STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5713

Investigation into New England Telephone and Telegraph Company's (NET's) tariff filing re: Open Network Architecture, including the unbundling of NET's network, expanded interconnection, and intelligent networks in re: Phase II, Module One	))))

Order entered:

PRESENT: Frederick W. Weston, III, Hearing Officer

APPEARANCES: Sheldon Katz, Esq.
for the Vermont Department of Public Service

Thomas M. Dailey, Esq.
for New England Telephone & Telegraph Company

John H. Marshall, Esq.
Downs, Rachlin & Martin
for Atlantic Cellular Company, L.P d/b/a Cellular One
and Hyperion Telecommunications of Vermont, Inc.

William B. Piper, Esq.
Paul J. Phillips, Esq.
Primmer and Piper, P.C.
for Champlain Valley Telephone Company
Franklin Telephone Company
Ludlow Telephone Company
Northfield Telephone Company
STE/NE Acquisition Corporation, d/b/a Northland Telephone Company of Vermont
Perkinsville Telephone Company
Shoreham Telephone Company
Topsham Telephone Company
and Waitsfield-Fayston Telephone Company, Inc. d/b/a Waitsfield Telecom, Inc.

Melinda B. Thaler, Esq.
for AT&T Communications of New England, Inc.

Robert Glass, Esq.
Glass, Seigle and Liston
for MCI Telecommunications Corporation

Stephen Whitaker, *pro se*
for Design Access Network

Evelyn Bailey, Executive Director
for the Enhanced 911 Board

PHASE II, MODULE ONE

TABLE OF CONTENTS

I. INTRODUCTION

Today's proposal for decision marks the completion of the second of the four major stages of this investigation. The Board opened this docket in 1994, with the express purpose of finding ways to "reap the benefits of competition and to promote diversity and innovation in the supply of telecommunications services" to Vermont's residents and businesses.[1] To that end, in the four years since, the parties and the Board have concentrated their efforts on developing the regulatory policies and methods that should govern the competitive provision of services in the local exchange, the chief component of the telephony system that today remains a monopoly.

In Phase One, the Board set out the broad policy objectives and general rules that are intended to promote "competitive entry in those market segments where competition promises to stimulate innovation and most efficiently meet demand for service."[2] In this module of Phase II, the Board and parties have sought to further refine those precepts, resolving many of the complex, non-price issues that must be settled before a seamless "network of networks" can be created. In specific, this report and proposed order affirms the need for parallel sets of regulatory requirements – one for the dominant, incumbent carriers, and a second, more relaxed canon for non-dominant competitors – and lays out a broad range of differential rules under which companies may compete. These rules govern such things, among others, as interconnection, directory information, service quality, tariff filings and certification, local calling areas, service area requirements and carrier of last resort obligations, and continuous emergency access.

II. BACKGROUND AND HISTORY

The Phase I Order describes in some detail the statutory authority of the Board to conduct this docket, as well as the essential prior orders that precipitated its opening. Here I wish only to summarize the relevant events that have occurred since then.[3]

---

1. Order Opening Investigation, 2/18/94, at 6.
2. Order of 5/29/96 at 2 (hereinafter the "Phase I Order").
3. There are twenty-eight parties to this proceeding, not all of whom have participated actively. They are the Department of Public Service ("DPS" or "Department"), Bell Atlantic-Vermont (see the following footnote), Frontier Communications of New England, Inc., Sprint Communications Company, L.P. , Atlantic Cellular Company, L.P. ("Atlantic Cellular"), Hyperion Telecommunications of Vermont, Inc. ("Hyperion", together with Atlantic Cellular, the "Alternative Technology Providers" or "ATP"), AT&T Communications of New England, Inc. ("AT&T"), MCI Telecommunications Corporation, Design Access Network, Chittenden Community Television, Inc., Enhanced 911 Board ("E-911 Board"), Chittenden County Cable Access Advisory Board, Channel 17 Policy Board, Lake Champlain Access Television, Inc., Vermont Access Network, RCN Network Services, Inc., U.S. Cellular Corporation, and VBV-Online.

Also parties are Vermont's ten independent local exchange companies. Nine of them participated jointly: Shoreham Telephone Company, Waitsfield-Fayston Telephone Company, d/b/a Waitsfield Telecom, Inc., Northfield Telephone Company, Ludlow Telephone Company, Perkinsville Telephone Company, Champlain Valley Telephone Company, Franklin Telephone Company, Topsham Telephone Company, and STE/NE Acquisition Corporation, d/b/a

(continued...)

A. Board Orders in This Docket

Since the signing of the Phase I Order in May 1997, the Board has issued four more substantive orders in this docket. The first, dated September 4, 1996, dealt with a motion by New England Telephone and Telegraph Company[4] to reconsider its decision in the Phase I Order with respect to compensation mechanisms for interconnection. In that September 4th decision, the Board reaffirmed the Phase I Order and also concluded that it was, taken all in all, consistent with the federal Telecommunications Act of 1996 ("Act").

On November 7, 1996, the Board issued an Order adopting an agreement entered into by several of the parties. This stipulation (the "Cost-Study Stipulation") set out the scheduling and technical requirements for the total service long-run incremental cost ("TSLRIC") studies that BAVT had been directed to perform.

On July 24, 1997, the Board approved a second stipulation, this one describing the intercarrier serving arrangements (with the exception of pricing terms) that BAVT will make available to competitive local exchange companies ("CLECs"), consistent with the Act. This settlement (the "Interconnection Stipulation") was executed by only BAVT, the Department, and AT&T; however, no other party opposed its approval.

And, lastly, on August 20, 1997, the Board approved a third stipulation. This agreement addressed technical, marketing, rate-making, and scheduling questions surrounding the implementation of intraLATA presubscription ("ILP") for toll service in Vermont.[5] ILP denotes the capability of a caller to make in-state long distance toll calls by dialing one plus the ten-digit number (area code and number) of the party with whom the caller wishes to speak, irrespective of the carrier providing the toll service. The Order called for the introduction of ILP, or dialing parity, beginning in November 1997.

B. The Act, the FCC, and Other Board Orders

On February 8, 1996, the Telecommunications Act of 1996 ("Act") was signed into law by President Clinton. It is the first comprehensive national telecommunications legislation to be

---

3. (...continued)
Northland Telephone Company of Vermont. The tenth is Vermont Telephone Company ("VTel"). The nine-party independents are referred to as the "independent LECs," or "ILECs"; however, I note that, in certain clear contexts, the reference also includes VTel.

4. Referred to under a variety of names herein. New England Telephone and Telegraph Company, formerly doing business under the name of its corporate holding company, NYNEX, has since merged (as a part of NYNEX) with Bell Atlantic. The entity operating in Vermont is known as Bell Atlantic-Vermont, or "BAVT." I also refer to it as "Bell Atlantic" or the "Company."

5. LATA is an acronym for "local access and transport area." Vermont is a single-LATA state, served in its entirety by the area code 802. Thus, "intraLATA" and "in-state" are synonymous in the case of Vermont.

passed since 1934. It implements significant legal and regulatory reforms at the state and federal levels, and imposes new duties and responsibilities on carriers for the purpose of opening telecommunications markets to competitive entry. In so doing, the Act seeks to subject telecommunications providers to the discipline of the marketplace, thereby stimulating technological innovation, efficiency, and improvements in service quality and reliability.

Since February 1996, the Federal Communications Commission ("FCC") has initiated several rulemakings to implement various sections of the Act. In its First Report and Order, the FCC set out a broad and detailed set of rules designed to open the local exchange system to competition, rules relating to the manner and degree of network unbundling, costing and pricing methodologies, interconnection, and resale of retail services.[6] That Order was, as the parties here know, quite controversial, and was appealed by many of the FCC parties to the Eighth Circuit Court of Appeals. The Eighth Circuit stayed several provisions of the Order and, on July 18, 1997, issued a decision making the stays final. That decision was amended on rehearing October 14, 1997. It is not necessary here to describe the Court's decisions; to the extent that they have any impact on my recommendations today, they are discussed in the relevant sections below.

Finally, in several other dockets, the Board has issued orders that relate, either directly or indirectly, to the development of a competitive local exchange market in Vermont. Those dockets have dealt with the interconnection agreements and certifications of individual competitors, and generally have not taken up the broader policy questions that this docket has been examining.[7] Where appropriate, I have striven here to maintain consistency with the Board's rulings in those cases.

C. Positions of the Parties

Given the breadth and detailed technical nature of the issues in this module, it is not possible here to describe succinctly the various positions of the parties. Their disputes generally turn on differing interpretations of the Act and contrasting views of the economics and technical capabilities of the public switched network. The competitive providers press for rapid and unconstrained access to the network, proclaiming the public benefits that competition will yield; and the incumbents naturally argue for a studied and deliberate approach, one that will preserve the reliability of the system and the fiscal integrity of its (erstwhile monopoly) builders, and will

6. First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* , CC Docket No. 96-98 (August 8, 1996).

7. With the exception of Docket 5903, *Investigation into Service Quality Standards, Privacy Protections, and other Consumer Safeguards for Retail Telecommunications Service*.

also effect a smooth transition to competition. The Department navigates the shoals, weighing the relative costs and benefits of various courses. All in all, the issues have been well joined. I thank the parties for their efforts.[8]

III. Scope of Issues in Phase II

On March 3, 1997, I issued a procedural order that described a stepped approach to the resolution of the issues in the second phase of this docket. The Phase was divided into two parts, the first of which — Module One — is taken up by today's proposal for decision. This module deals (or has dealt) with issues that do not depend directly upon the availability of the cost studies for resolution. The March 3, 1997, Order identified twelve general categories of issues:

(1) Reciprocity of the Unbundling Requirement;
(2) Interconnection of Leased Lines;
(3) Local Calling Areas;
(4) Interim Number Portability;
(5) Directory Publication of Information Pertaining to Competitive Providers;
(6) IntraLATA Presubscription ("ILP");
(7) Administration of Continuous Emergency Access;
(8) Regulatory Issues;
(9) Tariffs and "Pick and Choose";
(10) Enhanced Services;
(11) Status of the Interconnection Stipulation; and
(12) Service Quality Standards.

The second module of Phase II will consider all issues remaining with respect to the determination of costs, pricing methods, and prices themselves (as appropriate). Those issues were detailed in the March 1, 1995, Scoping Order.

Phase III will take up the remaining regulatory and policy questions that were originally reserved for it in the March 1, 1995, Scoping Order.[9] Primarily these have to do with changing regulatory methods and with approaches to meeting universal service obligations as the market for local telephone service becomes more competitive.

---

8. Use of the first-person in this proposed order is somewhat misleading, if not unfair (or, worse yet, an act of hubris). The analyses and recommendations drawn here have benefitted greatly from the careful consideration of a number of my colleagues at the Board. In addition, the review of the record and drafting of this report have been the joint and equal effort of Riley Allen, David Farnsworth, and myself.

9. In the March 3, 1997, Procedural Order, I suggested that Phase III issues would be addressed in the second module of Phase II. That idea, however, was short-lived: in light of the complexity of the questions that had already been allocated to Phase II, Module Two, we decided to keep Phase III intact as originally planned. See Procedural Order of 10/21/97 at 4.

IV. FINDINGS OF FACT AND DISCUSSION

Based on the testimony and evidence presented in this phase of the docket, I hereby report, pursuant to 30 V.S.A. § 8, the following findings of fact and conclusions.

A. General Principles Relating to the Regulation of Telecommunications Providers

1. Dominant and Non-Dominant Participants in a Market

Telecommunications providers in Vermont have historically been regulated on a cost-of-service ("ratebase" or "rate-of-return") basis. Features of traditional regulation include, among others, certification of providers, tariff review, review of major sales plans, examination of financial reports, the setting of cost-based prices, determination of rate design, and the development of accounting rules and procedures and other codes of conduct. Such regulation of carriers was (and continues to be) necessary as a matter of consumer protection; for most of this century, only a single monopoly provider existed to provide most, if not all, telecommunications services (in its specified service territory).[10] In such an environment, regulation has served as a substitute for the competitive market in maintaining reasonable prices and high service quality, and as a check against market dominance and the potential for abuses of market power.

Today, however, we are faced with a rapidly evolving industry. The regulated monopoly environment is gradually giving way to a competitive one, precipitated by significant changes in the technology and economics of providing service. In recognition of these changes, regulators and policymakers have taken steps to accommodate the emerging influences – witness the Telecommunications Act of 1996 – thereby hastening the inevitable transformation of the market.[11]

Even so, today the telecommunications market is neither wholly monopolistic nor effectively competitive. Nor it is likely to become truly competitive in the very near future. By virtue of their control over the bottleneck facilities of the local loop (albeit a gradually diminishing bottleneck) and by virtue of their long-standing position and associated good-will as monopoly service providers, incumbent carriers will continue to manifest substantial market power in the provision of many in-state telecommunications services. For just how long this will continue I cannot say, but surely long enough to counsel creative regulatory intervention to best effect the transition.

---

10. It was generally recognized that, due to significant economies of scale, it would be less efficient to have multiple providers for most telecommunications services. See, for example, Kahn, *The Economics of Regulation; Principles and Institutions*, (1970-71, John Wiley & Sons, Inc., New York).

11. See Phase I Order at 27-49 for a fuller discussion of the economics of the telephony system. In 30 V.S.A. §§ 226b and 227a (discussed briefly below), the Vermont Legislature has developed alternatives to the traditional regulation of telecommunications services.

Regulation during this period must recognize and respond to (or, better yet, anticipate) the realities of the marketplace; as the industry changes, regulation must change as well. For more than a decade now, the Board has articulated a policy of promoting competition and minimizing regulation where competition (or perhaps even its potential) is better able to protect consumers, stimulate innovation, and more efficiently meet demand for service.[12] As discussed in more detail below, the Board has implemented this policy through an "asymmetrical" approach to regulating "dominant" and "non-dominant" providers. The record in this docket demonstrates that continued reliance on certain traditional methods of regulation, including detailed tariff reviews and cost-of-service pricing, may very well discourage entry of new providers and therefore diminish the hoped-for consumer benefits of competition.[13]

As the competitive market takes shape, new entrants will enjoy the privileges of neither the monopoly bottleneck nor the considerable consumer "inertia" resulting from the decades-long relationship with their incumbent providers. Competitors are constrained by the exigencies of the markets that they enter because they can do little, if anything, to control prices to their own advantage; but incumbents – strictly speaking, no longer monopolies, but nevertheless possessors of overwhelming market share – are still capable of exploiting their dominance of the market. Under these circumstances, it is only reasonable that "non-dominant" providers should require less oversight from regulators than the incumbent, or "dominant," providers. In other words, the appropriate state action in a period of transition characterized by an imbalance of economic power between market participants is an "asymmetrical" regulatory treatment of those participants.

2. Positions of the Parties

In broad terms, the Department, AT&T, and ATP argue (1) that the market power of incumbents is such that they should continue to be fully regulated in order to prevent them from exercising their market power in ways that will inhibit competition and (2) that the competitors, because they lack market power, need not be regulated in the same manner as the incumbents. The Department and ATP assert that the Board has authority under 30 V.S.A. §§ 218, 226b and 227a to impose an asymmetrical regulatory regime to address this disparity in market power.

---

12. See Docket 5012, *Petition of Burlington Telephone Company for a Certificate of Public Good to Operate as a Reseller of Telephone Services Within the State of Vermont*, Order of 5/27/86 at 10; Docket 4946, *Petition of Burlington Telephone Company Requesting the Board to find that the Restriction of Wide Area Telephone Services (WATS) in New England Telephone Company Tariff P.S.B.-T.-20 Section 10.2.1A, is Invalid*, Order of 2/21/86.

13. Tr. 5/13/97 at 290*ff.* (Rozycki); tr. 5/16/97 at 72-77, 85-88 (Raymond); Rozycki pf. generally.

In response, BAVT and the ILECs[14] argue that CLECs should not be treated any differently than are incumbent LECs, and that to do so would unfairly favor competitors at the expense of the incumbents.[15] BAVT argues that such regulatory "greenhousing" would be discriminatory and an "abdication of [the Board's] jurisdiction."[16] BAVT argues that the Board lacks the authority to implement an asymmetrical regulatory regime; the Board, according to BAVT, has no authority to "jury-rig" § 227a to find that new entrant services are competitive, and the Company thus maintains that relaxed regulation of CLEC services is not statutorily authorized.[17] BAVT insists that, where the Legislature intended "that the Board be authorized to suspend or reduce requirements of Title 30, it has said so specifically."[18]

3. Board Authority to Determine Just and Reasonable Rates

There is no dispute that there are significant differences between, on the one hand, incumbent local exchange companies who possess significant market power and, on the other, emerging, competitive LECs who possess very little. The question is simply whether the imbalance in the economic power of these players in the Vermont market justifies subjecting them to asymmetric regulatory treatment.

In this context, integral to the effective and equitable application of regulatory requirements in Vermont's local exchange market is a clear understanding of the current status of that market.[19] The Phase I Order acknowledges that incumbents have historically been the only suppliers of service in Vermont and have been regulated accordingly.[20] And today, nearly two

---

14. As in the Phase I Order and for consistency's sake, I again use the acronym ILEC to refer to the independent phone companies. I must note, however, that several parties have used this abbreviation to refer more broadly to *incumbent* LECs. While there is some overlap in meaning, it is by no means complete. When quoting parties' arguments, I have corrected for any potential confusion in terminology.

15. See discussion of Tariffing Filing Requirements, Section IV.C.1., below.

16. BAVT Reply Brief at 2.

17. BAVT Brief at 6.

18. *Id.*

19. The record in this docket demonstrates that competitive local exchange providers are poised to enter the Vermont local exchange market and that, in certain limited circumstances, services are already being provided by CLECs. However, it is also clear that the competitive market is not yet robust enough to overcome the market power of the incumbent provider. At the close of the record in this phase, BAVT had negotiated and entered into eight interconnection agreements. Two others were pending. Over a half-dozen companies have indicated interest in providing local exchange service in Vermont. Meehan pf. at 5-6.

20. Phase I Order at 16-17. As the Board stated in that Order, the "continued treatment of the entire local exchange system as a regulated monopoly" is no longer justified by its economic characteristics. *Id*. at 17. (This is not, however, the same thing as saying that a competitive market for local exchange services now exists.) The Order also cited the Department's *Ten-Year Telecommunications Plan* which noted that "Some aspects of telecommunications remain monopolies, or effective monopolies. In those and perhaps other areas, the fundamental need for price or service quality regulation and consumer protection remains, while we foster policies to encourage innovation and efficiency and to establish fair and effective competition." *Id*.

years after the passage of the Telecommunications Act of 1996, they remain, for all intents and purposes, the sole providers. Consequently, incumbents should continue to be cost-of-service regulated until such time as they are no longer "dominant."

Competition in Vermont is not likely to develop quickly unless regulation reflects the market power of some players, and the potential for detrimental effects that exercise of that market power can have upon new entrants and, therefore, upon consumers (our ultimate concern).[21] Therefore, in order to achieve the policy objectives of this state – among them, making services available to all consumers at reasonable prices and levels of quality, improving the efficiency and reliability of the network, and fostering competition in the local exchange[22] – I recommend that the Board further develop and continue to implement its existing asymmetrical approach to the regulation of dominant and non-dominant providers.

There is nothing particularly novel about this approach. The FCC adopted it for regulating AT&T and its competitors in the interLATA toll market.[23] Other state utility commissions have also embraced it.[24] And it is precisely the approach taken by the Board in regulating incumbents and resellers of toll service in Vermont. Extending it to providers of local exchange service is both natural and sensible.

In the past, the Board has indicated its willingness to "interpret Title 30 in ways that are logical in light of the legal, technological and marketing realities that exist today."[25] The Board's discretion to do this is founded, in part, upon the grant of authority in 30 V.S.A. § 203, which provides that the Board's jurisdiction over regulated utilities, including telecommunications companies, "shall be exercised by the [B]oard and the [D]epartment *so far as may be necessary* to enable them to perform the duties and exercise the powers conferred upon them by law."[26]

In addition to § 203, and central to an understanding of the extent of the Board's regulatory authority, is the Board's duty to assure "just and reasonable" rates. Section 218(a) authorizes the Board to make changes to company's rates when "upon hearing, [they] are found unjust, unreasonable, insufficient or unjustly discriminatory, or are found to be preferential or otherwise in violation of a provision of this chapter."[27] The Vermont Supreme Court has considered the grant of authority to the Board under § 218 and has held that:

---

21. Tr. 5/13/97 at 153, 166, 300-30 (Friar, Rozycki); tr. 5/16/97 at 119 (Raymond).

22. *Vermont Telecommunications Plan* (1996) at i-iii.

23. Rozycki pf at 7-8; tr. 5/13/97 at 173 (Rozycki); tr. 5/13/9 at 150 (Friar).

24. DPS Brief at 4 (describing Ohio's reliance upon similar findings by the Wisconsin, Colorado, Florida, and New Hampshire Public Utilities Commissions); Case No. 95-845-TP-COI (Ohio PSC), Order of 6/12/96 at 13.

25. Docket 5012, Order of 5/27/86 at 10.

26. 30 V.S.A. § 203.

27. 30 V.S.A. § 218(a).

> The statutory basis of the Board's regulatory authority is extremely broad and unconfining with respect to means and methods available to that body to achieve the stated goal of adequate service at just and reasonable rates.[28]

Currently, resellers of in-state toll and enhanced telecommunications services are treated, for regulatory purposes, as competitive providers.[29] When applying for a certificate of public good ("CPG") in Vermont, resellers file, among other things, a proposed tariff that describes the services they will offer in Vermont. With the granting of a CPG, the reseller is required to file a final tariff (modified in accordance with the terms of the Board's approval); in this way, the initial tariff-filing requirements of 30 V.S.A. § 225(a) are satisfied. The initial tariffs of resellers are generally not subject to cost-of-service review.[30] The Board has found that this procedure is consistent with 30 V.S.A. § 225 and Board precedents.[31]

As a substantive matter, the evidence in this docket demonstrates that rate-of-return or cost-of-service regulation of CLECs is not necessary to meet the statutory criterion of just and reasonable rates.[32] CLECs will offer telecommunications services in a variety of ways. They will do so by using their own facilities, reselling LEC services, purchasing and recombining unbundled network elements, or by utilizing some mix of all three. CLECs will offer services to customers who, at minimal transaction costs, will be able to switch to other carriers if they so choose. Customers will be able to "vote with their feet" if they are unhappy with either their rates or quality of service.[33] This market constraint, which formed the basis of the Board's decision in Docket 5012 over ten years ago, operates even more powerfully today. There are likely to be more choices available to CLEC customers – and consequently greater competitive pressure on CLECs to provide high quality, low-priced services – than were available when the Board determined that Burlington Telephone Company customers should have similar options for in-state toll services.[34]

---

28. *In re Green Mtn. Power Corp.*, 142 Vt. 373, 380 (1983) citing In re Green Mtn. Power Corp., 136 Vt. 170, 173 (1978).

29. Cellular carriers are treated in similar fashion. See Docket 5454, Order of 1/8/92.

30. In the context of reviewing the CPG application, the Board makes the statutory determination as to whether the rates contained in the filed tariffs are "just and reasonable." As a procedural matter, the Board has consistently concluded that Title 30 allows approval of initial tariffs without rate-of-return or cost-of-service inquiry. 30 V.S.A. § 225(a); Docket 4849, *Application of John T. Thurber*, Order of 9/12/84.

31. See, *e.g.*, CPG No. 82, *Petition of Coast International, Inc.*, Order of 11/21/91; Docket 5038, *Petition of Richmond Cable Corp.*, Order of 11/6/85; Docket 5012, *Petition of Burlington Telephone Company*, Order of 5/27/86.

32. See Tariff Filing Requirements, Section IV.C.1, below.

33. In addition, the Board has the authority to revisit tariffs of companies providing services at wholesale or unbundled network elements, and CLECs themselves may also bring complaints about wholesale provisioning. For further discussion of tariffing provisions, see Section IV.C.1, below.

34. Docket 5012, Order of 5/27/86 at 7-8.

Therefore, I conclude that, with respect to CLECs, the Board should rely upon the competitive market to assure that they provide adequate service at just and reasonable rates.[35] The Board and Department must of course remain vigilant in their oversight of the market, to assure that competitors do not, for example, engage in deceptive sales and other practices. Lastly, because the Board is not required to subject CLECs to traditional cost-of-service regulation, it is not necessary to determine whether § 227a authorizes relaxed regulation of a class of *providers*, as opposed merely to *services*.[36]

These conclusions find their practical effects in the recommendations for CLEC tariff filings and certification detailed in later sections of this proposed decision (IV.C.1 and 3, respectively). Briefly stated here, I recommend (1) that the Board permit CLECs to file tariffs that include price bands within which services will be offered, (2) that the Board not regulate

---

35. The legislature has similarly recognized that, under certain conditions, competitive markets can exist for former monopoly services and that, in such situations, relaxed regulation is warranted. Section 227a of Title 30, for example, identifies certain conditions that must be met for a telecommunications service to be considered competitive and, therefore, eligible for suspended or relaxed regulatory treatment under that section. (In pertinent part, § 227a states that "[i]n addition to the Board's authority . . . under 226a of this title, the Board may also suspend or reduce such requirements in a competitive market. . . ." 30 V.S.A. § 227a.) Although I am not relying on the provisions of § 227a as the basis of the Board's authority to implement an asymmetric regulatory approach for CLECs, that section nonetheless may provide useful guidance in determining whether, in the context of local exchange services, a competitive market exists.

Section 227a requires the Board to make four findings in determining whether a competitive market exists for a telecommunications service. First, the Board must find that no competitor offering such service has sufficient market power to set prices for the service, taking into consideration whether competitors offer a sufficient quantity of similar or equivalent services and whether there is reasonable ease of entry into the market. At this time, CLECs do not possess such power, and for that reason need not be regulated on a cost-of-service basis. (Tr. 5/13/97 at 300-325 (Rozycki)). Second, under § 227a, the Board must determine that competition in the market will afford the public at least as much protection as the applicable regulatory requirements being suspended or reduced. Like other providers, CLECs will be screened by the Board in the certification process prior to entry in order to satisfy certain consumer protection standards. (See CLEC Certification Requirements, Section IV.C.3., below.) Also, rivalry among competitors to capture market share should ensure that product terms and conditions are reasonable. (Competitive providers must set prices low enough to attract customers away from existing providers. CLECs must also provide sufficiently high quality service so that customers, able to switch to another provider at little or no cost, do not leave them.) Third, under § 227a, the Board must establish that adequate safeguards exist to assure that any services provided by a competitor which continue to be regulated are not supporting or subsidizing any services offered in the competitive market, *i.e.*, cross-subsidization between regulated and unregulated subsidiaries. The safeguards against such behavior emerge through the regulation of monopoly services (or, more precisely, the services of the dominant provider) and of affiliate transactions. Fourth, the Board must also assure that all competitors have equal access to the regulated services required to support their competitive activities. Under the rules set out in earlier orders in this docket as well as under the Act, CLEC access to the incumbents' networks will be assured. (See generally, Phase I Order and §§ 251 and 252 of the Act.) In conclusion, an assessment, under the standards contained in § 227a of the current environment for CLECs suggests that there is a competitive market for CLEC services. Given the current environment, subjecting CLECs to cost-of-service regulation as currently applied to BAVT and the ILECs is not warranted. (These considerations also lead me to conclude that incumbents should continue to be fully cost-of-service regulated until such time as the Board determines that the market is competitive and that incumbents are no longer considered "dominant." The legislature has recognized the possibility of reducing regulatory requirements for individual incumbent LECs or their services if certain conditions are met. See, *e.g.*, 30 V.S.A. §§ 226b, and 227a.)

36. This conclusion notwithstanding, a statutory change that expands the Board's authority to subject competitors to varying degrees of regulatory oversight on the basis of their relative market power might be useful here.

CLECs on a cost-of-service basis (so long as they do not manifest market power), and (3) that the Board streamline the certification process so as to ease competitive entry into the market for local exchange services.

B. Interconnection Issues

1. Reciprocity of the Unbundling Requirement

In its May 29, 1996, Phase I Order in this docket, the Board concluded that "NYNEX and the independent LECs in Vermont shall have an obligation to unbundle all *essential* facilities. . . ."[37] The Board also stated that "the obligation to unbundle should be reciprocal with respect to carriers requesting interconnection," and accepted the recommendation that:

> this obligation should apply (1) only to those portions of the network that are interconnected to that of the incumbent LEC and (2) only to the extent that the facilities of the newly established carrier permit.

Id. at 24-25.

During this phase of the docket, several parties raised the question of whether the Act preempts the Board from ordering reciprocal unbundling by CLECs. On July 24, 1997, in its Order on the Interconnection Stipulation, the Board adopted my recommendation that this question was not yet ripe for decision. That conclusion issued from the fact that there were no pending requests for CLEC unbundling that required the Board to address the conflicting interpretations of the Act. These factual circumstances still operate and I see no reason, therefore, to ask the Board to revisit the question at this time.[38]

2. Interconnection of Leased Lines

AT&T and the ATP urge the Board to allow third parties who lease lines from CLECs to interconnect with incumbent LECs for the purpose of providing local exchange (and, presumably, a wider range of telecommunications) services.[39] The Department supports this request, pointing out that there are no technical difficulties that should prohibit the exercise; but the DPS also recognizes that, depending on the economies of scale that can be captured through the practice, it is unlikely "that interconnection of leased lines will be a major source of competitive

37. Phase I Order at 19 (emphasis added). Unbundled essential facilities are also referred to as "unbundled network elements," or "UNEs."

38. See Order of 7/24/97 at 3-5.

39. AT&T Brief at 2-3; ATP Brief at 18.

interconnection."[40] BAVT does not oppose the competitors' request, so long as the third party is a telecommunications carrier as defined by the Act.[41]

I conclude that such interconnection should be permitted. As a general proposition, it should not matter to the incumbent whether a loop is leased or owned by an interconnecting CLEC, so long as such interconnection is technically feasible (as required by the Act[42]) and that compensation for it is appropriately paid. I agree with AT&T that "prohibitions should generally only be put in place where [specified actions] compromise public safety, threaten fair competition, or negatively influence an overriding policy concern."[43] The public policy objectives of ubiquitous interconnection and the creation of a "seamless network of networks" is advanced by allowing the interconnection of leased lines.[44]

The ATP also ask that the Board not require CLECs to lease their unbundled network elements to either third parties or incumbent LECs.[45] They argue that, "because CLECs lack market power, they will provide network services to other carriers if there is reasonable demand. The Board should therefore not mandate the provision of unbundled services by CLECs, absent evidence that demand for such services exists and a CLEC has refused to provide the service to an ILEC or another CLEC."[46]

This request goes, in part, to the question of reciprocal unbundling already addressed (see the previous sub-section). Again, I see no reason to recommend that the Board order CLECs to lease their UNEs to other carriers. However, I note that, as competition takes hold, it is possible that a CLEC may be the sole provider of facilities to a customer (or group of customers). In that circumstance, it would be inappropriate to allow the CLEC (in this instance, a monopoly provider) to refuse to lease its facilities or interconnect with another CLEC: to do so would, in essence, prevent the customer free and open access to the competitive market. I believe that, under current Vermont law, the Board is authorized to take steps to prevent such behavior.[47] Nevertheless, there is no reason now to make a final determination on a potential (though seemingly unlikely) future event, especially when the proper decision may be fact-dependent.

3. Interim Number Portability

40. Weiss pf. at 30-31.
41. Meehan reb. pf. at 10.
42. Act § 251(c)(2).
43. AT&T Brief at 3.
44. *Id*. at 3.
45. Rozycki pf. at 10; tr. 5/14/97 at 67-69 (Rozycki); ATP Brief at 18.
46. Rozcki pf. at 10; tr. 5/14/97 at 35; ATP Brief at 18.
47. 30 V.S.A. §§ 203, 209.

Number portability describes the process by which a customer, while remaining at the same premises or, in certain cases, within the same exchange, may change her provider of local service and not change her telephone number.[48] This capability is a critical component of competitive local exchange markets: in its absence, argue the CLECs, customers' willingness to switch providers may be inhibited by the costs of acquiring a new number.[49]

Number portability involves complex technical issues. For this reason, a dual-track approach has been taken to solve them. Nationally, a permanent, long-term solution is under development (referred to as local number portability or "LNP"). The effort is overseen by the FCC, and is spearheaded by two contractors: Lockheed-Martin for states east of the Mississippi River and EDI for states west of the river. In October 1997, Bell Atlantic implemented the permanent capability in several metropolitan areas and will, over the next year and a half, continue to introduce it in various areas in its service territories.[50] By December 31, 1998, LECs must provide permanent LNP in the country's 100 largest metropolitan areas (metropolitan statistical areas or "MSAs"). After that date, all LECs must make LNP available within six months after a specific request for it.[51]

In the meantime, steps have been taken to provide interim number portability ("INP"); several approaches have been utilized. These involve the use of currently available technologies, but, because they impose certain constraints on the provision of enhanced and other services, they are inadequate as permanent solutions. The questions to be resolved at this time are: what are the appropriate technologies for INP, who should decide what technology to deploy in particular circumstances, and how should disputes be resolved?

---

48. Meehan pf. at 11; Weiss pf. at 18. As defined in the Act, number portability is "the ability of users of telecommunications service to retain, at the same location, existing telecommunications numbers without impairment of the quality, reliability, or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(a)(30).

49. Weiss pf. at 19. For residential customers, those costs might include informing friends, relatives, and others of one's new phone number. For businesses, analogous and more expansive costs might be incurred: reprinting of stationary and promotional materials, changes in advertising, and informing employees, customers, and suppliers.

50. Bell Atlantic press release, October 30, 1997.

51. 47 CFR §§ 52.3(b)(c).

a. Statutory and Regulatory Requirements

The Act requires all LECs to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the FCC.[52] However, neither the Act nor FCC rulings dictate that a particular technology be employed.[53]

The Interconnection Stipulation, approved by the Board on July 24, 1997, states that:

> Interim number portability will be provided by NYNEX and switch-based CLECs using available technologies, including remote call-forwarding, direct inward dialing ("DID"), route indexing or other comparable arrangements, where available, as mutually agreed upon by the carriers.

Interconnection Stipulation at § VII.B. The Stipulation is silent, however, on the question of how to determine which technology shall be used, if the contracting providers fail to reach agreement.

b. INP Technologies

There are several technologies that can be used to provide INP. Each requires that the end user customer originally assigned the telephone number stays within the boundaries of the central office and rate center to which the NXX was originally assigned.[54] The technologies are:

- *Remote Call Forwarding ("RCF"):* With RCF, a call is routed to the dialed number, then a translation table is used to redirect the call to the number assigned to it by the new carrier. Many optional calling features cannot function with this "porting" method. Moreover, additional telephone numbers are needed, which may pose problems in areas where the existing stock of numbers is nearly exhausted.[55]
- *Direct Inward Dialing ("DID"):* Here the call is routed through the original carrier's switch to a port, which is connected via dedicated trunks to the new carrier's switch. Like RCF, many optional calling features cannot function with this method.[56]
- *Hub Route Indexing ("HRI"):* HRI employs a single telephone number address, unlike RCF and DID. Calls are coded to identify their designated carrier and are routed through a tandem switch. HRI does not disable optional calling features and does not exhaust duplicate telephone number addresses.[57]

---

52. Act § 251(b)(2). This section states that local exchange carriers have "[t]he duty to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission [FCC]." See also Meehan pf. at 15; DPS Brief at 68.

53. *In the Matter of Telephone Number Portability*, CC Docket No. 95-116, RM 8535, First Report and Order, FCC96-286 (released July 2, 1996) at ¶ 136 (referred to herein as the "*Number Portability Order*").

54. Meehan pf. at 11. NXX refers to the first three digits of a phone number. Historically, each wire serving center or central office has had its own NXXs, which are not repeated anywhere else within the same area code.

55. Weiss pf. at 20.

56. *Id*.; Meehan pf. at 13.

57. Weiss pf. at 20.

- *Local Exchange Routing Guide ("LERG"):* This is similar to HRI: calls are routed directly to their destinations and do not require duplicate telephone number addresses and do not disable optional calling features. LERG, however, imposes additional maintenance and upkeep costs that the other methods avoid.[58]

Which technology, or "platform," will be optimal in specific circumstances will depend upon a variety of factors, including availability, cost, and the particular usage characteristics (for example, volume of traffic) of each customer.[59]

c. Who Should Choose the Technology?

BAVT argues that, because it is the INP provider's network that must be altered to provide the service, it should be the provider who should determine (in the few instances when agreement is not reached) which technology will be employed.[60]

The Department opposes this recommendation. The DPS, though it had originally proposed that RCF should be adopted as the "default" technology,[61] now argues that the Board should merely retain authority to resolve any disputes between negotiating carriers, in the event they fail to agree on an INP technology. The DPS contends that, because BAVT's approach would reserve to one party exclusive power to determine the means by and the extent to which a competitor is able to offer service, it is not competitively neutral and would violate the "mutual agreement" provisions of the Interconnection Stipulation. Furthermore, the DPS argues that, because CLECs will bear (at least in part) the financial burdens of INP, it would be inequitable to allow incumbents to determine which INP technology is used.[62] AT&T and the ATP concur generally with the Department's recommendations.[63]

The evidence supports a conclusion that giving the INP provider (most often the incumbent) unilateral authority in each instance to determine which technology will be used would be anti-competitive. In addition, it would be inappropriate for the Board to establish at this time a default technology for INP, in the event that negotiating carriers do not reach agreement on the point. At the very least, the default might not be the appropriate technology in every situation, and it is certainly possible that it would not be the preferred choice of either party to the

58. *Id*.
59. Meehan pf. at 14-15; tr. 5/13/97 at 6-7, 20-21, 42-45 (Meehan).
60. BAVT Brief at 4-5; tr. 5/12/97 at 117-118 (Meehan); tr. 5/13/97 at 6-9 (Meehan).
61. Weiss pf. at 23.
62. DPS Brief at 68-69, 70-71.
63. AT&T Brief at 12-13; ATP Brief at 17-18; Rozycki pf. at 11.

negotiations.[64] Lastly, given the imminence of a permanent solution, I do not anticipate that there will be many, if any, disputes over the interim technologies.

For these reasons, I recommend that the Board reject BAVT's proposal to allow INP providers to choose the ultimate INP platform to be utilized. I also recommend that the Board not adopt a default technology but, instead, affirm its readiness to swiftly hear and resolve any disputes that may arise.

d. How Should the Costs of INP Implementation be Established?

BAVT goes on to argue that the FCC stated that the INP costs to be recovered should include the incremental costs initially incurred by a LEC to transfer numbers and subsequently to forward calls to new service providers. The FCC left it to the states to determine the incremental costs that should be recovered.[65]

BAVT proposes that a LEC's annual INP costs be calculated as the sum of the incremental switching and transport costs per minute of use, multiplied by the total "ported" minutes during the year. Until such time as the Board determines a different incremental cost for BAVT, the Company proposes that the total element long-run incremental cost ("TELRIC") rates adopted on an interim basis in Docket 5906 (the NYNEX-AT&T § 252 arbitration) be used by all LECs for purposes of calculating the relevant costs to be recovered.[66]

The Department agrees that it is only the incremental costs of providing INP that should be recovered from carriers. The DPS concurs with BAVT that those costs should be calculated as the product of (a) the switching and transport costs per minute of use and (b) the total minutes "ported."[67]

The components and magnitudes of switching and transport costs will be litigated in the second module of this phase of the docket. BAVT recommends that, until a final decision on those (and other) costs and prices is issued, the Board should require that all local exchange carriers use the TELRIC rates adopted on an interim basis in Docket 5906 (the NYNEX-AT&T arbitration). No party opposed this proposal, and I recommend that the Board approve it.

e. Allocating the Costs of Number Portability

---

64. These considerations differentiate my reluctance to recommend an INP default from the Board's earlier decision to "adopt bill and keep as our starting point for compensation arrangements among interconnecting local exchange carriers." Phase I Order at 79. The policy objective is that the approach taken should be most conducive to facilitating fair and open competition; an INP default, unlike bill and keep, would not satisfy that aim.

65. Meehan pf. at 20.

66. BAVT Brief at 10.

67. Weiss pf. at 24 (line 22).

Bell Atlantic argues that, in its Number Portability Order, the FCC stated that the recovery of costs imposed by INP implementation should *not* be premised on findings of strict cost causation, but rather should be managed in a competitively-neutral manner.[68] BAVT "urges the Board to adopt a cost allocation plan that apportions the costs of INP among *all* telecommunications carriers according to their total inter- and intraLATA retail revenues."[69] In greater detail, the Company proposes that:

> each local exchange carrier operating in the state (including Independent LECs, IXCs, CLECs, and CMRS providers) would determine the total annual costs of providing INP and submit the cost data to the Board or its fiscal agent. The Board or its fiscal agent would allocate to each telecommunications carrier an annual INP charge base on the total INP costs submitted by all LECs and prorated on each carrier's percentage of year-end total retail revenue generated in Vermont. The Board or its fiscal agent would then distribute the funds owed to each local exchange provider which submitted cost data. Additionally, the Board should permit each Telecommunications Carrier to recover its assessed portion of the allocated costs from its end user customers, preferably through an explicit charge, such as a monthly per line charge, or implicitly in its rates.[70]

BAVT asserts that this approach is consistent with the Act's mandate that all telecommunications carriers share in the costs of providing number portability. Furthermore, the Company argues, by allocating costs to all carriers (who will then recover those costs from their customers), all users of the network appropriately share the burden of number portability because they all benefit, either directly or indirectly, from the capability. This is because number portability facilitates competition, and all users will benefit from competition.[71]

The Department concedes that the several cost recovery proposals put forward by the parties in this case satisfy the FCC's competitive neutrality objective set out in the Number Portability Order.[72] Nevertheless, the DPS argues that its proposal described below, based on approaches currently in use in Rochester and other New York metropolitan areas, should be

---

68. BAVT Brief at 10.
69. BAVT Brief at 8 (emphasis in original).
70. *Id*. at 8-9; Meehan pf. at 20-21.
71. *Id*. at 9.
72. DPS Brief at 71-72. Competitive neutrality is achieved if, one, the cost recovery mechanism "does not give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific customer . . ." and, two, the mechanism does not have "a disparate effect on the ability of competing service providers to earn normal returns on their investment." Number Portability Order at ¶¶ 132, 135; Weiss pf. at 23.

For the purposes of this analysis, I have differentiated between the calculation of the costs of providing number portability (refer to the previous sub-section) and the manner in which those costs will be recovered. This is a sensible approach in light of the relatively small costs of number portability; but as a general matter, it should be noted that, simply apportioning costs on a competitively neutral basis does not necessarily mean that the costs themselves, when reflected in prices, will not have an inhibiting effect upon the competitive market.

adopted because it has the added advantages of "closely match[ing] cost recovery to both cost causation and to direct benefit."[73]

The Department states that the FCC found that the incremental payment to an incumbent by a competitor for number portability will be very close to zero, since that represents the portability cost that an incumbent incurs to retain the customer.[74] Nevertheless, the FCC saw that number portability has value to competitors, and therefore they should share, in a competitively neutral manner, in covering its costs.[75] The Department then proposes a cost-recovery mechanism that would, presumably, satisfy the neutrality objective. The incremental cost of number portability should be allocated to carriers through an annual surcharge assessed on the receiving carrier by the "porting" carrier; that surcharge should be calculated as the product of (a) the number of working lines "ported" to a competitor and (b) the ratio of total "porting" costs (*i.e.*, total ported minutes times switching and transport costs/minute) to the total volume of working numbers provided by the incumbent.[76]

AT&T concurs with the Department that this allocation method is appropriate, satisfies the FCC's requirements, and could be adopted by the Board.[77] AT&T also argues that an alternative approach — simply compelling the incumbent or "porting" carrier to bear all the costs — might instead be implemented. AT&T contends that this allocation is competitively neutral insofar as "the incremental porting cost to the CLEC who wins the customer from the monopoly provider must be close to the incremental cost to the monopoly provider of retaining

---

73. DPS Brief at 72. AT&T notes that this approach, referred to generally as the Rochester Open Market Plan ("ROMP"), has also been adopted in Massachusetts. Sobieski pf. at 7; AT&T Brief at 9.

74. Weiss pf. at 24. "The incremental [porting] payment by the new entrant if it wins the customer would have to be close to zero, to approximate the incremental number portability cost borne by the incumbent LEC if it retains the customer." Number Portability Order at ¶ 133.

75. *Id*.

76. *Id*.; see also Sobieski pf. at 20. In mathematical notation, two equations:

$$(1)\qquad \frac{\text{(total ported minutes) * (switching and transport costs per minute)}}{\text{(total working numbers provided by the incumbent)}} = \text{Charge per Working Number}$$

The denominator refers to all numbers (or access lines) provided by the incumbent, both to itself and to competitive carriers.

$$(2)\qquad \text{Competitor Charge} = \text{(Charge per Working Number) * (volume of numbers ported to competitor)}$$

It should be noted that, in those instances where there exist facilities-based competitors, the formula would also be used to allocate each competitor's costs of providing INP to other carriers, including the incumbent. This would result in net payments for INP being made amongst carriers, and it is conceivable that, when the economics supported it, competitors could decide to provide the service on a "bill and keep" basis. See Sobieski pf. at 7; see also Phase I Order at 51-52, 78-80. Presumably, the permanent number portability solution will have been implemented by that time.

77. Sobieski pf. at 20; AT&T Brief at 8-10. BAVT also concedes that it satisfies the FCC's requirements. Tr. 5/12/97 at 111-112 (Meehan).

the customer [and] the monopoly provider has no incremental cost if it retains the customer. . . ."[78]

BAVT opposes these recommendations, arguing that there would be a disproportionate allocation of costs to the LEC providing the porting service, thereby yielding the competitor an unjust competitive advantage.[79]

I recommend that the Board adopt the cost allocation method proposed by the Department. I reach this conclusion for several reasons: it is straightforward, relatively easy to administer, competitively neutral (within the meaning of the FCC's order), and offers the greatest promise of rapidly bringing competition and its expected benefits to Vermont's consumers.

The parties and the FCC all recognize that number portability is critical to local exchange competition. They also understand that, by its very nature, number portability imposes costs on the network that would not occur but for the creation of a competitive market and, moreover, that the assignment of those costs according to strict principles of cost causation would undermine the very end sought—new entrants would be required to bear incremental costs that the incumbents automatically avoid. Consequently, the FCC concluded—rightly, in my judgment—that, to serve the greater public good, all competitors should share in the number portability costs, thereby giving no one competitor (or group of competitors) an unfair cost advantage.

This logic would seem to militate in favor of BAVT's recommendation, which requires that *all* telecommunications providers, regardless of whether they actually serve any customers on "ported" numbers, bear the INP costs. There are, however, two countervailing concerns that persuade me that the DPS's proposal, which requires that only those carriers either "porting" numbers or receiving "ported" numbers share the INP costs, offers a more balanced solution to the problem. The first is that INP is a temporary fix and, in the relatively short time before the implementation of the permanent solution, it will likely create costs from which only a subset of carriers and customers will benefit directly. The second is that, even though INP costs, if allocated according to their causative properties, would "give one service provider an appreciable, incremental cost advantage over another service provider," nevertheless it is appropriate (as a matter of economic efficiency) to assign costs as much as possible to those who cause them. If such assignment can occur without threatening the viability of the competitive market, then it should be done.

---

78. *Id*. at 8.

79. BAVT Brief at 10, fn. 13; Meehan reb. pf. at 4-6; tr. 5/13/97 at 11 (Meehan); exh. NET-II-1.

The DPS's proposal has the virtue that, to a greater extent than under the BAVT plan, customers and carriers who demand number portability—and who more directly benefit from it—will pay its costs. Those carriers for whom, in the near term at least, number portability yields only the most ethereal of benefits are therefore excluded from the calculus. At the same time, though, it is important to assure that all CLECs, including incumbents, compete on the basis of their incremental costs to serve: since the benefits of competition are expected to greatly outweigh the incremental costs of INP, it would be inappropriate to inhibit competition by too-faithfully adhering to the rate-design principle of cost causation.

BAVT's argument that the DPS's proposal foists upon the incumbent a disproportionate share of the INP costs deserves consideration. If true, the Board should be concerned that an incumbent will be inclined to act in ways that will deter competition, since to do otherwise would be to incur costs for which there are no corresponding revenues. As a general matter, I believe this to be a valid concern, but in this case I conclude that it is sufficiently mitigated by three factors. The first is that I expect that INP costs will, in relation to the industry's overall local exchange revenues in Vermont, be quite small. Second, under the DPS's approach, as the total number of "ported" minutes increases, so will competitors' shares of INP costs likewise increase.[80] And third, an incumbent's incentive to open its local exchange territories to competitors—that is, its own entry into the interLATA market[81]—dwarfs the benefits of maintaining the local exchange monopoly that law and technology will inevitably erode anyway.

Bell Atlantic proposes that the Board or an appointed fiscal agent manage the INP "settlements" process among carriers (described at the beginning of this sub-section). Because the Department's plan calls for a straightforward allocation of costs among CLECs (including incumbents), it does not seem to me necessary that an overly-involved administrative procedure be set in motion at this time. Carriers can bill each other on a periodic basis for their shares of ported minutes (under the formula, a function of the ratio of ported lines to total lines). BAVT recommends that carriers be permitted to freely design retail rates (either fixed or usage-based) to recover those costs. I agree, at least with respect to competitive providers who exercise no

---

80. Competitors' and incumbents' share of total costs vary as "ported" minutes of use vary, but the cost per minute of use should not, all else being equal, change. In this way, no carrier will have an appreciable incremental cost advantage (due to INP) over others. I reject AT&T's alternative plan—that BAVT bear all INP costs—because it would give CLECs that incremental cost advantage.

81. The status of § 271 of the Act is, perhaps, uncertain; the U.S. District Court in Texas recently ruled that it constitutes an unconstitutional bill of attainder.

significant market power. Incumbents, however, are a different matter, and the manner in which they recover INP costs should be taken up in a normal tariff review or rate case.[82]

Lastly, I should point out that the parties are asking the Board to determine the method for allocating the costs of INP — and only INP — to carriers (and ultimately, therefore, to customers).[83] I note that the question need not be limited merely to *interim* number portability, but could extend as well to the long-term solution. The Act does not distinguish between interim and permanent number portability, and simply requires that "The cost of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[84] Nevertheless, since the Board has not yet been presented with evidence on the details and magnitude of costs associated with implementing a permanent solution to number portability, and no party is arguing that a more expansive decision be made at this time, I recommend that the Board adopt these recommendations with respect to INP only.[85]

4. Directory Information Requirements of Incumbents

The question here is: what is the extent of an incumbent's obligation to publish information about CLECs in its telephone directories? Under the Interconnection Stipulation, BAVT agreed to include certain CLEC information in its directories;[86] however, the Company concedes that the scope of that obligation is fairly narrow, and that it will be free to provide a good deal more information about itself than it should of its competitors.[87]

AT&T and the ATP contend that the CLECs should be entitled to space in the directories' informational pages at the same rates, terms, and conditions as are the incumbents.[88] The Department endorses this position.[89] The basis of their contention is straightforward. Bell Atlantic, by virtue of its history, brand-name, market share, and control of bottleneck facilities, possesses significant market power. It is necessary to the effective functioning of the competitive market that BAVT be prevented from exercising that power, not merely through the setting of

82. I recommend that INP cost recovery should at least be broad-based (*i.e.*, all customers of a company should share the costs).

83. AT&T Brief at 8.

84. Act § 251(e)(2); see also § 153(a)(30) and § 251(b)2).

85. This is sensible. The specific facts surrounding the permanent solution, including actions taken at the federal level, may very well dictate that a different approach will better serve the public good.

86. Under the Interconnection Stipulation (§ VIII.A.), BAVT agreed to provide, at no charge to the CLECs, a variety of services, most notable among them: (1) listings of CLEC customers in BAVT directories (tariffed charges for additional listings and options do apply); (2) the publishing, delivery, and recycling of directories for CLEC customers, to the extent that BAVT does so for its own customers; and (3) listings of the names and business phone numbers of all CLECs. Order of 7/24/97, Appendix One, at 12-13.

87. Tr. 5/13/97 at 70 (Meehan).

88. Friar pf. at 3; Rozycki pf. at 12; ATP Brief at 16-17; AT&T Brief at 13-15.

89. DPS Brief at 67.

monopolistic prices, but also by restricting consumers' access to information about alternative providers. The competitors argue that directories are one of the more important sources of consumer information about telephone services and that BAVT enjoys a virtual monopoly over directories in Vermont.[90] They maintain that, in the interest of promoting competitive neutrality, the Board should establish requirements designating the amount and location of CLEC information to be published in BAVT's directories. In addition, they insist that CLECs should be required to pay for that space only to the extent that BAVT pays for it.[91]

The ATP and AT&T also argue that the segregation of BAVT's publishing into a separate subsidiary does not insulate it from a Board mandate to provide CLECs additional access to directory space.[92]

BAVT opposes the competitors' recommendations. The Company argues that the narrow question before the Board "is whether NYNEX should be *required* to publish CLEC information in the NYNEX directory beyond the information required by the Act or that NYNEX has voluntarily agreed to publish pursuant to the Interconnection Stipulation."[93] BAVT argues that, by meeting its obligations under the Stipulation, it will have satisfied the relevant requirements of the Act.[94] The Company urges the Board to deny the competitors' request:

> Simply stated, the Board should not compel NYNEX to exceed the commitments the Company has already agreed to undertake. If competing carriers wish to have additional information published in NYNEX directories, they should be required to purchase ad space as any other company would do and to pay the appropriate charge for those ads.[95]

In its reply brief, the Company argues that requiring it to provide additional directory space to its competitors runs "afoul of the First Amendment rights of the utility" and is therefore unconstitutional.[96] BAVT asserts that its directories, being property of the Company, are

---

90. Lackey pf. at 10; tr. 5/14/97 at 17, 4-0-42, 50 (Rozycki). AT&T, in its initial brief (at 14), contends that, "While it is possible in theory for any carrier to publish a directory, making entry into a market where one dominant player controls the entire market will not occur unassisted. The Board must regulate access to the [incumbents'] directories in much the same way as it regulates access to [their] networks."

91. Rozycki pf. at 12; Friar pf. at 3; tr. 5/13/97 at 161, 208-209, 237 (Friar); tr. 5/14/97 at 42 (Rozycki).

92. ATP Brief at 17; AT&T Brief at 15. AT&T refers to the finding of the Hearing Officer in Docket 5906 (the NYNEX-AT&T arbitration), adopted by the Board, that:

> NYNEX by separating its directory publishing services into a separate entity, can effectively remove those services from regulation. NYNEX's directory services are made possible by the regulated company providing complete customer listings. The Board has previously concluded that NYNEX's provision of those directories is an integral part of providing telecommunications services within the state. The Board also includes the costs and revenues associated with these services within rates.

Docket 5906, Order of 12/4/96, at 50-51 (citations omitted).

93. BAVT Brief at 11 (emphasis in original).

94. *Id*.

95. *Id*.

96. BAVT Reply Brief at 22.

"protected commercial speech under the First Amendment."[97] Elaborating further in its response to the DPS's surreply memorandum, BAVT asserts that the Department erroneously cited *Turner Broadcasting System, Inc. v. F.C.C.*[98] as the standard of law applicable to determining whether the compelled access rule that the DPS proposes is constitutional. Instead, contends the Company, because the proposed directory access rule is content-based, it is therefore "subject to *strict* scrutiny under *Pacific Gas & Elec. Co. v. Public Utils. Comm'n. of California*, 475 U.S. 1 (1986), ["*Pacific Gas*"] not the lesser intermediate level of scrutiny attributed to *content-neutral* restrictions under *Turner* on which the Department relies."[99]

In its surreply memorandum, the DPS had argued that, in this instance, the *Turner* test is correctly applied and that the competitors' required-access proposal meets that test. This is so, the Department asserted, because *Turner* holds that a "regulation is content-neutral if the government did not adopt it because of agreement or disagreement with the message conveyed, and it does not impose a restriction, penalty, or burden by reason of the content of the speech."[100] The DPS contended that its proposal "is motivated not by agreement with information about CLEC services and rates nor by disagreement with information about NYNEX's services or rates, but rather by the State's interest in moving from a monopoly model to a competitive one in the delivery of local exchange telecommunications service."[101]

For the reasons that follow, I conclude that the Board has the authority to require incumbent LECs to make available to CLECs additional space in the informational pages of the incumbents' directories at prices that the incumbents themselves pay for that space. I do not find that such a requirement would violate the U.S. Constitution.

Section 251(b)(3) of the Act imposes upon all LECs "the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[102] Section VIII of the Interconnection Stipulation, already approved by the Board, represents a good first step at complying with § 251(b)(3) of the Act (insofar as it applies to directory listings and related services); but I also

---

97. BAVT Reply Brief at 21.

98. 512 U.S. 662 (1994), herein referred as *Turner*. This case involved a challenge by cable television system operators and programmers to the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992. The provisions required carriage of local broadcast stations on cable systems.

99. BAVT Response, 10/8/97, at 1-2 (emphasis in original).

100. DPS Surreply Memorandum at 4.

101. *Id*.

102. Related to this, though not directly relevant to the issue before the Board here, is the Act's requirement that LECs "shall provide subscriber list information . . . on a timely and unbundled basis, under nondiscrimatory and reasonable rates, terms, and conditions, to any person upon request for purpose of publishing directories in any format." Act, § 221(e).

believe that additional steps can, and should, be taken that will assure consumers greater access to information about competitive offerings and services. Moreover, I conclude that §§ 261(b) and (c) of the Act allows state commissions to take such actions:

> (B) EXISTING STATE REGULATIONS.—Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.
>
> (C) ADDITIONAL STATE REQUIREMENTS.—Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.[103]

Directory service should be regarded as a monopoly until a demonstration that it is competitive has been made.[104] As the Board has already found, directory service is integral to the provision of telecommunications services generally;[105] furthermore, consumers rely especially on the informational sections of directories for important facts about the telecommunications market and its services.[106] While it is true that already in the market there are competitive directory offerings, this by itself does not establish that the incumbent is no longer the dominant provider of such service: until the market for directory services is truly competitive, the incumbents' directories will remain consumers' primary – and handiest – source of service-related information. Because the easy availability of useful information about services and providers is an essential component of a functioning market, in this instance the incumbent should be required to offer services and features to competitors on the same terms that it provides those services to itself. This should come as no surprise: it describes the essential unbundling and imputation rules that emerged in Phase I, simply extended to directory services.[107] Prices need to be explicit and imputed to BAVT where the services in question are also offered to competitors.

As to the constitutional question, relevant case law provides well-enunciated rules for resolving it. In *Central Hudson Gas v. New York Public Service Commission*, 447 U.S. 557 (1980) ("*Central Hudson*"), the United States Supreme Court established a four-part test to determine the limits of governmental regulation of commercial speech:

---

103. These provisions complement powers already reserved to the Board under state law. 30 V.S.A. §§ 203 and 209. See also § 253(b) of the Act.

104. Tr. 5/14/97 at 42 (Rozycki).

105. Dockets 5700/5702, Order of 10/5/94 at 91.

106. Tr. 5/14/97 at 57 (Rozycki).

107. Phase I Order at 16-18, 25, 48-49; see also Dockets 5700/5702, Order of 10/5/94 at 121-124.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson.[108] By application of this test, I conclude that BAVT's directories and, in particular, its informational pages do not reside outside the protections of the First Amendment.[109] I also find that there is a substantial government interest to be advanced – namely, the promotion of an open, competitive telecommunications market where none previously had existed. Next, I conclude that the proposed regulation – permitting competitive carriers to purchase additional (though limited) space in the incumbent's informational pages – will directly advance the governmental interest asserted because it will provide consumers with useful additional information about providers and services, which is critical to a functioning market.[110] Lastly, I find that the proposed regulation is not more extensive than is necessary to serve the interest: it does not give CLECs an unlimited right of access and it imposes a relatively insignificant burden upon BAVT.[111]

Bell Atlantic argues that, in fact, the requirement to distribute messages with which it disagrees does impose an impermissible burden upon it, because it renders the regulation non-neutral with respect to content. Therefore, the Company asserts, review under the stricter standards enunciated in *Pacific Gas* is triggered. *Pacific Gas* involved an order of the California Public Utilities Commission ("CPUC") directing the utility to include in its billing envelopes the newsletter of a third party. The Supreme Court vacated the CPUC's order, concluding that it:

> impermissibly burdens appellant's [Pacific Gas's] First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints. The order

---

108. Note that later, in *Turner*, the U.S. Supreme Court held that a content-neutral regulation "need not be the least speech-restrictive means of advancing the Government's interest. 'Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." ' Narrow tailoring in this context requires, in other words, that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.' " *Turner* at 662 (citations omitted).

109. So too the commercial expressions of the CLECs.

110. Friar pf. at 3; Rozycki at 12; tr. 5/14/97 at 42, 57-61 (Rozycki). It seems clear that Congress also reached this conclusion. Act § 251(b)(3). Directories constitute a critical conduit of information to consumers and, in the interest of promoting competition, it was necessary to assure that consumers would have reasonable access to relevant information. This section of the Act and my recommendations today are intended to overcome a perceived market failure – one that, if left unremedied, could have detrimental impacts on welfare – and thus the government's interest is substantial.

111. Selling and managing space in telephone directories is, after all, a primary activity of directory providers.

> is not a narrowly tailored means of furthering a compelling state interest, and it is not a valid time, place, or manner regulation.[112]

The Court had noted that "Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views."[113]

To determine whether the more stringent standards of *Pacific Gas* should be applied, the question of whether the regulation is content-neutral must first be answered. In *Ward v. Rock Against Racism*, the Supreme Court set out the standard to be applied in this case:

> The principle inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.[114]

I find that the proposed rule is content-neutral. In application, it will not force BAVT to "associate with the views of other speakers"; it will be clear from the manner in which it is presented that the material is being provided solely to inform consumers and that BAVT takes no position, one way or the other, on what is being stated. In addition, because the requirement merely allows any competitor to purchase additional space, it does not select "the other speakers on the basis of their viewpoints."[115]

---

112. *Pacific Gas* at 20-21.

113. *Pacific Gas* at 16, fn. 12 (citing *Zauderer v. Office of Disciplinary Counsel* 471 U.S. 626, 651 (1985)).

114. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted). This is the standard applied in *Turner*, upon which the Department has urged the Board to rely.

115. In *Turner*, the Court stated that "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas of viewpoints from the public dialogue." *Turner* at 642 (citations omitted).

Because I have concluded that the proposed requirement is content-neutral, it is not necessary to apply the stricter standards enunciated in *Pacific Gas*. Nevertheless, I note that I disagree with BAVT's contention that *Pacific Gas* prohibits in all instances a requirement that the Company provide additional directory space to competitors that can be used to inform consumers about the variety of providers and services available. In *Pacific Gas*, the Court overturned a CPUC order that the utility make available excess space in its billing envelopes to a third party, thereby disseminating that party's newsletters to all of the utility's customers. The CPUC reasoned, first, that compelling third party access did not infringe on Pacific Gas's right to speak and, two, that the utility has no property interest in the excess envelop space (being paid for by ratepayers and created by an artifact of the postage rates) and, therefore, the utility has no constitutionally protected right in restricting access to the envelopes.

The facts before the Board today are differentiable from those of *Pacific Gas*. The Department and the other parties are not asking that BAVT be required to provide unlimited directory access at no cost to competitive carriers; nor are they asking that CLECs be permitted to print in BAVT's directories any and all information that they so choose to print. Here the request is simply that they be given a right to purchase additional space to provide additional information (possibly in a standardized format) about their services – which is to say, information in addition to that which BAVT has already agreed to provide at no charge. Tr. 5/14/97 at 57-61 (Rozycki).

(continued...)

No testimony, however, was given on the extent of additional space in the informational pages that should be made available to competitors (I do not conclude that it should be equivalent in area or content to that which the Company provides itself),[116] nor on the costs and prices of that space.[117] I recommend that BAVT be directed to file for approval with the Board (copies to the parties), within sixty days of this Order, a schedule of terms, conditions, and prices for space to be made available to CLECs (including BAVT itself) in the informational pages of its Vermont directories.[118] I further recommend that a "sunset" for this requirement need not be established at this time; upon its own or a party's motion, the Board may reconsider the question at any time in the future. Although it is reasonable to expect that directory service will evolve into a fully competitive market over time, it is not possible now to predict with any certainty when that will come about.

I also recommend that the Board require that CLECs who publish their own directories be required to comply with the terms of Section VII of the Interconnection Stipulation and also to permit carriers to purchase additional space in their informational pages (at the same terms, conditions, and prices that they make such space available to themselves). This is consistent with the Act, which mandates that all LECs (including CLECs) satisfy the obligations of § 251(b).[119]

---

115. (...continued)

By invoking *Pacific Gas*, BAVT implicitly argues that any and all CLEC information beyond that which the Company will print under the terms of the Interconnection Stipulation will necessarily be "expressly contrary to the corporation's views," and, therefore, a requirement that it include such information in its directories is unconstitutional. BAVT's argument appears grounded in the notion that information that can be used against its economic interest is, necessarily, "contrary to its views" (presumably CLECs will want to print information that is intended to assist customers in their choices of local exchange providers, thereby reducing BAVT's market share). By this logic, one might assert that the Company should not be required to carry any information at all about CLECs and, therefore, it can be freed of the obligations it accepted under the Interconnection Stipulation. No party is making that argument, however. In any event, it would be directly at odds with the Act's requirement that LECs shall provide all telecommunications carriers non-discriminatory access to directories. Act, ¶ 251(b)(3). Bell Atlantic is not challenging the constitutionality of this section of the Act.

116. The Act is silent on the nature and extent of the "non-discriminatory access" that an incumbent LEC must provide to other carriers.

117. Hyperion urges the Board to establish rules "designating the amount (in pages) and location of local company information to be published in [incumbents'] directories. The Board should determine the order of appearance of [incumbent] and CLEC information by annual lottery administered by the Board or Department of Public Service." Rozycki pf. at 12. At this time, I conclude that Hyperion's request is more expansive than necessary.

118. I am aware that BAVT's directory publishing services are provided by an affiliate that is not directly regulated by the Board. That fact notwithstanding, the Company cannot be permitted to evade regulatory oversight of its monopoly directory services while simultaneously constraining competitors' access to those services so as to undermine the functioning of the overall market.

119. As stated earlier, the mere presence of alternative directory services does not, by itself, establish that the particular market is competitive. I recognize that placing this demand on all carriers (who choose to publish directories) deviates from the general principle of imposing differential regulatory requirements on carriers, according to the degree of market power they enjoy. However, in this case, the public policy objective of facilitating open competition (by

(continued...)

A final thought on this question: the Board and parties may wish to consider whether the establishment of a central repository of relevant directory information (names, numbers, etc.) could facilitate the development of a competitive market for directory service. Incumbents could free themselves of the imputation and unbundling obligations with respect to their own directories by making such information readily accessible (at appropriate prices for all competitors). Over time, the maintenance of such a repository could conceivably become a cooperative effort of all CLECs. It may even make sense to allow direct access to the database by customers.

5. Carrier-to-Carrier Service Quality

Reasonable assurance of intercarrier service and service quality is necessary to competitive entry, especially in the early stages of market development. Absent such assurances, carriers may be required to build parallel networks to meet their network reliability and service quality objectives.[120] Capital investment under such circumstances would very likely be economically inefficient and would constitute a barrier to entry.[121] Even if a new entrant intends to eventually deploy its own facilities, the prospect of poor or unreliable service in the meantime may deter entry altogether.[122] Even over the long term, the absence of intercarrier service quality threatens the overall quality and reliability of service.[123]

Hyperion and the Department identify a number of aspects of intercarrier service quality that deserve attention. They note that concerns with service quality relate not merely to technical questions of network performance, but also extend to issues involving intercarrier orders and requests for facilities. Hyperion's witness, for example, points to the problem of potential delays by the incumbent carrier in provisioning collocation trunks. The Department identifies several other potential problem areas:

- Provisioning and repair intervals: the amount of time between the new entrant's firm order for service and the incumbent's provision of that service, and the time between a repair call and the performance of the repair;[124]
- The new entrant's ability to obtain firm order commitments ("FOCs") from the incumbent, and the ability of the new entrant to enforce FOCs, including the assessment of penalties;[125] and

119. (...continued)
reducing the costs of information to consumers) is better served by mandating that all directories provide like information about competitors.

120. Lackey pf. at 12.

121. *Id*.

122. *Id*. at 13

123. *Id*. at 12.

124. Rozycki pf. at 21; Lackey pf. at 12.

125. Lackey pf. at 12.

- The strength of an incumbent's commitment to deliver – and its actual delivery of – superior service quality in terms of outage rates, signal integrity, error rates, noise levels, speed of transmission, and other technical characteristics.[126]

I agree with BAVT and the ATP that interconnection agreements can provide an important vehicle for establishing intercarrier service quality standards.[127] However, I also conclude that the public interest would be best served through the establishment of a reasonable set of intercarrier service quality standards that can be broadly applied.

The Department indicates that is not possible to establish carrier-to-carrier provisioning standards based on the record in this phase and recommends therefore that interested parties should collaborate (preferably through informal workshops) in the development of consensus standards to be adopted in a formal proceeding.[128] While reluctant to enter into a new round of negotiations, the ATP agree that quality standards for wholesale services – which should extend to such business services such as billing and collection, and could be based on models developed in other states – should be developed.[129] BAVT is not opposed to the creation of such standards.[130]

Such service quality standards should apply to all carrier-to-carrier services which are offered under the current toll access and wireless interconnection tariffs (BAVT's PSB Nos. 23 and 30), and future tariffs or statements of generally available terms and conditions ("SGAT") for services at wholesale (meant for resale) and unbundled network elements.[131] These services are essential to the ability of a telecommunications service provider to deliver superior quality retail service.[132]

Service quality standards should be developed for the following areas of activity. This is not intended to be an exhaustive list:

- Measurable and enforceable performance criteria;
- A means for new entrants purchasing services from the incumbent to track the status of service orders and repairs;
- A requirement that incumbent carriers offer purchasing carriers consistent procedures, a single point of contact that is available seven days per week, 24 hours per day, trouble management and escalation processes;
- A requirement that incumbent carriers offer purchasing carriers service that is of the quality and reliability of the "wholesale" service that the selling carrier provides to its own retail operations; and

---

126. *Id*.
127. Usher pf. 16-17; tr 5/12/97 at 71-72 (Usher); ATP Brief at 15.
128. Lackey pf. at 14; tr. 5/16/97 at 201-02 (Lackey).
129. Hyperion Brief at 14.
130. Usher pf. at 16-17.
131. Lackey pf. at 13.
132. *Id*.

- Appropriate liquidated damages and or credits for service quality deficiencies.[133]

I agree with Bell Atlantic that such a process may need to undertake some amount of data collection as a first order of business.[134] I also conclude that certain standards are needed to address concerns associated with entry barriers and are therefore applicable primarily to incumbent carriers. Other standards may be needed to ensure continued high service quality among all service providers and should be more broadly applicable.

I recommend that the Board direct the Department and interested parties to initiate a collaborative, informal process to develop a set of service quality standards, assurance mechanisms, and appropriate remedies for failure to meet them.[135] I further recommend that this process be overseen in the current investigation into service quality (Docket 5903).[136] The Hearing Officer in that Docket should be directed to hold a prehearing conference within 30 days of an Order in this Docket. The parties should be prepared to propose a schedule and determine whether, as the Department recommends, workshops present the best avenue for facilitating resolution of intercarrier service quality issues.[137]

Until those questions are ultimately resolved, interconnection agreements present perhaps the best mechanism for ensuring that intercarrier service quality does not delay entry. I recommend that the Board emphasize that delay or inadequate service quality in incumbent provisioning of competitive carriers will not be tolerated. Incumbent local exchange carriers should be placed on notice that interconnection agreements should contain service and provisioning arrangements that do not delay entry into the market. Agreements should include both reasonable time frames for provisioning and reasonable penalty provisions to ensure that those standards are met by the incumbent carriers.

6. Statement of Generally Available Terms and "Pick and Choose"

The Department asks that the Board direct incumbents to file Statements of Generally Available Terms ("SGATs") that incorporate "a disaggregated cafeteria-style 'pick and choose'

---

133. *Id*. at 14.

134. Usher pf. at 16-17.

135. Lackey pf. at 14.

136. I believe that Docket 5903 (*Investigation into Service Quality Standards, Privacy Protections, and other Consumer Safeguards for Retail Telecommunications Service*) may provide the better venue for service quality issues because a base of understanding and final consumer expectations has been established in that investigation that should inform expectations for provisioning and service quality between carriers.

137. DPS Brief at 65.

rule."[138] The DPS maintains that disaggregated pick and choose, which allows CLECs to opt for only the network functionalities and services that it wants,

> will reduce the considerable barriers to entering the local exchange market and the extent to which [incumbents] can exercise their market power against new entrants. One of the barriers to entry new entrants – particularly new entrants of smaller size which may be attracted to the Vermont market – face is the cost associated with negotiating with [incumbents] the rates, terms, and conditions of interconnection, resale, and unbundled elements.[139]

In addition, the Department requests that the pick-and-choose rule also allow for "CLECs which have not negotiated [interconnection] agreements to pick and choose from existing agreements and CLECs which have negotiated agreements to pick and choose from subsequent agreements."[140] The DPS reasons that, "Without disaggregated MFN status that applies to subsequent agreements, no CLEC could enter an interconnection agreement because it would know that its competitive opportunities could be sharply reduced if the [incumbent] offered more favorable terms in the next agreement."[141]

BAVT opposes the DPS's recommendation. The Company argues that the Department's proposal, "which mirrors the position originally taken by the FCC, was squarely rejected by the Eighth Circuit because it 'conflicts with the Act's design to promote negotiated binding agreements.'"[142] BAVT asserts that the Eighth Circuit's decision is dispositive of the issue, and the Board should find that § 252(i) "allows requesting carriers the option to select the terms and conditions of prior agreements only as a whole, not in a piecemeal fashion."[143]

In reply, the DPS argues that BAVT "confuses interpretation of 47 U.S.C.A. § 252(i) and the Board's authority to adopt a disaggregated 'pick and choose' rule independent of interpretation of § 252. The only action taken by the Eighth Circuit . . . was to vacate the FCC's interpretation of § 252(i)."[144] The Department goes on to state that:

> The court found that the FCC's interpretation was "*an unreasonable construction of the Act*." *Id.* (emphasis supplied). The issue of whether a state utility regulator could adopt and enforce a disaggregated "pick and choose" rule

138. DPS Brief at 57.

139. *Id*. at 57-58 (footnote omitted).

140. *Id*. at 62. The ability of those CLECs who have already entered into agreements with incumbents to pick and choose from among the elements of the incumbent's later agreements with other CLECs is often referred to as "most favored nation," or MFN, status.

141. *Id*. at 62.

142. BAVT Brief at 23, citing *Iowa Utilities Board v. F.C.C.*, No. 96-3321, 1997 WL 403401 at (8th Circuit 7/18/97) (herein referred to as "*Iowa Utilities*").

143. *Id*. at 24. The Company goes on to assert that "even the MFN provision in NYNEX's existing interconnection agreements is vastly overbroad." It does not suggest re-opening those agreements now, but reserves the right to do so in the future. *Id*. at fn. 28.

144. DPS Reply Brief at 24.

> based not on § 252(i) but on its own judgment about promoting competition was not before the court, and the court did not decide the issue. In point of fact, the Board may adopt a "pick and choose" rule that is more procompetitive than the federal rule. It may not adopt rules, however, that interfere with competition. *See* § 253(a).[145]

The DPS contends that BAVT's position wrongly assumes that the Act preempts the Board from taking any action with respect to "pick and choose" and that, in fact, the Board does have the authority to adopt its own rule, so long as it does not inhibit competition.[146]

Section 252(i) of the Act states simply:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Nothing is said about jurisdiction. Is it the state's utility commission or the FCC that is authorized to implement this sub-section of the Act? In striking down the FCC's pick and choose rule, the Eighth Circuit did not find (as it did with respect to local exchange pricing rules) that the FCC lacked jurisdiction; rather it addressed the substance of the proposed rule in relation to other LEC requirements under that Act.[147] The Eighth Circuit said nothing about jurisdiction with respect to § 252(i).

I conclude that state utility commissions are not preempted from establishing pick and choose rules for incumbent LECs. Under § 252, the FCC's jurisdiction is quite limited:

> In a case in which a state fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.[148]

Since § 252(i) describes a LEC's responsibilities and does not explicitly contemplate state or FCC action in respect of them, it is difficult to see how the FCC's pick and choose rule, and the Eighth Circuit's overturning of it, can be construed as preemptive of state action.[149] I agree with the Department that the Board is well within its authority to consider the question.

---

145. *Id*. (citing *Iowa Utilities* at 11).
146. *Id*. at 25-26.
147. *Iowa Utilities* at 5, 10-11.
148. Act § 252(e)(5).
149. As noted earlier, § 261(c) of the Act allows a state to impose additional requirements on a telecommunications carrier for intrastate services in order to promote competition, if the additional state requirements are not inconsistent with the Act or FCC regulations.

As to the substance of the matter, the Department asks for two things: one, that CLECs be permitted to freely pick and choose from among the individual provisions of an incumbent's other interconnection agreements; and, two, that they also be permitted to freely pick and choose among the individual services and unbundled elements of an incumbent's SGAT. With respect to the first, I conclude that a disaggregated pick and choose rule that gives competitors a unilateral right to "pick and choose" among individual provisions of other interconnection agreements while not having to accept other, linked terms and conditions of the agreements would conflict with the Act's intention to foster negotiated binding agreements. On this point, I conclude that the Eighth Circuit's reasoning is correct – a pick and choose rule:

> would thwart the negotiation process and preclude the attainment of binding negotiated agreements. During a negotiation, an incumbent LEC would be very reluctant to make a concession on one term in exchange for a benefit on another term when faced with the prospect that a subsequent competing carrier will be able to receive the concession without having to grant the incumbent the corresponding benefit. In this manner, the FCC's rule would discourage the give-and-take process that is essential to successful negotiations. Moreover, negotiated agreements will, in reality, not be binding, because, according to the FCC, an entrant who is an original party to an agreement may unilaterally incorporate more advantageous provisions contained in subsequent agreements negotiated by other carriers.[150]

Consequently, the rule would work against the very end its proponents seek: a vibrant, innovative market for telecommunications services. An incumbent's reluctance to enter into creative agreements to meet the specific needs of different CLECs will mean that all agreements will, in their essential details, look very much alike. Homogeneity may be a prerequisite for competitive markets in stasis, but it has fewer virtues in a dynamic environment.

Although I conclude that the DPS's disaggregated pick and choose rule for interconnection agreements vitiates Congress's preference for negotiated agreements, I do not conclude that § 252(i) requires that a LEC make available to CLECs other interconnection agreements only *in their entirety*. Section 252(i) states that a LEC "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier;" but the LEC shall do so "upon the same terms and conditions as those provided in the agreement." It is this caveat upon which debate turns: in the context of a negotiated agreement, a "term" or "condition" associated with a particular element may, in fact, also be a term or condition with respect to another (otherwise unrelated) element or service – that is, a *quid pro*

150. *Iowa Utilities* at 11.

quo.[151] But it would be unreasonable to conclude that the *quid pro quo* can only be the agreement as a whole. The Department rightly worries that too restrictive an interpretation of § 252(i) may enable a LEC to discriminate against certain CLECs while giving preferential treatment to others (in particular, its affiliates).[152] While § 252(e) affords general protection against discriminatory behavior, its own enforcement will often require regulatory intervention after the fact. In contrast, a pick and choose rule persuades incumbents to engage in arms' length, forthright negotiations with all CLECs.[153]

The question then is how to reconcile the competing objectives. BAVT's proposal is to allow a CLEC to "avail itself of either the other agreement in its entirety or all the prices, terms, and conditions contained in the agreement that relate to any one or combination of major sections of such contract. These sections include, for example, interconnection, resale, collocation, and number portability."[154] This describes, in fact, the "most favored nation" clause already incorporated in the Company's interconnection agreements.[155] I recommend that the Board adopt BAVT's proposal, as it relates to "picking and choosing" amongst the provisions of interconnection agreements; it is balanced, amenable to the emerging markets, and non-disruptive. I do not believe that it disadvantages competitors, who still retain their rights to arbitration; moreover, the Board is free to revisit the policy in the light of actual experience with it.

As to the application of pick and choose to an SGAT, I reach a different conclusion. An SGAT functions, in essence, as a general product and price list. One of its purposes is to enable any telecommunications provider to purchase "off the shelf," and thereby avoid the costs of negotiation and, possibly, arbitration. Seen in this light, it would be antagonistic to the development of competitive markets to give competitors' access to only broad categories of an SGAT's unbundled network elements and services.[156] A CLEC may, of course, elect to negotiate an interconnection agreement better tailored to its business needs; and, in those

---

151. The hypothetical examples drawn by the Department illustrate this. In return for, say, a relatively low wholesale price for basic service, a CLEC may agree to purchase local usage at a relatively high rate. Another CLEC may be willing to purchase higher cost basic service in exchange for lower usage rates. These, it seems to me, are precisely the kinds of variations that we hope for, and expect, in a competitive market. They give the incumbent flexibility in meeting market demands, while reasonably protecting its ability to recover costs. DPS Brief at 59-61.

152. *Id*. at 60.

153. *Id*. at 61-62.

154. Meehan pf. at 37.

155. *Id*.

156. Refer to ¶ 3.2 of the Company's SGAT, filed recently in Docket 5936, the Board investigation under § 271 of the Act. The Hearing Officers in that docket decided, for reasons of judicial economy, to incorporate Docket 5713's evaluation of BAVT's wholesale "pricing terms and conditions," when completed, into the record in Docket 5936. Docket 5936, Order of 7/7/97, at 6-7. It is reasonable to regard the degree of disaggregation of the SGAT (for the purposes of making network elements and services available to competitive providers) as a "pricing term [or] condition" and therefore within the scope of this docket's inquiry.

circumstances therefore, the negotiating parties would not be bound to the terms, conditions, and prices of the SGAT.[157]

C. Regulatory Issues

1. Tariff Filing Requirements

Current statutory tariff filing requirements appear to leave the Board with little programmatic discretion to adapt to the emergence of competitive providers of local exchange services. A legislative response enabling the Board to distinguish between incumbent LECs and CLECs, for the purpose of tariff requirements, would be desirable. The legislature has already acknowledged the value in alternative regulation of incumbent LECs and competitive services.[158] Similar flexibility and latitude for Board regulation of regulation of CLECs would be a natural next step.[159]

In this section I discuss tariff filing requirements for CLECs and incumbents. I conclude that, despite certain leeway available to the Board, by statute CLECs are generally held to similar filing requirements as those faced by incumbent LECs. I do, however, conclude (1) that CLECs can file tariffs with price bands, and (2) that legislation which would give the Board clear authority to better craft CLEC filing requirements would be desirable.

a. Positions of the Parties

AT&T and the ATP argue that potentially burdensome regulation of CLECs would, for a variety of reasons, thwart development of local exchange competition in Vermont, and result in reduced consumer welfare, insofar as it discourages CLEC entry into the Vermont market.[160] They assert that, first, the regulatory process imposes significant time and resource costs upon

---

157. Deviating from the SGAT allows for the "give-and-take" of negotiations that the Eighth Circuit rightly saw as an intention of the Act. This should not be seen, however, as a license for incumbents to discriminate among CLECs or to give preferential treatment to its own affiliates: all interconnection agreements must be approved by the state commission under the terms of § 252(e) of the Act.

158. *E.g.,* 30 V.S.A. §§ 226b and 227a.

159. I have refrained from reading 30 V.S.A. §§ 226b and 227a as a basis for providing flexibility in the tariff filing requirements that I discuss here. While it is apparent from those statutes that the Legislature contemplated that the provision of local exchange service would become more competitive, either on a service-by-service basis (§ 227a) or on an overall company-wide basis (§ 226b), it does not appear that the Legislature anticipated CLECs to come into Vermont and provide a complete stand-alone service. As such, the Board is faced with, first, having to accommodate CLEC needs and to protect Vermont consumers under current law and, second, proposing changes to existing law that recognize the differences between incumbent LECs and CLECs.

160. The evidence suggests that, for most consumers, tariffs are neither the sole nor the usual vehicle for obtaining information about products, rates, terms, and conditions. Tr. 5/16/97 at 26 (Raymond). The ATP go further, arguing that the filing of prices does not provide useful information to anyone except BAVT, which may be tempted to lower prices selectively as a preemptive measure. Rozycki at 18; see ATP Reply Brief at 6.

new entrants (costs that yield no discernable net benefits), thus inhibiting product development and the introduction of new services. Second, they contend, it would also give other competitors notice of proposed changes and an unreasonable opportunity to "undercut" them. [161] For these reasons, these parties recommend that the Board refrain from requiring that CLECs – that is, non-dominant providers –file tariffs for their telecommunications services.[162]

The DPS argues that regulating new entrants with no market power in the same manner as dominant providers are regulated would be anticompetitive and constitute unjust discrimination in contravention of 30 V.S.A. § 218(a).[163] In response, citing *Davison v. Morrisville Water & Light Dept.*,[164] the ILECs argue that § 218(a) applies to discriminatory treatment of customers and not to discriminatory treatment of other companies. In *Davison*, the Supreme Court held that the "Board has jurisdiction to review the rates, charges and service practices of regulated companies to ensure that customers are not being treated unreasonably, discriminatorily, or otherwise unlawfully."[165] Thus, *Davison*, according to the ILECs, stands for the proposition that the plain language of § 218(a) does not relate to discriminatory effects on companies, but rather on customers.

I disagree with the ILECs' narrow reading of § 218(a); for purposes of its application, the language of this section is broad. It concerns the "rates, tolls, charges or schedules" and "regulations, measurements, practices or acts of such company relating to its service . . . ."[166] According to the statute, when any of these are "found unjust, unreasonable, insufficient or unjustly discriminatory," the Board may take appropriate action.[167] Nowhere in this language is there a hint of the company/customer distinction suggested by the ILECs. Nor does the *Davison* court indicate that discrimination against customers is the only type of discrimination that lies within the scope of § 218(a).[168] In any event, the debate is misleading: the critical need is to guard against the adverse effects upon consumers of unjust discrimination. If consumers are disadvantaged as a consequence of unjust discrimination against competitive providers, then the Board is well within its authority under § 218 to take appropriate remedial actions.

---

161. *Id.*

162. *Id.* at 10-13; AT&T Brief at 23-26.

163. The DPS argues that the new entrants should be prohibited from filing tariffs. Raymond pf. at 10; tr. 5/16/97 at 8 (Raymond); DPS Brief at 39-40.

164. 137 Vt. 120, 122 (1979) ("*Davison*").

165. *Davison* at 122.

166. 30 V.S.A. § 218(a).

167. *Id*.

168. In further support of the conclusion that the customer/company distinction is a red herring, consider the inclusive language of 30 V.S.A. § 226b(c)(11), which refers to "unjust discrimination between *users* of the public switched network . . . ."

The DPS also maintains that, in addition to impeding the development of competition, imposing tariff filing requirements on CLECs "is not rationally related to any legitimate public policy objective . . . ."[169] The Board, however, has previously reached the opposite conclusion; it has found that the tariff filing requirement of 30 V.S.A. § 225(a) serves the very important purpose of consumer protection.[170] It has also determined that the requirements of § 225 apply regardless of whether a utility is subject to traditional utility regulation.[171] Consistent with this plain language, the Board requires utilities not subject to traditional rate regulation, such as competitive interexchange telecommunications carriers and cellular telephone providers, to file revised tariffs prior to changing rates.[172] The Board has thus determined that even when a public service company is not subject to traditional rate regulation, the advance filing of tariff revisions serves important consumer protections.[173]

b. Tariffing Under Title 30

In order to better understand what CLECs' filing requirements should be, a brief review of current requirements for all LECs is necessary. Unlike other facets of regulatory review, the procedural requirements of the tariff-related provisions in Title 30, including §§ 218, 225, 226, and 227, leave little room for adaptation to the special circumstances of CLECs. These statutes contain very specific and definite directions to regulators and the regulated community concerning tariff filing and review. For instance, § 225 requires utilities to file tariffs relating to all rates for all services and products.[174] The statute dictates specific procedures for initial tariff filings and for subsequent filings which change rates, terms, and conditions.[175] For example, companies are required by this statute to file with the DPS and to observe certain lead-times for rate increases and others for rate decreases. [176] The Board does not have the authority to eliminate these filing,

---

169. DPS Brief at 39.

170. *In re Generic Investigation Into the Regulation of Cellular Telecommunications Services in the State of Vermont*, Docket No. 5454, Order of 1/8/92 at 34, 41-43, 49-51, 53-54, 56-58.

171. *Id.*

172. *Id.*

173. *Id.* at 34, 41-43. There has been no indication in this docket that CLEC customers would not likewise benefit if CLECs were required to provide the Board and DPS with, at least, a minimum amount of information about their products, services, and terms and conditions of service.

174. "[E]ach company subject to the provisions of this chapter shall file . . . schedules . . . showing all rates . . . for any service performed or any product furnished by it within the state, and as part therof shall file the rules and regulations that in any manner affect the tolls or rates charged . . . ." 30 V.S.A. § 225(a).

175. For example, proposed initial tariffs are reviewed by the DPS and the Board and must, within 15 days, be published in two newspapers of general circulation within the state. *Id.*

176. Section 225 requires 45 days' advance notice to the Board, DPS, and other affected parties of proposed tariff changes. The DPS must make its recommendations to the Board at least fifteen days prior to the date upon which the requested tariff change is to become effective. In the case of proposed rate decreases, the Board, DPS, and affected

(continued...)

review, and approval requirements.[177] Consequently, absent a change to these statutes that would enable the Board to either eliminate or to develop substantially different tariffing standards and procedures for competitive providers like CLECs, the Board must continue to observe the statutory requirements for tariff filings of all telecommunications providers.

However, as noted earlier, the Board has broad authority to ensure that carriers provide adequate service at just-and-reasonable rates.[178] And it can – and does – exercise this authority flexibly. On one hand, it generally subjects monopoly carriers to rate-of-return regulation administered through specific, detailed tariffs, while, on the other hand, it applies tariff requirements somewhat less rigorously to competitive carriers such as Hyperion, which it allows to negotiate customers' prices within tariffed rate bands.[179] Under this broad authority, the Board can similarly authorize CLECs to submit tariffs that contain "rate bands," *i.e.*, price ranges for services.

There are several reasons for the Board to afford CLECs the opportunity to include rate bands in their tariffs. First, rate bands would provide CLECs with flexibility in initially filing their rates. Second, having the ability to move up or down within a pre-authorized range of service prices without having to observe the filing formalities and attendant time constraints of review and approval will allow CLECs to be more responsive to customers. Because CLECs lack market power to exploit customers or to cross-subsidize non-regulated products with regulated ones, the Board should afford them this flexibility in tariffing their services.[180] Therefore, I recommend that CLECs be given the opportunity to file tariffs containing rate bands. Rate bands shall be reviewed for their reasonableness on an individual basis, as they are filed.[181]

While rate bands will afford CLECs pricing flexibility, unconstrained pricing discretion should not be given to CLECs.[182] Even with a company's rate bands on file in an approved tariff,

---

176. (...continued)
parties must receive five days notice under the statute. *Id.*

177. With the exception of the authority to review and approve, with the consent of the DPS, a shorter time within which tariff changes may be made by a company that can show good cause (30 V.S.A. § 225 (a)) and the specific legislative grants of authority to reduce or suspend requirements pursuant to §§ 226a, 226b, 227a.

178. *See e.g.*, 30 V.S.A. §§ 218 and 227.

179. Docket 5608, Order of 3/16/97 at 83-84.

180. The DPS recommends that this flexibility not be given to incumbent LECs because of their dominant market status and the potential for cross-subsidization or other exploitation of their customers. Raymond pf. at 9. However, under certain forms of alternative regulation (*e.g.*, price caps plans), some pricing flexibility can be afforded incumbents.

181. For instance, I am not now proposing that the Board specify the magnitudes of such rate bands (say, as a percentage of services' average prices). However, this may be a step that the Board may later wish to consider, if circumstances warrant.

182. In addition to statutory requirements, the Board's approach to regulated and competitive providers has been informed by the Board's policy regarding the implementation of rate changes. The Board generally requires that rate changes be implemented on a *service-rendered* basis. *See e.g.*, Docket 5532, Order of 4/2/92. This policy is based on
(continued...)

CLEC customers are still entitled to notice of proposed rate increases, within those bands, prior to their going into effect.[183] With adequate notice, customers will be able to evaluate whether they wish to continue purchasing service from their current providers.[184] I recommend that CLECs using rate bands be required to provide notice directly to customers of changes in rates and other material terms and conditions of service. Such notice can take the form of direct mailings or bill inserts.[185]

c. Legislative Changes

Because of constraints created by the regulatory framework originally designed to protect the captive ratepayers of incumbent LECs, developing tariff filing requirements appropriate for CLECs poses a challenge to the Board. In a competitive market where customers have a choice between providers, the necessity for regulatory assurance of just and reasonable rates diminishes. If a customer is not satisfied with her carrier, the customer can switch to another company. (Of course, this faculty is meaningful only if the transactions costs of switching are minimal.)

In this environment, a lighter-handed regulatory approach for CLECs would be appropriate. However, since CLECs, like other LECs, are still subject to tariff filing requirements, it appears that statutory changes are needed before those requirements can be relaxed or eliminated. New legislation, in my opinion, would enhance the Board's ability to regulate CLECs in a manner that acknowledges their non-dominant status, and for Vermonters to realize the full benefits of their presence in our telecommunications market. Of course, such legislation need not – and should not – undermine Vermont's current policies of consumer protection and universal service.

No evidence in this docket suggests that competition eliminates the need for the Board and Department to have sufficient, organized, and up-to-date information on each of the competitive providers that chooses to offer service in Vermont. However, my review of the record convinces me that CLECs could provide the Board, Department, and consumers with sufficient and timely information to assure consumer protection, without having to submit to the

---

182. (...continued)
fundamental conceptions of fairness. It is intended to give customers notice of rate changes before the changes go into effect, so that they can be fully aware of the charges they will incur for a service before the service is actually provided.

183. *Id*.

184. *See, e.g.*, Docket 5454, Order of 1/8/92. As the Board recognized in Docket 5454, adequate notification of rate changes to customers consists of two related components. First is the form of notice, and to whom notice should be given. Second is the term of the advance notice and the amount of time sufficient to satisfy a customer's needs. *Id.* at 42-44.

185. There may be other ways in which notice can be effectively given. CLECs should be encouraged to consider and develop alternative means, in consultation with the Department , with such alternative means to be subject to Board approval.

full extent of detailed filing requirements imposed by statute. Their lesser market power makes lesser review of CLECs appropriate. This could be accomplished while still assuring just and reasonable rates, high-quality service, and other important consumer protections.

For these reasons, I recommend that legislation be adopted that would enable the Board to oversee a simpler regulatory process for CLECs. Such a process would require CLECs to file notice-only tariffs with the Board and DPS.[186] Notice to affected subscribers would be provided thirty days in advance of any material changes in service, except for rate reductions which would be allowed with five days' notice. Such notice would be in writing and specify the service or services affected, the new rate or charge (including the amount of the change relative to the existing rate), any other material changes, and the effective date thereof.

d. Tariffs for Terminating Access

The Department also recommends that CLECs should not be required to file tariffs for toll access services,[187] arguing that:

> Tariffs are just as unnecessary for CLEC toll access services – even terminating access – as they are for end-user services. Although IXCs cannot choose terminating access providers, because CLECs will have a small sliver of the market and will be competing with the [incumbent] LEC, which will have a dominant share of the market, [incumbent] LEC toll access charges will place a constraint on CLEC terminating charges. . . . Moreover, CLECs are not likely to risk damaging their relationships with IXCs by charging unreasonable termination rates.[188]

I agree with the Department's general argument on this point, but, for the reasons set out above, I conclude that CLECs must file tariffs for toll access services. There is, moreover, added reason for regulatory caution here. A market for local exchange services can be competitive at retail, but the provision of toll access services will remain essentially monopolistic in character. That is, only the chosen LEC will be able to provide such services; it will not be possible for an end-user (or IXC, for that matter) to choose a provider of toll access services that differs from the end-user's local exchange company. Consequently, the LEC controls a bottleneck service; there is no way for IXCs to bypass the LEC in order to provide service. Board and Department review

186. The filing of notice tariffs, as the terms suggests, would involve no rate review requirement by the DPS and Board, would allow both to gather and review information, and would leave open the possibility of a rate investigation if necessary.

187. That is, transporting toll calls between end-users and interexchange carriers' points-of-presence, often referred to as "originating" and "terminating" access. These services may involve other functionalities, including tandem switching and interoffice transport (but these are generally unbundled and priced separately).

188. DPS Brief at 38-39.

of tariffs for terminating access will assure that LECs will not abuse their control of this bottleneck service.[189]

2. Local Calling Areas

In Docket 5670, the Board defined mandatory local calling areas for the incumbent LECs. Specifically, the local calling areas include a customer's home exchange, any exchange contiguous with the home exchange, and any exchange whose boundaries are within three miles of the customer's home exchange. The second phase of that investigation expanded some calling areas to include particular communities of interest.[190] The question at issue in this docket is whether CLECs should also be obligated to include these same calling areas among their local service offerings.

The key distinctions between toll and local calling currently are (1) the rate charged to the end user, (2) the number of digits that need to be dialed, and (3) the rules for compensating the carrier that terminates the call.[191]

BAVT argues that the Docket 5670 calling areas established as a mandatory requirement for the existing incumbent local exchange carriers should also be imposed upon the CLECs. The Company gives several reasons for its position: (1) the substantial effort that went into the establishment of the local calling areas in that Docket, especially to eliminate "haphazard" calling areas; (2) the potential consumer confusion as providers differentiate their services on the basis of local calling areas; (3) the threat to competition in the long distance market;[192] and (4) the potential confusion caused by different dialing patterns for different calling areas.[193] BAVT also argues that adoption of the calling areas established in Docket 5670 does not interfere with consumer choice and product differentiation.[194] BAVT concedes, however, that there is no

---

189. It may be possible to relax the requirement that tariffs for access be filed by LECs, along with other tariff-filing obligations as discussed earlier. The logic is straightforward. Ultimately, any price-gouging tactics of CLECs would have impacts on the cost of retail service, and, in a competitive market, end-users' freedom to choose alternative providers would eventually act to reduce prices for toll access services. Furthermore, as the DPS observes, "CLECs are not likely to risk damaging their relationships with IXCs . . ." and that "the possibility of IXCs forming competitive marketing alliances with other exchange providers will constrain the rates charged by CLECs for competitive services." Also, the Department notes that "CLECs will be subject to § 208 complaints, providing further assurance that CLECs' termination rates will be reasonable." DPS Brief at 39. In any event, so long as there are opportunities for monopoly abuse that will threaten the efficient operation of the market, to the harm of consumers, it is sensible to continue requiring providers to file tariffs for the relevant services..

190. Docket 5670, Orders of 9/6/95 and 7/21/97 (respectively, Phase I and Phase II Orders).

191. Tr. 5/12/97 at 10 (Usher).

192. Tr. 5/12/97 at 24 (Usher).

193. See BAVT Brief at 25-29. Here the reference is to seven-digit dialing for local calls and eleven-digit dialing (1 + Area Code + seven digits) for toll calls.

194. BAVT Brief at 27; tr. 5/13/97 at 98-99 (Fox).

technological impediment to the matching of dialing arrangements with the different local calling areas offered by CLECs.[195]

Allowing CLECs to provide customers with their choice of calling areas need not upset the Board's requirements with respect to mutual compensation among carriers for interconnection.[196] In other words, whether a call is considered local or toll for retail billing purposes is separable from whether the retail provider pays switched access or interconnection rates at wholesale for terminating the call. The Department recommends that the Board adopt the calling routes schedule from Docket 5670 as the basis for establishing which rates should be charged by incumbents for terminating competitors' traffic.[197] BAVT joins the Department in recommending that compensation rates for carrier-to-carrier calls should be the same for each competitor.[198] Indeed, BAVT goes on to note that the prospect of reciprocal local compensation in the face of variable calling areas could present "an administrative nightmare" if the Board were to permit such variability in carrier-to-carrier compensation arrangements.[199]

The Department recommends that (1) incumbent local carriers should continue to be required to offer a basic service package that conforms to the local calling areas established in Docket 5670,[200] (2) that the carrier-to-carrier wholesale reciprocal local compensation arrangements should conform to the calling areas established in 5670,[201] and (3) that both incumbent and CLECs should be permitted to offer alternative retail local calling arrangements that do not conform to the local calling areas established in Docket 5670.[202] AT&T and the ATP also recommend that the Board not require CLECs to offer only the incumbents' prescribed local calling areas, thereby preventing them from differentiating their products.[203]

As a general matter, I agree with the Department's recommendation and those of AT&T and the ATP. In general, I believe that the current "one-size-fits-all" solution is not ideal and has

---

195. Tr. 5/12/97 at 32 (Usher). To the extent that technological constraints unrecognized during the evidentiary phase of this investigation limit dialing patterns of a provider to the existing calling areas established in Docket 5670, I recommend that calling areas be limited to those established in Docket 5670. I conclude, however, that technology constraints should not be a problem here.

196. Tr. 5/12/97 at 42, 70-71 (Usher).

197. Tr. 5/16/97 at 193-194 (Lackey).

198. Tr. 5/12/97 at 54 (Usher); Lackey pf. at 7; tr. 5/16/97 at 193-194 (Lackey).

199. Tr. 5/12/97 at 32-33 and 41 (Usher). Indeed, BAVT witness Usher made it clear that his concern was limited to carrier-to-carrier compensation arrangements. *Id*. at 42 (Usher).

200. Lackey pf. at 6-7.

201. Tr. 5/16/97 at 193-94 (Lackey). Indeed, BAVT also agrees that such compensation arrangements are necessary between carriers. Tr. 5/12/97 at 54 (Usher).

202. Lackey pf. at 3-4.

203. See tr. 5/13/97 at 185 (Friar); ATP Brief at 15. AT&T and the ATP argue that CLECs should not be required to offer the calling areas established in Docket 5670; rather, they should be free to respond to market demands for local calling services.

been a source of some consumer dissatisfaction.[204] I am confident that, in this instance, the market can accommodate more than one service area arrangement in an efficient manner, to the benefit of consumers generally.[205]

I have considered Bell Atlantic's objections to the Department's proposal. I do not believe that adopting the DPS's recommendation will substantially undermine or make wasteful the previous efforts in Docket 5670 to create rational calling areas. First, the calling areas established in that Docket will remain available to consumers through their existing providers. Second, those calling areas will serve as the basis for determining carrier-to-carrier compensation (terminating access) rates. As such, there will be an underlying cost pressure on carriers to mirror the calling areas in Docket 5670. Finally, to the extent that there is broad consumer demand for alternative calling arrangements that overcome such cost pressure, I believe that such demonstrated consumer preferences should not be ignored but, rather, recognized for what they are. It is appropriate to institute a regime that gives competitors and incumbents the freedom to respond to such market demand.

I do, however, share some of the concerns raised by BAVT. First, a variety of calling areas may make it difficult for consumers to make "apples to apples" comparisons of the options.[206] I generally agree with both the Department and AT&T that, as in any market, choice itself can be a source of confusion for consumers.[207] Nevertheless, I see no basis in the record for concluding that telecommunications markets are so different from other markets that consumer choice in local calling areas should be proscribed.

This conclusion notwithstanding, I am concerned that customer confusion may be significant at times, especially in the early stages of market development. At the extreme, consumers may fail to realize (or fail to be informed of) significant differences between local calling packages when making their selections. In most cases, I believe consumers will hold the CLEC accountable for its failure to provide adequate notice of the service limitation and find an alternative provider, though potentially after some inconvenience and unexpected cost to the consumer.[208] Such concerns can be affirmatively addressed by ensuring that consumers are given certain minimum information about the alternative local calling arrangements offered. I recommend that, at the very least, all carriers should be required to fully disclose the differential

---

204. Tr. 5/12/97 at 15 (Usher).

205. Tr. 5/13/97 at 149 (Friar); Friar pf. at 2; Lackey pf. at 4.

206. Usher pf. at 4.

207. Department Brief at 50; AT&T Brief at 5.

208. This concern may rise to another level in instances where consumers make term or volume commitments to service, put down significant deposits, or incur substantial installation or other up-front fees to obtain service from such a provider.

nature of the local calling area to consumers any time the area does not conform fully to the areas established in Docket 5670. I also recommend that this issue be taken up in Docket 5903.

As for competition in toll services, it seems to me that, over time, we are likely to see the distinction between toll and local markets fade. Already we have witnessed a blurring of the line between intra- and interLATA toll services; it seems only natural that this ambiguity will extend to local services as well.[209] As a general matter, I do not believe that it is appropriate for the Board to take actions simply to preserve competition in certain sub-markets;[210] certainly, it does not seem reasonable on the basis of this record for the Board to restrict service options in the local exchange market merely to protect competition in the intraLATA toll market. I agree with the Department that expanding retail choice of local calling areas is both pro-competitive (when taking a broader view of the market for telecommunications services) and quite likely to enhance consumer welfare.[211]

There are several aspects to the concern over confusion with differing dialing patterns. Mostly the problem will arise when a caller is using an unfamiliar phone.[212] In such cases, the caller may run the risk of momentary inconvenience caused by an initial mis-dial (dialing 11 digits when only 7 are needed or the converse); the caller would then simply redial using the proper dialing pattern, typically after receiving a recorded message describing the error.[213]

Similar problems may arise when using a public pay station.[214] While I believe the inconvenience of potentially having to redial, even in dealing with a public pay station, to be small, I conclude that there may be other considerations that weigh in favor of uniform calling areas for pay stations. Given the public nature of these phones and the overall benefits that consistency

---

209. It requires little creativity to imagine a product in which all calls – local, in-state, inter-state, and even international – are priced at the ten cents per-minute price that carriers are currently offering for many services. Such a product may be very attractive to users who make very few local calls.

210. Of course, whether regulatory intervention is warranted in a particular instance will depend upon the facts.

211. DPS Brief at 49.

212. Tr. 5/12/97 at 19 (Usher).

213. Tr. 5/12/97 at 20 (Usher). I am concerned that in certain instances a customer's call may be indeed be completed and ticketed as a toll call without customer notification. This may occur in instances where CLEC procedures for call handling and "ticketing" differ from those of the incumbent. In no instance should a call that is local in character be ticketed as a toll call. All carriers should have appropriate procedures in place to address this concern. At a minimum, toll calls dialed using the seven-digit local calling pattern should not be completed and customers should be notified that they are making a toll call requiring an alternative dialing pattern. Likewise, local calls dialed using a toll dialing pattern (*e.g.*, eleven-digit dialing pattern) should also be interrupted with a notification, but it may be appropriate (if possible) to allow the call to be completed (and correctly billed), since (presumably) the caller (in reality, the account) will be billed at a lower than expected rate. Similarly, local calls placed using a toll access code should not be ticketed as toll calls. To the extent that CLECs cannot provide adequate assurance that these concerns can be addressed (except by continued reliance on the local calling areas defined in Docket 5670), I recommend that they be limited to offering only the local calling areas as set out by the Board in that investigation. To the extent that any further refinement to this rule is necessary, it should be addressed in Docket 5903.

214. Tr. 5/12/97 at 18 (Usher).

would confer, I recommend that, for the time being, all public pay stations provide the minimum local service calling areas established in Docket 5670.[215] Any final resolution of this question should issue from the Board's *Generic Investigation Into the Transition from Regulation to Competition for Public Telephone Services in Vermont*, Docket 6012.

In its Brief, BAVT noted a concern for the manner in which local service could be marketed as local but sold at measured service rates generally recognized as toll.[216] The Department has recommended that the Board establish a price threshold for distinguishing toll service from local; specifically, the Department recommends that the threshold be set at five cents per minute.[217] For the vast majority of Vermonters, however, a rate of five cents per minute is more than twice that of local calls during the peak period.[218] For those customers, I believe that a five-cent per minute threshold would still cause confusion and frustration. Instead, I recommend that the price threshold for differentiating toll calls from local be set at the peak local measured service ("LMS") rate for BAVT customers (*i.e.*, approximately 2.2 cents per minute). I recommend that independent LECs whose peak local measured service rates exceed those of BAVT be granted a waiver of this rate design requirement (that is, their LMS rates should be "grandfathered"), until such time as a rate design change renders the waiver no longer applicable.

3. CLEC Certification Requirements

In order to accommodate the entry of competitive telecommunications providers while continuing to protect Vermont consumers, it is appropriate that the Board consider modifying its current certification criteria and review process, pursuant to 30 V.S.A. §§ 102 and 231.[219] Today I recommend that, in its review of CLECs, the Board modify the substantive and procedural requirements that it traditionally applies to telecommunications carriers requesting certificates of public good in Vermont. In doing so, the Board can assure that CLECs coming into the state satisfy the prerequisites for relaxed regulatory treatment.[220]

215. A pay phone provider could decide to offer more expansive calling areas than those set out in Docket 5670, but not less so.

216. BAVT Brief at 26, fn. 30.

217. Tr. 5/16/97 at 212 (Lackey); DPS Brief at 49-50.

218. This is true of BAVT, which serves approximately 84 percent of the access lines in the state.

219. Section 102 applies for newly-formed Vermont corporations, while § 231 applies to all others.

220. See Section IV.A., above.

a. Positions of the Parties

The DPS proposes substantive and procedural modifications to the Board's current certification requirements.[221] In general terms, the DPS advocates a lowering of entry barriers to Vermont's local exchange market. Its certification proposal would eliminate certain existing standards and replace them with others which, the DPS insists, will continue to protect consumers and maintain public health and safety. These new criteria, it argues, will reduce barriers facing new entrants and thus promote a greater level of competition.[222] Additionally, modifying existing certification standards, it suggests, will reduce the costs of regulatory review. In particular, the DPS proposes that the Board adopt the following CPG standards:

(1) An annual filing under seal of financial reports, service quality measures, and market position;
(2) An initial declaration of the intended market within 24 months and the types of services that the company intends to provide;
(3) For facilities-based providers, a triennial filing with the DPS covering disaster recovery, repair contingencies, mutual aid agreements, equipment inventory plans, power replacement strategies, communications strategies and customer service plans;
(4) A commitment to comply with Vermont statutes and generic Board orders and rules (including retail and carrier-to-carrier service quality, consumer protection, consumer privacy, E-911 financing and provision, compatibility with telephone relay system, universal service funding, and a carrier of last resort program);
(5) Commitments to support and supplement DPS consumer education efforts;
(6) Disclosure of any consumer fraud and fines, penalties, or sanctions imposed by another utility commission, an attorney general or the FCC;
(7) Acknowledgment of Board oversight over residual matters in cases where the company has abandoned customers; and
(8) Financial assurances, where necessary, to provide for return of customer deposits and for expenses associated with abrupt or unnoticed abandonment of service.[223]

While not as prescriptive in their proposals as is the DPS, other parties acknowledge that an appropriate process for certifying CLECs demands that the competing policies of protecting consumers and opening markets be reconciled. Bell Atlantic maintains that the Board ought to retain CPG requirements sufficient to "ensure that the necessary technical, financial, and managerial expertise exists before a company can provide local exchange service."[224] BAVT further argues that the certification process should "apply equally to all carriers operating in

221. It characterizes its certification proposal as "part of an integrated package including service areas, COLR, local calling areas, and tariff filing requirements." DPS Brief at 53. I appreciate the overall design and internal consistency of the DPS's recommendations and, as this report reveals, I adopt them in large measure; however, the structure of the DPS's proposal is not such that failure to adopt in full means that it cannot be adopted in part.

222. Raymond pf. at 3.

223. Raymond pf. at 4-6.

224. BAVT Brief at 20.

Vermont," although it should not be "unduly onerous."[225] AT&T asserts that the current certification process is sufficient to protect consumers. AT&T characterizes the DPS certification proposal, to the degree that it adds requirements, as an unnecessary duplication of consumer protections and a potential impediment to new entrants.[226] The ATP argue generally that the Board should minimize entry regulation.[227] However, they agree with other parties on the general proposition that market entrants should be subject to "some level of scrutiny" before they may offer telecommunications services in Vermont.[228]

b. Analysis

The Board has an interest and a duty to assure the continuation of key consumer protections that telecommunications customers have grown to expect as an aspect of their regulated local telephone service. The Board also has an interest in reducing entry barriers and enabling the development of a competitive market for local exchange service in Vermont. I am confident that the Board can continue to promote both policies through the modified certification process described below.

Currently, 30 V.S.A. §§ 102 and 231 regulate entry of public service companies into the state by requiring such companies to obtain CPGs before they can do business here. The Board has ruled that these statutes were initially designed for two purposes: (1) to protect consumers against incompetent or dishonest businesses; and (2) to protect existing providers by limiting or eliminating their competitors.[229] The first rationale for entry regulation – consumer protection – remains one of the Board's policy objectives. Regardless of the process eventually adopted, the Board should continue to require CLECs to provide sufficient information to assure the adequate protection of Vermont consumers.[230]

The second purpose, the franchise protection rationale for §§ 102 and 231, does not apply where competition exists (or is viable). As the Board recognized in Docket 4946 when it concluded that competition should be allowed into Vermont's communications market, the resale

---

225. *Id*.

226. AT&T Brief at 22-23.

227. ATP Brief at 5. They also add that "the Board should . . . not use CPG conditions to mandate CLECs' territories or services, and [should] apply CLECs' tariff obligations flexibly." *Id*.

228. *Id*. (citing Rozycki pf. at 16; Raymond pf. at 2-6; Friar pf. at 7; Meehan pf. at 31; tr. 5/13/97 at 218 (Friar)).

229. This goes to the question of economic efficiency and the existence of natural monopoly. See, *e.g.* Docket 5264, *Petition of MCI Telecommunications Corporation for A Certificate of Public Good, pursuant to 30 V.S.A. Section 231, to Operate a Telephone Business in the State of Vermont by Providing Intrastate Telecommunications Services*, Order of 12/13/88 at 12; Docket 5071, *Petition of GTE Sprint Communications Corporation for a Certificate of Public Good to Offer Intrastate Telecommunications Services within the State of Vermont,* Order of 10/1/86 at 9; and Docket 5012, *Petition of Burlington Telephone Company*, Order of 5/27/86 at 6.

230. See also Section IV.C.1 regarding tariff filing requirements.

of telephone services should be regulated in a relaxed manner and, despite the potential dangers and drawbacks inherent in competition, its benefits outweighed its flaws.[231] This rationale is still applicable to CLECs today, as it was to resellers ten years ago. As the Board said then:

> [t]he substitution of economic regulation for competition is to be preferred only where a "natural monopoly" exists; that is, where the economies of scale and scope make it more efficient to have only one provider. Where a market can be competitive, it is generally more efficient to allow such competition than to establish a regulated monopoly.[232]

Thus, there is less a need for economic regulation in a competitive environment, where dissatisfied customers of one service provider are free to "vote with their feet" by switching carriers and using a competitor's services.[233] This competition among firms, or the potential for such competition, benefits the public by creating pressure on existing service providers to minimize costs, lower prices, improve service quality, and develop new technologies and service offerings.[234]

Therefore, rather than continuing to rely on a regulatory approach developed to deal with monopoly service providers, the Board should promote consumer protection in a competitive market through the use of objective norms and a lighter-handed certification method which, in its screening function, will assure that market participants observe the standards contained in Vermont statutes and Board Rules. This less intrusive approach, described in greater detail below, can be used to enforce minimum standards of conduct while allowing CLECs greater freedom to enter the competitive market in response to consumers' demand for high quality service.

I also conclude that a less stringent approach would be ineffective. Mere registration, for instance, makes too few demands upon companies and their officers, who could then take advantage of consumers lacking experience in "shopping" for local exchange service. The telecommunications field, unfortunately, is replete with instances of consumer confusion and ignorance from which companies have unfairly profited.[235]

Conditioning entry into Vermont's local exchange market through certification of market participants can provide consumers with needed protections and help them avoid these pitfalls.

---

231. Docket 4946, Order of 2/21/86. See also Docket 5472, *Joint Petition of Burlington Telephone Company d/b/a Long Distance North to Sell its Assets to RCI Long Distance New England, Inc. (RCI); and Petition of RCI for a Certificate of Public Good to Operate as a Reseller of Telephone Services in the State of Vermont,* Order of 12/24/90 at 13; Docket 5264, Order of 12/13/88 at 12; Docket 5071, Order of 10/1/86 at 9.

232. Docket 4946, Order of 5/31/85 at 35.

233. See Docket 5472, Order of 12/24/90 at 14; Docket 5071, Order of 10/1/86 at 11; and Docket 5012, Order of 5/27/86 at 8.

234. Docket 4946, Order of 2/21/86 at 5.

235. Overpriced alternative operator services, costly 900 numbers, and "slamming" are a few examples of the surprises awaiting consumers when a regulatory body adopts a laissez-faire attitude.

Consequently, I recommend that the Board adopt the proposal below, a "registration and screening system," which should not only streamline certification procedures, but should also serve to enhance competition. It reflects many of the elements in the DPS's proposal, replaces certain previously applied CPG criteria, and adopts new ones. Overall, it mandates continued protection for Vermont consumers, but recognizes that such protection may be assured while imposing fewer barriers on new entrants.

c. Certification Criteria

In order for the Board to issue a CPG under 30 V.S.A. § 102 or § 231, the Board is required to find that the proposed public service operations of the applicant in Vermont will promote the general good of the state. These statutory provisions do not specify any criteria for the Board to apply when making this finding.

When considering applications for CPGs for the provision of telecommunications services, the Board has typically considered 13 items: (1) the applicant's FCC authorization; (2) availability of emergency services; (3) system compatibility with neighboring systems; (4) the "justness and reasonableness" of the terms and conditions of services; (5) service quality; (6) customer service; (7) facility quality; (8) rate of investment; (9) financial stability; (10) affiliate interests; (11) competent management; (12) technical knowledge and ability; and (13) business reputation.[236] In its certification proposal, the DPS advocates the elimination of items (4) through (13).

In the past, the Board has recognized that competitive markets possess two important characteristics. First, there are numerous providers, thereby largely obviating the need to assure that the financial and managerial character of a company meets certain standards.[237] If a company does not manage its business properly, it may fail, but there will be other companies to take its place. Second, customers in a competitive market have the fundamental ability to choose a competitor if their existing provider does not meet their needs.[238] Because of this, the customer, rather than the Board, is in the better position of determining the "suitability" of a given carrier. These characteristics of competitive markets, and the pressures that they bring to bear upon providers, relieve regulators of certain oversight responsibilities. In the past, the vitality of a company, especially if it were the sole provider, was critical to assuring just and reasonable rates

236. See *e.g.*, Docket 5900, *Joint Petition of New England Telephone and Telegraph Co.*, Order of 2/26/97 at 9.

237. Except in the case where a company offers prepaid customer services. There is a very real concern about the ability (and intention) of a company to serve customers to the full extent of its liabilities (*i.e.*, the customers' prepayments which, in this instance, resemble bank deposits).

238. Also, the service provider in this context is, by definition, not the sole provider of an essential service.

and quality service. In a competitive context, however, that company's rate of investment, financial stability, control of affiliate interests, management, technical knowledge and ability, and business reputation (items 8-13), though important, generally no longer require in-depth regulatory scrutiny.[239] For example, competitive companies bear the risk of their investment and management practices, and the same generally applies with the other categories listed here.[240] Similarly, assuring that companies meet standards with respect to (4) terms and conditions, (5) service quality, (6) customer service, and (7) facility quality (again, meaningful in a single-provider context) is of lesser import where the customer is able to switch carriers. Thus, absent instances of egregious behavior (already intolerable under existing laws) and subject to Board-developed service quality standards, relationships between CLECs and customers and most CLEC business decisions should no longer require regular scrutiny by the Board.

When warranted, the Board has relaxed its usual CPG review process. For instance, an owner of a coin-operated telephone enjoys a somewhat streamlined process, wherein it applies for and receives one CPG, but is free to install and remove phones as it sees fit. Annually, the provider files a report listing new and removed phones. In this fashion, essential regulatory oversight is preserved, and administrative burdens are greatly reduced.[241]

I recommend that, in place of existing practice, the Board adopt the following minimum filing criteria, listed on the model registration form in Appendix B, for certification of CLECs under 30 V.S.A §§ 102 and 231. While each information category in the registration form will be considered, I cannot be more precise as to the weight given any one category. Under this registration and screening process, the Board, after notice and opportunity for hearing on the filing, may find that the company's entry into Vermont promotes the general good of the state, and may accordingly grant a CPG. While I recommend that the Board adopts these requirements for CLEC CPG applications, nothing should preclude the Board or Board staff from requiring additional information from applicants, nor should the adoption of these guidelines by the Board limit its ability to modify these filing requirements in the future.

---

239. See *e.g.*, Docket 5454, Order of 1/8/92 at 45. "The primary purpose for financing review is to ensure that utilities do not incur unnecessary expenses which can later be collected from customers. Where rates are not tied into regulated costs of service as established by the Board, but are the product of the forces of competition, there is a lesser need for detailed prior review of such financings." Because the rates at issue here fall into the latter category – they are the product of competitive forces – it follows that a less stringent review of a firm's financial position is appropriate.

240. Control of affiliate interests, for example, is, by definition, not a concern. Since competitive companies will not be subject to traditional rate regulation, they cannot use their regulated activities to support their non-regulated affiliates.

241. Docket 5566, Order of 4/24/95 at 37-38.

d. Registration Form

I recommend that, to facilitate the filing process, a registration form provided by the Board be used in applications by companies requesting to offer telecommunications services in Vermont. A proposed draft of a list of the requested information is provided in Appendix B to this Order. The form may be amended from time to time without further Board order. The Board would make the form available through the Clerk's office and through the Board's internet Home Page. It would require the applicant to provide the following information:

- Full names, addresses and telephone numbers of company, registered agent in Vermont, current directors and officers, and contact person for the application.
- A copy of the company's Vermont Certificate of Authority (issued by the Secretary of State).
- A list of company officers and directors.
- Documentation describing the applicant's structure and ownership (including names and addresses of shareholders having a beneficial interest in five percent or more of the applicant's securities).
- Periodic filings containing (a) company financial reports, (b) reports on service quality and/or consumer complaints, and (c) information necessary for the Board or Department to assess the competitiveness of the market.
- A list, for information purposes only, of the counties which the CLEC intends to serve within 24 months of obtaining authorization and of the types of services it intends to provide.
- Financial assurances, where necessary, to provide for return of customer deposits and prepayments.[242]
- Disclosure of any fines, penalties, or sanctions imposed by another state or federal commission or state attorney general.
- Disclosure of any current or pending investigations (apart from state entry certification).
- Disclosure of bankruptcy proceedings.
- For facilities-based providers, filings deemed necessary by the Board or Department to ensure that there is adequate provision in Vermont to meet the

---

242. In the context of resale, the Board makes a distinction between new entrants into the Vermont market that provide only debit card service, and long-time participants (such as AT&T) that offer a multitude of services and that simply seek to add debit card services to their menu of offerings. For this latter group, the Board does not impose a bond requirement, on the theory that the provider is already established in Vermont, offers several services that are provided on an on-going basis, and would be unlikely to "take the money and run." For companies that fit into neither group, *i.e.*, new entrants to the Vermont market that offer debit card services as well as other services, the Board requires a bond in an amount equal to the company's projected Vermont intrastate revenues from its prepaid calling card services, for the first twelve months of operation.

The Board also imposes bonding requirements on new entrants in Vermont that provide *only* debit prepaid calling card services. See CPG 145, Order of 7/13/94, and CPG 146, Order of 8/17/94. As it noted in these Orders, the public utilities commissions of several states have expressed concern about the potential risks to consumers associated with payment in advance of receipt of service, and the Board shares the same concerns. Consequently, it ordered World Telecom Group and Quest Telecommunications, Inc., to post a bond, payable to the Board, in an amount equal to their projected Vermont intrastate revenues for the first twelve months of operation.

Accordingly, I recommend that the Board continue to require that CLECs post a bond in an amount equal to its projected Vermont intrastate revenues from prepaid services or services requiring deposits, for the first twelve months of operation. This approach will be fair to the CLEC, fair to the public, and consistent with the theory that underlies the Board's treatment of other telecommunications providers offering prepaid debit card and other services.

needs of Vermont consumers in the face of natural disasters or emergencies. This may include disaster recovery plans, repair contingencies, mutual aid agreements, equipment inventory plans, power replacement strategies, communications strategies, and customer service plans.

- Affidavits from two company officers certifying the truthfulness and completeness of the information provided, and the intent to fully comply with Vermont statutes, generic Board orders, and these and other Board requirements.

4. Service Area Requirements

Bell Atlantic urges the Board to "adopt reasonable service area requirements, based on ascertainable geographical or political boundaries, as a pre-condition to offering local exchange service in Vermont."[243] The Company argues that, because the economics of service vary greatly among customers and among locations, profit-maximizing firms unfettered by any obligation to serve will "target the highest margin customers located in the least costly areas to serve."[244] Consequently, "the benefits of competition will accrue only to a relatively small number of customers. In addition, permitting a new entrant selectively to market to high-end, high-margin customers only will have a significant and detrimental impact on incumbent LECs and retail prices."[245] Bell Atlantic recommends therefore that the Board require "that all CLECs provide service to any requesting party, within their designated service area."[246]

The Department, the ATP, and AT&T oppose the imposition of service area requirements on CLECs, arguing that (i) they would create disincentives to market entry, (ii) they would be illegal under § 253(a) of the Act, and (iii) they do not serve any legitimate policy objective.[247]

In general, I conclude that service area requirements should not apply to new competitive entrants.[248] I reach this conclusion for several reasons. First, service area requirements may affect the manner in and degree to which competitors enter the market, to the detriment of consumers.[249] As the Department notes, many competitive providers will enter the Vermont market in a niche fashion, starting with a small base of customers and services. Providers with

---

243. BAVT Brief at 17.

244. *Id.*; tr. 5/12/97 at 125-126 (Meehan).

245. BAVT Brief at 16-17; Meehan pf. at 29-30.

246. BAVT Brief at 17.

247. DPS Brief at 9-24; ATP Brief at 7-10; AT&T Brief at 19-20.

248. In the Phase I Order, I concluded that "certain service area obligations should not constitute a significant barrier to competitive entry. For example, it may be reasonable to require, as a condition for receiving universal service support, that a CLEC serve all customers who request service in those areas in which the CLEC is certified to operate." Phase I Order at 68. I am unable to conclude at this point, however, that some sort of service area requirement should (or should not) be included among the (as yet to be established) service obligations of competitive providers who seek universal service funding support for their customers. Indeed, practical considerations related to the administration of a universal service program may dictate that service area requirements be imposed. This issue will be addressed in Phase III (or other appropriate Board proceeding).

249. Tr. 5/16/97 at 73 (Raymond); tr. 5/13/97 at 290-91 (Rozycki); tr. 5/13/97 at 203 (Friar).

such narrowly targeted markets must be afforded the discretion to decide the geographic scope and product mix that best exploits their own individual talents and expertise in serving the Vermont market.[250] Such behavior is an essential characteristic of competitive markets. Moreover, I conclude that, even for competitive providers that have already entered (or decided to enter) the Vermont market, service area requirements would likely inhibit their introduction of new and innovative services or service packages.[251]

Second, I conclude that the administration of such a requirement would likely create significant additional regulatory and enforcement burdens that would yield little, if any, value. If, for example, the Board were to require a statewide service requirement or some other geographic requirement,[252] then any competitor that chose to challenge the requirement could offer service at inflated rates or with inferior service, or could simply fail to inform potential customers in the unwanted areas of the services they provide. The obvious responses of regulators would be to impose pricing, service quality, or marketing requirements on all carriers. In order to ensure compliance with such requirements, the Board would probably dictate geographic tariffing, service quality standards at a fine-grained level, and a protocol for customer notification. Such requirements would also likely necessitate intrusive supervision, enforcement, and penalties for those found to be in violation. Application of such requirements to potentially dozens of competitive providers would create an obvious regulatory burden, of which the benefits are unlikely to offset the costs.[253] As a general matter, I conclude that the Board should limit its market interventions to instances of significant consumer and competitive market abuse.

Third, I conclude that service area requirements applied broadly to many providers and many categories of service would ultimately fail to achieve the intended result – namely, ubiquitous competition and innovation in supply. Competitors who prefer market niches would "game" the requirements by defining and redefining their services in ways that make them unattractive to customers in service areas that they (the CLECs) wish to avoid. At best, the Board and Department could hope to address such issues in the tariff review process. "Creative avoidance" by competitors, however, would thwart regulatory efforts to correct such problems and would delay or even prevent the introduction of new and innovative services.

Fourth, Congress, the FCC, and the Board have established an environment that is designed to stimulate competition throughout the state. The unbundling and resale requirements

---

250. Tr. 5/16/97 at 74-75, 78, 119 (Raymond); DPS Brief at 13.

251. Tr. 5/13/97 at 290-91 (Rozycki).

252. As the Department notes, establishing the service area requirement, even if the Board desired to do so, would be complicated by the fact that no clear proposal for the relevant service area has been made. DPS Brief at 23.

253. This is the DPS's argument, couched in different terms. A policy must have identifiable objectives and reasonable expectations of net benefits. DPS Brief at 21-23.

set out in the Act and in the Phase I Order should encourage broad geographic entry by competitors. Universal service, if administered in a competitively neutral fashion, should further stimulate competitive entry into the more remote areas of the state.[254] In the light of practical considerations associated with marketing, growth in the demand for telecommunications services, and technology developments whose costs are not distance-sensitive, I believe that we can reasonably anticipate widespread entry into all parts of the state in the early stages of market development. Even if this assessment is incorrect, COLR obligations when combined with universal service funding supports should ensure reasonably priced service throughout the state without imposing additional (and unnecessary) service area requirements on all competitive telecommunications service providers.[255]

Finally, while I conclude that service area obligations that apply to all carriers are not now needed, such obligations may be appropriate in conjunction with the system of universal service support that is ultimately established. In Phase III (or other appropriate Board proceeding), we will take up in detail the question of universal service funding and administration.

a. Restrictions on CLECs in the Service Areas of the ILECs

Several parties request that the Board take particular actions with respect to the entry of competitive local exchange companies into the service territories of the independent telephone companies. While the requests differ, the issue that they raise is the same: Does the Board have the authority to certify CLECs on a state-wide basis, without restrictions in the areas served by ILECs and, if it has, should it do so?

The Department urges the Board to allow CLECs to enter Vermont on a state-wide basis. It argues § 253(a) of the Act, "bars state-imposed barriers to entry such as the absolute prohibition placed on Hyperion to provide service to customers in [ILECs'] territories."[256] The Department contends that, "While the Act exempts [ILECs'] of the obligations of § 251(c) such as interconnection, unbundling network elements, and resale at wholesale rates, it does not insulate them from competition by CLECs which can provide service without access to these

254. Tr. 5/16/97 at 135-36 (Raymond).

255. Rozycki pf. at 20; Raymond pf. at 7; tr. 5/16/97 (Raymond). Elsewhere in this proposed decision, I conclude that COLR obligations should continue for the incumbent carriers during the early stages of the transition to a competitive market (see Section IV.D.2., dealing with carrier-of-last-resort issues). As BAVT notes, however, such a requirement of incumbent LECs should not extend to circumstances in which CLEC facilities are already deployed in new developments. Meehan pf. at 27.

256. DPS Brief at 26.

incumbent services."[257] Subsequently, the DPS filed two letters in which it argues that recent FCC decisions confirm its interpretation of the Act, namely, that "absolute prohibitions on new entry into areas of a state served by rural telephone companies ("RTCs"), such as the current prohibition placed on Hyperion barring its entry into areas served by Vermont RTCs until one year after it provides notice of its intent to do so, violate the federal Telecommunications Act of 1996."[258]

Hyperion asks that the Board remove a condition that it imposed upon Hyperion in approving its petition for a CPG in Docket 5608. In that Order, the Board required Hyperion to give one year's notice of its intent to provide competitive access services in the territories of Vermont's independent LECs.[259] Like the Department, Hyperion argues that this condition constitutes a barrier to entry under the Act.[260]

The ILECs oppose the recommendations of the DPS and Hyperion. They point out that, in an order in Docket 5909, the Board amended Hyperion's original CPG but it did not amend or remove the ILEC-entry condition that Hyperion now asks the Board to eliminate. Moreover, the ILECs assert, in Docket 5909, Hyperion did not even request that the condition be amended. Consequently, contend the ILECs, Hyperion is collaterally estopped from making that request in this docket.[261] The ILECs go on to argue that, even if Hyperion is permitted to challenge the notice condition, this docket – a generic investigation – is not the appropriate proceeding for doing so; the ILECs assert that Hyperion should seek that amendment in a separate proceeding instead.[262] Next, they argue that, again if Hyperion is permitted to challenge the condition, it has

---

257. *Id*. In a footnote to this sentence, the DPS points out that "The exemption is not absolute. An [ILEC] loses its exemption if served with a *bona fide* request and the Board then makes certain determinations." In its letter of October 1, 1997, the Department also notes the exemptions are in fact available to rural telephone companies ("RTCs") and that the question of whether one or more of Vermont's independent telephone companies qualifies for RTC exemptions under § 251(f) of the Act has not yet been decided. DPS Letter, 10/1/97, at 2, fn. 2.

258. DPS Letter, 10/1/97, at 1-2 (citing *In the Matter of Silver Star Telephone Company, Inc., Petition for Preemption and Declaratory Ruling,* CCB Pol. 97-1, Memorandum Opinion and Order, FCC 97-336 (rel. 9/24/97) ("*Silver Star*")).

On October 6, 1997, the DPS filed a letter describing a second FCC ruling which it (the DPS) asserts again "confirms that absolute prohibitions on competitive entry into areas served by incumbent rural telephone companies – regardless of duration – are inconsistent with the Act." DPS Letter, 10/6/97, at 1 (citing *In the Matter of the Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, CCB Pol. 96-13 (rel. 10/1/97).

259. Docket 5608, Order of 3/16/94, at 100, ¶ 3.b. In addition, I should note that Hyperion's CPG was also "conditioned on the results of any generic investigation to be conducted by the Board into competition and/or competitive access services." *Id*. at ¶ 3.a.

260. ATP Brief at 9.

261. ILEC Brief at 8-11.

262. *Id*. at 11-12.

failed to meet its burden of proof that the condition is prejudicial to its interests.[263] Fourth, the ILECs dispute Hyperion's assertion that the condition is "the type of barrier to competition that the Telecommunications Act of 1996 prohibits."[264] Lastly, in a letter filed on October 31, 1997, the ILECs argue that the cases cited by the DPS in its October letters do not support the conclusion that the DPS asserts, namely they constitute binding precedents upon the Board and that, even if so, the factual, legal, and procedural circumstances of those cases are differentiable from those related to the one-year notice condition.[265]

In Docket 5608, the Board granted Hyperion's request to offer certain telecommunications services in Vermont but, in doing so, imposed certain conditions upon the company. The one at issue here allowed Hyperion "to provide service in the territories served by New England Telephone & Telegraph Company" and went on to state that:

> If [Hyperion] wishes to provide service in any territory served by any other local exchange company in Vermont, it must file notice of its intent to do so at least one year before the date on which it plans to commence offering such service. Such notice shall be given to the Department of Public Service, the Board, and the relevant local exchange company . . . . [266]

The reasoning behind this condition was simply stated:

> [W]e conclude that the [ILECs] will not be unduly prejudiced by Hyperion's offering of service in their territories, provided that Hyperion first gives notice of its intent to operate in those territories. We find that a notice period of one year strikes the appropriate balance between protecting the public in those territories from the potential deleterious effects of competition, and allowing that portion that would be interested in Hyperion's services to gain access to those services. One year should be ample time to allow any local exchange carrier to adjust its rates and tariffs to provide adequate service at rates that are just and reasonable, and to develop rate design mechanisms to protect captive customers and rural service territories.[267]

In addition, the Board directed Hyperion to "participate in any investigation, to be initiated by the Board, into local competition and/or competitive access services."[268]

In Docket 5909, the Board amended Hyperion's CPG to permit to offer, among other things, basic local exchange services. Several conditions were attached to the new CPG, two of which are relevant here:

---

263. *Id*. at 12-13.
264. *Id*. at 13; Rozycki pf. at 17.
265. ILEC Letter, 10/31/97, at 1-8.
266. Docket 5608, Order of 3/16/94 at 100-101.
267. *Id*. at 97.
268. *Id*. at 101.

> 1. Hyperion shall comply with the results of any generic investigation conducted by the Board into competition and/or competitive access services, including Docket 5713 and 5903.
>
> 2. Hyperion is authorized to provide service in the territories served by New England Telephone & Telegraph Company. If it wishes to provide service in any territory service by any other local exchange company in Vermont, it must give notice of its intent to do so at least one year before the date on which it plans to commence offering such service. Such notice shall be given to the Department of Public Service, the Board, and the relevant local exchange company or companies.[269]

As the Board made clear in its decision in that docket, the one-year notice condition was maintained expressly because the concerns that had originally prompted it – *i.e.*, the potential competitive effects of CLEC entry into the territories of BAVT and the ILECs – were under review in this docket (5713) and that "full review of competitive issues at this time would largely duplicate portions of Docket 5713."[270] Moreover, Hyperion "clearly stated that it understands that the Board may impose requirements in Docket 5713 that may necessitate changes in the manner in which it offers service. Hyperion is willing to accept those risks."[271] The ILECs were parties in Docket 5909.[272]

This procedural history makes it plain that the competitive effects of CLEC entry into ILEC territories is rightly at issue in this docket and that, moreover, it is entirely possible that decisions in this docket could affect "the manner in which [Hyperion] offers service." Since the one-year notice condition relates directly to competitive effects and "the manner in which [Hyperion] offers service," I conclude that the issue can be taken up in this proceeding.[273] Because the Board expressly intended that competitive effects be addressed in this docket, I conclude that Hyperion is not collaterally estopped from raising the one-year notice issue here.

As to the substance of the matter, I do not reach the conclusion that the Department urges, namely that the one-year notice condition is a violation of the Act. Section 253 of the Act states:

> (a) IN GENERAL.–No State or local statute or regulation, or other State or local requirement, may prohibit or have effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

---

269. Docket 5909, Amended CPG, 1/14/97, at 1.

270. Docket 5909, Order of 1/14/97 at 8.

271. *Id*. at 9.

272. A subset of them were also parties in Docket 5608.

273. This does not necessarily mean that the Board can, in this docket, actually amend Hyperion's CPG. This docket was not opened pursuant to 30 V.S.A. § 231. However, given the Board's express conclusions in Dockets 5608 and 5909, and its instructions to me in this docket (see Order Opening Investigation, 2/18/94), I conclude that I am well within the scope of this docket to make findings and reach conclusions that result in recommendations to impose or remove CLEC entry conditions in the service territories of BAVT and the ILECs. Conceivably, such recommendations could lead to a request by Hyperion, or the Board on its own motion, to open a new investigation into Hyperion's CPG.

> (b) STATE REGULATORY AUTHORITY.–Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

These juxtaposed subsections speak plainly. States cannot prohibit the ability of providers from offering any services, although they (the states) are not preempted from imposing requirements that serve certain broad public policy objectives. Three questions then arise. The first is, does the notice requirement serve any of the stated objectives? The second is, is the requirement imposed in a competitively neutral fashion? And the third is, should the requirement be lifted?

As to the first, I conclude that the notice requirement was designed at least to preserve universal service, protect the public welfare, and ensure the continued quality of telecommunications services. When setting the requirement, the Board was concerned that the potentially deleterious impacts of competition – impacts that, by harming the incumbents' ability to serve early in the transition to a competitive market, could threaten achievement of those policy objectives – had not yet been fully explored. The Board concluded that the one-year notice would fairly balance the interests of consumers, competitors, and ILECs, by giving regulators and incumbents an opportunity to examine and address any potential effects. Moreover, this docket was open, and consideration of the general questions surrounding competition were squarely within its purview. Seen in this light, the requirement, which does not absolutely prohibit a carrier from offering services, is not a violation of the Act.[274]

Is the requirement competitively neutral? I conclude that the answer is yes. If the requirement were not imposed on all competitive providers, or were imposed differentially upon CLECs in a way that does not advance the stated policies, then the opposite conclusion would be likely. Right now, however, Hyperion is the only certificated provider of competitive access and local exchange services in Vermont. The requirement applies to all relevant carriers therefore.

Lastly, should the Board grant Hyperion's request and remove the notice condition from its CPG? The answer depends upon findings on the competitive effects of competitive entry into ILEC territories. Unfortunately, the record in this case is, as yet, insufficient to support any findings on the question, and therefore I cannot conclude that the public interest would be served by lifting the condition. Hyperion has not presented evidence to persuade me that consumers in the independents' service areas would not be adversely affected by competitive entry. By the

---

274. I agree with the ILECs that the factual, legal, and procedural circumstances of the cases cited by the DPS are distinguishable from those in this instance. It is not necessary to dissect them in detail here, but only to say that the one-year notice is not an absolute bar to entry.

same token, neither have the ILECs demonstrated why the requirement should be maintained. The record is simply incomplete.[275]

On December 9, 1997, the Hearing Officer in Dockets 5992 and 5993, investigations into the CPG applications of two competitive telecommunications carriers, issued procedural orders prompted by comments on his proposals for decision that had been filed by the same nine independent LECs who are parties in this docket. The ILECs urge the Hearing Officer to recommend that the Board attach the following condition to their approvals of the CPGs:

> If [Petitioner] wishes to provide local exchange service through interconnection in any territory in Vermont served by any local exchange carrier other than NYNEX, it may do so not earlier than [90] days after submitting an interconnection agreement with such carrier for approval by the Board.[276]

The Hearing Officer points out that the ILECs believe that this condition will "[mitigate] the anti-competitive effects of the condition set forth in Docket 5909 . . . which required [Hyperion] to provide notice one year prior to entry in the service territory of each independent telephone company."[277] The Hearing Officer went on to explain that:

> The Independents' and other parties' focus on notice in advance of competitive entry into the service territory of one or more of the independent telephone companies obscures the main issue: whether the Board should adopt competitively neutral conditions, consistent with Section 253(b) of the Telecommunications Act of 1996 (the "Act"), to "preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." To date, even though the Board has considered competitive entry in several proceedings, the Independents have not identified any specific conditions that the Board should adopt.[278]

In deciding to adopt the ILECs' 90-day notice condition, the Hearing Officer also concluded that "it is now appropriate to examine the real issues related to entry into the Independents' service territories, either in a later stage of this proceeding or in some other docket."[279] He instructed the ILECs to make a filing that identified "what conditions, if any, the Board should adopt to meet the goals of the Act as competitors begin offering service in the

---

275. Under the Act, rural telephone companies are afforded additional protections (§ 251(f)) against rampant competitive entry that are not available to the large incumbent LECs (primarily the Bell operating companies, or "BOCs"). The Board should consider whether these protections adequately serve the purposes for which the one-year notice is intended and, if so, whether the notice requirement can therefore be eliminated.

276. Dockets 5992 and 5993, Orders of 12/9/97 at 2 (footnote omitted). The two Orders are virtually identical; they differ only in the name of the petitioner.

277. *Id*.

278. *Id*. at 3.

279. *Id*.

Independents' service territories."[280] He also directed them to propose a "procedural mechanism by which the Board would adopt these conditions, *i.e.*, should they be conditions in the CPGs of competitive entrants or adopted in some other form."[281]

Given the lack of an adequate record in this docket on which to base findings on the effects of competitive entry into the independent's service areas, and given the actions of the Hearing Officer in Dockets 5992 and 5993, I conclude that the issue need not be further addressed in this investigation. Admittedly, this docket has been dedicated to developing general regulatory policies with respect to local exchange competition; however, it is also true that the particular issues surrounding competition in the independents' territories are separable, and can be taken up at least as efficiently in another proceeding. I encourage the Hearing Officer in those cases to thoroughly investigate these questions in the light of the Board's findings in this docket.

Lastly, on May 8, 1997, Hyperion filed a letter with the Department, Board, and all of Vermont's independent telephone companies, informing them "of Hyperion's intent to offer telecommunications services in [ILEC] territories commencing one year from this letter's date." The company went on to note that

> Hyperion questions the legality of Paragraph 2 [the notice condition] but has decided not to litigate the paragraph's legality, instead asking the Board to remove Paragraph 2 from Hyperion's certificate in its entirety (or at least with respect to hospitals and schools). If the Board does not act on Hyperion's request, Hyperion will not seek to provide telecommunications services in the independent telephone companies' territories before May 8, 1998.[282]

For reasons set out above, I am not recommending that the Board remove the one-year notice requirement from Hyperion's CPG at this time. After May 8, 1998, the issue will be moot. However, the question of whether like conditions should be imposed on other CLECs will remain;[283] I expect it to be resolved in Dockets 5992 and 5993.

5. Carrier of Last Resort Obligations

Incumbent local exchange companies currently provide ubiquitous local exchange service and effectively operate as the "carrier of last resort" ("COLR") in their service territories.[284] In many competitive markets, however, providers decide for themselves which market segments they

---

280. *Id*.

281. *Id*.

282. Hyperion Letter, 5/8/97, at 1.

283. I wonder what purpose it will serve (or whether it would even be legal), if Hyperion is allowed to enter the ILECs' territories while other CLECs would have to wait until at least a year after they received their CPGs.

284. Rozycki pf. at 20; tr. 5/12/97 at 124-25 (Meehan); Phase I Order at 12.

will serve and what kinds of products to offer.[285] That model may be appropriate in certain instances, where (at the very least) the products in question do not satisfy an essential need, but it cannot be sanctioned here. In the market for local exchange service, it is possible (indeed, likely in the near term) that some areas of the state may continue to be served by a single provider. Without a clear assignment of COLR responsibilities, that lone supplier could (conceivably) decide to abandon service, leaving the areas's customers without an alternative local exchange carrier.[286]

BAVT does not object to continuing to bear its carrier of last resort responsibilities[287] and AT&T recommends that incumbents generally continue to serve as carriers of last resort until the local exchange market becomes fully competitive.[288] The ILECs maintain that the COLR obligation cannot be assigned without better understanding of the universal service funding arrangements scheduled for Phase III.[289] The Department recommends that the Board not impose service area requirements (and, therefore, COLR duties) on CLECs, but instead that it establish (through a competitive bidding process) alternative arrangements for COLR in the event that the sole incumbent provider desires to abandon this obligation.[290] The DPS also recommends that the burden of this obligation be shared amongst all in-state providers of basic exchange service.[291]

So long as there is at least one carrier with the facilities and financial support to act as the COLR, I do not see that there is an added benefit *of requiring* other carriers to do the same. By the same token, neither is there a need to prohibit additional carriers, who are willing and able to do so, to also take on the obligation.[292] As suggested earlier, I am presuming that COLR responsibilities and universal service support are (or will be) in some way linked. Therefore, to the extent that a carrier is eligible to receive high-cost assistance, I would expect that that assistance would be accompanied by the carrier's commitment to serve all requesting consumers

285. Raymond pf. at 11.

286. *Id*. at 11-12. Consider the financial difficulties facing a provider who, through a combination of high cost supports and rates that customers are willing (or can afford) to pay, is still unable to cover its costs of service. Obviously, there is a relationship among COLR, universal service support mechanisms, and rate design that deserves closer examination in Phase III (or other Board proceeding).

287. BAVT Brief at 13.

288. Friar pf. at 4.

289. Fox pf. at 7.

290. Raymond pf. at 12-13.

291. *Id*. at 12-13.

292. In a environment with resale opportunities, the COLR obligation can be met efficiently by several providers in a single service area.

within a specified area. At this point, however, I can make no recommendations on the design and details of such a program.[293]

Today, only incumbent carriers receive high-cost assistance. Such assistance takes the form of price-averaging (across high- and low-cost areas) and reductions to overall revenue requirements made possible through the disbursement of funds under the federal high-cost programs (which are currently undergoing reform). So long as these mechanisms provide effective high-cost support, and the recipients of funds remain willing to serve as COLRs, we can continue to rely on this method of assuring universal service as competitive markets – and regulatory responses to them – develop.

I recommend that the Board adopt, in part, the recommendations of AT&T and the Department on this issue. First, as the DPS proposed, I recommend that, for now, the Board not impose service area or COLR obligations on competitive local exchange providers, so long as there is at least one provider acting as the carrier of last resort. This would be, in a sense, an "interim" decision, one awaiting final disposition through an integrated approach to meeting universal service objectives. Second, I agree with AT&T that the Board can continue to rely on the incumbent carriers to serve as carriers of last resort, at least for a transition period.[294] Incumbents are today effectively operating as COLRs and are entitled to support if they can demonstrate the need for it.[295]

I acknowledge that, at some point, the COLR obligation, along with universal service funding support mechanisms, may need to be withdrawn from current incumbent providers or shared among several providers.[296] In the event that these support mechanisms are transformed or deemed no longer sustainable, then, as the Department recommends, there needs to be provisions for the transfer (or transformation) of the COLR obligation. An incumbent carrier, for example, may petition the Board for such relief through either the sale of portions of its service territory or simply by relinquishing its COLR obligation under the existing law.[297] I recommend that the Board adopt the DPS's proposal that the incumbent carriers (1) provide Board notice 12 months in advance of such plans and (2) provide a detailed proposal for its sale or transfer of its

---

293. See Phase I Order at 65-69.

294. Friar pf. at 4.

295. Rozycki pf. at 20; tr. 5/12/97 at 124-25 (Meehan); ATP Brief at 6.

296. I agree with the Department that imposition of service area and COLR requirements may be appropriate as a condition of receiving universal service program supports. DPS Brief at 9; see Phase I Order at 52-55. As the Department notes, conditional eligibility for the universal service program is sensible and is consistent with the Act. See 47 U.S.C.A. §214(e); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, FCC 97-157 (rel. May 8, 1997) at paragraph 129 (permitting states to impose service area requirements as a condition for becoming eligible for universal service support).

297. Board review of such a sale or transfer would presumably fall under 30 VSA §§ 102(c), 109, 231(b) and 232.

COLR obligation.[298] As the ILECs suggest, procedures for dealing with such changes can be considered in Phase III.[299]

The precise nature of universal service support is integral to resolving the questions surrounding COLR obligations.[300] It may be that, once the market is sufficiently competitive, continued reliance on an incumbent carrier or other CLEC to serve as COLR will no longer be required. At such a point carriers could petition the Board for relief from their COLR obligations.[301] I conclude that any further refinement of this proposal must await the details of universal service support proposals developed in Phase III (or other appropriate Board proceeding) and, of course, as established by state legislation or FCC rules.[302]

6. Enhanced Services

The term "enhanced services" refers to data processing services that use the telephone network to convey information from remote computers to customers' own terminals. The FCC distinguishes enhanced service from "basic service," which is one of the telecommunications services of regulated common carriers.[303] Enhanced services combine basic service with "computer processing applications [that] . . . act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different

---

298. Presumably, abandonment of the responsibility without transferring it to another would occur only in instances in which the market was deemed to be fully competitive. I am not sure, however, that even in such cases we will be able to do away with the COLR altogether – it remains to be seen whether the market can provide the consumer protections that the COLR embodies.

Transfers of the obligation could take a variety of forms and could vary according to the precise nature of any state or federal high-cost assistance programs. If an incumbent carrier proposes a transfer, it should also propose arrangements (wholesale service arrangements or facilities transfers) that ensure that the transfer can be accomplished at reasonable cost.

299. Fox pf. at 7.

300. I am reluctant at this time to propose a scheme for transferring COLR responsibilities. The service territory that is to be forfeited need not include the entire territory currently served by the COLR nor all of its facilities in that territory. Similarly, a company could propose to forfeit retail COLR responsibilities but continue to provide wholesale services (and even certain retail services) without the obligation. Incumbent carriers seeking to transfer the obligation should be given the flexibility to do so in a manner that best serves the interests of consumers and carriers.

301. I should note COLR duties may oblige a carrier not to serve any and all requesting consumers, but to provide financial support to those carriers who do.

302. Action taken with respect to COLR in this docket should not prejudice the outcome of Docket 5918, the Board's investigation into "eligible telecommunications carriers" under § 214(e) of the Act (see also § 254).

303. Specifically, the FCC has defined "basic service" as the offering of "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Computer II Final Decision, 77 F.C.C.2d at 420. The FCC is currently reviewing the question of whether the term "basic service" and the Act's definition of "telecommunications service" should be interpreted to extend to the same functions. *FCC, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20* and *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 98-10,* Further Notice of Proposed Rulemaking, released 1/29/98 at ¶ 7-8.

or restructured information, or involve subscriber interaction with stored information."[304] The FCC recently concluded that all "enhanced" services are "information" services under the Telecommunications Act of 1996.[305]

The issue of the proper regulatory treatment of the provision of enhanced services by incumbent carriers was the initial impetus for this investigation. This docket was opened in 1994 in response to BAVT's proposal to offer certain Open Network Architecture ("ONA") functions and services under state tariff,[306] filed pursuant to an FCC directive.[307] Although the scope of this investigation has been greatly expanded since then, there are nonetheless several questions relating directly to enhanced services that we must now address. One, to what extent should enhanced services be regulated (that is, in addition to any regulations and accounting rules addressing competitive concerns)? Two, to the extent that enhanced services are provided by regulated companies or their affiliates, what rules are needed to protect ratepayers, including potential LEC enhanced service competitors, from competitive abuses and cross-subsidization? We also face several jurisdictional questions, in light of the Telecommunications Act of 1996 and FCC rules.

a. Regulating Enhanced Services

No party has recommended that enhanced services should be regulated as telecommunications services generally under either federal law or Vermont law.[308] Indeed,

---

304. 47 C.F.R. 64.702(a). Under the Telecommunications Act of 1996, "information services" were defined to include capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(2).

305. First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-489, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended.*, 12/24/96, at 103.

306. Order of 3/18/94; Usher pf. 4/8/97 at 10. ONA plans explain how a BOC unbundles services and makes those services available both to unaffiliated companies and to itself, for the provision of enhanced service offerings.

307. On December 19, 1992, the FCC issued its Memorandum Opinion and Order ("MO&O") in CC Docket No. 90-623 granting the petition of Bell Atlantic for relief from structural separation requirements and waiving certain state tariffing requirements. The FCC, however, required Bell Atlantic (then NET) to specify in its state tariffs which ONA services were available on individual contract bases and, when demand grew sufficiently large, to file general tariffs for those services. Docket 5713, Order of 2/18/94 at 3.

308. The FCC, however, has identified a category of services that "may fall within the literal reading of enhanced service definition" yet they conclude should be treated as a "telecommunications service" rather than as an information service under the Act. These services include speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call blocking, call return, repeat dialing, call tracking, and certain Centrex features. FCC 96-489 at ¶ 107.

federal regulators have long sought to avoid unnecessary regulation of enhanced or information services.[309]

There are, nevertheless, competitive concerns raised by the provision of enhanced services by a monopoly or dominant service provider that is subject to traditional *economic* or *cost-based* regulation (*i.e.*, cost-of-service regulation). No party has suggested that enhanced services be cost-regulated or tariffed generally; however, when provided by an incumbent LEC, enhanced services may either be cost-regulated or given "below-the-line" treatment (which is to say, have all their costs and revenues removed from the regulated cost of service). *Competitive* enhanced services are a subset of enhanced services for which there are reasonable alternatives (in terms of price and quality) to those provided by the incumbent LEC. As set out below, I recommend that competitive enhanced services be subject to the accounting safeguards for competitive services established by the FCC in Parts 32 and 64 of its rules. This recommendation should not, however, be confused with the related issue of whether enhanced services, when provided by an incumbent LEC, should be cost-regulated.[310]

I do not recommend the adoption of any rules or requirements in addition to existing procedures that are designed to address competitive concerns. I do, however, recommend that FCC accounting protections against cross-subsidization under Parts 32 and 64 apply to all enhanced services unless a separate set of accounting provisions, approved by the Board, has been established that provide reasonable assurances against competitive abuse and cross-subsidization. Section 254(k) of the Act prohibits a "telecommunications carrier" from using "services that are not competitive to subsidize services that are subject to competition."[311] As the FCC notes, the accounting safeguards in its rules are not designed to prevent cross-subsidies from occurring among regulated services.[312] I believe that consumers and the competitive process will best be protected if incumbent LECs are properly subject to those safeguards in instances where the market is competitive.

I further recommend that, when enhanced services are offered by an incumbent (or dominant) LEC, notice should be provided to the Board and Department thirty days prior to their offering. Such notice will provide the Board and the DPS with an initial opportunity to address

---

309. FCC, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket Nos. 96-262, 94-1, 91-213, and 96-263, 12/24/96 at ¶ 282.

310. As emphasized later in this discussion, I recommend that truly competitive enhanced services should *not* be cost-regulated, but only if adequate competitive safeguards have been implemented and if the relevant market is sufficiently competitive to prevent abuses by the dominant provider.

311. 47 USC § 254(k).

312. FCC 96-490.

the question of whether there are adequate safeguards to protect consumers from cross-subsidies or other potential competitive abuses.

b. Competitive Safeguards for Enhanced Services

The sole area of concern raised by the parties with respect to enhanced services is the potential for anti-competitive abuses and cross-subsidies that may arise when a regulated monopoly company participates in the competitive market.[313] These competitive concerns have been spotlighted in recent investigations relating to internet access service by an independent local exchange provider.[314] The competitive concerns arise for two reasons. First, the incumbent, by virtue of providing noncompetitive (or minimally competitive) regulated services, may cross-subsidize or in some other way support its competitive services with regulated revenues.[315] Second, by virtue of its control over bottleneck monopoly facilities, the incumbent LEC may charge itself or its affiliate rates that confer an artificial advantage to its own delivery of these services over that of its competitors who also depend upon those same facilities to provide the services.[316]

For reasons of consumer welfare, I conclude that the Board and the Department should be concerned with, and take actions against, the potential for such competitive abuses. First, such behavior may directly affect ratepayers, in the form of higher rates for monopoly services.[317] Second, some consumers are, in fact, also competitors of the incumbent LEC and may be adversely affected in the markets they serve. Finally, such abuse may potentially drive out competitors or limit product choices for final consumers in the market for enhanced services.

313. See DPS Brief at 75-76. Provision of enhanced services may raise any number of potential fraud and consumer protection issues that did not receive emphasis in this investigation. Consequently, I make no recommendations on these matters as they relate to potential regulation by the Board or other state agencies with consumer protection authority.

314. In Docket 5866, the Board responded to a petition by a competitor of Vermont Telephone Company ("VTel"), by investigating issues of service quality and potential cross-subsidization. In Docket 5904, the Board's investigation into VTel's rates, the Board has identified problems with VTel's approach to imputation of costs for services that it provides itself when offering internet services to customers.

315. Protections against cross-subsidization is a primary goal behind FCC cost-allocation and affiliate rules. FCC *In the Matter of Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, FCC 96-490, CC Docket No. 96-150, 12/23/96 at ¶ 24.

316. Indeed, this was a fundamental premise of the Board in opening this investigation. Order of 2/18/94 at 5; see also tr. 5/14/97at 51 (Rozycki).

317. This direct subsidy may also manifest itself in less obvious forms. For example, the monopoly provider may improperly share information on consumer calling patterns (information that is available to it only) with its affiliates or competitive service operations. If regulated operations are not properly compensated for such information, the monopoly ratepayers would then effectively be paying for the resources of the competitive service operations. Even with some form of compensation, however, the distribution of certain customer information may be considered inappropriate, raising concerns about consumer privacy.

The competitive protections adopted by the Board here, however, need to recognize the preexisting framework of safeguards already put in place by federal lawmakers and regulators. These preexisting safeguards provide an important context necessary to inform the Board's judgments about the need for further action. There may also be certain jurisdictional limits on independent state action.

In its brief on the issue, BAVT observes that state jurisdiction over enhanced services has been "narrowly circumscribed" by the FCC.[318] Preemption of state authority appears to center on the separate subsidiary requirements related to enhanced services provision by BOCs and independent companies.

i. Structural Safeguards

State discretion to establish separate affiliates for enhanced services provided by local exchange carriers in Vermont appears to be preempted by the Telecommunications Act of 1996, the FCC's *Computer III* decision, and follow-on proceedings. In *Computer III*, the FCC adopted a regulatory framework that permits BOCs to provide enhanced services on an integrated basis subject to certain non-structural safeguards. In so doing, the FCC preempted states' ability to impose their own structural separation requirements. This preemption extended *only* to interstate and jurisdictionally-mixed services.[319] It did not extend to BOC and Tier I company provision of intrastate enhanced services.[320] It did, however, extend to the independent companies.[321]

Under Section 272 of the Act, BOCs are *required* to establish separate subsidiaries when providing interLATA information or enhanced services.[322] The Act does not require separate subsidiaries for intraLATA information services, and the FCC declined to require BOCs to provide intraLATA information services through § 272 affiliates in its Order implementing the non-accounting safeguards of the Act.[323] Recently, the FCC indicated that, to the extent that states did not otherwise require structural separation, BOCs should continue to be able to choose

318. BAVT Brief at 34-35, citing *In the Matter of Computer III Remand Proceedings*, FCC 91-381, CC Docket No. 90-623, 12/20/91 ("*Computer III*").

319. *Computer III* at ¶ 122. See also BAVT Reply Brief at 28.

320. *Computer III* at ¶ 122-23. Nor for matter did it apply to state requirements that merely require a separate corporate entity "with separate books of account for intrastate portion of jurisdictionally mixed enhanced services . . . ." *Id.* It did, however, apply to "state requirements for separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services . . . ." *Id.* "Tier I" is an FCC designation for the nation's largest local exchange companies.

321. *Id*. at ¶ 129. The independent local exchange carriers have never been required by the FCC to structurally separate in order to provide enhanced services. FCC, *Computer III Remand Proceedings*, FCC 91-381, CC Docket No. 90-623, 11/21/91 at ¶ 121, f. 245.

322. See Act § 272(a) and FCC *Non-Accounting Safeguards Order* at ¶ 102.

323. FCC *Non-Accounting Safeguards Order* at ¶ 135.

whether to provide intraLATA services through a separate subsidiary or to follow the non-structural safeguards established under *Computer III*. Section 274 of the Act also requires separate affiliates for BOCs that offer electronic publishing services (including both intraLATA and interLATA electronic publishing). [324]

While federal law now preempts states by requiring structural separation of interLATA enhanced services provided by BOCs, no such preemption appears to extend to BOC provision of intraLATA services.[325] In *Computer III*, however, the FCC concluded that states should be preempted from requiring structural separation of the independent LECs for the same reasons that it concluded such preemption was appropriate for the BOCs.[326]

ii. Accounting and Non-Structural Safeguards

Accounting safeguards include, among others, rules for separating costs between regulated (*i.e.*, basic) services and those that are not regulated as basic services but are provided on an integrated basis by local exchange carriers. Accounting safeguards also encompass rules and procedures governing operations and transactions between affiliates. The FCC has adopted a comprehensive system of accounting safeguards (described in Parts 32 and 64 of the FCC rules).[327] The FCC has also adopted certain additional rules, including requirements for unbundling network features and service quality assurances related to the provision of enhanced services by BOCs and Tier I local exchange companies.[328]

In a recent Order, the FCC concluded that its "existing cost allocation and affiliate transactions rules, as modified . . . are appropriate" and consistent with the Act, and that it has jurisdiction over both interstate and intrastate intraLATA service and interLATA information

---

324. *FCC, Computer III Further Remand Proceedings*, Further Notice of Proposed Rulemaking, released 1/29/98 at ¶ 53.

325. Vermont is a single LATA state. Any interLATA services are in fact interstate in nature and all instate services are intraLATA.

326. FCC, *Computer III Remand Proceedings* released 1/20/91 at 122-23. See also, *FCC, Computer III Further Remand Proceedings*, Further Notice of Proposed Rulemaking, released 1/29/98 at ¶ 131. As discussed further below, the Computer III/ONA requirements do not apply to the vast majority of independent LECs.

327. These rules were recently expanded following passage of the Act to include additional safeguards related to affiliate transactions. FCC, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, FCC 96-490, CC Docket No. 96-150, 12/23/96, Appendix B.

328. Tier 1 LECs include those with operating revenues greater than the applicable interim revenue threshold. In 1995, the interim revenue threshold was $107 million. FCC *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, at ¶ 1 f. 2. BAVT indicates that one of the outcomes of the *Computer III* inquiry was the requirement that BOCs purchase their own features, functions, and other network capabilities at retail prices rather than at (discounted) wholesale prices. I agree with BAVT that the critical element of the *Computer III* decision was not the retail/wholesale distinction, but rather the requirement that "neither the BOCs nor the ESPs would derive a pricing advantage." BAVT Reply Brief at 29, fn.25.

services.[329] Nevertheless, the FCC also concluded that "if [we have] the authority to preempt pursuant to *Louisiana PSC*, we should refrain from exercising that authority and retain our policy of not preempting States from using their own accounting safeguards for intrastate purposes."[330] It appears, then, that states are not preempted from imposing accounting safeguards on an intrastate basis, or from imposing additional accounting rules that are consistent with federal requirements for interstate and jurisdictionally-mixed services.[331]

As mentioned earlier, additional non-structural safeguards covering enhanced services are included in the *Computer III* and ONA rules to replace previously-established structural separation requirements for BOCs and Tier I independents. These rules included requirements to file Comparably Efficient Interconnection ("CEI") plans, and network information disclosure rules that are now under review as the FCC is attempting to remove unnecessary requirements in light of the Act. Other *Computer III* and ONA requirements cover CPNI and reporting requirements for the quality, installation and maintenance of service provision to enhanced service providers. The Commission is also reviewing the application of § 251-type unbundling rights to information and enhanced service providers.[332]

Unbundling, resale, and imputation safeguards are already largely, but not entirely, captured by FCC rules and the requirements of the Act. The FCC's *Computer III* decision and ONA rules already require unbundling of network features and functions by the BOCs and Tier 1 independent companies who provide enhanced services. Section 251(c)(3) of the Act also requires unbundling for *any requesting telecommunications carrier*. The FCC has not applied the *Computer III*/ONA requirements to other local exchange carriers.[333] I propose here, however, that this unbundling requirement be extended to any enhanced service provider if the incumbent already relies or proposes to rely on the specified feature or function in its own retail provision of an enhanced service.[334]

Imputation is already required in FCC rules § 32.27 (47 CFR) for affiliate transactions and § 32.5280 for "nonregulated" operating revenue of the incumbent. It appears that there may exist

---

329. FCC 96-490 at ¶ 26 and ¶ 29.

330. *Id*. at ¶ 30. See also ¶ 44.

331. See, *Computer III Remand Proceedings*, FCC 91-381, CC Docket No. 90-623, 11/21/91 at ¶ 121. At that time, the FCC also preempted state Customer Proprietary Network Information or "CPNI" rules which required prior authorization that had not been not required by the FCC rules. The FCC also preempted state network disclosure rules that require initial disclosure at a different time than required by the federal rules. *Id*. See also, *FCC, Computer III Further Remand Proceedings,* Further Notice of Proposed Rulemaking, released 1/29/98 at ¶ 53.

332. FCC, *Computer III Further Remand Proceedings*, Further Notice of Proposed Rulemaking 1/30/98 at ¶ 8.

333. FCC, *Computer III Further Remand Proceedings*, Further Notice of Proposed Rulemaking, 1/30/98, at fn. 5.

334. I do not propose here, however, that the service need be offered at a cost-based wholesale rate. I propose allowing carriers to offer the service at retail, so long as they purchase the service for their own provisioning of the enhanced service at the same rate.

certain enhanced services that have been deregulated by the state but do not meet the FCC's definition for "nonregulated" services under 47 CFR § 32.23. As such they would not be covered by the imputation standard of the FCC rules.

The resale requirements of § 251(c)(4) of the Act already extend to all local exchange carriers. I believe that, as a practical matter, the resale obligation would only be appropriately extended to competing enhanced service providers if they are also certified telecommunications service providers in Vermont. I conclude that there is no need to extend this requirement further.

c. Discussion

In general, I recommend that the Board augment existing state and federal accounting safeguards to cover enhanced services and markets when such services are provided by the incumbent local exchange carriers. I further recommend that the Board establish a process that will help ensure that appropriate safeguards (be they state-imposed or federally-imposed) be put in place to protect consumers (including enhanced service competitors) from competitive abuses by regulated, dominant telecommunications carriers.

I conclude that the accounting safeguards of FCC rules Parts 32 and 64, in conjunction with the requirements of the FCC's ONA rules and the Act (requiring structural separation) address most major competitive concerns related to the provision of enhanced services by regulated carriers.[335] I conclude, however, that there are also gaps in these requirements and that Vermont should supplement federal requirements where appropriate, to the extent that it has jurisdiction to do so.[336]

As stated earlier, concerns with potential competitive abuses go beyond mere accounting sleight of hand and include service quality issues. (See Section IV.B.5., above.) In general, I conclude that no single requirement or set of requirements can be applied efficiently across all

---

335. For example, § 32.23 of the FCC rules covers accounting treatment for "nonregulated activities" (*i.e.*, activities "preemptively deregulated" or activities "never subject to regulation"). Section 32.5280 covers "nonregulated operating revenue" and requires that nonregulated accounts be "debited and regulated revenue accounts shall be credited at tariffed rates when tariffed services are provided to nonregulated activities . . . ." Section 64.901 requires carriers to charge tariffed rates for regulated services purchased by their nonregulated operations.

336. Even within the guidelines established under Parts 32 and 64, there is still considerable potential for competitive abuse by LECs. While the FCC rules impose appropriate imputation standards over preemptively deregulated activities under § 32.5280, § 32.23 excludes activities that either have "been deregulated by the state" or "have been deregulated at the interstate level but not preemptively." CFR 47, Section 32.23(a). The application of these rules to "average cost" companies is also in question. See *Computer III Remand Proceedings*, 12/20/91 at ¶ 121 f. 245. Other problems may arise from the manner in which a provider goes about accounting or imputing such costs in actual practice. See, for example, Docket 5904, *Investigation into the Existing Rates of Vermont Telephone Company, Inc.*, Order of 11/10/97. Auditing requirements may also be necessary. Under the Act, the BOCs are already required to file biennial independent audits. § 272(d). No such audit requirements apply to the independent companies under the Act. See also , Docket 5904, Order of 11/10/97 at 153-154.

providers and services.[337] As discussed in further detail below, I therefore recommend that introduction of enhanced services be accompanied by notice to the Board. This notice would include the company's proposal for ensuring that adequate competitive safeguards are in place at the outset to protect consumers from cross-subsidies or other competitive abuses.

In instances where these protections are not adequate or that a provider has demonstrated an inability to adhere to any meaningful guidelines, I recommend that the Board consider imposing additional safeguards (either on its own motion or in response to a petition).[338] I recommend that, where LECs provide enhanced services, they also be required to make available to competitive providers, on nondiscriminatory terms and conditions, the basic telecommunications services and facilities necessary to the provision of enhanced services.[339] That is, any telecommunications services employed to provide an enhanced service should be tariffed (or included in an SGAT) and made available to competitors at comparable levels of service and service quality. This would include appropriate imputation of tariffed rates, to the extent not already required under CFR 47 Part 32.

I recommend that incumbent carriers be required to adhere to the FCC's accounting standards of Parts 32 and 64 for state jurisdictional and jurisdictionally-mixed enhanced services, for purposes of separating regulated telecommunications services from enhanced services when setting rates in Vermont,[340] unless the Board expressly adopts alternative safeguards. As noted earlier, I recommend that all enhanced services be deemed to be "competitive services," thereby triggering application of the FCC's competitive accounting protections.

---

337. Included among the factors relevant to efficiency are the following: (1) the nature of federal preemption of state authority; (2) the variable level and adequacy of pre-existing state and federal protections; (3) historic patterns of competitive abuse or adherence to prescribed accounting practices; (4) the varying sizes, and potential administrative burdens on, individual companies; (5) the differential nature of potential risk to LEC customers; (6) the varying potential for market distortion in the relevant competitive enhanced service markets; and (7) the extent to which competitors are dependent on the bottleneck facilities of the incumbent.

338. As the Board did in Docket 5904 related to VTel's provision of internet access services. Docket 5904, Order of 11/10/97.

339. In Phase I of this docket, the Board found that the availability of a network feature or function in another jurisdiction in which BAVT (or an ILEC) operates establishes a rebuttable presumption of demand sufficient to trigger a service requirement in Vermont. Phase I Order 5/29/96 at 23. With respect to vertical switch services, I recommend that BAVT be required to demonstrate within sixty (60) days of an Order in this phase of the investigation that it has complied with this directive; the Board may grant a waiver of this recommendation upon a demonstration of good cause. I also recommend that, like BAVT, ILECs offering information or enhanced services should be required to make available, at tariffed rates, basic telecommunications services and network capabilities that are used to provide the enhanced services. Such a tariffed rate should be used for purposes of imputation if the service is not already purchased at such rates from a separate subsidiary. Telecommunications features and functions of the provider, including switching functions and network intelligence, should be made available by LECs on request of competitive enhanced service providers if technically feasible to provide. Raymond pf. at 17.

340. To the extent that such services safeguards are not already required under 47 CFR Part 32 § 32.23. The Telecommunications Act already effectively requires such safeguards. Section 254(k) of the Act prevents a telecommunications carrier from using non-competitive services to subsidize services that are subject to competition.

I also recommend that, on a case-specific basis, the Board augment federal requirements imposed by the Act and the FCC's accounting rules (Parts 32 and 64) as necessary and, of course, to the degree that its jurisdiction allows. This would involve, where appropriate, the implementation of auditing requirements, codes of conduct, structural separations requirements, and affiliate transaction rules.

As noted earlier, I recommend that truly competitive enhanced services *not* be cost-regulated; however, this recommendation is strongly conditioned on both the adequacy of the competitive safeguards put in place (and of the assurances of the incumbents) and the strength of competition present in the market.

Lastly, I recommend that incumbent LECs be directed to notify the Board of any plans to provide new enhanced or information services so that the Board has an opportunity to ensure that adequate assurances are in place to protect consumers against anti-competitive practices by the regulated carrier. The following items should be included in such notification:

- Company plans (including timetable) for introduction of the service(s);
- Identification of existing Board policies and/or federal rules or safeguards that apply to the provision of the service(s);
- A listing of the regulated telecommunications services or the basic telecommunications facilities used to provide the service that are not already tariffed or available under an SGAT;
- Identification of any non-network-dependent competitive alternatives or other alternatives to the incumbent's network for delivery of services to end users;
- A description of any company resources or services that are or will be exchanged or shared with the regulated side of the business (indicating whether there are competitive alternatives to those resources) and the accounting rules that will apply;
- Identification of all relevant competitive safeguards employed by the company to prevent cross-subsidies or other potential competitive abuses (*e.g.,* discriminatory provision of information, marketing services, R&D, personnel training, access to capital, and service quality).

I also recommend that the Board require the incumbent LECs in Vermont to provide this information with respect to all enhanced or information services that they currently provide.

As for vertical switching functions (*i.e.*, those necessary to the provision of various enhanced services), I recommend that the Board require incumbent LECs to comply with the Phase I requirement to unbundle (*i.e.*, offer on a non-discriminatory basis) those features on a presumptive basis wherever those features are offered by the incumbent in another jurisdiction.[341] Companies that rely on those same switching features or functions in the delivery of enhanced

341. As BAVT points out, the Phase I Order establishes a "rebuttable" presumption of demand in such instances. That "rebuttable presumption" is equivalent to the request for a waiver. BAVT Reply Brief at 28-29; see Phase I Order at 23, fn. 82.

services should make those features available explicitly by tariff or under an SGAT.[342] Notice of the *availability* of other features and functions should be made through an SGAT and offered on an individual contract basis unless and until the company relies on that feature itself to provide enhanced services (in which case, pricing terms should be stated clearly and available to all).

D. Other Requirements

1. Continuous Emergency Access

In Dockets 5700/5702, the Board concluded that continuous emergency access ("CEA") "ensures that all subscribers, disconnected for any reason whatsoever, and all service locations, whether occupied or not, will always have access to 911 or other emergency service providers."[343] CEA is presently provisioned as a class of service known as "left-in dial tone" ("LIDT").[344] CEA allows an otherwise "disconnected" telephone service to connect a voice terminal to emergency response capabilities available to a community, including E-911.[345]

In Phase I, the Board concluded that CEA should be "a component of the service obligation of CLECs, though it need not be treated as an element of basic service."[346] The record in this phase suggests that the assumptions that underlay the Board's initial analysis of CEA need to be revisited – in particular, the precise nature of the CEA service obligation as it extends to ILECs and CLECs, and the associated problems of administrating the CEA obligation.

---

342. Bell Atlantic notes that those network elements are already available to *telecommunications carriers*, through its SGAT. BAVT Reply Brief at 27-28.

343. Docket 5700/5702, Order of 10/5/94 at 155-156.

344. For purposes of the discussion, I distinguish CEA from "warm" dial tone or left-in dial ("LIDT) tone. CEA refers specifically to the emergency access provisions associated with maintaining the limited dial tone connection referred to here as left-in dial tone. LIDT refers more broadly to the use of dedicated link facilities and the dial-tone provided by a LEC's switch to enable some limited outgoing or incoming access to non-paying customer accounts, whether disconnected by the company for non-payment by a customer or disconnected at the request of a customer.

345. As currently provided by BAVT, CEA also gives consumers access to the business office of the local service provider maintaining the link. Under current arrangements, these are the only kinds of non-emergency calls that can be initiated. Shapiro pf. at 2.

346. Phase I Order at 64.

a. Current CEA Provision by Incumbent Carriers

In today's network environment, CEA is implemented by changing the class of service programming of a particular line in the local exchange switch.[347] CEA also requires dedicated facilities,[348] which, when put to use, enable the LEC to avoid certain costs of disconnection and reconnection (*e.g.*, labor on or near customer premises).[349] The result may yield a net savings to providers.[350] Currently, VTel, Topsham, Shoreham and Northland do not prode CEA. BAVT does so for approximately 70 percent of its access lines.[351]

If the local service provider has SS7 call set-up capability to actuate the SS7 features in the network, then the line identification record associated with the location of that phone will reach the E-911 public service access point ("PSAP") before the voice component of the call.[352] This record is captured and displayed on the PSAP operator's screen even before the PSAP operator hears the caller's voice.[353] In those cases where SS7 call set-up capability is not available, both the line identification record and voice signal arrive simultaneously. The information available to the PSAP operator will denote, among other things, the caller's class of service (such as LIDT).[354]

b. Recommendations of the Parties

The Department proposes a comprehensive policy on CEA. In general terms, the Department recommends that all carriers be required to provide CEA for all customers (lines) for an indefinite period of time. The DPS also argues that, to maintain public safety, the emergency access capabilities (including callback from the PSAP operator) should function just as they would for any other customer.[355] The Department also recommends that the Board establish a competitively-neutral mechanism (using a voice response unit or "VRU") for allowing customers to access the business offices of all competitive providers.

---

347. Shapiro pf. at 3. No technician needs be deployed to effect the change in class of service. The line identification number or physical address of the wireline facility is left in place. *Id*. The physical line connections from the vertical main distribution frame to the "cross-connect" to the horizontal main distribution frame to the line equipment remain in place. *Id*. at 3.

348. Usher pf. at 7.

349. Shapiro reb. pf. at 2.

350. Bell Atlantic, however, states that it has never performed a cost study that would verify or refute this claim. Bell Atlantic Brief at 32.

351. *Id*.

352. Shapiro pf. at 3. "SS7" stands for "Signalling System 7," a set of network functions that direct and manage calls, and also identify, quantify, and record particular data about calls.

353. *Id*.

354. *Id*.

355. *Id*. at 4.

There are a number of technical details to the Department's proposal. The PSAP callback capability requires that each CEA line be assigned a "pseudo" directory number to replace the original (now disconnected) directory number.[356] The Department maintains, that since the pseudo-number remains unknown and unavailable to anyone but the PSAP operator, the CEA line would remain unreachable by anyone but the PSAP.[357] Proper training of PSAP operators can ensure that the pseudo-number is not revealed during the callback. In addition, the number could be "flagged," reminding the PSAP operator not to repeat the number to the caller, when confirming the original emergency.[358] The Department also asserts that CEA, because it obviates the need to send a technician to a customer's premises to disconnect the line, creates cost savings for the provider.[359]

The Department recommends that the CEA be available for as long as a line is disconnected – that is, indefinitely – but also that LECs may petition the Board for exemption from this requirement if they demonstrate that the dedicated facilities are more urgently needed elsewhere.[360] The Department does not, nor does any other party, argue that carriers should provide an actual telephone on the premises.[361]

The Department further maintains that the CEA requirement must remain competitively neutral. The DPS recommends that the Board require that all participating providers share the costs of deploying a voice response unit ("VRU") that would enable a caller to reach the business office of any CLEC offering service in that area.[362] Outgoing calls from a LIDT to the business office would be routed to a VRU programmed with appropriate information and capable of forwarding the call to the service provider of choice. This could be accomplished through an audio listing of each of the competitive carriers.[363] The Department maintains that the "minimal costs involved with maintaining such a unit can be apportioned to all LECs on a revenue or per-access line basis.[364]

---

356. *Id*. at 5.

357. *Id*.

358. *Id*. at 5-6. The number could even be masked from the PSAP operator, as passwords are when typed on a screen.

359. This question of fact was the subject of some debate. Usher pf. at 7; Shapiro pf. at 2. AT&T maintains that BAVT is already being compensated (through rates for local service) for providing CEA, implying therefore that any savings it may generate are already reflected in the Company's cost of service. Tr. 5/13/97 at 232-33 (Friar).

360. Id. at 7.

361. Shapiro reb. pf. at 2.

362. *Id*. at 10.

363. *Id*.

364. *Id*. at 11.

The Department also notes that public education about CEA will be necessary.[365] In particular, the Department recommends that the Board require all phone books include a page in the general information section explaining CEA.[366] Lastly, the DPS argues that providers should be required to promote the service through bill inserts at least once a year.[367]

Bell Atlantic questions the potential savings of LIDT and CEA in a multiple provider environment.[368] The Company argues that the savings may not flow to the carrier providing the CEA service. It acknowledges the fundamental public benefits of CEA, but argues that a competitively-neutral compensation mechanism to reimburse incumbent carriers for the disproportionate burden they may face in providing the service should be developed.[369] BAVT also contends that "uniform rules apply to all providers."[370] Lastly, BAVT argues that CEA should not be available indefinitely at a premises, but rather a specified term should be set by the Board.[371]

AT&T notes that the imposition of a CEA requirement in a multi-provider environment poses difficulties and suggests that, once the broader policy guidelines have been established, additional investigation into the details may be needed.[372] AT&T recommends that CEA be provided and administered by the last facilities-based carrier to serve each affected premises.[373]

The ATP support goals of CEA, but question its value if no telephone is actually available to make use of the service.[374] The ATP therefore recommend that the Board investigate and quantify the investment required to dedicate lines to CEA, and then decide if the benefits exceed the initial investment and ongoing costs.[375]

The ILECs argue that the issue – in particular, the question of whether to impose the CEA requirement on competitive carriers – should be addressed in Docket 5903.[376]

---

365. *Id*. at 13.
366. *Id*.
367. *Id*.
368. Usher pf. at 7; BAVT Brief at 31.
369. BAVT Brief at 31-33.
370. Tr. 5/12/97 at 83 (Usher); BAVT Brief at 33.
371. Tr. 5/12/97 at 7, 83 (Usher).
372. Tr. 5/13/97 at 162 (Friar).
373. Friar pf. at 4.
374. Rozycki pf. at 13.
375. ATP Brief at 19.
376. ILEC Brief at 3; Fox pf. at 17.

c. Discussion

In Docket 5700, the Board ordered Bell Atlantic to provide continuous emergency access to disconnected lines in its service territory.[377] In Phase I of this docket, the Board extended the requirement to independent and competitive local exchange carriers.[378] In this module of the investigation, the parties have examined a number of administrative and technical issues associated with CEA, and have tried to more precisely define the nature of the requirement.

There is no question that CEA serves legitimate public health and safety objectives. It does, however, create some thorny problems when implemented in a multi-provider, competitive environment. In general, I recommend that the practical administrative details of the CEA obligation be hammered out through Board-sponsored workshops as part of Phase III or in a separate docket altogether. Nevertheless, I conclude that many features of the CEA requirement can and should be established at this time, at least on a preliminary basis.

First, I believe that CEA should be an obligation of all *retail* service providers, whether incumbent LECs, resellers, or facilities-based competitive LECs. Furthermore, *incumbent* carriers should be required to offer any additional unbundled network element at wholesale that competitors need to meet the requirement at retail. I further recommend that CEA be offered as a bundled feature of a resold basic service in those areas where the incumbent is able to do so (that is, has in place the necessary facilities to permit it). Within ninety (90) days of a final order in this module, BAVT should file a proposed modification to its tariffs, making CEA available, and should file supporting cost data, as necessary.[379] It is not clear at this point that such a modification will have any effect upon the price of resold basic service.

Second, I conclude that the requirement should, at a minimum, extend to all *first* lines into the homes of residential customers. If, for this purpose, it is not possible to distinguish a first line from additional lines, then the CEA requirement should extend to all lines into each residence.

Third, I conclude that there are difficulties associated with making the CEA requirement generally applicable to business lines. Business use of telephones varies greatly, from small businesses with a single line to large businesses and universities with their own switches. At this time, lacking a fuller record on the issue, I conclude that the Board should not require that either CLECs or the incumbent carriers provide CEA to business lines without first addressing the many complex questions that doing so raises. For now, I recommend only that carriers be encouraged

377. Dockets 5700/5702, Order of 10/5/97 at 155-156.

378. Phase I Order at 61-65.

379. As noted earlier, the costs of CEA were an item of dispute among the parties. At this stage, I conclude that a final resolution of the costs is not necessary and can await a factual determination after the estimated costs of provisioning the service has been filed by BAVT. For the reasons stated by the Department, however, I conclude that the costs are likely small in relation to the public benefit and, in fact, may actually create net savings.

to provide business lines with left-in dial-tone signal and access to an emergency service provider.[380] The issue should be taken up in the workshops recommended above.

Fourth, I conclude that CEA itself should be distinguished from access to other kinds of services. In the current environment, the incumbent carriers provide access not only to an operator or an emergency service provider, but also to its business office.[381] I recommend that CEA entail access only to emergency services; however, I also recommend that carriers be permitted to provide non-paying customers access to other services and facilities so long as customers do not object. I recommend that the Board neither require nor restrict access to other services (including the business office of the last retail service provider) for non-paying customers. To the extent that an incumbent provider chooses to provide access to its business office, I recommend that they also be required to notify consumers that alternative providers are available, along with information about how to identify them and acquire their phone numbers. At this point, the evidence does not persuade me that the Department's VRU proposal should be adopted.[382] In general, I am concerned that the VRU proposal would be cumbersome and impractical in an environment in which there are potentially dozens of competive providers. Consider the problems associated with administering the process in a competitively neutral manner. In what order should listings be recited? How would the order be determined? By auction? Randomly? As discussed earlier, I believe that the focus of the CEA requirement should be on its emergency response capabilities; access to other services may very well yield benefits, but it is not clear to me today that they will exceed their associated costs. In any event, I believe that the standardized customer notice of the availability of other carriers will relieve most of the competitive concerns raised by allowing the CEA carrier to provide free access to its business offices or other services.

Fifth, little testimony was given on the term of the CEA requirement. The Department argues that CEA be provided so long as the line is disconnected (with certain exceptions), while BAVT argues that there should be a defined time limit. On the basis of this record, I can reach no final recommendation; the question should be revisited in the workshops. For the time being, the Board should establish a minimum CEA period of four months, beginning at the moment when service has been disconnected.

---

380. I would imagine that, given the asserted cost savings of CEA, most carriers will prefer to provide it to business lines, rather than dispatch technicians to sites.

381. Shapiro pf. at 2.

382. The expected benefits and costs of the proposal have not been demonstrated. Nor have the technical implementation details be sufficiently worked out.

Sixth, I agree with the Department that PSAP call-back capability is essential to the service and I recommend that the Board direct carriers to make it available. The Department identified potential problems associated with the capability (customer privacy and PSAP operator training concerns), and it also proposed solutions that appear sensible and easily implemented. I encourage LECs to work with the Department and the E-911 Board to develop workable solutions.

Seventh, I recommend that customers be notified of the availability of CEA. At this point, I recommend only that carriers provide customers with a *clear* audio notice on the line that carries the LIDT signal. I encourage the Department and the carriers to work with the Enhanced-911 Board to develop additional customer notices that can best suit the public need. While I agree with the Department that customer notice of the CEA capability is critical to ensuring meaningful customer access, I am concerned that unfocused advertising by carriers and others may create consumer expectations that CEA will be available even in instances where it is not required. This, in turn, poses its own risks to the public. I encourage the DPS, the E-911 Board, and carriers to jointly develop a program for customer notification that properly balances these competing concerns. It seems to me that bill inserts and the informational pages of phone directories will be the surest vehicles for customer notice, but I expect that there are others as well.

Eighth, BAVT has recommended that a compensation mechanism be established that fairly assigns the costs of CEA to all relevant carriers. As noted earlier, I recommend that the obligation for CEA fall on the retail service provider and that incumbents providing the capability at the wholesale level should be compensated directly by the retail carrier. Consequently, I conclude that no additional compensation scheme should be needed.

Finally, in today's environment, CEA should consist of the left-in dial tone connection (involving the use of dedicated links connected to the customer terminal and dial tone provided by the switch) and access to an emergency service operator. Once statewide E-911 is available, CEA should include access to the E-911 system. The requirement should not include the provision of an actual phone or other customer premises equipment. In the multi-provider future, however, it may be necessary to redefine the service and carriers' obligations to provide it. That future will likely be marked by a proliferation of technologies, among them wireless, and it is certainly possible that that hodgepodge will present unexpected problems in the delivery and maintenance of CEA. Some consideration of this question in the proposed workshops may be warranted.

V. Conclusion and Issues for Phase III

I recommend that the Board adopt the conclusions and regulatory policies described herein. Also, I recommend that the Board direct Bell Atlantic and other parties (as appropriate) to take the following actions (summarizing directives set out in the previous sections):

- Bell Atlantic should file for approval with the Board (with copies to the parties), within sixty days of this order, a schedule of terms, conditions, and prices for space to be made available to CLECs (including BAVT itself) in the informational pages of its Vermont directories.
- The Department and interested parties should initiate a collaborative, informal process to develop a set of intercarrier service quality standards, assurance mechanisms, and appropriate remedies for failure to meet them. This process should be overseen in the current investigation into service quality (Docket 5903), and the Hearing Officer in that Docket should be directed to hold a prehearing conference within 30 days of an Order in this Docket. The parties should be prepared to propose a schedule and determine whether, as the Department recommends, workshops present the best avenue for facilitating resolution of intercarrier service quality issues.
- Bell Atlantic and the independent local exchange companies will make continuous emergency access available in accordance with the requirements set out in Section IV.D.1., above. The Department, the E-911 Board, and the LECs should collaborate in the development of the necessary audio notices that CEA should carry. The Department should file proposed notices within ninety days of this Order.

Activities in this docket have already moved on to Module Two of this phase: cost and pricing issues. Immediately upon its completion, Phase III will begin. There (or, possibly, in another Board docket) we will take up the regulatory and policy questions that remain, primary among them universal service (funding and allocation), regulatory requirements for incumbents in an environment of full local exchange competition, and the criteria by which a determination of full competition can be made.[383] My hope is to complete this work before the end of 1998, so that its conclusions and recommendations can be considered by the Vermont legislature, to the extent relevant to any actions it may take.

DATED at Montpelier, Vermont, this __________ day of ___________________, 1998.

____
Frederick W. Weston, III
Hearing Officer

383. See Order of 3/1/95 at 6; Hearing Officer Memorandum, 12/22/94, at 5 and Att. at 16-17.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The conclusions and recommendations of the Hearing Officer are adopted.

2. Bell Atlantic shall file for approval with the Board (with copies to the parties), within sixty (60) days of this Order, a schedule of terms, conditions, and prices for space to be made available to CLECs (including BAVT itself) in the informational pages of its Vermont directories.

3. Issues of intercarrier service quality shall be addressed in Docket 5903. The Hearing Officer in that Docket shall conduct a prehearing conference within thirty (30) days of an Order in this Docket, to determine a procedural schedule for resolving these issues.

4. Bell Atlantic and the independent local exchange companies will make continuous emergency access available in accordance with the requirements set out in Section IV.D.1., above. Within ninety (90) days of this Order, the Department shall file a proposal for audio notices that CEA should carry.

DATED at Montpelier, Vermont, this _______ day of _______________________, 1998.

______________________________)	)	
	)	PUBLIC SERVICE
	)	
______________________________)	)	BOARD
	)	
	)	OF VERMONT
______________________________)	)	

OFFICE OF THE CLERK

FILED:

ATTEST: ________________________
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.