

August 15, 2005

Jaclyn A. Brillling, Secretary
New York State Department of Public Service
3 Empire Plaza
Albany, NY 12223-1350

Re: CASE 05-C-0616 Proceeding on Motion of the Commission to Examine Issues related to the Transition to Intermodal Competition in the Provision of Telecommunications Services.

Dear Secretary Brillling,

Please accept these comments in Case 05-C-0616 regarding the transition to intermodal competition issues.¹ The responses below will address several of the questions listed in Appendix A of the Commission's June 29, 2005 order in this proceeding. For those questions where there are no comments, the question has not been included below.

Area # 1 Consumer Protections Questions

Question #1: In view of the proliferation of competitive alternatives, is it appropriate for the Commission to relax some of its traditional consumer protections applicable to wireline companies?

¹ CASE 05-C-0616-Proceeding on Motion of the Commission to Examine Issues related to the Transition to Intermodal Competition in the Provision of Telecommunications Services. Order Initiating Proceeding and Inviting Comments, Issued and Effective June 29, 2005.

Response: Yes, wireline companies should be permitted to have two types of service offerings. The first would be “traditional wireline service” as provided today with the full level of consumer protections. This is needed since there are many low income and other consumers in New York State that need the full amount of consumer protections. The second type of service would be “competitive based wireline service” where a traditional wireline company may provide service to consumers at a different cost than traditional service but without the mandated consumer protections. Customers of wireline companies would be allowed to choose the type of service they desire:

1. “traditional wireline service,” or
2. “competitive based wireline service.”

These options have a dual purpose. First, they will allow a traditional wireline company to face the challenges associated with competition. Second, they will provide regulatory protections to those customers that choose “traditional wireline service.”

Question #2: Are there core consumer protections (e.g., slamming, cramming, termination notices, contract disclosures) that should be enforced by the Commission, notwithstanding the existence of competitive choices? Should a set of core consumer protections apply to wireless and VoIP/cable telephony, as well as traditional wireline?

Response: The set of currently available consumer protections should apply to “traditional wireline service” provided by wireline companies as set forth in question #1 above. Those wireline consumers who choose “competitive based wireline service” and all other intermodal customers should not be provided with consumer protections by the Commission. The New York State Consumer Protection Board (CPB) could provide

these optional consumer protections, if necessary, for consumers that choose “competitive wireline service.” State appropriations and federal grant programs could fund these programs.

Question #3. Does the Commission have a unique role to play in addressing consumer complaints? Should a common forum for the timely handling of consumer complaints be available under the auspices of the Commission? In other words, should the Commission’s complaint handling function and the authority to enforce core consumer protections be extended to wireless and VoIP telephony? Is so, what should the nature and scope of that function be?

Response: The only consumers to have these protections by the Commission should be wireline consumers with “traditional wireline service.” All other intermodal users including “competitive based wireline service” users for traditional wireline companies should not have these protections since they choose to have service provided by a competitive entity. They can switch providers or have the CPB resolve their complaints.

Area #2 Universal Service Questions

Question #1: Do the universal service goals articulated in 1996 remain valid in 2005?

Response: Yes, but only for “traditional wireline service” consumers of wireline companies. While today’s goal of the Commission is to have all consumers in a position of competitive choice, there is still a need for universal service requirements. If the requirements were substantially modified and/or eliminated, low-income consumers, Seniors, and those in rural areas in New York State would most likely

suffer. It is premature for the Commission to substantially change the universal service options today. They should be maintained for customers choosing the “traditional wireline service” option.

Question #2: Our view that “basic service” should be periodically re-evaluated appears appropriate in view of the expanding use of and reliance on high speed and wireless telecommunications capabilities. Does the existing definition of “basic service” remain appropriate in today’s environment?

Response: Basic service is still appropriate for “traditional wireline service” users of wireline companies.

Question #4: What approaches should we pursue to ensure the continued availability of affordable basic telecommunications service to all consumers in New York?

Response: The “traditional wireline service” offered by wireline companies will be the option that provides consumers with basic service and full consumer protections from the Commission. The Commission should conduct special studies to determine if there are significant cost savings between the group of consumers that have real competitive choice, and those lacking such choice. This could be accomplished by studying control groups determined by the Commission’s competitive index. If necessary, programs could be implemented to mitigate any significant cost differences between the two groups. The Commission’s studies would identify the cost difference and study options, such as rate subsidies, to mitigate them.

Area #3 Market Power and Regulatory Flexibility Questions

Question #1: The basic issue confronting us today is, given the proliferation of intermodal competition and choices for consumers, what is the appropriate role of the regulator in preventing market power abuses? More particularly, is there sufficient actual and potential competition for retail telecommunications service, including residential basic local telephone service, to prevent a firm from raising its prices or providing poor quality service without suffering commensurate competitive losses?

Response: On a macro level the Commission should use the HHI Index to study market concentration issues.² A Staff White Paper in Cases 05-C-0237³ and in Case 05-C-0242⁴ does a commendable job in using the HHI index to assess the competitive aspects of the proposed mergers of Verizon/MCI and AT&T/SBC. The HHI index is named after O.C. Herfindahl and A. O. Hirschman and is a recognized index developed in 1992 by the Antitrust Division of the Federal Justice Department and the Federal Trade Commission. It is recognized in both governmental and academic circles as an important device to examine the potential outcomes of proposed mergers.⁵ Section V. of Staff's White Paper entitled "Market Power" makes extensive use of industry concentration ratios and the HHI index to show potential negative issues associated with

² The HHI index is named after O.C. Herfindahl and A. O. Hirschman.

³ Case 05-C-0237 Joint Petition of Verizon New York Inc. and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction over or in the Alternative for Approval of Agreement and Plan of Merger.

⁴ Case 05-C-0243- Joint petition of SBC Communications Inc., AT&T Corporation, together with its Certificated New York Subsidiaries, for Approval of Merger.

⁵ See for instance "Economics of Regulation and Antitrust," 3rd edition by W. Kip Viscusi, John M. Vernon, and Joseph E. Harrinton, Jr., The MIT Press, at pp. 147-150.

the telephone markets in New York State.⁶ In that study, Staff uses concentration ratios and the related HHI Index for several sectors of the market including: Mass Market Concentration-Retail, Enterprise Market-Retail, Transport-Wholesale, and Special Access and High Capacity Loops (Retail and Wholesale).

The Department of Justice merger guidelines for using the HHI indicate that a HHI of 1,000 or less shows a market that is not concentrated.⁷ An HHI score between 1,000 to 1,800 shows moderate concentration. At that level there is concern if the HHI index increases by 100 points or more. If the HHI is greater than 1,800 the market is considered highly concentrated and changes of 50 to 100 points or more lead to concern about market concentration. The Commission should conduct analysis using the HHI for all telecommunications providers in New York State.

For those situations where adequate competition does not exist, and where large numbers of “traditional wireline service” users exist, increased regulatory actions should be taken. For instance, if prices are high and/or service is poor, the Commission should conduct special studies comparing the prices and/or service levels in competitive service areas versus areas where an adequate level of competition is not present. The Commission may be required to implement action plans including rate reductions and/or service quality penalties for “traditional wireline service” providers in some instances to protect consumers.

Question #2: What measures of competition should we consider when determining whether retail pricing is appropriate? Can the Department’s competitive index be used for this purpose?

⁶ See Staff White Paper in Cases 05-C-0237 and 05-C-0242, at pages 12-46.

⁷ The guidelines are taken from an October 2004 U.S. Department of Justice Antitrust Division publication entitled “Antitrust Division Policy Guide to Merger Remedies.”

Response: The Commission should use both the HHI index and the Department's proposed competitive index. The competitive index is outlined at pp. 9-10 of the order in this proceeding.⁸ If the Commission feels that the HHI Index is not applicable to certain situations, it may use the Department's competitive index.

Question #3: Are the criteria and assigned weights in the Department's competitive index reasonable? In particular, is the VoIP telephone weight reasonable in light of current carrier policies concerning the availability of stand-alone broadband?

Response: The Department's competitive index and weights assigned appear fair. The Commission should update the parameters yearly as the market providers change the mix of services offered to consumers.

Question #4: Can price levels from competitive areas serve as a first level gauge of reasonableness for prices in non-competitive areas?

Response: This can only be done if the services are comparable. If regulated service has consumer protections that the unregulated services do not have, then such a comparison is not reasonable unless the consumer protection costs are backed out of the regulated price.

⁸ CASE 05-C-0616-Proceeding on Motion of the Commission to Examine Issues related to the Transition to Intermodal Competition in the Provision of Telecommunications Services. Order Initiating Proceeding and Inviting Comments, Issued and Effective June 29, 2005.

Question #5: How do we define competitive versus non-competitive areas/markets?

Response: The Commission can determine a HHI Index and use its proposed competitive index in geographic areas to define whether the area has competitive service. An HHI Index can be constructed for specific small geographic units if necessary. The Department's competitive index can also be studied by small geographic areas.

Question #6. Should we allow rates in less densely populated areas to increase to their underlying cost levels.

Response: No, the rates should be based on prices in areas where a competitive market exists as measured by the HHI Index or the Department's competitive index. This will ensure that firms enter all markets in New York State. An appropriate transition period will be necessary to achieve this outcome.

Area #4 Service Quality Questions:

Question #1. How should we adapt our service quality regulation to the marketplace realities?

Response: Service quality measures should stay in place for "traditional wireline service users." Those customers choosing "competitive based wireline service" would not have service quality regulation. If they are dissatisfied with their service, they can switch to another mode of competitive service, or they can switch back to the "traditional wireline service" option. The CPB can have a role in providing information for consumers, and in dispute resolution between consumers and providers.

Question #6. If our service quality regulation and reporting were extended to all modalities (wireline and wireless) and all providers (e.g., VoIP and cellular), what if any, legal constraints apply to extending basic service quality regulation to all modalities?

Response: Service quality regulation should not be applied to any of the competitive modes. Those consumers that desire service quality regulation can choose the “traditional wireline service” option from a wireline company.

Question #7. Should we modify, relax, or eliminate performance-based standards in competitive markets?

Response: Yes, performance based regulation should not apply to those consumers in situations where there is an adequate degree of competitive choice as measured by the HHI Index or the Department’s competitive index.

Question #8. Are performance standards essential to ensure that consumers have access to a reliable, seamless network of networks and, if so, should they be changed?

Response: Performance standards should only apply to those consumers who choose to remain with “traditional wireline service.” They should not be applied to consumers in competitive situations as determined by the HHI Index and/or the Department’s competitive index.

Question #11. Should all carriers be held to a threshold standard for service?

Response: No, only those companies providing “traditional wireline service” should be subject to a threshold standard for service. Those customers in competitive situations can simply choose another provider if they are dissatisfied.

Question #12. Are the customer trouble report rate (CTRR) measures still reflective of the quality of service provided to consumers?

Response: Yes, they are applicable to customers who choose “traditional wireline service.” They should not be used for those consumers who have a choice of options as demonstrated by the HHI Index and/or the Department’s competitive index. Those customers in competitive situations can simply choose another provider if they are dissatisfied with their service.

Question #14. Should a periodic survey of customer satisfaction be used?

Response: Yes. The Commission should publish such surveys for “traditional wireline service” only. Other entities such as the New York State Consumer Protection Board (CPB) should publish surveys for competitive intermodal providers.

Question #15. Is our Public Service Commission (PSC) Complaint Rate Level still relevant?

Response: Yes. It should apply only to “traditional wireline service.” Complaint rate studies can be conducted by other entities such as the New York State Consumer Protection Board (CPB) for competitive intermodal providers.

Question #18. Should local exchange carriers (LECs) be required to submit annual construction budgets? [Part of question 18]

Response: Construction budgets should be provided for “traditional wireline service” providers only. The Commission should conduct special studies to determine if there are significant differences in the level of service between customers choosing “traditional wireline service” and those who have real competitive choice. If the service level quality measures are adequate for both groups, the requirement can then be substantially modified and/or eliminated

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Thank your for the opportunity to comment on these important questions concerning the new intermodal providers and traditional wireline providers.

Sincerely yours,

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Note: Original and fifteen copies submitted to Secretary Brillling, and electronic service provided to the Active Parties List in Case 05-C-0616.