Before the
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services	))))))	Case 05-C-0616

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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Cablevision Systems Corporation, through its attorneys, and on behalf of its affiliates Cablevision Lightpath, Inc. ("Lightpath") and Cablevision VoIP, LLC (collectively, "Cablevision"), hereby files its Comments in the above-entitled proceeding, in accordance with the Order Initiating Proceeding and Inviting Comments issued by the New York Public Service Commission ("Commission").[1/] While the goal of eliminating unnecessary and outdated regulation is a worthy one, the Commission must act cautiously to ensure that it does not destroy the carefully-crafted, pro-competitive framework it has established over the past fifteen years. Key to that balance are the following considerations that must be central to any evaluation and assessment of the existing regulatory framework.

First, oversight of Verizon's wholesale practices must continue in light of Verizon's dominant position in the market. Verizon has a stranglehold on the wholesale market, which allows Verizon to restrain and limit competitors' ability to obtain the essential facilities and services they need to provide the consumers of New York with competitive, economical alternatives. Similarly, Verizon's dominance in the retail market supports continuation of the

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 (June 29, 2005) ("*Order*"). Cablevision has not responded specifically to every question presented by the Commission, but retains an interest in every issue raised in this proceeding and reserves the right to respond in its reply comments to issues raised by any of the questions, not solely those discussed below.

pricing restraints currently imposed on Verizon's services. These Commission-imposed restraints ensure that Verizon cannot engage in retail price predation to eliminate competitors in more competitive market segments to the detriment of consumers. Vigilant oversight of both Verizon's wholesale practices and retail pricing are critical to ensuring that intermodal competition fully develops in New York.

Second, consistent with an articulated national regulatory policy, new and innovative services such as voice over Internet protocol ("VoIP") should be free to grow without the imposition of unnecessary and burdensome regulation. Application of New York legacy regulation to nascent technologies such as VoIP will diminish the continued development and deployment of these new services, undermine the promotion of broadband deployment, and stifle the Commission's goal of a fully-competitive marketplace. Thus, the public interest and the Commission's existing regulatory framework would be served best by permitting VoIP services to continue to grow in a deregulatory environment.

INTRODUCTION AND OVERVIEW

The Commission had a long history of working to create and maintain a regulatory framework that promotes innovative offerings for consumers by fostering competition in New York's telecommunications markets even prior to the passage of the 1996 amendments to the federal Communications Act of 1934 ("Act"). The Commission's forward-looking policies have been essential to the achievement of the level of local competition in the state today, and many would agree that those policies have served as a model to the nation. Encouraged by the Commission's pro-competitive policies, Cablevision (through its wholly-owned subsidiary Lightpath, a certified competitive local exchange carrier ("CLEC")) has been providing facilities-based telephone service in New York since 1991.[2/] Initially, Cablevision focused on providing highly reliable voice and data services to commercial customers. By investing hundreds of millions of dollars in its New York infrastructure, Cablevision has been able to take advantage of technological advancements to provide residential customers a viable, economic competitive alternative. Investment by companies like Cablevision and the forward-looking policies of the Commission have brought New York to another important threshold in the evolution of competition.

Fostering competition, however, does not always mean deregulation. As the Commission has recognized, "[w]here competition is robust, regulatory restraint is the best approach; where it is not, some intervention may be required to restrain the exercise of market power and ensure adequate consumer protections."[3/] Thus, regulators must undertake a dynamic, ongoing evaluation of market conditions and external regulatory influences. Any changes to the regulatory framework must be made carefully and gradually, to assure that consumers and competitive service providers remain protected from continuing use of market power by the incumbent carriers.

The Commission's success in striking this critical balance is evidenced by the fact that certain areas of New York enjoy the benefits of emerging competition. Competition, however, is

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[2/] *See* Case 91-C-0134, *Petition of NuComm Test, Inc. for a Certificate of Public Convenience and Necessity to Provide Private Line Telecommunications Services in New York and Petition for Expedited Proceeding and Related Waivers*, Order Issuing Certificate of Public Convenience and Necessity and Approving Expedited Proceeding and Related Waivers (Apr. 22, 1991); and Case 92-C-0680, *Petition of Cablevision Lightpath, Inc. (formerly NuComm Test, Inc.) to Amend Its Certificate of Public Convenience and Necessity To Authorize the Provision of All Forms of Telephone Service on an IntraLATA, IntraCity Switched Basis Throughout New York State*, Order Issuing Certificate of Public Convenience and Necessity and Approving Expedited Proceeding and Related Waivers (July 8, 1993).

[3/] *Order* at 2.

still not robust in all areas of New York, nor in all market segments.[4/] Even where competition exists, Verizon remains the overwhelmingly dominant player, and it is likely to retain that position for the foreseeable future.[5/] Verizon is dominant in both the wholesale and retail markets, and potential intermodal competitors have not developed to the point where Verizon's dominant position is threatened.[6/]

The challenge, therefore, is to ensure that the success that New York has experienced to date is not jeopardized by premature deregulation in a manner that allows the incumbent to use its market dominance to undermine the sustainability of competition. Indeed, wholesale elimination of asymmetrical regulation may not allow the Commission to achieve all of its goals, let alone its primary goal of "ensuring the provision of quality telecommunications services at reasonable rates . . . ."[7/] As the Commission itself recognizes, "absolute symmetry [of regulatory treatment] is likely unachievable."[8/]

Thus, the Commission should exercise caution as it considers changing or eliminating the rules and regulations that have formed New York's pro-competitive, deregulatory framework for the past fifteen years. Accordingly, evaluation and assessment of the existing regulatory framework should consider the following:

- ***Level Playing Field***: While the rhetoric of "symmetric regulation" has superficial appeal, the reality of the New York telecommunications landscape provides little practical support for such an approach. The incumbent has benefited from more than

4/ Therefore, a critical component of the Commission's evaluation will be an accurate and reliable determination of whether a market is competitive; indeed, that determination should underlie nearly every conclusion the Commission makes in this proceeding.

5/ Indeed, recent policy decisions to dismantle UNE-P and Verizon's pending merger with MCI will only solidify Verizon's market share. *See* Section II.A.2, *infra*.

6/ Even if intermodal services develop further, one of the major players in those markets will be Verizon itself.

7/ *Order* at 2.

8/ *Order* at 4.

one hundred years of publicly funded investment, ratepayer guarantees, and a nearly unfettered command of the market that is unmatched by even the largest of its competitors. Now that those competitors, including MCI and AT&T, are being phased out of the consumer market, the regulatory structure that constrains the incumbents' incentive and ability to discriminate against other providers and withhold value from consumers should be reinforced, not dismantled.

- ***Market Power***: There is insufficient competition in both the retail and wholesale telecommunications markets to balance the market power held by Verizon and other incumbents. Every practical indicator of market power – pricing, service, investment, and conduct of the incumbent in the wholesale market – demonstrates undiminished ability to maintain super-competitive pricing with modest investment. Verizon's market power is used to inhibit competition and block competitors' access to key services and inputs such as interconnection, timely and efficient billing, and number portability by denying access and imposing transaction costs that are ruinous to new entrants. Recent changes in the marketplace will only further enhance the incumbents' market power, and VoIP services have yet to demonstrate an ability to curb the exploitation of the incumbents' market power in the residential market.

- ***Measuring Competition***: Observations on the exercise of market power and empirical measures of concentration are the only sufficient measures of the ability of competition to discipline market power. Proxies, such as the potential entry of new competitors or the potential substitutability of new technologies, are only arbitrary indicators of the ability of a market to substitute for careful regulation. While Verizon touts every technology or even the most modest entry as a "mass market substitute," the reality is that – to date – neither wireless nor VoIP services can fairly be considered adequate, substitutable alternatives for wireline service because those services hold only a small portion of the overall market and have demonstrated no real impact on the incumbents' pricing and market power in the retail or wholesale markets. Further, without continuing review and vigorous oversight of the wholesale activities of the incumbent, the few strides made toward competition in the retail market may prove ephemeral if critical requirements for interconnection, traffic exchange, billing and related services are permitted to wither.

- ***Regulation of VoIP Services***: It is national policy that VoIP services should enjoy freedom to innovate and meet the market, and this policy has served to support a plethora of small but vibrant entrants providing a host of varied, advanced, and useful additions to wireline, incumbent-provided voice services. There is no need to regulate new and innovative services like VoIP. Notwithstanding potential legal obstacles, a light regulatory touch for VoIP services is warranted to ensure the dynamism and innovation in services that VoIP has brought to New York consumers is not significantly reduced or destroyed.

- ***Consumer Protection***: While competition should serve as a substitute for consumer protection regulation, in the absence of widespread, robust competition in the retail space, the roll back of such protections can only prove harmful to consumers. To date, the Commission's own experience with attempts to rely on competition, rather than regulation, for matters like investment and service quality, have proven discouraging. Absent demonstrable evidence that market discipline has and will continue to curb abuses of market power, consumer protections for the incumbent will continue to be necessary .

- ***Service Quality***: Service quality measures remain valid if based on the particular service offered and individual providers rather than a one-size-fits-all approach. When measuring service quality, output measures generally should be relied upon rather than input measures, except in limited circumstances.

- ***Universal Service***: Modifications to the current universal service regime would be premature at this time although changes in technology may require adjustments in the future.

While there may well be some regulations that competition has rendered unnecessary, before any restraints on the market power of incumbent carriers are removed in an effort to create a level playing field, there must be evidence of actual strong and continuing competition in the local telecommunications markets. As the Commission rightly affirms, "regulatory protections [must not] be abandoned merely on the promise that the market may eventually provide them,"[9/] and while "[s]imilar regulation should be expected for providers with similar market power[,] [d]ifferential regulation may be appropriate and necessary where significant market power differentials exist."[10/] If the Commission acts too hastily, the risk is all too real that those who hold market power today will quickly snuff out competition, so that the core benefits of deregulation are never realized.

The issues raised in this proceeding are complex – the level of competition varies greatly depending on the customer segment and geographic area served; the Commission's jurisdiction varies greatly by carrier and service type; the market is about to change significantly with the merger of two major carriers in the New York market, further concentrating market power; and

9/ *Order* at 3.

10/ *Order* at 3.

the intercarrier compensation system as well as the universal service program are under reform at the federal level. As the Commission considers the appropriate level of regulation in the next phase of the telecommunications market, it is critical that the primary goal remains to ensure the provision of quality telecommunications services at reasonable rates to all consumers in New York. Achieving this goal will require a carefully crafted balance of regulation and regulatory relief to allow the competitive transition to continue.

I. THE PLAYING FIELD SHOULD BE LEVEL FOR ALL OF THE INDUSTRY'S PARTICIPANTS

In attempting to apply a level playing field, the Commission must recognize that legacy services have a long history of public investment and subsidy that their providers should not be permitted to exploit for private benefit without repayment to the public. During a transition to fully competitive markets, certain regulation of legacy services must be maintained to prevent anticompetitive practices by bottleneck monopolists seeking to retain their high market shares. Particularly critical to the establishment of fair competition are the development of fair and efficient numbering policies and porting practices, a mechanism for the exchange of necessary information among carriers, interconnection, and timely billing practices.

A. Clearly Defined Provisioning Parameters for Day-to-Day Operations Such as Number Porting and Timely Billing Practices Are Necessary to Ensure A Level Playing Field[11/]

Cablevision's CLEC arm, Lightpath, depends on Verizon for certain key network components and business arrangements to offer competitive retail services, including day-to-day operational issues such as number porting and billing practices. Lightpath is significantly hindered in its ability to offer competitive services when Verizon does not provide timely and efficient service in these essential areas.

11/ This section addresses Level Playing Field, Questions #1, #5, and #6.

As the Commission recognizes,[12/] the FCC has jurisdiction over numbering and any state rules must be reviewed from the perspective of national numbering policies. The Commission should be concerned about difficulties with number porting that act as a barrier to entry of competitive services and impede choice for consumers. Lightpath frequently experiences such difficulties.

For instance, Lightpath, like many other competitors,[13/] has encountered numerous problems with Verizon when a Verizon customer seeks to transfer its number to Lightpath. Although there are established industry standards for number porting (*e.g.*, four days for a simple port), Verizon often uses the number porting process to delay the transfer of the customer to its competitor.[14/] As the FCC repeatedly has noted, the number portability process utilized by incumbents must be non-discriminatory.[15/] Incumbent carriers like Verizon clearly have a vested

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12/ *See Order* at 18-19.

13/ *See BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth To Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830, 6849, ¶ 36 (2005) ("*BellSouth UNE Order*") (noting that Comcast Phone, Time Warner, and Bright House Networks raised issues with incumbent providers' porting delays).

14/ For instance, Verizon has claimed that it cannot readily port a telephone number when the customer also has Verizon's DSL service, and in the past, has delayed the port for days or weeks, or in some cases, has refused it altogether until the customer disconnects its DSL service. In response to the *BellSouth UNE Order* stating that carriers must port numbers even in cases in which the voice customer also subscribes to DSL, Verizon has made a commitment to port telephone numbers connected to DSL services within seven business days. In the FCC proceeding considering the Verizon-MCI merger, however, one CLEC has stated that Verizon continues, despite this pledge, to "block[ ] orders from CloseCall (and likely other CLECs) to transfer a customer's local service when the customer also subscribes to Verizon's DSL service." *In the Matter of Applications for Consent to Transfer Control Filed by Verizon Communications Inc. and MCI, Inc.*, WC Docket No. 05-75, Comments of CloseCall America ("*CloseCall Comments*") at 4. *But cf. Case 05-C-0237, Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger, Petitioners' Comments on Department of Public Service Staff White Paper,* at 25-26 *(filed Aug. 5, 2005) ("Verizon White Paper Comments")* (reporting that Verizon "began [in April 2005] offering stand-alone DSL service to existing New York customers," in June 2005 to "New York customers who have never had voice service with Verizon," and will begin in September 2005 to offer naked DSL to "those using the commercial replacement for UNE Platform" service).

15/ *BellSouth UNE Order* at 6849, ¶ 36 (stating "we intend to enforce, non-discriminatory number porting"). S*ee also Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order, 18 FCC Rcd 20971, 20975, ¶ 11 (2003) (ruling that "carriers may not impose non-porting related restrictions on the porting out process"); *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order and Further interest in delaying number ports, especially for those customers who also subscribe to the incumbents' DSL services. Although there are indications that its number porting performance has recently improved, Verizon's failure to execute timely ports can significantly delay the ability of customers to switch providers and serves Verizon's interest by leading to customer frustration and cancellations of new service orders. Any delays in number porting can harm a competitive provider that relies on Verizon for that capability and ultimately interfere with a consumer's right to exercise choice of providers.[16/]

A definitive porting interval for DSL-related ports and enforcement of nondiscriminatory porting policies would ensure that incumbents could not use their ability to control the number porting process to discriminate against competitors.[17/] Both end users and competition suffer if the number porting process undermines the ability of new entrants to provide high-quality service to end users. Indeed, consumers are less likely to exercise their competitive options or change their minds to switch providers if the number porting process becomes too burdensome.[18/]

Another critical item Lightpath relies on is timely and accurate billing for the services Lightpath purchases from Verizon. Although the Commission has recognized that timely,

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Notice of Proposed Rulemaking, 18 FCC Rcd 23697, 23705, 23711-12, ¶¶ 21, 34-37 (2003).

16/ As the Commission recognizes, "a consumer's willingness to subscriber to VoIP telephony depends on the ability to purchase broadband unbundled from voice, and . . . the unavailability of stand-alone broadband could be an impediment to the proliferation of VoIP telephony." *Order* at 8.

17/ *Applications for Consent to Transfer Control Filed by Verizon Communications Inc. and MCI, Inc.*, WC Docket No. 05-75, Comments of CloseCall America, Inc., at 4 (filed May 9, 2005) ("Verizon's unyielding effort to maintain a stranglehold on local voice service customers by leveraging its DSL offering is hardly surprising."); *Applications for Consent to Transfer Control Filed by Verizon Communications Inc. and MCI, Inc.*, WC Docket No. 05-75, Comments of Elliott Spitzer, Attorney General of the State of New York, at 23 (filed May 9, 2005) ("As a condition to approving the proposed merger, Verizon should file proposed performance standards . . . in such categories as number porting . . .").

18/ *See, e.g.*, *Applications for Consent to Transfer Control Filed by Verizon Communications Inc. and MCI, Inc.*, WC Docket No. 05-75, Comments of Vonage Holdings Corp., at 10 (filed May 9, 2005) (noting that "the ILECs often make portability so difficult and time consuming that customers are discouraged from switching service providers").

accurate, and complete bills for wholesale services are critical to competitive carriers,[19/] Verizon continues to use its monopolistic market power to impose additional costs on competitors for reconciling bills and pursuing corrections. Verizon routinely engages in "bad billing" practices, such as billing for services not purchased, billing at non-agreed upon rates, and back billing for services rendered months and even years in the past.[20/] Verizon regularly issues bills to Lightpath that include charges expressly prohibited under Lightpath's interconnection agreement with Verizon, Verizon's tariffs, or the rules and regulations of the Commission and the FCC.[21/] Each of these bad billing practices requires Lightpath to expend significant time, effort and resources to review Verizon's bills, conduct regularly scheduled weekly conference calls with Verizon, lodge the necessary disputes, and follow up on the disputes in order to secure resolution. Often, the same disputes repeat month after month because Verizon fails to implement changes to its billing systems on a prospective basis. Lightpath's efforts to resolve billing disputes are often counterproductive and time consuming, frequently lasting months, or even years, after Lightpath first questions the validity of Verizon's charges.

[19/] *See, e.g.*, Case 97-C-0139, *Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies*, Order Adopting Inter-Carrier Service Quality Guidelines (Feb. 16, 1999) ("*Carrier-to-Carrier Order*") (establishing billing metrics).

[20/] The Commission currently has pending before it a proceeding brought by a group of CLECs who found Verizon's history of "unreasonable back-billing, inaccurate and incomplete invoices, and ineffective and inefficient dispute resolution procedures" significant enough and pervasive enough to warrant the attention of the Commission. Case 04-C-0882, *Complaint of A.R.C. Networks, Inc. d/b/a/ InfoHighway Communications Corporation, BridgeCom International, Inc., Broadview Networks, Inc., BullsEye Telecom, Inc., Choice One Communications of New York, Inc., Covad Communications Company, and Z-Tel Communications, Inc. against Verizon New York Inc. Concerning the Wholesale Billing Practices of Verizon New York*, Procedural Ruling, at 2 (July 28, 2005) ("*Billing Practices Procedural Ruling*"). The Administrative Law Judge assigned to the case agreed that the charges warranted attention, rejecting Verizon's motion to dismiss. *Id*. at 3.

[21/] Case 04-C-0882, *Complaint of A.R.C. Networks, Inc. d/b/a InfoHighway Communications Corporation, BridgeCom International, Inc., Broadview Networks, Inc., BullsEye Telecom, Inc., Choice One Communications of New York, Inc., Covad Communications Company, and Z-Tel Communications, Inc. against Verizon New York Inc. Concerning the Wholesale Billing Practices of Verizon New York*, Cablevision Lightpath, Inc. Petition for Leave to Intervene as an Interested Party, Affidavit of Linda Lazarich on behalf of Cablevision Lightpath, Inc. at 2 (filed Aug. 25, 2004) ("*Lightpath Motion*").

The importance of accurate and timely billing practices is well established. As the FCC has recognized, "[i]naccurate or untimely wholesale bills can impede a competitive LEC's ability to compete" because competitors "must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections."[22/] The FCC also acknowledged that untimely wholesale bills might cause competitors to "lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill."[23/] The Commission should ensure that incumbents cannot use billing practices to discriminate against competitors or otherwise erect roadblocks to entry.

B. Mutually Beneficial Compensation Arrangements for the Exchange of Traffic Are Critical to Facilities-Based Competition[24/]

Under their existing interconnection agreements, Lightpath and Verizon pay each other access charges or reciprocal compensation depending on the type of traffic exchanged. The FCC currently is investigating whether a unified intercarrier compensation regime, such as bill-and-keep, should apply to all traffic rather than the current access charge/reciprocal compensation regime.[25/] Commission intervention, where possible, to establish a bill-and-keep regime would contribute greatly to a level playing field.

22/ *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Memorandum Opinion and Order, 16 FCC Rcd 17419, 17431-32, ¶ 23 (2001).

23/ *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Memorandum Opinion and Order, 16 FCC Rcd 17419, 17431-32, ¶ 23 (2001).

24/ This section addresses Level Playing Field, Question #7.

25/ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005) ("*Intercarrier Compensation FNPRM*"). Verizon has argued in the FCC proceeding that the application of bill-and-keep should be conditioned on other network architecture requirements, such as the establishment of multiple POIs and the imposition of additional transport costs on competitors, and generally has refused to provide competitors with a bill-and-keep arrangement. *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of Verizon (filed Aug. 21, 2001).

The requirement to exchange intercarrier compensation results in problems tracking and billing for traffic, and usually results in disputes between the parties, which require the expenditure of time and resources to resolve. Bill-and-keep, however, would eliminate the need for intercarrier compensation payments between carriers, and thus eliminate most, if not all, of the existing compensation disputes between carriers.[26/]

The FCC has recognized that the existing compensation regimes are based on regulatory distinctions that are not tied to economic or technical differences between services, and distort telecommunications markets at the expense of healthy competition.[27/] Rather than perpetuate an antiquated regime that no longer reflects the current marketplace simply because carriers have always operated in this manner, competition would be greatly enhanced if Verizon were required to demonstrate why a bill-and-keep regime is unreasonable if requested by a competitor. Similarly, Verizon should not be permitted to impose additional obligations on competitors seeking a bill-and-keep regime.

II. VERIZON CONTINUES TO POSSESS SIGNIFICANT MARKET POWER AND INTERMODAL COMPETITION DOES NOT PROVIDE EFFECTIVE CONSTRAINTS ON THAT POWER

A. There Is Insufficient Competition In Retail Markets To Balance the Market Power Held By Verizon and Other ILECs[28/]

1. In New York, Verizon Retains Significant Market Power and Uses That Power to Inhibit Competitors

The Commission's review of New York telecommunications markets discussed in the *Order* suggests some presence of intermodal competitors in nearly every Verizon wire center in

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26/ *See Intercarrier Compensation FNRPM* at 4792.

27/ *Intercarrier Compensation FNPRM* at 4693-94, ¶ 15.

28/ This section addresses Market Power and Regulatory Flexibility, Question #1.

the state,[29/] with what the Commission judged to be a "robust mixture of alternatives" in over 85% of those wire centers.[30/] Contrary to this suggestion, Verizon continues to be the dominant provider in telecommunications markets – on the state level, in local markets, and in individual wire centers.

In 2003, a Commission statistical report declared Verizon to be "the predominant provider of ILEC retail lines" in New York.[31/] Verizon's line total was more than eight times that of its largest competitor, AT&T.[32/] More recently, Commission staff reported that Verizon "currently dominates the [New York] voice market . . . ."[33/] Verizon's proposed merger with MCI, itself one of the state's four largest carriers,[34/] will only increase Verizon's considerable market power.

Of course, such statewide numbers grossly distort the true state of competition in specific markets, and therefore grossly understate Verizon's market power where it really matters, in local markets.[35/] Specific numbers for local markets are not publicly available, but since Verizon does not provide local exchange service to all areas of the state, the staff assessment clearly

29/ Based on data collected in 2003. *Unbundled Access to Network Elements*, WC Docket No. 04-313, Comments of the New York State Department of Public Service, at 16 (filed Oct. 4, 2004) ("*PSC UNE Comments*"). *See also PSC UNE Comments*, Appendix A at iv.

30/ *Order* at 9.

31/ Case 03-C-1220, *Competitive Analysis Report*, Analysis of Local Exchange Service Competition in New York State, at 7 (Oct. 22, 2003) ("*NY Competitive Analysis*").

32/ *NY Competitive Analysis* at 9.

33/ DEPARTMENT OF PUBLIC SERVICE STAFF, WHITE PAPER, CASE NOS. 05-C-0237 AND 05-C-0242, at 20 (July 6, 2005) ("*Staff White Paper*").

34/ *NY Competitive Analysis* at 9.

35/ *See Order* at 8-9 (reporting on a staff competitive analysis conducted at the wire center level).

understates the level of dominance Verizon has in the local markets where it is the incumbent carrier.[36/]

Verizon is dominant not only in the retail market, but also in the provision of key wholesale services to competitors – as a necessary interconnection partner, as an interoffice transport provider, and as the operator of essential 911 emergency system connection facilities – services even its intermodal competitors need. Verizon, by far, has the largest base of retail customers; it is critical that competitors are able to obtain interconnection agreements with Verizon on reasonable terms to allow their customers to place and receive calls from Verizon customers.

Recently reviewing the status of transport competition, Commission staff found only 487 of Verizon's 15,774 transport routes to be "sufficiently competitive."[37/] The staff concluded "transport market concentration is problematic even in the most competitive subset of routes in the New York metropolitan LATA."[38/] Further, because MCI is also a major provider of transport services, "the impact of the [pending] merger [between Verizon and MCI] is significant even for many of the [transport] routes considered to be the most competitive."[39/]

Although Cablevision has made a significant financial investment in the State of New York to build its own facilities, efficient interconnection with Verizon is needed for Cablevision to provide adequate service to its customers. Verizon's dominant position in New York telecommunications markets creates both the ability and the incentive to impede and delay entry

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36/ FEDERAL COMMUNICATIONS COMMISSION, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 31, 2004, at Table 12 (rel. July 8, 2005) ("*FCC 2004 Competition Report*") (reporting Verizon to be only one of eight ILECs in New York with 10,000 lines or more). The ILEC roster includes one, Frontier Telephone, that served over 850,000 lines at the end of 2002. *NY Competitive Analysis* at 9.

37/ *Staff White Paper* at 33.

38/ *Staff White Paper* at 34.

39/ *Staff White Paper* at 37.

or expansion of competitors into the market by inflating the costs for competitors to enter into efficient interconnection agreements. As Cablevision has experienced (and continues to experience), Verizon uses the interconnection agreement process to maintain its market dominance. It does so by raising its rivals' costs through attempts to impose onerous terms in interconnection agreements, even those contrary to a competitor's legal rights, to which rivals must either agree or suffer the considerable expense of arbitration or litigation.[40/] The cost to CLECs of needless arbitration and litigation of interconnection agreements is measured not only in time and legal fees, but also in the loss of significant business opportunities that must be delayed or foregone while the interconnection agreements are being arbitrated.

In New York, Verizon's legal antics have forced Cablevision to file for arbitration in every renegotiation simply to obtain provisions to which it is entitled under the law. For example, under current law, competitive carriers are entitled to establish a single point of

[40/] Since 1996, Cablevision has engaged in three interconnection negotiation and arbitration proceedings with Verizon in New York (and five such proceedings in other Verizon states), which have cost Cablevision more than $2.4 million in litigation, administrative, and human resource costs. *See, e.g.*, Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 by and between New York Telephone Company and Cablevision Lightpath, Inc., (Aug. 1, 1997) (reaching agreement on the eve of arbitration hearings), *as amended* (Nov. 8, 1999) (extending the existing agreement and reaching a negotiated agreement only with assistance of Commission Staff); Case 03-C-0578, *Petition of Cablevision Lightpath, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.*, Arbitration Order (Oct. 24, 2003), Order Resolving Interconnection Agreement Issues between Verizon New York Inc. and Cablevision Lightpath, Inc. Submitted for Resolution Following Issuance of Arbitration Order (Oct. 12, 2004) (resolving all outstanding issues between the companies more than two years after renegotiation was originally requested); *see also* Docket No. TO98060343, *In the Matter of the Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell Atlantic New Jersey, Inc.*, Order Approving Interconnection Agreement (Oct. 21, 1998) (reaching agreement only after arbitration hearings); Interconnection Agreement between Cablevision Lightpath - NJ, Inc. and Verizon New Jersey Inc. for the State of New Jersey (Jan. 7, 2002), *approved by* Docket No. TO01080498; *Cablevision Lightpath - NJ, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New Jersey Inc.*, Order Approving Interconnection Agreement (Mar. 1, 2002) (arbitrating an interconnection agreement more than a year of negotiating); Docket No. 00-10-22, *Petition of Cablevision Lightpath - CT, Inc. for Arbitration*, Decision (Apr. 11, 2001) (reaching a negotiated agreement on the day of formal arbitration hearings).

interconnection ("POI") per LATA to interconnect with the incumbent carrier.[41/] Verizon completely disregards this law and continually attempts to require competitors, including Cablevision, to establish multiple POIs or be subject to financial penalties for failing to do so. The only alternative to accepting this costly term, and the expense of installing additional POIs, is to litigate the matter – an option that creates its own substantial cost.

Because interconnection agreements expire every two to three years, Cablevision is engaged in a constant cycle of negotiation and arbitration with Verizon. In order to minimize the costs involved in this process, Cablevision has repeatedly sought to extend existing agreements with Verizon – agreements reached previously at considerable expense of negotiation and arbitration – only to be rebuffed by Verizon, which regularly offers its generic, multistate, template agreement as the starting point for negotiations. This generic template: does not reflect either the specific network architecture arrangement between Cablevision and Verizon or the day-to-day operation provisions settled in previous negotiations; does not allow consumers to benefit from the efficiency of Cablevision's network; and is replete with unreasonable, one-sided provisions.

Even when Cablevision has been able through negotiation, arbitration, and litigation to eventually achieve a reasonable interconnection agreement, Verizon is able to use its position as keeper of critical bottleneck facilities to impose significant process costs, including, but not limited to, costs associated with number porting delays and bad billing practices, discussed

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[41/] 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a); *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27064, ¶ 52 (2002) ("Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. This includes the right to request a single point of interconnection in a LATA.").

above.[42/] These are process costs that Verizon, because of its size and market dominance, is far better able to afford.

As demonstrated by Verizon's behavior, the wholesale market is not competitive for those key bottleneck services required by competitors. A provider in a competitive market would view Cablevision as a customer and an additional business opportunity rather than attempt to erect roadblocks to Cablevision's entry in the market. Verizon is often inflexible and unresponsive to the needs of its "customers." Other carriers with whom Cablevision does business are much more willing to create customized solutions to meet Cablevision's needs and use individual case basis arrangements. Were Verizon simply one of many service providers in a competitive market, it would quickly lose its customers by engaging in the types of behavior described above. The fact that Verizon is able to impose these unnecessary costs on its customers without losing a significant share of the wholesale market is a clear indicator of the type of market power Verizon continues to possess.

Based on Verizon's sheer size in retail markets and dominance in provision of key services required by competitors, Verizon cannot be considered just one competitor among many in the Commission's analysis. The importance of taking Verizon's dominant position in the markets into consideration is underscored by the fact that Verizon has used, and continues to use, its market power to harm and exclude competitors from New York telecommunications markets.

2. The Commission Must Take Into Account Recent and Pending Changes in Telecommunications Markets When Determining the Extent of Competition

In setting the stage for this proceeding, the Commission recognized that "[t]echnological and marketplace advances are rapidly changing the telecommunications industry."[43/] In addition

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[42/] *See* Section I.A, *supra*.

to changes highlighted by the Commission that may tend to increase the level of competition in telecommunications markets, there are at least two significant changes either recently made, or possibly soon to be made, that must be acknowledged because they have the potential to significantly decrease the level of competition in those same markets.

First, the recent FCC ruling eliminating future availability of the UNE-P is already forcing some CLECs to withdraw from some markets, increasing the remaining ILECs' market power. Following the 2004 vacatur of the FCC's previous rules by the D.C. Circuit Court,[44/] the FCC adopted new rules regarding deployment of UNEs that, among other things, eliminated the unbundling requirement for mass market local switching, ending availability of UNE-P effective March 11, 2005.[45/] This change will have a significant effect on the level of competition. Of the more than 3.6 million lines deployed by CLECs in competitive markets in New York at the end of 2004, nearly 2.5 million were provided through the purchase of UNEs.[46/] While separate figures for New York are not available, nationally 80% of all deployed UNEs are UNE-P circuits.[47/]

The FCC gave CLECs twelve months, until March 11, 2006 to transition their customers from UNE-P to alternate arrangements.[48/] This means that in New York over the next seven months, nearly 2 million CLEC lines now served by UNE-P will need to be transitioned to other

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43/ *Order* at 1.

44/ United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

45/ *Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533, 2641-42, 2666, ¶¶ 199, 235 (2004) ("*Triennial Review Remand Order*").

46/ *FCC 2004 Competition Report* at Table 10.

47/ *FCC 2004 Competition Report* at Table 4.

48/ *Triennial Review Remand Order* at 2641-42, ¶ 199.

platforms or be lost.[49/] CLECs have few alternatives for provisioning these customers, and it is generally acknowledged that all of them are more difficult to achieve and will involve higher costs.[50/] As one news article described it, "the change [lack of availability of UNE-P] ensures a rough road ahead for CLECs . . . [that] could cause consolidation in the industry and even push some CLECs out of the market."[51/]

Anticipating loss of UNE-P availability after the D.C. Circuit ruling, AT&T, historically New York's largest CLEC,[52/] announced last year that it would "cease active marketing of both local and long distance services to mass market customers . . . ."[53/] MCI, historically the state's second largest CLEC,[54/] said that anticipated loss of UNE-P was expected to "significantly" increase its costs of providing local service and "may force [the company] to reduce efforts to acquire new customers and withdraw from certain markets."[55/] With these types of significant early impacts on the two largest CLECs in the market, the impact on smaller carriers can be expected to be even greater, perhaps forcing many of them to exit the competitive market as the March 11, 2006 deadline approaches.

Second, the proposed merger of Verizon and MCI may have a significant effect on the level of competition in many New York markets. Earlier this year, Verizon and MCI filed

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49/ *See Verizon White Paper Comments* at 19-20 (reporting that between January and May 2005 the number of UNE-P lines in New York declined by 45%).

50/ *See* Sean Buckley, *UNE-P to UNE-L: The New Battleground*, Telecommunications Online, Jan. 31, 2005, *at* http://www.telecommagazine.com/techzones/Article.asp?Id=AR_462.

51/ *The Switch is On for CLECs*, Light Reading, Mar. 7, 2005, *at* http://www.lightreading.com/document.asp?doc_id=69463.

52/ *NY Competitive Analysis* at 10.

53/ AT&T Corp., *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the Fiscal Year Ended December 31, 2004* (Form 10K) at 10 (filed Mar. 10, 2005).

54/ *NY Competitive Analysis* at 10.

55/ MCI, Inc., *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the Fiscal Year Ended December 31, 2004* (Form 10K) at 17 (filed Mar. 16, 2005).

applications currently pending before both the Commission[56/] and the FCC[57/] to merge their two corporations. Because Verizon is by far the largest carrier in New York,[58/] and MCI is one of the two largest CLECs in the state (and the fourth largest LEC),[59/] the merger will certainly have the effect of increasing concentration in local exchange markets and lessening competition.

The loss of MCI as a competitive carrier will have an additional impact on remaining competitors' ability to obtain fair and reasonable terms in interconnection agreements. As one of the state's largest competitive carriers, MCI has been able to devote considerable resources to securing interconnection agreements with Verizon that contain fair and reasonable terms. Other, smaller CLECs have been able in the past to use the terms MCI negotiated from a position of relative strength as standards against which to enter their own negotiations or through section 252(i) adoption of such agreements. With MCI's disappearance as a Verizon competitor, smaller CLECs will be even more disadvantaged in dealings with Verizon for mutually beneficial interconnection arrangements.

Reviewing the proposed merger, the Commission "[s]taff's analysis of the residential/small business, enterprise, transport and special access/ high capacity loop market shares associated with the proposed merger raise[d] significant concerns regarding market concentration in each of the segments that were analyzed."[60/] While the staff considered intermodal competition in their analysis, they minimized its importance to an analysis that

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[56/] *See* 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*, Notice Soliciting Comments (Apr. 1, 2005).

[57/] *See Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Pleading Cycle Established, 20 FCC Rcd 6293 (2005).

[58/] *See NY Competitive Analysis* at 7.

[59/] *See NY Competitive Analysis* at 7.

[60/] *Staff White Paper* at 15.

concluded that the post-merger market concentration would require remedies.[61/] Certainly a merger that the staff found would so seriously impact competition in New York telecommunications markets should be taken into account in this proceeding considering changes in regulation based on competition levels in those same markets. Given the Commission staff finding that Verizon's market power is greatest at the wholesale level,[62/] the merger will also have significant impacts on intermodal competitors that must interconnect to the public switched telephone network ("PTSN").

As the Commission's staff points out in its analysis, the SBC/AT&T merger, unlike the Verizon/MCI merger, is not the merger of two large competitors in New York, but a merger of what has been New York's largest CLEC (AT&T) with a company that has previously had a very small presence in the state. On the face of it, there should be little competitive impact because no major competitor is being lost to the market through the SBC/AT&T merger.[63/] The staff, however, may have too hastily dismissed the suggestion by several commenters[64/] that AT&T will be lost as an active competitor once merged with SBC because Verizon and SBC have a long history of failing to aggressively compete against each other even where they have both the opportunity and incentive to do so.[65/] The loss of AT&T as an effective competitor in

61/ The analysis relied almost entirely on computation of Herfindahl-Hirschman Indices (HHIs) to determine the impact on market concentration and competition. *See Staff White Paper* at 15. The HHI does not include intermodal competition as a factor.

62/ *Staff White Paper* at 37.

63/ *Staff White Paper* at 76.

64/ *Staff White Paper* at 72.

65/ *See e.g.*, Case 05-C-0237, *Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger,* Qwest Communications Corporation Comments on the Department of Public Service Staff White Paper, at 12-16 (filed Aug. 5, 2005) ("*Qwest White Paper Comments*") (documenting history of "mutual forbearance" between SBC and Verizon); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Petition to Deny of CBeyond Communications, Conversent Communications, Eschelon Telecom, NuVox Communications, TDS Metrocom, XO Communications, and Xxpedius Communications, at 46-59 (filed Apr. 25, New York telecommunications markets would have a major impact on the level of competition in those markets, and the possibility of such a loss should be taken into account when analyzing markets for this proceeding.

Failure to take these pending changes directly into account would cast a shadow over any analysis of market competition. The strong possibility that these changes will have significant anticompetitive effects on the New York telecommunications markets supports Commission delay of major modifications to regulatory constraints on dominant carriers until it can assess the full impact of these changes on competitive markets. To do otherwise, may result in the Commission basing its decision to regulate or deregulate on a level of competition that may no longer exist when any adopted changes take effect.[66/]

3. VoIP Services Are Not Yet Sufficiently Pervasive in New York to be Considered Serious Competition to Verizon and Other ILECs

In the invitation to comment in this proceeding, the Commission established a goal of eliminating "the asymmetrical aspects of current policies . . . so as to treat each telecommunications provider . . . as even-handedly as possible . . . ."[67/] Elimination of asymmetrical policies, if they exist, must be founded on a basis of at least reasonable symmetry in the market with regard to market penetration and market power. With regard to VoIP services, New York telecommunications markets are still extremely asymmetric and the

2005) (same). *See also*, Case 05-C-0237, *Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger*, Comments of Eliot Spitzer, Attorney General of the State of New York, on the Department of Public Service Staff White Paper, at 7 (filed Aug. 5, 2005) ("*Spitzer White Paper Comments*") ("If both mergers are consummated, each vertically integrated RBOC would have strong business incentives to focus its own marketing on enterprise customers with major operations within its own footprint.").

[66/] *Cf. Order* at 21, n.25 (reporting that of the 4 million retail lines Verizon lost between 1999 and 2004, "approximately 2.8 million shifted to resale or UNE-P . . . based competitive carriers").

[67/] *Order* at 4.

Commission must take care that its attempts to be "even-handed" do not result in handicapping or destroying the consumer benefits derived from this nascent service.[68/]

The Commission suggests that VoIP services are serious competitors to wireline telephone services because "[a]pproximately 95% of New Yorkers have access to the latent broadband capability necessary to avail themselves of IP telephony."[69/] Simple access to the precursor capability, however, does not equal evidence of a competitive market. VoIP is a reasonably competitive service for only those persons who already have a broadband connection, not all of the 95% who "have access" to one. For those without current broadband subscriptions, the need to purchase both broadband and VoIP service to get basic VoIP service prices VoIP out of any real competition with basic wireline service. As discussed below, the Commission must also consider whether all these potential consumers will even have access to VoIP from a competitor, since naked DSL is not yet widely available to NY consumers and there is no definite timetable that suggests it will be available in the near future.[70/]

Department staff estimates that Vonage, the largest national VoIP service provider, has approximately 45,000 customers in New York.[71/] These figures cannot compare to the approximately 9,000,000 lines reported by Verizon.[72/] Even generously assuming that there are about 400,000 total VoIP subscribers in New York, customers choosing VoIP service would

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68/ The Commission has consistently espoused the principle that light-handed regulation of nascent services and technologies is essential to development of advanced products and better choices for New York consumers. Specifically with regard to emerging VoIP technology, the Commission expressed "an interest in ensuring that . . . regulation does not needlessly impose costs that interfere with the rapid, widespread deployment of [the] new technolog[y]." Case 03-C-1285 *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York State in Violation of the Public Service* Law, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation, at 2 (May 21, 2004) ("*PSC Vonage Ruling*").

69/ *Order* at 8.

70/ *See infra,* notes 102 and 118, and accompanying text.

71/ *Staff White Paper* at 22-23, n.55.

72/ *Staff White Paper* at 8.

amount to only slightly more than 4% of the number of lines served by Verizon. This does not describe a symmetrical market crying out for correction of asymmetrical regulation. The subscriber numbers suggest instead a small, but growing, VoIP market that requires regulatory nurturing to avoid being snuffed out by a much larger competitor – a competitor that is, incidentally, already offering its own competing VoIP service.

4. Much of Verizon's Intermodal "Competition" May Come From Itself

It is also important for the Commission to take into consideration ILEC participation in the provision of intermodal services. Verizon may try to paint a picture of itself as a besieged ILEC suffering under heavy regulation while its nimble intermodal competitors, free of such regulation, steadily peel away its wireline business. But any such notion should be tempered by the fact that Verizon may be among its own biggest intermodal competitors.

Verizon Wireless[73/] is the nation's second largest wireless carrier, and is closing fast on number one Cingular.[74/] It has been suggested that customers are substituting wireless services for wireline. This may simply be Verizon cannibalizing its own customer base. For the second quarter of 2005, Verizon reported that it lost 500,000 local wireline customers nationally, while Verizon Wireless picked up 1.9 million new customers over the same period.[75/] While separate figures for New York are not available, it is likely that the same pattern prevails: Verizon

73/ Verizon Wireless is a joint venture of Verizon New York parent company Verizon Communications, Inc. and Vodafone. Verizon Wireless Overview *at* http://www.verizonwireless.com/b2c/aboutUs/.

74/ *Verizon Calls Wireless Subscriber Growth Strong*, USA TODAY, July 26, 2005, *available at* http://yahoo.usatoday.com/money/industries/telecom/2005-07-26-verizon-usat_x.htm?csp=1.

75/ *Id*.

Wireless, as one of the largest and most successful wireless companies in the state, is acting as one of Verizon New York's most significant intermodal competitors.[76/]

Perhaps not as significant in the market at the present time, but nonetheless worthy of note by the Commission is the fact that Verizon has expanded its own intermodal competition efforts with the offering of its VoiceWing VoIP "Broadband Phone Service" – a service the company describes as delivered through the customer's "broadband or cable Internet connection."[77/] So shifts from wireline to VoIP, as well, may, simply be shifts from one Verizon division to another.

B. Market Power, Not Simply Presence of Competitors, Must be Used to Assess Competition in Local Markets[78/]

In the *Order*, the Commission describes a "competitive index" it used to assess the level of competition in comments submitted to the FCC last year.[79/] The index assigns a weight to each form of intermodal competition – 1 for a full-service CLEC or for cable telephone, 0.75 for VoIP, and 0.5 for a business-only CLEC or for wireless services. The weights are based on judgments regarding "the degree of substitutability of the service and economic readiness of the competitive carriers to expand existing offerings."[80/] A score is then assigned to each wire center based on the number of such services that are available in that wire center. A score of 2.75 or above was deemed in the Commission's comments to the FCC in the UNE proceeding to "indicate[] a level of competition sufficient to conclude that competitive carriers would not be

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76/ *Cf.* Paula Bernier and Josh Long, *Is VoIP the Only Track to Competition?*, XCHANGE, Sept. 9, 2004, *at* http://www.xchangemag.com/articles/491coverstory1.html ("Of course, in many cases, the wireless competition is just RBOCs competing with themselves in a sense.").

77/ Verizon VoiceWing Broadband Phone Service *at* http://www22.verizon.com/ForYourHome/sas/sas_Voicewing.aspx.

78/ This section addresses Market Power and Regulatory Flexibility, Question #2.

79/ *Order* at 8-9. *See also PSC UNE Comments* at 6-12.

80/ *Order* at 9.

impaired without access to unbundled switching."[81/] The Commission now proposes to apply the same metric to measure competition in New York retail telecommunications markets.

Leaving aside for the moment whether the weights assigned to the various competitive services are appropriate, the Commission should recognize that the competitive index does not actually measure the level of competition in any market, but simply measures the presence or absence of competitors. For example, three-fourths of a point is assigned for VoIP competition in every wire center where there is broadband service available because anyone with broadband can sign up for VoIP service from Vonage and others. The presence of a means of subscribing to a competitor in the market is not the same as competition.[82/] In a wire center counted as VoIP-competitive because of broadband availability there may be thousands of actual VoIP subscribers or there may be none. In addition, the index tells the Commission nothing about whether competitors are actively seeking to compete in the market, and, more importantly, says nothing about the level of market power held by dominant providers in the market. Commission staff recognized this problem in their own analysis of the potential impact of the Verizon/MCI and SBC/AT&T mergers, rejecting a presence of competition measure in favor of the market concentration measures used by the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") in their antitrust analyses.[83/]

81/ *Order* at 9.

82/ *Cf. Staff White Paper* at 36, n.83 (reporting that collocations used to indicate competition in special access transport markets "were not being used to provide transport"). *See also Spitzer White Paper Comments* at 23 ("The mere availability of some alternate providers is not a substitute for competitors who are capable of blunting Verizon's market power.").

83/ *Order* at 16. *See also* U.S. DEPT. OF JUSTICE AND THE FEDERAL TRADE COMM., HORIZONTAL MERGER GUIDELINES § 1.5 (1997) available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html ("*DOJ/FTC Guidelines*").

"[W]here only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist . . . ."[84/] The presence of multiple potential competitors in a market will not necessarily restrain the market power of a dominant firm if there is a vast disparity in size. In other words, a market with many competitors of roughly equal size and market power will be more competitive than a market where one firm dominates the market and other firms are small competitors with no market power. The latter remains a market where the largest competitor can exert its market power to the detriment of its competitors and the public interest. The competitive index proposed by Commission staff would not capture any difference in the two markets, seeing both as simply markets in which there are many different competitors (with arbitrarily assigned weights).

Another method to determine whether market power (*i.e.*, the ability to maintain prices above competitive levels) exists is to evaluate the likely responses of consumers to a price increase. If a price increase will be made unprofitable by consumers either switching to another product or switching to purchase the same product from a different firm, then the company attempting the price increase lacks market power.[85/] When the products are very nearly the same, such as a customer switching from an ILEC to a CLEC in response to a price increase, the analysis can be relatively simple. Where products perform similar functions, yet are differentiated in many ways – such as VoIP or wireless services versus ILEC services – the analysis is more problematic. This difficulty, of defining the appropriate market in which to determine a competitive analysis, is discussed further below.

[84/] *DOJ/FTC Guidelines* at § 0.1. "Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time." *Id*.

[85/] *DOJ/FTC Guidelines* at § 1.0.

While the ability to manipulate price in a concentrated market is a key metric for determining whether or not competition exists, market power may also be shown in a concentrated market by the ability of a firm with market power to decrease the value of the service provided, while maintaining a constant or rising price. Thus, Verizon or other ILECs have market power (and therefore lack effective competition) in parts of the state where they are able to avoid losing market share even while avoiding investment in the upgrade of deteriorating copper lines.

The pitfalls of deregulating markets based solely on presence of potential competition measures were dramatically displayed in special access markets over the past few years. In 1999, the FCC adopted a rule that provided pricing flexibility for special access services to ILECs in markets where competitors had collocated in a certain percentage of wire centers.[86/] The FCC rejected calls to assess market power, demand and supply elasticities, and pricing behavior in favor of a collocation metric that measured only the presence of potential competition.[87/] As a study of the FCC's special access pricing flexibility regime put it:

> Pricing flexibility is not granted in response to a reduction in market power, but in response to the number of central offices in which at least one competitor has collocated. While measurable, collocation is not necessarily related in a meaningful way to the extent of competition, so the [FCC's] deregulatory framework relies on a highly indirect measure of competition.[88/]

The study observed that after grants of pricing flexibility, "[d]eregulated tariffed prices for special access are nearly ubiquitously higher than regulated prices," and that "very few price

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86/ *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14296, ¶ 141 (1999) ("*Pricing Flexibility Order*").

87/ *Pricing Flexibility Order* at 14300, ¶¶ 151-52.

88/ GEORGE S. FORD AND LAWRENCE J. SPIWAK, SET IT AND FORGET IT? MARKET POWER AND THE CONSEQUENCES OF PREMATURE DEREGULATION IN TELECOMMUNICATIONS MARKETS 13 (Phoenix Center Policy Paper No. 18, 2003).

reductions were observed over time for deregulated prices."[89/] Further, the study's statistical analysis showed that "price increases for Special Access services where pricing flexibility is granted appear to be driven predominantly by market power and not costs."[90/] The FCC is currently reconsidering its system of granting pricing flexibility based on presence of collocations, rather than other measures of competition and market power.[91/]

C. The Criteria and Assigned Weights in the Competitive Index are Arbitrary and Not Useful Measures of Competition[92/]

New York law requires that, to be upheld, actions of administrative agencies must not be arbitrary.[93/] The bases for the weights and criteria used in development of the Commission staff's competitive index are not fully explained, and the index is therefore possibly open to challenge as being arbitrary.[94/]

While there are good reasons to determine that VoIP and wireless services are imperfect substitutes for wireline services (a point that will be discussed in more detail below), the assignment of the weighting values to these two services is not explained and appears to be completely arbitrary. The Commission fails to explain on what basis it determined that a VoIP

89/ *Id*. at 23.

90/ *Id*. at 27.

91/ *Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No. 05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005).

92/ This section addresses Market Power and Regulatory Flexibility, Question #3.

93/ *See, e.g.*, Levine v. Whalen, 349 N.E.2d 820, 824 (N.Y. 1976) ("An administrative regulation, legislative in character, will be upheld as valid if it has a rational basis, that is if it is not unreasonable, arbitrary, or capricious.").

94/ Developing the impairment index proposed in the *Order*, Commission staff applied "[a] weighting . . . to each of the available alternatives to reflect characteristics that may render them less than perfect substitutes for traditional wireline telephone service." CLEC service and "PacketCable phone service, with a cable company's managed network" were considered completely substitutable for wireline phone service from an ILEC, and thus assigned a weight of 1.0. VoIP services were assigned a weight of 0.75 "based on the recognition that service providers may use the public Internet and may not always offer the same level of service quality for voice traffic as do PacketCable providers." And wireless services were assigned a weight of 0.5 because "[c]haracteristics of radio technology, including dropped calls, uneven reception, and the lack of dependable E-911 capability, suggest wireless is not yet a full substitute for basic wired telephone service. *PSC UNE Comments* at 11.

service provides three-quarters the level of competition that a CLEC does, and on what basis it determined that a wireless carrier provides less competition than a VoIP service, and why one-quarter of a weighting point less.[95/] The competition afforded by a CLEC providing only business service was judged to be equal to the competition afforded by wireless services and less than that afforded by VoIP, apparently on a completely arbitrary basis.[96/]

The solution to the problems inherent in using an arbitrary weighting system for determining market competition is not, however, to better explain the weights or to refine better weights. For even with better weighting, the system is left with the underlying flaw that it only measures the (often potential) presence of competitors, not the actual level of competition in any given New York market.

D. Assessment of Retail Market Competition Must Evaluate Both Substitutability of Services and Concentration in Wholesale Markets[97/]

Suggesting that intermodal competition may be sufficient to constrain anticompetitive behavior in many New York telecommunications markets assumes that the intermodal products

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95/ The Commission asks specifically whether the weight assigned to VoIP services is "reasonable in light of current carrier policies concerning the availability of stand-alone broadband." *Order* at 14. In originally assigning a weight of 0.75 to VoIP services, the Commission staff "assume[d] that Verizon will make stand-alone DSL available." *PSC UNE Comments* at 10, n.32. In April, Verizon announced that it would make stand-alone or "naked" DSL available to its current DSL customers, and would "eventually" make it available to everyone. *Verizon Offers "Naked" DSL in Northeast*, MSNBC.COM, Apr. 18, 2005, at http://www.msnbc.msn.com/id/7548500. *See also Verizon White Paper Comments* at 25-26 (reporting that Verizon "began [in April 2005] offering stand-alone DSL service to existing New York customers," in June 2005 to "New York customers who have never had voice service with Verizon," and will begin in September 2005 to offer naked DSL to "those using the commercial replacement for UNE Platform" service). There is not, at this time, any available timetable for availability of naked DSL from New York's other ILECs. If the original weight of 0.75 was assigned based on an assumption of naked DSL availability, it should be assigned some lesser weight until it becomes clear that naked DSL will become available to consumers on a widespread basis.

96/ Similarly, there is no clear rationale given for selecting the value of 2.75 to identify markets that have sufficient competition beyond Commission staff's statement that markets that have an index with at least that value "reflect[ ] a suitably robust mixture of alternatives" to ILEC wireline service. This value may have been chosen to meet Commission staff's declaration that "there should be [in each market] at least three alternatives to the ILECs wireline service and at least three different platforms to protect against market concentration." If this is the standard that must be met, then the proper criterion for a competitive market should be precisely that – "three alternatives, three different platforms" – rather than a numerical system based on arbitrary weights. *PSC UNE Comments* at 11.

97/ This section addresses Market Power and Regulatory Flexibility, Question #5.

are sufficiently alike to be placed in the same market and considered reasonably substitutable by consumers. "Whether or not two products are intermodal competitors is no different than the age-old question of whether or not two products are in the same market."[98/] The intermodal services considered by the Commission, particularly wireless service, are not yet sufficiently substitutable to be considered competing in the same market as wireline service.

1. Wireless Services Cannot Fully Substitute for Wireline Services

Even Department staff recognize that the degree of substitutability between wireline and wireless service is not complete, citing "dropped calls, uneven reception, and the lack of a dependable E-911 capability" as reasons to report last year that "wireless is not yet a full substitute for basic wired telephone service."[99/] Other significant differences between wireline and wireless service include the fact that wireless phone batteries must be charged periodically and wireless service is generally offered through a long-term contract with substantial early termination fees.

Statistics show that New York consumers generally purchase wireless service as a supplement to, not a replacement for, wireline service. Between 1999 and 2004, New Yorkers added over 6.0 million wireless subscriptions, while the total number of wirelines declined by less than 1.8 million.[100/] It is likely that most of the decline in wirelines was due to consumers reducing their number of second wirelines in favor of a wireless phone[101/] or dropping a second

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98/ FIXED-MOBILE "INTERMODAL" COMPETITION IN TELECOMMUNICATIONS: FACT OF FICTION? 3 (Phoenix Center Policy Bulletin No. 10, 2004).

99/ *PSC UNE Comments* at 11.

100/ *FCC 2004 Competition Report* at Tables 9, 13.

101/ *See, e.g.*, FIXED-MOBILE "INTERMODAL" COMPETITION IN TELECOMMUNICATIONS: FACT OF FICTION?, *supra* note 99, at 7 (citing three studies to support statement that "econometric studies consistently show that the own-price elasticity of demand is larger for second than primary lines"); Mark Rodoni, Michael R. Ward, and Glenn A Woroch, *Going Mobile: Substitutability Between Fixed and Mobile Access*, 27 TELECOMMUNICATIONS POLICY 457, 464 (2003) (displaying survey data showing that while between 6% and 8% of surveyed mobile phone wireline used for Internet connectivity in favor of DSL or other broadband connections.[102/] The evidence of consumers completely dropping their wireline service in favor of wireless is very thin. While there are no solid statistical reports on the numbers of wireless subscribers without wireline service, available survey data tends to center around 5% to 6%,[103/] and is never higher than 15%.[104/] In 2003, the FCC reported that "only about three to five percent of [wireless] subscribers use their service as a replacement for primary fixed voice wireline service, which indicates that wireless switches do not yet act broadly as an intermodal replacement for traditional landline circuit switches."[105/] A recent econometric study pegged the number of

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subscribers obtained their mobile phone as a substitute for a "home phone," only 2% to 3% use it as their only phone).

102/ David G. Loomis and Christopher M. Swann, *Telecommunications Demand Forecasting with Intermodal Competition*, TELEKTRONIKK, 4.2004, at 180, *available at* http://www.telenor.com/telektronikk/volumes/front.php.

103/ *See, e.g.*, Rodoni, Ward, and Woroch, *supra* note 102, at 470 ("Only about 1-2% of our [mobile phone study] sample does not subscribe to fixed line service."); Jason Gertzen and David Hayes, *Sprint Surfs Wireless Wave*, KANSAS CITY STAR, July 28, 2005, at C1 ("Sprint estimates that 7.5 percent of the customers in its local markets have cut the cord with landline service . . . ."); Jay Lyman, *Cutting the Cord for Mobile Phones*, MAC NEWS WORLD, June 9, 2005 *at* http://www.macnewsworld.com/story/43442.html (quoting Gartner Research vice president Phil Redman as reporting that his firm's surveys "reveal that wireline replacement with cell phones is only 2 to 3 percent" and that "[t]here's never really growth" in that figure); Yuki Noguchi, *Seldom at Home, He Decided His Cell Would Suffice, and He Cut the Cord*, WASHINGTON POST, May, 13, 2005, at H6 (reporting that "roughly 6 percent of the population . . . has 'cut the cord'"); Silla Brush, *Cell 411 Service Creating Static*, DALLAS MORNING NEWS, Aug. 2, 2004, at A1 ("The Yankee Group says 6 percent of . . . cellphone users . . . only have a wireless phone."); Michael H. Hodges, *Cell Phones: We Love 'Em, Hate 'Em, Need 'Em*, DETROIT NEWS, Apr. 1, 2004, at C1 (reporting that the Cellular Telecommunications & Internet Association estimates that 5% of wireless users do not also have a wireline). Verizon suggests that the percentage is only slightly higher. *Verizon White Paper Comments* at 17 ("As of year-end 2004, analysts estimate that 7 to 8 percent of wireless users had given up their landlines altogether.").

104/ Loomis and Swann, *supra*, n.103 (citing a study by research firm InStat/MDR that reported "14.4 percent of U.S. consumers use a wireless phone as their primary phone"). *But see* Eric Hellweg, *Cutting the Cord*, CNN/MONEY, Mar. 1, 2004 *at* http://money.cnn.com/2004/03/01/technology/techinvestor/hellweg/ (reporting an InStat/MDR study that found "roughly 5 percent" of telephone users had "abandoned their landlines for wireless phones").

105/ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17252-53, ¶ 445 (2003) ("We also find that, despite evidence demonstrating that narrowband local services are widely available through CMRS providers, wireless is not yet a suitable substitute for local circuit switching."). *See also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, Eighth Report, 18 FCC Rcd 14783, 14831-32, ¶ 102 (2003) ("While specific data is largely unavailable, it appears that only a small percentage of wireless customers use their wireless phones as their only phone, and that relatively wireless subscribers who "use wireless exclusively" at 5%.[106/] The number of businesses that use wireless service exclusively is extremely small.[107/]

Evidence from economic studies also suggests that wireline services do not face effective competition from wireless services. One recent economic study of intermodal competition, "[u]sing the standard tools of market definition from antitrust economics and academic empirical work on wireline and wireless services," concluded that "wireline service is a market unto itself and mobile telephony does not, today, offer an effective constraint on market power in the wireline industry."[108/] An older study, while finding that its "estimates indicate that mobile service is a moderate substitute for fixed-line access," warned that "[i]t would be premature . . . to infer from these estimates that mobile service currently constrains local telephone service market power to any economically significant degree."[109/] Even the wireless industry has told the FCC through an economist "[a]t the present time, wireline service is sufficiently differentiated from wireless service to exclude wireline from the relevant product market [for wireless]."[110/]

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few wireless customers have 'cut the cord' in the sense of canceling their subscription to wireline telephone service."). *But see id*. (reporting that wireless customers substitute wireless minutes for wireline minutes of use).

106/ David G. Loomis and Christopher M. Swann, *Intermodal Competition in Local Telecommunications Markets*, 17 INFORMATION ECONOMICS AND POLICY 97, 108 (2005).

107/ Case 05-C-0237, *Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger*, Comments of Conversent Communications of New York, LLC in Response to the Staff White Paper, at 9-10 (filed Aug. 5, 2005) (reporting a New Jersey study that found only about one percent of businesses using wireless as their primary means of making local telephone calls).

108/ FIXED-MOBILE "INTERMODAL" COMPETITION IN TELECOMMUNICATIONS: FACT OF FICTION?, *supra* note 102, at 10.

109/ MARK RODONI, MICHAEL R. WARD, AND GLENN A . WOROCH, GOING MOBILE: SUBSTITUTABILITY BETWEEN FIXED AND MOBILE ACCESS 20 (Haas School of Business, Center for Research on Telecommunications Policy Working Paper CRTP-58, 2002) *available at* http://ssrn.com/abstract=379661.

110/ *AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer of Licenses and Authorizations*, WT Docket No. 04-70, Application for Transfer of Control, Declaration of Richard Gilbert, at 17, ¶ 44 (filed Mar. 18, 2004).

2. VoIP Is Not a Full Substitute for Wireline Service Today

While the other services have not been as well studied as wireless, there are significant differences between wireline and cable telephony and between wireline and VoIP that probably limit customers' willingness to consider those services a substitute for wireline.[111/] Prime among these is that to subscribe to one of these services, a customer must also subscribe to an underlying service, either cable service or broadband Internet service. For potential subscribers who already subscribe to the underlying service, this may not be a significant impediment, but for those faced with purchasing the underlying service for the sole purpose of obtaining voice service, this could be an impediment to substitutability of services. In addition, as the Commission has noted (and as discussed above), the inability of subscribers to readily purchase naked DSL broadband connections from Verizon and other ILECs can make substitutability of VoIP for wireline nearly prohibitive.[112/] The FCC has recognized that because of these limitations, VoIP should not be considered to be a real substitute for wireline service "at this time."[113/]

111/ *See, e.g.,* Marcelo Prince, *Telephony – Dialing for Dollars: Internet Phone Calls Haven't Made Much of a Dent in the Baby Bells' Business*, WALL STREET JOURNAL, May 19, 2003, at R8 ("[M]ost observers see VoIP for now as an attractive second phone line, instead of a replacement for the Bell local service completely.").

112/ Availability of naked DSL may not, in any case, be a solution for many consumers. *See Spitzer White Paper Comments* at 19-20 ("Even if Verizon follows through with and maintains its professed policy to allow stand-alone DSL, customers located more than three miles from the Verizon central office serving heir premises cannot obtain DSL for either VoIP or for broadband Internet access generally."). In addition, naked DSL, should it become available, will be carried on Verizon's copper line plant. "[T]aking into account Verizon's professed goal of retargeting its capital expenditures away from copper plant construction, maintenance and repair, promoting "naked DSL" as a way to spur competition would result in inter-modal competitors' products being carried on lines that will be neglected by Verizon – hardly a healthy competitive prospect." Case 05-C-0237, *Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger*, Comments of Assemblyman Richard L. Brodsky, Chair, New York State Assembly Standing Committee on Corporations, Authorities and Commissions, at 7-8 (filed Aug. 5, 2005) ("*Assemblyman Brodsky White Paper Comments*").

113/ *Triennial Review Remand Order* at 2556-57, ¶ 39, n.118 (reviewing lack of ubiquity of broadband Internet services and concluding that "[a]lthough we recognize that limited intermodal competition exists due to VoIP offerings, we do not believe that it makes sense at this time to view VoIP as a substitute for wireline telephony.").

Given the significant differences between the services and the potential impediments to consumers contemplating switching services, conducting a data-based study of substitutability of the services may be a reasonable undertaking before the Commission proceeds to make an assumption that the products are sufficiently substitutable to be in the same economic market for purposes of competition analysis.[114/]

As an initial area of study, Commission staff may simply assess the relative price levels charged for basic wireline telephone service and for comparable VoIP services. If VoIP services are actually good substitutes for wireline services in the eyes of most consumers, VoIP's generally lower prices should have resulted in VoIP's capture of a significant portion of the voice market. The fact that that has not occurred suggests that substitutability of the two services is limited.

3 Any Assessment of Retail Market Competition Must Include An Evaluation of Concentration in Wholesale Markets

A clear understanding and assessment of the level of competition in retail telecommunications markets also requires an understanding and assessment of the level of competition in related wholesale markets. This is not solely because a dominant retailer in a given market may be able to exert monopsonistic influence on prices and services in the wholesale market, but also because in many telecommunications markets, the dominant retailer is also the dominant wholesaler. An ILEC in a telecommunications market is not solely a provider of retail telephone services, but also serves as a wholesaler and necessary interconnection partner to its competitors – including its intermodal competitors.

[114/] *See Assemblyman Brodsky White Paper Comments* at 8 ("The Committee [on Corporations, Authorities and Commissions] calls therefore, . . . for the Commission to obtain and provide to the parties – accompanied by a period in which to comment – the data necessary to comment upon impediments to switching between [wireline, DSL and cable modem based] telephone service providers.").

The Commission clearly recognized the importance of the wholesale market to effective retail competition in its *Competition II Order*: "Local exchange service is fundamentally about providing a communications path from the customer's location to a point connecting networks serving the rest of the world. Effective local exchange competition can develop only if new providers have the ability to provide these paths."[115/] In the same Order, the Commission declared that "[i]nterconnection continues to be the linchpin of competition,"[116/] and that fair and reasonable intercarrier compensation was "considered integral to a competitive market as well."[117/] Verizon's dominant market position comes clearly into play when viewed in light of the interconnection "linchpin." Given the sheer size of Verizon's customer base, all of Verizon's competitors must be able to connect to Verizon's network to be able to realistically sell services – few, if any, customers would purchase a competitive service if they were unable to call the vast number of persons on Verizon's network. On the other hand, Verizon would likely lose few customers by refusing to interconnect with a smaller competitor, since most of its customers could still complete all (or nearly all) the calls they want on Verizon's network alone. This asymmetrical need for interconnection – competitors needing it badly, the dominant carrier advantaged without it – is the very definition of market power. Cablevision's concerns about Verizon using its dominant position in the market to undermine competitors with regard to negotiation of interconnection agreements and intercarrier compensation have been highlighted above. Verizon's significant and growing market dominance for provision of transport services is also directly relevant when defining an appropriate competitive market. A Commission study

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115/ Case 94-C-0095, *Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market*, Opinion and Order Adopting Regulatory Framework, at 4 (May 22, 1996) ("*Competition II Order*").

116/ *Competition II Order* at 20.

117/ *Competition II Order* at 21.

submitted to the FCC last fall found that out of 15,774 Verizon transport lines in New York, only 487 could be declared competitive.[118/] These figures clearly show the near-monopolistic hold Verizon has on the New York wholesale transport market. Commission staff recently reported "transport market concentration is problematic even in the most competitive subset of routes in the New York metropolitan LATA."[119/]

As small as the number of competitive New York transport routes is, the number may become nearly microscopic if the Verizon/MCI and SBC/AT&T mergers are approved. Of the 487 transport routes identified as competitive because they have multiple providers, the mergers will leave Verizon in 409 of these routes with only a single competitive provider – SBC/AT&T.[120/] Commission staff concludes "the impact of the merger on competition is significant even for many of the routes considered to be the most competitive . . . ."[121/] With nearly total control of the New York transport market, Verizon is in a position to leverage that control to enhance its already-dominant position in retail telecommunications markets.[122/]

118/ *Staff White Paper* at 33.

119/ *Staff White Paper* at 34. *See also* Case 05-C-0237, *Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger*, Comments of PAETEC Communications, Inc., at 6 (filed Aug. 5, 2005) (reporting its internal survey of the interoffice transport market routes it utilizes "found that on numerous routes even in New York City, Verizon and MCI were the only providers of interoffice transport").

120/ *Staff White Paper* at 36-37.

121/ *Staff White Paper* at 37.

122/ *Qwest White Paper Comments* at 10-12 ("Following the merger, the combined Verizon/MCI could discriminate in favor of its own retail enterprise operations and against rivals in a number of ways, most of which would be relatively difficult to detect or prevent.").

III. CONSUMER PROTECTIONS REMAIN APPROPRIATE AND NECESSARY

A. Competition May Not Eliminate the Need for Some Traditional Consumer Protection Regulation[123/]

As a general matter, consumer protection is most effectively provided and ensured when consumers have a choice among different service providers and each provider fully discloses all relevant terms and conditions to consumers, to ensure consumers can make an educated choice among services to find that which best fits his or her needs and preferences. Two means of ensuring that consumers in non-competitive markets enjoy the same benefits as those in fully competitive markets is to require the incumbent 1) to maintain nondiscriminatory rates in all of its service areas, and 2) to offer the same level of service quality in non-competitive areas as is provided in competitive areas.[124/] This has dual benefits of preventing predatory practices aimed at eliminating nascent competition and of spreading the benefits of competition to every part of the market, even where choices are unavailable to otherwise discipline the conduct of the incumbent.[125/]

123/ This section addresses Consumer Protections, Question #1.

124/ In the merger proceeding, PSC Staff has suggested that "to ensure that Verizon continues to focus on maintaining good service quality in New York, especially in areas where adequate competition does not yet exist, a potential remedy might be that before Verizon is permitted to exercise any potential pricing flexibility in those areas in the future, it must show that it is maintaining good service quality performance according to the Commission standards." *Staff White Paper* at 6.

125/ For example, Verizon's dominance in the retail market also supports continuation of the pricing restraints currently imposed on Verizon's services. These Commission-imposed restraints ensure that Verizon cannot engage in retail price predation to eliminate competitors in more competitive market segments to the detriment of consumers. *See* 16 NYCRR §§ 720.2-3, 720.2-4. Under no circumstances should Verizon be extended the flexibility that competitors enjoy pursuant to 16 NYCRR §§ 720.2.6. Further, to maintain progress toward a more competitive market, Verizon must continue to comply with the protections the Commission established in the Carrier-to-Carrier proceeding and in the Performance Assurance Plan ("PAP"). *See Carrier-to-Carrier Order*; Case No. 99-C-0949, *Petition Filed by Bell Atlantic – New York for Approval of a Performance Assurance Plan and Change in Control Assurance Plan, Filed in C 97-C-0271*, Order Amending Performance Assurance Plan (Jan. 24, 2003). Without such requirements, Verizon will have little incentive to address deficiencies in wholesale service quality, especially when dealing with smaller carriers. Verizon's refusal to provide adequate service to competitive carriers could affect those carriers' ability to stay in business, and thus decrease the competitive choices available to consumers. Even if those carriers remain in business, inadequate wholesale service will directly affect retail consumers who enjoy the benefits of competitive carriers' lower priced, innovative service offerings but demand a certain level of service quality.

As discussed above, current conditions indicate that in New York markets there are serious questions about the extent of substitutability of wireless and VoIP services for wireline telephone services for many consumers.[126/] Competition has not yet fully developed, and consumers do not have a real choice of alternative services comparable in quality and price,[127/] and the Commission should retain those protections necessary to restrain abuses of market power by the dominant provider.[128/]

[126/] *See* Section II.D., *supra*.

[127/] While the *Order* states that "viable facilities-based telephone options are widely available in New York," *Order* at 9 (acknowledging that "some parts of the State are more robustly competitive than others"), the Staff White Paper acknowledged that many competitors, such as VoIP and wireless providers, do not yet have sufficient market penetration to be considered significant, although their market presence may grow. *See Staff White Paper* at 22-23. Others have also questioned the extent to which potential competition may force service quality standards. Case 05-C-0237, *Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger*, Comments of the Communications Workers of America, AFL-CIO, at 13 ("*CWA White Paper Comments*") ("[I]t should be noted that Verizon's Out of Service performance has been substandard in areas with the most potential competition including Westchester, Nassau, Queens and Suffolk counties.").

[128/] The Commission's experience with the Verizon Incentive Plan ("VIP") demonstrates the dangers of relying on competition to maintain consumer protection when markets are not yet sufficiently competitive. In 2002, the Commission cited "the positive impact of competitive pressures on service quality" as support for its adoption of the VIP that granted Verizon pricing flexibility and required the company to meet basic service performance metrics. Case 00-C-1945, *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework,* Order Instituting Verizon Incentive Plan, at 32 (Feb. 27, 2002). One year later, the Commission was forced to suspend Verizon's pricing flexibility under the plan because Verizon had failed to meet service quality targets. Case 02-C-0543, *Quality of Service Provided by Local Exchange Companies in New York State*, Verizon New York Inc. Loss of Pricing Flexibility (June 11, 2003). Later that year, expressing concern that "Verizon is not doing enough to correct problems in areas that are experiencing chronically poor service," the Commission initiated a proceeding "to review Verizon's retail service quality," and required an independent audit of Verizon's customer service operations. Case 03-C-0971, *Proceeding on Motion of the Commission to Consider the Adequacy of Verizon New York Inc.'s Retail Service Quality Processes and Programs*, Order Initiating Verizon New York Service Quality Proceeding, at 10-11 (July 11, 2003). Ultimately, initial hopes that competition would help to force Verizon's compliance with consumer protection standards were not realized. *See also Assemblyman Brodsky White Paper Comments* at 16 (supporting reinstitution of a "performance based service quality plan" and questioning as "unsupported . . . [by] empirical evidence" Commission staff's conclusion that "the sheer number of inter-modal competitors for telecommunications services has significantly reduced the need for" quality control regulation).

B. Both State and National Policy Favor Avoiding Regulation of VoIP Services[129/]

Both Commission precedent and FCC rulings favor allowing VoIP services, including new VoIP offerings like those from Verizon,[130/] to flourish as free of regulation as possible. The FCC has established that state regulation of VoIP services generally "must yield to important federal objectives,"[131/] and that even federal regulators should "apply[ ] discrete regulatory requirements [to Internet-based services] only where such requirements are necessary to fulfill important policy objectives."[132/] . The Commission has also recognized that it has "an interest in ensuring that . . . regulation does not needlessly impose costs that interfere with the rapid, widespread deployment of new technolog[y]."[133/] With regard to VoIP, the Commission has said that it "seek[s] to maximize the benefits of new technologies . . . by imposing as little regulation as is necessary . . .."[134/]

With the advent of competitive alternatives, there is no compelling justification for imposing economic and customer service regulations on IP-enabled voice services. There is, however, tremendous potential downside. As Congress, the FCC, and the Commission repeatedly have recognized, burdensome regulation has a chilling effect on the deployment of

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129/ This section addresses Consumer Protections, Question #2.

130/ Verizon's VoIP service need not be regulated differently from any other New York VoIP service.

131/ As the Commission is aware, a November 2004 ruling by the Federal Communications Commission held that federal regulation preempts state regulation of VoIP services. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("*FCC Vonage Order*"). While the Commission is among those entities seeking to have that ruling modified or overturned, *see* New York v. FCC, No. 05-72953 (9th Cir. filed Apr. 26, 2005) (transferred from the 2d Cir. and consolidated with No. 05-71238; consolidated case ordered transferred to the 8th Cir., July 15, 2005), unless and until it is overturned, the FCC's decision circumscribes the type of VoIP regulation the Commission may consider in this proceeding.

132/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Notice of proposed Rulemaking, 20 FCC Rcd 1994, 1996, ¶ 5 (2005).

133/ *PSC Vonage Ruling* at 2.

134/ *PSC Vonage Ruling* at 2. Verizon also enjoys the benefit of light-touch regulation for its VoIP services.

new services, raises the cost of services, and diverts funds that could be used to create additional creative products and services, thereby discouraging new subscribers and the development of healthy competition.[135/]

Finally, while VoIP service providers support many important consumer protection concepts, including E911, access for the disabled, and meeting the needs of law enforcement, the FCC has indicated that the imposition of most types of "social policy" obligations on VoIP service providers are best handled exclusively at the federal level in order to ensure the development of a uniform national policy.[136/] The imposition of different or additional obligations at the state level could undermine the development of this federal regime. It is important for both national security and the disabled community to have telecommunications systems that work the same way across the country, and a national regime provides the sort of seamless solution these interests require.

135/ *See, e.g.*, *PSC Vonage Ruling* at 2 ("We seek to maximize the benefits of new technologies, while minimizing the risks to the public interest, by imposing as little regulation as is necessary to ensure that our core public interest concerns . . . are addressed."); *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, CSR-4790, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441-42, ¶¶ 105-106 (1997) (expressing concern over regulatory over-reaching by localities and the resulting discouragement of both competition and new services); *2000 Biennial Regulatory Review: Spectrum Aggregation Limits For Commercial Mobile Radio Services*, WT Docket No. 01-14, Report and Order, 16 FCC Rcd 22668, 22677-79, ¶¶ 22-25 (2001) (discussing Congress' and, consequently, the FCC's preference for deregulation over regulation); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11540-41, ¶ 82, n.170 (1998) (discussing Congress' and the FCC's view that regulation of ISPs would stifle development of new technologies and services).

136/ *See FCC Vonage Order* at 22404-05, ¶ 1 ("[T]his Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities. For such services, comparable regulations of other states must likewise yield to important federal objectives."). *See also E911 Services for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, ¶¶ 36, 61 (rel. June 3, 2005) (establishing standards for E911 service by VoIP service providers and seeking comment on "what role the states can and should play to help implement the E911 rules"); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3316-23, ¶¶ 15-25 (2004) (declaring pulver.com's VoIP service to be subject to exclusive federal jurisdiction).

IV. SERVICE QUALITY MEASURES REMAIN VALID IF BASED ON THE PARTICULAR SERVICE OFFERED AND THE INDIVIDUAL CHARACTERISTICS OF PROVIDERS RATHER THAN A ONE SIZE FITS ALL REGIME[137/]

The Commission consistently has adopted regulatory policies that foster competition in the local telecommunications market, with a primary focus on facilities-based competition. As a result of these pro-competitive policies, carriers have continued to deploy their own facilities and provide unique and innovative services to consumers. Within this framework, service quality has become important to all providers and, as the Commission has recognized,[138/] is vital to the operation of New York State's telecommunications infrastructure. Service quality, however, (and the resulting network reliability) is a competitive issue that should be advanced based on market demands rather than through the adoption stringent requirements applied to all providers under a "one size fits all" regime. Providers have a competitive incentive to provide the best quality of service to their customers, which is achieved through reliable, robust, and redundant networks, not through the imposition of specific regulatory requirements.

The Commission's current service quality standards vary depending on the size of the reporting company and the company's reporting history.[139/] In adopting those variations, the Commission found that a reduction in reporting requirements would be "a reasonable way to streamline regulations . . . especially for competitive carriers entering the market."[140/] The same reasoning holds true today. Service quality standards should be applied based on the

137/ This section addresses Service Quality, Questions #2 and #6.

138/ *Order* at 15.

139/ *Order* at 16. S*ee also Competition II Order* at 32 (describing rationale for "basing service quality reporting on company size and performance"); Case 97-C-0139, *Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies*, Memorandum and Resolution Adopting Revision of Parts 602, 603, and Section 644.2 of 16 NTCRR, at 8 (Oct. 6, 2000) ("*Carrier-to-Carrier Order II*") (describing different service quality reporting requirements for different sized carriers).

140/ *Carrier-to-Carrier Order II* at 9.

characteristics of the provider and the particular service offered. Such an approach is consistent with the Commission's policies of applying regulation only when regulation is necessary.[141/]

General service quality standards should not be based solely on input measures, as such standards could have the unintended consequence of unnecessarily delaying the implementation of network upgrades and other technological advancements intended to benefit consumers. Such a result would be inconsistent with the Commission's long history of adopting regulatory policies that encourage investment and innovation, rather than dictating specific parameters for that investment.

There may, however, be some limited instances in which using input measures may be an appropriate measure of service quality. For example, when a provider transitions from a copper network to a fiber-based network, service standards should be established to ensure that consumers in economically disadvantaged or rural communities do not suffer poor service quality because they are left with deteriorating copper while providers invest in fiber in other more economically beneficial areas of the state.[142/] As Commission staff has recognized in other proceedings, competitive alternatives "are *not* universally available . . . due to limited build outs, and/or other limits on the 'reach of the technology.'"[143/] In this type of situation, utilizing only a performance-based metric may not yield an accurate and reliable report of the level of service being received by those customers. As Commission staff previously has suggested, the "level of

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141/ *See, e.g.*, *Competition II Order* at 5 ("To the greatest extent possible, the [regulatory] framework is designed to leave the market free to define itself.").

142/ *Cf. Staff White Paper* at 51 (noting concerns that Verizon may dedicate investment to more competitive areas at the expense of less competitive areas). There are also some indications that Verizon plans to sell or spin off its less-profitable upstate copper-wired lines following installation of fiber in more profitable areas. This portends the possibility that less-affluent areas of the state will be left with service provided by companies far less financially capable than Verizon to maintain their aging copper networks. *CWA White Paper Comments* at 20-21; *Spitzer White Paper Comments* at 21-22.

143/ *Staff White Paper* at 50 (emphasis in original).

regulatory oversight must be informed by the extent of competition in the specific areas of the State."[144/]

V. MODIFICATIONS TO UNIVERSAL SERVICE WOULD BE PREMATURE AT THIS TIME

The goals for universal service established by the Commission in 1996[145/] are still appropriate. Basic services "should be evaluated and revised as necessary to meet evolving needs;"[146/] at this point, however, the Commission's current definition of "basic service" remains valid and does not need to be altered.

While it may be necessary to make changes to the Commission's definition of basic service in the future to accommodate changes in technology and consumers' basic needs, it would be premature for the Commission to act at this time. Universal service is undergoing comprehensive review on the national level, which may create changes that impact state-level programs. In addition, the FCC is considering changes to intercarrier compensation as well as conducting a review of several large telecommunications mergers, all of which may affect the universal service program. Deferring state changes until after the federal government acts will permit a more rational assessment of public needs.

In brief answer to some of the Commission's specific questions,[147/] there is no need to establish a state "high cost" program (again, any such change should first await the conclusion of the ongoing intercarrier compensation proceeding); funding for Universal Service should be from collections assessed on a per-telephone number basis; the provision of universal service must be transparent, explicit, and competitively neutral; and universal service support should not

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144/ *Staff White Paper* at 51.

145/ *Competition II Order* at 9.

146/ *Order* at 10.

147/ *See Order* at 12-13.

be based on support for carriers, but should be based on provision of support for consumers, recognizing consumers' choices for obtaining basic services in competitive markets.

CONCLUSION

The Commission is wise to periodically review its regulatory structures to be sure that they still appropriately serve the citizens of the state. In the abstract, the twin goals of this proceeding – the elimination of any unnecessary regulation and achievement of a level regulatory playing field for like services with like market power – are worthy. There are real questions, however, as to whether intermodal competitors to the dominant wireline services are sufficiently substitutable, sufficiently robust, and sufficiently ubiquitous to effectively counter the vast market power held in New York telecommunications markets by Verizon and other ILECs. There is, in fact, considerable evidence that despite the limited presence of intermodal competitors, Verizon continues to maintain and wield significant market power. Care must be taken that this proceeding does not, in the name of regulatory fairness, remove restraints on ILEC market power that currently protect New York consumers and that foster the growth of competition in local telecommunications markets.

Any potential action in this proceeding must be carefully considered and informed by more complete analysis of the level of market concentration, market power, and competition than is currently available to the Commission. The day is not yet here when wireline, wireless, cable, and VoIP services are equal competitors in New York telecommunications markets. The day is not yet here when Verizon can be considered just one of many players in those same markets. The day is not yet here when Verizon's customer service levels and its provision of needed services to other carriers are disciplined by competition. Study of the level of intermodal competition in New York should continue, but it must be recognized that current evidence of the level of intermodal competition does not support significant changes in the regulatory structures the Commission has put into place to protect New York consumers.

Respectfully submitted,

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