerning local exchange competition has been adopted by the General Assembly and the Commission is without statutory authority to change it.

Further, these parties look to Section 4905.24, Revised Code, as granting LECs exclusive franchise rights which were then clarified by Sections 4905.241-4905.244, Revised Code (the Henderson Act). Under the analysis set forth by these entities, Section 4905.24, Revised Code, requires the Commission to make a finding regarding adequacy of service and, if the incumbent provider is furnishing adequate service, the one provider per exchange policy must prevail. If, however, adequate service is not being provided, then the Commission must look to the Henderson Act which outlines the remedial action the Commission must take.

Additionally, these parties contend that LEC franchise rights were again recently confirmed by the Ohio General Assembly through Section 4927.03, Revised Code. Finally, these entities cite a number of Ohio Supreme Court and Commission decisions in support of their position including Citizens Exchange Telephone Co. v. Pub. Util. Comm., 102 Ohio St. 570 (1921), and Celina & Mercer County Tel. Co. v. Union-Center Mut. Tel. Ass'n., 102 Ohio St. 487 (1921). Because these entities have raised these issues, the Commission will reiter-

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ate, in the context of this application to provide switched basic local exchange service, its analysis with respect to a claim of LEC exclusive franchise rights.

Analysis:

With respect to the issue of the Commission's being a creature of statute, in previously addressing this issue we have stated:

...the Commission is a creature of statute and, as such, has only the authority delegated to it by the General Assembly. However, the Commission's delegated authority to regulate public utilities is broad. For instance, Section 4905.06, Revised Code, delegates to the Commission general supervision over all public utilities within our jurisdiction. Additionally, Section 4905.04, Revised Code, provides that, '(T)he public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities... (and) to require all public utilities to furnish their products and render all services exacted by the Commission or by law....'

(93-2069 at 5-6).

Having established our authority to regulate public utilities and the services they provide, we must next address the arguments that we will exceed our statutory authority by granting Time Warner the certificate it is seeking.

It is generally held that the granting of an exclusive privilege to a monopoly should be done so expressly. For example, in State Ex Rel. v. City of Hamilton, 47 Ohio St. 52 (1890), in considering a claim by Hamilton Gas Company that the city's construction of a gas works would destroy its vested and exclusive right to supply gas within the city, the Ohio Supreme Court stated:

Grants by the public are to be strictly construed, and an intention to grant an exclusive privilege or monopoly is not to be implied. Where exclusive privileges are not expressly given by charter, they should not be held to be conferred.

(Id. at 71).

Further, in Ohio Power Company v. Craig, 50 Ohio App. 239 (1935), the Court of Appeals noted that public policy does not condone exclusive franchises. As the Court of Appeals stated:

The granting of an exclusive franchise to operate a public utility is invalid as against public policy. By a long and almost unvaried line of decisions it has been held that such cannot be granted unless expressly authorized by statute....

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(Id. at 244).

It is with these guiding principles in mind that we have examined the statutory framework of Ohio law and concluded that it does not grant exclusive local franchise rights to LECs.

Time Warner is seeking to be certified, in part, pursuant to Section 4905.24, Revised Code. This statute, in relevant part, provides:

No telephone company shall exercise any permit, license, or franchise. . . in any municipality or locality where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the public utilities commission a certificate, after public hearing of all parties interested, that the exercising of such license, permit, right, or franchise is proper and necessary for the public convenience.

This statute was originally codified in 1911 as Section 614-52, General Code, and was subsequently recodified, with minor change, as Section 4905.24, Revised Code.

In previously rejecting the argument set forth by CBT and others with respect to Section 4905.24, Revised Code, we noted that, while there are no modern court cases dealing with the current requirements of Section 4905.24, Revised Code, there were several Ohio Supreme Court cases dealing with Section 614-52, General Code. As an example, we cited Celina & Mercer County Tel. Co. v. Union-Center Mutl. Tel. Ass'n., 102 Ohio St. 487 (1921), in which the Ohio Supreme Court explained:

(i)t is important to notice that this section does not prohibit another company from competing, but makes it a condition precedent to engaging in business in the way of competition for that company to first apply for and receive a certificate from the Public Utilities Commission. The commission in the act is provided with all the facilities to investigate and determine whether the public convenience will be served, and in so doing must determine first whether the serving company is furnishing adequate service, and next, irrespective of whether it is or is not so doing, find whether or not the public convenience will be better served by granting the certificate to a competing company.

(Id. at 499).

Based upon our plain reading of Section 4905.24, Revised Code, as reinforced by decisions of the Ohio Supreme Court, we have consistently held that statute "clearly permits the Commission to certify,

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after a public hearing of all interested entities, more than one telephone company in a particular locality if it is proper and necessary for the public convenience. Moreover, nothing within this statute limits the services entities certified thereunder are authorized to provide" (93-2069 at 7). In fact, we have used Section 4905.24, Revised Code, in order to authorize numerous entities to provide telecommunication services in areas currently served by a local exchange carrier including radio common carriers, cellular companies, interexchange carriers, and competitive access providers. Under the rationale presented by the LECs, the Commission was without authority to grant those certificates--a result which would be most ironic since, in many cases, Ohio's LECs and their parent companies were the beneficiaries of the streamlined open entry procedures set forth in our 944 Order (See, e.g., Cincinnati Bell Long Distance, Inc., Case No. 84-469-TP-ACE (84-469) (August 20, 1985); Ameritech Advanced Data Services of Ohio, Inc., Case No. 93-1081-TP-UNC (93-1081) (August 19, 1993); and GTE Mobilnet, Inc., Case No. 91-561-RC-ACE (July 18, 1991)). None of the local exchange companies challenged our interpretation of Section 4905.24, Revised Code, and the "paper hearing" process set forth in the 944 case but, in fact, availed themselves of that process.<sup>2</sup>

With respect to the position of CBT and various other parties that the existing provider must be found to be providing inadequate service before a second provider can be authorized, we continue to believe that position to be a misstatement of the applicable law. As we have previously stated, "Section 4905.24, Revised Code, does not require a finding that the existing provider is furnishing inadequate service. In fact, under the Celina decision... a second provider may be certified 'irrespective' of the adequacy of the first provider's service" (93-2069 at 12).

Through Section 4905.24, Revised Code, the General Assembly, recognizing that circumstances within the telecommunications industry may change, delegated the authority to the Commission to modify the public policy if it is in the public interest to do so. This delegation of authority to the Commission was upheld by the Ohio Supreme Court in Ashley Tri-County Mut. Tel. Co. v. New Ashley Tel Co., 92 Ohio St. 336 (1915), and Celina. In short, Section 4905.24, Revised Code, clearly permits competition where the Commission finds that entry into the market is proper and necessary for the public convenience and that a certificate should be issued by the Commission.

<sup>2</sup> GTE and CBT both make the rather curious argument that Time Warner cannot apply to this Commission pursuant to Section 4905.24, Revised Code, until it has first secured a municipal franchise to provide telecommunications services. See GTE Reply Brief at p. 6, CBT Reply Brief at p. 7. Such an argument implies that these companies would concur that a municipality has a right to revoke such a franchise of any telecommunications provider, including LECs and their IXC or cellular affiliates. We do not need to reach this issue but doubt that GTE and CBT would welcome the potential consequences of the arguments they raise on this issue.

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In light of this statutory delegation, the Ohio Supreme Court has held that decisions of the Commission pursuant to Section 4905.24, Revised Code, will not be disturbed unless such decisions are unreasonable or unlawful. In fact, the Court, in the Citizens Exchange case, expressly determined that the Commission had acted within its authority and found that the involved Commission action was reasonable and lawful.

Further, we continue to disagree with the interpretation of the Henderson Act endorsed by CBT and others. As we have previously stated, these statutes were adopted at a much later time than Section 4905.24, Revised Code, and address those situations in which no entity is supplying telecommunications service in a given area or where there are allegations of inadequate service by the existing provider. In fact, the Henderson Act statutes do not even mention, let alone tie-in, the procedures outlined in Section 4905.24, Revised Code. As in previous cases where the Commission has rejected this argument, there has been no allegation presented in this proceeding and none must be proven, that an incumbent LEC is furnishing inadequate service. Consequently, Sections 4905.241-4905.244, Revised Code, are inapplicable here.

Moreover, we continue to reject the position of CBT and others with respect to their interpretation of Section 4927.03, Revised Code. Again, as we have previously noted, Section 4927.03(B), Revised Code, provides, in relevant part, that "(t)he public utilities commission shall not approve or authorize any exemption from or modification of any provision of Chapter 4905. or 4909. of the Revised Code or any rule or order issued under them. . . ." From the plain language of this statute, it seems clear that it is inapplicable to the present situation because it applies only if the Commission is authorizing an exemption or modification from Chapters 4905 or 4909 of the Revised Code.

Additionally, as we have concluded previously, we believe that the "exclusive right" language referred to by Section 4927.03(B), Revised Code, is the right defined in Chapters 4905 and 4909 of the Revised Code. Certainly, the General Assembly was aware of the statutory language contained in Section 4905.24, Revised Code, and was further aware of this Commission's certification of alternative providers such as cellular and paging services dating back as early as 1964 when the General Assembly considered and adopted Section 4927.03, Revised Code. Nothing in Section 4927.03, Revised Code, indicated an intention to reverse the Commission's previous actions. Consequently, we construe the rights referenced in Section 4927.03, Revised Code, to be the rights defined in the statutes to which they relate. Section 4927.03(b), Revised Code, if anything, strengthened the requirement in Section 4905.24, Revised Code, that certificates must be obtained prior to one's transmitting telephonic messages within the state.

That Section 4927.03(B), Revised Code, was not intended to confer any exclusive right upon LECs is further underscored by the testimony concerning Amended Substitute House Bill 563 (HB 563) given by

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then Commission Chairman, Thomas V. Chema before the General Assembly when it considered HB 563. Chairman Chema testified that the goal of the proposed legislation was to recognize where competition exists and relax that segment, but maintain control where monopoly characteristics continue.

CBT and others also cite Commission decisions in support of their position including Telwest Communications, Inc., Case No. 89-1287-TP-ACE (August 2, 1990), and In re Paisley, 84 Ohio Law Abs. 577 (Pub. Util. Comm. of Ohio 1960). With respect to the Telwest decision, it was issued well prior to the current movement on both a state and federal level toward local competition and, therefore, has very little relevance to the instant proceeding. Likewise, the Paisley decision is inapplicable here. That case involved a boundary change request and was not considered under Section 4905.24, Revised Code.

Finally, various parties cite an Attorney General's opinion, 1912 OAG 666, issued the year after the predecessor statute to Section 4905.24, Revised Code, was enacted in support of their position. However, the Commission notes that, while this opinion does in fact clarify Section 4905.24, Revised Code, it indicates that the intention of the statute was to grant the Commission the authority to certify duplicate providers if it concludes that a public necessity exists. As stated in the opinion:

The purpose of the statute of 1911 was to give the Commission power to have exclusive control of public utilities and prevent duplicate companies from invading territory already occupied, unless a public necessity existed for the same, which question is exclusively under the control and supervision of your Commission.

Based on the foregoing, the Commission can find no reason why the analysis set forth in 93-1370 should not be extended to the present situation involving an application to provide switched local exchange services. It seems clear to us that either LECs have exclusive franchise rights granted by these statutes or they do not. There does not appear to be any scenario pursuant to Ohio's statutory scheme under which LECs have such rights for some services but not for switched basic local exchange services.<sup>3</sup> In concluding that LECs do not have exclusive local franchise rights to provide basic local exchange services, however, we are not suggesting that there might not be differences between switched services and other services where we have previously certified multiple providers. In fact, we acknowledged in the Time Warner AxS cases that the policy issues as-

<sup>3</sup> We would be remiss if we did not note that, as this order is being drafted, Congress is considering telecommunications legislation which, if enacted, would potentially preempt any arguable state franchise laws which purport to grant LECs exclusive franchises and thus moot this entire issue. We are unaware of any large Ohio LECs objecting to that particular provision of the federal telecommunications legislation.

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sociated with switched service are greater than those at issue in that case which was limited to a request for private line service. The statutes and the cases under them leave these policy issues to the Commission's determination by making such certificates to operate subject to a public convenience standard. As noted below, we have determined that these policy issues are best addressed in the upcoming generic docket and have placed appropriate limitations on the ability of this applicant to operate pending further development of those issues in that case or in negotiations between the applicant and incumbent providers.<sup>4</sup>

Public Convenience Issue:

The second threshold issue to be addressed prior to a consideration of Time Warner's managerial, technical, and financial capabilities relates to the Commission's obligations with respect to making a finding as to whether the granting of Time Warner's application is proper and necessary for the public convenience.

According to Time Warner, the Ohio legislature, in enacting Section 4927.02, Revised Code, has determined that competition is in the public interest and serves the public convenience. Consequently, Time Warner contends, the Commission's duty under Section 4905.24, Revised Code, to make a public convenience finding is satisfied through applying the two statutes in conjunction. In short, Time Warner asserts that, based on the policies enunciated in Section 4927.02, Revised Code, the Commission is in a position to find, as a matter of law, that competition in the local exchange arena serves the public convenience. MFS, AT&T, Columbus, Cablevision, OCTVA, and the MCI companies echo Time Warner's position.

CBT and those parties supporting its position, on the other hand, contend that, assuming the Commission has the jurisdiction to grant Time Warner's requested authority, it cannot do so until it holds further hearings in this case directed to the issue of public convenience. According to these entities, the plain language of Section 4905.24, Revised Code, compels a hearing on this issue. Further, the Ohio Supreme Court held in the Celina case that the public hearing mandated by Section 4905.24, Revised Code, must include specific evidence leading to a finding that a requested certificate is necessary for the public convenience.

Historically, there has been very little guidance for the Commission as to what constitutes public convenience within the meaning of Section 4905.24, Revised Code. However, with the codification of the state's telecommunications policy in Section 4927.02, Revised Code, the Commission was given a legislative mandate as to the criteria it was to consider in fulfilling its statutory responsibilities.

Section 4927.02(A), Revised Code, provides that the policy of this state is to:

<sup>4</sup> In reaching this decision we do not believe that we have transgressed any authority possessed by the City of Cincinnati.

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- (1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;
- (2) Maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications services;
- (3) Encourage innovation in the telecommunications industry;
- (4) Promote diversity and options in the supply of public telecommunications services and equipment throughout the state; and
- (5) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of public telecommunications services where appropriate.

Consequently, with the enactment of Section 4927.02, Revised Code, for the first time, the Commission has specific direction regarding factors to consider when evaluating public convenience pursuant to Section 4905.24, Revised Code. Specifically, the Commission is now to consider the goals of competition, diversity, and consumer choice in evaluating public convenience.

In light of the policies enumerated in Section 4927.02, Revised Code, the focus of a public convenience finding pursuant to Section 4905.24, Revised Code, has shifted away from the issue of whether competition itself should be permitted to whether the particular applicant at issue is going to further competition and the other policy goals enumerated in Section 4927.02, Revised Code. That is, the focus shifts to the managerial, technical, and financial capabilities of a proposed new entrant and the terms and conditions pursuant to which both the incumbent and the new LECs will provide telecommunication services to the public in an environment offering consumers diverse choices. Consequently, in order to determine whether the granting of Time Warner's application is necessary and proper for the public convenience, the Commission must review Time Warner's managerial, technical, and financial capabilities based on the evidence elicited at the hearing in this matter<sup>5</sup> and subsequently adopt appropriate parameters applicable to the services offered by both the new and incumbent LECs that are consistent with and advance the telecommunications policy stated in Section 4927.02, Revised Code.

Time Warner's Managerial, Technical, and Financial Abilities:

<sup>5</sup> As noted *infra*, the Commission acknowledges that there are other more generic issues associated with ensuring that switched basic exchange competition will further the goals and policies set forth in Section 4927.02, Revised Code. The Commission has the inherent authority to manage its own dockets. Senior Citizens Coalition vs. PUCO, 69 Ohio St. 2d 625 (1982); Toledo Coalition For Safe Energy v. PUCO, 69 Ohio St. 2d 559 (1982). We have determined that the proper way to proceed is to address those generic issues in our soon-to-be opened generic proceeding rather than relitigating those issues in each certificate case as the LECs would have us do. This case will be left open so that subsequent phases can consider the application of those generic policies to the applicant in this case, including the tariff review process

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At the hearing, Time Warner presented five witnesses in support of its position that it possesses the requisite financial, technical, and managerial capabilities to provide the services it proposes, Danny G. Engleman, Director of Switch Technologies for TWC; Tom Morrow, President of TWC; David J. Rayner, Controller for TWC; Thomas P. Staebell, Director-Interconnect Management for TWC; and Raymond Wendell, Director-Product Marketing for TWC.

CBT presented the testimony of four witnesses in support of its position that Time Warner is not managerially, technically, or financially qualified to provide its proposed services, Barbara J. Stonebraker, a Senior Vice President with CBT; Joseph H. Warkany, a retired Senior Vice President-Technology & Network Services for CBT; James H. Vander Weide, Ph.D., a research professor of finance and economics at the Fuqua School of Business of Duke University and president of Financial Strategy Associates, a strategic and financial consulting firm; and Dr. Bart Stuck, a consultant in the computer and telecommunications industry employed by Business Strategies, LLC.

OCC submitted the testimony of F. Ross Pultz, on the issue of Time Warner's financial capability.

Turning first to the testimony of Mr. Engleman, on behalf of Time Warner, he testified regarding the structure of Time Warner's proposed network and sponsored Time Warner Exhibit 3 consisting of his prefiled direct testimony and attachments. According to Mr. Engleman, the telephone network is being designed to work in conjunction with the cable network. The cable system is currently being upgraded through the broad deployment of fiber, electronics, and other equipment (Time Warner Ex. 3 at 2). Under the telephony architecture Time Warner intends to use, an incoming telephone call will arrive through a switch and travel over a self-healing synchronous optical network (SONET) transport network to a SONET add/drop multiplexer (Id.). The spectrum will be allocated on a per call basis through a controller which will permit the call to be routed through the network without interfering with the video service (Id.). The call will then be sent over the network from a host digital terminal (HDT) to a fiber node and will be carried over the Time Warner cable to the network interface unit (NIU) on a customer's house where the signal will be split allowing the telephone call to go to the telephone (Id.). For outgoing calls, the process is reversed (Id.). This hybrid fiber-coaxial (HFC) network is a broadband network in its capacities (Id.).

The Time Warner switched architecture was designed to utilize Time Warner's current equipment once an NIU is installed on a customer's premises (Time Warner Ex. 3 at 3-4). An NIU is similar to the telephone network interface (TNI) currently used by telephone companies (Id. at 4). A customer's inside wiring will terminate on an RJ-11 jack in the inside of the NIU (Id.). Time Warner currently has customers being served by HFC access equipment in a multiple dwelling unit (MDU) in Rochester, New York. Prototype equipment for single family residences is currently under vendor test and scheduled to be field trialed in the near future (Id.).

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The Time Warner telecommunications system will be monitored by a network operations center (NOC) located in Colorado (Time Warner Ex. 3 at 5). The NOC is a central point of contact for business customer ordering of telecommunications services, provisioning of services, billing and collections, and network surveillance and management (Id.) Through the NOC, personnel monitor telecommunications systems 24 hours a day, seven days a week, and can identify performance deviations from operating specifications for a given network component (Id.) The NOC presently serves operations in several Ohio locations including the operations of the competitive access provider (CAP) facilities in northeast Ohio, western Ohio, Columbus, and Cincinnati (Id.).

On cross-examination by CBT, Mr. Engleman testified that he is the chief architect of Time Warner's telephone network that would work in conjunction with cable, that the proposed telephone network will not work until the cable network is upgraded through the installation of fiber lines between the laser transmitter receiver and the fiber node, and that the cable division is being provided standards that must be met in upgrading its system to enable telephony (Tr. I, 97-103). With respect to further additions that need to be made to the existing cable network, Mr. Engleman testified that a switch, multiplexers, a SONET ring, and HDTs need to be added (Id. 103-106). Additionally, Mr. Engleman testified that the HDT works for the telephone network but has nothing to do with the television network, that the HDT feeds into a combiner where the television and telephone signals are combined onto one line, that from the combiner in the distribution hub the telephone and television signals are put on an RF carrier and carried in different frequency bands on the same line, that from the HDT out to the fiber node it is an optical signal, and that from the fiber node to the residence it is a coax electrical signal (Id. at 106-107).

Further, Mr. Engleman testified that the NIU and the HDT are being built to industry standards but there is no industry standard for the interface that goes between the HDT and the NIU and those standards are proprietary (Id. at 114). Time Warner has established a reliability goal for the NIU which is based on TR-909, the standard to which all LECs are held (Id. at 120). A source of electrical power is required to operate the NIU and this power will be provided through the coaxial tree and Time Warner is planning to add backup equivalent to that provided by the LECs (Id. at 129-132). Additionally, if another carrier were to connect to Time Warner's network upstream from the HDT, the carrier would have to rely on Time Warner providing the signal from the customer premises to the interconnection point (Id. at 137).

Raymond Wendell testified regarding Time Warner's proposed services and sponsored Time Warner Exhibit 4 consisting of his pre-field direct testimony. According to Mr. Wendell, Time Warner intends to offer local exchange services to residences as well as businesses within the franchise areas of its cable affiliates (Time Warner Ex. 4 at 3). Time Warner will provide service to both current cable sub-

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scribers and those who do not currently subscribe to cable television service (Id.) Additionally, Time Warner will have the capability to offer lifeline services, 911 services, operator services, directory assistance services, and equal access to interexchange carriers (Id. at 4-5). Time Warner does not intend to offer interLATA toll services (Id. at 5).

On cross-examination by CBT, Mr. Wendell testified that he had managerial experience within the product marketing group but that he had no technical or financial responsibility relating to Time Warner (Tr. I, 177). Further, the upgrade to the cable network will be done gradually and will not be turned on all at once in a given network or division (Id. at 178). Further, Mr. Wendell testified regarding Time Warner's ability to comply with the Minimum Telephone Service Standards (Id. at 179-188). Finally, Mr. Wendell testified that Time Warner contemplates a package that would provide discounts to customers agreeing to subscribe to both telephone and cable services (Tr. 189).

David J. Rayner testified regarding the accounting systems established by Time Warner for the operation of its businesses and sponsored Time Warner Exhibit 5 consisting of his pre-filed direct testimony. According to Mr. Rayner, Time Warner has accounting systems in place which permit it to accurately record and maintain information about its various operations (Time Warner Ex. 5 at 1). Further, the accounting systems used by Time Warner are capable of providing information sufficient to permit the Commission to fulfill its statutory duties with respect to the oversight of certified telecommunications companies (Id. at 2).

On cross-examination by CBT, Mr. Rayner testified that TWI is a Delaware corporation which has three principal businesses: publishing, music, and entertainment (Tr. 1, 154). Further, the entertainment business is run by TWE and the three limited partners of TWE are Itochu, Toshiba, and U.S. West (Id.). Additionally, TWE operates three divisions including the filmed entertainment division, the programming and HDO division, and the cable division and TWC is part of the cable division (Id. at 156). TWI has audited financial statements but TWC and the cable division do not have independently audited financial statements (Id. at 159). Time Warner has general ledger accounts but the activity in them is minimal and, in fact, the accounting system, with respect to specific accounts, is very much in a developmental stage (Id. at 161-163).

Thomas P. Staebell testified regarding Time Warner's capabilities and resources to negotiate and finalize interconnection agreements and sponsored Time Warner Exhibit 6 consisting of his pre-filed direct testimony. According to Mr. Staebell, collocation is required to be addressed during the negotiation and finalization of carrier to carrier arrangements and there are differences in interconnection, operability considerations, and collocation from LEC to LEC and state to state (Time Warner Exhibit 6 at 3). Further, a number of subjects generally enter into the negotiation and finalization of carrier to

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carrier agreements including compensation, collocation, and number portability (Id. at 4).

On cross-examination by CBT, Mr. Staebell testified that if interconnection is seamless and transparent, when a customer picks up the telephone to make a call and has trouble, the source of the trouble is transparent to the customer and that the customer may call his own telephone company to report the trouble even if the source of the trouble is with another company (Tr. I, 202). Additionally, Mr. Staebell testified that the cost of interconnection is an important element in planning a business and the financial viability of a business would, in part, hinge on the terms of the interconnection agreement (Id. at 202-203).

Tom Morrow testified regarding Time Warner's financial and managerial capabilities and sponsored Time Warner Exhibit 7 consisting of his pre-filed direct testimony. Mr. Morrow testified regarding the relationships among the various Time Warner entities. Further, Mr. Morrow testified that Time Warner anticipates that expenditures for the new equipment and upgrades of existing equipment related to the provision of service in Ohio will be significant but that TWE and TWC have the ability to finance this endeavor because they have access to significant amounts of capital (Id.).

In response to questions from the chairman of this Commission, Mr. Morrow testified that Time Warner would expect to operate subject to the rules to come out of the Commission's generic proceeding (Tr. II, 20). Further, Mr. Morrow testified that Time Warner needs interconnection agreements with the LECs before it could provide service to its customers regardless of the outcome of this certification proceeding (Id. at 25). Additionally, Time Warner is committed to providing interconnection of its network with any other provider that wants to interconnect with it in the same way Time Warner is seeking to interconnect (Id. at 29). Mr. Morrow also testified that it is Time Warner's intention to create an integrated business such that a customer should only need to place one call to buy cable and/or telephone services (Id. at 32). Further, according to Mr. Morrow, it is the intention to keep separate records of the cable and telephone operations to the extent required (Id. at 33). Finally, Mr. Morrow stated that there is no question in his mind or in that of the investment community regarding the ability of Time Warner and its family of companies to invest in the telephone business (Id. at 35).

On cross-examination by CBT, Mr. Morrow testified that Time Warner was capitalized with \$10,000--\$9,900 from TWE and \$100 from TWC and that these entities are under no continuing obligation to provide any further capital to Time Warner (Tr. II, 49-50). Further, Mr. Morrow testified that Time Warner would submit a budget to TWC, that TWC receives budget requests from other entities outside Ohio, and that TWC in turn submits a budget request to Time Warner Cable (Id. at 51). Additionally, a number of other entities submit budget requests to Time Warner Cable, a number of entities submit budget requests to the various other Time Warner entities which are in turn

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submitted to TWE and TWE ultimately submits a budget request to TWI (Id. at 53). Mr. Morrow further testified regarding the debt load of the various Time Warner entities, and of various plans to attempt to reduce the debt load (Id. at 57). Further, Mr. Morrow testified that Time Warner will essentially be managed by TWC and that TWC has a number of employees who formerly were employed by US WEST (Id. at 66).

CBT witness Barbara Stonebraker testified regarding the management standards that Time Warner should be required to meet in a competitive environment and sponsored CBT Exhibit G consisting of her prefiled direct testimony. According to Ms. Stonebraker, the standards followed by CBT, including a low number of trouble reports and a proactive commitment to seeking out and eliminating potential service problems, would be a reasonable benchmark for Time Warner (CBT Ex. G at 17-18).

On cross-examination, Ms. Stonebraker testified regarding the corporate structure of CBT, and that it is Cincinnati Bell, Inc. (CBI) that goes to the market to raise equity capital (Tr. I, 117-121). The process by which CBI determines its capital resources is a function of the individual business segments submitting budgets and obtaining management approval (Id. at 121).

CBT witness Joseph Warkany testified regarding the technical aspects of Time Warner's proposed network and sponsored CBT Ex. H consisting of his prefiled direct testimony. According to Mr. Warkany, the first requirement for any public network is that the overall network architecture and the network elements conform with technical standards and requirements applicable for facilities to be used in public networks (CBT Ex. H at 4). The task facing a provider of public telecommunications is to implement a network in a cost-effective manner which will meet a given set of network performance criteria (Id.). A number of variables will shape a provider's design of a public network including the services to be offered, market demand for each service, interconnection requirements, and service standards (Id. at 5-6). Underlying the technical standards are detailed specifications which identify functional requirements and interfaces for each individual type of network element described in the overall network architecture (Id. at 7). In Mr. Warkany's opinion, Time Warner has failed to demonstrate that its network will meet these standards (Id. at 8). Further, according to Mr. Warkany, proper network design and construction is not all that is needed to assure that a provider of public network service will deliver service to its customers which meets the Commission's performance standards (Id. at 19). Rather, operation, administration, and maintenance (O.A.&M.) aspects are of equal importance (Id. at 20). O.A.&M. are important because poor performance on one network can adversely affect other networks (Id.). Mr. Warkany further testified that there are special tools and management competencies required for O.A.&M. relating to software administration and operations systems (Id. at 22). Finally, Mr. Warkany testified that it is unclear what procedures Time Warner plans to

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follow in introducing new products or technologies into its network (Id. at 23).

On cross-examination, Mr. Warkany testified that for purposes of preparing his direct testimony he reviewed the application, Time Warner's responses to CBT's interrogatories, and Mr. Morrow's deposition testimony (Tr. III, 20). Further, Mr. Warkany testified that in preparing his testimony he did not speak with any of the CBT representatives that visited the Rochester facilities nor did he review Mr. Engleman's testimony but that his testimony was drawn on the many years of experience as the chief network officer at CBT (Id. at 29-30, 33).

CBT witness Dr. James H. Vander Weide testified regarding Time Warner's financial capabilities and resources for providing facilities-based local exchange service in Ohio and sponsored CBT Exhibit J consisting of his prefiled testimony. According to Dr. Vander Weide, Time Warner has not identified which of the many Time Warner companies will own the assets required to provide local exchange service in Ohio (CBT Ex. J at 6). Further, in Dr. Vander Weide's opinion, Time Warner has no present ability to finance the building of a telecommunications network in Ohio (Id. at 8). Further, Time Warner could only have the continuing ability to finance its endeavor if TWE and TWC have available to them the necessary funds to finance the endeavor and they voluntarily chose to contribute additional capital to the applicant in this case (Id. at 8-9). Dr. Vander Weide testified that he was unable to analyze the ability of TWC to finance the building of an advanced telecommunications network because TWC's financial statements are not publicly available and TWC does not have any pro forma financial statements (Id. at 9). However, based on the testimony of Mr. Morrow, it appears that TWC does not have a separate ability to finance the building of an advanced telecommunications network (Id. at 9). Further, according to Dr. Vander Weide, TWE would have a very difficult time raising additional funds to finance the building of a telecommunications network (Id. at 13-14). TWE's ability to obtain funds from the earnings of the business are limited by TWE's earnings which have been low or negative to date and have been used by TWI to reduce TWI's debt (Id. at 14). Further, TWE's ability to raise additional funds by selling debt is limited by TWE's credit rating (Id.) Further, Time Warner has been unsuccessful in obtaining equity infusions into their business (Id.). Additionally, Dr. Vander Weide testified that, in his opinion, TWI is limited by the same constraints as TWE with respect to raising additional funds (Id. at 15). Moreover, Dr. Vander Weide testified, TWE and TWI have no legal obligation to make additional capital contributions to Time Warner (Id. at 17).

On cross-examination, Dr. Vander Weide testified that he was not aware of any failure on the part of either TWI or TWE to meet any debt service requirements since 1992 or of any failure to pay preferred dividends when due or to redeem any notes (Tr. III, 54-55). Further, Dr. Vander Weide testified regarding a number of recommendations in the recent financial press to buy TWI stock (Id. at 64).

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CBT witness Dr. Bart Stuck testified regarding technical issues that will need to be resolved in order to construct a telephone system on Time Warner's existing cable television networks and sponsored CBT Exhibit I. According to Dr. Stuck, he has concerns regarding the availability of the hardware and software components in Time Warner's network, the method of powering the network to provide lifeline services, the cost of training staff to install and operate the network, and the cost of implementing such a network (CBT Ex. I at 4). With respect to the availability of the necessary hardware and software, Dr. Stuck is concerned that there is no industry standard for the HDT and NIU that Time Warner intends to use to simultaneously transmit cable television and telephonic signals across the same coaxial cable (Id.) According to Dr. Stuck, commercially ready NIUs are unavailable meaning that the cost of producing NIUs may be too high for a successful telephone business and the NIU is an unproved product (Id. at 5-6). Dr. Stuck also testified regarding concerns relating to the impact on telephone service if a failure occurs in the NIU or the HDT (Id. at 7). Further, Dr. Stuck testified that the power scheme typically used by cable providers may not provide sufficient alternate power supplies in an emergency situation (Id. at 7-8).

For purposes of cross-examination at the hearing, Time Warner submitted Dr. Stuck's deposition testimony as Time Warner Exhibit 11. According to this testimony, in preparing his direct testimony, Dr. Stuck reviewed the application in this matter, various filings made by some of the parties to this matter, the prefiled testimony of Time Warner's witnesses, and Mr. Engleman's deposition testimony (Time Warner Exhibit 11 at 25-26). Dr. Stuck did not visit the Rochester facilities but instead, in forming his opinion, relied on the written materials provided to him and a description of the Rochester facilities provided by counsel for CBT (Id. at 31).

OCC witness F. Ross Pultz testified regarding Time Warner's financial condition in OCC Exhibit 1. According to Mr. Pultz, under his analysis, TWI and TWE are in a much stronger financial position than is reflected by net income (OCC Ex. 1 at 10). Additionally, companies like Time Warner that are trying to get into the local telephone business may not always have excellent bond ratings because their abilities to succeed in the local telephone market is unproved and requires investments that may take years to recover (Id.).

In order to rebut the testimony of CBT witnesses Warkany and Stuck, Time Warner offered additional testimony by Mr. Engleman as Time Warner Exhibit 3A. According to Mr. Engleman, in response to issues raised by Mr. Warkany, Time Warner's network is being designed to meet telecommunications industry standards and will not degrade the public switched network at all (Time Warner Ex. 3A at 1-2). In response to concerns raised by Dr. Stuck, Mr. Engleman testified that there is no question that the network architecture will work based on the services currently being provided in Rochester and the network will provide sufficient backup power through batteries so that the loss of commercial power will not result in the loss of telephone service (Id. at 3). Further, with respect to Dr. Stuck's concerns

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regarding the availability of hardware and software, Mr. Engleman testified that Time Warner has established rigorous standards for the hardware and software to be used in its system (Id. at 3-4). With respect to Dr. Stuck's concerns that the NIU to be used by Time Warner is an unproved product, Mr. Engleman stated that, as with all new technologies, the parts of Time Warner's network will be tested thoroughly both individually and as a system before they are field tested to make sure that they are capable of functioning correctly under a variety of conditions (Id. at 4). Additionally, with respect to Dr. Stuck's suggestion that Time Warner's proposed network needs to be installed and operated on a large scale before anyone can say with certainty that the network will provide the reliability presently provided by LECs, Mr. Engleman asserted that if this standard were imposed on all suppliers of products to the telecommunications industry, it is unlikely that progress would ever occur and that such a standard would make it effectively impossible for anyone to break into the LEC market (Id. at 5). Further, it is not unusual, as Dr. Stuck suggests, that there is a lack of price quotes for NIUs because vendors would lose all bargaining power for these highly proprietary items (Id. at 6). Finally, Mr. Engleman testified that the quality of Dr. Stuck's investigation of the Rochester field trials lacked depth and quality (Id. at 7).

On cross-examination, Mr. Engleman testified that there is no industry technical standard for the communications link between the HDT and the NIU (Time Warner Exhibit 3A at 73). Further, with respect to an individual customer, if there is an NIU failure, that customer would have no telephone service (Id. at 79).

#### DISCUSSION:

In its post-hearing briefs, Time Warner contends that, based on the testimony at hearing, it has established its managerial, technical, and financial capabilities to provide the services it proposes. Additionally, the parties to the stipulation agree that Time Warner is technically, managerially, and financially capable of providing the full range of local services as described in its application. According to Time Warner, the stipulation meets each of the Commission's criteria governing review and approval of stipulations. Further, Time Warner contends that the stipulation is reasonable in light of the record.

With respect to the record regarding its technical abilities, Time Warner contends that the testimony of Mr. Engleman relating to the physical plant, architecture, and technology which Time Warner will utilize in the provision of telecommunications services demonstrates its technical ability. Moreover, Time Warner contends that its technical ability is demonstrated by virtue of the entry into telephony of Time Warner AxS of Rochester in Rochester, New York. Finally, Time Warner contends that its technical capabilities have been demonstrated to the Commission's satisfaction in the context of the certification of three Time Warner competitive access providers (CAPs).

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With respect to its financial abilities, Time Warner contends that it has no question about its ability to raise funds to enter the telephone business because it is part of a much larger organization which has the ability to finance Time Warner's endeavor. In support of this position, Time Warner cites to the testimony of Mr. Morrow and OCC witness Mr. Pultz and the Annual Report submitted with the application.

Finally, Time Warner asserts that it is managerially qualified to receive a certificate based upon the testimony presented at hearing and the fact that the Time Warner CAPs are currently operating in Ohio. Further, Time Warner has gained first-hand experience in the local exchange business in Rochester. According to Time Warner, management skills have been reflected in customer interest in retaining Time Warner as the preferred supplier of local exchange service. Finally, because Time Warner and US West have entered into a business relationship, Time Warner has the ability to utilize the expertise of US West.

With respect to the testimony offered by CBT, Time Warner contends that the testimony of Ms. Stonebraker is entitled to little weight. In support of this position, Time Warner asserts that Ms. Stonebraker failed to undertake investigation of the facts upon which she based her testimony, CBT admitted in response to discovery requests that its standards of managerial qualifications was not relevant, and, based on Time Warner Ex. 9, CBT has recognized that Time Warner has qualities that CBT should emulate. Similarly, Time Warner contends that the testimony of Mr. Warkany is undeserving of any weight because he made little real effort to obtain facts upon which to make a reasoned evaluation of Time Warner's technical capabilities and chose to ignore evidence in the record. Likewise, Time Warner attacks Dr. Stuck's testimony on grounds that he also failed to undertake a complete investigation of Time Warner's proposed network before offering his opinion as to Time Warner's capabilities. Finally, with respect to Dr. Vander Weide, Time Warner maintains that he was unable to state that Time Warner did not have the financial capability to fund entry into the local exchange market.<sup>6</sup>

CBT and various other parties contend that Time Warner is not technically, managerially, or financially capable of providing its proposed services. In fact, at the close of the hearing, CBT made a motion to dismiss Time Warner's application for Time Warner's failure to meet its burden with respect to these issues. The ALLTEL companies joined in CBT's motion. The Attorney Examiner took this motion under advisement. CBT also contends that the stipulation advocated by Time Warner has no effect on this case.

With respect to Time Warner's technical abilities, CBT and others contend that in order to provide the services it proposes, Time Warner will have to use devices that have never been implemented in

<sup>6</sup> We note that Time Warner moved to strike certain portions of CBT's brief asserting that CBT made improper use of CBT Exhibit N, a document filed under seal. This motion to strike is denied.

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the field on a wide scale, Time Warner has no control over the network upgrades that are necessary to provide the proposed services, and the network technology Time Warner proposes to use is unproved and there are no industry standards established for it. In support of this position, these parties rely on the testimony of CBT witnesses Warkany and Stuck. With respect to Time Warner's managerial capabilities, these parties point to the testimony of Time Warner witnesses Morrow and Wendell and contend that Time Warner has failed to provide any evidence of its managerial capabilities to provide the proposed services. Finally, with respect to Time Warner's financial ability, these parties contend that based on the testimony of Mr. Morrow, Time Warner is uncertain as to how its entry into the local exchange market will be financed.

Contrary to the view of CBT and others, based upon the testimony at the hearing in this matter, the Commission believes that Time Warner is managerially, technically, and financially qualified to provide the services it proposes. Consequently, CBT's motion to dismiss will be denied. It is clear from the testimony of Mr. Engleman that Time Warner understands the issues involved in constructing a network and has the expertise available to address those issues. While the HFC network proposed by Time Warner may be new to Ohio, we are comfortable with Time Warner's steps to ensure that this network will work. Further, we believe, based upon our experience with the Time Warner CAP entities, that Time Warner has the managerial capabilities to provide its proposed services. Finally, we believe that the applicant in this case, as a member of the Time Warner Entertainment family of companies, certainly has the financial ability to provide its proposed services. While there may be some conflicting testimony in the record on this issue, we find that there is sufficient testimony to find Time Warner financially fit at this point in time. Consequently, we believe that Time Warner has met its burden with respect to establishing that it is managerially, financially, and technically able to provide service pursuant to Section 4905.24, Revised Code, and is deserving of receiving a certificate subject to the limitations described below.

As noted at the outset of this order, Time Warner's application raises a number of issues, some of which are company specific and have been addressed to date in this proceeding, and some of which are industry-wide and currently are being addressed by staff in anticipation of a generic docket. While we find that the General Assembly has addressed the basic policy issue and, as a matter of law, has determined that competition and diversity of suppliers should be promoted in this state, the generic docket will establish policies that will ensure that the other policies set forth in Section 4927.02, Revised Code, are furthered.<sup>7</sup> Thus, the public convenience requirement of Section 4905.24, Revised Code, will result from a finding that a particular applicant is financially, managerially, and

<sup>7</sup> Although CBT argues that the General Assembly's call for innovation and efficiency in the provision of service can be fully met under the existing monopoly system, the record indicates that just the mere filing of this case has internally within the LECs spurred new efforts toward promoting an even higher quality of service and increased focus on customers (See Time Warner Exhibit 9).

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technically able to provide its proposed services, and authority to operate under the statute (which occurs, *inter alia*, through approval of tariffs) will occur once the generic case has progressed sufficiently to allow the Commission to meaningfully review such tariffs. While we have concluded that Time Warner has met its burden of establishing that the granting of its authority is proper and necessary for the public convenience, in that it has demonstrated that it is capable of providing service such that it would promote competition consistent with the state's telecommunications policy, some of the issues to be addressed on a generic basis may have public interest aspects.

We note, as some of the parties have pointed out, that dealing with the generic issues would have been inappropriate in an individual certification case and that is why we have specifically chosen not to address them in the context of reviewing Time Warner's application. Moreover, it is within our inherent authority to manage our docket in the way we believe to be most efficient, and we found it to be more appropriate to address these issues in a generic manner. See Toledo Coalition.<sup>8</sup>

Many of the industry-wide issues impact both the content of Time Warner's final proposed tariff and our review of that tariff. Based on our conclusions above that we have the authority to certify multiple providers of basic local exchange service and that Time Warner has met its burden of demonstrating its capabilities, we are now confronted with the issue of whether it would be appropriate to issue a certificate to Time Warner prior to a resolution of the generic issues and prior to final approval of a tariff. Contrary to the view espoused in some of the briefs, we believe that it would be.<sup>9</sup>

In light of the above, we will grant Time Warner's application for a certificate to provide its proposed services, subject to a written affirmation by an appropriate officer of Time Warner filed in this docket, that Time Warner accepts the certificate and unconditionally agrees to fully abide by all terms, conditions, guidelines, and decisions subsequently adopted by the Commission as proper and necessary to protect the public interest relative to the provision of local exchange service. However, given the issues remaining to be addressed in the generic deliberations, Time Warner's commencement of

<sup>8</sup> We note that Ameritech agrees that these issues should be resolved in the generic case, not in individual certification proceedings (Ameritech Brief at 8). Further, Ameritech argues that the five policy goals set forth in Section 4927.02, Revised Code, are interrelated and must be balanced (*Id.* at 6). We agree with Ameritech on this point. This is precisely what the generic docket will be designed to do. In light of this, we would expect that the various parties would target their resources toward developing solutions for the Commission's consideration in that docket rather than engaging in costly and unduly contentious litigation in the individual certification cases as they have done to date.

<sup>9</sup> Ohio's small LECs argue for a blanket exemption and exclusion of their service territories from the scope of this application. The Commission notes that we will consider the appropriateness of small LEC issues in the context of our generic docket on a local competition framework.

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service to the public will be delayed until the Commission is satisfied that it is fully prepared to evaluate the reasonableness and appropriateness of proposed local service tariffs and their consistency with state telecommunication goals. Upon Time Warner's acceptance of the certificate and concurrence with the stated conditions, all prerequisites to full local exchange carrier status for Time Warner will have been satisfied. Accordingly, Time Warner is directed to initiate negotiations with other LECs for the purposes of developing interconnection agreements. Such agreements must be submitted to the Commission for review and approval. A LEC with whom such negotiations are initiated is directed to negotiate in good faith with Time Warner. The Commission directs Time Warner and the relevant LEC to file written reports in this docket on the status of such negotiations within 60 days of their commencement and every 60 days thereafter. Time Warner and the relevant LEC are further directed to coordinate these negotiations closely with Commission staff to ensure compatibility with the local competition docket.

We note CBT's point that Time Warner Communications of Ohio, L.P. may be a shell corporation designed to immunize the parent from claims. We think this concern is worth considering but note that, on the other hand, we have oftentimes required separate affiliates to prevent cross-subsidization and to protect the utility from claims against its parent (See, e.g., 84-469 and 93-1081). In order to address this issue, we will require, in the affidavits filed in this case, that the officers of the company certify that sufficient financial resources will be available at all times to the certified entity to satisfy its public utility obligations as determined by Title 49 of the Revised Code and this Commission. Maintenance of this certificate will be conditioned upon the applicant's continued compliance with this affirmation.

There remain two specific issues which, as CBT points out, were left somewhat open on the record. In our initial order we underscored the importance of Time Warner designing its network in such a manner as to be as open as we may require of the LECs. We do not wish to later be confronted with arguments by Time Warner that such requirements will involve costly modifications to an already designed network. Accordingly, Time Warner's affidavits should attest to the fact that it will, at all times, design its network to permit interconnection and unbundling at least to the same extent as may be required of incumbent Ohio LECs.

In this same vein, Time Warner is directed to work with our Staff to review its proposed accounting procedures and is to affirm by affidavit that it will abide by any public utility accounting procedures adopted by this Commission pursuant to Section 4905.13, Revised Code.

The Commission notes that the issuance of a certificate conditioned upon the resolution of various issues is not unprecedented. Rather, there is Commission precedent for doing so established in circumstances virtually identical to those presented here. In 944, where we established the framework for competitive carriers, we is-

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sued certificates conditioned upon review by the Commission of the applicants' proposed tariffs and ultimate approval of those tariffs (See, e.g., 84-469). Additionally, in our alternative operator service proceedings, in Case No. 88-560-TP-COI, we issued interim certificates to carriers pending the issuance of final rules. In this instance, however, we are taking an even more conservative approach by not letting Time Warner provide service on its first day of certification, in order to ensure that the remaining issues which need to be addressed are appropriately resolved.

Moreover, we believe that issuance of a certificate to Time Warner will not jeopardize the current provision of telephone service to the Ohio consumer because LEC service will continue undisturbed for the near future. In the meantime, the Commission will continue to address the numerous issues inherent to the introduction of local competition.

FINDINGS OF FACT:

- 1) On October 26, 1994, Time Warner filed an application with the Commission requesting a certificate of public convenience and necessity authorizing it to provide direct and resold exchange services, including local exchange and dialtone services, in all or parts of Adams, Allen, Auglaize, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Delaware, Franklin, Greene, Hamilton, Hardin, Highland, Logan, Madison, Mahoning, Marion, Medina, Mercer, Miami, Montgomery, Pike, Portage, Preble, Putnam, Scioto, Shelby, Stark, Summit, Tuscarawas, Union, Van Wert, Warren, and Wayne counties, Ohio.
- 2) The following parties were granted intervention: Ameritech, GTE, MFS, the ALLTEL companies, CBT, ICRC, TSC, Columbus Grove, Champaign, Cincinnati, AT&T, Cablevision, OCC, FoneNet, Sprint, Columbus, the MCI companies, TCG, OTA, Oxford, United, Hamilton County Commissioners, Chillicothe, Oxford, Century, OCTVA, Ridgefield Homes, and North Ridgeville.
- 3) A five day hearing on Time Warner's managerial, technical, and financial capabilities to provide its proposed services was held between May 31 and June 23, 1995, at the offices of the Commission.
- 4) Initial briefs addressed to, among other things, the issue of the Commission's authority to grant Time Warner's application were filed on July 7, 1995, and replies were filed on July 14, 1995.
- 5) Issues surrounding this application which are more appropriately addressed on an industry-wide basis are currently under consideration by the Commission staff.

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CONCLUSIONS OF LAW:

- 1) The Commission has jurisdiction to certify multiple providers of basic local exchange services pursuant to Section 4905.24, Revised Code.
- 2) The telecommunications policy of this state promotes diversity and option in the supply of public telecommunications services and equipment throughout the state and encourages innovation in the telecommunications industry, among other things, as set forth in Section 4927.02, Revised Code.
- 3) Time Warner has met its burden of demonstrating that the granting of its application, coupled with the conditions set forth in this opinion and order and the Commission's consideration of a multitude of issues in the upcoming generic proceeding, is proper and necessary for the public convenience. The Commission will approve the tariffs necessary to effectuate this order once the generic docket has progressed sufficiently to allow the Commission to determine if these tariffs will further the standard set forth above.

ORDER:

It is, therefore,

ORDERED, That the application of Time Warner is granted to the extent set forth above and CBT's motion to dismiss is denied. It is, further,

ORDERED, That Time Warner and the relevant LECs begin negotiations relating to interconnection agreements as set forth above and that Time Warner and the relevant LECs report the status of any negotiations as set forth above. It is, further,

ORDERED, That Time Warner's motion to strike is denied. It is, further,