



STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE CONSUMER PROTECTION BOARD

comments

George E. Pataki
Governor

Teresa A. Santiago
Chairperson and Executive Director

August 15, 2005

*ORIG-FILES
C 05-C-0616
12 COPIES DIST
PER 6/29/2005 LST*

Jacklyn Brilling
Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, New York 12223

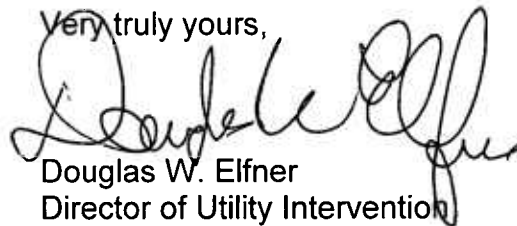
Re: Case 05-C-0616 -- Proceeding on Motion of the Commission to Examine Issues
Related to the Transition to Intermodal Competition in the Provision of
Telecommunications Services.

Dear Secretary Brilling:

Enclosed for filing in this proceeding are the original and five (5) copies of the New York State Consumer Protection Board's Comments.

Copies of this filing have been sent electronically to all parties appearing on the Active Parties List for this case.

Very truly yours,



Douglas W. Elfner
Director of Utility Intervention

DWE/jf

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 THE
NEW YORK STATE CONSUMER PROTECTION BOARD

Teresa A. Santiago
Chairperson and Executive Director

Douglas W. Elfner
Director of Utility Intervention

Gregg Collar
Telecommunications Project Manager

Dated: August 15, 2005
Albany, New York

NYS CONSUMER PROTECTION BOARD
5 EMPIRE STATE PLAZA
SUITE 2101
ALBANY, NEW YORK 12223-1556
<http://www.nysconsumer.gov>

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 THE
NEW YORK STATE CONSUMER PROTECTION BOARD

On June 29, 2005, the Public Service Commission ("PSC" or "Commission") initiated this proceeding to conduct a broad review of telecommunications policies, practices and rules in light of ongoing changes in the telecommunications industry.¹ The Commission stated that intermodal competition is flourishing and that all telecommunications providers should be subject to the same policies, practices and rules, to the extent practicable and consistent with the public interest and statutory constraints.² It invited comments on these conclusions and suggestions for appropriate changes that should be made to its regulatory framework. It also invited parties to comment on more than 40 specific questions regarding consumer protections, universal service goals and policies, regulatory flexibility in consideration of market power, measures to ensure adequate service quality, and symmetrical regulation.³

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 ("Initiating Order").

² Id., p. 4.

³ Id., Appendix A.

Overall, the Consumer Protection Board recognizes that the telecommunications industry is being transformed by on-going technological advances, legal determinations and regulatory changes, and is providing consumers with new innovative services and competitive choices. Nevertheless, it is critically important that the PSC continue to ensure that traditional wireline services, which in many circumstances are not yet subject to robust competitive market forces, are provided in the public interest. Reliable access to the network must continue to be provided for public health and safety reasons, telecommunications service providers must not impede customer choice, and the state's telecommunications infrastructure must ensure the availability of high quality state-of-the-art services to facilitate economic development.

The CPB also believes that basic protections should be in place regardless of the technology used by the customer. In particular, all telephone service providers should offer reliable service including access to E-911, and should be subject to adequate consumer protections. The PSC should also continue to ensure that services subject to its jurisdiction are secure, reliable and offered at just and reasonable rates; all New Yorkers have access to basic telecommunications service; and telephone service providers cannot exercise market power or impede competition.

In Point I, we comment on the PSC's conclusion that intermodal competition is flourishing and provides effective substitutes for wireline telephone access line service. We demonstrate that the market analysis summarized in the Initiating Order substantially overstates the degree to which wireless, cable telephony and VoIP are effective substitutes for wireline access lines and thereby exaggerates the extent of

competition between these services. In Point II, we respond to the Commission's premise that asymmetrical regulation of telecommunications services should necessarily be avoided. We demonstrate that wireline telephone access line service must continue to be regulated for, among other reasons, public health and safety reasons, regardless of what regulations are applicable to new telecommunications services such as VoIP. We also explain that proponents of symmetric regulation should demonstrate that changes to current regulation are required to remove costs or burdens that are not justified by the benefits those rules provide. In Point III, we address many of the specific questions posed by the Commission. Overall, the CPB recognizes that some rules and regulations might be streamlined to avoid unwarranted costs and others might be updated. However, wholesale changes are not appropriate in the key areas of consumer protections, universal service, market power, and service quality.

I. THE INITIATING ORDER SUBSTANTIALLY OVERSTATES THE DEGREE OF SUBSTITUTABILITY BETWEEN WIRELINE AND OTHER TELEPHONE SERVICES.

The Initiating Order suggests that there is vigorous competition for traditional wireline telephone access line service. For example, the Commission asserted that "[i]ntermodal forms of competition are quickly gaining acceptance in the marketplace and thus are creating substantial facilities-based competition,"⁴ and referred to these intermodal options as "substitute services."⁵

⁴ Initiating Order, p. 1.

⁵ *Id.*, p. 4.

The Commission based that conclusion on a “competitive analysis” conducted by Staff of the Department of Public Service (“DPS Staff”), the stated purpose of which was to identify alternatives to wireline service “in each wire center in Verizon New York’s service territory.”⁶ The analysis sought to measure four alternatives to Verizon’s traditional wireline telephone service: (1) cable telephony, (2) telephone service from competitive local exchange carriers (“CLECs”) that use facilities-based UNE-L, (3) wireless, and (4) VoIP via a broadband connection.

As explained below, that analysis suffers from numerous flaws that preclude its use as a basis for concluding that many of these services are substitutes for wireline access line service, and provides no rational basis for a conclusion in this proceeding that the need for certain regulation of wireline service is obviated by intermodal competition. To determine the extent of intermodal competition for wireline telephone access line service, the PSC should to rely heavily on data regarding the extent to which consumers actually substitute these services for wireline access lines. Available data demonstrates that the Initiating Order overstates the extent of substitution between intermodal services and wireline access lines at this time.

A. The Focus of the “Competitive Analysis”

The competitive analysis in the Initiating Order was designed to address the extent of barriers to wholesale competition, and cannot be relied upon to address the degree of substitutability between wireline and other retail services. It was developed as part of the DPS’ submission in a Federal Communications Commission (“FCC”)

⁶ In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Comments of the New York State Department of Public Service, October 4, 2004 (“DPS Comments in FCC Unbundling Docket”), p. 6.

proceeding to determine whether incumbent local exchange carriers ("ILECs") have adequately made their facilities available to competitors.⁷ DPS Staff developed a model and collected data to determine whether competitors' access to ILECs' central office switches was impaired,⁸ thereby disadvantaging competitors seeking to rely on ILEC facilities to offer their own services.

In the Initiating Order, the PSC stated: "This type of analysis can be useful in determining how vulnerable the incumbents are to competition, and thus how widespread such competition is."⁹ We disagree. The absence of impediments to competitors seeking access to ILEC facilities is a necessary, but not a sufficient condition for retail competition. Even in the absence of such impediments, consumers may determine that the attributes of other providers' retail service offerings render them imperfect substitutes for the ILECs' service. In other words, although alternative providers may have full access to the ILECs' network, consumers may not consider the telephone services they offer to be effective substitutes for ILEC service. The absence of impairment would not equate to the presence of meaningful retail competition.

The extent of competition among products is best measured by the degree of substitutability among those products. We address the flaws in that portion of the "competitive analysis" in Point I(C).

⁷ In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of ILECs, CC Docket No. 01-338, Order and NPRM, August 20, 2004, FCC 04-179.

⁸ DPS Comments in FCC Unbundling Docket, p. 6. DPS Staff recommended that the FCC consider its model and place greater emphasis on intermodal competition to analyze impairment. The FCC did not accept the DPS recommendation.

⁹ Initiating Order, p. 8, footnote omitted.

B. Availability of Alternatives to Wireline Service

DPS Staff's competitive analysis measured the availability of alternatives to wireline service by considering "actual deployment to date as well as service providers' announced plans for expansion."¹⁰ Flaws in that analysis have the effect of overstating the availability of those alternatives.

The analysis is based on data from various sources, some of which are not directly comparable. Most notably, information on the availability of cable telephone service and cable modem service for VoIP was taken from FCC data compiled by zip codes, but was reported in the DPS Staff analysis based on telephone wire centers. The geographic boundaries of telephone wire centers bear no necessary relationship to the geographic boundaries of zip codes.

Use of this data in the competitive analysis substantially overstates the availability of cable telephone service and VoIP service in New York State. First, the FCC surveys regarding the availability of cable telephone and cable modem service assume that if a single consumer in a zip code subscribes to the service, the service is available to all consumers in that zip code. Second, DPS assumed that if the service was available in any zip code in the territory of a telephone wire center, it was available to all customers in all zip codes throughout that territory.¹¹ Combined, these assumptions mean that if a single customer in the geographic area of a wire center subscribed to cable telephony or cable modem service, the competitive analysis assumed that the service or services were available to all customers served by that wire

¹⁰ DPS Comments in FCC Unbundling Docket, p. 6.

¹¹ Response to CPB's July 21, 2005 Information Requests to DPS Staff, Questions 1 – 2.

center. DPS Staff reports that it is aware of this discrepancy and anticipates refining its analysis to address these issues.¹² At this point, however, the competitive analysis in the Initiating Order overstates the availability of cable telephony and VoIP telephone service in New York State.

The competitive analysis also overstates the availability of cable telephony and VoIP for another reason. The analysis assumes that cable telephone service is ubiquitously available in areas served by Time Warner or Cablevision.¹³ This assumption is erroneous. Those companies' marketing materials clearly indicate that cable telephony is only available in certain limited portions of the companies' service areas.¹⁴ Similarly, the analysis erroneously assumes that if Digital Subscriber Line ("DSL") service is available to any customer in a wire center, it is available to all customers in that wire center.

The CPB is also concerned that the competitive analysis overstates the availability of residential telephone service from CLECs using UNE-L. Based on data collected in early 2004, the analysis concludes that CLECs are providing service to residential customers using their own switches in 178 Verizon wire centers.¹⁵ The CPB understands, however, that in recent months, many CLECs have modified their business plans substantially, including by reducing their focus on residential customers.

¹² Id.

¹³ DPS Comments in FCC Unbundling Docket, Appendix A, p. ii.

¹⁴ We address a related point regarding limits on the availability of stand-alone cable telephony in Point I (C) (1).

¹⁵ Initiating Order, p. 7.

Accordingly, data regarding the actual availability of residential service from CLECs using UNE-L should be updated and verified.

C. Judgment Regarding Substitutability With Wireline Service

The competitive analysis relies heavily on subjective weights assigned by DPS Staff to each of the four main potential alternatives to wireline service. Those weights are intended to reflect the “characteristics that may render each less than perfect substitutes for traditional wireline telephone service.”¹⁶ The following weights were assigned to each service: cable telephony (1.0); CLEC (1.0 where the CLEC provides residential service and 0.5 where the CLEC provides only business service); wireless (0.5) and VoIP (0.75).¹⁷ DPS Staff then calculated an index score for each wire center by summing the weights of the alternative services available. If the index totaled at least 2.75 in a wire center, this indicated to DPS Staff that there was:

a level of competition sufficient to conclude that competitive carriers will not be impaired without access to unbundled switching ... [and that] the wholesale market was sufficiently open to competition to relax wholesale regulation.¹⁸

The Initiating Order concludes that over 85% of Verizon’s access lines are located in wire centers that have an index of at least 2.75.¹⁹

¹⁶ DPS Comments in FCC Unbundling Docket, p.6.

¹⁷ Initiating Order, p. 9. A weight of 1.0 represents full substitutability. Fractions represent partial or imperfect substitution.

¹⁸ Id., p.9. As explained in Point I (A), findings regarding wholesale markets are not necessarily applicable to retail markets.

¹⁹ Id.

As explained below, the competitive analysis reflects several significant errors that overstate the extent of competition for wireline access line service.

1. Cable Telephony

The DPS Staff analysis assigns a weight of 1 to cable telephony, indicating that it is a perfect substitute for wireline telephone service. We disagree with that subjective assessment for two reasons.

First, cable telephony does not have some of the important attributes of wireline service. For example, cable telephony does not function when the subscriber's home or business loses electrical power, making it unreliable as a tool to address emergencies. For some consumers, this makes cable telephone service an unacceptable alternative. In addition, cable telephony generally does not provide consumers with access to vision and hearing impaired service, or to low income assistance programs such as Lifeline. As a result of these differences, cable telephony cannot be considered a perfect substitute for wireline service.

Second, many consumers do not have access to cable telephony as a stand-alone product. The state's second largest cable operator, Cablevision, is a prime example. It markets cable telephone service under the name "Optimum Voice," but as explained on its website,

To take advantage of this great new home phone service, you must be an Optimum Online subscriber in an area where Optimum Voice is available.²⁰

²⁰ www.optimumvoice.com/index.jhtml?pageType=how_to_get.

Thus, consumers in Cablevision's service territory can only purchase cable telephony as part of a bundle of products including high speed internet access. Consumers purchasing high speed internet access from another provider or without a home computer would have no reason to consider Cablevision's voice product as an alternative to wireline voice service,²¹ and other consumers would be unlikely to consider Cablevision's voice product unless they also chose to purchase a high speed internet access service from Cablevision.²² The competitive analysis totally disregarded this fact, thereby grossly overstating the degree to which cable telephony and wireline telephony are substitutes in the 30% of the state served by Cablevision.²³

2. Competitive Local Exchange Carriers

DPS Staff assigns a weight of 1 for services offered by CLECs deploying their own switches where residential service is provided, and a weight of 0.5 where service is provided to businesses only. If the index is to be used to evaluate the residential telecommunications market, a weight of 0.0 must be assigned where residential service is not offered. No other weight assignment makes any sense. The use of a single index for residential and business markets overstates the extent of competition in residential markets.

²¹ Households without computers have no need for high speed internet access service. As of October 2003, the most recent time period for which data are available, only 61.8% of households in the U.S. had computers. (A Nation Online: Entering the Broadband Age, September 2004, U.S. Department of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, and U.S. Census Bureau, "Federal Broadband Report"), Chart 2.9.)

²² Only 19.9% of U.S. households had high speed internet access as of October 2003. Id.

²³ This concern may also be applicable in other areas of the state.

3. Wireless

The PSC asserts that “wireless services serve as the basic telephone service for an increasing number of New Yorkers.”²⁴ DPS Staff assigns a weight of 0.5 to wireless service, which indicates that in DPS Staff’s judgment, 50% of customers consider wireless to be a perfect substitute for wireline telephone service. These claims vastly overstate the available evidence regarding the extent of substitution between wireless and wireline access line service.

The competitive analysis erred in not distinguishing between minutes of use, and the underlying telephone access line. Consumers readily substitute minutes of use on wireless service for usage on their landline service. However, only a relatively small number of customers substitute wireless for their telephone access line service.²⁵ That is because, among other things, wireless service is often plagued by bad reception and dropped calls; E-911 service is not ubiquitous and where it is available, it does not always provide the location of the caller; there is no centralized directory for finding a cellular telephone number; wireless companies need not comply with service quality standards for wireline service, such as time to restore service; batteries must be charged periodically; and service is generally offered through a long-term contract with substantial termination penalties. Moreover, the industry apparently recognizes that wireless is not, and cannot be, a substitute for wireline service. Mr. Ivan Seidenberg, Chief Executive Officer of Verizon Communications, Inc., was reported to have said

²⁴ Initiating Order, p. 21.

²⁵ Moreover, such substitution appears to be limited mainly to young adults.

recently, "Why in the world would you think your (cell) phone would work in your house? The customer has come to expect so much."²⁶

Overall, the evidence indicates that consumers generally use wireless as a complement to wireline telephone service. For example, the FCC cites data that only 3% to 5% of wireless customers use their wireless phones as their only phone.²⁷ Research also demonstrates that the trend of wireless-only homes is not accelerating as quickly as previously predicted.²⁸ For all these reasons, the DPS Staff assessment that 50% of customers would consider wireless to be a perfect substitute for wireline access line service overstates the actual extent of substitution between these products by a full order of magnitude.

4. VoIP

DPS Staff assigns a weight of 0.75 for VoIP telephone service, indicating that 75% of customers consider VoIP to be a perfect substitute for wireline telephone service. This judgment substantially overstates the degree of substitutability between these products.

Although VoIP offers many innovative and convenient features, it has many attributes that limit its substitutability for wireline service. These include: it may not be reliably connected to E-911, it generally does not work when the power goes out, voice

²⁶ As reported in the San Francisco Chronicle, by Todd Wallack, Staff Writer, April 16, 2005.

²⁷ Seventh Annual CMRS Competition Report, FCC Docket No. 02-179, p. 32.

²⁸ Rhoads, Christopher, Cutting the Phone Cord Isn't as Popular as Once Predicted, Wall Street Journal, June 2, 2005, p. B1.

quality is not always as good as with wireline telephone service,²⁹ white and yellow page listings are not available, it is generally not offered without a bundle of features or services, its reliability may be affected by computer viruses, and telephone number portability is questionable. In addition, VoIP service is relatively costly, requiring subscription to DSL service or cable modem Internet access, at a cost of from \$30 to \$50 per month in addition to the \$10 to \$30 per month charge for the VoIP service itself.³⁰ Moreover, it appears that most VoIP customers retain their primary wireline telephone.

Overall, there is little evidence that a significant percentage of consumers consider VoIP service to be an adequate substitute for wireline service.

D. Sense Check of the Results of the Competitive Analysis

1. Comparison with Results from Merger White Paper

The results of the "competitive analysis" presented in the Initiating Order contrast markedly with the DPS Staff analysis of the proposed merger between Verizon and MCI.³¹ The DPS Staff White Paper in the merger proceeding includes a comprehensive analysis, supported by well-cited facts, which support the conclusions that Verizon

²⁹ A recent study concludes that internet-based telephone services are "very inferior when pitted against the reliability and sound quality of traditional phone connections." VoIP Judged Inferior to Regular Phone, All Headline News, www.allheadlinenews.com/cgi-bin/news/newsbrief.plx?id=224274508&fa=1

³⁰ As mentioned above, according to the most recent data available, less than 20% of households have high speed internet access. Federal Broadband Report.

³¹ 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; Case 05-C-0242, Joint Petition of SBC Communications Inc., AT&T Corporation, together with its Certified New York Subsidiaries, for Approval of Merger ("the merger proceeding"), Department of Public Service White Paper, July 6, 2005 ("DPS Staff Merger White Paper").

“currently dominates the voice market”³² and “the proposed merger makes an already concentrated residential and small business local telephone market even more concentrated.”³³

Moreover, in the merger proceeding, DPS Staff cites numerous facts that demonstrate that other telephone services are not adequate substitutes for wireline service. For example, DPS Staff cited data that only 3%~~9~~ 5% of wireless customers do not have wireline service and the trend of wireless only homes is not increasing as quickly as projected.³⁴ DPS Staff also explained that “the largest cable VoIP provider in New York did not report any voice grade lines in June 2004.”³⁵

Inexplicably, the extensive market analysis and supporting facts in the DPS Staff Merger White Paper, with which CPB generally agrees, were not even mentioned in the “competitive analysis” in this proceeding.

2. Comparison with Characteristics of Basic Service

The PSC has determined that one of its most important objectives is to “ensure the provision of basic telephone service, at an affordable rate, to New York’s customers.”³⁶ It defined “basic service” as “those telephone services deemed essential

³² Id., p. 20.

³³ Id., p. 23.

³⁴ Id., pp. 23 – 24.

³⁵ Id., p. 22.

³⁶ Case 95-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, (“1996 Telephone Competition Order”) p. 9.

to minimally acceptable access to, and use of" telecommunications networks.³⁷ The Commission's list of essential basic services includes: single party access line, access to local/toll calling, local usage, tone dialing, access to emergency services, access to assistance services, access to telecommunications relay services, directory listing and privacy protections.³⁸

It is noteworthy that most of the services touted in the Initiating Order as substitutes for wireline service do not even satisfy the PSC's definition of basic services. For example, access to emergency services is not always available with VoIP service and E-911 access is generally not available with wireless service. In addition, access to telecommunications relay services is generally unavailable from wireless, cable telephony or VoIP. Moreover, as explained above, the quality of many of these services does not come close to matching what consumers expect from wireline service. Inasmuch as these alternative services do not satisfy the definition of basic service, which means they do not offer some of the minimally acceptable attributes of telephone service, these services cannot be deemed perfect substitutes for wireline telephone service.

II. ASYMMETRICAL REGULATION IS NECESSARY AND APPROPRIATE IN THESE CIRCUMSTANCES.

The PSC stated:

We intend to eliminate, consistent with the public interest and to the extent practicable, the asymmetrical aspects of current policies, practices, and rules, so as to treat each

³⁷ Id., pp. 9 – 10.

³⁸ Id.

telecommunications provider of wired and wireless, IP-enabled or traditional circuit-switched, voice, data, or video – as evenhandedly as possible given the current statutory constraints.³⁹

The CPB urges the Commission to recognize that there are several reasons why asymmetric regulation continues to be necessary and appropriate under current competitive conditions. First, as explained in Point I, new telecommunications services are not complete substitutes for wireline telephone access line service. Different public interest characteristics are associated with that service than with other telephone services. For example, consumers have come to expect that wireline telephone service will provide reliable access to E-911 service, and that calls placed over wireline networks will be completed on the first attempt and will not be terminated by a signal interruption. Most other telephone services identified in the Initiating Order do not have these attributes. Because wireline telephone access line service has different public interest characteristics, it is appropriate to apply regulations to it that differ from those applicable to telephone services without such public interest attributes.

Second, asymmetric regulation does not necessarily impose unreasonable burdens or obligations on providers. We would agree that such asymmetry should be eliminated when it adds costs or burdens that are not justified by the benefits that differing rules provide, but the Initiating Order does not identify any such issues. Proponents of symmetric regulation should demonstrate that changes to current regulation are necessary to eliminate burdens or obligations that unreasonably inhibit the ability of incumbent carriers to attract and retain customers. The Instituting Order

³⁹ Initiating Notice, p. 4.

provides little evidence that existing regulation has made wireline access line service unattractive – or even less attractive – to consumers.

III. RESPONSES TO SPECIFIC QUESTIONS.

The PSC invited parties to comment on more than 40 specific questions concerning the rules, regulations and policies that should be applicable to telephone service providers. The CPB responds to many, but not all, of those questions below.⁴⁰

A. Consumer Protections

Overall, the CPB urges the Commission to maintain consumer protections applicable to wireline telephone service, particularly basic service, due to the public interest importance of this service. There is no urgency and no rational basis for eliminating these protections at this time, for the reasons explained herein in Points I and II.

Q1. In view of the proliferation of competitive alternatives, is it appropriate for the Commission to relax some of its traditional consumer protections applicable to wireline companies?

A1. No. As explained above, competitive alternatives are not ubiquitously available and are not complete substitutes for wireline telephone access line service. In addition, there are numerous public interest aspects of wireline telephone service which warrant retention of traditional consumer protections. Overall, relaxation of traditional consumer protections applicable to wireline service, particularly basic service, would not be in the public interest. For example, it would not be in the public interest to eliminate provisions

⁴⁰ We reserve the right to comment later in this proceeding on matters we do not address at this time.

that: (1) prevent telephone corporations from selling the names and address of customers who have elected to have their listings omitted from published directories (PSL §91(5)), (2) require landline telephone corporations to sell or lease equipment to hearing impaired persons (PSL §92-a), (3) limit telephone service deposits for elderly consumers (PSL §92-b), (4) require local exchange telephone companies to inform customers regarding their rights with respect to telemarketers (PSL §92-d), (5) prevent telephone slamming (PSL §92-e), (6) limit consumer deposits and establish requirements regarding the refund of those deposits (PSL §117), (7) require credit or refund when customers have overpaid (PSL §118), or (8) provide consumers basic information concerning the rates, terms and conditions of service, and other relevant information regarding their service (16 NYCRR 602.3 – 602.7). Similarly, PSC determinations that established the framework for 911 service, E-911, and LifeLine service should not be disturbed.

As we have discussed in Sections I and II above, the Instituting Order provides no evidence that an absence of regulatory parity is inhibiting the ability of wireline carriers to compete for customers. Furthermore, even if differential regulation should become a competitive issue in the future, consideration should be given to strengthening protections afforded consumers, not by weakening them. This may require action at the Federal level, and may be difficult to achieve, but it is substantially less likely to occur if states like New York begin to retreat from their historic commitment to essential consumer protections.

Q2. Are there core consumer protections (e.g., slamming, cramming, termination notices, contract disclosures) that should be enforced by the Commission, notwithstanding the existence of competitive choices? Should a set of core consumer protections apply to wireless and VoIP/cable telephony, as well as traditional wireline?

A2. As explained in the response to the previous question, consumer protections applicable to wireline telephone access line service should not be relaxed at this time.

In our view, core consumer protections such as those identified in the question, and including access to E-911 service, should be applicable to telephone services regardless of the technology used to provide that service. Strong measures to help ensure that customers of wireless and VoIP/cable telephony have necessary protections, beyond those provided in the General Business Law, should be available.

B. Universal Service

Policy makers should continue to ensure that basic telecommunications services are available to residential customers. Significant changes to state policies to achieve that objective are not required at this time.

Q1. Do the universal service goals articulated in 1996 remain valid in 2005?

A1. In general, yes. Universal service is the goal of ensuring that all consumers have access to affordable basic telephone service. In 1996, the Commission stated that its universal service policy is based on five principles: (1) an appropriate and evolving definition of basic service, (2) the availability of basic services to all residential consumers, (3) the accessibility of basic service by all persons, (4) the pricing of basic services at reasonable and affordable levels, and (5) fair, equitable, and competitively

neutral funding mechanisms to support universal service.⁴¹ These goals continue to be reasonable today.

Q2. Our view that “basic service” should be periodically re-evaluated appears appropriate in view of the expanding use of and reliance on high speed and wireless telecommunications capabilities. Does the existing definition of “basic service” remain appropriate in today’s environment?

A2. At this time, the CPB does not recommend any changes to the definition of basic service. Each of the elements of that definition remains an essential, minimum requirement, so the only question would be whether some new service should be added to the list. We note that while some may advocate that the definition of basic services be expanded to encompass broadband communications services, more work needs to be done first to ensure access to basic telephone service as currently defined.

The most fundamental measure of the extent of universal service is the number and percentage of households having telephone service. According to the FCC’s most recent report, telephone subscribership across the country declined from a high of 95.5% in March 2003 to 92.4% in March 2005.⁴² That trend is also applicable in New York. Although the FCC has not identified the reason for the reported decline, it is apparently not due to any substitution of wireless phones for wireline phones, since that phenomenon was captured by the sampling methodology. Regardless of the reason for that decline, priority should be given to increasing telephone subscribership in New York before expanding the definition of basic service.

⁴¹ 1996 Telephone Competition Order, p. 9.

⁴² Telephone Subscribership in the United States (Data Through March 2005), Alexander Belinfante, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, May 2005.

Q3. Although, to date, we have not found a need to establish a universal funding mechanism to ensure generally affordable rates in "high cost" areas of the state, does that conclusion remain valid as traditional revenue streams are challenged by growing competition, technological advancement, and evolving intercarrier compensation arrangements?

A3. Proponents of a universal service fund for this purpose should provide revenue and cost data that demonstrate that such a high cost fund is necessary and appropriate.

Q4. What approaches should we pursue to ensure the continued availability of affordable basic telecommunications service to all consumers in New York?

A4. First, the Commission should not deviate from its primary goal of ensuring reasonable prices for quality telecommunications services. As the PSC explained in 1996,

The goal of ensuring the provision of quality telecommunications services at reasonable rates is primary. The primacy of this particular goal is of fundamental importance. While other goals in this proceeding may be important, even critical, to various parties, their attainment must not come at the expense of this primary goal.⁴³

This goal, and its high priority, continues today. Accordingly, ILEC requests to increase basic service rates should be accompanied by data demonstrating that such action is required, and subject to thorough review by the PSC.

The PSC should also work with the FCC to determine the cause for the substantial reported reduction in telephone subscribership in New York, and throughout the country, as explained in the response to Question 2 in this section. The results of that investigation should suggest whether programs such as LifeLine and LinkUp need

⁴³ 1996 Telephone Competition Order, P. 3.

to be strengthened, measures should be taken to enhance awareness of LifeLine/LinkUp programs, or other action might be appropriate.

C. Market Power and Regulatory Flexibility

The PSC should continue to act to prevent the exercise of market power over essential telecommunications services. Action may be required at the wholesale level to remove barriers to entry and address bottleneck facilities. Regulation continues to be required at the retail level, in recognition of the public interest characteristics of landline telephone service and the absence of adequate substitutes for landline access line service.

Regulatory flexibility is appropriate for non-dominant carriers and for non-essential services offered by dominant carriers. However, because of their market power, dominant local exchange carriers should not be permitted to increase prices for basic services without a thorough PSC review of the reasonableness of such a rate increase. Similarly, the Commission should maintain vigilant oversight of the quality of basic telephone service provided by dominant local exchange carriers and take action to ensure that it does not deteriorate. If consumers are to forego basic wireline services in favor of newer modes of telecommunication, it must be because the new options have become more desirable, not because traditional service has become high-priced and low quality.

Q1. The basic issue confronting us today is, given the proliferation of intermodal competition and choices for consumers, what is the appropriate role of the regulator in preventing market power abuses? More particularly, is there sufficient actual and potential competition for retail

telecommunications service, including residential basic local telephone service, to prevent a firm from raising its price or providing poor quality service without suffering commensurate competitive losses?

A1. As explained in Point I, the Initiating Order vastly overstates the "proliferation" of intermodal competition. Although customers have more choices, a careful analysis of today's telecommunications market demonstrates that only a relatively small number of consumers consider cable telephony, VoIP or wireless service to be an effective substitute for primary wireline access lines.

This extremely small degree of substitution between primary wireline access line service and other forms of telecommunications services demonstrates that the price and service quality of basic telephone service from the dominant provider of such services in each market, must continue to be regulated. In particular, upward pricing flexibility for basic telephone services provided by dominant carriers should not be permitted. In addition, the quality of basic telephone service must be monitored vigilantly, and corrective action for deterioration taken as soon as possible. Public policy makers should recognize that local exchange carriers can influence the quality of wireline service on a wire-center basis as a result of decisions to invest and maintain the network in that area. Policies to ensure high quality basic local exchange service should be designed to identify and respond to, deterioration of service quality on a wire-center level.

Q2. What measure of competition should we consider when determining whether retail pricing flexibility is appropriate? Can the Department's competitive index be used for this purpose?

Q2. The index reflected in the Initiating Order cannot be used as a basis for policy decisions, including the appropriateness of retail pricing flexibility, due to its numerous shortcomings as explained in Point I. To ensure a rational basis for policy decisions, such decisions should be based on actual data regarding the number of customers who have the opportunity to purchase alternative services, as well as documented evidence regarding the substitutability between wireline access line service (particularly primary lines) and other telecommunications services.

Q3. Are the criteria and assigned weights in the Department's competitive index reasonable? In particular, is the VoIP telephone weight reasonable in light of current carrier policies concerning the availability of stand-alone broadband?

A3. No. As fully explained in Point I, the criteria and assigned weights in the DPS' competitive index overstate the degree of substitutability between services. The weight assigned to VoIP is far too high in view of Verizon's unwillingness to offer stand-alone DSL service, and numerous other limiting factors, including the requirement that consumers purchase a relatively expensive broadband access line, limits on access to E-911 service, concerns about service quality and the loss of VoIP service in the home when power goes out.

Q6. Should we allow rates in less densely populated areas to increase to their underlying cost levels?

A6. Rates should move toward underlying documented costs at a pace developed in full consideration of customer bill impacts. All other things equal, such rate adjustments

should be revenue neutral to the company, since rates that are above cost should also decline.

D. Service Quality

The CPB strongly agrees with the PSC's conclusion that

high service quality is essential to ensure New York's leadership in telecommunications and ... service quality must be maintained even in an evolving telecommunications market.⁴⁴

No reason to reduce the service quality standards or regulations applicable to local exchange companies in New York has been presented in the Initiating Order. Indeed, measures to more readily detect basic local exchange service quality degradation and ensure prompt remedial action may be required.

Moreover, consumers should have ready access to information regarding the quality of service and the access to emergency services provided by all telecommunications companies, regardless of the technology used to deliver that service. Based on their experience with wireline telephone service, consumers may expect that services using other technologies are equally as reliable, have the same high quality, and permit the same access to E-911 services as wireline service. To help ensure public health and safety, consumers should have access to information regarding these issues.

⁴⁴ Initiating Order, p. 15.

Q1. How should we adapt our service quality regulation to the marketplace realities?

A1. As explained above, service quality regulation should not be diminished, and may need to be enhanced to ensure that consumers have access to important information regarding the characteristics and quality of telephone service from all providers. In recognition of the importance of telephone service quality to the state's economy and the health and safety of its residents, New York State should press for authority to oversee, and regulate where appropriate, the quality of telephone service provided in New York regardless of the technology used to provide that service.

Q2. Are output-oriented performance measures still valid as a means of informing consumer choices, and, if so, should they be expanded to include all modes (wired and wireless, VoIP and cable telephony)?

A2. Yes. Output-oriented measures, such as complaint rates and customer trouble reports, are of far greater use to consumers than measures of inputs, such as expenditures or the number of employees. Consumers should have access to service quality performance information regarding all modes of telephony.

Q3. Should proactive service quality performance oversight and enforcement of whatever breadth be limited to less competitive markets or geographic areas? More importantly, indeed critically, how can this be done in a manner that ensures the overall reliability of the underlying inputs, the interconnected networks themselves?

A3. As explained above, the PSC should vigilantly monitor the quality of basic telephone service and enforce its rules and regulations throughout New York State. Although competitive market pressures, if and where they exist, might help prevent

service quality degradations, in some areas the current and expected level of competition does not obviate the need for such monitoring and enforcement. It is also noteworthy that some of the most serious and continuing service quality difficulties for Verizon in recent months have been in regions that might logically be expected to be subject to significant competition. In particular, the PSC has concluded that there have been “persistent and significant service difficulties” in Verizon’s North Nassau and South Nassau bureaus,⁴⁵ thereby demonstrating that monitoring and enforcement in all regions of the state are required.

Q5. Is our performance-centric approach appropriate in an era of intermodal competition, where other service providers (e.g., VoIP and cellular) are not subject to our regulation?

A5. Yes. Service quality regulation of local exchange telephone service is necessary and appropriate because of the importance of such service to public health, safety and the state’s economy. The PSC should continue to work to ensure that service quality deficiencies are identified, and corrected, as soon as possible.

Q6. If our service quality regulation and reporting were extended to all modalities (wireline and wireless) and all providers (e.g., VoIP and cellular), what, if any, legal constraints apply to extending basic service quality regulation to all modalities?

⁴⁵ Case 02-C-0543, In the Matter of Quality of Service provided by Local Exchange Companies in New York State, filed in 25290; Case 00-C-1945, Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon New York Inc. (fka New York Telephone Company) and Modification of Performance Regulatory Plan under Merger Standards and to Investigate the Future Regulatory Framework, Verizon New York Inc. Third Quarter 2004 Service Quality Report, October 25, 2004, pp. 3 – 4.

A6. The PSC may resume service quality regulation and reporting for cellular service if, after notice and hearing, it determines that such action is necessary to protect the public interest.⁴⁶ The regulatory status of VoIP is currently being litigated.⁴⁷

Q7. Should we modify, relax, or eliminate performance-based standards in competitive markets?

A7. No. See the response to Question 5 in this section.

Q8. Are performance standards essential to ensure that consumers have access to a reliable, seamless network of networks and, if so, should they be changed?

A8. See the response to Question 5 in this section.

Q9. Is reporting based on size still relevant? Should we focus our reporting requirements on less competitive markets or geographic areas?

A9. Based on information provided in the Initiating Order, there is no reason to modify service quality reporting requirements at this time.

Q10. Should we continue to allow an exception for carriers that provide service solely by repackaging or reselling another carriers' service?

A10. Yes, provided those carriers are not affiliated with any facilities-based carrier.

Q11. Should all carriers be held to a threshold standard of service?

A11. See the response to Question 1 in this section.

⁴⁶ PSL § 5 (6).

⁴⁷ National Association of State Utility Consumer Advocates et al v. FCC (Case 05-71238, U.S. Court of Appeals (Ninth Circuit) 2005)).

Q12. Are the customer trouble report rate (CTRR) measures still reflective of the quality of service provided to consumers?

A12. Generally, yes. Some refinements in the way CTRR is measured may be appropriate. As the Commission stated,

Because it involves the integrity of the network itself, CTRR is the only metric that the Commission has to monitor on a regular basis in order to protect the public interest.⁴⁸

Q13. Are there other more relevant measures than the CTRR?

A13. The CTRR is the single most relevant measure of telephone service quality.

Q16. Should we maintain and expand our Commendation Program for excellent service?

A16. This program does not appear to be necessary.

Q17. Parts 602 (Consumer Relations and Operations Management) and 603 (Service Standards) were streamlined in 2000 to better reflect the competitive environment; should these regulations be re-examined in light of the changing market? Is additional streamlining needed?

A17. Those regulations were streamlined at a time when it was expected that competition from CLECs, who offered near-perfect substitutes for wireline telephone service from ILECs, would flourish. Such competition is declining while alternatives that are not complete substitutes for wireline telephone service are becoming available.

Accordingly, market conditions do not warrant further streamlining of these regulations.

⁴⁸ 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 NYCRR, October 6, 2000, p. 9.

Parties proposing additional streamlining should support their recommendations with a demonstration that the cost of such regulations outweighs the benefit.

Q18. In 1996, we emphasized our duty to know how the state's telecommunications infrastructure varies by region, how that infrastructure compares with the rest of the world's, and how effective competition is in providing services demanded by consumers. The primary vehicle for gathering this information is our requirement for local exchange carriers (LECs) to submit annual construction budgets. Is this information still needed? If so, should it be modified in some fashion? Are there more relevant indicators that we should monitor? Are capital dollars still relevant or should we only consider benchmarks and outputs? Should intermodal competitors contribute data in order for us to gauge the robustness of telecommunications infrastructure in the state?

A18. Information on the construction budget of the state's LECs continues to be necessary to help monitor the adequacy of the state's telecommunications infrastructure and to identify areas that might require attention. The PSC should ensure that the information provided by the largest ILECs disaggregates expenditures to maintain the traditional copper infrastructure. That information may be a leading indicator of a deterioration in service quality in those areas of the state where the ILEC is not installing fiber to the curb.

CONCLUSION

The New York State Consumer Protection Board recommends that the Public Service Commission adopt the recommendations identified herein.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Teresa A. Santiago".

Teresa A. Santiago, Chairperson and Executive Director
Douglas W. Elfner, Director of Utility Intervention
Gregg Collar, Telecommunications Project Manager

Dated: August 15, 2005
Albany, New York