Before the
STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE
Albany, New York 12223-1350

Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Service	**No. 05-C-0616**

COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION OF NEW YORK, INC.

The Cable Telecommunications Association of New York, Inc. ("CTANY"), an industry trade association representing the interests of cable television operators and competitive telecommunications service providers in New York, respectfully submits these comments on behalf of its members. Point I examines the jurisdictional questions raised by the Commission's proceeding and offers an overview of CTANY's substantive suggestions. Point II analyzes the issues discussed in the Commission's Order relating to inter-company relationships and wholesale matters. Point III addresses the questions posed by the Commission regarding its retail regulation of incumbent local exchange companies ("ILECs").

POINT I

OVERVIEW OF COMMENTS AND DISCUSSION OF JURISDICTIONAL ISSUES

A. Overview

Government regulation of any business imposes two kinds of costs: the administrative costs of compiling and maintaining information required by regulators and the societal costs of reduced market responsiveness and "dynamism."[1] Price and service regulation is essential when one or more suppliers possess market power and, therefore, can significantly raise prices or reduce service without suffering lost revenues.[2] The challenge facing the PSC is to foster retail competition while avoiding market power abuses.

The inter-company matters addressed in Point II are critical to retail telephone competition in New York State because the ability of new providers to compete with ILECs depends on government preventing ILECs from exercising market power over competitors at the "wholesale" level. Point II suggests the PSC should recommend that the FCC: (a) replace the current intercarrier compensation program with a bill and keep model; and (b) allocate universal service funds on a customer number basis, rather than have particular companies designated for funding. Finally, we propose for reasons stated below that major state initiatives should be deferred until the FCC completes several significant proceedings examining intermodal competition.

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[1] *FCC Policy and Rules for Competitive Common Carrier Service,* 85 FCC2d 1, 5, 14, 20, 30 (1980).

[2] George Priest, The Origins of Utility Regulation and the Theories of Regulation Debate, 36 J.L. Econ. 289 (1993)

Point III below suggests the test that the PSC should apply in deciding whether to reduce its regulation of ILECs. The Commission's rate and service regulation of ILECs' retail services should continue if ILEC customers would be subjected to significant price increases or service declines, without a reasonably timely market response.

B. Jurisdiction

Administrative agencies derive all authority from their enabling statutes.[3] Even when a state legislature has empowered a state agency to regulate a particular matter, the Supremacy Clause of the United States Constitution (Art. VI, cl. 2) allows a federal agency, acting within its statutory authority, to preempt the state agency by deregulating the activity.[4]

The FCC, in 2002, declared that cable modem service was not a "telecommunications service" and therefore would not (and could not) be subjected to common-carrier regulation under Title II of the Telecommunications Act.[5] This decision was consistent with the decision the FCC reached in its *Vonage Memorandum Opinion and Order*.[6] Paragraph 32 of that Order extended the practical effect of the FCC's preemption to "other types of IP-enabled services having basic characteristics [that] include: a requirement

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[3] New York Superfund Coalition v. New York Dept. of Envt'l. Conserv., 75 N.Y. 2d 88, 92 (1989).

[4] North Carolina Util. Comm'n v. FCC, 537 F.2d 787, 790, cert. denied, 429 U.S. 1027 (1976) (preempting state regulation of the connection of telephone equipment connected to the network). See also, Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700 (1984) ("if the FCC has resolved to preempt an area of … regulation and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain … we must conclude that all conflicting state regulations have been precluded" (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).

[5] Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C. Rcd 4798 (2002).

[6] *In the Matter of Vonage Holdings Corporation*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (2004)(hereinafter *Vonage MO&O)* Para.32.

for a broadband connection from the user's locations; a need for IP-compatible CPE; and a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video."[7] The FCC indicated in the *Vonage MO&O* that it would not countenance "patchwork" regulation of VoIP-based services and did not intend for its state preemption to apply narrowly to only the subcategory of companies that provide VoIP–based services in the exact same manner as Vonage. Rather, the Commission noted that to the extent that other entities such as cable companies provide VoIP services, it would preempt state regulation to an extent comparable to what it had done in the Order.[8]

On June 27, 2005, the United States Supreme Court provided its decision in *Brand X*.[9] The Supreme Court noted that the broadband delivery system of cable modem service was "always" involved not only in voice transmission, but "in connection with the information-processing capabilities provided by Internet access …." Thus the Court held the FCC's classification of cable modem service as an information service was reasonable. The Court also favorably cited the FCC's finding that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[10] On August 5, 2005 the FCC held that, like cable telephone, DSL service

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[7] Id.

[8] *Vonage MO&O* Para. 32.

[9] National Cable & Telecomm. Assn. v. Brand X Internet Services 125 S. Ct. 2688 (2005).

[10] (Citing Declaratory Ruling, 4802.

provided on an integrated voice/data basis is information service and therefore is not subject to the FCC's title II jurisdiction.

During the pendency of the Brand X litigation, the FCC held in abeyance several significant proceedings including a proceeding on cable modem and on IP-enabled services.[11] Its decisions in these cases, which should come in the near future, will establish a national blueprint for intermodal competition.

Although the regulatory framework that will be developed by the FCC will presumably leave an important role for state regulation, it does not appear that role will include voice service provided by cable operators.[12] The FCC should be permitted, in any event, to complete its proceedings on intermodal competition before states embark on new regulatory initiatives.[13]

Inasmuch as the Commission has sought input on: (a) whether it should alter the degree to which it regulates the retail service of incumbent local exchange companies, and (b) inter-company questions (e.g., intercarrier compensation and universal service funding) that are highly relevant to retail compensation, we will, as discussed above,

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[11] *Comments Sought on Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand* Proceedings, CC Docket No. 02-33, 95-20, 98-10, Public Notice, 17 Fcc Rcd 3706; *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (March 10, 2004)

[12] See also Vonage Holdings Corp. v. Minnesota Pub. Utilities Comm'n, 394 F.2d 568, 569 (8th Cir. 2004) [wherein the Court, after concluding that an FCC holding that states could not regulate an alleged intrastate component of Vonage's VOIP service without impermissibly regulating the interstate component of VOIP was binding because it was not being directly challenged, affirmed a District Court injunction of state regulation].

[13] See Farmers Telephone Company v. FCC, 184 F.3d 1241, 1250 (8th Cir. 1999) [State Commissions cannot issue binding interpretations of FCC regulations].

respectfully respond. Our input should not be interpreted, however, as waiving jurisdictional or other objections to Commission initiatives in these areas.[14]

POINT II

CARRIER-TO-CARRIER ISSUES

The following sections respond to a number of questions in the Order that relate to the wholesale provisioning of telecommunications services. An appropriate regulatory regime regarding wholesale issues will continue to be vital to the ability of cable companies and other providers to access all of New York's citizens on a competitive basis. The nature of the relationship at the wholesale level will have a direct effect on consumers at the retail level. Thus any impediments to competitive providers, or bottlenecks set forth by the incumbent, will have a deleterious effect on retail relationships and will erode the competitive landscape that is beginning to emerge.

A. Intercarrier Compensation

In order to provide voice services, cable operators need to be interconnected, directly or indirectly, with other voice providers. Thus for cable operators and other

[14] Public Service Law § 91 statutorily obligates the Public Service Commission to set "just and reasonable" rates and thus the PSC cannot deregulate ILEC prices. See Federal Power Comm'n v. Texaco, Inc., 417 U.S. 380, 400 (1974)(noting that economic theory may not displace a legislative mandate to set rates.) Even if the Public Service Law allowed the PSC to deregulate (which it does not), the PSC would have to show substantial evidence that the market would bring all consumers reliable service at just and reasonable rates. See New York Pub. Serv. Comm'n v. Federal Power Comm'n, 511 F.2d 338, 354 (U.S. App 1975)(noting that the courts will not countenance regulation that does not provide to consumers the full scope of safeguards inherent in the agency's enabling legislation). The substantial evidence would have to be adduced not from written filings in a notice and comment proceeding, but from sworn testimony in formal evidentiary hearings. New York Telephone v. Public Serv. Comm'n, 59 A.D.2d 17, 19 (3d Dep't), lv. to app. denied, 42 N.Y.2d 810 (1977)(noting that "all interested parties must be permitted to call and cross-examine witnesses and to rebut adverse claims.")

providers, there must be fair and consistent rules with respect to intercarrier compensation. The current patchwork of intercarrier compensation rules harms consumers and the economy. It creates artificial regulatory advantages and disadvantages among carriers, creates incorrect economic signals and skews investment decisions. It constrains the introduction of new, bundled services by maintaining the artificial edifices of 'local', 'toll' and 'long distance' services, and discriminates based on the technology by which a customer is served.

In its Order initiating this proceeding, the Commission expressed that it is "… particularly interested in revisiting the intercarrier compensation structure established in our prior order," and inquires about the state of its desired transition to a symmetrical basis for compensation.[15] CTANY commends the Commission's continuing interest in resolving this thorny economic issue. However, as the Commission is well aware, the issue of its jurisdiction to regulate at least some aspects of these charges is under active debate at the Federal Communications Commission and in the Courts.[16] As in some other issues involved in this proceeding, it may be premature for the Commission to develop detailed parameters for access charge reform no matter how well-intentioned. Nonetheless, CTANY would like to submit the following observations regarding a transition toward a rational scheme of intercarrier compensation that we would urge the Commission to consider in both its state decision-making and in its federal advocacy.

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[15] *Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services*, Order Instituting Proceeding, Case 05-C-0616 (issued and Effective June 29, 2005), p.19.

[16] *In the Matter of Developing A Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-03, 20 Fcc Rcd 4865 (March 3, 2005).

An intercarrier compensation model that will be sustainable in the evolving telecommunications marketplace must be competitively neutral, minimize arbitrage opportunities and carrier disputes, and be symmetrical. CTANY believes that a compensation regime that applies bill-and-keep to all voice traffic fits these requirements, and suggests that this Commission urge the Federal Communications Commission (FCC) to implement such a regulatory platform over a reasonable transition period.

Bill-and-keep requires involvement by both state and federal regulators and recognition that there should be a unified policy for both interstate access charges and intrastate access charges. To the extent that it is not possible to transition to bill-and-keep in a flash cut, any interim access charge policy should involve a unified approach related to both interstate and intrastate charges. There should be a uniform termination rate applicable to all forms of traffic. This rate would be reduced to zero on a schedule that would take into account customer impacts on a reasonable basis. Where traffic exchange is materially out of balance, (as determined by the FCC or the Commission), carriers and other providers may need to continue to charge a uniform cost-based rate even after other terminating traffic has gone to a completely bill-and-keep regime. In addition, negotiated rates that depart from the unified scheme should be permitted.

CTANY urges the New York Commission to play a leadership role in encouraging a model of cooperative federalism that allows for such a coordinated policy between its state colleagues and federal regulators. In addition to assisting federal regulators in determining a fair unified rate, there are several important functions that the New York Commission can and should provide under this cooperative model, including resolving contract disputes between providers and carriers. In addition, until such time as such a

unified state/federal rate can be established, New York should establish an interim call termination rate based on long run marginal costs.

1. Bill-and-Keep is Technologically and Competitively Neutral.

Bill-and-keep treats all traffic the same, regardless of technology. The regulatory gamesmanship and arbitrage that have been constant symptoms of the current compensation regime would be replaced by a symmetrical system that recognizes that there is no discernible difference in the cost of originating or terminating traffic based on the various types of traffic involved.

2. Level Playing Field Concepts Do Not Support Continued Subsidies of Legacy Facilities Through Uneconomic Mechanisms.

While RBOCs have argued that current levels of competition call for reduced levels of regulation, they have also continued to argue that their legacy networks should be supported by other providers' customers through 'make whole' or 'revenue neutrality' provisions in intercarrier compensation transition proposals. With the exception of certain rural ILECs to be discussed below, such continued subsidization is inappropriate for these carriers in a regulatory regime for a competitive market place. As mentioned above, to the extent that transitional, unified termination charges may be required, they should be cost based. Such termination rate should be uniform for all call types regardless of carrier class, technology or jurisdiction (interstate or intrastate).

This approach enhances competition, particularly intermodal competition, by requiring that each network recover its costs from its customers. This will better drive investment decisions and send better price signals to end users.

To the extent ILECs lose revenue as a result of the reduction in access charges, they are not entitled to be 'held harmless' against these losses. As New York's highest court stated in Matter of Abrams v. Public Service Commission, 67 NY2d 205, 217 (1986):

> "While it is true that a regulated company is generally entitled to recapture its prudently incurred costs, including a return on its investment (*see*, Power Comm'n v. Hope Gas Co., 320 US 591, 603), due process does not insure values or *** restore values that have been lost by the operation of economic forces' (Market St. Ry. Co. v. Commission, 324 US 548, 567). Neither justice nor the Constitution obliges consumers to ensure a profitable return on an unprofitable enterprise *** (see, San Diego Land & Town Co. v. Jasper, 189 US 439, 446-447)." (Matter of Rochester Gas & Elec. Corp. v. Public Serv. Comm'n, 108 A.D.2d 35, 37, supra.)"

Indeed, the PSC may, when appropriate, even exercise its discretion to deny any recovery at all.[17] Thus, recovery of ILEC costs "stranded" due to revenues lost to competition will be a matter of Commission discretion.

If regulators decide to allow recovery of such costs they should only be borne by end users through Subscriber Line Charges (SLCs). CTANY opposes the introduction of a new universal service fund to subsidize ILECs. SLC recovery would ensure that the excess costs of ILECs are borne by their customers, and not the customers of other carriers and providers. To the extent that federal regulators permit increases in the SLCs, the National Cable & Telecommunications Association (NCTA) has urged that they be uniform within a customer class. In addition, it has urged against the flexibility of an ILEC to waive these

[17] (See, Matter of Rochester Gas & Elec. Corp. v. Public Serv. Comm'n, 85 A.D. 2d 486, supra). 67 N.Y. 2d at 217.

increases by contract, so that these costs do not unduly burden customers with lesser bargaining power, i.e. residential and small business customers.[18]

A. Universal Service

The Commission asks whether the universal service principles enunciated in its 1996 order remain appropriate given the current and anticipated states of the telecommunications market and whether the definition of basic service should be revisited at this time based on technological advances. In addition, the Commission notes that it has not previously established a high cost fund based on these principles, and inquires as to whether it is an appropriate time to do so.

First and foremost, like many issues addressed in this docket, this issue is one that is very sensitive to timing. Federal regulators recognize that the current system of universal service suffers from serious structural and implementation flaws. As a result, it is actively examining this issue in the context of a proceeding that was initiated in 2002.[19] It would be extremely inefficient for these issues to be debated in depth in New York until the federal context in which this debate will take place has been established.

It does not appear that the PSC has jurisdiction over voice service provided by cable operators. Further, it is not empowered by the Public Service Law to assess non-jurisdictional entities for universal service funding.[20] The Federal Telecommunications Act

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[18] Comments of National Cable & Telecommunications, In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, May 23, 2005 p.9.

[19] Federal-State Joint Board on Universal Service, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24955-57 (2002).

[20] See Matter of Rochester Gas & Electric Corporation v. Public Service Commission, 71 A.D.2d 185, 193 (3d Dep't, 1979) app. dism'd 49 N.Y.2d 1014, mot. for lv. to app. den.

Section 254(f), notes that States may adopt regulations requiring "telecommunications carrier(s)" to contribute to state universal service funds, but (as indicated above) the FCC has held that the provision of cable modem service does not make the provider a telecommunications carrier.[21] Further, state agencies cannot normally point to federal law as a basis for regulating entities that fall beyond the bounds of their State enabling legislation.[22] Cable companies providing cable modem service cannot be ordered to contribute to a state universal service fund.

Having said that, CTANY makes the following observations about principles that should continue to guide the universal service debate at both the federal level and in New York.

1. Cable companies providing voice telecommunications services recognize that there may be some need to render additional financial support to certain high cost areas and perhaps certain customer classes that are unable to afford basic telecommunications service. However, with respect to high cost areas, particularly small rural companies, the first avenues to address higher costs should come from utilizing the maximum SLC and then considering termination charges outside of bill-and-keep. It should only be after these two avenues are exhausted that state or federal regulators should consider additional support for these companies in the form of universal support, and then only after a careful study of the actual costs of the company.

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51 N.Y.2d 703 (1980) [the Court annulled a PSC order insofar as it had ordered oil dealers to participate in an energy conservation program].

[21] 17 FCC Rcd 4798 (2002).

[22] GTE Northwest, Inc. v. Pub. Util. Comm'n of Oregon, 900 F.2d 495, 498 (Or. 1995) cert. den. 517 U.S. 1155 (1990) [holding that the Federal Telecommunications Act could not empower state officials to promulgate rules that conflicted with Oregon law].

2. A properly structured number-based funding mechanism holds the best prospect of providing an equitable and nondiscriminatory funding mechanism in a market that is experiencing changing technology. Like other proposals contained in these comments, CTANY believes that this method achieves the twin goals of being competitively and technologically neutral.

   CTANY believes that a number-based methodology will create predictability in the cost of service, reduce gamesmanship and forum shopping by providers, and allow customer choice and business investment based on technology and economics rather than on regulatory burdens.

   Any universal service support should be geared to the consumer, not to the company. These funds should not be intended to subsidize corporate earnings. The customer who qualifies for the support, either by virtue of the fact that it is in a particular customer class or in a particular region, should have access to this support regardless of what carrier it chooses.

B. Other Wholesale Issues

If cable providers are to continue to successfully grow their voice markets and compete effectively in the long term, there are certain wholesale services that must be provisioned reasonably and expeditiously by incumbent carriers who control much of the Public Switched Network. Inadequate provisioning of these services can easily discourage customers of competitive providers, who may then see return to incumbent providers as the path of least resistance.

1. Number portability. The availability of number portability is one of the most significant regulatory actions in furthering intermodal competition that has occurred in the last several years. The New York Commission should, once again, be applauded for its initiative in this area and in furthering this goal at the national level. However, there still remain technological and process challenges that are resulting in the slow provisioning of this function. Whether incumbent or new provider, a carrier that has a customer has a distinct disincentive to ensure that numbers are ported in a timely manner. Slow provisioning and the ensuing customer frustration serve as significant barriers to competition. Some cable operators have complained that because of the time lag that exists before the number is ported, the incumbent provider has an opportunity to "win back" the customer before the customer even leaves its service. The Commission should continue to play a facilitative role in ensuring that all providers develop protocols to ensure fast and effective porting of numbers among providers and between technologies.

2. Pole Attachments. CTANY acknowledges that pole attachment proceedings at the Commission are time consuming.[23] However, it should also be recognized that electric and telephone poles represent one of the most tangible and important bottleneck facilities that are controlled by the incumbent providers, whether they be electric companies or

[23] *See e.g. Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Instituting Proceeding, Case 03-M-0432 (issued and effective Mar. 27, 2003). A final order was issued on August 6, 2004 regarding many of the issues relating to pole attachments. Still pending, however, is a petition for clarification filed by CTANY and others. Also, the parties are still negotiating the terms and conditions of a standardized Pole Attachment Agreement that parties can use.

ILEC's.[24] Entities such as cable operators need efficient and fair access to poles and conduits to complete upgrades and new builds for the deployment of important new services, including broadband, digital television and local exchange service. Cable operators cannot fairly compete for customers who have almost immediate access to services offered by telephone companies, but are sometimes forced to wait months for Attachers' services due to an inability to access Pole Owners' facilities. As the pole owners continue to provide competitive services, swift access to poles and conduit becomes of paramount concern to pole attachers.

> Untimely make ready or continual rearrangement of cable wires to accommodate an incumbent also has a deleterious impact on cable and other third party attachers to the pole. Such delays in service may cause customers to abandon their plans to switch to a new carrier if they experience a lengthy delay in obtaining service.[25]

3. To date, the cable industry has invested nearly 100 billion dollars of private risk capital into its networks. In an effort to seek a return on that investment, cable operators know that quality customer service is essential. Features such as 911/E911 service[26], and twenty-four hour call centers are commonplace for VoIP customers as these are the types of services consumers desire. In addition to its outstanding customer service, the cable industry has long supported many of the social policy obligations such as 911/E911 service,

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[24] Verizon has over one million poles in service in the State of New York and leases over 600,000 poles to Cable Operators.

[25] For example, one particular area of concern involves a lack of clear cost recovery limits. Without some limits in place, structural incentives exist for Pole Owners to overcharge for certain services as a deterrent to the use of such services, thereby thwarting expedited access.

[26] The FCC has already spoken on the need to E911 services. See E911 Services for IP-Enabled Service Providers, WC Docket No. 05-196, First Report and Order and notice of Proposed Rulemaking, FCC 05-116 paras. 36, 61 (June 3, 2005);

cooperation with law enforcement including compliance with CALEA, and access to the disabled.

In exchange for support of these responsibilities, however, VoIP providers believe that they can expect certain rights such as: "1. the right to interconnect and efficiently exchange traffic and control signals with both IP and PSTN entities on a peer-to-peer basis; 2. the right to obtain telephone numbers, including numbers secured through number portability, to assign those numbers to VoIP customers; 3. the right to access the facilities and resources necessary to provide VoIP customers with full and efficient 911/E911 services (e.g. interconnection to incumbent utility E911 selective router switches, and Master Street Address Guide and automatic Location Identification database uploads)."[27]

Until robust competition emerges, however, the present customer protection regulations imposed on the incumbent are important to curtail the market power abuse that could result if the incumbent providers are fully deregulated. Thus, incumbents such as Verizon should still be required to follow the carrier-to carrier guidelines and PAP.[28]

POINT III

Market Power and Regulatory Flexibility

The New York State Public Service Commission, in recognition of the changing and emerging face of communications technology, seeks to determine whether the rules

[27] For a more complete discussion of the rights that VoIP providers want, see *Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition*, NCTA Policy Paper, February 2004 p 27.

[28] The Commission has noted that Verizon service quality must be maintained and that Verizon still be required to submit monthly service reports. This service quality is especially important for the wholesale market because if Verizon fails to provide adequate service or provides deficient service quality to competitive carriers, those carriers will find it hard to remain in business.

traditionally imposed on the incumbent service providers are in sync with the state of competition today or whether current regulatory policies should be altered. Thus the question before the Commission is how to best determine when there is enough actual and potential competition for residential retail telecommunications service. As competition begins to emerge, then controlled and limited deregulation of incumbent providers is acceptable. Because of the light regulatory touch enjoyed by cable telephony as a new entrant, competition has begun to emerge. We continue to encourage a light regulatory touch to VoIP providers in order to develop a more robust market place.

The PSC has made clear that it believes a robust and competitive marketplace exists in proximately 85% of Verizon's wire centers[29] with a variety of alternatives available to consumers. In comments to the FCC in October 2004, the PSC noted that "no longer is telecommunications competition as critically reliant upon the use of the incumbents' network."[30] The PSC is misguided here because as was explained in Section II, the relationship between the incumbent and competitors in the wholesale marketplace has a direct effect on the retail market. The market power enjoyed by the incumbent in the wholesale market becomes magnified as competitors look to the retail market. Any bottlenecks imposed by the incumbent, such as number porting, interconnection issues, billing practices and even pole attachment issues provides an additional avenue for market power abuse.

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[29] Comments of the New York State Department of Public Service, *In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338*, (filed October 4, 2004) (Hereinafter PSC UNE Comments). P. 9.

[30] PSC UNE Comments p.2.

Before any regulations can be relaxed, the Commission must first undertake a comprehensive analysis to define the appropriate "markets" and then to evaluate the level of competition within each market. Presently there is a growing, but developing telecommunications market with a number of limited providers. However, the availability of competitive providers in the absence of data showing customer migration to these providers, does not mean that sufficient competition exists such that the regulations imposed on the incumbent providers may be relaxed. Despite acknowledging that it cannot predict how fast customers migrate to new platforms,[31] staff believes that substantial weight should be placed on intermodal competition given the availability of some competitors in the marketplace.[32]

The PSC order seeks to both eliminate asymmetrical aspects of current policies[33] and also treat providers of all services as evenhandedly as possible "given the current statutory constraints."[34] However, there is a question as to whether symmetrical regulations will produce the intended result of achieving true competition. In its effort to balance the perceived asymmetries, however, the PSC has made numerous assumptions that may not all be valid.

In comments to the FCC regarding unbundled access to network elements[35]the PSC claims a robust competitive market in nearly 85% of Verizon's call centers.[36] At the same time, the PSC notes that Verizon is the dominant provider of ILEC retail lines in New York

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[31] PSC UNE Comments p.4

[32] Even the FCC in the TRO found that intermodal alternatives were not yet a full substitute for wireline competition. [cite TRO para. 245, p. 443-445]

[33] Order p.4

[34] *Id.*

[35] PSC UNE Comments p.9

[36] PSC UNE Comments p. 9.

and controls nearly 67% of such lines[37] and that as the dominant provider, Verizon is expected to have an even greater share of the marketplace given the proposed merger between Verizon and MCI.[38]

The number of providers alone does not tell the whole story because many of these providers offer services in niche markets. Not all providers are able to offer the same level of service, nor can they serve all potential customers. Some providers serve only one type of customer. For example, the VoIP service provided by cable operators presently is extended only to residential customers whereas other VoIP providers may be able to serve business customers. Some competitors may limit their offerings to particular geographic regions because such regions are a higher profit area (or they may choose to avoid certain regions because the cost of providing services is too high).

The PSC's impairment index, developed for its comments to the FCC on the unbundling case, assigned various weights to each of the various competitors as a means to show the substitutability of the different intermodal alternatives such as wireless providers, facilities-based VoIP providers, and non-facilities based VoIP providers. Staff considered the level of service quality, the necessity of entering into long term contracts, the need for broadband subscription, and the availability of E911.[39]What staff did not include, however, was any analysis of whether consumers were choosing these alternatives, and if so, whether

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[37] 2002 Competition Analysis by the PSC.

[38] Department of Public Service Staff White Paper, Case 05-C-0237 *Joint Petition of Verizon New York Inc. and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction over on in the Alternative for Approval of Agreement and Plan of Merger*; Case 05-C-0242 *Joint Petition of SBC Communications Inc., AT&T Corporation, together with its Certified New York Subsidiaries, for Approval of Merger* (Hereinafter Staff White Paper on Merger) p. 5.

[39] PSC UNE Comments, Appendix A, p. iii.

they were choosing the alternatives in addition to or in lieu of their present provider. Such analysis is critical in assigning a relative weight regarding substitutability.

Verizon continues to be the dominant provider of voice services in New York and controls approximately 67% of retail exchange lines.[40] As recently as July 2005, PSC staff noted that Verizon has more than 50% of the market share in the mass market and this continued dominance is assured if Verizon's proposed merger with MCI is approved.[41]

While a true competitive marketplace is emerging, the present regulations should remain in place to ensure that competition proceeds fairly and continues to develop and flourish. Given that the telecommunications market is in a constant state of change, the Commission should develop some means of analysis to account for these changes. For example, the recent announcement of mergers between incumbent providers and CLECs removes some choices available to consumers. Only time will tell the lasting impact that these mergers have on consumers in the future.[42]

Market power will need to be examined in terms of actual market share, accessibility, price, geography, value, investment and suite of services available to consumers. In addition, the needs of customers must also be taken into account. For example wireless may be a substitute for some segment of customers, but at present only a minority of customers have been willing to completely forgo their landline in favor of a

[40] 2002 PSC Competitive analysis.

[41] PSC Staff White paper p.20).

[42] PSC staff expressed concern over the market concentration and noted that there will be a reduction in choice, but has eventually concluded that the merger will be good for New Yorkers.

wireless telephone.[43] More commonly, consumers choose wireless communications in addition to their present telephone service. .

In addition, the Commission should explore the "essentiality of access" and examine which services or facilities are essential and which facilities provide an impediment to access such as interconnection agreements, number transport, and pole attachment issues.

As competition increases, the regulations imposed on the incumbents can be selectively reduced, however a certain degree of regulation should be maintained because inevitably there will be some customers who will retain only the most basic services.

Finally, given that the FCC has a number of proceedings before it, the desire for New York to develop a regulatory framework may be either premature or ultimately preempted by the FCC as "the FCC seeks to develop an analytical framework that is consistent, to the extent possible, across multiple platforms."[44] The FCC has reiterated its belief of "function over facilities" and thus the FCC should take a functional approach to regulation looking at the nature of the service provided rather than focusing more on the facility or architecture that is used to deliver the services.[45]

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[43] Some analysts have noted that approximately 9% of households have begun using wireless exclusively for telephone service. See Phoenix Center Policy Paper Number 21: *Competition After Unbundling: Entry, Industry Structure and Convergence*, July 2005 fn.7.

[44] see Wireline Broadband NPRM § 6, Cable modem ruling § 85

[45] In the cable modem ruling, the FCC concluded that the classification of cable modem service turns on the nature of the functions that the end user is offered. See cable modem ruling § 38. Even NY reached that decision in the DataNet decision….see DataNet decision at 7?

B. Consumer Protection and Service Quality

Consumers derive the greatest benefits by having a robust marketplace that offers substitutable choices. As competition develops and increases, consumer protection regulations will become less necessary because the marketplace itself will police the behavior of competitors. Competitors will naturally strive to provide the highest levels of service of customer service in order to retain their customers and attract new customers. When consumers are armed with full information and an array of options, consumers will be able to base decisions on service quality, price, and the options that fit into their lifestyle and needs. Consumers will come to expect high quality products and customer service or they will leave their provider and find another competitor.

While deregulation is a laudable goal once competition has emerged, deregulation in the absence of competition will not stimulate investment or innovation. In fact, the opposite effect is likely. Once true competition with fully substitutable choices is reached, then the regulations upon the incumbent can be relaxed although some minimal oversight in accordance with the provisions of Public Service Law § 91 will be necessary.

Additionally, VoIP providers should not be burdened with regulations that were established for monopoly legacy utilities. The obligations such as billing, payment, credit and collection, and quality of service standards do not need to be imposed on a nascent industry. As competition continues to develop, market forces will necessarily address many of these concerns as long as customers are well informed. Imposing these legacy utility

requirements on new competitive entrants increases costs on competitors, deters investment and deployment and slows growth.[46]

CONCLUSION

Facilities-based VoIP providers do not believe that the Commission has the necessary jurisdiction to impose new rules and regulations upon it. Nor do we believe that sufficient competition exists at present sufficient to relieve the incumbent providers of their obligations to the customers of New York. In addition to end user customers, those obligations should also be maintained in the wholesale marketplace where the incumbents market power is often a bottleneck to competition. Competitors should be able to seek a resolution at the Commission should these bottlenecks persist. For our part, we recognize that it is our responsibility to undertake a number of social obligations such as providing access to 911/E911, access to the disabled, and assistance to law enforcement. In response, however, VoIP providers should be able to expect certain rights: the ability to interconnect easily and efficiently; the ability to have numbers transported in a timely fashion, the ability to access 911/E911 databases, the ability to access poles in an efficient and fair manner. By allowing competition to grow and flourish, all New Yorkers will be better off as they will have more choices and better products.

[46] See *Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition*, NCTA Policy Paper, February 2004 p. 26. See also *Amendment of Section 64.702 of the Commissions Rules and Regulations*, Final Decision, 77 FCC 2d 384 at para.84 (1980), Aff'd sub. Nom. (Computer and Comm. Ind. Ass'n v. FCC, 693 F.2d 198 (1982) (Computer II)(noting that regulatory restraint can result in investment and innovation, and that non-dominant carriers should not be exposed to additional regulations.)

Respectfully submitted

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