Agenda Date: 2/11/10
Agenda Item: 4A

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu/

TELECOMMUNICATIONS

IN THE MATTER OF THE BOARD'S INVESTIGATION AND REVIEW OF LOCAL EXCHANGE CARRIER INTRASTATE EXCHANGE ACCESS RATES – EMERGENT APPLICATION	))))	ORDER ON MOTION TO STAY DOCKET NO. TX08090830

(SERVICE LIST ATTACHED)

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BY THE BOARD:

On February 1, 2010, the New Jersey Board of Public Utilities ("Board") issued an Order in the above captioned matter, setting forth its decision and requirements on the issue of Intrastate Access Rates. Specifically, that Order set a process and timeline for the reduction of Intrastate Access Rates over a 36 month period ("Transition Period"), and resulted in the Intrastate Access Rates of Local Exchange Carriers' ("LECs") being set, at the conclusion of the Transition Period, at the same level as the LECs' Interstate Access Rates.

On Wednesday, February 3, 2010, at 4:53 p.m., Verizon New Jersey, Inc. ("VNJ") filed with the Board an Emergent Application for a Stay of the Board's Access Charge Order ("Application"). VNJ requested that the Board decide upon its Application no later than Friday, February 5, 2010.

Acting President Elizabeth Randall, the presiding Commissioner in this matter, issued a scheduling Order on February 3, 2010, setting a date for reply papers of February 8, 2010, and indicating that the Board intends to take action on this matter at the regularly scheduled Board Meeting on February 10, 2010. This schedule was necessary to ensure the rights of all the parties, and to allow the Board to notice the meeting in conformity with the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. The Board HEREBY RATIFIES that scheduling Order.

VNJ's Application requests that the Board stay the enforcement of the Order pending judicial review. This matter is appropriately before the Board, as a request for a stay pending review in the New Jersey Superior Court, Appellate Division, should be brought first to the issuing agency pursuant to R. 2:9-7. In that Application, VNJ claims that the Board should stay the Order because the decisions in the Order violate both "constitutional standards and New Jersey law rooted in those standards." Specifically, VNJ claims that the Board takes away revenues designed to subsidize below-cost retail rates without allowing VNJ to "rebalance" its rates or reduce the services it offers. This failure, claims VNJ, results in negative return on regulated services, and is a fundamental shortcoming of the Board's Order. This inability to recover rates is a direct loss to VNJ and an indirect loss to VNJ's customers, as it will be unable to invest in its network in the State.

In support of its Application, VNJ argues the four criteria set forth in the Supreme Court's seminal case on the issue – Crowe v. De Gioia, 90 N.J. 126 (1982). According to VNJ, a request for a stay must show four criteria to be granted: (1) a likelihood of success on the

merits; (2) irreparable harm; (3) the relative hardships to the various parties; and (4) a settled legal right to the relief sought. VNJ argues that a stay is warranted under the current circumstances.

Specifically, VNJ asserts that the Board's Order is unlawful because it produces a confiscatory result, in that the rates fail to provide the recovery of costs plus a rate of return. VNJ claims that the Board can not look to non-regulated rates as a foundation for confiscatory regulated rates. This is a core element, asserts VNJ, in the Board's "just and reasonable" language in N.J.S.A. 48:2-21(b), as the term of art means that rates must be compensatory and not confiscatory, and that this analysis must be performed based purely upon the regulated rates.

VNJ's core position is that the Board's action in this Order violates this requirement because VNJ's revenues from all rate-regulated intrastate services are lower than its costs of providing those services, and the changes included in the Order make the situation worse, not better. Likewise, the prior incumbent local exchange carrier ("ILEC") Reclassification Order (dated 8-20-08), which provided VNJ with rate relief and an opportunity to seek additional rate relief in the event of a decrease in intrastate access rates, does not resolve the issue, and was never intended to do so. According to VNJ, the ILEC Reclassification Order only partially allowed VNJ to recover local rates, but did not authorize VNJ to fully recover its costs for local services. VNJ asserts that even if it fully implemented the price adjustments permitted in the ILEC Reclassification Order, which it can not do because of competitive pressure to keep prices low, it would still be losing money on an annual basis.

VNJ further notes that the Board Order fails to claim that it has set compensatory rates, and instead avoids the issue by noting that rate recovery is not part of the proceeding. VNJ claims that the Board's failure to ensure that the rates were compensatory as set is a fatal flaw such that the Order must be reversed. Likewise, by failing to even consider the issue, VNJ considers the Order arbitrary and capricious on its face.

Next, on the issue of merits, VNJ claims that the Board Order requires VNJ and other ILECs to act as carriers of last resort ("COLR"), regardless of cost and without adequate compensation. This COLR obligation is without support and a violation of constitutional requirements, in the words of VNJ. Thus, taken together, each of these issues results in the Board's Order being invalid under both constitutional and statutory principles.

VNJ also claims that it will suffer irreparable harm without a stay, as the loss of additional revenue, coupled with its ongoing operation of its rate regulated intrastate business at a loss, will place VNJ in a position where it will not be able to be made whole by financial means. Finally, VNJ claims that maintenance of the status quo would cause the least harm and thus advocates for a stay, and that because the Order would "drastically reduce Verizon NJ's revenues," VNJ has a settled right to request the stay.

For all those reasons, VNJ claims that a stay is warranted and necessary in this situation.

On February 5, 2010, United Telephone Company of New Jersey, Inc. d/b/a CenturyLink (f/d/b/a Embarq) ("CenturyLink") also filed a request for a stay in this matter ("Motion or Application"). Following a recitation of its view of the facts and the procedural history, CenturyLink sets forth its understanding of the standards for a stay under N.J.A.C. 14:1-8.7(d) and the Board's prior precedent, and specifically notes the standards as requiring a moving party to show: (1) that the movant will suffer immediate and irreparable harm in the absence of the stay; (2) that there is a

reasonable probability of success on the merits; (3) that the underlying claim is a well-settled legal right; and (4) that the balance of the equities is in favor of the movant.

In support of its motion, CenturyLink asserts that it will suffer immediate and irreparable harm if the Order is not stayed. The "extremely accelerated schedule" for implementing the Board's Order, without a commensurate opportunity to replace lost revenues, creates a significant hardship for CenturyLink. The failure of the Order to provide for a state Universal Service Fund or other revenue source, claims CenturyLink, will impose immediate financial harms and consumer impacts. The reduction in Intrastate Access Rates will result in an increase in CenturyLink's losses and will limit the ability of CenturyLink to continue to invest in its network and other consumer benefits. Likewise, the COLR obligations continue to form a foundation for revenue shortfall, which the Order only accelerates, because the Board mandates continued COLR obligations without providing for sufficient revenues.

CenturyLink claims that immediate reduction of the intrastate access rates is without support in the record and will result in CenturyLink's inability to continue to support significant state benefits, such as universal service, COLR, investments, jobs, and support for high-cost service. Additionally, the Board clearly failed to consider the practical realities of a 20 day implementation period, as CenturyLink finds the "rushed implementation" as having "no relationship to the record or to reality." Finally, the Board failed to require the beneficiaries of the access rate reduction to pass through those reductions and thus CenturyLink assumes that these beneficiaries will not be able or willing to return the funds in the event of an appeal.

Moving on to the question of success on the merits, CenturyLink claims that the Order violates constitutional requirements and State law. Much as VNJ claimed, CenturyLink asserts that the Order sets rates that are no longer just and reasonable, and that the Order eliminates a significant portion of CenturyLink's revenue stream. The Board's failure to consider the impact of pricing and intrastate access rates, coupled with the continued requirement of COLR, ensures that CenturyLink is on the losing side of the equation. Second, CenturyLink claims that the Order violates substantive and procedural due process by failing to implement a state USF and adjusting rates without the ability to recover. Nothing in the record or the Order, claims CenturyLink, provides a foundation to believe that CenturyLink's rates remain just and reasonable.

CenturyLink also claims that the net result of the Order is a return to rate based, rate-of-return regulation, as the Board intends for non-regulated rates to subsidize regulated rates. This invalidates the Plan of Alternative Regulation that Embarq was granted, and ensures that CenturyLink will be unable to provide new and innovative services to the State.

CenturyLink further alleges that the unjust and unreasonable rates are a takings, fail to qualify as just and reasonable by setting intrastate access rates at the same level as interstate access rates without setting a state USF, have a disproportionate impact on CenturyLink and its customers because of the difference in the loss of revenues per customer, and violate legislative intent by failing to make universal service as important as competition. All of these issues, singly or in unison, are sufficient, according to CenturyLink, to point to success on the merits.

Finally, CenturyLink observes that the legal rights are well settled and that preservation of the status quo is the proper balancing of the equities in this case. Thus, CenturyLink calls upon the Board to issue a stay in this matter.

On February 8, 2010, the Joint competitive local exchange carriers ("Joint CLECs") also filed for a stay, although it was designated as a "response" to the prior motions. The Board will consider it an initial Application, despite the terminology used, and thus the Board has considered the comments of parties who oppose the Application and who submitted comments prior to the Board meeting.

The Joint CLECs essentially join with the arguments of VNJ and, at core, wish to make certain that any stay as to VNJ or CenturyLink should also apply to the Joint CLECs. Beyond adding specific figures to the analysis, the arguments of the Joint CLECs are essentially identical to those raised by VNJ.

Also on February 8, 2010, replies to the initial Verizon and CenturyLink applications were received by the Board. AT&T Communications of NJ, L.P. and its regulated affiliates ("AT&T") filed an opposition to the Applications of VNJ, CenturyLink, and the Joint CLECs, advocating against the issuance of a stay in this matter. AT&T applauds the Board for the recent Order, noting that the Order reflects a correct understanding about the role that "implicit subsidies" play in the current competitive environment; i.e., none. AT&T notes that the Board has granted significant rate flexibility to VNJ and CenturyLink, and that the Joint CLECs simply do not serve residential customers, thus making the subsidies not only unnecessary but nonsensical. AT&T claims that both VNJ and CenturyLink come out far ahead on the balance between rate flexibility and intrastate access rate reduction, and that the Board's approach here essentially gave the LECs the benefit of pricing flexibility before requiring lower access charges.

Specifically, AT&T notes that VNJ has received significant rate flexibility, but during each proceeding, VNJ claimed that intrastate access rates should only be considered after the rate flexibility proceeding. Now, however, AT&T notes that once a reduction of intrastate access rates is here, VNJ claims that it must be tied to additional rate flexibility, despite VNJ's promise in the ILEC Reclassification Order that it would not seek additional retail pricing flexibility until after the Board addresses access rate reductions. As to CenturyLink, AT&T claims that it also benefited from rate flexibility without associated intrastate access reform, and also made the same commitment as to waiting to seek additional rate reduction unless and until intrastate access rates were reduced. Thus, both VNJ and CenturyLink ("the LECs") should not now be rewarded, according to AT&T. Instead of a stay, AT&T advocates for the Board to consider an acceleration of the phase-in period for the intrastate access rate reduction, either independently or in conjunction with an attempt to open the rate flexibility proceeding considered in the ILEC Reclassification Order.

In addressing the merits, AT&T asserts that the LECs have made no showing of a likelihood of success on the merits. In support, AT&T claims that the LECs deliberately fail to recognize the inter-related Board proceedings that have considered rate flexibility, competition, and rates. The Board has not, as the LECs assert, damaged the LECs; instead, they have been provided a substantial net benefit from the various forms of rate flexibility provided by the Board. VNJ, as an example, has complete rate flexibility over nearly 70% of its revenues, without ever experiencing a reduction in its "bloated" intrastate switched access rates. CenturyLink is in a similar situation. Thus, AT&T notes, the Board has provided, on the whole, a significant increase and gain to the LECs through the entire process. This approach, claims AT&T, makes clear that nothing in the Board's total course of action even approaches a confiscatory rate. Likewise, the Board has found that rate flexibility more than offsets the reduction in income from

the reduction in intrastate access rates, that the decrease will benefit consumers, and that the current regulatory environment no longer requires this level of subsidy.

AT&T further claims that rate recovery – the only foundation for the stay applications – falls completely outside of the scope of the underlying proceeding. The Board made clear, from its initial opening Order, that the purpose of the proceeding was intrastate access rate review, and that revenues would be dealt with in a separate proceeding. AT&T finds this consistent with the Board's previous, step-by-step process in granting regulatory relief. No party sought to challenge this "ground rule" during the proceeding, and thus, according to AT&T, they have waived the right to object at this time. This is even more significant when viewed in light of the LECs previous efforts to ensure that, when the Board was conducting rate flexibility, no discussion of access rates occurred. Finally, both LECs committed, in the words of AT&T, to hold off on seeking additional rate flexibility until after the Board issued an order on intrastate access charges. Thus, according to AT&T, the LECs are behaving in a hypocritical manner, which should not be supported.

AT&T then moves on to refute the idea that the access rates violate constitutional requirements by noting that the companies have admitted that their intrastate access rates are currently above cost. AT&T claims that the access rates will remain above cost for providing the access service even after the reductions approved by the Board go into effect, and thus no confiscatory rates exist. As to CenturyLink, AT&T notes that even CenturyLink's own experts have rejected the inclusion of loop costs into the cost models, and thus the Board was correct to reject that cost-modeling.

Furthermore, AT&T calls upon the Board to reject the legal sources cited by the LECs, as all of them consider the role of regulation and ratemaking on rate of return companies, which neither VNJ nor CenturyLink are. If the LECs want the benefit of rate-of-return, AT&T believes that they should face the liabilities as well, and would need to return to a full rate of return regulatory scheme.

Finally, on the issues of rates, AT&T quotes language from both VNJ and CenturyLink that the shortfall in revenues claimed stems not from this Board Order, but from the legacy rate process involved in prior Board action, and thus is not an appropriate topic for review in this particular Order.

AT&T also asserts that, as here, when the Board makes a policy determination, the Board is afforded substantial deference, especially in light of the Board's specialized knowledge and skills. In the present Order, the Board made significant and well-reasoned policy determinations, in keeping with a long stretch of incremental regulatory steps, such that the likelihood of success on the merits in an appellate review is almost zero. Taken all together, AT&T claims that the LECs will be unable to succeed and thus a stay is unwarranted.

On the issue of irreparable harm, AT&T believes that the LECs will suffer no harm at all, much less irreparable harm. Both companies have gained multiple millions of dollars from the Board's regulatory relief over the last number of years, and the reductions associated with the access rate Order are dwarfed by these increases. Even if the Board had ordered immediate reductions to the interstate level, neither VNJ nor CenturyLink would be harmed – AT&T makes clear its understanding that both companies will continue to recover in excess of costs for the service under the fully implemented Order, and the companies should consider themselves fortunate that the Board did not order immediate mirroring. Thus, VNJ and CenturyLink are unable to show any harm, much less irreparable harm.

Likewise, asserts AT&T, the claim of harm and allegations of confiscation from the LECs reflects an improper mismatch between revenues and costs, as VNJ is comparing the costs of its entire wireline network to the revenues it receives from only rate-regulated services. This mismatch makes any analysis useless as the comparison is without a reference to reality. In essence, based upon AT&T's example, VNJ is attempting to recover the entirety of its network costs from only a small subset of its revenue producing services – rate-regulated services. And, extrapolating from that, AT&T asserts that VNJ would, in the event of further deregulation of services, expect to recover all of its network costs from the only remaining regulated service – switched access. This is, in the words of AT&T, illogical and ridiculous. As to CenturyLink, AT&T claims that the Board's prior grant of a retail rate hike is such that the net benefit to CenturyLink, even factoring in the Order, is significant and beneficial.

Finally, in relation to the discussion of harm, AT&T claims that Verizon has taken positions in other states that make clear that the arguments by VNJ in this state are hypocritical and clearly show a lack of harm. Likewise, AT&T claims that VNJ has misrepresented the actions of other states in an attempt to confuse the issue here in New Jersey. Taken together, AT&T states that neither VNJ nor CenturyLink face any harm, much less irreparable harm, and that any harm that they might experience can be remedied by the simple act of filing for the additional rate relief clearly contemplated by the ILEC Reclassification Order.

AT&T concludes its argument by noting that the only harm that may flow from the requested stay would be to the consumers and the marketplace, as the Board has found, and the LECs have not disputed, that consumers will benefit from the reductions in the costs of intrastate access rates. Specifically, AT&T points to direct costs paid by customers, as well as administrative costs, competitive hurdles to access for other communications companies, a drag upon the development and deployment of new technology, and the recognition that access charges are unsustainable in light of the customer shift away from traditional wireline telephone services. Thus, AT&T claims that reformation of the intrastate access rate system is necessary, that the Board's Order was just that reformation, and that the request for a stay is without merit and should be denied.

Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel of New York, Inc. (collectively, "Sprint") also filed an opposition to the stay application on February 8, 2010. As with the AT&T filing, Sprint strongly opposes the granting of a stay, finding no basis in the Board's Order or decision to justify the extraordinary relief of a stay. Sprint notes that claims of monetary damage do not rise to the level of irreparable harm. Further, Sprint argues, VNJ did not establish the financial harm it claims it experienced from access charge reductions. Significantly, Sprint recounts the ILEC Reclassification Order and the agreement contained in it dealing with the ability of CenturyLink or VNJ to seek additional rate flexibility following the Board's issuance of an Order in the access proceeding. Based upon this, coupled with the inability of VNJ to show a likelihood of success on the merits or irreparable harm, Sprint calls upon the Board to deny the application.

Sprint, after setting forth the requirements for a stay, notes that VNJ has failed to satisfy even one, much less all four, as required before the extraordinary remedy of a stay should be issued. Sprint makes clear its belief that no immediate and irreparable harm will befall VNJ in the absence of the stay. Specifically, Sprint notes that the harms claimed by VNJ are all related to

lost revenue, which certainly can be remedied through monetary damages, and thus renders the claim insufficient for a stay. Crowe, supra, 90 N.J. at 132-33. Likewise, the Board's gradual process of moving towards a mirror of the interstate access rates, which are compensatory, shows that VNJ will not suffer any harm. The evidence in the record claims Sprint, points to VNJ continuing to receive positive net revenues from the new intrastate access rates, even at the conclusions of the phase-in. The "crux" of VNJ's claim is, according to Sprint, that VNJ's retail rates are not compensatory, and ultimately that is beyond the scope of this proceeding. VNJ would be well-served, states Sprint, to simply take advantage of the Board's continued offering to open a revenue proceeding rather than wasting time and effort through this meaningless application.

Furthermore, VNJ's claim of loss in revenues is incorrect and false, as the revenues "lost" are many orders of magnitude smaller than the additional revenue relief the Board has provided and that VNJ has collected. The net result makes it impossible to claim that VNJ is experiencing any loss, much less an irreparable loss, based upon the Board's action. Likewise, VNJ is in no risk of bankruptcy or other financial distress such as to justify a claim of "irreparable harm," and the Board even provided a true-up process to ensure proper allocation. According to Sprint, VNJ has no foundation to claim irreparable harm.

In a similar vein, Sprint claims that VNJ is unable to show a likelihood of success on the merits, as the Board's decision to separate rate flexibility from access rate rehabilitation is not arbitrary, and VNJ is unable to point to any legal foundation for the idea that the Board must act simultaneously on both issues. Additionally, VNJ is under a Plan of Alternative Regulation, not rate base, rate-of-return regulation, and thus much of the "argument" by VNJ is without merit.

VNJ has also failed to show that the uncontroverted facts favor a stay. In fact, the parties to the matter have introduced conflicting information, which the Board considered and made a final decision based upon its review and understanding of the case. In a situation such as this, according to Sprint, a stay would be inappropriate and unsupported.

Finally, Sprint asserts that the balance of the equities is in favor of the denial of the stay, as testimony and the Board's decision made it clear that the purpose of the Order was to benefit customers and consumers, the reduction of anti-competitive subsidies, and the encouragement of new and innovative services and technologies. A stay in this matter would foreclose those benefits and serve as a step back from the Board's move towards setting an appropriate level of intrastate access rates. Accordingly, VNJ's application should be denied.

Also on February 8, 2010, the New Jersey Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") filed opposition to the applications for a stay. As with AT&T and Sprint, Rate Counsel asserts that the moving parties failed to satisfy the legal requirements for a stay. Rate Counsel alleges that the moving parties simply make "repackaged arguments" previously made – and rejected – before the Board. The Board's balancing of the considerations before it and the understanding of the benefits that could flow from a reconfiguration of intrastate access rates make the chance of success on the merits unlikely, and thus a stay should not be granted.

Furthermore, Rate Counsel asserts that no new arguments or support has been raised to indicate that the Board's decision was arbitrary, capricious, or an abuse of discretion. Similarly, as the LECs are subject to an alternative form of regulation, the "legal" support for a takings can not apply and must be dismissed. Likewise, the only "harm" that can be shown is monetary, and that may not form the foundation for a stay. Finally, the balance of interest opposes the

motion, as the ratepayers of the State are expected to benefit from the Board's decision, and, as it was based upon sound legal and policy considerations, those benefits should not be reduced or eliminated. Thus, claims Rate Counsel, the stay applications should be denied.

The New Jersey Cable Telecommunications Association (NJCTA), on February 8, 2010, also opposed the motions of VNJ and CenturyLink for a stay. The NJCTA filing, which supported the opposition papers filed by AT&T, Sprint and Rate Counsel, emphasized that the applicants failed to provide a sufficient legal basis for overturning the Board's decision.

On Tuesday, February 9, 2010, VNJ filed a response. As Acting President Randall did not authorize a response in her scheduling Order, and because of the need for an expedited process claimed by VNJ and the risk to the schedule associated with further responsive documents from all the parties, the Board HEREBY DECLINES, in this particular situation, to accept the February 9, 2010 filing.

DISCUSSION

The moving parties in this matter claim that a stay is necessary to retain the status quo and to ensure that no irreparable harm occurs. These Petitions are predicated upon the assertion that the Board's action was confiscatory, failed to provide for a just and reasonable rate, and represents an arbitrary and capricious action. In response, the opposing parties claim that no harm will occur and that the Board's decision represents a legal and well-reasoned policy determination.

N.J.A.C. 14:1-8.7(d) provides that "a stay will be granted only for good cause shown." As set forth in Crowe v. De Gioia, 90 N.J. 126 (1982) and its progeny, extraordinary relief, such as a stay, can be granted if the following standards are met: 1) that the injunction would prevent irreparable harm; 2) that the movant can show a reasonable probability of success on the merits; 3) that a balancing of the equities and hardships weigh in favor of injunctive relief, and 4) that a stay would be in the public interest. Id. at 132-35; McKenzie v. Corzine, 396 N.J. Super. 405, 413 (App. Div. 2007). Finally, the factors must be clearly and convincingly demonstrated. Waste Management of New Jersey v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008).

The first factor provides that a stay should not be issued except when necessary to prevent irreparable harm. Harm is considered irreparable in equity if the harm cannot be adequately redressed by monetary damages. Crowe, supra, 90 N.J. at 132-133. The papers submitted by the moving parties argue the net effect of the Order is the loss of revenues. A stay of the Board's Order would allow VNJ, CenturyLink, and the Joint CLECs to continue to recover a rate for intrastate access that provides a level of subsidy that is not mandated by statute, but was based on previous Board policy and is no longer necessary. Both VNJ and CenturyLink, which have chosen to be regulated under an alternative form of regulation, have agreed to the significant regulatory freedom granted by the Board for pricing, and that regulatory freedom must be considered in conjunction with this proceeding. Throughout previous reclassification reviews, VNJ and CenturyLink have consistently stated that rate freedom must be provided without review of access rates, and the Board has permitted this to happen. The Board, however, has committed to a review of intrastate access rates and this Order reflects that review. At the outset of this proceeding in its Prehearing Order issued in December, 2008, the Board made clear that revenue recovery would be considered, if appropriate, in a separate proceeding. The parties opposing these Applications correctly note that the movants did not initiate any formal action to challenge the Board's determinations regarding the scope of the

proceeding. That future proceeding, expressly agreed to by VNJ and CenturyLink and referenced in the ILEC Reclassification Order, remains a viable option for the LECs to "recover" any alleged revenue shortfalls. Claiming that rate freedom can be considered without access rate review, but access rate review can not be considered without additional rate freedom, is hypocritical at best.

Additionally, the Board reviewed the cost studies and found, as noted in the initial Order, that the costs of providing intrastate access would continue to be lower than the rates, even after the reduction, such that the Board does not believe that the rates are confiscatory. The Board believed then, and continues to believe, that the mirroring of rates is an appropriate action in light of the evidence, policy, and changes in the industry. Nothing presented by the moving parties constitutes new information that would give the Board cause to change its analysis.

Finally, the "harm" claimed by the moving parties is, at core, financial. Remedies are available if the Board's decision is found to be incorrect. The list of concerns set forth by the moving parties all center on this idea of financial loss, and all can be remedied. As such, no irreparable harm has been shown.

As is the case here, the failure of just one element of the Crowe requirements would be sufficient for denial of the stay, but the other elements are also left unsatisfied by the moving parties.

The second requirement for a temporary stay is that a movant must make a preliminary showing of "a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133. Here, the moving parties have failed to make that showing. The claims of takings and confiscatory rates, as discussed above, are without merit, and reflect a failure to consider both the Board's prior steps towards regulatory freedom and the realities of alternative forms of regulation. VNJ, CenturyLink and the Joint CLECs each have been granted significant or complete retail rate freedom, in addition to the removal of explicit rate of return requirements. Under these regimes, citations relied upon by the moving parties are misplaced and they therefore are without a significant probability of success on the merits.

Third, the Board must consider the balance of relative hardship to the parties. Here, the balance of the hardship points to denial of the requests for stay. The harms that consumers and the marketplace would suffer from a stay outweigh the harm alleged by the movants. The record indicates that consumers of toll services will benefit from access reductions and the elimination of legacy subsidies will send appropriate pricing signals that will result in more efficient pricing from toll providers. This is consistent with the analysis below regarding the impact on the public interest.

Finally, a stay of the Board's Order would harm the public interest. AT&T has expressly noted its intention to pass through savings to its customers, and in light of the competitive nature of the telecommunications marketplace, that pass-through can be expected from other entities as well. The subsidies, established in the 1980's and associated with intrastate access rates no longer serve the same level of importance in the current competitive environment, particularly in light of the significant rate freedom granted to telecommunications providers in the State. Thus, the stay would not be in the public interest.

Accordingly, the movants have not satisfied the statutory requirements for the relief sought. Based upon the Board's consideration of the above factors, a stay of the Board's intrastate access Order is not justified. Based upon the above, the Board HEREBY FINDS that the requests for a stay of the Board's February 1, 2010 Order is HEREBY DENIED.

DATED: 2/18/10

BOARD OF PUBLIC UTILITIES
BY:

ELIZABETH RANDALL
ACTING PRESIDENT

FREDERICK F. BUTLER
COMMISSIONER

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

NICHOLAS ASSELTA
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KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

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