BEFORE THE
STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O Application of Bell Atlantic-New Jersey, Inc. for Approval of a Modified Plan for an Alternative Form of Regulation and to Reclassify All Rate Regulated Services as Competitive Services	**:**	BPU Docket No. TO99120934

BRIEF AND APPENDIX IN SUPPORT OF
MOTION TO DISMISS VERIZON NEW JERSEY INC.'S PETITION
ON BEHALF OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

REDACTED VERSION

BLOSSOM A. PERETZ, ESQ.
Division of the Ratepayer Advocate
31 Clinton Street - 11th Floor
P.O. Box 46005
Newark, New Jersey 07101
(973) 648-2690

HEIKKI LEESMENT, Deputy Ratepayer Advocate
CHRISTOPHER J. WHITE, Asst. Deputy Ratepayer Advocate
JOSE RIVERA-BENITEZ, Asst. Deputy Ratepayer Advocate
JOSHUA H. SEIDEMANN, Asst. Deputy Ratepayer Advocate
ELANA SHAPOCHNIKOV, Asst. Deputy Ratepayer Advocate
BRIAN M. WONDRACK, Legal Consultant
On the Brief

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PROCEDURAL HISTORY

See Appendix 1 attached hereto for the Procedural History.

STATEMENT OF FACTS

See Appendix 2 attached hereto for the Statement of Facts.

I. LEGAL STANDARDS FOR MOTION TO DISMISS

The legal standards for a motion to dismiss are found in N.J.A.C. 1:1- 1.1(a) which states in relevant part that "[s]ubject to any superseding Federal or State law, this chapter shall govern the procedural aspects pertaining to transmission, the conduct of the hearing and the rendering of the initial and final decisions in all contested cases...", and in N.J.A.C. 1:1- 12.1 which sets out the procedures for filing a motion. As the N.J.A.C. does not contain standards specific to the filing of a motion to dismiss, the applicable standards are set forth in Civ.Rul. 4:37-2 (b) which governs involuntary dismissal. The rule states that following the conclusion of presentation of evidence on all matters by the petitioner, a motion may be made for dismissal of the action or of any claim on grounds that upon the facts and the law, the petitioner has shown no grounds for relief.[1]

As described below, at the conclusion of its case, Verizon has failed to meet the statutory standards for the relief that it seeks, namely approval of its CTP. Accordingly, Verizon's Application in this proceeding should be dismissed by the Board. The Ratepayer Advocate, pursuant to Rule 4.37-2(b), does not hereby waive any of its rights to offer evidence in the event that this motion is not granted.

The Ratepayer Advocate respectfully submits that Verizon did not present any evidence upon which approval of its petition may be granted under N.J.S.A. 48:2-21.18, and 48:2-21.19(b).[2] Pursuant to Civ. Rul. 4:37-2(b), the standard of review for dismissal is stated clearly, that the reviewing court (here the Board) must

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[1]/ At Trial - Generally. After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in the plaintiff's favor. N.J. Civ.Rul. 4:37-2(b).

[2]/ See Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

examine the evidence, together with legitimate inferences which can be drawn therefrom, and determine whether the evidence could have sustained a judgment in favor of the party who opposed the motion. Thus the Board is required to accept as true all evidence supporting the petitioner's claim and accord Verizon the benefit of all reasonable inferences.[3] Appropriately, the Board's concern is not with the worth, nature or extent of the evidence, but rather with its existence beyond a scintilla, as viewed most favorably to the petitioner.[4]

As shown throughout this brief, Verizon has failed to provide evidence for each and every service it seeks to have reclassified as competitive. Indeed, the Ratepayer Advocate and President Tate raised similar concerns as to the existence of evidentiary support for the existence of competition for each of Verizon's rate regulated services. Similarly, with no credible evidence to support its proposed rates as claimed in its insufficient cost studies - which are material components of Verizon's proposal - Verizon has simply failed to meet the evidentiary standards necessary for survival of this motion to dismiss.

II. ARGUMENT

A. Verizon Has Failed to Meet the Standards Required for Reclassification of All its Rate Regulated Services as Competitive.

The Ratepayer Advocate has moved before the Board to dismiss the pending petition of Verizon in its entirety, based on a variety of legal infirmities in this filing. The proposal is premature, anticompetitive, incomplete, and counter to the public interest. It would also severely hamper the ability of CLECs to compete against Verizon for customers in the mass market. This Board has time and again stated its goal and intention of achieving a vigorously competitive telecommunications market in New Jersey, a goal equally sought and supported by the Ratepayer Advocate. The approval of this petition, on the basis of the proofs submitted in this record and the state of the telecommunications market as it currently exists in New Jersey will not only fail to advance the cause of competition in New Jersey, but will instead ensure that markets that are currently

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[3]/ See Bell v. Eastern Beef Co., 42 N.J. 126 (1964); Bozza v. Vornado, Inc., 42 N.J. 355 (1964); Walsh, et al. V. Madison Park Properties, Ltd., 102 N.J. Super. 134 (App. Div. 1968).

[4]/ See Dolson v. Anastasia, 55 N.J. 2, 5 (1969); Tannock v. New Jersey Bell Telephone, 223 N.J.Super. 2, 6 (1988); Cameco, Inc. V. Gedicke, 157 N.J. 504 (1999); Teilhaber v. Greene, 320 N.J. Super. 453, 462 (App. Div. 1999).

competitive, such as the IntraLATA toll market, perhaps the shining competitive success in telecommunications, will again become dominated by the incumbent monopoly carrier, Verizon New Jersey. The Board must not let this happen.

B. Verizon's Competitive Telecommunications Plan Fails to Demonstrate that Each of the Minimum Statutory Requirements Set Forth in N.J.S.A. 48:2-21.19(b) Necessary for Reclassification of Services as Competitive is Satisfied Based on Competitive Market Conditions that Exist in New Jersey TODAY.

The legal issues implicated in the present motion are set forth in N.J.S.A. 48:2-21.19(b), which sets forth in plain and unmistakable language both the authority of the Board in reclassifying services as competitive, and the minimal standards which the Board shall employ in making that determination.

> The board is authorized to determine, after notice and hearing, whether a telecommunications service is a competitive service. In making such a determination, **the board shall develop standards of competitive service which, at a minimum, shall include evidence of ease of market entry; presence of other competitors; and the availability of like or substitute services in the relevant geographic area.** (emphasis added)

The statute is written in the present tense ("...whether a telecommunications service ***is*** a competitive service") and clearly requires the petitioning carrier to bring forth proofs addressed to the ***current*** state of the telecommunications market in New Jersey, as the sole and exclusive basis for any Board actions respecting deregulation of essential telecommunications services. Verizon has grounded its entire case on the contention that the Board is permitted to declare a service competitive ***today***, based on the assertion that there ***will be*** competition some time ***in the future***. This approach flies directly in the face of the statute, its express wording, and the clear intent of its drafters. The Legislative intent of N.J.S.A. 48:2-21.19(b) is further clarified, should any clarification of the plain terms be necessary, by reference to the entire statutory scheme, including N.J.S.A. 48:2-21.19(d) which permits reclassification of services as noncompetitive if the Board "determines that sufficient competition ***is*** *no longer* ***present*** . . .", as well as the additional authority to again reclassify a service as competitive ". . . whenever the board shall find that the telecommunications service ***has again become*** sufficiently competitive pursuant to section b. of this section, ..." N.J.S.A. 48:2-21.19(d) (emphasis added). The statute, in sub-sections (b) and (d), establishes a simple test: if the market ***is*** competitive, then services can

be declared competitive; if the market ***is not*** competitive, then services cannot be declared competitive. The Board must apply the statute in this manner, because the meaning of the statute is plain on its face, and "statutory language must always be read in its proper context."[5]

1. Ease of Market Entry.

Applying the three statutory standards individually, it is sufficiently clear that Verizon has not, and cannot, satisfy its burden of proof. With regard to the first criteria, ease of market entry, the Board has identified two essential requirements for a CLEC to have any hope of competing against the incumbent carrier; one being the availability of UNEs priced on forward looking economic cost; and the other being a functioning OSS which permits CLECs to process customer orders with the incumbent carrier (Verizon) on a seamless basis, computer to computer, as efficiently as Verizon processes its own customer orders.[6] Though the Board has hoped that parallel proceedings, in which issues related to OSS functionality and UNE pricing are being addressed, would both conclude before December 31, 2000, that no longer appears to be realistic. The UNE proceeding, which will commence hearings following conclusion of the matter *sub judice,* will apparently start sometime in December 2000 at the very earliest, and considering the number of witnesses that have already been identified by the parties, hearings will certainly require several weeks. Thus, it is reasonable to anticipate the final decision of the Board in perhaps the second quarter of 2001.

With regard to the OSS issues, the parties have not been advised that the contractor conducting the military style testing of Verizon's OSS functionality is ready to conclude the test anytime soon. Following conclusion of the test, KPMG would still have to issue its final report and the parties would have the opportunity to comment on the report before the Board can make the ultimate determination, whether Verizon's OSS is performing in a satisfactory manner. That decision will also not be issued until some time in 2001, well after the close of this record and the Board imposed deadline of December 31, 2000 for issuance of a decision on

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[5] American Train Dispatchers Assn. v. ICC, No. 94-1036 (D.C. Cir.) (1995), citing McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[6] See, e.g., "Status of Local Telephone Competition: Report and Action Plan," July 1998, BPU Docket No. TX98010010.

Verizon's pending petition.

Among other unresolved issues that will impact on the ability of CLECs to enter the marketplace, is the issue of UNE-P availability. The Board has yet to implement in New Jersey the same UNEs, and their availability as a platform of elements together (the UNE-P), that the FCC established as the minimal requirement. (T:2018 -- UNE-P pricing remains as an issue for resolution in a future docket). Though Verizon may not be at fault for the failure of these other proceedings to conclude before the end of the current year, it is patent, that, in the absence of a favorable resolution of these other matters as of the conclusion of the present case, the Company has not proven "ease of market entry," so as to permit the Board to declare all remaining rate regulated services competitive.

Although Verizon contends that competitors can use UNEs to provide service, Verizon through the cross examination of Dr. Taylor confirms that UNEs have to be offered under terms and conditions that an efficient competitor can make meaningful use of them and that if Bell Atlantic offered unbundled loops at a price at which no efficient competitor could compete, then his criteria for reclassification would not be met. T.1473-1474 where Dr. Taylor is responding to questions on RPA-44. RPA-44 is portions of the record in Maryland where Bell Atlantic sought to reclassify rate regulated service as competitive in 1996. Whether UNEs rates are offered at prices at which an efficient competitor can compete, is not yet decided. The UNEs are being set in a separate proceeding which is not yet complete. Therefore, an essential element necessary to grant Verizon's petition in the CTP a showing of "ease of market entry" remains unproven.

2. Presence of Other Competitors.

The second statutory standard requires Verizon to demonstrate that competitive carriers are in the marketplace, actively competing for Verizon's customers, ***today***. Verizon has utterly failed in this regard. The telecommunications market in the State of New Jersey, by Verizon's own admission, is currently not competitive. Verizon's CEO Dennis Bone testified that competition will occur at sometime in the future -- ". . . that free for all is going to begin in a very few months," T.72:15-16; ". . . the CLECs and carriers have pretty much stayed on the sideline with regard to residential customers . . " T.311:15-16; "[t]hey are strategically sitting on the

sidelines right now with regard to local competition" T.321:15-16; and ". . . when the gun goes off for residential, this will happen, and it's already happening all over the business marketplace." T.286:7-10. Accepting as true Verizon's assertion that competitors are "sitting on the sidelines," it is axiomatic that they are not competing and they have no competitive presence in the market. Indeed, Verizon testified that when comparing comparable data respecting residential exchange, business exchange, and local toll markets, intraLATA toll was the only market where Verizon experienced a decline. T.384:13-17. In all other markets, Verizon experienced growth, year after year, whether in number of lines added (T.185:12-13, T.385:25 to T.386.2) or revenues earned. T.384:13-17; see also AT&T-9, AT&T-11, AT&T-27 and AT&T-48. These factors certainly do not indicate that the marketplace for these services is even remotely competitive.

Mr. Bone acknowledged that presubscription increased competition for intraLATA toll. T.388:24. He testified further that its 1-800 long distance market, which is vigorously competitive, shrank from $80 million to $1 million. T.388:16-17. Mr. Bone also acknowledged that in a competitive environment, an incumbent carrier would expect to lose presubscribed lines. T.391:23. And, indeed, in New York, in a fully competitive environment, Verizon lost 1,000,000 lines to its competitors. T.394:14, 15. Yet, in New Jersey, where Verizon alleges it is facing the same competitive market forces, only 60,000 have been lost. (see RPA-10) T.394:18, 19, T.661:16 to 662:11. These figures support only one conclusion: that the marketplace in New Jersey is not yet competitive. Indeed, overall, Verizon has not suffered diminution, noting that growth in access revenues from 1996 to 1999 more than offset the reduction in toll revenues for the same period. T.646:9 to T.647.19. Further, after contending that wireless services pose a threat to landline sales, see T.413:21-23, Mr. Bone stated that it was unaware of any statement to investors regarding concern that local revenues might decline due to competitive inroads being made by wireless, T.418:1-7, or indeed of any analysis within Verizon-New Jersey showing that competitive wireless is going to "cannibalize" part of the local market, T.418:8-12.

Dr. Taylor suggests in much of its testimony that in the future there will be more substantial and vibrant competition in New Jersey. See TaylorD at 29-36.[7] In fact, Verizon states that the relevant economic question

[7] Direct testimony of Verizon witnesses is identified as "D", rebuttal as "R" and surrebuttal as "S".

for the Board to decide in this proceeding is: "will competition be sufficiently effective to ensure that Verizon cannot exercise market power by 2001 for business services and 2003 for residential and access services," the dates proposed in the CTP for the Board to relinquish all remaining control over these services. See Taylor-D at 37. Dr. Taylor reinforces this point when he states that the relevant question does not concern the ***current*** market share of a previously regulated firm (Verizon); rather, the relevant question addresses the ability of Verizon to exercise market power, *i.e.*, raise prices profitably, under the competitive and regulatory conditions that ***will be in effect once regulatory control of retail rates is ended***. See TaylorR at 6.

Verizon would have the Board abdicate its regulatory authority on the basis of the monopolist's crystal ball vision of the marketplace of the future, some two plus years away. Clearly, this could not have been the contemplation of the New Jersey Legislature when it enacted N.J.S.A. 48:2-21.19.

Indeed, this very contention was soundly rejected by the State of Maryland in a similar proceeding involving Bell Atlantic-Maryland. The Maryland Commission set forth the following criteria *inter alia,* for information that must be provided when requesting reclassification of certain telecommunications services:

- the breadth of the relevant market;
- market share characteristics of the incumbent in the relevant market;
- price elasticity of demand in the relevant market; and
- market data on the percent of customers for whom choices are available, and the number of customers who have availed themselves of those choices.[8]

In applying these criteria to the application of Bell Atlantic then pending before the Maryland Commission, it had no trouble denying the petition as failing to prove vitally important elements of its sought cause of action. The same observations can be made regarding the woefully deficient petition filed by Verizon New Jersey in this matter.

In asserting that competitors are providing service to residential customers, Dr. Taylor identified three carriers by name: Cablevision, RCN, and Conectiv. SeeTaylorD at 18. On cross examination, however, Dr. Taylor was forced to concede that none of the named carriers is providing telephone service to residential customers. See T.1336 (no facility based carriers offer POTS service); T.1343 to1344 (RCN is not providing

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[8] Re: Alternative Forms of Regulating Telephone Companies, 174 PUR 4th 120, 262 (1996) ("Maryland Alt.Reg.").

local service, RPA-42); T.1347 (Cablevision is not providing telephone service); T.1337 (Connectiv provides DSL services only). Clearly, Verizon has failed to make the case that the marketplace "presence of other competitors" requires the Board to declare competitive all remaining rate regulated services of Verizon.

Verizon's entire justification for deregulation of its residential services, is the asserted claim that "there will be" competition in 2003 and thereafter. The patent legal insufficiency of that claim cannot possibly permit the present deregulation of all residential services.

Verizon has also failed to establish that there is a sufficient level of competition in local service for the business market in New Jersey, both small and large, in order to justify complete removal of all regulatory constraints on the Company. The mere existence of CLECs certificated to provide local exchange service, or the existence of authorized resellers, does not correlate with sufficient marketplace presence of actual competitors to declare that there exists competition in any given wire center or exchange. The evidence submitted by Verizon in support of the proposition that business services are competitive throughout New Jersey is woeful and only support denial of the petition in this regard.

Verizon alleges that business services are competitive based on market analysis conducted by Mr. Shooshan. (Shooshan Direct, at 2). Verizon postulates that according to its study competitors account for 75% of the measurable telecommunications revenue in New Jersey. Id. On the basis of the Competitor's Footprint analysis, Verizon also argues that because business customers participating in the study were actively marketed to by competitors and the fact that customers are in fact procuring services to any degree from providers other than Verizon there is proof that all segments of the business market are competitive and hence ready for reclassification. He also admitted that Verizon's market share would be high if the relevant market were construed narrowly as the local exchange market. (ShooshanR at 8:19). In his opinion, issues regarding barriers to entry such as UNE pricing, OSS functionality and performance measurements need not be concluded before the Board can reclassify all business services as competitive. (ShooshanR at 12:13). He admits that while surveys are not anecdotal, his findings did include anecdotal material. (ShooshanR at 13:12-20).His definition of available substitute services is expansive and includes wirelines networks, wireless, resale and UNE based offerings

alleging that it is not necessary to show that wireless is a perfect replacement for wireline. (ShooshanR at 17.19-23; 19.15-16).

To the contrary, it is indisputable that Verizon is the dominant local exchange carrier in New Jersey and comfortably exercises the corresponding market power to its full advantage. The use of revenue streams for purposes of determining competition in the business market did not account for business size; thus, any conclusions reached on the basis of that information does not correlate to whether small, medium or large businesses are procuring local exchange service from providers other than Verizon. (T.3862:20 ;T.3867: 14-18). Indeed, the analysis suffers from grave infirmities. The study includes all Verizon wireless revenue as well as revenue from carriers providing intraLATA toll, as well as interLATA toll. (ShooshanD at 18). On cross-examination, Mr. Shooshan admitted that the business market is not fully competitive. (T.3918:15-18), that as much as 88% of the study subjects did not receive a personal visit from alleged competitors (T.3930:3-11), that 93% of the study subjects did not take service from a provider other than Verizon (T.3936:6-10). He admitted that in three years of studying New Jersey he could not identify specific exchanges where customers are able to take competitive service from a competing carrier because he has not examined New Jersey on an exchange by exchange basis, but clearly stated that a reasonable approach to study the relevant geographic market, as required by statute, might focus on competitive conditions within individual exchange areas. (T.3912:15-21, T.3991:11-15). Despite those three years of reviewing New jersey markets, and in view of the fact that Verizon divides business customers into either Enterprise or General business based on billed revenue of $60,000, a competitive footprint analysis along those lines or any specific segment of the business market has not been performed. (T.3980:24-25, T. 3982:11-16, T.3983:1-4).

The weakness of Verizon's proofs in support of the petition are demonstrable. Despite his study of New Jersey markets his competitive analysis did not separately calculate business revenues from local service, for either Verizon or its alleged competitors. (T.3907:22). While suggesting that wireless is a substitute service for Verizon's local exchange service, his conclusions are based on the perceptions of his study subjects-- anecdotal references-- and not on reliable data. (T.4094:2-6). His array of study subjects consists of large business suers:

Paine Webber, Merrill Lynch, Colgate-Palmolive, and not any "mom and pops" or other smaller businesses. (T.4074:8-14). The customer interviews also do not demonstrate which services the companies are purchasing from carriers other than Verizon as there was no distinction of services procured or whether those customers were purchasing services which have already been determined competitive such as Centrex. (T.4082:21-25, T.4083:2-4). He admits that the footprint analysis includes VSAT which is not a substitute for local voice service. (T.4000:23-24). He had not analyzed the number of customers or lines served by fixed wireless providers in New Jersey (T.4085:2-5), nor had he conducted any study of the number of customers that have actually replaced their wirelines with wireless facilities-- he only reported customer perceptions. (T.4094:2-6). Customer perceptions led him to believe that Verizon could not compete on equal footing with other carriers and that Verizon was required t o go through hoops other carriers did not. (T.3966:2-7, T.3968:14-20). Earlier in history the world was perceived to be flat without substantive evidence to prove the point. Here, too, Verizon's unsubstantiated assertions that there exist like or substitute services must be rejected.

The assertion that Verizon faces competition is also unproven by the record in this matter. Verizon alleges that if we look at line loss we see customers leaving Verizon and going elsewhere. Verizon controls **BEGIN VERIZON PROPRIETARY<<*********>>END VERIZON PROPRIETARY** business access lines. (RPA-10). However, only **BEGIN VERIZON PROPRIETARY<< ******>>END VERIZON PROPRIETARY** of those lines were lost from general business lines between 1998 and July 2000. Id. Comparatively, that represents 2.2% of total business lines, exclusive of any lines won back. (T.3942:19-24, T.3950:2-10). Mr. Shooshan cannot specify which carriers customers are switching to, nor can he identify the services provided by those carriers. (T.3902:2-3, T. 4037:4-10, T.4037:15-18, T.3958:21-23, T.3984:23-25, T.3985:3). He also did not know whether any of the companies certificated to provide local exchange service have approved tariffs, knowing full well that tariff approval is a prerequisite to the provisioning of service. (T.4036:2-10).

Mr. Shooshan also fails to support Verizon's petition as he failed to review the services listed under business services which Verizon seeks to reclassify. (T.4231, 4242). Indeed, Verizon's counsel admitted that the

list of services sought to be reclassified may have been put together improperly or erroneously. (T-4239).

It is also irrefutable that Verizon enjoys market dominance due to its market power flowing from its huge market share. The clear absence of any significant competition to Verizon's local exchange product weighs heavily on the judgement of CLECs to engage an unworthy market due to the inability to turn a profit. (T-3956). Verizon's command of the business market is clear. For instance, growth in new plant investment by Verizon is greater than the total of all CLECs combined. (T.4046). The issue, then is whether a dominant company is anticompetitive. (T.3918). In the "Non-dominance" proceeding concerning AT&T before the FCC, Mr. Shooshan testified that market share can be indicative of market power and thus be classified as a dominant carrier. The analysis flows from examination of supply and demand as those principles operate to confer market power. (T.3881). While in that proceeding Mr. Shooshan advocated against a determination that AT&T was a dominant carrier, and the FCC determined that AT&T's loss of a significant market share was required before it shed that designation, he now advocates against any benchmarking or goals relative to Verizon's local exchange service market before business services are deemed competitive. (T.3953). Moreover weighing similar evidence of a competitive footprint analysis, as here, the Illinois Commission staff rejected his contention that Ameritech's business services were competitive. (T.3889), as did the Pennsylvania Utility Commission in its Global Order. (T.3891.23). While analysis of market share and market power are not referenced in the statute, he admits there is no prohibition to the Board's examination of these economic principles in this proceeding. (T.3869, T.3870, T.3871 to T.3873, T.3879).

It is clear that when challenged Verizon's petition, which stands in part on the testimony of Mr. Shooshan, is factually unsubstantiated. There could be no greater harm to the expected arrival of the competition the future holds than to grant Verizon's petition to reclassify business services on the basis of this record. Accordingly, in the absence of the substantiated factual record required, the petition fails and must be denied.

3. Availability of Like or Substitute Services in the Relevant Geographic Area.

The third standard set forth in the relevant statute requires the petitioner to prove that consumers, in a given geographic area, are able to purchase similar services from another carrier, in order for that service to be

declared "competitive." The proofs of Verizon are, if anything, even more deficient with regard to this aspect of the applicable standard. Initially, Verizon asks the Board to declare all rate regulated services competitive, throughout the state, without even acknowledging differences in the competitive landscape between urban and commercial centers, such as Newark and Jersey City, and relatively rural areas of the state, such as Salem or Warren Counties. Traditionally, when competition begins, it will manifest itself initially in the more densely populated and commercially intensive areas around our major population centers, yet the Company would have the Board presently deregulate all its services throughout its vast and diverse service territories. The overly broad brush with which Verizon makes this application, should itself be grounds for its summary dismissal of its petition.

In enacting N.J.S.A. 48:2-21.19, the Legislature recognized that not all consumers would enjoy the same competitive choices at the same time. CLECs will initially build their networks in areas where they perceive an economic opportunity to be pursued, likely to be the more densely populated areas of New Jersey. In the more rural areas of New Jersey, where the costs of emplacing facilities will, on average, cost more than in the more densely populated areas, competition may not come for many years. Indeed, absent the Board implementing a Universal Service Fund to provide assistance to carriers willing to provide alternative service in high cost areas of New Jersey, the reality is that there will likely never be competition in some insular and remote areas of New Jersey. It is precisely for this reason, and in recognition of this reality, that the Legislature included the requirement that carriers asking to have their services declared "competitive" must be able to prove that customers can obtain a competitive service "in the relevant geographic area" for which the declaration of "competitive" is sought. Verizon's filing utterly ignores this statutory requirement. Verizon would have this Board believe that, in New Jersey, competition is ubiquitous, pervasive, and vigorous -- none of which is true. Indicative of Verizon's cavalier approach to satisfying this statutory standard is its utter disregard of the statutory requirement to address competitive marketplace conditions ***in each relevant geographic area.*** Verizon has failed to prove the availability of like or substitute services for the vast majority of telephone subscribers and for the overwhelming majority of the state. Verizon CEO Bone offered only, on the basis of a flyer sent by a cable

system to a Verizon employee, that cable telephony would be offered by that cable operator sometime in 2001, but could provide no specific information regarding the relevant geographic area in which it might be available, T.678:15 to 679:11; and, even when discussing the availability of Internet-telephony as a like or substitute service, Mr. Bone acknowledged that a dial-up connection was used to access the Internet, which means that the telephoning party would have to subscribe to telephone service in order to access the Internet. T.692:4 to T.693.23. That hardly identifies Internet telephony as a competitive threat to Verizon! What the record reflects is that at present, no cable company offers telephone service in New Jersey. While Internet and wireless are currently available in New Jersey, these service complement wireline and do not serve as a replacement for wireline telephone service today.

No matter how the Board examines this issue, Verizon has not demonstrated that there is an existing competitive marketplace in New Jersey. Its very assertion that competitors are "on the sidelines," means they are not actively competing in the market. Verizon can produce no evidence of eroding market share, which, the Company concedes, is to be expected when the incumbent carrier is faced with real competition. Though Verizon affirmatively alleges that the CTP is intended to promote competition to the local exchange marketplace, Verizon's "noble intentions" and desire to be the spokesperson for the CLEC industry should be received with extreme skepticism. The truth is that competition is developing much more slowly in New Jersey than in other industrialized states, and the ability of Verizon New Jersey to place burdens on its potential competitors and slow-roll the competitive process has achieved its intended aim-- we have no competition in New Jersey and there is no real prospect of competition in the near future unless the Board takes affirmative action to emplace procompetitive regulatory policies and aggressively remove impediments to competition. The premature deregulation of Verizon, with 99% of the residential market and some 96% of the business market, will not promote competition in New Jersey.

C. Verizon's CTP Fails to Demonstrate Compliance with the Criteria of N.J.S.A. 48:2-21.19(b) for Each of the More than 90 Services for Which it Seeks Reclassification.

N.J.S.A. 48:2-21.19(b) sets forth standards that the Board must ensure are met before a telecommunications service can be declared competitive. When interpreting and applying this statute, the Board

must look to the plain language of the particular provision, as well as the language and design of the entire statutory scheme.[9] N.J.S.A. 48:2-21.19(b) states that "[the Board is authorized to determine, after notice and hearing, whether ***a*** telecommunications ***service*** is competitive." N.J.S.A. 48:2-21.19(b) (emphasis added). **The statute states clearly that the Board's investigation must proceed on a service-by-service basis, that each service must be found to meet the criteria required before a service can be declared competitive.** For each service, the statute continues, the Board must consider, *at a minimum*, evidence of ease of market entry, the presence of other competitors, and the availability of like or substitute services in the relevant geographic area. Id. Verizon's petition must be dismissed for failure to prove its case because the structure of Verizon's petition and proposal does not address nor provide evidence to support that ***each*** service that it seeks to be declared competitive can meet these criteria. Verizon's petition is structured by a brief proposal that ***all*** of its rate regulated services be declared competitive. Nowhere in the presentation of its case, whether through direct, rebuttal, or other testimony, or on cross examination, did Verizon present evidence with regard to all the many services, or, indeed, that even generally, the local telecommunications market is competitive. Though Verizon consistently spoke to competitive markets that will develop in the future, none of its references in this respect addressed the some 90 enhanced services which the Company would have the Board deregulate as of January 1, 2001. But, as the statute clearly sets forth, competition must exist ***at the time the service would be declared competitive***. No provision in the statute exists for the reclassification of services in the absence of competition, or in anticipation of speculative market changes. The need to examine the Verizon proposal on a service-by-service basis is in accord with action taken by the Maryland Public Service Commission.[10]

D. The Plan is Incomplete Because it Fails to Provide Essential Information Regarding the Specific Provisions of the CTP.

1. The CTP Cannot be Evaluated Fairly by the Board Because the Vertical Features to be Included Have Not Been Identified.

The Board must dismiss Verizon's CTP petition for failure to present a *prima facie* case because Verizon

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[9] Bethesda Hospital Assn. v. Bowen, 485 U.S. 399, 403-405 (1988).

[10] Maryland Alt.Reg. at 258.

has not provided evidence related to key elements of the plan. Verizon has failed to verify the vertical services that would be bundled mandatorily as part of RBES, has not provided sufficient detail regarding the revenue neutral rate rebalancing involved in the CTP, and has not addressed adequately the treatment of second lines, leaving that issue, like the others, open for future development. In short, in presenting its case to the Board, Verizon has proposed a plan with a glaring absence of indispensable details.

Mr. Bone has testified that no decision has yet been made as to the three vertical services that consumers will be required to accept as part of the new RBES under the CTP. T.137:18-22, T.541:6-10. He has stated that he is seeking a consensus from the parties, which has not yet been achieved, T.545:19-25, though the Company has identified the vertical services that it will ***not*** bundle with the package. T.544:2-20. Further, though Mr. Bone testified that the Company seeks a consensus and a review of the evidence in this proceeding before Verizon makes the final determination as to which specific vertical services will be included in the compulsory package, T.138:15-25, T.545:19-22, the Company was uncertain as to how a consensus against bundling would be addressed, T.141:8-9, and perhaps would not be considered by Verizon at all. T.139:8-9.

Verizon's lack of specificity leaves the Board to pass judgment on a plan whose form and content is unknown. Verizon's petition presents half of the story by designating only the vertical services that will not be included, while offering the Board no fair opportunity to review the plan by not revealing the services that will be included. In truth, there ***is*** no plan, because Verizon has stated that it would look to a consensus that would arise out of this proceeding before providing the specific details. T.137:25 to T.138:2, T.543:15-19, T.545:19-21. The Board cannot rule on half a plan, with gaping holes and voids. Accordingly, Verizon's petition must be dismissed for failure to prove its case.

2. Verizon Has Not Provided Sufficient Detail Regarding the Revenue Neutral Rate Rebalancing.

The Verizon petition must be dismissed because it has not provided any details regarding the revenue neutral rate rebalancing component of the CTP. CEO Bone has apparently deferred final consideration of rate rebalancing structure until after the hearings, stating ". . . let's go through these hearings and let's hear the position of all of the parties and hopefully it will be clear to Board about exactly where we can do that."

T.124:15-18. Stated differently, there is no rate rebalancing structure before the Board for review. Verizon has identified only "targets" and "areas" that would be considered, T.559:1-25, leaving the Board in this area, like the vertical services [not] described above, to approve a plan whose form, content and lack of crucial detail is simply not ready for serious Board consideration. At best, groups have been identified, but "particular rates in particular services" have not been identified, and therefore not only *have* not, but *cannot*, be presented to the Board for review. See T.566:22 to T.567:7, T.817:23 to T.818:2. In Mr. Bone's own words, there are "open ended questions" in its proposal. T.554:5-16. Verizon has not presented a complete proposal to the Board that can be reviewed and evaluated. Accordingly, the Verizon petition must be dismissed for failure to present a *prima facie* case.

3. The Verizon Proposal Does Not Provide Adequate Information About the Treatment of Second Lines.

The Verizon petition must be dismissed because it fails to provide adequate information about the treatment of second lines. This detail, like others in the Verizon plan, has been left open ended. See T.551:19 to T.554:16. Whether the second line, which conceivably would be utilized for computer or other purposes that would not benefit from vertical features, would be saddled with the services and fees associated therewith remains, in the testimony of Mr. West, "an open issue." T.778:21-23

The treatment of second lines, and the ripple effect that rate structuring for them could have on the rebalancing of rates for other services, is yet another integral element that Verizon has failed to provide to the Board. The Board has not even had the ability to fully review Verizon's plan, because Verizon has failed to address with specificity key elements of its proposal. As described above, Verizon has not stated which vertical services would be bundled with RBES; Verizon has not provided conclusive information on how it would price second lines; and Verizon has not provided sufficient details of the revenue neutral adjustment. It is functionally impossible for the Board to evaluate a plan that is so void of details and that does not in reality exist. The lack of information regarding the specific vertical services that would be bundled with RBES and the treatment of second lines is material to the Board's evaluation of the CTP under the criteria established by N.J.S.A. 48:2-21.18. These criteria demand that the Board examine, *inter alia*, whether a PAR ensures affordability, produces

just and reasonable rates, engenders competitive or consumer disadvantage, reduces regulatory delay and cost, and is in the public interest. But the Board cannot make this evaluation if the details of the structure of the plan have not been provided to the Board. The identification of the vertical services speaks instantly to the issue of just and reasonable rates; the treatment of second lines also speaks to affordability. Both elements are determinative in the Board's evaluation of whether the plan is in the public interest. As whole, the skeleton of this plan without the relevant details renders impossible the Board's ability to review it. Verizon has failed to present the Board with a complete case that meets the standards set for review.[11]

Verizon has provided a laundry list of services and has asked the Board to declare the entire list competitive, without regard to identifying and then supplying statutorily-mandated proof with regard to how each service meets the criteria demanded by the statute. The language of the statute is clear -- the Board must make a finding of these criteria with regard to each individual service that is to be declared competitive. Verizon offers no evidence to support the reclassification of the other 87 plus rate regulated services encompassed by its CTP.[12] Yet, it asserts that the three minimum standards set forth in N.J.S.A. 48:2-21.19 are met.

4. Verizon Failed to Provide Cost of Service Studies for Nearly All Of the 90+ Services Which it is Asking the Board to Reclassify as Competitive.

As discussed above, Verizon seeks to reclassify all remaining rate regulated services (over 90 plus services) as competitive services under N.J.S.A. 48:2-21.19. On August 8, 2000 Commissioner Carmen J. Armenti issued a letter to all parties reconfirming that all responsive testimony shall continue to be due no later than close of business, August 9, 2000 with one exception which permitted the Ratepayer Advocate a 9 day extension to otherwise file Dr. Lee L. Selwyn's supplemental testimony. Commissioner Armenti also instructed Verizon to "file a cost of service justification with supporting testimony for all proposed rates contained in the CTP, no later than August 11, 2000." The Ratepayer Advocate interpreted this letter as requiring the submission of traditional cost of service studies for all services which Verizon is asking the Board to reclassify

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[11]/ Cf. I/M/O the Petition of MCI Telecommunications Corporation for Authorization of IntraLATA Competition and Approval of Certain Tariffs, 263 N.J.Super 313 (1993).

[12] See RPA-37 which identifies all of the rate regulated services that Verizon seeks reclassification for.

as competitive. On August 11, 2000, Verizon filed various TSLRIC cost studies sponsored by Mr. Garzillo.[13]. The filed cost studies only address cost of service related to Verizon's RBES proposal and provide no cost information regarding the other 90+ services covered by the pending petition. Verizon did not provide traditional cost of service studies for each of the 90 plus services that is seeks to reclassify as competitive services.[14]

The statutory scheme creating the Board of Public Utilities and delineating its powers states in unmistakable terms that rates approved by the Board must be "just and reasonable." N.J.S.A. 48:2-21(b)(1); N.J.S.A. 48:2-21.18(a)(2). Under well settled New Jersey law, the justness and reasonableness of a rate can only be determined after three factors are considered: an examination of the Company's property valuation, which constititutes its rate base; determination of its legitimate expenses, including taxes and an allowance for depreciation; and the rate of return developed by relating its income to the rate base (collectively referred to as the "Rate Setting Factors").[15]

Cost of service studies for each service that Verizon seeks to reclassify as competitive are essential to any determination that each of the 90 plus services should be reclassified from rate regulated to competitive. Reclassification is premised upon the fact that competition can replace regulations because competitition will ensure rates are just and reasonable. See N.J.S.A. 48:2-21.16. Such reclassification determination must rest on an examination of each service which necessitates having the Rate Setting Factors identified for each service. Then, each rate currently set by tariff can be compared to its cost and the stutory standards for reclassification can be applaid to each service.

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[13] Specifically, Verizon filed Garzillo direct (GarzilloD) on August 11, 2000 which provided cost service studies for dial tone line, local usage cost study, CO switched Services cost study, and IntraLATA toll study message telecommunications service cost study. On September 8, 2000, Verizon filed Garzillo rebuttal (GarzilloR). On October 12, 2000, Verizon filed Garzillo surrebuttal (GarzilloSR).

[14] Dr. Selwyn in his supplemental direct testimony at page 3 criticized Garzillo's TSLRIC cost studies as being non responsive to the Board's request for cost of service studies. Dr. Selwyn states that based upon economic theory, embedded cost is the proper measure for determining fair and reasonable prices in a cost of service study. Dr. Taylor in his surrebuttal at page 17 states that the Board should reject an embedded cost of service study as advocated by Dr. Selwyn. See TaylorSR at 17.

[15] See In Re Intrastate Industrial Sand Rates, 66 N.J. 12, 327 A.2d 427 (1974); Public Service Coord. Trans. v. State, 5 N.J. 196, 74 A.2d 589 (1950)

A thorough review of Verizon's rates has not occurred since at least 1985. That is a period of more than fifteen years. Reclassification should not and cannot proceed without first having cost of service studies for all rate regulated services. Verizon simply has failed to provide the necessary cost of service studies. Therefore, Verizon has failed to establish a prima facia case. Dismissal is warranted at this time. Additionally, the premature reclassification of all remaining rate regulated services can have substantial anti-competitive consequences which interferes with the underlying premise that competition can replace regulation.

Verizon has simply not produced sufficient cost of service studies for the Board to assure itself that removal of all regulation will not enable Verizon to overprice services where they face little if any competition and offer price reduction in those areas where they face competition. Verizon has not shown that competition is ubiquitous in each and every wire center in New Jersey for each and every service it seeks to reclassify. With over 90 plus services, the potential for discriminating against consumer is overwhelming. Verizon's petition must be dismissed as being inadequate.

E. The Deregulation of All Remaining Rate Regulated Services, While Verizon New Jersey Is A Dominant Carrier With Immense Market Power, Is Antithetical to the Public Interest and Will Impede the Board's Efforts to Promote Competition in the Telecommunications Market.

A dominant carrier is a carrier with market power. Market power is defined as the ability to price substantially above the competitive level and to persist in doing so for a significant period without erosion by new entry or expansion;[16]

In order to demonstrate a lack of market power, i.e, that Verizon is no longer a dominant carrier, the Ratepayer Advocate submits that Verizon must show: (1) that its market share in each wire center for each service is such that Verizon is not the dominant carrier; (2) that Verizon's elasticities of demand and supply are high and not inelastic in each wire center; (3) that Verizon's market share in each wire precludes Verizon from deterring or foreclosing competitive entry by anticompetitive practices; (4) that Verizon's prices for each service is free of subsidies and not below costs; (5) that Verizon is experiencing sufficient competition, i.e., substantial competition in each wire for each service, and (6) the trends in market share evidence substantial erosion of

[16] See llA Philip E. Areeda, Herbert Hovenkamp & John L. Solow, Antitrust Law P 501 at 86 (1995)

market share now and not in the future. See Appendix 3 for summary of the FCC finding that Verizon is a dominant carrier with market power. See TaylorD at 41 and TaylorSR at 15-18. Dr. Taylor states unequivocally that residential local exchange service is below cost and otherwise subsidized in New Jersey. T.1522 to T.1523, T.1527 to T.1528, and T.1536. See GarzilloD at 6-7; GarzilloSR at 3, and RPA-80 which is Verizon's response to DRA 8-2, Attachment to Exhibit A, shows that residential local service is subsidized and is below cost. See T.4565 to T.4567, and T.4590, where Verizon through Dr. Taylor states residential is subsidized, i.e., below cost in New Jersey and see T.4556 where Verizon through Dr. Taylor states that the Verizon's bundled proposal is below cost.

Verizon suggests that in the future there will be more substantial and vibrant competition in New Jersey. See TaylorD at 29-36. In fact, Dr. Taylor states that the relevant economic question for the Board to decide in this proceeding is: "will competition be sufficiently effective to ensure that Verizon cannot exercise market power by 2001 for business services and 2003 for residential and access services," the dates proposed in the CTP for the Board to relinquish control. See TaylorD at 37. Dr. Taylor reinforces this point when he states the relevant question does not concern the current market share of a previously regulated firm (Verizon); rather, the relevant question addresses the ability of the firm to exercise market power, *i.e.*, raise price profitably, under the competitive and regulatory conditions that **will be in effect once regulatory control of retail rates is ended**. See TaylorR at 6.

Specifically, Verizon through Dr. Taylor opines that a proper market power analysis examines what would happen to a company's demand and to competitive supply, if the company sought to raise prices above competitive level. Dr. Taylor acknowledges that he has no supply and demand elasticity studies for even the three services covered by his testimony let alone studies on the other 87 rate regulated services which Verizon has petitioned to be reclassified as competitive. See T.1387 to T.1388 where Dr. Taylor acknowledges that market power is defined in terms of market share, and elasticity of supply and demand; T .1455:56, T.1531 to T.1533 and T.4547 to T.4548 where Dr. Taylor acknowledges that no supply or demand studies were performed by Verizon including the three services covered in Dr. Taylor's testimonies; T. at 1482 where Dr. Taylor

acknowledges that in Maryland a reclassification of rate regulated service to competitive requires determination of the elasticity of demand in the relevant market.[17]

If rates are below cost, a competitive market cannot occur because a competitor is unable to price its service at or below a subsidized price and make a profit.. See T.1323 to T.1328 where Verizon through Dr. Taylor acknowledges that competitors cannot compete with Verizon if rates are below cost. See T. 4565 to T.4567, and T.4590, where Verizon through Dr. Taylor states residential is subsidized, i.e., below cost in New Jersey and see T.4556 where Verizon through Dr. Taylor states that the Verizon's bundled proposal offered in the CTP is below cost. Assuming, arguendo, that Verizon's current rates as well as proposed RBES rates are both below cost, the bundling and repricing requested by Verizon will not benefit competition.

The FCC has declined to find Verizon non-dominant in special access and high capacity dedicated transport and has continued its regulation of these services. Certainly on the basis of this record, with Verizon holding 93% market share of the business market and 99% of the residential market, Verizon continues to possess immense market power and cannot be cut loose from regulation. See RPA-16 at 21 which identifies what the FCC sees as anticompetitive practices that could arise from premature deregulation of BOCs, including Verizon.[18]

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[17] Maryland uses a seven step test which requires the petitioner to provide the following information: (1) the breadth of the relevant market; (2) market share characteristics of Verizon in the relevant market; (3) available evidence on the ease of market entry and exit; (4) factors that facilitate or inhibit the ability of entrants and competitors to expand capacity and capture sales; (5) factors that facilitate or inhibit the willingness to switch providers; (6) the price elasticity of demand in the relevant market; and (7) market data on the percent of customers for whom choices are available and the percentage who have availed themselves of choice.

[18] See RPA-16 at page 21 where the FCC held:

> Absent a sufficient showing of competition, it's clear that the regulation of the BOC petition special access and high capacity transport services is necessary to protect consumers. Without such regulation and in the absence of competition, the BOC petitioners could discriminate against certain consumers by charging higher rates to those that lack competitive alternative.
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> For example, without our rate structure and rate level regulations, the BOC petitioners could engage in strategic pricing by offering reductions in rates for special access and high capacity dedicated transport services where they face competition, and higher rates for these services where they face little competition. This sort of strategic pricing discriminates among consumers not on the basis of cost characteristics but on the basis of availability of competitive alternatives. It deters entry by competitors. As we concluded in the pricing flexibility order, relaxation of our rate structure and rate level rules must be structured to prevent exclusionary pricing behavior so as to safeguard the development of competition. Similarly, because the BOC petitioners had failed to show that competition will constrain anti-competitive conduct by them, the public interest is

Based upon the complete failure of Verizon in this proceeding to show that it no longer is a dominant carrier, i.e, that it lacks market power, Verizon's CTP plan must be dismissed. In fact compelling evidence exist in the record; to wit RPA-14 wherein Verizon admits that it has monopoly power ("How quickly will the ILEC's monopoly position erode with key customers sets-business, high-end residential?") ("For how long will ownership of 'last mile' facilities continue to generate superior economic returns?"). The unrefuted evidence based upon the FCC proceedings is that Verizon has market power and remains dominant in the local exchange and exchange access markets. Couple this fact with the complete absence in this record of any evidence of supply and demand elasticities for each of the 90 plus services, let alone the three services for which evidences was offered, a *prima facie* case has not been made. Verizon has stipulated on the record that the only services they sought to be deregulated which they support in their proofs are residential exchange, business exchange and carrier switched access. T.1428.

Verizon acknowledges that its competitors are serving very few customers. CLECs serve through the use of their own facilities approximately 134,000 lines (based upon E 911 listing)[19] and approximately 100,320 lines by resale. See TaylorD at 5-6. Although Verizon alleges that numerous alternatives exist for the local loop including fixed wireless, cable TV, and wireless mobile services, and the availability of local number portability demonstrates that facilities-based carriers can enter the market (TaylorD at 11-17), the facts show (1) that no cable company is providing telephone service today in New Jersey, that (2) although anecdotal evidence suggests that the national penetration rates for customers who have replaced wireline with wireless service is between 2 and 4%, no showing has been made that wireless is priced at or below Verizon rates, and that (3) the three

> best served by the continued regulation of special access and high capacity dedicated transport services which was designed to foster competition for these services. For these same reasons, we do not believe that forbearance from dominant carrier regulation will promote competitive conditions in the market for special access and high capacity dedicated transport services.

[19] See TaylorD at 20 which states that E911 listing exists in only 85% of the Verizon's 180 rate exchange areas in New Jersey.

CLECS (Cablevision, RCN and Conectiv.[20] See TaylorD at 18), which Verizon asserts price residential service below Verizon's tariffed prices, do not offer service today to residential customers.

Additionally, Verizon admits through Dr. Taylor that local exchange service is inelastic. T.1530:6-25 and T.1531:1-25. In addition, Dr. Taylor acknowledges that Verizon has not determined what the profit maximizing rate would be for local residence service in New Jersey. T.1533:11-18. The profit maximizing rate is the rate that competitors must be able to price at or below. Under economic theory, an inelastic service means that demand will not be affected by price increases. In a market for an inelastic service such as telephony, a carrier needs less market share to exert market power than would otherwise be required for a service whose demand is elastic. This inelasticity of local exchange service reinforces the conclusion that deregulation of Verizon on the basis of the record established in this proceeding would be entirely inappropriate.

Verizon's CTP is premised upon the assumption that if the market is open to competition, then all rate regulated services can be reclassified as competitive. Verizon seeks to end all regulation by the Board so that Verizon will have pricing flexibility for its services. Verizon proceeds from a flawed premise that open to competition means the market is fully competitive. Verizon acknowledges that the degree of regulation is commensurate with the degree of competition in the marketplace. If there is not effective competition in a given market, continued regulation is appropriate and necessary to protect consumers.

On cross examination, Dr. Taylor confirmed that the degree and extent of regulation is directly related to the extent of competition in the market place. N.J.S.A. 48:2-21.19(d) permits the Board to reclassify a service from competitive if the Board concludes that sufficient competition is no longer present. When N.J.S.A. 48:2-21.19(b) is read in conjunction with N.J.S.A. 48:2-21.19(d), a service cannot be classified as competitive if the market is merely open to competition. The market has to have sufficient competition, i.e., there have to be competitors in the market.

Dr. Taylor also concluded that a sufficient showing of competition is necessary to protect consumers.

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[20] On cross examination, the record shows that residential service is not being provide by any of the three CLECs. See T.1336 to T.1337; T.1343 to T.1344; and T.1347.

A fully competitive market suggests that there must be competitors for the services offered by Verizon, including like and substitute services offered by others which can substitute for the services that Verizon offers. In this case, Verizon contends that telephony by cable, wireless and the Internet constitutes like and substitute services and their presence in the marketplace will increase in the future.

Verizon would have the Board presently deregulate the Company, on the unsupported assertion that there will be competition in the telecommunications marketplace at some point in the future. So long as Verizon possesses market power, as it most certainly does this present moment, the Board must not deregulate the Company. The worst of all possible worlds is the creation of an unregulated monopoly, which is what Verizon would become, were this petition to be granted. It would be bad for consumers of telephone services, both business and residence; bad for competition; and bad policy for the state. It bears noting, that the two jurisdictions which have permitted their incumbent local exchange carriers to enter the long distance market because their local exchange markets were fully open to competition (New York and Texas), have not considered it necessary to deregulate the incumbent carrier, nor to double and triple residential exchange rates, in order to open their markets to competition. In both of these jurisdictions, the Commissions imposed a three year price cap on existing tariffed rates as the appropriate regulatory response during this transition period to full competition. The Board would be well served to heed the example set by our sister states. Verizon is asking this Board go substantially further than the Texas and New York Commissions have felt the need to go (total deregulation), while the Company retains an absolute monopoly on the network and a stranglehold on the customer base, and New Jersey lags far behind behind most of the country in promoting real competition.

F. The Proposal of Verizon-New Jersey to Package IntraLATA Toll Calling, a Competitive Service, with Residential Exchange Service, a Monopoly Service, Constitutes an Unlawful Tying, in Violation of Both Federal and New Jersey Antitrust Law.

One of the most significant issues raised throughout this proceeding, is the issue of bundling. The CTP proposes to redefine RBES to include three vertical services and 25 minutes of Toll calling. This bundling of services necessarily implicates antitrust and tying concerns that must be reviewed in order for the Board to determine that the CTP is not anticompetitive and thus in the public interest. As set forth below, the CTP is

violative of both the Sherman Act and the New Jersey Antitrust Act

Tying is *per se* illegal under both the federal Sherman Act and the New Jersey Antitrust Act. 15 U.S.C. §§ 1-7; N.J.S.A. 56:9-1 *et. seq.* Tying is defined as the selling of a product to a buyer on the condition that the buyer purchase additional services from the supplier.[21] Thus coercion is a component of tying and stems from the supplier's abuse of its market power over the tying product to force the buyer to purchase products or services the buyer does not want or need. This type of coercion is especially egregious when the tied product is a lifeline service such as POTS. Tying arrangements are disfavored because the seller is able to advance sales in the tied product for reasons other than the product's competitive merits.[22] Since Verizon has not propounded any evidence that illustrates that competition exists for all of its rate regulated services (including vertical services), the record is devoid of any evidence related to the competitive merits of these services. In order to have an illegal tying, monopoly power is not required, though Verizon-New Jersey certainly has monopoly power over residential exchange service. The seller must have "appreciable economic power" in the tying product market and the arrangement must affect a substantial volume of commerce in the tied market[23]. Verizon has not provided any evidence to dispute the fact that it posses "appreciable economic power." Indeed, as stated earlier in this brief, Verizon serves 96 and 99 percent of New Jersey's business and residential consumers respectively.

Under the New Jersey Antitrust Act (see N.J.S.A. 56:9-1), courts use the "rule of reason" analysis which requires an examination of the competitive and anti-competitive effect of the challenged practice under all relevant circumstances.[24] Although the New Jersey Antitrust Act exempts public utilities from provisions of the act,[25] the public utility exemption is only applicable where the Board has either expressly or impliedly authorized

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[21] See Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 45`, 461 (1992).

[22] "Tying arrangements have been found unlawful where sellers exploit their market power over one product to force unwilling buyers into acquiring another." See U.S. v. Microsoft Corporation, U.S. District Court for the District of Columbia (D.D.C.), Civil Action Docket No. 98-1232 and 98-1233, Conclusions of Law, April 3, 2000, at 33. See also, Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 12 (1984).

[23] See Eastman Kodak Co. v. Image Technical Servs., Id.

[24] See Belmar v. Cipolla, 96 N.J. at 218.

[25] See N.J.S.A. 56:9-5(3).

the anticompetitive conduct.[26] Here, since the Board has not authorized the tying of Verizon's services, this issue falls under the ambit of the New Jersey Antitrust Act. Accordingly, Verizon has failed to produce any evidence illustrating that its tying of services is not anti-competitive under all relevant circumstances.[27]

IV. PLAN FOR ALTERNATIVE REGULATION

A. Verizon Failed to Meet the Standards Necessary for the Approval of a Plan for an Alternative Form of Regulation. The CTP was offered as a Plan for an Alternative Form of Regulation, and Once Rejected, There is No Plan Before the Board and No Proof in the Record Regarding the Eight Statutory Criteria for Approval Under N.J.S.A. 48.2-21.18.

Verizon's CTP is inseparable from its alternative regulation plan. Verizon has also stated that the CTP is supposedly a modification of the existing PAR. (T.3112:16-25; T.3113:1-18). As such, the CTP must meet all eight of the statutory criteria required for its approval as an alternative regulation plan. However, to the extent that the evidence put forth by Verizon for the eight criteria is dependant upon its showing that competition currently exists, if the CTP is dismissed, then the CTP as the alternative regulation plan must be dismissed as well. However, as demonstrated below, even if the Board determines that some portion of the alternative regulation plan survives dismissal of the CTP, Verizon has failed to produce any evidence to meet the eight criteria under N.J.S.A. 48.2-21.18.

1. Verizon has Failed to Provide Any Evidence to Demonstrate that its Proposed Rates that at Least Nearly Double Existing Rates are Affordable to All Classes of Customers.

As an alternative regulation plan, the CTP must meet both the competitive reclassification statute pursuant to N.J.S.A. 48:2-21.19(b) as well as all eight of the statutory criteria pursuant to N.J.S.A. 48:2-21.18. As demonstrated below, Verizon has failed to produce any evidence for each of the eight criteria.

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[26] See State v. Scioscia, 200 N.J.Super. 28, 490 A.2d 327 (A.D. 1985), certification denied 101 N.J. 277, 501 A.2d 942.

[27] It should also be noted, that the proposed bundling may be inconsistent with the FCC 's dialing parity order and the regulations that implement it. The FCC developed Federal Standards for implementing dial parity including toll dialing parity. See Second Report and Order and Memorandum Opinion and Order, FCC 96-333 (rel. August 8, 1996). The rules issued under that order was stayed by the 8th Circuit but the Supreme Court reinstated those rules. These rules apply. Section 51.205 requires that BA-NJ provide local and toll dialing parity to competing providers of telephone exchange service or telephone toll service, with no unreasonable dialing delays. Dialing parity must be provided for all originating telecommunications services that require dialing to route a call. Verizon's filing does not even address this issue. Since Verizon has not established that its proposal is consistent with state or federal law, its CTP should be dismissed. For an indepth discussion of antitrust concerns as applied to dialing parity, see SelwynD at 68-81.

N.J.S.A. 48:2-21.18 (a)(1) unequivocally states the Board may approve an alternative regulation plan only if it finds that the plan will "ensure the affordability of protected telephone services."[28] The N.J.S.A. defines "protected telephone services" as rate regulated telecommunications services that are not competitive.

a) There is no evidence in the record with regards to affordability of Protected Services.

Verizon has produced no evidence as to which protected services will remain affordable under the CTP. The CTP proposes that *all* rate regulated (protected) services will be deemed competitive thereby eliminating the existence of protected services. Absent the protected service component, the CTP is inconsistent with the alternative regulation statute. Accordingly, the Board lacks sufficient evidence to determine which protected services are contemplated under the CTP.

b) There is no evidence in the record with regards to whether the CTP will "ensure" affordable rates.

The record is devoid of any evidence demonstrating how the CTP will "ensure" affordable rates. The CTP proposes a rate freeze for only two years once all of its services are deemed competitive. Verizon contends that two years is a sufficient amount of time for competition to develop to the point where market forces could control rates. To that end, Verizon's witness Mr. West testifies that "competition will force competitor's to set reasonable, affordable rates," (WestD at 9; WestR at 3:18-19) and that "competition is absolutely a component of [their] affordability argument..." (T.3046:11-14). However, as stated above, absent any evidence that competition currently exists, Verizon cannot demonstrate that "market forces" will ensure the affordability of rates after the rate freeze is lifted in January 2003.[29] Indeed, Verizon's witness Dr. Taylor asserts that the relevant economic question for the Board to decide in this proceeding is "will competition be sufficiently effective

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[28] N.J.S.A. 48:2-21.17 defines "protected services" as "any of the following telecommunications services provided by a local exchange telecommunications company, unless the board determines, after notice and hearing, that nay 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 or these services."

[29] As stated, according to the plain statutory language of *N.J.S.A.* 49.2-21.19(b), future prognostications of competition absent any evidence that competition exists today, cannot service as the predicate for the Board to reclassify all services as competitive under the CTP.

to ensure that Verizon cannot exercise market power by 2001 for business services and 2003 for residential and access services, the dates proposed in the CTP for the Board to relinquish control."[30] Thus, absent a showing that competition will control prices where Verizon cannot use its market power to raise rates unreasonably, there is no evidence in the record as to how the CTP will ensure affordability. Accordingly, the concept of rate rebalancing is not the appropriate mechanism for judging the affordability of Verizon's plan because it seeks to declare all rate regulated services competitive subject to market rates within the time frame of the plan.

Additionally, the evidence propounded by Verizon is deficient in that it fails to illustrate affordability of its rate increase in a real-world setting. Verizon's witness Mr. West describes affordability as a simplistic formula consisting of measuring residential service as a percentage of per capita income. (WestD at 10). Mr. West maintains that if the current RBES rate were to take up the same percent of per capita income today as in 1985 (63 percent), an affordable rate for telephone service would amount to $17.71, without value added services. (WestD at 13). Even if taken in the most favorable light, Mr. West's formula fails to illustrate whether New Jersey consumers could actually afford a rate increase of the magnitude proposed by Verizon.

Further, Mr. West's affordability formula does not take into consideration any factors truly determinative of affordability. Specifically, Mr. West's affordability model is devoid of any evidence regarding the household, inflation (such as increases in gas and electric rates), incomes of New Jersey's working poor and the non-working poor, and the fact that Lifeline assistance covers a minuscule portion of consumers. The FCC has defined the term "affordable" to include both "the absolute and relative components...in making the affordability determination..."[31] Thus, affordability includes both the "absolute" ("to have enough or the means for") and "relative" ("to bear the cost of without serious detriment") components. Absent any evidentiary showing that Verizon's proposed rate of $17.50 is affordable in a real-world model which contemplates at least some of the above factors, Verizon cannot show that New Jersey consumers have "the means for" paying the increased rate "without serious detriment." Although Mr. West echos this point when he testifies that "affordability is not only

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[30] See TaylorD at page 37.

[31] See Universal Service Order, FCC Docket No. 96-45, FCC 97-157 (May 7, 1997), at paras. 109, *et seq.*.

a function of price, its a function of the customer's ability to pay" (T.3045:21-23), he limits his affordability analysis to an improper per capita calculation which provides no evidence as to the average customer's actual ability to pay the $17.50 rate.

c) On October 30, 2000, President Tate raised a concern as to whether rebalancing of the rates undermines the issue of affordability of protected telephone service and the flexibility of customers to choose the type of telephone service they want, which may, in the near term, become a competitive service under the plan.

In order for the Board to address this concern, Verizon must have provided sufficient evidence on the issue of affordability. In addition to absence of the above factors, Verizon does not contemplate the effect of the addition of three vertical services and 25 minutes of toll, into its affordability formula.

d) Additionally, President Tate raised the issue of whether the CTP must include POTS offerings in order to be considered affordable.

The Ratepayer Advocate maintains that an accurate affordability examination over time, must include a comparison of POTS service to POTS service. Mr. West's affordability formula, however, compares apples and oranges in that he compares affordability of the current $8.19 POTS rate to the affordability of the proposed $17.50 rate which includes a bundled package of services. As the comparison of rates is inaccurate, no evidence has been provided as to whether standing on its own, the $17.50 bundled package is affordable. Since the record is devoid of any evidence dealing specifically with the $17.50 rate, the Board lacks sufficient information upon which to base its affordability decision.

e) Among President Tate's many concerns with the CTP, is whether second lines must include the entire proposed package of services.

Verizon has not considered second lines in creating any portion of the CTP. The record is thus incomplete with regard to any information dealing with affordability of second lines and whether they will include the bundled services. Although this issue is discussed later in this brief, in short, consumers using second lines solely for computer and fax use may not be able to afford second lines if they are priced at $17.50 and include bundled services they may never need or use. Verizon has thus far made no distinction between primary and secondary lines. (T.778:12-25; T.779:1-3; T.780). It should be noted that since currently, second lines are priced higher than primary lines, affordability of auxiliary lines is directly affected and must be examined on the record

for a determination to be made.

2. Verizon Failed to Prove, Through Cost Studies or Sufficient Means, that its Plan Offers Just and Reasonable Rates.

Verizon's evidence regarding the second criteria under N.J.S.A. 48.2-21.18 (a)(2) is lacking in that it depends solely on unsupported witness statements that competition in the marketplace will produce "just and reasonable rates." (WestD at 15; T.3047:6-11). The statute requires that an alternative regulation plan must "produce just and reasonable rates for telecommunications services." The burden of proof to show that its proposed rates are just and reasonable, is upon the utility.[32] As part of its proof, Verizon must provide: (2) the value of its property or the rate base, (2) the amount of its expenses, including operations, income taxes, and depreciation, and (3) a fair rate of return to investors.[33] Verizon has provided evidence (cost studies) for local, business and access services only without mention of the additional 87+ remaining services that are rate-regulated. Absent any evidence as to each and every rate regulated service, the Board does not have a sufficient basis upon which to make a determination as to as to (1), (2) and (3) above, based on the record. Consequently, Verizon has not provided evidence as to whether its rate increase is "Just and reasonable."

Moreover, the CTP is deficient in that it is inconsistent with the plain meaning of the statute which defines "telecommunications services" as rate regulated services.[34] There can be no rate regulated services if Verizon's CTP is approved since all services will be deemed competitive. Should all services be deemed competitive, the Board will not retain authority to "regulate, fix, or prescribe the rates, tolls, charges, rate structures, terms and conditions of service, rate base, rate of return, and cost of service" for these services.[35] The Board cannot therefore retain authority over rate regulated services if no such services will exist under the CTP. It follows that since the CTP is inconsistent with the alternative regulation statute, it provides no evidence with regard to "just and reasonable rates for *telecommunications services,*" and must be dismissed.

a) President Tate raised the salient concern as to whether the plan in its present

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[32] See N.J.S.A. 48:2-21(d).

[33] See In re Jersey Cent. Power & Light Co., 9 N.J. 498 at 529 (1952).

[34] See N.J.S.A. 48.2-21.17.

[35] N.J.S.A. 48.2-21.19 (a).

form creates rate shock and thereby undermines the Board's ability to find just and reasonable rates.

Rate shock is defined as a "precipitous increase in rates resulting from immediate inclusion of new plant costs in rates -- and ...the importance of rate continuity."[36] Generally, the issue of rate shock applies to gas, water, and electric utilities. However, the principle of rate shock is equally applicable in the context of a rate increase in telephone services of the magnitude proposed by the CTP.

The Ratepayer Advocate maintains that the combination of rate increase in other utilities such as gas and electric, the proposed rate increase of telephone service, and the possibility of additional rate increases once the rate freeze is lifted in 2003, can lead to rate shock. As stated above, the record is devoid of any affordability analysis with regard to factors such as inflation, causing the Board to take pause as to whether the public can absorb rate increases across all utilities.

In prior cases dealing with rate shock, the Board has recognized the usefulness of a phase-in plan for mitigating rate shock.[37] No such phase-in is recommended by the CTP. To the contrary, the CTP proposes an instant doubling of rates which will be frozen for two years, after which there is no evidence as to whether competition will develop to curb anti-competitive pricing. Moreover, the Board has traditionally acknowledged that there is a need to gradually increase rates over a period of time,[38] and that it has been repeatedly held that in considering whether rates are "just and reasonable," no single method need be followed.[39] Thus, in order for the Board to determine a proper method to mitigate rate shock, it is necessary that the record reflect evidence upon which the Board may base such a determination. Absent evidence regarding (2) the value of its property or the rate base (which must include all services), (2) the amount of its expenses, including operations, income

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[36] See *Rate-Making Trends in the 1980s*. Public Utilities Reports, Inc, at 77, (1988).

[37] See I/M/O Petition of Environmental Disposal Corporation, Docket No. WR94070319, dated July 17, 1996.

[38] See I/M/O Petition of Rockland Electric Company for Approval of an Increase in Rates, Docket No. ER91030356, dated January 23, 1992. See also, I/M/O Pennsgrove Water Supply Company Request for Rate Increase, Docket No. WR98030147, dated June 30, 1999. See also, I/M/O Seaview Water Company Petition for Authority to Increase Rates, Docket No. WR98040193, dated October 01, 1999.

[39] See Duquesne Light Co. V. Barasch, 488 U.S. 299 (1989).

taxes, and depreciation, and (3) a fair rate of return to investors,[40] coupled with the probability that such a rate increase will cause rate shock, the Board is lacking evidence upon which to determine whether $17.50 is just and reasonable.

3. President Tate was especially concerned regarding the issue as to whether POTS Must be Retained in order to Fulfill the Statutory Mandate to Prevent Undue or Unreasonable Prejudice to a Class of Consumers or Competing Providers of Services.

As for the third statutory criteria, Verizon has provided no proof that the CTP "will not unduly or unreasonably prejudice or disadvantage a customer class or providers of competitive services."[41] There is no evidence in the record showing that customers who want POTS will not be disadvantaged by having to pay for additional services. In fact, Verizon's witness Mr. West stated that a customer who does not need or want the vertical services in the package "is not going to get as much usefulness on the package as a customer who uses the main line in a more traditional vein." (T.758:19-24). According to Verizon, only **[BEGIN PROPRIETARY]** ***** **[END PROPRIETARY]** of residential customers subscribe to more than two vertical services. See RPA 6. Given this, it is clear that Verizon has failed to provide any information as to how **[BEGIN PROPRIETARY]** ***** **[END PROPRIETARY]** of customers would not be prejudiced by having to pay for services they do not need or use.

Additionally, Mr. West testified that Lifeline customers would not be required to purchase the bundled package proposed by the CTP. (T.760:17-23; T.823:19-24). Lifeline customers would thus be permitted to purchase POTS without paying for additional services. Customers that are not on the Lifeline program who do not use any vertical services would therefore be disadvantaged by having to pay for these services. Accordingly, Verizon has not provided any evidence as to how these customers would not be disadvantaged by the CTP.

Further, the CTP also fails to address the issue of second lines and whether the bundled package would only apply to primary lines. Both Mr. Bone and Mr. West testified that the CTP does not differentiate between primary and secondary lines and that this issue is still open. (T.778:12-25; T.779 to T.780). In fact, the class

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[40] See In re Jersey Cent. Power & Light Co., 9 N.J. 498 at 529 (1952).

[41] N.J.S.A. 48:2-21.18 (a) (3).

of customers that purchases secondary lines solely for data transmission via computer or fax would be disadvantaged in two ways in that they would be required to pay for services they don't use, and may be required to take the affirmative step and disable some of the services, such as call waiting. (T.757 to T.758). Thus, Verizon has not provided any evidence as to how customers that would have to disable a vertical service would not be prejudiced.

With regard to competitive providers, Verizon has not produced any evidence that shows that competitive providers can compete wire center by wire center. Additionally, Verizon retains a dominant share of residential and business customers and vertical services can only be provided by the local service provider. Verizon has not provided any evidence demonstrating how the bundling of its POTS with vertical services would not disadvantage CLECs' from competing for customers based on vertical services.

4. Verizon Has Failed to Demonstrate How the CTP Reduces Regulatory Delay and Costs.

Likewise, Verizon has failed to produce any evidence as to how the CTP would meet the fourth criteria of the statute by "reducing regulatory delay and costs."[42] Verizon's evidence consist of statements that the CTP will reduce regulatory delay and costs because it would: not be subject to significant administrative burdens and provide for price flexibility that will enable a faster introduction of new packages and services to customers. (WestD at 17-18; WestR at 5). Additionally, Verizon's argument in this regard is predicated on the existence of a competitive marketplace. (WestD at 18). However, as discussed *infra*, since Verizon has failed to provide any evidence with regards to whether a competitive market *currently* exists in New Jersey, it likewise has not provided evidence as to how a competitive market would reduce regulatory delay and costs.

Moreover, Mr. West testified that "if a service turns out not to be as competitive as you think, the Board has the ability to move it right back into the rate regulated category." (T.3115:15-20). However, if the Board approves the CTP deeming all of Verizon's 90+ rate regulated services as competitive in the absence of market competition, the Board would have to engage in a lengthy hearing process to reclassify these services as rate-

[42] See N.J.S.A. 48:2-21.18 (a) (4).

regulated.[43] Consequently, the evidence presented simply illustrates that regulatory delay and cost will shift to reclassifying services as rate-regulated in the absence of competition. There is thus no evidence in the record upon which the Board can determine how the CTP "reduces" regulatory costs and delays.

5. Verizon has Not Demonstrated that the Repackaging of Services, Increased Rates and Elimination of POTS, is in the Public Interest.

Verizon asserts that its CTP is the public interest. However, the record in this case shows the opposite. N.J.S.A. 48;2-21.16b(1) sets forth the underlying legislative policy behind the portion of the 1992 Act which authorizes reclassifications of a rate regulated service to a competitive service. N.J.S.A. 48:2-21.16b(1) provides:

> b. Legislature further finds and declares that:
>
> (1) In a competitive market place, traditional utility regulation is not necessary to protect the public interest and that competition will promote efficiency, reduce regulatory delay, and foster productivity and innovation.

This declaration supplements and implements the general policy set forth in N.J.S.A. 48:2-21.16a. That general policy includes the following:

> (1) Maintain universal telecommunications service at affordable rates.
> (2) Ensure that customers pay only reasonable charges for local exchange telecommunications services, which shall be available on a non-discriminatory basis.
> (3) Provide diversity in the supply of telecommunications services and products in telecommunication markets throughout the State.

See N.J.S.A. 48:2-21.16a(1), (2), and (4).

Verizon's CTP eliminates customer choice by precluding the purchase of POTs, mandates the bundling of vertical services that more than 40% of customer do not subscribe to today, and increases the price customers must pay if they want telephone service. As a result, New Jersey consumers are left with no diversity (all consumers throughout the state must subscribe to one of the three plans), no choice (only the three plans) and higher prices irrespective of whether they make toll calls or want vertical services. All consumer in New Jersey will see rate increases, some will see rates double, some will see them triple and others will see increases of more than 10%.

[43] See N.J.S.A. 48:2-21.19 (b).

At the same time, Verizon is proposing that all regulation be removed for the 90 plus rate regulated services and that competition will protect the public interest consistent with legislative policy set forth in N.J.S.A. 48:2-21.16b(1). Commencing January 1, 2001, Verizon would be free to charge business customers including small businesses whatever rates the market will bear for any of the services that are offered to business customers. Commencing in January 1, 2003, Verizon would be free to charge residential customer whatever rates the market will bear. Indeed, the Company may choose to discontinue any distinctions between business and residential services. Verizon does commit to cap residential service, its RBES service, for two years and make a revenue neutral adjustment to certain rates which rates have yet to be identified. However during the two year period, Verizon is free to adjust any other rates it offers to residential and busienss customers. Verizon's petition seeks this relief without regard to whether sufficient competition is in place today to ensure that the market place is fully competitive. Verizon asserts that the level of competition will be adequate in two years and that hope is sufficient to warrant complete deregulation now.

The 1992 Act echoes the mantra of the Federal Telecommunications Act of 1996 in that consumers should have more choice, lower prices and technological innovation.[44] Verizon's CTP is a step back and is fundamentally inconsistent with the Federal Telecommunications Act in that it eliminates choice, raises prices and forces services on consumer who may not want them or use them. More compelling is the fact that Verizon's CTP ignores that it has and continue to have market power in the local exchange and exchange access markets. See *Interconnection Order* at ¶¶ 1 and 4.[45] As discussed above, the existence of market power by Verizon precludes competition from providing the necessary discipline and limitation on on Verizon's pricing of services to ensure the public interest is protected. Verizon has simply offered no evidence to support that it lacks market power today, that its competitors today can price at or below Verizon in the market place for the proposed RBES

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[44] See RPA-15 which contains excerts from *I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report And Order,11 FCC Rcd. 15499 (August 8, 1996) (*Interconenction Order*); in particular, RPA-15 at ¶ 4.

[45] See RPA-15 which contain portions of the *Interconnection Order*.

services or for any of the other 90 plus services for which reclassification is sought. Verizon has stipulated on the record that the only services they discuss are residence, business and access. T.1428.

Verizon also acknowledges that its competitors are serving very few customers. CLECs serve through the use of their own facilities approximately 134,000 lines (based upon E 911 listing)[46] and approximately 100,320 lines by resale. See TaylorD at 5-6. Numerous alternatives exist for the local loop including fixed wireless, cable TV, and wireless mobile services, and the availability of local number portability facilitates entry. See TaylorD at 11-17. However, no cable company is providing telephone service today in New Jersey. Wireless penetration rates are between 2 and 4% but no showing has been made that wireless is priced at or below Verizon rates. See AT&T-29. Verizon opines that three CLECS price residential service below Verizon's tariffed prices. These are Cablevision, RCN and Conectiv.[47] See TaylorD at 18.

Verizon suggests that in the future there will be more substantial and vibrant competition in New Jersey. See TaylorD at 29-36. In fact, Dr. Taylor states that the relevant economic question for the Board to decide in this proceeding is: "will competition be sufficiently effective to ensure that Verizon cannot exercise market power by 2001for business services and 2003 for residential and access services, the dates proposed in the CTP for the Board to relinquish control. See TaylorD at 37. Dr. Taylor reinforces this point when he states the relevant question does not concern the current market share of a previously regulated firm (Verizon); rather, the relevant question addresses the ability of the firm to exercise market power, *i.e.*, raise price profitably, under the competitive and regulatory conditions that **will be in effect once regulatory control of retail rates is ended**. See TaylorR at 6.

Specifically, Verizon through Dr. Taylor opines that a proper market power analysis examines what would happen to a company's demand and to competitive supply, if the company sought to raise prices above competitive level. Dr. Taylor acknowledges that he has no supply and demand elasticity studies for even the three

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[46] See TaylorD at 20 which states that E911 listing exists in only 85% of the Verizon's 180 rate exchange areas in New Jersey.

[47] See footnote 19.

services covered by his testimony let alone studies on the other 87 rate regulated services which Verizon has petitioned to be reclassified as competitive. See T.1387 to T.1388 where Dr. Taylor acknowledges that market power is defined in terms of market share, and elasticity of supply and demand; T.1455 to T.1456 and T.1531 to T.1533 where Dr. Taylor acknowledges that no supply or demand studies were performed by Verizon including the three services covered in Dr. Taylor's testimonies; Transcript at 1482 where Dr. Taylor acknowledges that in Maryland a reclassification of rate regulated service to competitive requires determination of the elasticity of demand in the relevant market.[48]

Verizon contends that rate rebalancing, adusting the rates for basic residential service will lessen the subsidy that exists now and after rebalancing, will promote more residential competition in all areas of New Jersey. See TaylorD at 41and TaylorSR at 15-18. Dr. Taylor states unequivocably that residential local exchange service is below cost and otherwise subsidized in New Jersey. T.1522 to T.1523, T.1527 to T.1528, and T.1536. See GarzilloD at 6-7; GarzilloSR at 3, and RPA-80 which is Verizon's response to DRA 8-2, Attachment to Exhibit A shows that residential local service is subsidized and is below cost. See BoneR at 18:7-9.

If rates are below cost, a competitive market can not occur. See T.1323 to T.1328 where Verizon through Dr. Taylor acknowledges that competitors cannot compete with Verizon if rates are below cost. See T.4565 to T.4567; T.4590; T.4556 where Verizon, through Dr. Taylor, states residential rates are subsidized, i.e., below cost in New Jersey. Dr. Taylor also confirms that UNEs have to be offered under terms and conditions that an efficient competitor can make meaningful use of them and that if Bell Atlantic offered unbundled loops at a price at which no efficient competitor could compete, then his criteria for reclassification would not be met. T.1473 to T.1474 where Dr. Taylor is responding to questions on RPA-44. RPA-44 are portions of the record in Maryland where Bell Atlantic sought to reclassify rate regulated service as competitive in 1996.

Dr. Taylor also concurred that a sufficient showing of competition is necessary to protect consumers. Specifically, Dr. Taylor acknowledged that the FCC declined to find Verizon non-dominant in special access and

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[48] See footnote 18.

high capacity dedicated transport and continued its regulation of these services. See RPA-16 at 21which identfies what the FCC sees as anticompetitive practices that could arise from premature deregulation of BOCs, including Verizon.[49]

Verizon admits through Dr. Taylor that local exchange service is inelastic. T.1530:6-25 and T.1531:1-25. In addition, Dr. Taylor acknowledges that Verizon has not determined what the profit maximizing rate would be for local residence service in New Jersey. T.1533:11-18. Under economic theory, an inelastic service means that demand will not be affected by price increases. In addition, more inelastic a service is, the less the market share needed to exert market power. See TaylorR at 3, footnote 3 where Taylor cites to Dr. Mayo for the proposition that market shares of 5 to 50% are generally associated with effective competition. Dr. Taylor has previously proposed a test for effective competition based upon loss of market share for regulated telecommunications markets. See RPA-43 which are comments filed in support of United States Telecom Association's ("USTA") request for pricing flexibility. Dr. Taylor proposed that a wire center should be removed from regulation when it is designated as a competitive market area ("CMA"). Specifically, a transitional market area ("TMA") wire center would be classified as a CMA if (1) a sufficiently large portion of the customer demand in the wire center has an alternative source of supply available and (2) a sufficiently large number of customers are actively seeking alternative sources of supply. T.1397:1-12. In satisfying this two part test, Dr. Taylor proposed a test predicated upon loss of 25% of market share should trigger pricing flexibility for a wire center. In other words, a wire center should be classified as a CMA when the incumbent telecommunications provider loss market share of 25%. T.1399:1-7.

Verizon now seeks to have the Board ignore any consideration of market share and ignore the fact that the record fails to reflect that **consumers are actually switching** to other providers in sufficient numbers to impose price discipline on Verizon (Verizon controls 99% of residential market and 96% of the business market).

As a result, Verizon's CTP now before the Board which after three attempts stills fails to make out a *prima facia* cace, must be dismissed as not being in the public interest and inconsistent with the 1992 Act.

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[49] See footnote 19.

6. Verizon has not Demonstrated that its Plan Will Enhance Economic Development in the State While Maintaining Affordable Rates.

The sixth criteria under the statute requires that the CTP "will enhance economic development in the State while maintaining affordable rates."[50] Verizon claims that the CTP will enhance economic development in the State while maintaining affordable rates by: promoting efficiency, improving productivity, and ensuring high quality service through a fully competitive marketplace. (WestD at 19-21;WestR at 5). Verizon's evidence is again predicated upon a showing that competition presently exists within the State and that rates will remain affordable. However, Verizon has produced no evidence illustrating the existence of competition in New Jersey or whether rates will remain affordable. Indeed, as stated above in this brief, Verizon's evidence regarding competition is based on prognostications of the future should the CTP be approved.

7. Verizon has Not Presented Evidence of Sufficient Service Quality Standards. President Tate noted that he is concerned with whether the present performance standards for the provision of end user services are adequate when applied to the CTP.

Verizon failed to meet the seventh criteria under the statute which requires that the CTP contain "a comprehensive program of service quality standards, with procedures for Board monitoring and review."[51] The CTP states that it will continue to file the same service quality standards existing under the current PAR. Simply extending existing service quality standards is insufficient to ensure adequate performance in provision of services to consumers under the CTP. The service quality standards set in 1985, may not be sufficient to meet the changing technological structure of the telecommunications market. This is especially true when the PAR service quality standards that applied to rate regulated services, would apply only to competitive services under the CTP. The statute is clear in that it requires a "comprehensive program" setting forth the precise service quality standards that would apply to the present proposal. The record does not provide any evidence upon which the Board may base its monitoring or review of the present plan which consists entirely of competitive services.

The Board must analyze the adequacy of existing service quality standards in order to determine if

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[50] See *N.J.S.A.* 48:2-21.18 (a) (6).

[51] See *N.J.S.A.* 48:2-21.18 (a) (6).

additional or modified standards are necessary. For example, in her study submitted on behalf of the Ratepayer Advocate during the Board's investigation of local competition proceeding Docket No. TX95120631, Barbara Alexander, a consumer affairs consultant, recommended that the following service quality standards be applied in a competitive market: (1) reasonable measures to insure consumer privacy, (2) applications for service deposits where competitors can decide where or which service to offer, (3) credit collection where payments are allocated first to past due local exchange services, (4) anti-slamming standards, (5) a service quality index that measures standards based on performance, (6) full bill and contract disclosures containing itemized lists of all services sold to the customer, (7) amelioration of the market power of the incumbent and regulating affiliates, (8) adoption of uniform rules for all competitive providers to ensure access to basic local exchange service, (9) comprehensive complaint resolution procedures, and (10) Board monitoring of unfair trade practices by providers. Absent sufficient evidence upon which to base its analysis, the Board is placed in the difficult position of attempting to discern whether existing quality standards should be applied to the CTP.

In addition, the Board's review of service quality standards for competitive services may be more limited as compared to its authority to review rate regulated services. (WestD at 22).[52] Indeed, the evidence in the record does not answer the threshold question of whether the service quality standards proposed in 1985 under the PAR remain sufficient today. Nevertheless, although Verizon claims that existing service quality standards are sufficient, customer complaints regarding service are at an all time high.[53] Clearly, Verizon has not provided evidence necessary for the Board to determine whether existing service quality standards are applicable to the CTP.

8. Verizon has not Identified Specific Benefits that will Accrue to the Ratepayers or the Public in the State of New Jersey.

The eighth and final criteria requires that the CTP specifically identify "the Benefits to be derived from

[52] See also, N.J.S.A. 48:2-21.19 (a) which prevents the Board from regulating the "terms and conditions" of provision of competitive services.

[53] See ARMIS Report attached hereto as Appendix 5.

the alternative form of regulation."[54] Mr. West testified that the CTP will provide benefits occurring from pricing flexibility which will provide the freedom and opportunity to offer service packages on an accelerated basis, stimulate innovation and investment in New Jersey's telecommunications infrastructure, and eliminate subsidies that hinder competitive development. See WestD at 23-24. Prior to listing the elimination of subsidies as a consumer benefit under the CTP, Verizon must provide evidence that subsidies do in fact exist. Verizon has not provided any evidence as to whether subsidies exist, or if so, then the source of those subsidies. In fact, Mr. West also testified that he was unsure as to how subsidies would affect customer choices (T.766 to T.768), that subsidies cannot be derived from one service to another (T. 989:15-25, T.980:1-8), and that Verizon does not map subsidies from one service to another (T.989 to T.990:1-8).

Moreover, Verizon has failed to produce evidence regarding whether the bundled package would benefit customers. In fact, Mr. West testified that he was surprised to learn that only two thirds of New Jersey consumers (66%) find that being forced to purchase services they may not want, is a convincing reason to oppose the plan. (T.771 to T.772). Absent evidence that "specifically" rather than generally, identifies any benefits derived from the CTP, the Board cannot approve the CTP as the alternative regulation plan based on the record.

V. RATE REBALANCING.

A. Verizon's Current Proposal Must be Dismissed Because it Fails to Satisfy the Threshold Requirements Established by the Board in the *IntraLATA Toll Presubscription Order* for the Consideration of any Local Exchange Carrier's Request to Rebalance Rates.

The Board should recognize that Verizon's Proposal is, in effect, a plan to rebalance rates. The Board should therefore scrutinize Verizon's current Proposal according to the standards that it established for the consideration of any LEC's request to rebalance rates in its 1995 *Presubscription Order*.[55] Applying those standards, Verizon's Proposal fails to satisfy the threshold requirements necessary for the Board to even consider a plan to rebalance rates. Therefore, the Board must dismiss Verizon's Proposal because the Board cannot

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[54] See N.J.S.A. 48:2-21.18 (a) (8).

[55] *Order Approving Presubscription and Proposal of Rules, I/M/O the Investigation of Interlata Toll Competition for Telecommunications Services on a Presubscription Basis*, Docket No. TX94090388 (Dec. 14, 1995) ("Presubscription Order").

consider and approve any plan to rebalance rates on the basis of the record in this proceeding.

Verizon's Proposal is tantamount to a request to rebalance rates. As defined by the Board and applicable to this proceeding, "rate rebalancing is the resetting of rates for certain utility services or service components in a manner that brings them more in line with their underlying costs."[56] Verizon succinctly summarized its rate rebalancing Proposal in a recent newspaper advertisement:

> Verizon's plan would not add a penny to its bottom line because any rate increases would be offset by rate decreases in other services. Verizon's New Jersey customers pay the lowest rate in the nation --- way below the actual cost of providing the service. The rate for basic service in New Jersey, unchanged for 15 years, has been regulated and maintained by subsidies from toll charges and charges for premium services. Clearly, subsidies cannot be sustained in a free market. The charge for basic local service should reflect actual costs of providing basic service.[57]

Although Verizon avoids packaging its current Proposal to the Board as a request to rebalance rates, the Board previously rejected similar arguments by Verizon to rebalance rates.[58] In 1995, Verizon also insisted that rates must be rebalanced to address inherent subsidies.[59] Verizon specifically argued:

> that its basic exchange and directory assistance services have been priced below the level required to recoup their direct costs and contribute to common costs and investment returns while other services, such as toll, have been priced above the level necessary to recoup direct costs and contribute to common costs and investment returns.[60]

Verizon contended that the purpose of such a scheme was to support universal service in New Jersey by permitting other services to subsidize basic exchange. Verizon asked the Board to authorize rate rebalancing on the grounds that such a pricing scheme would no longer be sustainable "because vigorous competition will cause a reduction in LEC market share and will force LECs to reduce toll prices to remain competitive thereby reducing

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56 *Presubscription Order*, at 10.

57 Verizon Advertisement, *What Every New Jersey Resident Needs to Know About Proposed Changes in Local Phone Rates*, STAR-LEDGER, Oct. 24, 2000. Ironically, the Board should grant RPA's Motion to Dismiss because Verizon utterly failed to provide the Board with the information that it and every New Jersey resident needs to know about Verizon's proposed changes in local phone rates.

58 *See Presubscription Order*, at 10-25.

59 *See Presubscription Order*, at 6.

60 *Presubscription Order*, at 10.

revenues available to subsidize other services."[61]

Although repackaged, a rate rebalancing plan by any other name is still a rate rebalancing plan. Verizon's current Proposal fully satisfies the Board's prior definition of rate rebalancing. In fact, Verizon's current Proposal even satisfies its own prior explanation of rate rebalancing.[62] Of course, the terms and the titles may differ, but Verizon's intent remains the same. Verizon still seeks to restructure and reprice the rates for RBES to more accurately reflect its underlying costs. The only difference is that Verizon now hopes that a name change will save its current Proposal from the same ill-fated demise of its 1995 rate rebalancing plan, even though the two plans are similarly, grossly deficient in terms of evidentiary support. Therefore, the Board should apply the same standard that it established for the consideration of a rate rebalancing plan in the *Presubscription Order* to Verizon's current Proposal to rebalance rates. In rejecting Verizon's prior rate rebalancing scheme in 1995, the *Presubscription Order* clarified the standard that the Board would apply to requests by LECs, generally, and by Verizon, specifically, to rebalance rates. Any LEC petition to rebalance rates must include:

> (1) a detailed cost/price relationship study demonstrating the cost for all services as well as the tariffed prices; (2) a study detailing any positive or negative contribution for all major service categories sufficient to balance to the total company records (This study will be for all major service categories including rate regulated, competitive, plus any other services such that total intrastate costs can be developed); (3) a fully developed rate design detailing each service's proposed rate change; (4) a showing that the resultant rates are just and reasonable; and (5) a fully developed analysis of any rate change effects on universal service and affordability of rates.[63]

In addition to the five criteria listed above, the Board further noted that any request by Verizon to rebalance rates must also comply with the PAR.[64] Verizon's current Proposal fails to satisfy the *Presubscription*

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[61] *Presubscription Order*, at 10.

[62] Compare the language used by Verizon in its request to rebalance rates in 1995 with its rationale for its current Proposal.

[63] *Presubscription Order*, at 25.

[64] *See Presubscription Order*, at 25. The PAR requires Verizon to demonstrate the revenue neutral effect of its Proposal and detail the impact of the Proposal to verify that it does not unduly advantage one customer class over another. *See Decision and Order, I/M/O The Application of New Jersey Bell Telephone Company for Approval of Its Plan for an Alternative Form of Regulation*, Docket No. TO92030358 (May 6, 1993) ("1993 Order"). RBES is a protected service under the PAR. The PAR prohibits increases to RBES and compels Verizon to demonstrate a need for rate increases. Rates

Order's threshold standard for the consideration of a rate rebalancing plan. Verizon entirely disregarded the five elements that the Board requires any LEC to include in a rate rebalancing request. Verizon failed to (1) provide a detailed cost/price study demonstrating the cost and tariffed prices for all services; (2) furnish a study detailing the positive or negative contribution for all major service categories, including rate regulated, competitive, and any other services, sufficient to balance the total Company records; (3) disclose a fully developed rate structure with details of the proposed rate change for each service; (4) establish that the Proposal's rates are just and reasonable; and (5) present a fully developed analysis of the Proposal's effects on universal service and the affordability of rates. As a result, Verizon failed to comply with the threshold requirements necessary for the Board to even consider a plan to rebalance rates. Therefore, the Board cannot consider and approve Verizon's rate rebalancing plan on the basis of the record in this proceeding.

First, Verizon failed to provide the Board with a detailed cost/price study demonstrating the cost and tariffed prices for all services. In the *Presubscription Order*, the Board rebuked Verizon for not providing such information and clearly mandated that any request to rebalance rates must include a detailed cost/price study.[65] Nevertheless, in this proceeding, Verizon prepared and submitted limited cost studies for only three specific services. *See* T.1455 to T.1456; T.1531 to T.1533. In fact, Verizon's cost studies disregard nearly ninety other rate regulated and competitive services. *See* T.1455 to T.1456; T.1531 to T.1533. As a result of Verizon's failure to furnish the Board with the necessary information, the record lacks a full cost study for all of Verizon's services.

Even if the Board could examine only three services and ignore the remaining eighty-seven or more rate regulated and competitive services, the limited cost studies provided by Verizon are insufficient to satisfy the Board's empirical requirements of an appropriate cost-subsidy study. The form, conduct, and results of

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for other protected services may only be increased through a revenue neutral rate rebalancing or because of exogenous events. *See Telecommunications Decision and Order, In re. Bell Atlantic-New Jersey, Inc.*, Docket No. T092030358 (May 24, 1999) (approving a one year extension of the PAR, without modification, from January 1, 2000 through December 31, 2000) ("1999 Extension Order"). For Verizon to request a change of any of its commitments under the PAR, it must provide substantial, compelling reasons. *See Presubscription Order*, at 25.

65 *See Presubscription Order*, at 19-24.

Verizon's evidence are in question. For example, the Ratepayer Advocate and other parties disputed the specific cost study methodology utilized by Verizon and also challenged Verizon's categorization of service groups. Consequently, the record discloses serious flaws in the accuracy of Verizon's data and undermines the validity of such data in supporting Verizon's rate rebalancing scheme. Second. Verizon also disregarded the Board's requirement that it furnish a study detailing any positive or negative contribution for all major service categories, including rate regulated, competitive, and any other services, sufficient to balance the total Company records. The information is necessary to identify the existence and magnitude of Verizon's claimed subsidies.[66] Verizon offered limited testimony on this point to the effect that prices for services should move toward covering all relevant costs to promote economic efficiency. *See* T.1522 to T.1528; T.1536; GarzilloD at 6-7; GarzilloSR at 3. However, as the Board reminded Verizon in rejecting its 1995 rate rebalancing plan, the appropriate application of such abstract economic theories "requires a full and detailed analysis of the costs of all services to correctly identify system costs and alleged subsidy flows."[67] Without the appropriate study, the record lacks the information necessary for the Board to ensure that Verizon's Proposal is revenue neutral. Verizon's assertions that basic exchange services are currently priced below costs are therefore totally unsubstantiated in the record.

Third. Verizon never disclosed a fully developed rate structure with details of the proposed rate change for each service. The *Presubscription Order* rejected Verizon's "illustrative" rate rebalancing scheme, in part, because Verizon never identified the specific rate designs for each service.[68] The *Prescription Order* unambiguously emphasized that *specificity* was critical to the Board's consideration of any rate rebalancing

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66 Verizon failed to identify the services, if any, that would decrease in price to offset the dramatic price increase in RBES rates. Verizon's 1995 rate rebalancing scheme also suffered from the same flaw. *See Presubscription Order*, at 7-11. The flaw was a fatal factor in foreclosing the Board's approval of Verizon's 1995 rate rebalancing plan. *See Presubscription Order*, at 19-24.

67 *Presubscription Order*, at 22.

68 *See Presubscription Order*, at 7-8.

proposal.[69] Verizon's current Proposal, however, focuses exclusively on only three services and neglects Verizon's remaining eighty-seven or more rate regulated and competitive services. See T.1455 to T.1456; T.1531 to 1533. Even within those three services, Verizon's Proposal lacks specificity and glosses over terms and categorizations without explanation and elaboration. As a result, no definitive rate rebalancing proposal is actually before the Board at this time. Therefore, the Board lacks the record necessary to even consider Verizon's rate rebalancing plan.

Fourth. Verizon failed to demonstrate that the Proposal's rates are just and reasonable. Verizon's Proposal rebalances rates in a discriminatory and anti-competitive manner. Verizon refuses to commit to a revenue neutral rate rebalancing. For example, Verizon intends to dramatically raise the rates of all RBES customers without identifying specific decreases in the rates of other services.[70] The Board should be extremely concerned because Verizon seeks to decrease the rates of competitive services at the expense of the rates of monopoly services such as RBES. Furthermore, the Proposal insulates Verizon from increasing competition in the intraLATA market by tying the purchase of monopoly services, such as RBES, to the purchase of competitive services, such as regional toll calling.[71] The twenty-five (25) regional toll calls included in Verizon's Proposal effectively insulate a substantial number of toll calls from competition. Thus, the record indicates that certain provisions of Verizon's Proposal raise significant discriminatory and anticompetitive concerns.

Verizon's failure to provide any protections or choice for RBES customers further demonstrates that the Proposal's rates are not just and reasonable. Verizon still maintains a stranglehold monopoly over RBES. See TaylorD at 29-37; TaylorD at 41; TaylorR at 6; TaylorSR at 15-18. The absence of competition in and the inelastic nature of the RBES market necessitate that the Board protect captive customers from the unfair pricing

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[69] *See Presubscription Order*, at 7-8 & 19-24.

[70] In the *Presubscription Order*, the Board condemned Verizon's failure to identify the reductions to unspecified services. *See Presubscription Order*, at 7-8 & 19-24. Verizon's insistence that they were under development did not reassure the Board or save its plan. *See Presubscription Order*, at 7-8 & 19-24.

[71] As part of its 1995 proposed plan to rebalance rates, Verizon petitioned the Board to restructure the intraLATA toll to include the first two mileage bands as part of basic service. *See Presubscription Order*, at 8.

and packaging of telecommunications services.[72] Verizon's Proposal offers RBES customers virtually no choice.[73] RBES customers cannot even retain POTS. Rather, Verizon's Proposal forces RBES customers --- all RBES customers ---- to pay for vertical services, regional toll calling, and other bells and whistles that these customers would otherwise never voluntarily select.[74] Verizon's Proposal also lacks safeguards to mitigate the "rate shock" that RBES consumers will immediately experience when their rates jump nearly double on the first day that Verizon's Proposal takes effect.[75] Moreover, competition cannot be relied upon to assure just and reasonable rates after the two year freeze on RBES rates because real competition will not yet exist in New Jersey's inelastic RBES market.[76] Hence, adequate safeguards remain necessary to protect RBES customers from dictatorial pricing and packaging of services.

Fifth. Verizon failed to present a fully developed analysis of the Proposal's effects on universal service and the affordability of rates. The record is void of any in-depth examination of how universal goals will be met in the future.[77]

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72 *See, e.g., Re Alternative Forms of Regulating Telephone Companies*, 87 MD PSC 232 (1996) (protecting captive customers from price increases after the expiration of a three-year freeze). Verizon-NJ concedes that local exchange service is an inelastic market. *See, e.g.,* T.1530:6 to T.1531:25. Verizon-NJ also understands that some competition would be necessary to protect consumers from rate increases in the absence of regulation. *See, e.g.*, T.1512 to T.1513. However, Verizon-NJ speculates that rebalancing rates will lessens the current subsidization of RBES and eventually promote more competition. *See, e.g*, TaylorD at 41; TaylorSR at 15-18.

73 The Board has been careful to protect the public's right to exercise *real* choice in selecting telecommunications services. *See, e.g., Presubscription Order*, at 7.

74 *See, e.g.,* David P. Willis, *Seniors Slam Verizon Request; No Big Hikes and No Extras, Say Opponents of Phone Plan*, ASBURY PARK PRESS, Oct. 19, 2000, at A 1; Martha McKay, *Verizon's Rate Hike Proposal Draws Fire, Regulators Hear from Politicians, Activists*, THE RECORD, Sept. 20, 2000, at B 1.

75 Other states created specific and easily enforceable mechanisms to protect consumers from "rate shock." For example, some states required Verizon not to increase the rates of any service by more than 10% in any given year. *See, e.g., Re Alternative Forms of Regulating Telephone Companies*, 87 MD PSC at 232; *see also Virginia State Corporation Commission*, Docket No. PUC000265 (proposing similar 10% cap on price increases for discretionary services in any given year).

76 Verizon speculates that competition will eventually exist. *See, e.g.*, TaylorD at 29-36. However, even in Maryland, a state that boasts the gradual evolution of competitive telecommunications services within the state over the past two decades, the Public Service Commission decided that "it would be unwise to regulate as if competition were an accomplished fact when it is not." *Re Alternative Forms of Regulating Telephone Companies*, 87 MD PSC at 257.

77 Verizon's 1995 rate rebalancing scheme was similarly deficient. *See Presubscription Order*, at 7-8 & 19-24.

Furthermore, Verizon essentially relies on bald assertions that the revised rates will remain affordable for RBES customers. See TaylorR at 6; TaylorD at 29-36. Verizon mistakenly assumes that any increases in the telephone penetration rate in New Jersey indicate the affordability of its telecommunications services and that competitive forces will maintain the affordability of services at the end of the two-year freeze. See T.1512 to T.1513; TaylorD at 41; Taylor SR at 15-18. The testament of busloads of senior citizens, working mothers, and people representing nearly all walks of life belies Verizon's insistence that rates will remain affordable.[78]

In conclusion, the Board lacks the record necessary to even consider Verizon's Proposal to rebalance rates in this proceeding because Verizon failed to satisfy the *Presubscription Order*'s five threshold standards. Verizon never provided a detailed cost/price study demonstrating the cost and tariffed prices for all services, furnished a study enabling the Board to identify the positive or negative contribution for all major service categories and balance the total Company records, disclosed a fully developed rate structure with details of the proposed rate change for each service, established that the Proposal's rates are just and reasonable, and presented a fully developed analysis of the Proposal's effects on universal service and the affordability of rates. As the Board cannot consider and approve Verizon's rate rebalancing plan on the basis of the record in this proceeding, the Board should grant RPA's Motion to Dismiss.

VI. MERGER SAVINGS

A. The Present Verizon Petition Must be Dismissed for the Complete Failure of Verizon to Produce, in this Record, Proofs Ordered by the Board Regarding the Mergers with NYNEX and GTE.

Verizon has failed to provide any evidence supporting its claim that merger savings have been passed onto consumers. Verizon has not only failed to provide evidence with regards to the statutory criteria necessary for approval of the CTP, but also with three key Board Orders requiring the production of cost studies contemplating its merger savings. In its May 22, 1997 Order, the Board explicitly directed then Bell Atlantic to:

" compile cost and savings data related to the merger on an ongoing basis and submit to the

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[78] *See, e.g.*, David P. Willis, *Go Figure*, ASBURY PARK PRESS, Oct. 15, 2000, at B 1; Cheryl Sarfaty, *Area Seniors Say No to Verizon Proposal*, HOME NEWS TRIBUNE, Oct. 19, 2000; *New Jersey Suspends Hearing on Proposal to Double Phone Rates*, NEW YORK TIMES, Nov. 1, 2000, at B 10.

> Board annually a comprehensive review of merger-related costs, savings, structural and operational changes and economic impacts on NJ ratepayers. The Board will review this data and consider merger impacts in future BA-NJ regulatory proceedings, including the proceeding which the termination of BA-NJ's Plan triggers in 1999."[79]

Although the Board directed Verizon to provide information on merger savings in order to make a determination as to whether New Jersey consumers were entitled to directly share in merger savings, Verizon has failed to provide any evidence to that effect. Verizon's witness, former President of Verizon New Jersey, William M. Freeman[80] testified that ratepayers "are already receiving benefits that have accrued from the NYNEX merger," and that Verizon expects "the merger with GTE to provide similar benefits." (FreemanD at 8). However, in order for the Board to determine whether ratepayers should share in merger savings, or what those merger savings are, the record must be replete with evidence illustrating what those savings are and how consumers have already benefitted (if at all) form economies of scale resulting from the mergers. Likewise, Verizon has failed to provide any evidence in compliance with the Board's May 24, 1999 Order which expressly reaffirmed that Verizon must provide cost and savings data related to the merger on an ongoing basis for Board review during this proceeding.[81] Again, the record in this proceeding is devoid of any cost or savings data necessary for the Board to determine whether ratepayers are entitled to directly share in merger savings. In recent cases, public utility commissioners, including this Board, have recognized that ratepayers are entitled to share in merger savings. See RPA-24.

Finally, Verizon has failed to provide any evidence in compliance with the Board's June 21, 1999 Order requiring Verizon to:

> "compile cost and savings data related to the merger including a comprehensive review of the merger related costs, savings, structural and operation changes and economic impacts on New Jersey ratepayers," and "BA-NJ is required to address the issue of savings and other impacts relating to its merger with GTE in its modified Plan for Alternative Regulation proceeding. In that proceeding, the Board will consider the issue of merger savings and to what extent said

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[79] *See* I/M/O Board's Review of the Amended and Restated Agreement and Plan of Merger Dated as of April 21, 1996 by and Between NYNEX Corporation and Bell Atlantic Corporation, Order, Docket No. TM96070504 dated May 22, 1997.

[80] Mr. Bone, the current President of Verizon New Jersey, adopted Mr. Freeman's direct testimony in full as his own. (BoneR at 2:6-15).

[81] *See* I/M/O the Application of Bell Atlantic-New Jersey, Inc. For Approval of an Extension of its Plan for an Alternative Form of Regulation, Decision and Order Docket Nos. TO92030358 and TO98121462 dated May 24, 1999.

savings are to be shared between New Jersey Ratepayers and Shareholders."[82]

By its own admission and in direct contravention to the Board's Orders, Verizon has not provided any costs and savings data with regards to merger savings.

Clearly, since the Board has explicitly reserved the right to determine merger savings to be shared with consumers and shareholders, it is not up to Verizon to make this determination. Indeed, that fact that Verizon asserts that merger savings should not be shared directly with ratepayers (FreemanD at 9) does not relieve it of its burden to provide cost studies that include merger savings for the Board's review.

In short, even if Verizon's contentions that consumers are already receiving benefits resulting from the NYNEX merger, (FreemanD at 8) are taken as true, the record is devoid of any quantification, description, or details of these supposed benefits. There is thus no evidence in the record upon which the Board can confirm that any benefits were in fact received or even what those benefits are. Additionally, Verizon makes no such assertion with regard to its merger with GTE. Verizon simply states that it "expect[s] the merger with GTE to provide similar benefits. (Id.). For example, Mr. Garzillo stated that Verizon did not include any forward merger saving cost in arriving at its TSLRIC cost studies. (T.3569 to T.3570). On re-cross, Mr. Garzillo contradicted his prior testimony when he indicated that NYNEX merger savings costs going forward, were included, but no merger savings associated with the GTE merger were taken into account in Verizon's cost study. (T.3828 to T.3829). In further addressing the GTE merger savings, Mr. Garzillo confirmed that these were not taken into account because "we don't know what those are as of yet." (T.3829). Although the Board reaffirmed that cost studies contemplating merger savings from the GTE merger must be provided in this proceeding, Verizon has simply not done so. Accordingly, absent any evidence upon which to base its conclusions regarding the existence of merger savings from both the NYNEX and GTE mergers, the Board cannot make a determination as to sharing of merger savings.

As Verizon has repeatedly failed to comply with all three Board Orders requiring cost studies on merger

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[82] *See* I/M/O the Joint Petition of Bell Atlantic Corporation and GTE Corporation for Approval of Agreement and Plan of Merger, Order Approving Merger, Docket No. TM98101125 dated March 15, 2000.

savings, the Board does not have a basis upon which to make any determination as to merger savings to be shared with ratepayers as a condition of approval of the current petition. Absent any evidence in this regard, Verizon's petition is both factually insufficient and as a matter of law, and must be dismissed accordingly.

VII. CONCLUSION.

The record of this matter contains all the evidence that Verizon is able to muster and willing to offer in support of its request for deregulation for all its remaining rate regulated services, and in satisfaction of various Board directives identifying issues to be addressed in this proceeding. It is altogether clear that, reviewing the current state of the record, both what has been submitted as well as what is missing, that Verizon has not satisfied the statutory standards for the extraordinary relief which the Company has requested. Moreover, there are serious antitrust concerns raised by Verizon's attempt to tie the sale of its monopoly residential exchange service with competitive and discretionary services. The Company has also failed to bring forth any proofs and data on merger savings and benefits from its multi-billion dollar mergers with NYNEX and GTE, nor made any proposal for sharing these benefits with ratepayers.

Other than a complete deregulation of all remaining rate regulated services, Verizon has not proposed any other form of Alternative Regulation for the Company. Accordingly, anticipating that based on the incomplete record, the Board should dismiss the pending proposal to deregulate, for all the reasons set forth herein, there is no surviving proposal for Alternative Regulation that the Board can address. Accordingly, the Ratepayer Advocate hereby respectfully asks the Board to dismiss the pending petition of Verizon in its entirety.

This proceeding was filed by Verizon out of its stated goal of promoting competition in the telecommunications market in New Jersey, which, from all indications, is lagging behind other industrialized states for all the reasons set forth at length in this brief. The approval of this filing by Verizon would not have promoted competition, but would instead have created an unregulated monopoly, which would clearly not be in the interest of the ratepayers of New Jersey, nor the promotion of economic development for the state. Thus, the mere dismissal of this petition does nothing to assist the Board in achieving its stated goal of stimulating competition in the telecommunications marketplace.

The Ratepayer Advocate has therefore enclosed with this brief, an affidavit of John Hanger, former Commissioner of the Pennsylvania Public Utilities Commission, whose direct and rebuttal testimony was stipulated into this record without the benefit of cross examination, since Mr. Hanger did not personally appear before Commissioner Butler. Since Pennsylvania has been cited to the Board and the parties as a model jurisdiction for the promotion of telecommunications competition, the Ratepayer Advocate thought it may be useful to the parties and to the Board, to hear the recommendations of a former Commissioner who has struggled with the multiple issues that are necessary for resolution, in order to permit and promote real competition. We offer Mr. Hanger's affidavit as a list of suggestions as a future road map in the aftermath of the deficient and anticompetitive filing made by Verizon in New Jersey. We urge the Board to convene proceedings to resolve all the issues referenced in Mr. Hanger's affidavit. While some of those issues (such as OSS and UNE pricing) are being addressed in parallel proceedings, others are not. The Board conducted extensive hearings on the Universal Service issues in 1997, creating a comprehensive record on which to implement policies to advance universal service in a competitive marketplace, yet no decision has been made on these issues. If the Board continues to address these matters on a piecemeal basis, progress toward real competition in New Jersey will be halting and limited to only the largest customers. All customers in New Jersey deserve affordable choice, which includes choice of POTs service, and if demanded, choice of all advanced technologies.

Respectfully submitted,

Blossom A. Peretz, Esq.
RATEPAYER ADVOCATE

Dated: November 9, 2000