

**BEFORE THE STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

I/M/O THE BOARD INVESTIGATION)	BPU Docket No.
REGARDING THE RECLASSIFICATION)	TX06120841
OF COMPETITIVE LOCAL EXCHANGE)	
CARRIER SERVICES AS COMPETITIVE)	

**INITIAL BRIEF OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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PRELIMINARY STATEMENT

This investigation was initiated by the New Jersey Board of Public Utilities (“Board”) on its own motion to determine whether Competitive Local Exchange Carrier (“CLEC”) services as a group satisfy the statutory criteria for classification as competitive services. After this investigation, the record shows there is no basis on which the Board could declare any CLEC service competitive. Moreover, the New Jersey Division of Rate Counsel (“Rate Counsel”) asserts through the Initial, Reply, and Rebuttal expert Testimony of Susan M. Baldwin that Verizon NJ’s two or more business lines previously declared by the Board as competitive should now be reclassified back to non-competitive status.

While there are over 130 CLECs authorized by the Board to provide local exchange telecommunications service in New Jersey, only AT&T and Time Warner have joined in the matter as active parties. Verizon NJ appeared as an active party but its interest to piggyback on the CLEC investigation and have its own services declared competitive was rejected by the Board. In fact, as Rate Counsel ably demonstrated, that Verizon NJ possesses and indeed exercises the ability to exercise market power, that its regulated rates are below costs, that Verizon NJ does not constrain CLECs’ rates and CLECs rates do not constrain Verizon NJ’s rates and other market failures preclude a finding that the local exchange market in New Jersey is competitive.

AT&T and Verizon NJ have intentionally misdefined the relevant product and geographic markets which undermine their entire analysis of the competitive marketplace. Furthermore, Rate Counsel’s anecdotal evidence demonstrates that Verizon NJ’s and CLECs are raising rates not lowering rates and this is evidence of a failed

market. In addition, Rate Counsel was improperly precluded from pursuing its theories in this proceeding by the denial of its various motions to compel.

This proceeding is simply a veiled attempt by AT&T to remove regulatory oversight so that AT&T can achieve its corporate directive to harvest its customers and obtain as much revenue from hostage customers for as long as they remain with AT&T. To grant AT&T and/or any CLEC the freedom from regulation on the basis of this record would expose New Jersey consumers to unbridled rate increases without recourse to the Board for relief in the face of serious market failures.

Rate Counsel also demonstrated the ability of CLECs to increase rates and that neither CLEC rates discipline Verizon NJ's rates nor vice-versa. The numerous market failures identified by Rate Counsel in testimony and made evident through cross-examination support Rate Counsel's position that rate regulation of CLEC services should remain in effect at this time. Accordingly, AT&T has not sustained its burden of proof to show that its services should be classified as competitive and has similarly failed as the advocate for CLECs to show that CLECs services should be declared competitive.

PROCEDURAL HISTORY

On December 22, 2006, the New Jersey Board of Public Utilities (“Board”), on its own motion, opened a proceeding by issuing an order in Docket No. TX06120841. The order set forth a procedural schedule based upon the Board’s expectation of the process.¹ The Procedural Schedule Order notes the Board’s observation through “...hearings on the readoption of its telecommunications regulations, and oversight of the industry as a whole as justification to conduct a full investigation and hearing into the question of whether CLEC provided telecommunications services (sic) should be declared a competitive service as allowed for in *N.J.S.A. 2:21-19* (sic).” Pursuant to the Order, requests for intervention were due by December 29, 2006. On December 27, 2006, United Telephone Company of NJ d/b/a Embarq (“Embarq”) filed for intervention. On December 28, 2006, Warwick Valley Telephone Company (“WVT”), NJ DataNet Telecom LLC (“DataNet”), Sprint, and Time Warner Telecom of NJ, LP (“Time Warner”), and BCN Telecom Inc filed for intervenor status. AT&T filed for intervenor status on December 29, 2006 as did Qwest and Verizon NJ. Cablevision Lightpath, the New Jersey Cable Telecommunications Association, Monmouth Telephone & Telegraph, Broadview Networks, ATX Licensing and BridgeCom International also filed on December 29, 2006 yet their applications were not noticed to Rate Counsel until January 19, 2007. Thereafter, all interested parties that filed for intervenor status, except for Verizon NJ, AT&T, Time Warner and the NJCTA, requested participant status, thereby

¹/ *I/M/O The Board Investigation Regarding the Reclassification of Competitive Local Exchange Carrier (CLEC) Services as Competitive*, BPU Docket No. TX06120841, Order dated December 22, 2006. (“Procedural Schedule Order” or “Order”). The Order designated Commissioner Frederick F. Butler and Commissioner Christine V. Bator as presiding officers with Commissioner Butler the chief presiding officer authorized to modify the schedule as necessary.

relieved of the obligation to submit testimony, engage in discovery, or otherwise have an active role in the proceeding.

Rate Counsel sought to obtain clarification on the scope of the proceeding, including who has the burden of proof, whether there was a confidentiality agreement for the parties, the scope of discovery, and whether written or live surrebuttal would be permitted. Rat Counsel's letter request on these questions was never responded to. In fact, the only scoping direction was issued as part of the February 27, 2007 Discovery Order noted *infra*.

Rate counsel served its initial set of generic data requests, RC-1 through 49 on January 9, 2007. Pursuant to the Order, initial testimony was filed on January 9, 2007 and discovery on the initial testimony was due January 16, 2007. Rate Counsel filed Initial Testimony on January 9, 2007. Rate Counsel served discovery on the initial testimony on January 16, 2007. On January 22, 2007 AT&T served its responses to the generic set and on January 23, 2007 served its responses to the initial testimony discovery. Time Warner served responses to both sets on January 23, 2007. Verizon NJ served responses to both sets on January 24, 2007. Rate Counsel also served the generic set on Cablevision and the NJCTA on January 19, 2007 the same date Rate Counsel was advised by Board Staff that these were additional parties. Upon review of the responses from AT&T and Verizon NJ, Rate Counsel pursued its right to compel responses that would support its theory of the case and/or undermine the theories espoused by the intervenors. On January 31, 2007, Rate counsel filed a Motion to Compel Discovery from Verizon NJ, Cablevision and NJCTA. On February 2, 2007, Rate Counsel filed a Motion to Compel Discovery from AT&T. On February 27, 2007, Commissioner Butler issued an Order on Motions to

Compel relative to both motions. That discovery order granted nominal relief but the bulk of the data sought was denied. Additionally, the discovery order stated that issues related to costs of service, profits, or quality of service was outside of the scope of review. To the extent that neither Cablevision nor NJCTA filed initial testimony, no discovery was compelled as to the generic set of data requests. The order also found that Board Staff would not be compelled to respond to discovery in the matter given its “unique” role.²

On February 2, 2007 Rate Counsel filed a Notice of Appeal as to the Procedural Schedule Order.³ The Appeal is pending.⁴

Pursuant to the Order, Reply Testimony was filed on January 30, 2007. Rate Counsel, Verizon NJ, AT&T, Time Warner and NJCTA filed Reply Testimony. Rate Counsel served discovery relating to the Reply Testimony of these parties on February 6, 2007 as permitted by the Order. Rate Counsel received responses on February 13, 2007 from AT&T and NJCTA, and from Verizon NJ on February 14, 2007.

Rebuttal Testimony was filed by AT&T, Verizon NJ and Rate Counsel on February 20, 2007. Discovery on the Rebuttal Testimony was served by Rate Counsel on February 27, 2007 as provided for in the Order. On March 2, 2007 Verizon NJ served its responses to Rate Counsel’s discovery on the Rebuttal Testimony. Pursuant to the

^{2/} *I/M/O The Board Investigation Regarding the Reclassification of Competitive Local Exchange Carrier (CLEC) Services as Competitive*, BPU Docket No. TX06120841, Order dated February 27, 2007 (“Discovery Order #1).

^{3/} *The New Jersey Public Advocate, Division of Rate Counsel, Appellants v. The New Jersey Board of Public Utilities, Respondents*, Appellate Docket. No. A-2924-06T1. In this appeal Rate Counsel seeks to have the Board’s Order reversed on grounds that the Board exceeded its statutory authority to consider whether the entirety of CLEC services meet the statutory criteria for reclassification from non-competitive to competitive status.

^{4/} Nothing herein changes Rate counsel’s position that the Board lacks the authority to reclassify services offered by CLECs as a class or affecting Rate Counsel’s challenges to the appropriateness of this proceeding.

February 22, 2007 discovery Order, Rate Counsel renewed its request for responses from NJCTA on the generic set of data requests, to which NJCTA refused to respond other than to state that it did not possess CLEC data since it is not a CLEC. AT&T provided responses to Rate counsel's Rebuttal discovery on March 6, 2007 with the Rate Counsel's consent. On March 12, 2007, Rate Counsel file a Motion to Compel Discovery from Verizon N J and NJCTA based on Verizon NJ's responses to the Reply and Rebuttal discovery, as well as NJCTA's responses to the re-served generic questions. AT&T's Rebuttal Testimony included a proposal which was not related to any party's Reply Testimony. Therefore, Rate Counsel filed a Motion to Strike that portion of AT&T's Rebuttal Testimony.

Evidentiary hearings were scheduled for March 8 and 9, 2007. However, due to unforeseen personal circumstances facing counsel for Rate Counsel, the hearing dates were rescheduled by Commissioner Butler to March 19 and 21, 2007. On March 19, 2007 Commissioner Butler ruled on the two pending motions. On the discovery motion, Rate Counsel's motion was denied in its totality. On the Motion to Strike, both AT&T's proposal and Rate Counsel's counterproposal were allowed to stand in the proceeding.

Additionally, AT&T and Verizon NJ's Joint Motion for a Protective Order was granted subject to any objection.⁵ Rate counsel's objection was noted for the record.⁶ Also, various motions for admission *pro hoc vice* and for intervention and/or participation were granted.⁷

⁵/ T. 10, lines 3-25.

⁶/ T. 12- 13.

⁷/ T. 14, lines 13-16.

Evidentiary hearings commenced on March 19, 2007. Presiding Commissioner Butler and Commissioner Bator were joined by Commissioner Hughes. AT&T witnesses Aron and Nurse were allowed to appear as a panel over Rate Counsel's objection that their individual testimony was not presented as a panel. Cross examination of the AT&T witnesses ensued. All active parties waived cross examination of any other party witnesses. Specifically, Rate Counsel waived its right to cross examine Verizon NJ's witnesses in reliance on the on the Presiding Commissioner's ruling that the proceeding concerned CLEC services; and because Verizon NJ is an ILEC, its position that Verizon NJ's services should also be reclassified as competitive was not properly in this docket, but in another docket.⁸ Evidentiary hearings concluded on March 21, 2007. The briefing schedule was thereafter set as April 9, 2007 for Initial Briefs and April 19, 2007 for Reply Briefs.

⁸/ T. 117-120.

STATEMENT OF FACTS

As the Board noted in the Procedural Schedule Order, the proceeding was initiated in part based on the Board's observations in the recent hearings on the readoption of its telecommunications regulations.⁹ A Public Hearing on the readoption of the telecommunications regulations was held on October 17, 2006 in BPU Docket No. TX06030230, concerning N.J.A.C. 14:10 ("Chapter 10" or "Chapter 10 Rules"). In that matter, Dr. Debra Aron, Mr. Nurse, and Mr. Mosca testified on behalf of AT&T calling for elimination of current regulations so as to promote, job growth, investment and innovation in New Jersey. Verizon NJ, NJCTA, and Rate Counsel made public statements.¹⁰ On November 9, 2006, AT&T's witness, Dr. Aron, also appeared and made a presentation before the State Legislative Assembly Telecommunications and Utilities Committee on Chapter 10 Readoption, concerning State regulation of certain telecommunications services, again calling for elimination of telecommunications regulation, as in the instant matter. Including this proceeding, Dr. Aron has argued that it is appropriate to deregulate CLECs in order to promote job growth, investment and innovation in New Jersey. The record shows that for the third time, that Dr. Aron's positions about the telecommunications markets were not supported by current, complete and accurate data and Dr. Aron exaggerated the extent of competition. Dr. Aron also failed to demonstrate that the relevant criteria for classification are met and failed to show that telecommunications market in New Jersey is sufficiently competitive to warrant the elimination of regulation for competitive local exchange carriers ("CLECs").

⁹/ Order at page 1.

¹⁰/ *I/M/O Public Hearing on the Proposed Readoption with Amendments to the Telecommunications Rules N.J.A.C. 14:10*, BPU Docket no. TX06030230, Public Hearing dated October 17, 2006, Newark, New Jersey

Significantly, throughout her appearances in New Jersey, Dr. Aron has been less than forthcoming with full and complete information about the competitive marketplace and CLEC services in New Jersey. In fact, the information Dr. Aron relies upon in this proceeding fails to fully inform the Board of the status of the telecommunications markets in New Jersey, including how the FCC views like and substitute services. When a full, complete and accurate review of the marketplace is performed, such information undercuts the conclusions and recommendations that Dr. Aron would have this Board rely upon. Dr. Aron's "market study" supports just the opposite conclusion; that is, the telecommunications market in New Jersey should not be declared competitive, since the statutory criteria are not satisfied.

Rate Counsel's active participation in the proceeding was based on its statutory right to protect the public interest of New Jersey ratepayers. Rate Counsel's positions as set forth in the Initial, Reply and Rebuttal Testimony of Susan M. Baldwin show that the assertions of AT&T, as presented in testimony by Dr. Aron and Mr. E. Christopher Nurse that the local exchange telecommunications market in New Jersey is sufficiently competitive to warrant the reclassification of CLEC services *en masse* as competitive lacks support in the record. In addition, Rate Counsel has shown that Verizon NJ has also failed to sustain its burden of proof through the testimonies offered by Paul Vasington and Dr. William E. Taylor. Verizon NJ's has misdefined the relevant markets and the relevant geographic markets under which any analysis must be premised. Rate Counsel submitted in Testimony by Susan M. Baldwin that neither the CLECs nor Verizon NJ's services should be declared competitive because the telecommunications carriers failed to substantiate by competent and reliable evidence that their services were

competitive under the three statutory criteria and/or that sufficient competition exists to constrain the pricing of Verizon or the other CLECs. As a result, Rate Counsel submits that Verizon NJ's services for two or more lines previously classified by the Board as competitive should be reclassified back to non-competitive in view of the lack of sufficient competition.

Based upon the testimony and the hearings, the record shows that AT&T's proof is lacking a showing sufficient to find that any AT&T services or any CLEC services are competitive. Similarly, Dr. Taylor's conclusions on the competitiveness of the telecommunications market are based upon misdefining the relevant markets and the relevant geographic markets in New Jersey.

The record supports the finding that Verizon NJ, despite its claimed line losses, has the ability to exercise market power in the properly defined relevant and geographic markets for the mass market and for the markets that include two or more business lines. In addition, the 130 CLECs that have been authorized by the Board to provide local exchange service do not constrain the pricing of Verizon New Jersey in the New Jersey local exchange telecommunications market viewed as a whole. Moreover, among the CLECs, the new AT&T wants to remove Board regulations so that it can harvest its customers by increasing rates across its service lines in New Jersey.

Applying established federal standards, as required by the New Jersey Administrative Procedure Act, the record reveals that AT&T and Verizon NJ have not sustained their burden of proof and that there are three relevant product markets for residential and single line business markets and that the geographic market is the wire center or smaller for the mass market and enterprise markets. The record demonstrates

that telecommunications services provided by VoIP, wireless, DSL, and carrier bundles all fail to qualify as like or substitute services, and that there is insufficient evidence to satisfy each of the three criteria. Therefore, all existing services related to residential and single line business must remain regulated and services previously declared competitive must be reclassified as non-competitive. Verizon NJ's flaws in defining the relevant product and geographic markets preclude any finding that any service offered by any CLEC should be declared competitive at this time.¹¹

^{11/} Further support for the Rate Counsel's assertions herein are included in the Proposed Findings of Fact and Conclusions of Law attached hereto as Attachment A.

ARGUMENT

AT&T'S RELIANCE UPON VERIZON NJ'S DEFINITION OF THE RELEVANT PRODUCT MARKET AND GEOGRAPHIC MARKET UNDERMINES ITS ANALYSIS OF THE THREE STATUTORY CRITERIA AND PRECLUDES A FINDING THAT ANY CLEC SERVICE CAN BE DECLARED COMPETITIVE

AT&T's case rests upon the relevant product and geographic markets set forth in the testimony filed on behalf of Verizon NJ. AT&T relies upon the same faulty line loss data that Verizon NJ's relies upon to demonstrate satisfaction of the three statutory criteria. The purported data is not current, complete or accurate and fails to address the evidence in the record of numerous market failures that preclude removal of economic regulation at this time. Although Dr. Aron acknowledges the value of the Merger Guidelines in defining the relevant product market, she erroneously chooses to rely on a single product market that includes any and all technologies that provide telecommunications and information services to consumers. The relevant product market properly defined does not include the breadth of services offered by AT&T and Verizon NJ, such as VoIP, DSL, wireless and so called bundled services. As a result, many of the so called substitutes are not in the relevant product markets and relevant geographic markets. In addition, there has been no showing that such services are in fact like or substitute services. Dr. Aron has consistently presented incomplete, irrelevant, and erroneous data that misleads this Board and is offered to achieve her client's desired result, harvesting its customers in New Jersey by increasing rates. Dr. Aron's conclusions are not supported by the record and her analysis is defective and entitled to no weight. The parameters of what constitutes the relevant product markets and the relevant geographic markets must be based upon application of the Department of Justice Merger Guidelines, and applicable FCC precedent and the expressed requirements found in

N.J.S.A. 48:2-21.19. The stated and often quoted triumvirate – ease of market entry, presence of competitors and availability of like or substitute services in the relevant geographic area—does not exist in a vacuum. If Verizon NJ has the ability to exercise market power, if Verizon NJ’s rates are below costs, if intrastate access charges are above costs, if CLEC rates are above Verizon NJ’s rates, if CLEC rates do not constrain Verizon NJ’s rates, and Verizon NJ rates do not constrain CLEC rates, than rate regulation of CLEC and ILEC services must remain in place.

As a precondition to reclassification of a service as competitive, the Board must have detail reporting requirements in place. AT&T and Verizon NJ have offered no reporting requirements applicable to the services for which competitive status is sought. The Board’s current regulations require the reporting of by various categories including reporting on the number of customers. The record shows that line losses relied upon by AT&T and Verizon NJ do not reflect how many customers have been lost. By way of example, *N.J.A.C.* 14: 10-5.1 and *N.J.A.C.* 14: 10-5.9 promulgated and adopted in connection with Docket No. TX92020201 on June 7, 1993, provide that certain reporting requirements apply equally to any service proposed for reclassification from rate regulated to competitive. These post classification standards also evidence what type of information that must be filed in the first instance when seeking reclassification. The Board noted the reporting requirements established in Docket No. TX92020201 already applied to Verizon NJ as evidence in the Board’s Order in Docket No. TO92030358, wherein the Board found that

“... standards for determining and monitoring the competitiveness of services set forth in the Board’s established competitive service rulemaking in Docket No. TX92020201...Data shall be filed on a quarterly basis... and shall include the following:

1. Total number of customers by service category;
2. Total minutes of use by service category;
3. Total number of calls by service category;
4. A description of each service offering;
5. A summary of complaints by service category; and
6. Any other information deemed necessary by the Board to fulfill the mandates of the Telecommunications Act of 1992.

I/M/O the Application of New Jersey Bell Telephone Company for Approval of its Plan for an Alternative Form of Regulation, BPU Docket No. TO92939358 (May 6, 1993) at 133.

The Board has previously clearly stated why this information is necessary and how it will be used:

- “1. Use this information to conduct an analysis as to whether services are becoming more or less competitive; specifically, ***monitor the market shares of carriers*** as measured by number of calls, minutes of use, number of customers and customer complaints;
2. Use an economic measure of concentration or any other appropriate economic indicator to measure individual services; or
3. Use a customer survey to solicit information related to the perception of the level of competition by actual telecommunications users.”

(Emphasis Added) *Id.*

In this same context, the Board also foresaw that “...if regulated services are reclassified as competitive, it will be necessary to reallocate the costs and revenues from those services.” *Id.* Service cost and revenue allocation stems from the Board’s approval of a methodology to segregate a carrier’s service into two distinct groups: Group I comprising competitive services and Group II comprising non-competitive services and to require reporting on a quarterly basis. See *I/M/O Petition of New Jersey Bell Telephone Company for Approval of a Proposal for a Rate Stability Plan and Relaxed Earnings Surveillance for Certain Competitive Services*, BPU Docket No. TO87050398, Order dated June 22, 1987, at 4. The Board adopted as a requirement that, in all future

filings, costing information on all three existing cost methods must be supplied as part of any subsequent filing. See Order in Docket No. TO9203030358 at 99.

The Board adopted as specific criteria applicable to reclassification:

1. That the market concentration for an individual carrier results in a service no longer being sufficiently competitive;
2. That significant barriers to market entry exist;
3. There is a lack of significant presence of competitors;
4. That there is a lack of like or substitute services in the relevant geographic area; or
5. That a carrier is not providing safe, adequate and proper service.

Docket No. TO92030358 at 134.

The record simply fails to contain the information required by the Board through its current regulations and past determinations of what is necessary in order to find a service competitive. If a regulated service offered by Verizon NJ is not competitive or if a competitive service offered by Verizon NJ is no longer sufficiently competitive, the corresponding CLEC services are precluded from being declared competitive. The markets lack the ability to ensure competitive market based prices. Market based prices cannot exist in the face of market power or other market failures. As Dr. Aron acknowledged under cross-examination, the existence of market power is evidence of market failure which in turn calls for regulation to help provide a balancing effect where the market is unable to do so.¹² There is no algorithm to apply; instead, to decide whether there is market failure one needs to look at market structure, the ability of competitors to expand services and ease of market entry.¹³

^{12/} T.240, lines 12-25.

^{13/} T.243, lines 23-25; T.244, lines 1-6.

Market power is described as the ability to raise price by restricting output,¹⁴ or stated differently, it is “[t]he ability of one or more firms profitably to maintain prices above a competitive level for a significant period of time”, and in economic terms, it is the ability to raise price without a loss of demand that make the increase unprofitable.¹⁵ While a truly competitive marketplace provides a powerful antidote to any effort to exploit consumers and ratepayers, the competitive marketplace, however, cannot provide this protection if a competitor has market power since the pricing discipline of a competitive marketplace cannot be effective in the presence of market power.

To determine whether market power is present, one must first begin with the determination of the relevant market. In general, the test for determining the relevant market has been defined by various courts.¹⁶ In *SCFC*, the court noted that since “the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the ‘relevant market’ rests on a determination of available substitutes.”¹⁷ The *SCFC* court also stated that

[t]o define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume.¹⁸

^{14/} *United States Department of Justice Merger Guidelines (1984)*, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,556

^{15/} T. 381, lines 7-10.

^{16/} *SCFC ILC, Inc. v. Visa USA, Inc.* 36 F.3d 958 (10 Cir. 1994) (“*SCFC*”).

^{17/} *Id.* at 966 citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d at 218 (DC Cir. 1986).

^{18/} *Id.*, quoting L. Sullivan, *Antitrust* § 12, at 41 (1977).

To quantitatively measure the extent to which two products or services are economic substitutes for one another requires examination of the “own price elasticity” of a product or service, and the “cross-price elasticity” of that product/service *vis-à-vis* another that is hypothesized to be a substitute. In *Telecor*,¹⁹ the Court of Appeals reaffirmed that a determination of a relevant market rests on a determination of available substitutes. The 10th Circuit Court of Appeals reaffirmed the finding in *Brown Shoe*²⁰ that the “reasonable interchangeability” test is measured by, and is substantially synonymous with, cross-elasticity. A market is elastic if demand goes down as price goes up, and a market is cross-elastic if rising prices for product “A” cause consumers to switch to product “B.”²¹ When applying the relevant market test of “reasonable interchangeability,” one must determine the elasticities of the product market. “Reasonably interchangeability” is predicated upon cross-elasticity being present and if non-cross-elasticity exists, than a product is not a substitute.²² Accordingly, one must look at the “reasonable interchangeability,” *i.e.*, available substitutes, from the perspective of purchasers, rather than the seller, when determining the relevant market.²³

Dr. Aron also confirms that the Merger Guidelines provide principles for market definition as do court decisions. How those principles translate into a specific market definition depends on the service and the proper market definition depends on the

¹⁹/ *Telecor Communications, Inc. et. al., v. Southwestern Bell Telephone Company*, 305 F.3d 1124, 1130 (10th Cir. 2002) (*Telecor*); accord *Eichorn, et. al. v. AT&T Corp., et. al.*, 248 F.3d 131 (3rd Cir. 2001).

²⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

²¹/ *Telecor* at 1131.

²²/ *Id.* at 1132.

²³/ *Id.* at 1131-1136.

characteristics of the service.²⁴ The standard approach to market definition in the Merger Guidelines is demand based.²⁵ Dr. Aron clearly recognized this when assessing entry into the market, supply elasticity is relevant.²⁶

In regard to relevant product market, the FCC agreed with commenters, including Rate Counsel, in the *SBC/ATT Merger Order*,²⁷ that bundled local and long distance services should be treated as a separate product market. Over the top VoIP was also carved out of consideration from the local service market.²⁸ In addition, VoIP services would also fall into a separate product market.²⁹ The record shows that neither wireless service nor VoIP are viable substitutes.³⁰

Customer perspective is crucial to determine whether any product is a like or substitute service.³¹ On this basis, wireless service also fails to qualify as a substitute service since there is no direct evidence in the record that New Jersey consumers are in fact cutting the cord and resorting exclusively to wireless.³² Indeed, contrary to the testimony of Dr. Aron, AT&T has unequivocally stated it does not foresee wireless as the

^{24/} T.299, lines22-25; T.300, lines 1-2.

^{25/} T.303, lines 3-4.

^{26/} T.306, lines 11-13.

^{27/} *I/M/O SBC Communications Inc and AT&T Corp Applications for Approval of Transfer of Control*, WC Docket No. 05-65, FCC 05-183,(*SBC/ATT Merger Order*) at ¶ 95.

^{28/} *Id.* at ¶ 86.

^{29/} *The Minnesota Public Utilities Commission, et. als. v. Federal Communications Commission, etc., Petitions for Review of an Order of the Federal Communications Commission*, NO. 05-1069, 2007 U.S. App. LEXIS 6448.

^{30/} See Proposed Finding of Fact and Conclusion of Law at ¶¶ 59, 60, 61.

^{31/} Aron Direct, at 23; Taylor/Vasington Direct, at 21; Baldwin Rebuttal, at 14.

^{32/} See, *SBC/ATT Merger Order*, at ¶ 89, 90. The FCC only considered mobile wireless as a substitute based on their findings on a national level that between 6% and 11% of households have cut the cord.

substitute for wireline service.³³

The FCC has defined what are the relevant product markets in so far as the mass market and the appropriate geographic markets.³⁴ Under the FCC definitions, the local service product market is distinct from long distance and bundled service. Therefore, local service readily equates with protected telephone service, as defined by New Jersey statutes, which includes service to residential or business customers for the purpose of completing local calls, touch-tone service, access services, toll service, and ordering, installation and restoration of these services.³⁵ However, the focus of Dr. Aron's testimony is broader than protected telephone service for residential and business customers. Protected telephone service or plain old telephone service (POTS) does not include, and is distinct from, bundles of services and long distance. Accordingly, the relevant product market for local service is POTS, which corresponds to residential and single line business lines and other POTS defined services.

Only after defining the correct relevant product markets, can the analysis moves to identify the relevant geographic markets. The FCC has identified the relevant geographic market for residential and for business customers. The residential and small business sector is grouped as mass market customers, whereas the large business sector is grouped as enterprise customers.³⁶ For enterprise customers the geographic market for

^{33/} See Proposed Findings of Fact and Conclusions of Law at ¶ 54, page 17.

^{34/} *SBC/ST&T Merger Order*, FNs 83, 84. These definitions originate from the Horizontal Merger Guidelines.

^{35/} *N.J.S.A. 48: 2-21.17*. Assurance of affordable protected telephone services is a significant factor in consideration of a plan for alternative regulation which could provide CLECs with the regulatory relaxation sought through this investigation proceeding.

^{36/} *SBC/AT&T Merger Order*, FN 243; See also, ¶ 82 in which the Commission identifies three distinct relevant product markets for mass market analysis: (1) local service, (2) long distance service, and (3) bundled local and long distance service.

local service the FCC found that each customer location constituted a separate relevant geographic market. For mass market customers the FCC simply concluded that it lacked sufficient information in the record to use less than the entire state.³⁷ Other FCC statements clearly show that the geographic markets are no larger than a wire center and no smaller than an individual customer location.³⁸ In any event, neither AT&T nor Verizon NJ has demonstrated that sufficient competition exists in the relevant product and geographic markets to protect consumers from unreasonable rates and inadequate service quality.³⁹

The limited evidence available in the record suggests that Verizon NJ has market power in all wire centers within its local exchange service territory. Verizon NJ's ability to increase prices is further anecdotal evidence that Verizon NJ has market power.⁴⁰ Verizon NJ's ability to derive increased revenue is evidence of its market power.⁴¹

Rate Counsel has been precluded from affirmatively showing the ability of Verizon to exercise market power by the denial of Rate Counsel's motions to compel discovery. In order to apply the definition of market power, one must know the cost of service in order to assess whether an increase in price translates in sufficient loss of demand to make the increase unprofitable. Cost of service is also necessary to determine

^{37/} The FCC conducted its analysis on a state to state level only because of insufficiency of data in the record in order to perform a structural analysis at a more disaggregated level than that of the state. *SBC/AT&T Merger Order* at ¶ 99. The FCC also relied upon that fact that for the mass market, AT&T has exited that market.

^{38/} See Proposed Findings of Fact and Conclusions of Law at ¶78.

^{39/} Baldwin Reply at 19-20.

^{40/} Baldwin Reply at 32-37.

^{41/} Baldwin Reply at 28-29.

whether super-competitive returns are being earned and whether sufficient competition exists to drive costs towards marginal costs. Similarly, without cost of service and margins of the CLECs, one cannot show whether sufficient competition actually exists. Rate Counsel has been precluded from developing its theory of the case due to erroneous ruling on its motions to compel and evidentiary rulings at the hearings.

Additionally, Verizon NJ's data on purported line loss is neither relevant nor persuasive evidence as to the level of competition, nor does it constitute empirical evidence necessary to satisfy the three criteria.⁴² In fact, the record shows that when all lines are considered Verizon NJ has a net increase in lines.⁴³ There are also other identifiable reasons unrelated to competitive forces that can explain the claimed line losses.⁴⁴

As to AT&T, Dr. Aron's claim that CLECs offer competitive priced alternatives based upon her CLEC sampler is contrary to the actual facts. CLECs are not pricing at or below Verizon NJ.⁴⁵ A cursory examination of Dr. Aron's claimed sample demonstrates that the noted carriers do not offer services in all geographic areas of New Jersey, the carriers rely on the ILEC facilities, the local service component is only provided in conjunction with long distance as a bundle which falls into a separate product market, or

⁴²/ *Petition of US West Communications, Inc., et. al for Forbearance as Dominant Carriers*, Docket Nos.: CC-98-157, 98-22, 98-227, 99-1, 99-24, 99-65. Memorandum Opinion and Order Adopted: November 22, 1999. FCC No. 99-365.14 FCC R'cd 19947. Docket No. 99-24 pertains specifically to New Jersey, wherein the Bell Atlantic Telephone Companies (currently Verizon) sought forbearance from regulation as dominant carriers. The FCC rejected the claim that the Bell Atlantic companies were no longer dominant carriers after concluding, *inter alia*, that retail losses is an inadequate measure for loss in market share.

⁴³/ Baldwin Reply at 6-8.

⁴⁴/ Baldwin Reply at 8-9.

⁴⁵/ Aron Direct at 24-26.

the service offering is priced well above the ILEC service rate in the same area.⁴⁶ Dr. Aron's representation of the sampler as a demonstration of competition is therefore a further example of her inability to provide current, complete and accurate information to this Board. As a result, such incomplete, inaccurate and misleading information should be afforded no weight.

Time Warner Telecom of New Jersey Inc. ("Time Warner"), the other intervenor in this matter, has made no showing that its services satisfy the three criteria. Time Warner serves *de minimis* business customers in Jersey City and Time Warner does not provide service to any residential customers.⁴⁷ More importantly, Time Warner merely request more lenient tariff filing requirements for its services. Such request is beyond the scope of the present proceeding.

The overriding harm to ratepayers from permitting AT&T to cloak itself as the protector of CLECs is amply found in the cross examination of Mr. Nurse. Without any equivocation, AT&T has declared it is no longer actively pursuing new customers for local service, and is implementing its national plan to exit the local exchange service market.⁴⁸ In any event, AT&T will harvest those customers who continue to buy its local service which entails rate increases for those consumers.⁴⁹ AT&T has openly declared, as early as 2004, its intent to cease marketing to the mass market, to reduce consumer operations, to retire infrastructure used to support mass market service and customer care, and to harvest its mass market business by raising prices resulting in a declining mass

^{46/} See Proposed Findings of Fact and Conclusions of Law ¶¶ 69, 70, 71, 74.

^{47/} Baldwin Reply at 16-17 referring to Time Warner response to RC-8, 9.

^{48/} See Exhibit A, on AT&T's exit of local market.

^{49/} Baldwin Reply at 15; Baldwin Direct at 14.

market customer base.⁵⁰ AT&T's claim of "excessive over regulation" is nothing but a "red herring" to mask its true motives. Rate Counsel attempted to show that the only services that AT&T has been precluded from increasing rates for are for residential customers who purchase local service only. The increased revenue sought from these customers is less than \$150,000.00 per year but AT&T has spent many more than ten times that on this proceeding even though they are exiting the mass market.⁵¹ In fact, AT&T's grand plan to harvest its local service customers and thereby derive as much revenue as possible is evident from recent tariffs.⁵² Moreover, AT&T's practice discriminates against out of region ratepayers by harvesting them while it ceases operations in region.⁵³ The Board should not insulate this discriminatory practice by granting AT&T competitive status on its services in New Jersey.

AT&T failed to carry its burden of proof on ease of entry, presence of competitors, and like and substitute services.

The presence of a carrier with market power is evidence of market failure and hence regulation is necessary to constrain the exercise of such market power. In New Jersey, Verizon NJ continues to have the ability to exercise its market power over the wireline local exchange service market.⁵⁴ Verizon NJ remains the dominant carrier for local exchange service, and thereby sets the "umbrella" rate which CLECs must try to

^{50/} Baldwin Direct at 14, and fn 15 therein.

^{51/} Rate Counsel was precluded by the Hearing Officer and the other attending Commissioners from developing this point on cross examination. The proffered examination action goes to undermine what AT&T claims is its interest in this proceeding. As a matter of due process, Rate Counsel was entitled to pursue this line questioning and the cutting off of this line of questioning denies fundamental due process.

^{52/} See Attachment #2 to Rate Counsel's Proposed Findings of Fact and Conclusions of Law.

^{53/} See Exhibit A, on AT&T's exit of local market.

^{54/} Baldwin Direct at 13-14.

beat and compete on an “apples to apples” basis.⁵⁵ The record shows that CLECs do not constrain Verizon NJ prices nor does Verizon NJ constrain CLEC prices. The record shows that the rates for intermodal services to which Dr. Aron refers are as much as three times higher than Verizon NJ’s rate for basic local exchange service. The services to which Dr. Aron refers are not affordable, like, or substitute services and are not reasonably interchangeable with basic local exchange service. Dr. Aron describes stand-alone cable-based voice services at rates of \$54.95 and \$49.95, and describes stand-alone VoIP service at a rate of \$39.95.⁵⁶ Even if cable based telephony and VoIP services were otherwise comparable products (in the relevant product market), which they are not, such pricing does not constrain Verizon NJ’s pricing, nor is there any evidence in the record to that effect. Therefore, the presence of sufficient competition has not been demonstrated.

To further illustrate this point, Dr. Aron testified on cross-examination that while one company is charging fifteen dollars for something, another company can charge twenty dollars if it is offering a better product with additional components.⁵⁷ However, if competitors are offering the same service at a higher price, she did not see why customers would ever pay that price when they can go to the incumbent and pay the lower price, regardless of whether the competitor had market power or not.⁵⁸ Yet, that is the scenario that AT&T paints through efforts to harvest local exchange customers. In view of Mr. Nurse’s recognition that regulation is justified where there is a breakdown in the marketplace, Rate Counsel submits that continued regulation of CLEC services is

⁵⁵/ *Id.*

⁵⁶/ Aron Rebuttal, at 4-5.

⁵⁷/ T.126, lines 19-23.

⁵⁸/ T.127, lines 9-14.

warranted and justified.

The record in this matter is also devoid of empirical evidence that demonstrates ease of market entry. The Horizontal Merger Guidelines instruct that in order to assess ease of market entry a three part analysis is required. The analysis includes assessment of the timeliness of entry, the profitability of entry and the sufficiency of entry. The Guidelines note that, among other things, entry may not be sufficient, even though timely and likely, where the constraints on availability of essential assets, due to incumbent control, make it impossible for entry profitably to achieve the necessary levels of sales.⁵⁹ Dr. Aron also acknowledges the significance that sunk costs can have on ease of entry and can in fact serve as a barrier to entry.⁶⁰ With a sound business plan and a reasonable expectation of providing a risk adjusted adequate return to the investors, the capital markets will provide capital; however, if the capital markets do not favor the business plan then the capital investment will not be made available.⁶¹ The unavailability of capital to smaller carriers, as the cited premise for merger and acquisitions in petitions asking approval of mergers and transfers of control, has resulted in numerous carrier consolidations which the Board has had the opportunity to rule upon and approve. Indeed, those petitions clearly illustrate the inability of smaller carriers to survive the economics of the local exchange market in New Jersey. Nevertheless, Rate Counsel's pursuit of cost data to help further demonstrate its theory of the case – that Verizon NJ's market power daunts the ability of CLECs to adequately perform in the local exchange

^{59/} Horizontal Merger Guidelines, Department of Justice and the Federal Trade Commission, issued April 2, 1992, revised April 7, 1997 (“Horizontal Merger Guidelines”).

^{60/} Aron Direct at 53-54; T. 356, line 10-25; T. 357, lines 1-2. The term “sunk cost” refers to costs that could not be recovered if the firm were to exit the market.

^{61/} T. 357, lines 3-10.

market – was denied. The financial information provided by Verizon NJ does not provide disaggregated cost for local exchange service and is therefore of no value to the issues in this matter. Furthermore, a carrier’s costs are recovered through rates. Although Rate Counsel was not permitted to develop this line of questioning fully via cross-examination,⁶² Rate Counsel was able to establish through Dr. Aron that in a competitive market competition is a process and the process drives prices in the direction of costs.⁶³ This recognizes that to survive in a market all costs must be recovered or the carrier will not be able to attract capital and make investments to stay in the market.⁶⁴

Verizon NJ’s market power dominance is self evident from the record. Rate Counsel’s position that Verizon NJ sets an “umbrella rate” that CLECs cannot undercut in order to compete economically is not a fiction, but a reality. Dr. Aron, on behalf of AT&T states that “[p]ricing below cost discourages others from entering the market.”⁶⁵ AT&T elaborates, “[n]obody wants to enter a market where they have to compete with an established provider who is pricing below cost.”⁶⁶ The record shows at present there is no ease of entry for CLECs in the basic local exchange service market, because the vast majority of CLEC-served lines rely on Verizon’s wholesale facilities. Once UNE-P was replaced with wholesale advantage, (a commercially “negotiated” rate), which is higher than preexisting UNE-P rates, the cost of entry is prohibitively greater than it had been,

⁶²/ T. 236-238 (transcript portion under seal).

⁶³/ T. 252, lines 18-20.

⁶⁴/ T. 253, lines 5-10.

⁶⁵/ T. 195, lines 13-14.

⁶⁶/ T. 195, line 24 – T. 196, line 1.

making it virtually impossible for a CLEC to price at or below the ILEC provider.⁶⁷ Entry based on CLECs' own switching facilities (UNE-L) is on the decline; similarly, UNE-P ("wholesale advantage") and resale is also on the decline.

Market competition for telecommunications has been grossly exaggerated in the testimony of Dr. Aron, and of Dr. Taylor and Mr. Vasington, to the extent that Dr. Aron finds support for her contentions in their testimony. For instance, reliance on E-911 listings as support for line loss as indicative of presence of competitors is erroneous and misleading.⁶⁸ Any analysis by AT&T and Verizon which relies on E911 data is fundamentally flawed and must be ignored. AT&T and numerous other ILECs have publicly noted in filings before the FCC that E911 data a) overstates the actual facilities which assigns multiple telephone numbers relative to the facilities needed to serve customer, b) can include inactive telephone numbers, c) assigned numbers are not correlated with lines in service (customers may subscribe to blocks of numbers for PBX for which they have no immediate use and are set aside for possible future use), d) overstates line loss, since a single PBX trunk could support five or more stations, each with an individual E-911 listing.⁶⁹ Rate Counsel was not afforded the opportunity to pursue an independent review and analysis of the E-911 database. Without verification and review of that data, reliance on E-911 as a measure of competition is faulty and should therefore be accorded no weight.

Line loss data relied upon by AT&T and Verizon NJ is also incomplete,

^{67/} Baldwin Direct, Attachment B.

^{68/} T. 253, lines 23-25 - T. 254, lines 11-17.

^{69/} *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160 (c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Opposition of AT&T Corp., August 24, 2004, at 9.

unreliable, and misleading. Contrary to their assertions, AT&T and Verizon NJ line loss has declined in recent years.⁷⁰ Data in the record omits winbacks by AT&T and Verizon NJ.⁷¹ Data shows CLEC line loss as well.⁷² In view of AT&T and Verizon NJ's decreasing line losses (or line gains) and the decreased lines to CLECs, it is reasonable to conclude, as stated by Rate Counsel, that there are a host of alternative reasons to explain this anomaly other than that CLECs are gaining those lines. For example, AT&T and Verizon NJ have been successful at winning back lost lines, businesses have migrated to special access, or customers have left the state altogether. The line loss effect could in fact be due to causes wholly unrelated to CLEC competition. AT&T, however, has failed to demonstrate and carry its burden of proof that its allegations of line loss are actually attributable to CLEC competition.

To the extent that intrastate access charges by Verizon NJ assessed to AT&T and other interexchange carriers remains a protected service as defined under *N.J.S.A.* 48:2-21.17, and such rates are substantially above costs, then intrastate access will remain the only rate regulated service (as residential and single business lines will have been declared competitive). See AT&T's pending petition seeking access charge reform.⁷³ And, if residential service is below cost as claimed by Verizon NJ, then rate regulated access charges would be providing a subsidy to competitive services in violation of *N.J.S.A.* 48: 2-21.16 (a) (3).

⁷⁰/ Baldwin Reply 23-30.

⁷¹/ See Proposed Findings of Fact Nos. 27, 28.

⁷²/ See Proposed Findings of Fact No. 24.

⁷³/ *I/M/O Petition of AT&T Communications of NJ, LP Regarding Access Payments to Verizon NJ Inc., etc.*, BPU Docket No. TR03100767 filed October 2003.

**Sale of Yellow Pages affects Just and Reasonableness
of Verizon NJ local exchange rates.**

Verizon NJ's local service rates are even further below cost given the loss of contribution from Yellow Pages. Although Yellow Pages was previously declared competitive by the Board, Yellow Pages provided contribution to local service.⁷⁴ As a result of the unapproved sale of Verizon's Yellow Pages,⁷⁵ the revenue contribution to Verizon NJ's basic exchange service from Yellow pages may no longer be available to offset the cost of local service which Verizon NJ has long claimed is below cost and subsidized by competitive services. In 1993, the Board determined that Yellow Pages provided \$116 million contribution to local service. With the loss of such contribution, Verizon NJ's basic service rates are even further below cost. As previously stated, one cannot compete against a below cost rate.

**The record reflects sufficient market failures to require continued regulation
of CLEC services as well as reclassification as non-competitive Verizon NJ services
previously declared competitive.**

It is a fundamental economic principle that the existence of market failure(s) justifies rate regulation. The record in this matter is full of examples that demonstrate market failures exist so that the continuation of rate regulation in the local service market in New Jersey is warranted.

As noted above, by Dr. Aron's own admission, the existence of market power is evidence of market failure which calls for regulation.⁷⁶ Verizon NJ's market power is

^{74/} *I/M/O Application of New Jersey Bell Telephone Company for Approval of its Plan for an Alternative Form of Regulation*, BPU Docket No. 92030358 (May 6, 1993) at 127.

^{75/} The sale of this asset flies in the face of New Jersey's Public Utility law that requires prior Board approval of the sale or encumbrance of public utility property; otherwise, the transaction is void as a matter of law. See, *N.J.S.A.* 48: 3-7.

^{76/} See also Taylor/Vasington Direct at 7.

evident in its ability to sustain increased revenue – indeed super-competitive profits – in the face of rate increases and alleged competition.⁷⁷ Dr. Taylor’s proposition – that small losses of volume to competitors’ results in a large reduction in profits to a company like Verizon NJ with sunk costs⁷⁸ – is refuted by the fact that Verizon NJ is earning substantial profits. Indeed, Verizon NJ’s level of profits in the face of claimed substantial line loss is inconsistent with Dr. Taylor’s proposition. Line loss without loss of profits is a market failure. It is also consistent with the conclusion that Verizon NJ has market power in the local exchange service market.

Furthermore, Verizon NJ’s ability to increase rates and realize super-competitive profits demonstrates that CLEC rates fail to discipline Verizon NJ’s market power. Likewise, the ability of AT&T and other CLECS to increase rates without restraint is further evidence of a market failure.⁷⁹ The fact that AT&T can harvest its local service customers is a clear market failure.

Additionally, a carrier’s lack of access to capital is also indicative of market failure. As noted above,⁸⁰ if the capital market finds fault with the carrier’s plans to enter the market where one carrier exerts market power, the necessary capital to either enter or grow will not be provided. After all, a carrier’s costs are recovered through rates. If CLECs cannot price services at or below Verizon NJ’s rates, there is little chance of

⁷⁷/ Baldwin Reply 28-35.

⁷⁸/ Taylor/Vashington Direct at 22.

⁷⁹/ *Supra* at 24-25.

⁸⁰/ *Supra* at 26.

survival.⁸¹

The record supports a finding that there are numerous market failures in the local exchange service market in New Jersey. Accordingly, rate regulation is the antidote to market failure to ensure that customers pay only reasonable charges for local exchange telecommunications services consistent with legislative policies.⁸²

**The Lack of credibility and candor
of AT&T and Verizon NJ undermines their entire case.**

AT&T has failed to carry its burden of proof to demonstrate that its services and CLEC services should be declared competitive. This failure is primarily due to the lack of evidentiary support for its theory of the case, as detailed above, and the lack of credible evidence submitted by Dr. Aron whose testimony is replete with incomplete, inaccurate, and misleading information. As detailed above, Dr. Aron's representations regarding the CLECs she asserts are indicative of a vibrant competitive local exchange market in New Jersey is pure fiction. The CLECs sampled do not price at or below Verizon NJ's rates so as to be considered sufficiently competitive to constrain Verizon NJ's rates. The record shows that Verizon NJ rates are not constrained by CLEC rates nor are CLEC rates constrained by Verizon NJ's rates as is evident from more recent tariff filings.⁸³

AT&T's reliance on line loss as indicative of a competitive market is simply misplaced. The facts belie that assertion and prove that the representation is misleading. In fact, line losses by Verizon NJ have declined over time. Dr. Aron's testimony fails to

^{81/} *Supra* at 25.

^{82/} See N.J.S.A. 48: 2-21.16 (a) (2).

^{83/} Baldwin Reply at 40-44; Baldwin Rebuttal at 59, 61-62. See also Baldwin Direct Exhibit B and additional tariff filings in Attachment #2 to the Proposed Findings of Fact and Conclusions of Law.

account for winbacks or for the increasing growth in private line service that can be reasonably concluded to have replaced the switched access line losses. The line loss data is incomplete at best; at worst, it is inaccurate or incomplete. In either case, it is neither reliable nor worthy of any weight.

Verizon NJ and AT&T both refused to provide the number of customers lost versus lines claimed lost. Both companies have laid off thousands of workers which translates to line loss but not to a customer loss. For Verizon NJ, the inability to identify the number of lost customers, even though the Board requires such data in its reporting requirements, undermines Verizon NJ's credibility.

AT&T's disingenuousness is further demonstrated by its proposal for expeditious deregulation includes provisions for Lifeline that portend grave consequences for the most vulnerable consumers although touted as beneficial to ratepayers.⁸⁴ Again, the facts belie AT&T's assertions that their lifeline proposal is good for consumers. By its own words, the Lifeline rate could increase by up to 75% of the wholesale cost to provide the service, and in no event would the CLEC Lifeline rate be priced below the incumbent carrier's rate.⁸⁵ Once established, the price cap could not be lowered.⁸⁶ The potential result from such a liberal grant of authority is that after January 2009, the CLECs including AT&T would be empowered to increase Lifeline rates to New Jersey's most vulnerable population without any review by the Board. Lifeline customers would be left without any rate protection.

Additionally, Dr. Aron insisted that she had not reviewed the FCC's SBC/AT&T

⁸⁴/ Nurse Rebuttal at 5-6.

⁸⁵/ *Id.* at 6.

⁸⁶/ *Id.*

Merger Order in a long time, but under cross-examination she recanted that statement and said she in fact had reviewed it in preparation for her testimony.⁸⁷ Her credibility is further undercut by her failure to acknowledge how the FCC defined the relevant product market while insisting that line loss, bundles, VoIP and other services are within the relevant product market and are substitutes for wireline local exchange service.⁸⁸ Dr. Aron refused to acknowledge this not only in this proceeding but also in the public hearing on Chapter 10 Rules Readoption and before the Assembly hearing in Trenton on Chapter 10. In addition, Dr. Aron felt compelled to attack Rate Counsel's expert,⁸⁹ yet she does not mention that her client has been fined for not correcting misstatements and for making misleading and inaccurate statements.⁹⁰

Accordingly, because the assertions made on behalf of AT&T and Verizon NJ are based on information that is incomplete, inaccurate, and misleading, their respective testimony should be given no weight.

⁸⁷/ T. 292, lines 22-25, T. 293, lines 1-23.

⁸⁸/ T.284. lines 7-12; T. 286, lines 1-2; T. 288, lines 4-10;

⁸⁹/ Aron Reply at 2.

⁹⁰/ See Telecommunications Reports March 29, 2007 at page 5. Therein, Minnesota Department of Commerce sought corrective action for AT&T's conduct hiding facts from regulators as a strategy to maximize profits. AT&T was aware of its duty to inform and deliberately chose to disregard that duty. Docket No.12-2500-17084-2. See Exhibit B attached hereto. (FCC Public Notices imposing fines on AT&T for providing misleading and inaccurate information to the FCC).

CONCLUSION

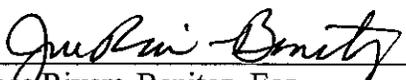
The record is insufficient to permit consideration of whether CLEC services may be classified as competitive at this time. AT&T also has not carried its burden of proof to demonstrate that the statutory criteria are met to permit classification of any of its services as competitive. In fact, as established in argument above, the record discloses numerous market failures which economists agree is the cornerstone to requiring rate regulation. Therefore, continued rate regulation of CLEC services is necessary, justified, and warranted.

In order to promote investment, job growth and innovation, first, the Board should be looking at alternative forms of regulation not classification of services as competitive; Second, the Board must not let AT&T or any other service provider harvest New Jersey ratepayers (this requires suspending and investigating tariff filings identified by Rate Counsel as part of this proceeding); third, the Board should open a proceeding to adopt new procedures for review and approval of requests for competitive classification, including the voluntary expedited procedure offered by Rate Counsel; and fourth, the Board should close this proceeding and proceed to re-adopt chapter 10 as proposed.

Respectfully submitted,

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Division of Rate Counsel

By: 
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**BEFORE THE STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

IN THE MATTER OF THE BOARD)
INVESTIGATION REGARDING THE)
RECLASSIFICATION OF COMPETITIVE)
LOCAL EXCHANGE CARRIER (CLEC))
SERVICES AS COMPETITIVE)
_____) BPU DOCKET NO. TX06120841

ATTACHMENT A

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE DIVISION OF RATE COUNSEL**

Before the Board of Public Utilities (“Board”) is the above proceeding initiated by the Board as an “investigation,” to determine the current state of competition as to telecommunications services provided by Competitive Local Exchange Carriers (“CLECs”) in New Jersey. The Board stated in its *Order* of December 22, 2006, that “through its recent hearings on the readoption of its telecommunications regulations, as well as through the Board’s continued review and oversight of the industry as a whole, it had noted that the competitive environment appeared to have undergone considerable change and modification.... [B]ased upon this awareness, the Board determined it

appropriate to conduct a full investigation and hearing into the question of whether CLEC provided telecommunications services should be declared a competitive service under *N.J.S.A. 48:2-21.19*.”¹

Based upon the record in the proceeding, Rate Counsel offers the following as findings of fact and conclusions of law:²

^{1/} *In the Matter of the Board Investigation Regarding the Reclassification of Competitive Local Exchange Carrier (CLEC) Services as Competitive*, Docket No. TX06120841, *Order*, December 22, 2006 (“*Order Opening Investigation*”) at 1.

^{2/} The record includes, but is not limited to, the Petition, the prefiled testimonies of the various parties, the transcripts of the hearings and the Exhibits entered into evidence in this proceeding.

PROPOSED FINDINGS OF FACT

PROCEDURAL FACTS

1. Pursuant to an *Order* dated December 22, 2006, the New Jersey Board of Public Utilities (“Board”) initiated this proceeding to determine whether to reclassify competitive local exchange (“CLEC”) services as competitive pursuant to *N.J.S.A. 48:2-21.19(b)*.
2. During the week of December 25, 2006 in a telephone call, and on two other occasions by written correspondence on January 9, 2007 and January 24, 2007, Rate Counsel sought clarification as to multiple issues, including but not limited to the nature, and scope of the proceeding.
3. On February 2, 2007, having received no further clarification on the scope of this proceeding from the Board, Rate Counsel appealed the Board’s *Order* to the New Jersey Superior Court, Appellate Division on three grounds:
 - 1) The Board exceeded its authority under the relevant statute to the extent that it seeks to classify one or more telecommunications services as a competitive service for a class of carriers. The Board has affirmatively stated and affirmed the policy that classification of services for a particular carrier does not classify that service for another carrier and if a carrier wants classification of its services it must independently file a petition;
 - 2) If the Board wishes to change its policy and/or interpretation of the statute for classification of services as competitive, the Board must do so through a rule-making, otherwise the Board is in violation of New Jersey Administrative Procedure Act. *See Metromedia, Inc. v. Director, Div. of Taxation*, 97 NJ 313, 331, 478 A.2d 742; and
 - 3) The schedule, as adopted by the Board, in this proceeding failed to satisfy the notice and hearing requirements required by statute.

This appeal is currently pending before the New Jersey Appellate Division. See, *The New Jersey Public Advocate, Division of Rate Counsel, Appellants v. The New Jersey Board of Public Utilities, Respondents*, Appellate Dkt. No.A-2924-06T1.

4. The record shows that the Board substantially denied (qualified by a handful of allowances) Rate Counsel's Motions to Compel and to Strike, and throughout the hearings overruled several requests by Rate Counsel to include information concerning costs of service and special access which are essential and indispensable material issues in this proceeding. The Board's ruling on these motions and issues denied Rate Counsel from effectively representing the interests of New Jersey ratepayers and denied Rate Counsel's right to procedural due process as required under the law.
5. The record is clear that pursuant to *N.J.S.A. 48:2-21.16 (a)(1)-(5)* the Board is required to:
 - 1) Maintain universal telecommunications services at affordable rates.
 - 2) Ensure that customers pay only reasonable charges for local exchange telecommunications services, which is available on a non-discriminatory basis.
 - 3) Ensure rates for noncompetitive telecommunications services do not subsidize the competitive ventures of providers of telecommunications services.
 - 4) Provide diversity in the supply of telecommunications services and products in telecommunications markets throughout the state.
 - 5) Permit the Board the authority to approve alternative forms of regulation in order to address changes in technology and the structure of the telecommunications industry; **to modify the regulation of competitive services**; and to promote economic development.

An alternative form of regulation permits deregulation of competitive services and trumps and supersedes the necessity to show a lack of sufficient competition.

(Emphasis added)

6. The New Jersey Telecommunications Act of 1992 ("1992 New Jersey Act") *N.J.S.A. 48:2-21.19(b)*, authorizes the Board to "determine, after notice and hearing, whether a

telecommunications service is a competitive service.” The legislation requires the Board to develop standards of competitive service that, “at a minimum,” include evidence with respect to:

- 1) Ease of market entry;
 - 2) Presence of other competitors; and
 - 3) The availability of like or substitute services in the relevant geographic area.
7. The Board precluded Rate Counsel from showing that Verizon NJ has market power through denial of its Motions to Compel and its refusal to compel discovery on cost of service. Any determination to reclassify services as competitive must address whether market power is present, and cost of service is a component of determining market power.
8. The Board has the authority and responsibility to establish reporting requirements to monitor the “competitiveness” of a telecommunications service. *N.J.S.A. 48:2-21.19(c)*.
9. No reporting requirements were offered either by staff or any other party in this proceeding, and without reporting requirements the Board cannot reclassify the services as competitive.
10. The Board retains the authority to reclassify a service previously deemed competitive if, after notice and hearing, it determines that competitive conditions have changed and that “sufficient” competition is no longer present. *N.J.S.A. 48:2-21.19(d)*.
11. Pursuant to *N.J.S.A. 48:2-21.17*, “Protected telephone service” means any of the following telecommunications services provided by a local exchange telecommunications company, unless the board determines, after notice and hearing, that any of these services is competitive or should no longer be a protected telephone service: telecommunications services provided to business or residential customers for the purpose of completing local calls; touch-tone service or similar service; access services other than those services that the board has previously found to be competitive; toll service provided by a local exchange telecommunications company; and the ordering, installation and restoration of these services.

12. The record shows that the Board's denial of Rate Counsel's Motions to Compel discovery prevented Rate Counsel from developing a full and complete record regarding its theories of the case including whether two or more lines should be reclassified as non-competitive.
13. Two competitive local exchange carriers participated in this "investigative" proceeding – Time Warner and AT&T.
14. The record shows that AT&T and Verizon NJ failed to provide correct, complete and accurate information as to, what are the relevant product markets, what are substitutes, and what is the relevant geographic markets. Baldwin (Rate Counsel) Rebuttal, at 12-22.

Services For Which Competitive Classification Is Sought

15. The record shows that no evidence as to the three criteria has been provided for the services sought to be reclassified other than residential and single line business. However, the limited evidence presented in this proceeding is flawed and AT&T and Verizon have failed to provide sufficient evidence to show that CLEC services warrant competitive classification. Baldwin (Rate Counsel) Rebuttal, at 71-72, Baldwin (Rate Counsel) Rebuttal, at 59-60.
16. AT&T seeks competitive classification for all local exchange services (all existing and new services, residential and business), "whether standing alone or bundled with any other services," for the following:
 - all residential and business single and multiple line basic local exchange services, including unlimited usage services,
 - features such as call waiting, call forwarding, three-way calling, distinctive ringing, call return, caller ID, caller ID with name and all other vertical features and functions.
 - business local exchange service plans such as All In One, Uniplan Basic, Uniplan

OneRate, CustomNet (all options), OneNet, Business Network, DS1 Digital Facilities, Centrex, ISDN PRI, Digital Trunk, Integrated Access/Frame Relay and AT&T Digital Link services.

See, Nurse (AT&T) Direct at 22-23; Nurse Cross, Transcript 3/19/07, p. 103, L 3-12 (discussing relationship of the Board's classification of Verizon NJ's services as competitive to determinations regarding AT&T's services), and Aron (AT&T) Cross, Transcript, 3/19/07, p. 182, L. 17-19.

17. The record shows that Verizon NJ seeks competitive classification of mass market services provided by Verizon NJ that have not already been classified as competitive including residential and single line business basic local exchange and associated usage and vertical features. Specifically, Verizon NJ seeks to have the following services provided to single line business and residential customers classified as competitive:

- (a) Switched Services: exchange access line service, foreign exchange service; IntelliLinQ BRI; local usage messages, and PBX trunks;
- (b) Ancillary Services – Switched: call block; call forward busy/don't answer; call forwarding; call trace; call waiting; caller ID; caller ID manager; caller ID with name; do not disturb; distinctive ring; priority call; remote call forwarding; repeat dialing; return call; ring count change interface; select forward; speed dialing; switched redirect; three-way call transfer; three-way calling; toll diversion, and special assistance service charge;
- (c) Ancillary Services - Non-Switched: additional listings; joint user service; non-published listings, and non-listed listings. The services to be reclassified as competitive include all related recurring charges, nonrecurring charges (e.g., ordering and installation charges) and usage charges.

See, Taylor/Vasington (VNJ) Direct, at 3 and 9, note 2.

18. The record shows that Rate Counsel sought the reclassification of local exchange service offered to business customers with two or more lines as non-competitive. Baldwin (Rate Counsel) Direct, at 26; Baldwin (Rate Counsel) Reply, at 4, 50. Rate

Counsel was denied the opportunity to support such reclassification by the denial by the Board of its discovery requests.

19. The record shows that the Board Staff:

- conducted no independent discovery on the parties,
- no cross on any of the witnesses,
- failed to respond to discovery served by Rate Counsel, and
- conducted no investigation at all in this proceeding.

20. The record shows that at the hearing BPU Commissioners asked questions of AT&T witnesses and did not ask questions of Rate Counsel's witness.

STATUTORY CRITERIA

A) EASE OF ENTRY/BARRIERS TO ENTRY

21. The record shows pursuant to the Horizontal Merger Guidelines that in order to assess ease of market entry an agency must apply a three-part analysis of the market which includes an assessment of the timeliness of entry, the profitability of entry, and the sufficiency of entry. The Guidelines note that:

- Entry may not be sufficient, even though timely and likely, where the constraints on availability of essential assets, due to incumbent control, make it impossible for entry profitably to achieve the necessary levels of sales.
- Also, the character and scope of entrants' products might not be fully responsive to the localized sales opportunities created by the removal of direct competition among sellers of differentiated products.
- Access to control is a barrier to entry (Merger Guidelines §§ 1.32, 3.0)

Horizontal Merger Guidelines, Department of Justice and the Federal Trade Commission, issued April 2, 1992, revised April 7, 1997, ("Horizontal Merger Guidelines").

22. The record shows that “[p]ricing below cost discourages others from entering the market. Aron Cross, Transcript, 3/19/07, p. 195, at 13-14). AT&T elaborates, “[n]obody wants to enter a market where they have to compete with an established provider who is pricing below cost.” (Aron Cross, Transcript, 3/19/07, p. 195, L. 24 – p. 196, L.1).
23. The record shows that there is no ease of entry for CLECs in the basic local exchange service market. Because the vast majority of CLEC-served lines rely on Verizon’s wholesale facilities, CLECs are vulnerable to increases in wholesale rates. Wholesale Advantage, a commercially “negotiated” rate, is substantially more expensive than the UNE-P it replaces. Because of the increase in the cost of necessary inputs, the cost of entry is greater than it was before, making it virtually impossible for a CLEC to compete with the ILEC provider on price. In fact, the record demonstrates that rates for basic local exchange services provided by CLECs are higher than rates for similar services offered by Verizon NJ. *See* Attachment B to Direct Testimony of Susan M. Baldwin, and **Attachments 1 (analysis of 9 CLECs) and 2 (additional Tariff filings by Verizon and CLECs) hereto annexed (containing various recent tariff filings showing increased rates)**.
24. The record shows that entry based on CLECs’ own switching facilities (UNE-L) is on the decline. (See the table below.) Similarly, UNE-P (“wholesale advantage”) and resale is on the decline.
25. The record shows that the decline in ILEC wireline services is not due to an increase in CLEC-served wireline alternatives. The record is clear that CLECs do not serve the entire state. Moreover, the data show that although Verizon’s retail lines have declined, the vast majority of customers continue to rely on wireline service for connection to New Jersey’s public switched network. **See Table Below.**

Lines VNJ Provides to CLECs

	VNJ lines	Lines VNJ Provides to CLECs			Total
		Resold	UNE-Loops	UNE-P	
12/31/2005	4,502,403	86,278	79,873	824,001	990,152
6/30/2006	4,372,090	72,845	72,220	584,976	730,041

Sources: FCC, *RBOC_Local_Telephone_Dec_2005.xls* and *RBOC_Local_Telephone_June_2006.xls*.

Note: This table is based on the FCC's public *Selected RBOC Local Telephone Data*, and provides a similar break-down to that provided by Verizon in its Form 477 reports.

B) PRESENCE OF OTHER COMPETITORS

1) Misrepresentation of Line Loss

26. The record shows that consumer demand for additional lines has declined in the past four years. AT&T relied on FCC ARMIS data to show that from December 2003 to December 2005, additional lines account for 47% of the loss in Verizon's total residential lines. AT&T response to RC-ATT3-5.
27. The record shows that demand for special access has increased substantially during the same time period as the retail line loss. Business customers are migrating from Verizon's retail local exchange lines to special access lines. *See* Table 2 below:

Table 2
Verizon NJ Interstate Special Access

Year	Number of Special Access Lines
2001	2,724,625
2002	2,876,421
2003	3,921,076
2004	4,235,953
2005	13,400,006

Source: FCC ARMIS Report 43-08, Table III, Row 410.

However, the record clearly shows that AT&T and Verizon failed to:

- provide data on whether line losses were due to disconnects of secondary lines which were replaced by other Verizon services
- specify how many customers replaced Verizon retail wireline service with Verizon wireless service (RC-VNJ-72)
- provide information on the reasons for customer disconnects
- provide studies or surveys of disconnecting customers (cf AT&T).
- explain the reasons for retail line loss (See RC-VNJ-2-41 and RC-VNJ-2-42.)
- adjust wireline loss to reflect win-backs and the acquisition of MCI
- track whether disconnecting business lines are migrating to interstate special access
- provide the number of customers lost as opposed to line loss

See Verizon NJ response to RC-VNJ-57(t).

28. The record shows that demand for special access has been increasing dramatically, which could explain some of the decline in demand for business retail lines. Baldwin (Rate Counsel) Reply, at 30-31.

29. The record shows that Verizon NJ's rates for intrastate services are distorted and

excessive, and therefore cannot be relied upon to constrain the rates, service quality, or terms and conditions of CLEC offerings. Baldwin Direct (Rate Counsel), at 14.

30. The record shows that Rate Counsel requested information on gross margins. Such information was denied, and yet is relevant to show Verizon NJ's ability to exercise market power.

2) Misrepresentation of CLEC Sampling/ Other Suppliers

31. The record shows that the sample of nine CLEC providers presented in Table 1 of Dr. Aron's testimony cannot be considered "like or substitute services" because these CLECs do not offer services in all geographic areas of New Jersey, and in some cases the providers listed rely on the ILECs facilities.

32. The record shows that the sample of nine CLEC providers presented in Table 1 of Dr. Aron's testimony cannot be considered "like or substitute services" because the relevant services offered by these companies are available only at prices substantially higher than Verizon's. *See* Tariff Table below. Exhibit ___ to the Rate Counsel's Initial Brief.

33. The record shows that:

- websites are not reliable sources of information for prices that consumers are charged; only filed tariffs give complete pricing information.
- Tariffs are not readily available to consumers, *See*, Aron Cross Transcript dated 3/21, 2007, at para. 347, lns. 17-23.
- The lack of consumer knowledge is a market failure which justifies and requires a continuation of economic regulation.

34. Attachment 1 based on publicly filed tariffs, summarizes these nine CLECs' residential rates. The nine attached pages provide more detailed summaries of these CLECs' rates for residential basic local exchange service as set forth in their tariffs. In addition to monthly and initial nonrecurring rates, CLECs also charge for other fees.

35. Recently, Broadview decreased its discount for its "Business Bonanza" service, which

effectively raises rates. Broadview also introduced late payment fees for business customers ranging between \$5.00 and \$50.00. Broadview Networks, Inc. Tariff B.P.U. NJ No. 1, Seventh Revised Page 58, Issued February 22, 2007, Effective February 26, 2006 (sic); Broadview Networks, Inc. Tariff B.P.U. NJ No. 1, First Revised Page 22, Issued February 22, 2007, Effective February 26, 2007. See Supplemental tariffs in Attachment 2 to the Rate Counsel's Initial Brief and Attachment 2 hereto.

36. The record is clear that any analysis by AT&T and Verizon which relies on E911 data is fundamentally flawed and must be ignored. AT&T and numerous other ILECs have publicly noted in filings before the FCC that E911 data:

- overstates the actual facilities as with, for example, the use of direct inward dialing ("DID"), which assigns multiple telephone numbers relative to the facilities needed to serve customer.
- can include inactive telephone numbers
- includes numbers that are not correlated with lines in service, (i.e customers may subscribe to blocks of numbers for PBX for which they have no immediate use and are set aside for possible future use).
- overstates line loss, since a single PBX trunk could support five or more stations, each with an individual E-911 listing.

See, In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160 (c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Opposition of AT&T Corp., August 24, 2004, at 9.

37. The record shows that Rate Counsel sought access to the underlying E911 data sources upon which Verizon NJ relied, but was not afforded the requested access. AT&T and Verizon did not make the E911 database available for independent review and analysis by Rate Counsel or the Board. Without third-party verification and review of the data, it should be afforded no weight.

C) LIKE OR SUBSTITUTE SERVICES

38. The record shows that pursuant to *N.J.S.A. 48:2-21.19(b)*, the availability of "like or substitute" services in the relevant geographic area must be established if a service is to

be determined competitive.

39. The record shows that the FCC has defined the relevant geographic market “as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a ‘small but significant and nontransitory’ increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change.” *EchoStar/DirectTV Order*, 17 FCC Rcd at 20606, para. 117, (citing to DOJ/FTC *Merger Guidelines* at § 1.21).
40. The record shows that the Supreme Court has recognized that even where a market clearly exists, submarkets may also exist. The Court discerned that these submarkets may themselves be relevant for antitrust action, and for purposes of further determining the existence of submarkets enumerated seven “practical indicia” of whether a submarket existed:
- industry or public recognition of the submarket as a separate economic entity,
 - the product’s peculiar characteristics and uses,
 - unique production facilities,
 - distinct customers,
 - distinct prices,
 - sensitivity to price changes, and
 - specialized vendors.

These criteria were for many years the crucial boundary markers in market definition. Brunner et al., at 85, citing *Brown Shoe Co. v. United States*, 370 U.S. 325 (1962). The Board must follow applicable federal standards under the NJ Administrative Procedure Act and these standards require the Board to follow DOJ and FCC decisions regarding the elimination of economic regulation for CLEC services. See *Brunner, Thomas W., Thomas G. Krattenmaker, Robert A. Skitol, Mergers in the New Antitrust Era, 1985.*, at 85.

41. The record is clear that the FCC engages in a similar analysis and closely examines buyers’ perception, price movements, product configuration, to wit: “when one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical.”

This record is insufficient to perform a quantitative demand analysis to estimate the likely consumer response to a small but significant change in the price of a particular service, and AT&T and Verizon failed to provide evidence as to:

- 1) the attributes and relative prices of possible competing services;
- 2) evidence that consumers view the possible competing services similarly, and have shifted or have considered shifting purchases between these services in response to relative changes in price or other competitive variables;
- 3) evidence that service providers consider the prospect of buyer substitution between services in response to relative changes in price or other competitive variables; and
- 4) the costs a consumer could incur to substitute between traditional services and services provided on an alternative platform. See, *FCC Verizon/MCI Merger Order* FN 251, citing to *DOJ/FTC Merger Guidelines* at § 1.11 and *EchoStar/DirectTV Order*, 17 FCC Rcd at 20606, para. 106

42. The Board has recognized as recently as April 12, 2006, in the merger of Verizon Communications Inc. and MCI, Inc. (“Verizon/MCI Merger Order”), that intermodal technologies do not currently serve as an economic substitute for wireline services in New Jersey’s local market for either enterprise or mass market customers. In reviewing the evidence, the Board made the following conclusions with respect to the mass market:

In the case of the aforementioned technologies except wireless, market penetration rates are very low. Thus, we are not willing to accept on this record that intermodal technologies such as VoIP, WiFi, WiMAX and cable telephony currently constrain Verizon’s wireline pricing to a meaningful degree. See, *In the Matter of the Joint Petition of Verizon Communications Inc. and MCI, Inc. for Approval of Merger*, New Jersey Board of Public Utilities Docket No. TM05030189, *Order of Approval*, April 12, 2006 pp. 33-36.

43. The record clearly shows that AT&T’s “revealed preference theory” is misapplied because it misidentifies the relevant product markets, and fails to provide evidence as to what consumers consider are substitutes. The vast majority of consumers still purchase a basic local exchange wireline service. (See Verizon responses to: RC-VNJ2-40(a), RC-VNJ-37(a) data as of September 2006).

44. The record shows that intervenors confuse the availability of services with the substitutability of service in the relevant geographic area, the wire center and cable telephony is not an affordable alternative. Customers have dropped second lines but continue to use wireline.
45. The record shows that while the demand for wireless and broadband is growing the vast majority of New Jersey consumers continue to rely on a wireline connection to New Jersey's public switched network provides evidence that wireline is a separate relevant market. See, *In The Matter of SBC Communications Corp., and AT&T Corp., Inc., Applications for Approval Transfer of Control*, WC Docket No. 05-65, *Memorandum Opinion and Order, rel.* November 27, 2005; *In The Matter of Verizon Communications Inc., and MCI, Inc., Applications for Approval of Transfer of Control*, WC Docket No. 05-75, *Memorandum Opinion and Order, rel.* November 17, 2005; and *In The Matter of AT&T and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, December 29, 2006
46. The record is clear that the FCC has defined the relevant product market as "the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a 'small but significant and nontransitory increase in price.'" Horizontal Merger Guidelines, issued by the US Department of Justice and the Federal Trade Commission, (Apr. 2, 1992, revised Apr. 8, 1997) §§ 1.11, 1.12 (*DOJ/FTC Guidelines*); See also *EchoStar/DirectTV Order*, 17 FCC Rcd at 20605-6, para. 106.

1) Misidentification of Product Market

47. The record shows that AT&T and Verizon have failed to properly define the relevant product markets (Baldwin Rebuttal, at 18, 24-25). As set forth by the FCC, there are three relevant product markets for mass market consumers:
- local market;
 - long distance market; and
 - bundled local and long distance services market

(Baldwin Rebuttal, at 16-17, citing FCC Verizon/MCI Merger Order, at paras. 83-84;

and FCC SBC/AT&T Merger Order, at paras. 82-83.) the FCC stating at para. “Based on the record in this proceeding and consistent with the *SBC/AT&T Order* and the *Verizon/MCI Order*, we identify three relevant product markets for our mass market analysis: (1) local service; (2) long distance service; and (3) bundled local and long distance service. **Also, consistent with those orders, we consider both the demand for “access” and demand for “usage” when defining our relevant product markets.**

48. The record shows that a significant percentage of customers do not buy bundles. Of those who do buy what Verizon calls bundles, many are buying local service and long distance service only. These customers are not candidates for alternatives that rely on a broadband platform RC-VNJ-15 (proprietary information) provides the data as of September 2006.
49. Vertical features are part of the local service relevant product market. Package counts are not accurate or complete. The record shows that Verizon NJ provides data under a title of “package line counts by category.” However the data under September 2006 is for the percentages of local, toll, and/or long distance package customers with DSL. Verizon NJ provides the information for the percentages of customers with local and toll packages that also have DSL. See Verizon supplemental response to parts f-g of RC-VNJ-15. Moreover, DSL is an information service and is not part of the relevant product market.
50. The record shows data collected by TNS Telecoms ReQuest Consumer Survey reporting that slightly over 50% percent of residential wireline customers in Verizon’s New Jersey service area have selected a service plan that bundles at least local and long distance and may include other services such as video and/or broadband Internet service is not relevant to the product markets under consideration. See Verizon response to RC-VNJ2-9.
51. The record shows that Verizon misuses the words “package” and “bundle” in its analysis of the three statutory criteria. Verizon NJ did not provide detailed data about consumer demand.
52. The record shows that AT&T’s and Verizon’s pursuit of bundles, instead of

constraining rates, terms and conditions for local exchange and vertical services, actually *jeopardizes* rates, terms and conditions for local exchange and vertical services.

53. The record shows that the presence of bundles does not discipline a la carte services and indeed puts them at risk. Triple play bundles in no way constrain the rates, terms, and conditions of basic local exchange service. In fact, the industry's eagerness to serve the high volume triple play customer makes a la carte customers much more vulnerable to neglect and rate hikes. Baldwin (Rate Counsel) Rebuttal, at 51.
54. The record shows that AT&T has failed to demonstrate that New Jersey consumers view intermodal products as affordable like or substitute services for basic local exchange service. Baldwin (Rate Counsel) Rebuttal, at 13-15.
55. No New Jersey specific data exists in the record that shows how many residences have cut the cord. Wireless users that have cut the cord are the only wireless customers that should be considered as part of the local wireless service product market. The record shows that the price for wireless service exceeds that for wireline service. The average monthly household expenditure on local exchange service in 2005 was \$36 compared to \$74 average for wireless service. Therefore, wireless is not a substitute for wireline. (Federal Communications Commission, *Trends in Telephone Service*, February 2007, Table 3.2. The average monthly expenditures include only those households billed for service.) See AT&T Exhibit 6.
56. The record shows that Legacy AT&T quoted CEO Whitacre as stating that "wireless is not going to displace the wireline network" and is "*never* going to the substitute." He elaborated that "[r]eliability is one reason." *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Opposition of AT&T Corp., August 24, 2004, at 18, citing Business Week Online, Oct. 20, 2003 (emphasis added by AT&T).
57. The record shows that Tom Tauke, the executive vice president of public affairs, policy and communications, Verizon Communications, Inc., in discussing Verizon's proposal for universal service reserve auctions in high-cost areas, stated that a reason for having

both a wireline and wireless subsidy recipient is that “most consumers in America today would like to have access to wireline voice as well as wireless voice, that they really think both are important and critical.” (Baldwin Rebuttal, at 31, citing *Telecommunications Reports, State NewsWire*, “Verizon calls for broadband inventory, USF ‘reverse auction,’” February 13, 2007).

58. The record shows that the FCC recently concluded in the Verizon/MCI Merger proceeding that “the record does not present credible evidence that mobile wireless services have a price constraining effect on all consumers’ demand for primary line wireline services.” In addition, the Commission observed that the “average cost for mobile wireless services appears to be higher than for wireline local service” which “may make it not price competitive for consumers.” (Baldwin Rebuttal, at 30, citing FCC Verizon/MCI Merger Order, at fn 276, para. 90, and fn 268).
59. The record shows that the FCC in its most recent order approving the merger of AT&T Inc. and BellSouth Corporation, noted that “approximately 6 percent of households have chosen to rely upon mobile wireless service for all of their communications needs.” (*In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, FCC WC Docket No. 06-74, *Memorandum Opinion and Order*, Rel. March 26, 2007, at para. 96. See, also, footnote 282 acknowledging the argument that wireless services are, in most cases, a complement, not substitute for wireline services put forth in the Baldwin/Bosley Declaration on behalf of the New Jersey Ratepayer Advocate.)
60. The record shows that the services to which Dr. Aron refers are not affordable “like or substitute services” and are not reasonably interchangeable with basic local exchange service. Dr. Aron describes stand-alone cable-based voice services at rates of \$54.95 and \$49.95, and she also describes stand-alone VoIP service at a rate of \$39.95. Aron Rebuttal (AT&T), at 4-5.
61. The record shows that the FCC has determined that VoIP is an interstate service and is not part of the relevant product market for the mass market. See, *The Minnesota Public Utilities Commission, et. als. v. Federal Communications Commission, etc., Petitions for Review of an Order of the Federal Communications Commission*, NO. 05-1069, 2007 U.S. App. LEXIS 6448.

62. The record shows that in the recent *AT&T BellSouth Transfer of Control* matter the FCC declined to include “over-the-top” VoIP services in its product market analysis finding that:

- The requirement that a consumer have broadband access to be able to use certain over-the-top VoIP services affects its substitutability.
- Specifically, for consumers who do not already have broadband access service, the subscription fee to obtain it must be added to the subscription fee for the over-the-top VoIP service when weighing it against the price of traditional wireline local service, which could make substitution uneconomical.
- Even for consumers who have broadband service, their willingness to subscribe to over-the-top VoIP service instead of wireline local service will vary with the attributes of the service and their willingness to trade service characteristics for lower prices.
- Although it is likely that some portion of mass market consumers view certain over-the-top VoIP services as substitutes for wireline local service, there is insufficient information in our record to determine which types of over-the top VoIP services should be included in the product market.

(In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, FCC WC Docket No. 06-74, Memorandum Opinion and Order, Rel. March 26, 2007, at para. 94; and FCC citing to New Jersey Ratepayer Advocate Baldwin/Bosley Declaration, at paras. 116-117).

63. The record shows that the rates for intermodal services to which Dr. Aron refers are as much as three times higher than Verizon NJ’s rate for basic local exchange service. Baldwin (Rate Counsel) Rebuttal, at 25-30.

64. The record shows that AT&T relies upon Dr. Taylor to define the relevant product market and Dr. Taylor has misdefined the relevant product market.

65. The record clearly shows that CLECs’ wireline alternatives are not offered throughout the state, are not always offered to residential customers, and typically are not like or substitute services. Furthermore, customers often are required to purchase bundled offerings and cannot purchase a la carte basic local exchange service. Baldwin

Rebuttal (Rate Counsel), at 68. For example, effective March 30, 2005, TalkAmerica grandfathered its stand-alone local exchange service, and, therefore, only offers it to existing customers. *Id.*, at 68, footnote 134, TalkAmerica “offers basic local exchange service only as part of a bundle or package of telecommunications services to small business and/or residential customers.” *Id.*, citing TalkAmerica NJBPU Tariff No. 2, Section 6, Original Page 6, January 30, 2007. The bundled packages are priced significantly above Verizon NJ’s rates. *Id.*, citing TalkAmerica NJBPU Tariff No. 2, Section 6, pages 8-15. *See* CLEC sample analysis, Attachment 1 hereto.

66. The record shows that although Verizon relies on consumer demand as evidence of substitutability of service, Verizon failed to provide access to consumer demand data. *See, e.g.,* RC-VNJ-2-54 (data about consumer demand, bundled offerings); RC-VNJ-2-55 (regarding TNS sample); RC-VNJ-2-56 and 57 (information about Verizon NJ consumers); RC-VNJ2-66, parts h, i, j, k, and l (data about consumer demand, consumers’ purchasing decisions).

67. The record shows that AT&T has not presented any customer surveys to support their contention that consumers view intermodal services as like or substitute services. *See, Nurse Cross, Transcript, 3/19/07, p. 82, L. 10-12; Aron Cross, Transcript, 3/19/07, p. 211, L. 21-24).*

68. The record shows that Verizon failed to provide the requested information and/or failed to provide the underlying information that would allow Rate Counsel to conduct its own analysis on the demand for primary versus additional lines. This information is vital as it bears on various issues raised in the proceeding including but not limited to:

- the validity and weight that should be afforded Verizon’s elasticity study;
- the merits of Verizon’s proposed product definition (bundled and a la carte);
- the presence of competitors and like or substitute services; and
- consumers’ ability to migrate to other suppliers in the face of a rate increase.

See, RC-VNJ-2-51, RC-VNJ-2-66, e.g., parts (h) through (l), and RC-VNJ-2-67 .

69. The record shows that AT&T witness Dr. Aron testified that for residential offerings she “looked at AT&T, Verizon, Embarq, Trinsic 1-800, RECONEX and ACN

Communication Services,” and that for business offerings, she “looked at AT&T, Verizon, Embarq, Broadwing, InfoHighway, Communications Services, Access Point, and Trinsic.” (Aron Cross, Transcript 3/21, p. 351, L. 2-7).

70. The record clearly shows that intervenors have failed to demonstrate the availability of like or substitute services. AT&T’s witness, Dr. Aron, provides a sample of CLEC offerings in New Jersey in order to substantiate her position that services provided by CLEC and by the ILEC are “reasonably interchangeable, and all compete with each other.” (Aron Direct, at 23). (Aron Cross, Transcript 3/19/07, p. 182, L. 20-25; see also, Aron Cross, Transcript, 3/21/07, p. 350, L. 21 - p. 251, L. 14). She provided the sample to demonstrate that all CLEC and ILEC services are within the same product market and the like or substitute services requirement of the statute is met.
71. However, the record shows that the sample of nine CLEC providers presented in Table 1 of Dr. Aron’s testimony undermines AT&T’s position that all CLEC and ILEC offerings should be considered like or substitute services. Not all of the providers offer services in all geographic areas of New Jersey, and in some cases the providers rely on the ILECs facilities. See Attachment 1 hereto.
72. Broadwing Communications, LLC’s tariff indicates that local exchange service is provided in “limited geographic areas,” and “full service versions of the Company’s Local Exchange Services will be provided to Customers, at Customer premises located in these areas pursuant to this tariff to the extent that: (a) the Company has in-place and available network facilities extending to such premises; or (b) the Customer’s premises is served by a new Jersey Bell Telephone company or any Other Telephone company of New Jersey wire center at which the Company maintains a collocation arrangement and is able to reasonably employ such arrangement to interconnect to unbundled exchange link facilities which the company...”
73. The record shows that Access Point, Inc.’s services are available “subject to availability of facilities and equipment” in the Verizon, NJ ILEC service areas.
74. It is clear from Dr. Aron’s sample that the services provided by the companies are not like or substitute services given the vast range of prices and target customers. For example, 4 Connections LLC, a carrier offering services to other carriers, ISPs, city and

state governments, and medium to large commercial entities does not provide like or substitute services to the offerings of 1-800 RECONEX, Inc., a reseller of prepaid residential telephone service targeting customers that have been denied service by local telephone company for nonpayment. (Aron Direct, at Table 1.) Furthermore, 4 Connections, LLC states on its website that is “maintains a carrier neutral position and does not compete as a service provider.”

75. Dr. Aron notes that “[w]hat is critical from an economic standpoint is that the ultimate determinant of where products are competitive substitutes is whether they ‘have the ability – actual or potential – to take significant amounts of business away from each other.’” (Aron Direct, at 23) AT&T has failed to provide evidence on this point. Of the nine carriers presented in Dr. Aron’s testimony, only four provide residential services.

76. Dr. Aron contends that “where pricing information is available, [she] found that prices among CLECs and ILECs are competitive.” (Aron Direct, at 26) Dr. Aron does not provide any pricing information, however. The Rate Counsel’s review of the websites of providers listed in Dr. Aron’s testimony does not bear out AT&T’s position. ACN Communications Services, Inc. provides services to residential customers, but prices for local exchange service start at \$22.95 per month. (http://www.acninc.com/acn/us/products/Local_Calling/residential/index.jsp accessed March 27, 2007). The lowest priced plan from Trinsic, another provider of residential services cited by Dr. Aron, is its “Value” plan offering unlimited local service and fifty long distance minutes starting at \$32.99 per month. (<http://www.trinsic.com/res/home.jsp> accessed March 27, 2007). The service offered by 1-800 RECONEX, Inc. is \$57.56 per month. (<http://www.trinsic.com/res/home.jsp>

2) Geographic Market

77. The record clearly shows that a geographic market is “the area of effective competition ... in which the seller operates and to which the purchaser can effectively turn for supplies.” *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

78. The record demonstrates that the relevant geographic market over which the Board should evaluate the statutory criteria for residential and single line business is the wire

center or smaller and for two or more business lines, the geographic market is not larger than the wire center and no smaller than the location of a customer. (Baldwin Rebuttal, at 39-41.)

79. The record shows that both AT&T and Verizon expert witnesses acknowledge that competitive entry does not occur on a statewide basis (Taylor/Vasington Reply, Appendix B, at 5 stating: “This may be due to greater competitive entry in these potentially more lucrative areas.”; and Aron Reply, at 11).
80. The record shows from data provided by Verizon that competition varies on a wire center basis and that a statewide analysis masks geographic variation. (RC-VNJ-2 Proprietary attachment, VNJ2-Tables, at page 17 summary.)
81. The record clearly shows that as recently as January 30, 2007, the FCC relied upon the wire center as the relevant geographic market in its analysis in examining the level of competition in the Anchorage, Alaska study area for purposes of a forbearance petition. (Baldwin Rebuttal, at 40-41 citing *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, FCC WC Docket No. 05-281, *Memorandum Opinion and Order*, Rel. January 30, 2007, at para. 14.)
82. The record shows in the Verizon/MCI Merger Order, the FCC stated:

As with special access and enterprise services, we conclude that the relevant geographic market for mass market local, long distance, and bundled local and long distance services is the customer’s location. We then aggregate customers facing similar competitive choices. As explained below, because of limitations in the data in the record, we analyze local, long distance, and bundled local and long distance service for SBC’s franchise area within each state.” (Baldwin Rebuttal, at 17 citing FCC Verizon/MCI Merger Order, at para. 98. See, also, FCC SBC/AT&T Merger Order, at para. 97).

AT&T relies upon the geographic market definition of Verizon and Verizon provided no granular data to support the statewide geographic market. By improperly defining the relevant product markets Verizon’s position that the geographic market is the entire state is misdefined and unsupported.

83. The record shows that the wire center, or smaller area, for the mass market is the appropriate geographic market. Rate Counsel sought detailed information about CLEC presence on a wire center basis. See, e.g., RC-VNJ3-22, Verizon NJ failed to provide granular data in the appropriate geographic market so as to show compliance with the three statutory conditions in response to confidential RC-VNJ-37(a). With the identities of the CLECs masked, no independent assessment of whether the CLECs are still in business, whether they offer service to residential customers, in which communities they offer service, and whether they offer stand-alone local exchange service can be made.
84. The record shows that Verizon NJ provided data by population density. See file entitled "Proprietary VNJ2-Tables," Tab Page 17 Source data. The fact that wire centers are in the same population density category does not mean that consumers have same competitive options. The presence of a competitive carrier in one rural area in New Jersey (should there be such an instance) does not mean that consumers in a totally different part of the state have the option of subscribing to that carrier's service.
85. The record shows that AT&T and Verizon have failed to provide evidence of the presence of competitive carriers. The fact that simply because a wire center is in the same population density category does not mean that consumers have the same competitive options. A competitive carrier in one rural area in New Jersey (should there be one) does not mean that consumers in a totally different part of the state have the option of subscribing to that carrier's service. See Proprietary VNJ2-Tables [This was provided in electronic PDF format] Tab Page 17 Source data .
86. The record shows that for the most rural areas, there is a disproportionately low level of line loss which implies that there is little to no competition from other carriers in these areas. See Proprietary VNJ2-Tables [This was provided in electronic PDF format] Tab Pages 18-19 Source data .
87. Many of the CLECs shown in Verizon NJ's response to RC-VNJ-37(a) serve de minimus quantities of lines (Verizon says it does not track customers).

88. Verizon NJ's response to RC-VNJ-37(a) is not disaggregated by wire center.
89. Verizon NJ response to RC-VNJ-38(i), specifically the highly confidential attachment, is not disaggregated by wire center.

3) Distortion of Market Competitiveness

90. The record shows that pervasive market imperfections prevent a finding that services are competitive in New Jersey. As AT&T has observed in other regulatory proceedings, excessive intrastate access charges distort local exchange markets. This fundamental and significant distortion prevents the development of effective, economically efficient local competition and prevents a finding that services are competitive. Interstate access charges are will above costs in New Jersey.
91. As AT&T has observed in other regulatory proceedings, excessive intrastate access charges distort local exchange markets. Verizon NJ's intrastate access charges are \$0.019197 per minute and its interstate access charges are \$0.038394. This fundamental and significant distortion prevents the development of effective, economically efficient local competition and prevents a finding that services are competitive.
- See, (Bell Atlantic-New Jersey, Inc. Tariff B.P.U.-N.J.-No. 2 Access Service, Sections 3 and 6. The Verizon Telephone Companies, Tariff F.C.C. No. 1 Access Service, Sections 3 and 6. In The Matter of the Board's Review of Unbundled Network Element rates, terms and Conditions of Bell Atlantic-New Jersey, BPU Docket No. TO00060356, Compliance Filing by Verizon New Jersey, November 12, 2002, Appendix A to Pricing Attachment, referenced in Petition of AT&T Communications of NJ, LP v. Verizon, NJ, Inc., et seq., Seeking an Immediate Reduction in Verizon NJ Inc.'s, Intrastate Carrier Access Rates, BPU Docket No. TR03100767.*
92. The record shows that the testimony presented in this proceeding acknowledges that competitive entry does not occur on a statewide basis (Taylor/Vashington Reply, Appendix B, at 5 stating: "This may be due to greater competitive entry in these potentially more lucrative areas," Aron Reply, at 11).
93. The record shows that data provided by Verizon NJ confirms Rate Counsel's position

that competition varies on a wire center basis and that a statewide analysis masks geographic variation. (RC-VNJ-2 Proprietary attachment, VNJ2-Tables, at page 17).

94. The record shows that Rate Counsel provided examples of various market failures that merit Board oversight. Baldwin (Rate Counsel) Reply, at 52-54; Baldwin (Rate Counsel) Rebuttal, at 69-72.
95. The record shows that AT&T and Verizon NJ do not address the concerns that Rate Counsel raises about issues such as billing disputes, and other consumer protection issues. (Baldwin Rebuttal at 68-72).

4) Inevitable Harm To New Jersey Consumers

96. The record shows that AT&T will increase its rates to harvest its customers. Furthermore AT&T's merger synergies exceed the company's original predictions. AT&T originally forecast \$15 billion in merger synergies from merging with legacy AT&T, but has saved \$18 billion. AT&T merger synergies from all mergers are now \$40 billion, and those savings are not resulting in lower rates. AT&T's margins are not reflective of a sufficiently competitive market, i.e., in the fourth quarter of 2006 AT&T's profit margin was 34.4 percent, an increase from the fourth quarter of 2004 margin of 23.4 percent. "Tall in the Saddle at AT&T: Smallest of the Bells Has Become the Giant Under Whitacre," *The New York Times*, March 27, 2007, C1, C-4.
97. AT&T has proposed a cap on Lifeline, but the cap is higher than the present AT&T rate, which is above Verizon's Life line rate. The most vulnerable customers will be harmed and all other ratepayers will have no protection from increases in rates.
98. According to AT&T, if a CLEC service is competitive that does not necessarily mean that the ILEC service is competitive. (Nurse Cross, Transcript 3/19, p. 142, L. 16-24).
99. AT&T also concedes, however that "[i]f there is a substantial market failure, regulation would be appropriate." (Nurse Cross, Transcript 3/19, p. 99, L. 19-20).

100. The record demonstrates that there are market failures. Competitive classification would place consumers at serious risk of probable rate increases and possible service quality deterioration. The record shows that granting the intervenors' request would contribute to the establishment of a two-tier system of telecommunications, with preferential treatment for high volume and broadband customers (the triple play and quadruple play customers).
101. The record shows that if the Board reclassifies residential and single line business, basic local exchange service as competitive, rates will be raised by CLECs.
102. The record shows that market failures exist that preclude the Board from making CLEC services competitive, these are:
- Verizon has the ability to exercise market power, and its rates are below cost,
 - Reclassification of all services will result in interstate access charges subsidizing intrastate access charges, (interstate access is the only rate regulated service and that service is above cost than residential and single line business rates if reclassified it would be subsidized which is inconsistent with the statute), and
 - ILEC prices are not constraining CLEC prices and CLEC prices cannot constrain ILEC prices.
 - Consumers do not know how to obtain access to tariffs.
 - AT&T will harvest its customers and discriminate between in-region and out of region customers. For example, on March 29, 2007, AT&T filed a tariff revision increasing the Primary Interexchange Carrier (PIC) change charge to \$10.00, effective on May 1, 2007. The current rate for Verizon NJ is \$2.50 and for Embarq the rate is \$3.00. See Attachment 2 hereto for the tariff filing.
103. Reclassification of a service cannot occur if there is market power. According to Dr. Taylor local exchange service is priced below cost, and economic regulation remains necessary.

PROPOSED CONCLUSIONS OF LAW

1. Pursuant to *N.J.S.A.* 48:2-21.19(b), the record shows that the Board cannot classify CLEC services as competitive because:
 - The record is devoid of any evidence that consumers have like or substitute services, as the alternatives which both AT&T and Verizon NJ describe are distinctly and significantly inferior to the ILEC's local exchange services.
 - There are substantial barrier to entry, as Verizon uniquely controls the invaluable access to lines, access to capital is limited and many CLECs are not pursuing residential customers.
 - AT&T and Verizon NJ have failed to demonstrate that reasonable alternatives to "substitute or like services" exist.
 - The dominant carrier's rates do not constrain CLECs' rates, nor do CLECs' rates constrain Verizon's ability to raise prices and to sustain the price increases which undermines AT&T's and Verizon's assertions of competition in the market and proves that Verizon NJ retains and continues to exercise market power.
 - Both AT&T and Verizon have failed to properly define the relevant markets.

2. AT&T and Verizon NJ have failed to show (sustain their burden of proof) that the existing CLEC market and services in New Jersey warrant these services to be classified as competitive.
 - The evidence presented to the Board by AT&T and Verizon fails to demonstrate that the statutory requirements for classifying a service as competitive have been met.
 - Verizon NJ and AT&T only supplied data with respect to residential and single line business and no data was provided for the other services for which classification as competitive is sought.
 - Verizon NJ has market power in its provision of services to New Jersey consumers, and, therefore, the presence of competitors is lacking and the Board cannot therefore classify CLEC services as competitive and should continue to regulate

CLEC services as a non-competitive, rate-regulated service.

- The record unambiguously demonstrates Verizon NJ's market power, and based upon AT&T's internal documents and data responses shows that Verizon rates do not constrain CLEC rates and once CLEC services are deemed competitive, service quality will be compromised.
- The record shows that AT&T and Verizon failed to perform and or submit 1) elasticity studies, 2) cost data in support of its filings, and 3) failed to demonstrate that CLEC services in New Jersey meets the three-part statutory requirement for classification as competitive service.

3. The alternatives that AT&T and Verizon NJ describe are not like or substitute services that constrain Verizon NJ's market power.

- The purported alternatives are different and/or inferior, and are often higher-priced. AT&T and Verizon NJ have failed to submit cost data, in order to assess whether market power exists and/or whether super competitive profits are being earned. AT&T and Verizon NJ failed to provide information about consumers' demand choices.
- The relevant geographic market encompasses the wire center or smaller for mass market and the individual location but no larger than a wire center or smaller than an individual customer for multiple business lines. The relevant product market does not include non-wireline alternatives. *See Findings of Fact*, at ¶¶ 46, 47, 48.

4. The Board is under "a duty to go behind the figures... and get at the realities," *Public Service Coordinated Transport v. State*, 5 N.J. 196, 218-219.

- AT&T and Verizon NJ have failed to provide empirical support or evidence in support of the reclassification of CLEC services. As a result, AT&T and Verizon NJ have failed rebut the evidence offered by Rate Counsel which supports a finding that CLEC services in New Jersey continues to be a non-competitive service and have failed to rebut the verifiable harms to customers in the area of potential price increases and diminished service quality that New Jersey consumers are likely to suffer should the Board find that CLEC service is a competitive service.
- The findings and holdings of the FCC in the *Verizon/MCI Merger Order and EchoStar/Direct TV Order*, the DOJ/FTC *Merger Guidelines* and by the Supreme

Court in *Brown Shoe Co.*, clearly demonstrate that in making a valid analysis it is crucial to consider the: 1) buyers' perception, 2) price movements, 3) product configuration, and 4) sellers' perception. AT&T and Verizon NJ have 1) improperly defined the relevant market 2) proposed alternatives that are outside of the relevant market and may not be considered, 3) submitted no data regarding buyers' perception, 4) failed to conduct any analysis regarding price movement and impact on the consumer, and 5) failed to submitted clear and current information on product configuration.

5. As a matter of law and in light of the dearth of accurate and relevant data submitted in this proceeding the Board cannot at present, classify any CLEC service in New Jersey as competitive for any CLEC.

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