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August 15, 2005

Jaclyn A. Brilling
New York Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

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

Dear Secretary Brilling:

On behalf of Public Utility Law Project of New York, Inc (PULP), enclosed please find an original and fifteen (15) copies of PULP's comments in the above-referenced proceeding. Copies of the enclosed comments have been sent to those persons on the Commission's Active Party List dated August 15, 2005 by e-mail. Should you have any questions please do not hesitate to contact Gerald A. Norlander at (518) 449-3375, Ext. 13.

Respectfully submitted,

Gerald A. Norlander
Executive Director
Public Utility Law Project

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 PUBLIC UTILITY LAW PROJECT
IN RESPONSE TO JUNE 29, 2005 ORDER

Public Utility Law Project of
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August 15, 2005

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 PUBLIC UTILITY LAW PROJECT
IN RESPONSE TO JUNE 29, 2005 ORDER

The Public Utility Law Project of New York, Inc. ("PULP") is a non-profit organization representing the interests of low and fixed income utility consumers in matters affecting affordability, universal service and consumer protections associated with gas, electric and telephone service. PULP submits these comments in response to the Commission's *Order Initiating Proceeding and Inviting Comments* in 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* (Issued July 29, 2005) (*"June 29 Order"*), concerning the regulatory policies and requirements that flow from an "intermodal competition" in the provision of telephone service.[1]

[1] PULP notes the phrase "intermodal competition" is a linguistic concession that intra-modal competition does not exist. This concession, fully consistent with the increasing concentration through merger of ILECs on a national level and with the withdrawal of CLECs from most New York residential markets, means that residential telephone customers will increasingly find "competition" only through newer, less tested, less trusted, historically less reliable and possibly more costly broadband or wireless based

POINT I

NEW YORK STATE'S IMPLEMENTATION OF UNIVERSAL TELEPHONE SERVICE HAS DECLINED AND SHOULD BE RESTORED

In the *July 29 Order*, the Commission repeats the principles articulated in Opinion 96-13 as the foundation for its universal service policy. PULP supports these principles and commends the July 29 Order for recognizing and restating them. The *June 29 Order*, however, fails to recognize and take into account the lack of progress towards, indeed the movement away from, the attainment of these important goals in recent years.

Using the entire United States as a benchmark, New York had improved its performance throughout the 1990's toward the universal service objective.[2] In 2000, the percent of households having telephone service in New York was 96.1%. This is the highest telephone service penetration rate achieved in New York since 1984 – the first year in which the FCC collected this data. Moreover, the difference between the telephone service penetration rate for the nation and for New York was 1.6% (94.5% vs. 96.1%) – again this is the highest by which New York's rate has exceeded the national rate since 1984. While seemingly small in percentage terms, this 1.6% difference represents 112,603 customers. In effect, because New York's rate exceeded the nation's as a whole in that year, over 100,000 more New York households had telephone service

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alternative technologies. In most cases, the market performance of these technologies shows that they are complements to – rather than substitutes for –existing ILEC dominated wireline services. These technologies bring with them none of the consumer benefits which might be associated with a true competitor. See, Selwyn, L., Golding, H. and Thompson, H., "*Confronting Telecom Industry Consolidation – A Regulatory Agenda for Dealing with the Implosion of Competition*" (April 2005) (prepared for NASUCA by Economics and Technology, Inc. and found at http://www.nasuca.org/FINAL%20NASUCA%20Paper%20April%202005.pdf.

[2] Attached to these Comments as Exhibit A is a spreadsheet created from the most recent FCC data on telephone service penetration in New York State between 1984 and 2005. All references to telephone service penetration in the text of these Comments are to this data.

at that time than would have enjoyed this service if New York had matched, but not exceeded the national penetration rate.

While the State's achievement in 2000 was a significant benefit to those who otherwise would have been without telephone service in that year and a significant demonstration of the State's commitment to the universal service goal, performance since that date has degraded significantly. <u>The percentage of households having telephone service declined from its all time high in 2000 of 96.1% to 91.3% in 2005</u>. This 4.8% drop in the penetration rate is statistically significant, and the 91.3% rate is the second lowest rate on record. It is exceeded only by the rate experienced in 1990, when the State rate of telephone usage was 2.5% <u>lower</u> than the national average. The 4.8% drop from 2000 to 2005 represents at least 331,390 customers[3] who lacked telephone service in 2005 but who would have had this service if the 2000 penetration rates had been maintained.

Low income New Yorkers have a significantly lower telephone service penetration rate than the State as a whole. In 2000, when this rate was the highest for the State as a whole, it was also highest for the poorest New Yorkers as well. While the rate for New York in general was 96.1%, the rate for households having less than $10,000 in income was 92.0%. However, this number declined to 89.0% in 2004. In that year, over 186,560 of the households in this income category lacked telephone service – up from 125,812 households for this income category in 2000.

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[3] This calculation is made by taking 4.5% of the total number of New York households in March 2004 because the FCC reports do not have this data for March 2005. The calculation is based on the assumption that the total number of households in 2005 at least equaled the number of households in 2004. If the number of households in 2005 exceeded the number in 2004, then the 331,390 figure used in the text would be even higher.

As noted above, the rate of telephone service availability for these lowest income households in 2000 was 92.0% This rate is the highest recorded for this income category since 1984. Further, the number of unserved households in 2000 – 125,812 – was the lowest in this 20-year time span. While these figures show that service to these very low income households improved to a high point in 2000, the decline in telephone service penetration from 2000 to 2004 increased the number of unserved households in this income group by more than 60,700 – an increase of over 48%.

For the low income households with between $10,000 and $20,000 in household income, the telephone service penetration rate was also at an all time high in 2000 - 96.9%. At 96.9%, this rate was higher than the state average. However, the rates for all income groups other than the lowest income group are higher than the State average in that year. The most striking difference between the rates for this income group and the rates for households with higher incomes is that, while the rates for this group decline between 2000 and 2004, <u>the penetration rates for the three higher income groups actually go up or remain the same in this period</u>.[4] For the $10,000-$19,999 income category, the decline between 2000 and 2004 is from 96.9% to 93.3% - a statistically significant drop in the rate for this group. In real numbers, this drop meant that the number of unserved households in this income category increased from 47,173 in 2000, its all time low, to 102,224 in 2004 – an increase of 54,049 households or 116%.

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[4] The Percentage of Households with telephone service in these income brackets for these years are:

	2000	2004
$9,999 or less	92.0	89.0
$10,000 - $19,999	96.9	93.3
$20,000 - $29,000	96.8	97.2
$30,000 - $39,999	97.6	97.6
$40,000 or more	97.9	98.0
All households	96.1	94.8

The Commission should promptly take steps to restore telephone penetration in lower income households to prior levels and move forward toward the goals of universal service.

POINT II

THE STATE'S EFFORTS TO SUPPORT THE TELEPHONE LIFELINE PROGRAM HAVE NOT MET ITS FUNDAMENTAL UNIVERSAL SERVICE GOALS

Lifeline telephone rates provide qualifying residential customers with telephone service at rates that are reduced by the application of federal and State discounts. Under the New York program, qualifying residential customers do not pay the federal subscriber line charge for their service. Today, for Verizon customers, for example, this charge amounts to $6.50 per month. In addition, these customers receive a separate State discount and the amount of this discount is matched by further federal funds at a 2 to 1 rate up to $1.75 in federal funds.[5] Today, the discount for flat rate customers amounts to $13.11 per month, and, for measured rate customers, to $14.11 per month. The costs of these discounts are made up, for the federal portion, from the federal Universal Service Fund and, for the State portion, from the State's Targeted Assistance Fund.

Since 1995, New York has implemented one of the most effective programs in the country for the enrollment of Lifeline customers. This program relies on seven other assistance programs to identify customers who are eligible for Lifeline assistance.[6] Using

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[5] Attached as Exhibit 2 is a chart illustrating the impact on residential customer bills for both flat rate and measured rate customers.

[6] The seven programs identifying Lifeline-eligible households are:

Food Stamps
Medicaid
Supplemental Security Income (SSI)
Temporary Assistance Program (TANF)

these seven programs to establish eligibility and exploiting a computerized matching process for identifying customers who are beneficiaries of these programs, Verizon increased its enrollment of Lifeline customers to over 720,000 customers in 1996. After that date, however, enrollment declined from the high of over 727,000 to 453,000 in 2001.[7]

Based simply on the figures currently available, there is a reduction from the 727,000 high of 274,000 customers or 38%. In PULP's view this drop is the result of changes in many of the programs that qualify customers for Lifeline, rather than a dramatic increase in the incomes of low income New Yorkers. Welfare "reform" in the late 1990's resulted in many individuals being removed from the rolls of some of the programs which create Lifeline eligibility. More significantly, as enrollment declined, no measures were taken to identify new programs to indicate Lifeline eligibility or to find alternative means to reach these customers.

The impact of this atrophy in the Lifeline program imposed dramatic costs on many New York consumers. Each Verizon customer otherswise eligible for the Lifeline discount who does not in fact receive the discount today pays about $13 per month more for telephone service than he or she otherwise should pay for this service. Based on the drop in enrollment that we know about, PULP estimates that there are 250,000 Lifeline eligible customers who do not receive the Lifeline discount. If 80% of these customers

Home Energy Assistance Program (HEAP)
Veterans Disability Pension
Veterans Surviving Spouse Pension.

Customers receiving benefits under any of these programs are qualified to receive benefits under the telephone Lifeline program. In addition, customers who are income eligible for any of these programs also qualify for the Lifeline program, even if they are not actually receiving benefits under the non-Lifeline program.

[7] PULP has no figures for Lifeline enrollment after 2001 and has sought this information in discovery. It will be supplied as it becomes available in response to PULP's information requests.

continue telephone service at the non-Lifeline rate, they are being overcharged collectively $2.6 million per month for their telephone service, or over $30 million per year.[8] The June 29 Order repeats the well understood universal service principle that service "should be affordable and reasonably priced". In PULP's view, this principle is flatly contradicted when hundreds of thousands of customers are not receiving the discount that was intended to make this service "affordable and reasonably priced", to which they are entitled, and which amount to, in the aggregate overcharges of tens of millions of dollars a year. All eligible customers should be able to receive the benefits of reduced rate lifeline service. This problem is severely compounded when the withdrawal of the discount actually results in the loss of telephone service as the customer is forced to leave the system.

POINT III

CUSTOMER SERVICE STANDARDS AND CONSUMER PROTECTIONS SHOULD BE APPLIED EQUALLY TO ALL TELEPHONE SERVICE PROVIDERS

In PULP's view, the advent of competition in the market to supply telephone service in no way supplants the need for and importance of consumer protections for residential telephone customers. Complaint statistics from the State Consumer Protection Bureau and the Attorney General's Office clearly show that telephone service regularly draws one of the highest levels of consumer complaint and that non-ILEC providers of this service are commonly the source of these complaints. Clearly, whatever the theory that competitive markets will supply customer service to meet the market, this has not

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[8] In this example, the 20% of customers who can not migrate to the non-Lifeline rate will lose service and their households then contribute to the declines in telephone service penetration discussed in Point I.

proven to be the case, and competitive telephone service providers have competed by trying to reduce customer service or to reduce the customer's ability to obtain a remedy for their complaints. Experience, therefore, suggests that competition, when it exists, is not a substitute for the customer service standards and consumer protections that residential customers have historically associated with telephone service. There is simply no basis to eliminate customer rights and remedies simply because there are two or more potential providers. The advent of competition provides no basis to conclude that the existing standards for customer service and consumer protection for residential customers should be reduced in any way.[9]

Further, because of the inadequate response of competitive providers to consumers' needs for adequate customer service and meaningful remedies for poor service, PULP argues strongly that consumer protections afforded to customers of competitive suppliers of telephone service should be equal to or greater than those provided to customers of ILEC wireline services.[10] Finally, the need for a level "customer service" playing field further underscores the benefits to consumers of a common, accessible forum for the resolution of consumer complaints. In New York, this forum has been with the Commission for decades, and there is no known alternative that

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[9] In PULP's experience, the reduction in Commission's oversight of customer service for ILEC telephone service providers has resulted in substantial reductions is customer service – even where competitive non-ILEC competition exists. We note that the Commission recently discontinued the customer service program instituted in Verizon's most recent rate settlement, and today Verizon answers out of service calls from residential customers on the weekend with a recorded announcement that service personnel will not be in the field to address the problem until Monday morning. This response comes even though the non-response will surely expose Verizon to the out-of service refund for the customer who will be waiting for service to resume for more than 24 hours. In effect, Verizon in these situations has made the economic decision to pay the penalty, rather than pay the personnel to be in the field addressing these problems on the weekend. Because of this decision, service quality has declined.

[10] Of course, some of the intermodal competitors to wireline telephone service providers may present challenges for customer service that justify consumer protection rules specific to that modality. For example, pending legislative initiatives add specific protections for wireless telephone customers which stem from the idiosyncrasies of wireless telephone service and wireless telephone service offerings. See Assembly Bill No. 8539.

would be as economical, or as effective, for the fair and consistent resolution of consumer grievances.

POINT IV

THE COMMISSION'S DESCRIPTION OF "CHOICE" IS INSENSITIVE TO INDIVIDUAL CONSUMER'S NEEDS

The June 29 order concludes without reference to a substantiating record that consumers in New York are already "benefiting from a vigorous marketplace and have considerable choice." June 29 Order at 1. This conclusion is apparently based the development of an index in which the existence of alternatives to ILEC based wireline service are provided weights and the weights are summed. If the sum of the weights exceed a threshold, the existence of sufficient competition is presumed. July 29 Order at 9. The existence of these alternatives to ILEC service was evaluated by Staff on a wire center by wire center basis. Apparently, if, for example, cable telephone service was present in any of the geographic area associated with a wire center, such service was assumed to be available throughout the wire center, even though the existence of such service was completely independent of the ILEC's wire center infrastructure.[11] Plainly, there could easily be areas within the ILEC service territory associated with that wire center that may not have cable telephone service, or wireless service, or, to the extent such service is based on broadband availability, VOIP service. In those portions of the territory, the index value for "sufficient" competition would not be present, even if it were for the wire center in general.

[11] The "competitive" availability of, say, cable telephony, may require customer subscription to cable service, subscription to broadband, and subscription to cable phone or VOIP. Even where putative alternatives exist, there is no real substitutability.

In effect, the "index value" system described in the June 29 Order, to the extent it measures anything, only measures the existence of alternatives to ILEC service at the wire center level. However, in PULP's view, telephone service is not purchased by wire centers, it is purchased by individual consumers. From the customer's perspective, however, if competitive alternatives are not available to him or her, it is irrelevant that they may be available somewhere else in the wire center. If competition is the antidote to the exercise of market power to the disadvantage of individual consumers, then the existence of competition must be measured at the individual consumer level. For competition to exceed the threshold for a given wire center defined by the Commission's methodology, the competitive alternatives must exist throughout the service territory associated with the wire center, and the Commission's methodology should be modified accordingly.

POINT V

THE COMMISSION'S ADOPTION OF "PRICING FLEXIBILITY" OFTEN LIMITS THE CONSUMER'S ABILITY TO RECEIVE AND REACT TO APPROPRIATE PRICE SIGNALS

In the *June 29 Order*, the Commission describes its previous decisions to provide "pricing flexibility" to certain market participants for certain services. The Commission does not recognize, however, that "pricing flexibility" facilitates the provision of telephone services based on unfiled rates that may change from day to day. With "pricing flexibility," consumers experience price non-transparency in which the provider's price is difficult or impossible to determine prior to the actual transaction, and consumers are unequipped to determine the price signal the market is sending them or to respond rationally as those signals change. In this context, the benefits of a competitive market are lost, and consumers can not protect themselves from market abuses.

"Pricing flexibility" also promotes redlining by service providers. With "pricing flexibility" providers can choose to sell at a lower price where competition is strong, and at a higher price where competition is weak. This may mean higher prices for one geographic area in comparison to another (geographic redlining) or to one customer who may be a more favorable marketing opportunity in comparison to another (economic redlining). Both types of redlining, when applied to residential customers are unnecessary compromises of the Commission's universal service objectives ("reasonably priced" services "available to all residential customers"). Any implementation of "pricing flexibility" must be fashioned to protect against this apparently unintended but unwelcome consequence. The best solution will be to return to filed rates from all providers with "flexibility" achieved through fast track rules to dramatically shorten the time needed to file rate changes.

CONCLUSION

For the foregoing reasons, the Public Utility Law Project respectfully requests that the Commission's conclusions in this proceeding fully recognize the shortcomings extant today in the implementation of the fundamental goals of universal access to basic telephone service and to the recognition and renewal of the telephone Lifeline program as the best alternative available today to reverse current trends away from the State's universal service objectives. PULP further urges the Commission to create a level playing field among all providers of residential telephone service by requiring ILEC providers to reverse the erosions to customer service that have recently been experienced by residential ILEC customers and to require non-ILEC providers to meet comparable standards for the service they supply. Consistent with the level playing field for customer service, PULP also urges that consumer protections for residential customers of non-ILEC providers be equivalent to those now provided to ILEC customers through the Public Service Law and the Commission's regulations.

Respectfully submitted,

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August 15, 2005

Exhibit A

	% hshlds in Mar w/tel serv US	NY	diff. US-NY	households <$10,000 (1984 $) % hshlds w/tel serv	no. of hshlds w/serv	total no. of hshlds	no. of hshlds w/out serv	households $10-$20K (1984 $) % hshlds w/tel serv	no. of hshlds w/serv	total no. of hshlds	no. of hshlds w/out serv	hshlds <$20K (1984 $) w/out serv
1984	91.8	91.4	-0.4	78.4	1,351,060	1,723,889	372,829	91.9	1,320,462	1,436,545	116,083	488,912
85	91.8	92.2	0.4	80.4	1,323,070	1,645,655	322,585	91.8	1,359,347	1,479,989	120,642	443,227
86	92.2	92.9	0.7	81.6	1,267,568	1,552,843	285,275	92.7	1,386,578	1,495,802	109,224	394,499
87	92.5	93.3	0.8	82.9	1,302,662	1,570,891	268,229	91.8	1,282,083	1,396,200	114,117	382,346
88	92.9	93.0	0.1	82.2	1,276,369	1,552,925	276,556	92.3	1,348,427	1,460,569	112,142	388,698
89	93.1	92.9	-0.2	80.6	1,246,253	1,547,152	300,899	94.1	1,267,126	1,346,216	79,090	379,989
90	93.4	90.9	-2.5	75.4	1,090,869	1,446,630	355,761	90.7	1,217,678	1,342,413	124,735	480,496
91	93.7	91.5	-2.2	77.7	1,212,779	1,561,549	348,770	89.8	1,206,987	1,343,639	136,652	485,422
92	93.9	93.1	-0.8	83.2	1,379,027	1,657,505	278,478	92.9	1,296,371	1,396,198	99,827	378,305
93	94.2	93.7	-0.5	84.2	1,380,192	1,638,350	258,158	94.5	1,427,511	1,510,766	83,255	341,413
94	93.9	93.4	-0.5	83.7	1,435,636	1,715,293	279,657	93.5	1,408,056	1,505,342	97,286	376,943
95	93.9	93.4	-0.5	84.8	1,497,780	1,766,276	268,496	94.4	1,406,807	1,489,791	82,984	351,480
96	93.9	93.6	-0.3	85.4	1,477,825	1,731,206	253,381	93.3	1,403,843	1,504,324	100,481	353,862
97	94.0	94.5	0.5	87.5	1,499,789	1,714,108	214,319	95.3	1,368,658	1,436,324	67,666	281,985
98	94.1	95.2	1.1	88.5	1,546,503	1,748,074	201,571	95.3	1,333,488	1,399,495	66,007	267,578
99	94.0	95.1	1.1	90.7	1,589,922	1,753,406	163,484	94.3	1,313,593	1,393,461	79,868	243,352
2000	94.5	96.1	1.6	92.0	1,442,140	1,567,952	125,812	96.9	1,453,453	1,500,626	47,173	172,985
2001	94.4	95.0	0.6	90.7	1,456,130	1,605,613	149,483	94	1,490,764	1,585,086	94,322	243,805
2002	95.5	96.0	0.5	89.2	1,492,191	1,672,155	179,964	96.6	1,401,262	1,450,261	48,999	228,963
2003	95.5	95.7	0.2	90.7	1,563,718	1,724,309	160,591	94.6	1,509,974	1,596,275	86,301	246,892
2004	94.2	94.8	0.6	89.0	1,512,288	1,698,848	186,560	93.3	1,426,312	1,528,536	102,224	288,784
2005	92.4	91.3	-1.1									

Sources: Belinfante, A., "Telephone Penetration by Income by State", Federal Communications Commission (March 2005)
Belinfante, A., "Telephone Subscribership in the United States", Federal Communications Commission (May 2005)

Exhibit B

Residential rates and Lifeline rates:

Flat rate residential (1FR):

Residential customer:		Lifeline customer:
Basic service	$8.61	$2.00
Local usage-Group 1	$7.20	$7.20
	$15.81	$9.20
Fed Subscriber Line Charge	$6.50	$0.00
	$22.31	$9.20

Before Fed SLC, Lifeline savings was: $6.61

The $6.61 comes from:

$1.75 in further federal support
$1.62 in federal matching support (1/2 of state support up to 1.75)
$3.24 in state support
$6.61

Measured rate residential (1MR):

Residential customer:		Lifeline customer:
Basic service	$8.61	$1.00
Local usage	various	various
	$8.61	$1.00
Fed Subscriber Line Charge	$6.50	$0.00
	$14.11	$1.00

Before Fed SLC, savings was: $7.61

The $7.61 comes from:

$1.75 in further federal support
$1.75 in federal matching support (1/2 of state support up to 1.75)
$4.11 in state support
$7.61