Attachment 5

Agenda Date: 01/09/02
Agenda Item: 4B

STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center
Newark, NJ 07102

TELECOMMUNICATIONS

IN THE MATTER OF THE PETITION OF	)	
CABLEVISION LIGHTPATH-NJ, INC.	)	ORDER APPROVING
FOR ARBITRATION PURSUANT	)	INTERCONNECTION AGREEMENT
TO SECTION 252(b) OF THE TELE-	)	
COMMUNICATIONS ACT OF 1996	)	
TO ESTABLISH AN INTERCONNEC-	)	
TION AGREEMENT WITH VERIZON	)	
NEW JERSEY INC.	)	DOCKET NO. TO01080498

(SERVICE LIST ATTACHED)

BY THE BOARD:

I. PROCEDURAL HISTORY

By letter dated August 17, 2001, pursuant to Section 252 (b) of the Telecommunications Act of 1996, P.L. 104 -104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. § 151 et seq.) (the Act), Cablevision Lightpath-NJ, Inc., (Lightpath or CLI) filed with the Board of Public Utilities (Board) a Petition for Arbitration. The Petition related to CLI's negotiations with Verizon New Jersey Inc. (VNJ) relating to an interconnection agreement (Agreement) for the provision of local exchange services in New Jersey.

CLI had requested formal negotiations with VNJ for interconnection on March 10, 2001, and after failure to come to terms on an Agreement, filed for arbitration with the Board. Pursuant to the arbitration procedures adopted by the Board in I/M/O The Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996, Docket No. TX96070540 (August 15, 1996), this matter was referred to the Honorable Daniel J. O'Hern for arbitration.

At the time of CLI's petition for arbitration, twenty issues remained unresolved. However, prior to the commencement of hearings on the contested issues, the parties successfully resolved the following twelve issues: Audits, Term and Termination, Customer Authorization, Collocation, Directory Assistance, Number Portability, Two-Way Trunking, Performance Standards and Liquidated Damages, Insurance, Section 252(i) obligations, and Directory Services. The remaining unresolved issues between the parties were: Physical Architecture, Reciprocal Compensation, Tandem Transit Traffic, Rates and Charges, Unbundled Network Elements (UNEs) Directory Listings, Referral Announcements, and Measurements and Billing.
In addition, certain issues related to VNJ's obligations under Section 252(i), the so-called "most favored nation," or "MFN," provision of the Act, as well as VNJ's obligation under the Bell

Atlantic/GTE Merger conditions, were resolved by Arbitrator O'Hern by Interim Decision dated October 26, 2001.[1]

Following the filing of Pre-Arbitration Statements and discovery, an arbitration hearing was conducted on November 2, 2001, in which both Parties were allowed a full opportunity to present their cases. By letter dated December 12, 2001, Arbitrator O'Hern issued a Recommended Decision.

In rendering his arbitration decision, Arbitrator O'Hern directed the parties to submit to him, by December 19, 2001, proposed language embodying his decisions on the contested issues. VNJ subsequently requested that the date be extended to December 27, 2001, in response to which, Arbitrator O'Hern extended the date to December 21, 2000. VNJ submitted its proposed language on December 19, 2001, and CLI submitted its proposed language on December 21, 2001. A telephone conference between the parties was held on January 2, 2002, at which time the parties were given an opportunity to present oral argument regarding their language proposals. On January 3, 2002, Arbitrator O'Hern issued his ruling on the disputed language. In compliance with that ruling, VNJ filed with the Board an interconnection agreement signed by both CLI and VNJ. On January 7, 2002, VNJ submitted a letter to the Board objecting to the Agreement. On January 8, 2002, CLI responded to VNJ's objections, and argued that the Board should approve the Agreement.[2]

Following is a brief restatement of the positions of the parties and the Arbitrator's decision regarding each issue.

II. The Issues

A. PHYSICAL ARCHITECTURE

The issue of Physical Architecture concerns the location and number of points of physical interconnection between the networks of the parties, and the financial consequences of a decision on the location of the point, or points, of interconnection.

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[1] In his Interim Decision, Arbitrator O'Hern recommended the following findings to the Board: (1) that only provisions of an interconnection agreement governed by Section 251(c) are importable; (2) that "arbitrated" provisions of an interconnection agreement are not importable because the Merger Conditions explicitly state that the obligation to make available the provisions of an interconnection agreement are limited to those that are "voluntarily negotiated;" (3) that measurement and billing provisions are not importable because they are not subject to Section 251(c) and are "price and state specific performance measures" that are excluded from importation under ¶31 of the Merger Conditions; (4) that UNE pricing provisions are importable because the Merger Conditions generally provide for retroactive adjustments that will achieve fair pricing. Paragraph 31(a) of the Merger Conditions states generally that when state-specific pricing for UNEs is not available in a state, a requesting carrier may pay the price established in the negotiated agreement on an interim basis and subject to true up, an event that will occur when the New Jersey Board of Public Utilities concludes pending regulatory hearings concerning UNE pricing; (5) that insurance provisions are not subject to 251(c) and are therefore not importable; (6) that the 252(i) obligations of Verizon are determined by statute and are not part of a carrier's 251(c) obligations; and (7) that directory listings as such are covered by a carrier's 251(b)(3) obligations but "price and state specific performance measures" are excluded from coverage under the Merger Conditions and from the coverage of 251(b) or (c). Therefore, directory listings are not importable pursuant to the MFN clause of the Merger Conditions.

[2] The arguments contained in the Post-Arbitration submissions of the parties are discussed below.

(1) VNJ Position

According to VNJ, as a result of CLI's choice of network architecture, VNJ is required to shoulder the entire burden of transporting calls to and from CLI's single point of physical interconnection, regardless of where such calls originate or terminate. VNJ stated that for traffic bound from one CLI caller to other CLI end users, CLI pays no transport from VNJ's distant originating office. And, for traffic flows in the other direction, VNJ stated that it carries CLI-originated traffic from the Newark tandem intersection to the New Brunswick and Rochelle Park tandems "for free." VNJ Pre-Arbitration Statement at 4-5.

VNJ proposed that CLI deliver its traffic to a VNJ tandem or end office switch in closer proximity to the point of destination. VNJ further proposed to deliver traffic it originates to CLI at more central locations, closer to the point of origination or termination. VNJ contended that if CLI chooses to have only one point of interconnection with VNJ, CLI should bear the costs of the traffic it generates at other VNJ tandems and end offices. VNJ asked to be compensated for the costs required to carry this traffic irrespective of the physical hand-off. Id. at 5.

According to VNJ, its proposal is based on a distinction that it makes between the Point of Interconnection (POI) and the Interconnection Point (IP). VNJ stated the difference in this manner:

> The Point of Interconnection, or "POI", is the place where a carrier physically interconnects with the network of another carrier.
>
> The Interconnection Point, or "IP", is the place where a carrier hands over financial responsibility to another carrier. VNJ's IP is the place at which CLI ceases to be financially responsible for transporting traffic to VNJ end users. CLI's IP is the place at which VNJ ceases to be financially responsible for transporting traffic to CLI end users.

According to VNJ, an "IP" is a "virtual" point where financial responsibility transfers from one carrier's network to another's, whereas a "POI" is an actual physical interconnection point between two carriers' networks. An IP does not have to be at the same place as the POI, i.e., the "virtual" financial/billing point can be different from the actual physical point of interconnection. VNJ stated that when a POI is at a different point from an IP, one party could be charged for traffic carried beyond a POI on the other party's network to a more "distant" IP. Id. at 3-4.

(a) Traffic bound from CLI to VNJ

VNJ contended that reciprocal compensation call termination usage rates are applied to compensate the terminating carrier for transmitting the traffic on its network from handoff to the point of termination. VNJ argued that Board-approved cost studies to establish the local reciprocal compensation rates are based on the cost to transport and terminate calls that are delivered by the originating carrier at an end office or tandem of the terminating carrier (i.e., to a VNJ IP), regardless of where an actual POI is located. VNJ argued that its economic interconnection points are its terminating end office, or tandem office, serving the end users. Id. at 5.

Therefore, according to VNJ, if CLI delivers calls at the Newark POI, leaving VNJ with the responsibility for transmitting the calls over the VNJ network to the IP as well as to the point of termination, VNJ believes that it will not be fully compensated for all its costs. According to

VNJ, the Board's approved call-termination rate for reciprocal compensation traffic delivered at a VNJ tandem is $.003738 per minute of use, whereas the Board-approved call termination rate for reciprocal compensation traffic delivered at a VNJ end office is lower, or only $.001846 per minute of use. VNJ contended that the end office rate is lower because there are no tandem costs (e.g., tandem switching, tandem to end-office transport) involved in terminating calls that are delivered directly to an end office. VNJ argued that if CLI does not pay for the applicable transport to move the call from the POI to the VNJ IP, then VNJ will be providing service to CLI at rates that are below cost. Id. at 6.

In order to eliminate this alleged problem, VNJ proposed that CLI implement interconnection points at each VNJ tandem. VNJ stated that where the parties are already interconnected, CLI may maintain its existing IPs (the points of economic pass-off in VNJ's view) with the understanding that VNJ may request a transition to such virtual IPs at each tandem. VNJ suggested that upon such a request, the parties would have 30 days to negotiate the terms for such a transition. VNJ proposed that if the parties fail to agree on a time frame for implementing interconnection points at each VNJ tandem, the parties can pursue dispute resolution and VNJ would pay CLI a reduced reciprocal compensation rate for terminating traffic that originates on CLI's network. According to VNJ, this discounted rate would compensate VNJ for the costs it incurs in transporting the CLI originated traffic from the Newark tandem to the other tandems in North Jersey. VNJ argued that in the event that CLI establishes interconnection points only at its switch locations, rather than at VNJ's tandems, VNJ should have the option of constructing its own interconnection facilities to CLI's switch location(s). Id. at 6-7.

VNJ proposed a list of possible methods that either party may choose to physically interconnect with the other carrier. According to VNJ, its offer allows the parties mutually to agree to alternative points of interconnection through written side agreements. By providing a list of methods for physical interconnection and permitting the parties to agree to alternatives, VNJ believed that its proposal conforms to its obligation under the Act to allow interconnection at any "technically feasible point." Id. at 7.

As VNJ put it, the issue in dispute is whether CLI should be financially accountable for choosing one point of physical interconnection. VNJ argued that if CLI is not financially accountable for its choice of IP locations, then the transport costs associated with hauling what should be local calls from the distant POI are unfairly shifted to VNJ. This, VNJ argued, encourages inefficient carrier behavior, because the CLEC will have no incentive to locate its switch in a geographically convenient location vis-à-vis the ILEC. Id. at 7-8.

(b) Traffic Bound from VNJ to CLI

VNJ stated that in order to avoid what it perceives to be unfairness in which VNJ is required to bear the uncompensated cost of carrying traffic from its end office to the distant POI before handing the traffic off to CLI, it is preferable that CLI establish what it calls Geographically Relevant Interconnection Points (GRIPs) within each local calling area. In VNJ's view, GRIPs will ensure that the cost causer bears its own costs for transporting traffic across local calling area boundaries. VNJ asserted that, if the party that causes the costs bears none of the costs that result from its interconnection location decisions, all incentives are removed for it to make rational and economic decisions regarding the placement of its facilities and POIs. VNJ stated that it relies on interconnection policy allegedly set forth in the Federal Communications

Commission (FCC's) first Local Competition Order[3] which requires that carriers desiring "expensive interconnection(s) . . . bear the cost of that interconnection, including a reasonable profit." Id. at 8.

VNJ asserted that although it would prefer that CLI establish GRIPs, VNJ offered CLI a compromise proposal called a virtual geographically relevant interconnection point (VGRIP). Under its VGRIP proposal, VNJ may request that CLI establish a physical interconnection point at each VNJ tandem switch wire center location where CLI's subscribers also are located. In situations where VNJ only operates one tandem in a LATA, VNJ may designate additional VGRIP locations, such as host end office wire centers. Under the VGRIP proposal, CLI and VNJ would exchange traffic at designated central locations, and VNJ would be able to exchange traffic with CLI at more central locations, instead of bearing all of the additional cost of providing transport to whatever location CLI designates as its interconnection point. VNJ stated that it would be responsible for the costs of hauling this traffic between the VNJ customer and the designated VNJ VGRIP tandem wire center and/or end office wire center where CLI is interconnected, even though that location may be beyond the local calling area of the originating customers. The proposal provides that CLI would then be responsible for delivering the CLI-bound calls from this central location to CLI's customer. In VNJ's view, this proposal represents, a significant compromise to share network expenses, to minimize CLI interconnection locations, and to establish those locations where CLI may already have located facilities or has plans to do so. For authority in support of this proposal, VNJ relied on one State Utility Commission decision and several federal cases cited in its submissions. Id. at 8-11.

(2) CLI Position

CLI proposed that each Party have a single POI (place of physical interconnection) on its network and to be responsible for delivering the traffic originating on its network from its customers to the point of interconnection on the other carrier's network. According to this proposal, the terminating carrier would be responsible for delivering the traffic from the point of interconnection to its customer. Thus, CLI would be responsible for transporting all of its originating traffic to a single point on VNJ's network (the facilities housing the Newark tandem) at which point it would pay VNJ the tandem rate for terminating and transporting CLI's originating traffic to all of VNJ's customers. Similarly, VNJ would be responsible for transporting all of its originating traffic to a single point on CLI's network (the facilities housing CLI's multifunction switch in Parsippany) at which point VNJ would pay CLI the tandem rate for terminating and transporting VNJ's originating traffic to CLI's customers. CLI argues that this is a balanced arrangement in which each Party can reach all of the other Party's customers by transporting traffic to a single interconnection point on the other carrier's network. CLI Pre-Hearing Statement at 15-16.

In addition, CLI stated that it might choose to deliver its traffic to additional locations on VNJ's network if CLI determines that such additional locations are justified economically and will promote a more efficient and reliable network. CLI also provided VNJ with the option of delivering its traffic to CLI's collocation sites at VNJ's tandems, should CLI establish them, from which VNJ could purchase transport to CLI's POI or undertake transport to CLI's POI itself. CLI's proposed language equally permits VNJ to deliver its traffic to any other CLI switch it may choose. Id. at 16.

[3] First Report and Order, I/M/O Implementation of Local Competition Provisions in the Telecommunications Act of 1996, etc., cc Docket Nos. 96-98 and 95-185, FCC 96-325 (August 8, 1996) (hereinafter, Local Competition Order) at ¶ 199.

According to CLI, Section 251(c)(2) and the FCC's implementing rules impose upon incumbent carriers the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . at any technically feasible point within the carrier's network." Thus, according to CLI's view, the incumbent bears the burden of demonstrating that an interconnection point selected by a competitive carrier should be rejected. Id. at 17-18.

CLI argued that the FCC has also determined that a CLEC's right to interconnect at any technically feasible point on an ILECs network not only means that the competitive carrier is entitled to interconnect at a location that it chooses rather than one selected by the incumbent, but also "means that a competitive [carrier] has the option to interconnect at only one technically feasible point in each LATA." CLI asserted that incumbents are thus expressly prohibited from requiring any competitive carrier to interconnect at multiple IPs. Id. at 18-19.

CLI argued that the purpose of the FCC's rules and the Act itself is to promote competition and thereby increase the efficiency, quality, and pricing of services available in the local exchange market. Transport and termination are defined to include the transmission of traffic from the interconnection point to the called party. Citing 47 C.F.R. §51.703, CLI argued that, not only must an incumbent carrier originating traffic pay a terminating carrier for the transport and termination of the incumbent's traffic on the competitive carriers' network (from the interconnection point to the competitive carrier's customer), but the incumbent is also barred from imposing any charges on a competitive carrier "for [reciprocal compensation] traffic originating on its network" (i.e., on its own side of the interconnection point). Id. at 21.

According to CLI, despite the fact that it has no legal obligation to establish any facilities for the transport of traffic on VNJ's side of the interconnection point, as a result of the negotiations in connection with the parties' existing New Jersey agreement, CLI had agreed to establish non-switched, dedicated trunks from VNJ's tandems to VNJ's end offices once it reached a certain threshold of traffic to a particular end office. CLI stated it was willing to agree to establish those trunks in order to reach a negotiated agreement, avoid the expensive process of arbitration, and because the negotiated threshold triggering CLI's contractual obligation to install the trunks (two million minutes per month) reflected a reasonable estimate of when CLI would expect to grow its network based upon sound business judgment. Id. at 35-36; CLI Post-Hearing Summation at 9.

CLI has stated that it was still willing to abide by those terms, and specifically that it would interconnect its facilities with VNJ's Rochelle Park and New Brunswick tandems not later than December 2002.

(3) Arbitrator's Recommendation

The Arbitrator recommended that the Board generally adopt CLI's position on the issue of physical architecture. Section 251(c)(2) of the Act requires incumbent local exchange carriers to allow other local exchange carriers to interconnect "at any technically feasible point" on their networks. Citing U.S. West Communications v. AT&T Communications, 31 F. Supp. 2d 839, 852 (D. Or. 1998), the Arbitrator found that generally, these provisions have been interpreted to permit a CLEC to have access at any point on the incumbent network where connection is technically feasible. This recommendation was based, in part, on CLI's commitment to interconnect with each of the three tandem switches of VNJ in the North New Jersey 224 LATA by December 2002. Arbitrator's Decision at 18.

The Arbitrator reasoned that to adopt VNJ's concepts of "virtual" architecture at this stage in deregulation of the telecommunications industry would make "more complex the transition to a competitive market for local calling services." Id. at 19.

According to the Arbitrator, if CLI's architecture were to remain as it is currently structured, there would be an imbalance in the amount of local traffic transported and terminated by the parties. The Arbitrator noted however, that VNJ candidly conceded "yes" in response to the question that if "after December 2002, there is a connection to the other two tandem switches . . . a lot of this concern [would] go away?" T 132:13-17. Therefore, the Arbitrator recommended that the Board allow a single interconnection point, but hold CLI to its commitment and keep this docket open until December 2002, to determine whether CLI has fulfilled its commitment to establish additional points of interconnection; otherwise the Board should direct the parties to resume negotiations on the issues of additional trunking or pricing. Ibid.

B. RECIPROCAL COMPENSATION

There are three issues to be resolved concerning Reciprocal Compensation. The first issue is whether CLI may redefine the local calling area boundaries established by the Board, and, if CLI may designate its own local calling areas, whether VNJ must bear any added financial costs associated with this change. The second issue is whether CLI's or VNJ's language should be used concerning definitions used in the Interconnection Agreement for determining the parties' reciprocal compensation obligations so that the definitions reflect changes in calculating reciprocal compensation caused by the FCC's Order on Remand of April 27, 2001. The third issue is what reciprocal compensation rate CLI can charge VNJ when CLI receives local traffic from VNJ at CLI's Parsippany switch.

(1) Must CLI adopt VNJ's Local Calling Areas for Purposes of Reciprocal Compensation?

(a) VNJ Position

VNJ contended that allowing CLI to establish any local calling area it desires for the purposes of reciprocal compensation opens up a regulatory quagmire that the Board should avoid. VNJ Pre-Arbitration Statement at 12. The Arbitrator referenced a local calling area as an area, usually within geographic proximity of a local caller's home, within which there are no toll charges. Arbitrator's Decision at 20. VNJ advanced the position that, although CLI is free to designate any area it chooses as its local calling areas for purposes of billing its own customers, CLI cannot impose its rate centers and network design on VNJ for purposes of reciprocal compensation. VNJ Pre-Arbitration Statement at 12-14.

VNJ contended that this issue is rarely disputed because the law is allegedly so clear. Id. at 12. VNJ referred to a statement by the FCC in its Local Competition Order that "it is reasonable to adopt the incumbent LECs transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination." Local Competition Order at ¶1985. VNJ asserted that the FCC did so because "[b]oth the incumbent LEC and the interconnecting carriers usually will be providing service in the same geographic area, so the forward-looking economic costs should be similar in most cases." Ibid. VNJ also argued, as further justifications for its positions, that the FCC has stated that:

> Given the advantages of symmetrical rates, we direct states to establish presumptive symmetrical rates based on the incumbent LECs costs for

> transport and termination of traffic when arbitrating disputes under 252(d) . . .. If a competing local service provider believes that is costs will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate. In that case, we direct state commissions, when arbitrating interconnection arrangements, to depart from symmetrical rates only if they find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate.
>
> [Id. at ¶1089].

VNJ argued that its rates are based on its cost studies that assume the geographical area of its rate centers, and that its existing tariffs and all current rate structures are based on its existing rate centers and local calling areas. VNJ argued that the FCC places a heavy burden upon CLI to convince the Board to reject the use of an ILEC's rate system, and that CLI has not met that burden. VNJ Pre-Arbitration Statement at 13.

VNJ relied on a decision of the Maryland Public Service Commission that stated that: "while carriers may determine their own local calling areas such decisions are not binding on calls interconnecting to another carrier." Matter of Application of MFS Intelenet, 86 Md. P.S.C. 467, 487; 1995 WL 848272 (December 28, 1995); VNJ Pre-Arbitration Statement at 13. According to VNJ, the Maryland Commission reasoned that "[u]se of any alternative exchange boundaries would require a massive restructuring of Maryland's exchanges." Ibid. VNJ argued that the same is true for New Jersey.

VNJ argued that, as a business decision, CLI may choose or create a larger geographical local calling area for its customers; for retail competition purposes. However, VNJ asserted that to the extent that CLI relies on VNJ's cost studies to support a claim for reciprocal compensation from VNJ, VNJ's rate centers must be determinative of the application of reciprocal compensation between the parties, and to do otherwise would allow CLI to inappropriately bypass the federal access charge regime and ignore VNJ tariffs and cost studies for purposes of intercarrier compensation. Id. at 13-14. VNJ argued that by enlarging its calling area, CLI could pay the lower reciprocal compensation rate instead of the higher access charges which apply to toll calls. Id. at 14.

As an example, VNJ referred to a hypothetical call between Toms River and Hackensack that is normally rated by VNJ as an in-state long distance or toll call. According to VNJ, under CLI's proposal, it would be free to expand its local calling area so that it includes both Toms River and Hackensack. VNJ asserted that as a result of such expansion, if a VNJ customer in Toms River calls a CLI customer in Hackensack, under CLI's language, it would be entitled to receive the higher access rate rather than the lower reciprocal compensation rate; but, if CLI's Hackensack customer called VNJ's Toms River customer, VNJ is only entitled to receive from CLI the lower reciprocal compensation rate from CLI for the same services, and the only variable is CLI's unilaterally altered local exchange area boundary. Ibid.

(b) CLI Position

According to CLI, the FCC has made it clear that the states have the authority to define local calling areas. CLI Pre-Hearing Arbitration Statement at 48. CLI advised that, under this

authority, states have allowed competitive carriers to define their own local calling areas in order to promote innovation and the ability of such carriers to offer the sort of differentiated services necessary to compete with incumbents. Id. at 48-49. CLI argued that the FCC sought to facilitate market entry by new competitors by establishing the symmetrical rate presumption, which entitles competitive carriers to charge the same rates for interconnection services as the incumbent. Id. at 51. By relying upon the rates established through incumbent cost studies, the FCC sought to place the financial burden of conducting expensive cost studies on the incumbents and to avoid the administrative burdens that would result from requiring particularized cost studies from every CLEC seeking interconnection. Id. at 42-43, 51. CLI argued that the FCC was fully aware of the possibility that competitive carriers' costs might differ somewhat from those of incumbents, but nonetheless adopted the symmetrical rate presumption because it provided innovation and competition by providing incumbents with strong financial incentives to update their networks. Id. at 43.

CLI contended that as part of the FCC's goal, the FCC established that competitive carriers are entitled to the incumbent carriers' tandem rates whenever they can establish that their facilities serve a comparable geographic area to that served by an incumbent tandem switch. Ibid.; Local Competition Order at ¶ 1090. CLI also contended that, under current law, competitive carriers need make no showing to receive incumbent interconnection rates for offering the same services, except, whenever seeking the tandem rate, to demonstrate that their facilities meet the geographically comparable area test. Id. at 43.

(c) Arbitrator's Recommendation

The Arbitrator recommended that the Board accept CLI's position on the issue of a CLEC's right to choose its own local calling areas, believing that Congress intended to stimulate competition in all aspects of telecommunications. Arbitrator's Decision at 24. Accordingly, Arbitrator O'Hern deduced that a competing carrier should be able to offer new, different, or innovative calling plans to its customers. Ibid. Referencing 47 C.F.R. § 51.701(a), the Arbitrator explained that Section 251(b)(5) applies only to traffic that is originated and terminated within a local area; and that therefore, reciprocal compensation is paid only for local traffic. Citing to Southwestern Bell Tel. Co. v. Public Util. Comm'n, 1998 U.S. Dist. LEXIS 12, 938, *6 (W.D. Tex. June 16, 1998) the Arbitrator stated that local traffic is defined in most interconnection agreements as traffic terminated within "local calling areas, as described in the maps, tariffs and rate schedules approved by state utility commissions and the FCC." Arbitrator O' Hern also quoted from what he described as the pertinent part of the First Report and Order, § 1035, which states in part:

> With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)s reciprocal compensation obligations or whether

intrastate access charges should apply to the portions of their local service areas that are different.

Local Competition Order at ¶ 1035.

Arbitrator O'Hern disagreed with VNJ's claims that the FCC's reference to "state commissions' historical practice of defining local service areas" essentially means that a state commission may not establish local calling areas that differ from historic exchange boundaries and believed that a state commission can establish local calling areas that are not symmetrical. Arbitrator's Decision at 24-25. The Arbitrator would, however, limit CLI's local calling areas to the confines of the 224 LATA. He referenced that the staff at the Florida Public Service Commission reached a similar conclusion in its November 21, 2001, memorandum regarding Docket No. 000075-TP, wherein the commission recommended limiting reciprocal compensation to "all calls that originate and terminate in the same LATA." ~~L~~Arbitrator O'Hern recognized that there are some difficulties posed for VNJ in accommodating this, but believed that ~~some of~~ the problems will be ~~minimized or at least~~ lessened when CLI adopts its more expeansive architecture proposal.

(2) What Types of Traffic are Eligible for Reciprocal Compensation?

(a) VNJ Position

VNJ proposed a modified definition of traffic that is eligible for reciprocal compensation that VNJ claimed acknowledged the fundamental changes in the calculation of reciprocal compensation caused by the FCC's Order on Remand and Report and Order, I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, I/M/O Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC 01-131 (April 27, 2001)(hereinafter, Order on Remand). See VNJ Post-Hearing Summary at 14-17; VNJ proposed language at Interconnection Agreement Sections 1.34, 1.42, 1.49, 1.64, 1.65, 1.80 and 1.81. VNJ asserted that its language enumerates with specificity the types of traffic that are included and excluded from reciprocal compensation payments. VNJ Pre-Hearing Statement at 15. VNJ concluded that the issue of whether Internet-bound traffic, a subset of Information Access traffic, is eligible for reciprocal compensation was resolved by the FCC in its April 27, 2001, Order on Remand. Id. at 16.

According to VNJ, its proposed definitions for "Measured Internet Traffic," "Traffic Factor 1," and "Traffic Factor 2" are used to separate ISP-bound traffic from otherwise local traffic pursuant to the FCC's ~~*ISP Intercarrier Compensation*~~ Order on Remand. Id. at 15-16. VNJ claimed that the language sought by CLI, which would preserve the terms used in the older agreement, is no longer compatible with the FCC's treatment of compensation for Internet traffic. Ibid. Verizon contended that using the old definitions of Percent Interstate Usage (PIU) and Percent Local Usage (PLU) does not fit the equation prescribed by the FCC. VNJ argued that using these outmoded definitions would classify calls to a dialup Internet service provider as local calls. Id. 15. According to VNJ, plugging that number into the FCC's equation results in an incorrect calculation. VNJ further claimed that Traffic Factor 1 is essentially the same as PLU, but does not include Measured Internet Traffic. Id. at 15-16.

(b) CLI Position

As indicated above, VNJ claimed that it proposed revisions to the definitions of PIU and PLU and modification to the Measurement and Billing provision in the proposed agreement (inserting its new definitions) are needed in light of the FCC's recent ~~ISP Intercarrier Compensation~~ Order on Remand. CLI contended, on the other hand, ~~the ISP Intercarrier Compensation~~ that the Order on Remand only changed whether certain types of traffic are eligible for compensation; but did not change the tools for measuring traffic levels. CLI Post-Hearing Summation at 13-15. CLI also objected to VNJ's definition of "Internet Traffic," stating that it is incomprehensible, and is broader than the definition of "ISP-bound Traffic," the sole focus of the Order on Remand. Id. at 15. CLI also contended that VNJ's position that the compensation mechanism for ISP-bound traffic should be access charges does not comport with the Order on Remand, in which the FCC reiterated its exemption of ISPs from access charges and established a graduated rate scheme for such traffic. Id. at 15-16; Order on Remand at 11, 77-80.

(3) Arbitrator's Recommendation

In his recommendation on this issue, the Arbitrator stated his understanding of intercarrier compensation for originating and terminating traffic between local exchange carriers. Arbitrator O'Hern acknowledged that Section 251(b)(5) imposed on all local exchange carriers, both incumbent and competing, a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Arbitrator's Recommended Decision at 28. He stated that when more than two local carriers collaborate to complete a call, "reciprocal compensation" describes the compensation that the carrier who terminates the call receives from the carrier that originates the call. Ibid. According to the Arbitrator, the typical compensation arrangement is that the originating carrier pays the terminating carrier a per-minute of use transport and termination fee, such that the longer a call lasts, the more the originating carrier pays to the terminating carrier. Ibid. Although, in a typical situation, local traffic should flow about equally in both directions, so neither carrier will end up paying disproportionately more in reciprocal compensation fees than the other, Arbitrator O'Hern explained that ~~I recommend that the Board approve CLI's language specifying the types of traffic that are included and excluded from reciprocal compensation payments in the FCC's ISP intercarrier compensation order.~~ problems arose because CLECs attempted to skim the money that derived from the imbalance in terminating calls to Internet Service Providers (ISPs). Ibid.

If calls to ISPs are deemed local, then the following problem arises: assume that a competing carrier serves the ISP and an incumbent serves most of the ISP's customers (most of whom pay the incumbent a flat monthly fee for local telephone service). Each time a customer places a call to the ISP, the incumbent carrier winds up paying the competing carrier a per-minute termination fee. Arbitrator O'Hern considered the nature of ISP traffic, which is typically "one-way." He explained that many customers call an ISP to connect to the Internet, but an ISP seldom places calls to its computing customers. He also noted that calls made to ISPs are typically much longer than the average voice call, since people often surf the Internet for hours at a time. Ibid. And he noted that the potential for regulatory arbitrage is obvious, because a competing carrier that signs up an ISP as a customer stands to collect far more in reciprocal compensation fees than it will pay out in connection with serving that customer. Id. at 27-28.

The Arbitrator stated that the FCC has recognized the difficulty of separating ISP bound traffic from other traffic. Id. at 28. And he noted that the FCC attempted ~~i~~to limit disputes about identifying such traffic~~.~~ by~~T~~ adopting a rebuttable presumption that traffic exceeding a 3:1 ratio of terminating to originating traffic would be deemed ISP bound traffic subject to a graduated rate scheme while traffic at or below the ratio would trigger normal reciprocal compensation obligations. Ibid. Arbitrator O'Hern, referencing the arbitration transcript at 161, line 24, pointed

to the fact that VNJ personnel acknowledged at the hearing that they did not know how to rebut the 3:1 presumption. Ibid. Finally, he noted that this presumptive ratio will remain in force for only a period of years or until the FCC completes a review of all intercarrier compensation schemes, concluding that it is better to await the outcome of that review. Ibid. Arbitrator O'Hern recommended that the Board approve CLI's language on this issue.

(3) CLI's Entitlement to Receive the Tandem Reciprocal Compensation Rate

(a) VNJ Position

VNJ contended that before CLI can receive the tandem rate, CLI must show that its switches are functionally equivalent and geographically comparable with VNJ's tandem switches. VNJ Pre-Arbitration Statement at 16-17; VNJ Post-Hearing Summary at 17-20. VNJ argued that tandem rates should only be paid for traffic routed through a tandem or through facilities functionally equivalent and geographically comparable to a tandem. Ibid. VNJ asserted that CLI conceded that its switch is not functionally equivalent to its tandem since (1) calls running through CLI's facility are switched only once, (2) CLI's Parsippany switch is a class 5 switch, and (3) CLI itself defines its Parsippany switch in the Local Exchange Routing Guide (LERG) as an end office switch. VNJ Post-Hearing Summary at 19. VNJ also asserted its undisputed that CLI's switch does not meet the geographic area requirements contained in 47 C.F.R. § 51.711(a)(3). Ibid. VNJ asserted that CLI must show that each switch actually serves a geographically dispersed customer base of mixed types of customers, not just an ability to serve an area or unrealized plans to do so in the future. VNJ contended that CLI's current customers are in very limited areas of the State, as opposed to its "ubiquitous network serving a diverse base of all types of customers located throughout the service area. Ibid. VNJ asserted that, because CLI's switch is neither functionally equivalent nor geographically comparable to VNJ's tandem switch, CLI is not entitled to the tandem reciprocal compensation rate. Id. at 17-21. VNJ suggested, as a solution, that CLI be paid a "blended rate" based upon the percentage of traffic sent through the tandem or to the end office. Id. at 21.

(b) CLI Position

CLI claimed that the law is "settled" that when VNJ delivers its traffic to CLI at the POI VNJ must pay CLI the tandem reciprocal compensation rate for CLI's transport and termination of VNJ's call to CLI's customer. CLI Post–Hearing Summarization at 11. CLI contended that its eligibility to receive the tandem rate does not depend on whether CLI's switch performs the "functions" of a tandem, and that it need only demonstrate that its switch serves a comparable geographic area to that served by VNJ's tandem switch. Id. at 11-12. CLI asserted that its Parsippany switch serves the entire 224 LATA, or the same geographic area as three of VNJ's tandems. Id. at 12. CLI also argued that VNJ's blended rate proposal, based as it is on the Board's 1997 UNE Order found invalid by the Federal District Court, is unlawful. Ibid.

(c) Arbitrator's Recommendation

Arbitrator O'Hern recommended that the Board adopt CLI's position that it is entitled to the tandem rate. Arbitrator O'Hern advised that, even if CLI's terminating switch is not functionally equivalent to a VNJ tandem switch, it is a switching system that serves a geographically

comparable area to that served by VNJ's tandem switch. Arbitrator's Recommended Decision at 30-31.

C. Tandem Transit Traffic

Tandem Transit Traffic is telecommunications traffic originating with a CLEC's customer that physically passes over VNJ's network facilities to be passed on to a third telecommunications carrier for termination. This issue involves the degree to which compensation should be paid to VNJ for carrying tandem transit traffic, the calculation of such compensation, and other issues related to interconnection between the originating and terminating CLECs.

(1) VNJ Position

VNJ defined transit traffic as telecommunications traffic that neither originates from nor terminates to a VNJ customer, but merely passes through VNJ's tandem network to reach its ultimate destination to other carriers when other carriers fail to make arrangements to directly interconnect with one another's network. VNJ Pre-Arbitration Statement at 18. As an example, VNJ proffered the scenario in which a CLI customer were to call a home or office that had chosen AT&T as its local exchange carrier, leaving VNJ to simply serve as the "middle man." Ibid.

VNJ contended that CLECs do not have an unrestricted right to have an unlimited volume of transit traffic pass through an ILEC's tandem network, and argued that neither the FCC nor the Act requires VNJ to transport transit traffic from other LECs. Ibid. VNJ noted that it has voluntarily agreed to carry traffic between CLI and other carriers, and agreed that in certain circumstances, CLECs, such as CLI, have a legitimate need to transport transit traffic in volumes where interconnection with the third-party carrier and construction of a DS-1 trunk has not yet occurred. Ibid.

VNJ stated it is willing to allow CLI transit traffic on its network, up to the volume of one DS-1, as a "reasonable" accommodation to CLI, such that CLI is free to transport traffic with third-party carriers through VNJ's network rather than interconnecting directly with the third-party so long as that traffic does not exceed the volume of one DS-1. Id. at 19.

However, VNJ proposed two limitations on CLI's ability to transport transit traffic over VNJ's network. First, VNJ retained the right to terminate such transit traffic after a 60-day transition period, which begins as soon as CLI's tandem transit traffic reaches a level of one DS-1 (or approximately 200,000 minute per month), and during which CLI pays a Transit Service Trunking Charge and a Transit Service Billing Fee. At the end of the transition period, VNJ proposed that CLI must use its best efforts to enter into its own interconnection agreement with the third-party carrier. VNJ Post-Hearing Summary at 22-23. Second, within a period of 180 days after the initial traffic exchange CLI must enter into direct trunking arrangements (i.e., interconnection agreements) with the third-party carrier. Id. at 23. If CLI does not enter into such an agreement, VNJ reserved the right to charge CLI a monthly Transit Service Billing Fee. For each carrier with which CLI has not entered into an interconnection agreement, VNJ would receive 5% of the total charges CLI bills the third-party carrier. Ibid.

VNJ also proposed to continue providing transit service for overflow traffic after an interconnecting trunk is installed for CLI's traffic to the third-party carrier. VNJ Pre-Arbitration Statement at 20.

(2) CLI Position

According to CLI, Section 251(a) of the Act requires each telecommunications carrier "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." CLI Pre-Hearing Arbitration Statement at 63. CLI stated that tandem transit traffic arrangements allow CLI's customers to reach customers of other competitive carriers without establishing direct interconnection with those carriers. Ibid. In essence, according to CLI, the CLI-originated traffic is delivered to VNJ's tandem switch and then VNJ hands off that traffic to the appropriate carrier, which is also interconnected with VNJ, and both CLI and the third-party carrier compensate VNJ for this service at the tandem transit traffic service rates. Ibid.

CLI claimed that VNJ ignores the efficiencies inherent in tandem transit service and that it receives reasonable compensation for its tandem transit service. Ibid. Instead, CLI argued VNJ seeks to impose unnecessary restraints and unreasonable additional charges on CLI's use of transit service. Ibid. CLI asserted that under VNJ's proposal, it must enter into arrangements with every third-party carrier with which it exchanges traffic, regardless of the amount of traffic exchanged. Id. at 64. Moreover, CLI argued that if it does not succeed in entering into such arrangement within 180 days, VNJ would require CLI to pay an additional Transit Service Billing Fee of 5% of the total charges billed to the relevant third-party carrier. Ibid. CLI did not object to VNJ's requirement that it enter into agreements with other third-party carriers for billing and collection purposes, but objected to the 180-day timeframe in conjunction with the imposition of an additional charge. Ibid. CLI contended that the 5% charge results in a traffic-sensitive charge for a service (the billing) that is not traffic sensitive. CLI argued that VNJ has no right to charge CLI for the bill it sends CLI to collect the charges it assesses for the tandem transit service. CLI explained that VNJ's tandem transit traffic charges already cover VNJ's costs for the provision of this service and, thus, VNJ is attempting to charge CLI more than VNJ's costs for this service. Id. at 64. CLI claimed that these additional new charges are unsupported by the tandem transit rates currently effective in New Jersey. Ibid.

CLI acknowledged that the DS-1 level is the appropriate level to establish a direct connection with a third-party carrier, but stated that it cannot accept the termination of tandem transit service. Id. at 64-65. According to CLI, if VNJ terminates CLI's tandem transit service before CLI has reached an interconnection arrangement with the third-party, CLI's customers will not be able to place calls to that third-party's customers or receive calls from that third-party's customers. CLI asserted that compromising customer service is never acceptable. CLI contended that in many instances it is difficult to enter into arrangements with small carriers, especially those with little or no presence in the state, and thus, arrangements are not always feasible within VNJ's prescribed confines. Ibid.

CLI noted that VNJ's proposal does provide for a "Transition Period" of 60 days during which it will refrain from terminating transit service to CLI's customers, but contended that the timeframe should be, at a minimum, 180 days. Ibid.

CLI argued that in the case of tandem transit traffic, there is no justification for an additional trunking charge because both CLI and the third-party carrier build (or pay for) facilities from its network to VNJ's. Id. at 65-66. CLI argued that VNJ does not incur an additional trunking charge and only seeks to recoup additional compensation from CLI for a service for which VNJ is already compensated by both CLI and the third-party carrier through tandem transit service switching charges. Id. at 66.

(3) Arbitrator's Recommendation

The Arbitrator recommended that the Board adopt a modified version of VNJ's position concerning compensation for tandem transit traffic. Arbitrator's Recommended Decision at 35. Arbitrator O'Hern noted that Section 251 of the Act "lifts monopolistic barriers against insurgent or competing telecommunications carriers by mandating interconnection agreements among carriers and by imposing a duty on carriers to agree to terms that promote seamless service to consumers." Bell Atlantic MD, Inc. v. MCI WorldCom, Inc., 240 F.3d 279, 301-302 (4th Cir. 2001).

Arbitrator O'Hern recommended that VNJ recover its transit switching and transportation costs from CLI when calls are delivered by VNJ to a third-party carrier. In addition, Arbitrator O'Hern recommended that monetary settlement for the termination of transit traffic should be the responsibility of the originating and terminating carriers and not the transiting carrier. Arbitrator's Recommended Decision at 36.

The Arbitrator stated that, under this rubric, CLI will be required to pay VNJ's tandem switching and transport costs for transit traffic originated by CLI and terminated to third-party carriers. Ibid. The Arbitrator also recommended that CLI be required to negotiate interconnection agreements with third-party carriers for the termination of transit traffic within 180 days of such traffic reaching the DS-1 level.

According to Arbitrator O'Hern, VNJ's request for an additional transit service billing fee of 5% is not a penalty, but rather an incentive to CLI to make a direct arrangement with the third-party carrier. Ibid. Accordingly, the Arbitrator recommended that VNJ not have the right to terminate such transit traffic, and that it not have the right to impose a 5% surcharge until after a 180-day transition period, during which period VNJ would receive tandem switching and transit costs and would not be allowed to terminate service. Ibid.

D. Rates and Charges

The issue of Rates and Charges concerns how much CLI may charge VNJ for certain services, facilities, and arrangements, it sells to VNJ. One example is operator assistance in the case of an emergency need to interrupt a telephone call. VNJ contended that CLI may only charge VNJ the rate it charges CLI; CLI asserted that VNJ may not be permitted to "cap" CLI's rates and charges at the VNJ level, however low or high.

(1) VNJ Position

VNJ contended that before CLI should be permitted to charge VNJ more than VNJ charges CLI for the same services, facilities and arrangements, CLI should be required to demonstrate to the Board that its costs are higher than VNJ's. VNJ Post-hearing Summary at 27-28.

VNJ asserted that, in accordance with FCC rules, intercarrier rates and charges should be cost based. VNJ Pre-Arbitration Statement at 20. VNJ stated that as an ILEC, VNJ's tariffs and rates are extensively scrutinized by the Board, while those of competing carriers are not. Ibid. VNJ concluded that it is therefore logical to rely upon VNJ's rates and charges because they are supported by cost data reviewed by the Board. Id. at 20-21.

According to VNJ, CLECs are permitted to adopt an ILEC's rates or cost studies. VNJ stated that commissions follow this policy because the ILEC's rates and cost studies, once approved, are presumptively reasonable. Id. at 21. Therefore, according to VNJ, it is presumptively fair that the CLEC should charge the ILEC no more than the ILEC can charge to the CLEC, particularly when there are no competitive alternatives. Ibid. Because it is required by law to interconnect with a CLEC, like CLI, so to, VNJ is compelled to buy certain services, such as entrance facilities or terminating access from CLI, and the rates for those services are not subject to the same scrutiny by the Board. Ibid.

(2) CLI Position

CLI asserted that it is not subject to the same regulatory regime as VNJ because it is not a dominant carrier. CLI Pre-Hearing Arbitration Statement at 76, CLI Post-Hearing Summation at 22. According to CLI, neither the Act nor New Jersey law requires CLI's rates or the rates of other competitors to be capped at the rates that VNJ charges. CLI Pre-Hearing Arbitration Statement at 76. CLI argued that the Act established pricing standards for incumbents, not competitors, and CLI is not subject to such pricing standards. Ibid.

CLI stated that, as a certified telecommunications carrier, it is simply required to file appropriate tariffs for services it provides, which tariffs are subject to investigation, hearing, modification, and denial upon petition by other carriers. Id. at 76-77. CLI argued that the regulatory regime under which it operates is different from the regulatory regime under which VNJ operates because of the vastly different market positions of the respective carriers. Id. at 76-77. CLI argued that, in approving competitive carriers' tariffs, the Board has made clear that requiring competitors to make detailed cost justifications could be perceived as the imposition of a barrier to entry, which Section 253(a) expressly bars. Ibid. Because certified telecommunications carriers are part of a competitive market structure, their rates are based on market forces. If such carriers do not offer competitive rates, whether to end users or other carriers, they will be driven out of the market. In fact, citing to the Board's Order of Approval in I/M/O Filing by Conectiv Communications, Inc. Regulatory Approval of its Telecommunications No. 1 Tariff, BPU Docket No. TT98121405 (June 9, 1999), CLI noted that, in determining that competitors do not have to justify their rates. The Board recognized that competitors "seeking to challenge the ILEC will have to compete on several levels to attract and retain customers."

(3) Arbitrator's Recommendation

Arbitrator O'Hern recommended that the Board adopt CLI's position on the question of whether it should be required to cap its rates at the rates that VNJ charges. Arbitrator's Recommended Decision at 39. The Arbitrator agreed that a CLEC operates under an entirely different regulatory regime than an ILEC, and that market forces will normally determine how much VNJ will be willing to pay to CLI for any services that it might choose to purchase from it. Ibid. Arbitrator O'Hern also suggested that if a CLEC sought to impose an exorbitant tariff for a needed service such as call-interruption, the Board would likely reject it. Ibid.

E. Unbundled Network Elements

A network element is "a facility or equipment used in the provision of a telecommunications service," and includes "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunications service." 47 U.S.C. § 153(29). The FCC imposes on ILECs the duty to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory." 47 U.S.C. § 251(c)(3). The FCC determines the network elements that must be made available for purposes of Section 251(c)(3), and in so doing, it must consider at a minimum (1) whether access to proprietary network elements is necessary, and (2) whether the failure to provide access to a given element would "impair" the ability of the CLEC to provide services. 47 U.S.C. § 251(d)(2).

(1) VNJ Position

According to VNJ, its proposed language for the UNE provisions of the parties' interconnection agreement seeks to account for any changes in the New Jersey UNE prices, terms and conditions resulting from the Board's anticipated UNE decision. VNJ Pre Arbitration Statement at 23. VNJ asserted that the terms and conditions set forth in the VNJ language are explicitly made subject to applicable law in proposed paragraphs 11.1 and 11.2, while CLI's proposed language does not incorporate applicable law. Ibid. VNJ argued that the forthcoming Board UNE Order and the subsequent VNJ compliance filings will constitute such applicable law and will govern all of the UNE pricing, terms and conditions between the parties, and in the meantime, VNJ's language, which automatically incorporates the impending Order, should be adopted into the new agreement. Ibid.

(2) CLI Position

CLI's position is that the language negotiated by the Parties in connection with the Parties' Connecticut and New York interconnection agreements should be incorporated into the New Jersey agreement. That is, CLI argued for UNEs in New Jersey on the same terms and conditions as VNJ provides those UNEs to CLI in New York and Connecticut. CLI Post-Hearing Summation at 24-26. CLI argued that VNJ does not have approved tariff offerings for UNEs in New Jersey that reflect the offerings in New York and Connecticut, and VNJ's proposed language does not include complete terms and conditions for all the services that CLI seeks or that VNJ is required by the FCC to offer. Id. at 25. Accordingly, CLI contended that VNJ should provide the same UNE terms and conditions in New Jersey that it does in Connecticut and New York, which are incorporated by reference in CLI's proposed language.

(3) Arbitrator's Recommendation

Arbitrator O'Hern recommended that the Board adopt CLI's language concerning the pricing of unbundled network elements. Arbitrator's Recommended Decision at 40. He also made clear his understanding that the Board would shortly approve modified UNE pricing terms and conditions that would control this issue as between VNJ and CLI. Ibid. Finally, Arbitrator O'Hern recommended that CLI's language should be modified to make it explicitly clear that the Board's forthcoming UNE Order will automatically supersede the current pricing arrangements. Ibid.

F. Directory Listings

The Directory Listings issue concerns the mutual exchange and use of listings and what liability should follow an error in a directory listing.

(1) VNJ Position

VNJ claimed that it should not be required to collect CLI's licensing fees for customer listings, nor should VNJ's liability to CLI for directory listing errors exceed VNJ's liability to its own end-users. VNJ Post-Hearing Summary at 31-32.

VNJ argued that CLI is free to exclude its directory listings from the directory listings VNJ makes available to other parties for a fee, and CLI can make its own financial arrangements with parties who seek to acquire directory lists. Id. at 31. VNJ contended that CLI seeks to require VNJ to include the CLI directory listings among the VNJ listings, collect CLI's licensing fee and then remit it. Id. at 31-32.

In addition, VNJ asserted that CLI sought to impose greater liability on VNJ for errors in listing CLI's customers than what VNJ incurs for the same errors in listing its own customers, creating unreasonable disparate treatment. Ibid. VNJ stated that it is committed to treating CLEC listings the same as its own. Accordingly, VNJ's proposed language would limit its liability to CLI for listing errors to "the lesser of the amount of charges actually paid by CLI for such listing or the amount VNJ would be liable to its customers for such error or omission." Ibid.

(2) CLI Position

According to CLI, the Board has acknowledged that the "telephone directory is one of the first points of contact that a subscriber has with the telephone company." CLI Post-Hearing Summation at 23 (quoting from the Board's Decision and Order, I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, BPU Docket No. TX95120631 (December 2, 1997) (hereinafter, Local Competition Order) at 137-38. CLI stated that it recognized the importance of accurate and complete directory listings information and seeks mutually beneficial contract language governing the parties' obligations and use of directory listings information. CLI Pre-Hearing Arbitration Statement at 71. CLI argued that it merely seeks the exact language the Parties negotiated in connection with the Parties' existing Connecticut agreement. Ibid.

CLI contended that VNJ's proposed language would give VNJ the right to use or license CLI's listing information without compensating CLI. Ibid. According to CLI, its proposed language eliminates the ability of VNJ to exclude CLI from receiving a portion of the revenue that VNJ generates through its licensing of CLI's customer listings. CLI contended that VNJ should not be permitted to sell CLI's customer lists without reimbursing CLI proportionately for the use of this "goodwill." Ibid.

(3) Arbitrator's Recommendation

Arbitrator O'Hern recommended that the Board adopt VNJ's position concerning its duty or obligation to collect licensing fees on account of the marketing of customer information

furnished to it by CLI. Arbitrator's Recommended Decision at 43. Arbitrator O'Hern based this recommendation on the fact that VNJ has stated that it will exclude CLI's customers from any customer lists that it sells. Ibid. Arbitrator O'Hern also agreed that VNJ's liability to CLI's customers should be the same as VNJ's liability to its own customers. Ibid.

G. Referral Announcements

Referral announcements are recorded messages that alert the calling party that the telephone number is no longer in service, and in some cases, announce the called party's new telephone number. These announcements are generally provided free of charge to customers and vary in duration depending on the type of customer and the willingness of the customer to pay for an extended referral period. The telephone number on which a referral announcement is placed is known as an "aging" number. The purpose of referral announcements is to prevent erroneous calls that could be made to the new customer assigned the old customer's phone number. The referral announcements issue relates to area code exhaustion because the longer a telephone number ages, the longer it is out of service, contributing to the non-availability, and ultimate exhaust of numbers in a local exchange, and then, in an area code. The FCC has determined that telephone numbers may be aged no more than ninety days for residential numbers and 360 days for business customers. See Report and Order and Further Notice of Proposal Rulemaking, I/M/O Numbering Resource Optimization, CC Docket No. 99-200, FCC 00-104 (March 31, 2000) (hereinafter, First NRO Order) at ¶ 29.

(1) VNJ Position

According to VNJ, referral announcements present a problem for area code exhaustion because the consumer's former telephone number must remain activated during the referral period. VNJ Post-Hearing Summary at 29. VNJ commented that, during the referral period, the old telephone number continues to be in service and cannot be assigned to another customer. That is, one customer is taking up two telephone numbers. Ibid. VNJ stated that, occasionally, to avoid number depletion, VNJ must shorten the "aging" or referral period to free up dormant numbers. Ibid.

According to VNJ, the FCC has not set any minimum time limit for referral announcements to run. In fact, VNJ argued, the FCC has ruled that carriers "can selectively reduce some aging limits to near zero if necessary . . .." Id. at 30, quoting from the First NRO Order at ¶ 29. According to VNJ, the FCC has recognized that any possible reduction in a referral period to accommodate a number shortage is not likely to cause any disruption to subscribers. Ibid. VNJ asserted that the FCC also "decline[d] to permit states to modify its aging limits." Ibid.

VNJ's language provides that referral announcements on business numbers will be active for 120 days and announcements on residential numbers will be active for 30 days. Id. at 29. VNJ's proposed language also provides that in the event of a number shortage, and in accordance with FCC rules, each party has the ability to shorten the interval, if necessary, to free up needed numbering resources. Id. at 30. The same shortened period would apply to both CLI and VNJ in the case of a number shortage. VNJ's proposed language also allows the party formerly providing the service to charge its customer a standard tariff charge, if any, for referrals. VNJ Pre-Arbitration Statement at 27.

(2) CLI Position

Citing to the First NRO at ¶ 29, CLI reiterated that, under current law, all carriers may shorten aging periods "in situations where no charges are incurred for calls of less than one minute in duration" in areas of acute number shortages. CLI Pre-Hearing Arbitration Statement at 60. CLI also noted that the FCC was cautious in its approval of this practice and stressed that reduction in aging periods must not cause customer confusion or unnecessary disruptions to subscribers. Ibid. CLI stated that, accordingly, its proposed language takes the practice of shortening aging periods into account with the inclusion of "or other time frames as may be required by the Board." Ibid. CLI noted that under current industry practice, the North American Numbering Plan Administrator (NANPA) informs the appropriate state public utility commission when an area code is in "jeopardy" of running out of numbers, and based on this information, the state commission can implement rationing procedures or request further delegated authority from the FCC to implement other number conservation measures. Id. at 60-61. Thus, according to CLI the Board, based on information from NANPA, not VNJ, is the most appropriate entity to decide when a number shortage condition exists and if shortened referral periods are absolutely necessary. Id. at 61.

CLI claimed that "VNJ seeks unilateral authority to determine whether a number shortage exists and to shorten referral periods based on its sole determination that a number shortage condition requires the reassignment of the telephone number." Ibid. CLI contended that VNJ's response misstated CLI's proposed language. CLI stated that it merely seeks to have an objective entity determine whether a number shortage exists. In CLI's view, once the Board has determined, based on information from NANPA, that a number shortage condition exists, VNJ has the right to shorten referral periods, as long as it does so on a nondiscriminatory basis for all customers and carriers. Ibid.

(3) Arbitrator's Recommendation

The Arbitrator recommended that the Board adopt CLI's position concerning referral announcements. Arbitrator's Recommended Decision at 46. Arbitrator O'Hern reasoned that under the current numbering regime, there are objective measures for determining pending number shortages, and those measures can reasonably be incorporated in any provision that would allow the shortening of the aging or referral periods in order to free up dormant numbers. Ibid.

III. POST ARBITRATION SUBMISSIONS

As noted earlier, at the time Arbitrator O'Hern rendered his recommended decision, he also directed the parties to submit to him, and to each other, by December 19, 2001, proposed interconnection agreement language implementing his decisions on the contested issues. Following a VNJ request for an extension of time to submit proposed language governing the issues, there was a subsequent exchange of language proposals.

On December 28, 2001, Arbitrator O'Hern contacted the parties to inform them that any post-hearing motions or concerns would be addressed via conference call on January 3, 2002. VNJ, CLI and Staff participated in the call. Arbitrator O'Hern rendered a decision on January 4, 2002, affirming in part his initial decision and clarifying that VNJ's Section 7.3.4 language did not authorize a 5% surcharge prior to the expiration of the 180-day transition period for Tandem Transit Traffic, which was an issue for the parties in crafting its final interconnection agreement. The Arbitrator directed CLI to draft an interconnection agreement incorporating his Decision and

VNJ was directed to execute and deliver a copy of the agreement to the Board by the close of business on January 7, 2002.

By letter dated January 7, 2002, the Parties submitted to the Board a fully executed Interconnection Agreement. Contemporaneous with the filing, VNJ filed a letter of objection to the agreement.

In its letter, VNJ argued that the Board's Arbitration Order specifically sets forth that the Board is charged with the review of the interconnection agreement. VNJ asserted that the Agreement has no basis in the Arbitrator's Recommended Decision because it incorporates both UNE pricing and UNE terms and conditions, while the Recommended Decision only concerned UNE pricing. VNJ also contended that the agreement is not in the public interest as it redefines the access charge structure established by the Board. VNJ also asserted that the decision improperly suggests that NY and Connecticut tariffs apply in New Jersey. In addition, VNJ disputed the effective date of the agreement as being preemptive of review. Last, VNJ contended that the agreement contains terms that are "premature" because it is being executed prior to the Board's acceptance of the arbitrator's decision and/or receipt of exceptions or modifications thereto. VNJ also stated that its countersignature on the Agreement cannot be construed as agreement to the document as either a negotiated or arbitrated agreement. VNJ asserted that the filing of the Agreement does not constitute a waiver by VNJ of any of its positions as to the illegality or unreasonableness of the Agreement, or of any rights or remedies it may have in order to seek review of the Agreement or any of its provisions. VNJ requested that the Board not approve the Agreement in light of these considerations, "unless and until it has remedied the legal infirmities [it has] identified."

By letter dated January 8, 2002, Cablevision responded to Verizon's letter, urging the Board to reject VNJ's "attempt to improperly expand the scope and process" of the arbitration proceeding. CLI January 8, 2002 Letter (CLI Letter) at 1. CLI asserted that VNJ's request for additional argument is "unnecessary and would serve no other purpose than to delay." Ibid. CLI asserted that additional procedure would violate the Board's Arbitration Rules, and that Arbitrator O'Hern had taken "full advantage of the authority granted him under the Board Arbitration Rules to provide Parties with additional opportunities to raise issue with the decision after the issuance of the Arbitration Award"; including accepting and considering several unsolicited submissions filed by VNJ objecting to certain provisions of the Award, and holding a hearing to address any outstanding concerns that VNJ may have had." Id. at 1-2. CLI stated that "there is no legal or policy basis for the reconsideration of the issues to which [VNJ] "takes exception." Id. at 2.

CLI also responded to each specific issue raised by VNJ in its January 7, 2002 letter. Regarding VNJ's allegation that the Agreement contained terms that have no basics in the Arbitrator's Recommended Decision of December 12, 2001, and specifically that Section II of the Agreement included UNE terms and conditions although the Recommended Decision only concerned UNE pricing, CLI asserted that Section II of the Agreement resulted from three decisions[4] of Arbitrator O'Hern to adopt CLI's language and permit CLI to purchase UNEs with terms and conditions that mirror those in Verizon New York UNE tariff. CLI Letter at 2-3.

[4] The CLI Letter referred to the following decisions of Arbitrator O'Hern: (1) Interim Decision regarding "most favored nation" issues, dated October 26, 2001; (2) Recommended Decision, dated December 12, 2001; and (3) the January 3, 2002 Arbitrator's Decision Concerning Language to Implement His Decision of December 12, 2001.

With regard to VNJ's argument that terms of the Agreement are contrary to the public interest (as an example, "redefining the access charge compensation structure established by the Board), CLI argued that, rather than redefining the New Jersey access charge structure, the Arbitrator permitted CLI, consistent with FCC decisions to designate, via tariff, its own local calling areas, which are then approved by the Board. Id. at 3.

Regarding VNJ's assertion that the effective date term in the Agreement preempts a review of the Arbitrator's decision, CLI countered that the effective date has no bearing on VNJ's ability to seek review because Section 22.5 of the Agreement protects that right, and, in addition, the January 7, 2002 effective date is, in fact, the date on which the Agreement was executed. Ibid.

Regarding VNJ's contention that the Agreement should be rejected by the Board because it contains terms that are "premature" because the Agreement "is being executed prior to the Board's acceptance of the Arbitrator's Decision, the receipt of exceptions or motions to modify the Arbitrator's decision", CLI countered that there is nothing premature about this "heavily reviewed, litigated, and relitigated" Agreement in light of the "comprehensive arbitration proceedings conducted (and the record compiled) below by the Board's representative." Ibid.

CLI argued that the Board's Arbitration procedures do not prejudice either party, that neither State nor federal law entitled VNJ to make filings with the Board after the issuance of the Arbitration Award. Id. at 5-6. CLI contended that VNJ's rights to be heard have been fully vindicated by ample opportunities for argument provided during the arbitration proceedings. Id. at 6. CLI asserted that the Arbitrator fully took advantage of the discretion given to him by the Board's Arbitration Procedures[5]. Ibid. CLI argued that VNJ had no right to additional proceedings under the Board's rules, or State or federal law. Id. at 7. CLI also argued that VNJ can not be surprised by the Board's Arbitration Rule that permits no further pleadings following the filing of the Agreement, since these rules have been in effect since August 1996. Ibid. CLI also asserted that VNJ's contention that the Agreement's inclusion of UNE terms and conditions is not supported by the Arbitration Award is not tenable, since the Arbitrator, on several occasions, heard argument on the scope of UNE language and ultimately, his January 3, 2002 Decision concerning language, adopted CLI's language which defined UNE terms and conditions. Id. at 8-9.

CLI countered VNJ's assertions that various provisions in the Agreement are contrary to the public interest by noting that the 1996 Telecommunications Act permits rejection of arbitrated agreements only for inconsistency with Sections 251 or 252(d), and does not posit a public interest test. Id. at 9. Moreover, according to CLI, the provision in the Agreement allowing CLECs to establish their own local calling areas is "clearly consistent with the [FCC's] conclusion in [¶ 1035 of] the Local Competition Order that state commissions have the authority to determine local calling areas." Ibid.

Finally, CLI asserted that VNJ's complaints about the inclusion of New York and/or Connecticut tariff language in the Agreement was considered and rejected these three times by the Arbitrator. Ibid.

IV. COMMENTS

[5] See Order, I/M/O the Board's Consideration of Procedures for the Implementation of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996, Docket No. TX96070540 (August 15, 1996) (hereinafter, Arbitration Rules Order) at Appendix A, §§ 3-8.

By letter dated January 8, 2002, the Division of the Ratepayer Advocate (Advocate) commented on the Recommended Decision, including the Supplemental Decision and the resulting interconnection Agreement. The Advocate recommended approval of the Arbitrator's Decisions and the resulting Interconnection Agreement. Regarding the Interconnection Agreement, the Advocate expressed satisfaction that the terms of the Agreement satisfy Section 252(e)(2) of the Act and "[a]pproval of the Interconnection Agreement is in the public interest because it will expand the competitive market by allowing an alternative carrier to provide service to local exchange customers in New Jersey." Advocate Comments at 4.

V. DISCUSSION

Pursuant to 47 U.S.C. §252(e)(1), the Act requires approval by the Board of any interconnection agreement adopted by negotiation or arbitration, and further requires the Board to approve or reject the agreement with written findings as to any deficiencies. The Act provides that the Board may reject a negotiated agreement only if it finds that:

> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent with the pubic interest, convenience and necessity.
>
> [47 U.S.C. §252(e)(2)(A)].

The Act also provides that the Board may reject an arbitrated agreement only if it finds that the agreement does not meet the requirements of Section 251 or the pricing standards set forth in Section 252(d).

This comprehensive Agreement contains various rates, terms and conditions of interconnection of the networks of CLI and VNJ, which are necessary for CLI to provide, and received reciprocal transport and termination of local telecommunication traffic within New Jersey.

Notwithstanding the standards for rejection referenced above, the Board is not prohibited from establishing or enforcing other requirements of State law in its review of an interconnection agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

The Interconnection Agreement, dated January 7, 2002, will permit CLI to resell VNJ local service, branded as CLI service, and incorporates specific detail to existing interconnection, testing, and support systems. VNJ will provide to CLI services including: access to VNJ databases and ordering systems; interconnection at various points in the VNJ network; collocation of CLI's equipment in VNJ central offices; interconnection to other companies with whom CLI is not directly connected; number portability, and the ability to purchase and combine unbundled network elements. The arrangements permit CLI to offer local service to customers through several means, including reselling VNJ's local service, repackaging VNJ's network elements or interconnecting CLI's facilities to VNJ's facilities, or CLI's own facilities.

The Agreement consists of the issues which have been negotiated and arbitrated by VNJ and CLI and related to the technical requirements, pricing, and general contractual concerns needed to connect one carrier with another. The Agreement shall be effective on January 7, 2002 and shall expire on January 7, 2004.

Having reviewed the executed Agreement submitted on January 7, 2002, and having considered the entire record in this matter, the Board notes that the process outlined for arbitrations in this jurisdiction does not include a review of the arbitrator's decision but rather provides for a review of the final agreement, which is a by-product of the arbitration process. See Arbitration Rules Order. The Board therefore rejects VNJ's demand for additional process. The Board concludes that those positions of the Agreement that have been negotiated are consistent with the public interest, convenience and necessity, and that those positions of the Agreement do not discriminate against telecommunications carriers not parties to the Agreement. The Board also concludes that the arbitrated portions of the Agreement are consistent with Sections 251 and 252(d) of the Act. Therefore, the Board FINDS that the Agreement meets the standards set forth in the Act. Accordingly, the Board HEREBY APPROVES the Agreement without modification. The Board's approval herein is final as it relates to those aspects of the Agreement, which were not subject to arbitration.

Regarding the first issue arbitrated, Physical Architecture, as recommended by Arbitrator O'Hern, this Docket will remain open on this single issue until December 2002, in order to review compliance by CLI of its commitment to connect to two additional tandem switches to remedy any potential imbalances in traffic flow between the carriers. The Board DIRECTS CLI to notify the Board no later than December 27, 2002, of its compliance. In addition, the Board notes that local exchange services continue to be "protected telephone services" as defined by N.J.S.A. 48:2-21.17.

This approval should not be construed as preapproval of any future petitions for rate recovery of costs incurred pursuant to the Agreement. Our approval does not constitute a determination regarding VNJ's obligations pursuant to Section 271 of the Act, although this Agreement will be taken into consideration in that determination.

Pursuant to 47 U.S.C. §252(h) of the Act, a copy of the Agreement will be made available for public inspection and copying within ten (10) days of the issuance of this Order. Subsequent amendments or modifications of the Agreement are subject to review and approval by the Board.

DATED: March 1, 2002

BOARD OF PUBLIC UTILITIES
BY:

SIGNED

FREDERICK F. BUTLER
COMMISSIONER

SIGNED

CONNIE O. HUGHES
COMMISSIONER

ATTEST:

SIGNED

HENRY M. OGDEN
ACTING BOARD SECRETARY