

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7469

Petitions of Vermont Telephone Company, Inc.)
("VTel"), and Comcast Phone of Vermont, LLC,)
d/b/a Comcast Digital Phone ("Comcast"), for)
Arbitration of an Interconnection Agreement)
Between VTel and Comcast, Pursuant to Section)
252 of the Telecommunications Act of 1996, and)
Applicable State Laws)

Hearings at
Montpelier, Vermont
November 5 & 6, 2008

Order entered: 2/2/2009

PRESENT: J. Riley Allen, Hearing Officer

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Table of Contents

- I. Introduction 4
 - A. Procedural History 5
 - B. Ruling on Objection and Motions 6

- II. Findings and Discussion 9
 - A. Background and General Findings and Discussion 9
 - B. List of Issues in Dispute 11
 - C. Detailed Findings and Discussion 14
 - Issue 1: Are the Parties arbitrating an interconnection agreement under Sections 251 and 252 of the Act? 14
 - Issue 2: Is Comcast Phone of Vermont, LLC, the appropriate party to the interconnection agreement? 14
 - Issue 3: Is VTel entitled to arbitrate services and arrangements other than those required under Sections 251 and 252 of the Act? 14
 - Issue 4: Is Comcast entitled to both direct and indirect interconnection with VTel? 22
 - Issue 5: Should VTel be required to withdraw its petition for declaratory ruling at the FCC? 23
 - Issue 6: Does Local Traffic include VoIP-originated or terminated traffic? 24
 - Issue 7: Should certain obligations and rights under the interconnection agreement be reciprocal? 26
 - Issue 8: Should Comcast be required to provide VTel with call detail records for the purpose of preparing VTel's invoices to Comcast? 29
 - Issue 9: Should the interconnection agreement include a 12-month limitation on backbilling? 30
 - Issue 10: Should the dispute resolution provisions authorize the parties' recourse to the courts only for the purpose of seeking a temporary restraining order or an order compelling compliance with the dispute resolution procedures? 30
 - Issue 11: Does the interconnection agreement involve unique provisioning that must be tested before implementation? 31
 - Issue 12: Should Comcast be required to provide call detail on transit traffic and authorize VTel to block any such traffic, impose access charges, or terminate the agreement? 33
 - Issue 13: How should the interconnection agreement address ISP-bound traffic? 35
 - Issue 14: Is VTel entitled to a special right to audit Comcast's records for rate arbitrage? 37
 - Issue 15: Should Comcast be required to make special representations and warranties on behalf of its affiliate with respect to CALEA? 39
 - Issue 16: Should Comcast be required to ensure its affiliate's compliance with certain specified regulations? 41

Issue 17: Should VTel be authorized to discontinue service, block traffic, or assess access charges if Comcast delivers a high volume of traffic to VTel for termination? 42

Issue 18: Do the rates, terms, and conditions of VTel's tariffs apply to the interconnection and services provided under the interconnection agreement? 44

Issue 19: Does the interconnection under the interconnection agreement exclude exchange access service? 46

Issue 20: Is Comcast required to have its own number resources in the VTel rate center as a prerequisite to local number portability? 47

Issue 21: Must Comcast have a letter of authorization prior to obtaining LNP from VTel? 49

Issue 22: What terms should govern return of ported numbers when those numbers are no longer in service? 50

Issue 23: Which LNP rules and guidelines should the Parties be required to follow? 53

Issue 24: Should Comcast be required to provide written confirmation that it will assume responsibility for 911 access and indemnify VTel when porting each telephone number? 54

Issue 25: Is either Party entitled to charge the other for LNP other than the standard service order charge specified in the interconnection agreement? 57

Issue 26: What terms and conditions for VTel's provisioning of white pages directory listings should be included in the interconnection agreement? 58

Issue 27: How should the Parties compensate each other for the exchange of Local Traffic? 61

Issue 28: Should the provision and recording of billing records be governed by VTel practices and procedures? 63

Issue 29: Should pricing for products and services provided pursuant to the Act but not specified in the pricing appendix be determined by VTel's tariffs? 65

Issue 30: What should the rates be for local service orders? 66

Issue 31: Should there be a rate to establish an account for Comcast? 68

Issue 32: What should the labor rates be? 68

Issue 33: Is the jurisdiction of the call based on the physical location of the customer? 69

Issue 34: Does VTel have to provide Comcast access services outside the VTel access tariffs? 71

D. Concluding Comments and Recommendations 72

III. Conclusion 72

IV. Order 74

I. INTRODUCTION

This Docket concerns the arbitration of an interconnection agreement between Vermont Telephone Company, Inc. ("VTel") and Comcast Phone of Vermont, LLC, d/b/a Comcast Digital Phone ("Comcast Phone").¹ Pursuant to Section 252(a)(1) of the Federal Communications Act of 1996 (the "Act"), the incumbent local exchange carrier ("ILEC") or other party to the negotiation may petition the Vermont Public Service Board ("Board") to arbitrate any open issues. A non-petitioning party may then respond. In this case, both parties petitioned and provided responses.² The Board is tasked with responsibility for resolving each issue set forth in the petition and the response and may impose conditions it finds appropriate as required to implement the standards for arbitration set forth in the Act. Pursuant to agreements among the parties, the Board is now asked to resolve these issues by February 1, 2009.³

1. Comcast Phone, Comcast IP phone II, LLC (referred to herein as either "Comcast Digital Voice," "CDV," or "Comcast Phone's VoIP affiliate"), and Comcast Cable Communications ("Comcast Cable") are all subsidiaries of Comcast Corporation. Comcast Cable is the entity that provides cable service and owns the cable system over which the other affiliates provide service. Comcast Phone is the entity that, it asserts, provides wholesale telecommunications services; it is also the Comcast Corporation subsidiary that requested VTel, the incumbent local exchange carrier, to enter into negotiations for an interconnection agreement under Section 252. CDV is a provider of Voice over Internet Protocol ("VoIP") phone services on a retail basis to members of the public. The question of whether CDV, which did not request an interconnection agreement from VTel, is also a telecommunications carrier under Vermont law is now before the Board in Docket 7316.

In this proposal for decision, I use the term "Comcast Phone" to refer specifically to the petitioner that is the negotiating party to this interconnection agreement. In various places I use the term "Comcast" to refer to either the Comcast corporate family, the parent corporation, or with respect to CDV's affiliate end users (e.g., Comcast end users), where it should be clear from the reference, that it is to Comcast Phone's affiliate's VoIP end users rather than Comcast Phone's, since Comcast Phone only provides wholesale Local Interconnection Service ("LIS") services. In certain instances, I use "Comcast" where I am quoting a reference to a specific document (e.g., "Comcast Exhibit #") or to specific language filed that frames one of the 34 issues. In certain instances where I paraphrase a position of a witness or party who refers to "Comcast" rather than "Comcast Phone" or "Comcast Digital Voice," I leave the reference the same as was used by the party or witness, unless I footnote the distinction for clarity of meaning.

2. Pursuant to Section 252(a)(4) the Board must limit its consideration of any petition to the issues set forth in the petition and in the response.

3. Pursuant to agreement among the parties, the final decision date in this arbitration was first moved by a month, from December 18, 2008, to January 17, 2009, as reflected in the prehearing conference notice of October 3, 2008. The parties subsequently agreed to shift the date of the reply briefs and the schedule for this docket by two weeks further. Based on this agreement, a decision by the Board is now due on February 2, 2009.

The parties to the negotiation petitioned the Board in late August of 2008. The parties identified 34 issues to be resolved and filed them with the Board on October 14, 2008.⁴ The parties assert that a number of the issues have been resolved, although, the level of agreement on several of these is still in question. The parties identified three threshold legal issues to be resolved: (1) whether Comcast Phone is the correct party to the interconnection [Issue #2]; (2) whether Comcast Phone is a bonafide telecommunications carrier eligible for interconnection under Section 251 of the Federal Communications Act; and (3) whether this Board has jurisdiction to actually arbitrate the interconnection agreement between the two parties that petitioned for this proceeding [Issue #1]. As the findings and discussion below reflect, I conclude that Comcast Phone, upon fulfillment of one condition, is a wholesale telecommunications carrier eligible for interconnection pursuant to Section 251 of the Act and is therefore a valid party to the interconnection agreement. I conclude further that this Board has the jurisdiction to arbitrate matters in this proceeding.

A. Procedural History

Comcast Phone first requested interconnection with VTel on January 10, 2008. As noted above, the request was pursuant to 47 U.S.C. §§ 151(a) and (b). Through agreement among the negotiating parties, the parties agreed to treat that request as if it had been received on March 19, 2008, for purposes of Section 252 of the Act.⁵

On August 22, 2008, and August 25, 2008, respectively, VTel and Comcast Phone each filed petitions with the Board seeking arbitration of an interconnection agreement between VTel and Comcast Phone, pursuant to Section 252 of the Telecommunications Act of 1996. These petitions were consolidated in a single arbitration proceeding.

Hearings in this investigation took place on November 5 & 6, 2008. At the request of the parties, the original schedule for this proceeding was modified from the schedule established in the October 3, 2008, Prehearing Conference Memorandum. Briefs were filed on November 26,

4. The list of issues was presented to the Board in a combined filing on October 14, 2008. Comcast Phone also filed its list independent of the combined filing on October 14, 2008.

5. Letter from Andrew D. Fisher to James U. Troup, Esq. (representing VTel), sent August 19, 2008, and agreed to in the letter by Mr. Troup on August 22, 2008.

2008, and the remainder of the schedule delayed by two weeks. (Tr. 11/6/08 at 252-253). Reply briefs were filed on December 10, 2008.

Based upon the agreement on the starting date for negotiations of March 19, 2008, the original deadline under Section 252(b)(4) for this arbitration was December 19, 2008. Agreements by the parties moved the target date for the Board's decision by 30 days to January 18, 2009. Following the hearing, the parties further agreed to delay the schedule by two additional weeks beyond the prior extension.

B. Ruling on Objection and Motions

Ruling on Objections to Prefiled Testimony and Exhibits of Mr. Jeffrey J. Binder

On October 29, 2008, Comcast Phone filed Objections to Prefiled Testimony and Exhibits in this proceeding. At the technical hearing on November 6, I overruled the objections and provided my rationale for that decision. I also agreed to provide a written analysis explaining my reasons for overruling the objection which follows.

Pursuant to Board Rule 2.216 and the Vermont Rules of Evidence, Comcast Phone objected to portions of the prefiled direct and rebuttal testimony of Mr. Jeffrey J. Binder filed on behalf of VTel. Comcast Phone asserted that "the majority of the testimony contains purely legal analysis and conclusions from a witness that VTel is offering as an expert pertaining to Disputed Issues 1, 2, and 3." Comcast Phone argued that VTel should have addressed these legal issues through an appropriate motion or post-hearing legal briefing, not through "expert" prefiled testimony.⁶

At the center of Comcast Phone's objections is the legal nature of the testimony. Comcast Phone maintains that the Board can and should decide these and any other legal issues in this case based upon its own determination of the law after consideration of the parties' respective legal positions, rather than by weighting the legal testimony from an evidentiary perspective. Further, Comcast Phone notes that Hearing Officer and the parties should not be required to waste hearing time cross-examining an attorney on the meaning of legal cases.⁷

6. Comcast Phone, letter and objection, 10/20/08 at 3.

7. *Id.*, at 4.

Comcast Phone also objects to the testimony of Mr. Binder on the grounds that Mr. Binder was not a party to the negotiations and "thus relies on inadmissible hearsay."⁸ The "sample correspondence" between representatives of Comcast Phone and VTel, Comcast Phone argues, were communications to which Mr. Binder was not a party and in which he has no personal knowledge."⁹

Comcast Phone responded to the objections raised by VTel in a letter of October 31, 2008. In general, I found the legal reasoning contained in the VTel response compelling. As stated at the hearing on November 6, 2008, I overruled the objection of Comcast Phone. My reasons for ruling in favor of admitting the prefiled testimony of Mr. Binder parallel those expressed by VTel's counsel¹⁰ and are set out below. Nonetheless, I indicated at the time I overruled the objections, and repeat now, that I intended to give the legal analysis of Mr. Binder no more weight than I would give to it in a brief. Comcast Phone's objections to the legal analysis and its additional concerns are not unique to either Mr. Binder nor to VTel's witnesses, and are, in any event, best addressed by my including it in the evidence and giving it the weight that it is due given the nature and source of the evidence. In the following discussion, I also address concerns raised associated with the hearsay evidence of VTel's witness. Again, I believe that the concerns expressed by Comcast Phone are best addressed through the weight that I attach to the testimony.

Legal Opinion Testimony

First, I conclude that it is appropriate for this Board to hear evidence on legal matters of this nature. In this instance, the matters involve highly technical issues that involve questions of law, as well as the interplay of law and policy, that are not typically addressed by the Board. The current proceeding involves questions concerning the application of federal law that have not been challenged before in a Board proceeding.

Second, the concerns associated with the general rule concerning legal opinion testimony do not arise when the jury is not the trier of fact. This Board has the legal resources necessary to

8. *Id.*, at 5.

9. *Id.*, at 4.

10. Letter to Susan Hudson, Clerk, from Peter H. Zamore, VTel Counsel, dated October 31, 2008.

avoid confusing its obligations under the law with the expert legal opinions of a given legal witness concerning its obligations.

Third, as VTel notes, it would simply be inefficient in the context of this proceeding to separate out the legal analysis from the questions of fact, and the application of the law to the facts before us. Given the short time available for the hearings and resolving the issues in this proceeding, I concluded that our time would be most efficiently spent through cross examination of the witnesses.

Finally, there is little risk that the Board would attach greater weight to legal argument passed via expert witness testimony than if offered through a brief. As I indicated at the hearing, I attach no more weight to the legal opinions of Mr. Binder or Comcast Phone's own witnesses, than I would attach those same arguments in a brief.

Hearsay Objection

In this case, it appears that the primary concern is about communications between Comcast Phone and VTel, to which Mr. Binder was not a party. Information about these communications were subject to direct challenge by Comcast Phone's witnesses.

A major concern with the communication is that it may lack important or relevant context. I believe that is best addressed through the relative weight that I afford the testimony and attachments.

Administrative economy simply required judgment on my part to help ensure efficiency in the hearing room. I conclude that our time was not well spent arguing each element of testimony that was in dispute over its hearsay nature.

Ruling on Motion to Withdraw Appearance

On October 24, 3008, the firm of Primmer Piper Eggleston & Cramer PC, requested permission under Board Rule 2.201(D) to withdraw as Vtel's attorney in this proceeding. No objections were filed. I now grant that request.

II. FINDINGS AND DISCUSSION

Based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board, pursuant to 30 V.S.A. Section 8.

A. Background and General Findings and Discussion

The Parties to the Interconnection Agreement, Affiliate Organizations, Rural Exemption

Findings

1. Vermont Telephone Company, Inc. ("VTel") is an incumbent local exchange carrier ("ILEC"). Wimer pf. at 3.
2. Comcast Phone of Vermont, LLC, d/b/a Comcast Digital Phone ("Comcast Phone"), is a certified provider of telecommunications services in Vermont. Wimer pf. at 3; Choroser pf. and exh. Comcast-1 (Opening Position Statement of Comcast Phone of Vermont, LLC, d/b/a Comcast Digital Phone) at 2.¹¹
3. Comcast Phone is a competitive local exchange carrier ("CLEC") certified to provide telecommunications service in Vermont granted by the Board on August 24, 2006 (CPG No. 834-CR). Exh. Comcast-1 at 2.
4. Pursuant to its authority, Comcast Phone offers a wholesale Local Interconnection Service ("LIS") to qualified providers of Voice over Internet Protocol ("VoIP"). Exh. Comcast-1 at 2.
5. Comcast IP Phone II, LLC, d/b/a Comcast Digital Voice ("CDV"), is the retail interconnecting VoIP affiliate of Comcast Phone. Wimer pf. at 3; exh. Comcast-1 at 2.

11. At my invitation, Comcast Phone submitted its opening position and its rebuttal as attachments to the testimony of a sponsoring witness. Beth Choroser, Senior Director of Regulatory Compliance, Comcast Cable Communications, sponsored both statements. The opening and the rebuttal position statements of Comcast Phone were entered as exhibits in this proceeding. Throughout this document, the Opening Position Statement sponsored by Beth Choroser is referenced as Exh. Comcast-1 and the Rebuttal Position Statement, also sponsored by Ms. Choroser, is referenced as Exh. Comcast-2.

6. CDV is a retail interconnected VoIP service offering as defined by the FCC. Comcast Phone's LIS telecommunications service provides CDV with interconnection to the public switched telephone network ("PSTN"). Exh. Comcast-1 at 2.

7. VTel and Comcast Phone filed petitions for arbitration pursuant to Sections 252, 251(a) and 251(b) in this proceeding. Exhs. Comcast-5 (Comcast Phone Petition) and VTel-4 (VTel Petition).

8. Neither VTel nor Comcast Phone requested arbitration of § 251(c) that applies the standard of interconnection appropriate for an ILEC. Exhs. Comcast-5 (Comcast Phone Petition) and VTel- 4 (VTel Petition).

9. The Act defines a "rural telephone company" as a local exchange carrier that provides telephone exchange service, including exchange access, to fewer than 50,000 access lines. 47 U.S.C. § 251(f); 47 U.S.C. § 153(37); Binder pf. at 10.

10. VTel is a rural ILEC operating in eight Vermont exchanges and services approximately 20,000 access lines. Wimer pf. at 3.

11. 47 U.S.C. § 251(f) provides an exemption for certain rural telephone companies until the Board determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254. 47 U.S.C. § 251(f).

12. VTel does not intend to waive its rural exemption. Binder pf. at 9-12.

Discussion

Comcast Phone is a certified provider of telecommunications services in Vermont. Comcast Phone offers wholesale Local Interconnection Service to its affiliate Comcast Digital Voice ("CDV"). CDV is a retail interconnected VoIP service offering as defined by the FCC. Comcast Phone's LIS telecommunications service provides CDV with interconnection to the public switched telephone network ("PSTN").

VTel is a rural ILEC operating in Vermont with approximately 20,000 access lines.

Comcast Phone requested negotiation with VTel for interconnection pursuant to Sections 251(a) and (b). Both parties petitioned for arbitration pursuant to Sections 251(a) and (b). No request was made for interconnection pursuant to Section 251(c) and no evidence was provided by any party in this proceeding that would demonstrate that the rural exemption available to VTel

under Section 251(f) should be removed. Pursuant to the federal statutory definitions identified above, together with any evidence to the contrary, I conclude that VTel qualifies under the definition as a rural telephone company for purposes of meeting the Act's exemption of Section 251(f). As such the standards established under 47 U.S.C. § 251(c) for an ILEC do not apply, nor do the cost-based for pricing standards of Sections 252(d)(1) and (3).

B. List of Issues in Dispute

Findings

13. Thirty-four issues were identified by the petitioners in the arbitration proceeding. They are as follows:

Issue 1	Are the parties arbitrating an interconnection agreement under Sections 251 and 252 of the Act?
Issue 2	Is Comcast Phone of Vermont, LLC, the appropriate party to the interconnection agreement?
Issue 3	Is VTel entitled to arbitrate services and arrangements other than those required under Sections 251 and 252 of the Act?
Issue 4	Is Comcast entitled to both direct and indirect interconnection with VTel?
Issue 5	Should VTel be required to withdraw its petition for declaratory ruling at the FCC?
Issue 6	Does Local Traffic include VoIP-originated or terminated traffic?
Issue 7	Should certain obligations and rights under the interconnection agreement be reciprocal?
Issue 8	Should Comcast be required to provide VTel with call detail records for the purpose of preparing VTel's invoices to Comcast?
Issue 9	Should the interconnection agreement include a 12-month limitation on backbilling?

Issue 10	Should the dispute resolution provisions authorize the parties' recourse to the courts only for the purpose of seeking a temporary restraining order or an order compelling compliance with the dispute resolution procedures?
Issue 11	Does the interconnection agreement involve unique provisioning that must be tested before implementation?
Issue 12	Should Comcast be required to provide call detail on transit traffic and authorize VTel to block any such traffic, impose access charges, or terminate the agreement?
Issue 13	How should the interconnection agreement address ISP-bound traffic?
Issue 14	Is VTel entitled to a special right to audit Comcast's records for rate arbitrage?
Issue 15	Should Comcast be required to make special representations and warranties on behalf of its affiliate with respect to CALEA?
Issue 16	Should Comcast be required to ensure its affiliate's compliance with certain specified regulations?
Issue 17	Should VTel be authorized to discontinue service, block traffic, or assess access charges if Comcast delivers a high volume of traffic to VTel for termination?
Issue 18	Do the rates, terms, and conditions of VTel's tariffs apply to the interconnection and services provided under the interconnection agreement?
Issue 19	Does the interconnection under the interconnection agreement exclude exchange access service?
Issue 20	Is Comcast required to have its own number resources in the VTel rate center as a prerequisite to local number portability?
Issue 21	Must Comcast have a letter of authorization prior to obtaining LNP from VTel?
Issue 22	What terms should govern return of ported numbers when those numbers are no longer in service?

Issue 23	Which LNP rules and guidelines should the Parties be required to follow?
Issue 24	Should Comcast be required to provide written confirmation that it will assume responsibility for 911 access and indemnify VTel when porting each telephone number?
Issue 25	Is either party entitled to charge the other for LNP other than the standard service order charge specified in the interconnection agreement?
Issue 26	What terms and conditions for VTel's provisioning of white pages directory listings should be included in the interconnection agreement?
Issue 27	How should the parties compensate each other for the exchange of Local Traffic?
Issue 28	Should the provision and recording of billing records be governed by VTel practices and procedures?
Issue 29	Should pricing for products and services provided pursuant to the Act but not specified in the pricing appendix be determined by VTel's tariffs?
Issue 30	What should the rates be for local service orders?
Issue 31	Should there be a rate to establish an account for Comcast?
Issue 32	What should the labor rates be?
Issue 33	Is the jurisdiction of the call based on the physical location of the customer?
Issue 34	Does VTel have to provide Comcast access services outside the VTel access tariffs?

Wimer pf. at 4-5; exh. VTel-3 (Comcast-VTel Disputed Issues List, dated October 14, 2008); exh. Comcast-6 (Comcast's Disputed Issues List – 10/14/08).

C. Detailed Findings and Discussion

Issue 1: Are the Parties arbitrating an interconnection agreement under Sections 251 and 252 of the Act?

Issue 2: Is Comcast Phone of Vermont, LLC, the appropriate party to the interconnection agreement?

Issue 3: Is VTel entitled to arbitrate services and arrangements other than those required under Sections 251 and 252 of the Act?

On the basis of the findings and reasons discussed below, I conclude that (i) Comcast Phone is a telecommunications carrier for purposes of the Act subject to Comcast Phone's compliance with the condition set forth in the discussion below, (ii) Comcast Phone is the appropriate party to an interconnection agreement with VTel under Sections 251(a) and (b) of the Act, (iii) the Board has jurisdiction under Section 252 of the Act to arbitrate an interconnection agreement between Comcast Phone and VTel, and (iv) VTel is not entitled to arbitrate proposed services and arrangements that could only be provided by third- parties to this proceeding, even if such parties are affiliates of Comcast Phone.

Findings

14. Comcast Phone has declared its willingness to offer its wholesale local interconnection service to qualified providers of voice-over-internet-protocol services. Comcast currently offers its wholesale services to the public through its LIS offer that is available on the world-wide web. Exh. Comcast-1 at 4.

15. Comcast Phone holds a Certificate of Public Good in Vermont and is subject to the jurisdiction of the Board in all matters respecting the rates for its services, when unreasonable or in violation of the law, and is subject to restraints on any unjust discriminations in rates under Vermont law. Finding 3, above; CPG 834-CR, 8/24/06; 30 V.S.A. §§ 209(a) and 218(a).

16. Comcast Phone currently provides wholesale local interconnection service in Vermont only to its affiliate. Comcast Phone has not made public the rates, terms and conditions of its service arrangements with CDV. Binder pf. at 17; exh. Comcast-2 at 6; Binder pf. at 21.

Discussion

The principal threshold legal issue is whether Comcast Phone is a telecommunications carrier for purposes of Section 251 of the Act. If Comcast Phone is not a telecommunications carrier, it apparently would not be entitled to an interconnection agreement under Section 251, and the Board would not have jurisdiction to arbitrate open issues related to an interconnection agreement with VTel under Section 252.

Comcast Phone argues that the Act and legal precedent interpreting the Act establish that Comcast Phone is a telecommunications carrier entitled to an interconnection agreement as a wholesale provider of local interconnection services to its VoIP service provider affiliate, CDV. (Comcast Brief at 4-17). Comcast Phone asserts that it is a telecommunications carrier for purposes of the Act because it has declared its willingness to serve as a common carrier and it has made its wholesale local interconnection service offering publicly available to qualified customers. Comcast Brief at 5 and 8. Comcast provides information about the availability of its wholesale LIS offerings through a Local Interconnection Service Guide ("LIS Guide") that is available on Comcast's website. (Exh. Comcast-1 at 4; Binder pf. at 18; exh. VTel-1).

The Vermont Department of Public Service ("Department") also concludes that Comcast Phone is a telecommunications carrier under the Act on the basis that the issuance of a Certificate of Public Good to Comcast Phone to provide telecommunications service in Vermont constitutes an unequivocal determination to this effect. (Department's Brief at 3).

On the other hand, VTel contends that Comcast Phone does not offer its services on a common carrier basis and, thus, is not a telecommunications carrier under the Act. VTel also argues that the services provided by Comcast Phone are information services rather than telecommunications services. (VTel Brief at 1, *et seq*). Furthermore, even if Comcast Phone is a telecommunications carrier under the Act, VTel asserts that its rural telephone company exemption under Section 251(f) of the Act would preclude arbitration by the Board. VTel Brief at 29-33. Although it has not addressed this issue directly in its brief or reply brief, VTel also took the position, assuming the Board has arbitration jurisdiction, that VTel would be entitled to arbitrate services and agreements that would provide VTel with interconnections to the cable

facilities, network and programming of Comcast Phone affiliates. (*See* Comcast-VTel Disputed Issues List of October 14, 2008, at 6-7).

On the issue of the common carrier status of Comcast Phone, VTel argues that, despite Comcast Phone's declaration of its common carrier status and the publication of the LIS Guide, Comcast Phone does not meet the common carrier requirement because it does not hold out its wholesale local interconnection services indiscriminately or indifferently to the public. (VTel Brief at 17-28). VTel asserts that the scope of Comcast Phone's offering of local interconnection services under the terms of the LIS Guide is so limited that only CDV would meet all the requirements necessary to obtain the service.¹² (VTel Brief at 17-25). VTel also notes that the failure of Comcast Phone to disclose all the prices, terms and conditions of its arrangements with CDV makes it impossible for another potential VoIP customer of Comcast Phone's wholesale local interconnection services to review such arrangements so as to verify whether any offer to it by Comcast Phone was discriminatory. (VTel Brief at 25-27).

Under Section 251(a) of the Act, a telecommunications carrier has a duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Each local exchange carrier has additional duties as detailed in Section 251(b) of the Act. (47 U.S.C. § 251). Under the Act, "telecommunications carrier" generally means any provider of telecommunications services, which services are defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §§ 153(44) and (46). The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." (47 U.S.C. § 153(43)).

Under the "common carrier" standard applicable to determining whether a service provider is a telecommunications carrier for purposes of the Act, a service provider must hold itself out indiscriminately or indifferently to the public. *Nat'l Ass'n of Regulatory Util. Comm'r v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976). A specialized carrier whose service is of possible

12. Although the record is insufficient to support a conclusion that only CDV could meet the offering requirements of Comcast Phone for its wholesale local interconnection services, it does appear, as a practical matter, that potential wholesale customers of Comcast Phone are, at minimum, severely limited.

use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

However, Comcast Phone currently provides wholesale local interconnection service in Vermont only to its affiliate, CDV. (Binder pf. at 17; exh. Comcast-2 at 6). Furthermore, although Comcast affiliates in 38 states have entered into approximately 150 interconnection agreements with incumbent local exchange carriers, no evidence was presented that any of these affiliates provide wholesale local interconnection service to any voice-over-internet-protocol service providers except other affiliates of Comcast.¹³ (Exhs. Comcast-1 at 5, Comcast-2 at 6, and Comcast-4).

The FCC has held that wholesale competitive local exchange carriers, such as Comcast Phone, that are affiliates of Comcast Corporation and provide services only to their affiliates may be "telecommunication carriers" offering "telecommunications services" at least for purposes of Section 222(b) of the Act. *Bright House Networks, LLC v Verizon California, Inc.*, *Memorandum Opinion and Order*, 23 FCC Rcd 10704, ¶¶ 37-41(2008) ("*Bright House*"). In its determination, the FCC gave significant weight to self-certifications of common carrier status and to attestations of a willingness to serve all similarly situated customers equally. The possession of a certificate of public convenience or comparable approval from the state in which the company operated also was cited as supporting the determination. (*Id.* at ¶ 38).

Comcast Phone holds a Certificate of Public Good pursuant to 30 V.S.A. § 231 to provide telecommunications services in Vermont, including service to the local exchange. (CPG 834-CR, 8/24/06).¹⁴ Accordingly, Comcast Phone is subject to the jurisdiction of the Board in

13. In its rebuttal position paper, Comcast Phone states that "Comcast has entered into approximately 150 interconnection agreements with ILECs around the country" and that "Comcast does not currently have customers for its LIS service other than its VoIP affiliate." Exh. Comcast-2 at 6. It is not clear whether the second statement refers to just Comcast Phone of Vermont, LLC, or whether it is a more general statement that applies also to similarly situated Comcast affiliates in other states. In any case, there is nothing in the record that suggests that any similarly situated Comcast affiliate provides local interconnection services to any party other than Comcast's VoIP affiliates.

14. Vermont law defines "telecommunications services" as the transmission of any interactive two-way electromagnetic communications including voice, image, data and information." 30 VSA § 203(5); Campbell reb. pf. at 13.

all matters respecting the rates for its services, when unreasonable or in violation of law, and is subject to restraints on any unjust discriminations in rates under 30 V.S.A. § 209(a) and § 218(a).

In view of the Bright House decision,¹⁵ Comcast's offering of the LIS service to all eligible customers (not merely its affiliates), and the obligations of Comcast Phone under Vermont law not to engage in unjust discrimination with respect to its offering of wholesale local interconnection services, it is difficult not to conclude that Comcast Phone is a telecommunications carrier for purposes of Section 251 of the Act.

Nevertheless, I am concerned that Comcast Phone has not made public the prices and other terms and conditions relating to the wholesale local interconnection services provided by it to its only customer, CDV. Without making all the terms of its CDV arrangements public, there is little basis for determining whether an offer by Comcast Phone to another party provides unjustly discriminatory service or whether Comcast Phone held itself out "indifferently to all potential users." Accordingly, as a condition to finding Comcast Phone to be a telecommunications carrier for purposes of Section 251 of the Act, Comcast Phone must fully reveal all prices, terms and conditions related to the wholesale local interconnection services provided by Comcast Phone to CDV. Further, the same terms and conditions of service must be made generally known and offered to other similarly situated customers or potential customers. I recommend that the Board require submission of those terms and conditions to the Department and Board for review and post those same terms and conditions at a location that is accessible to the public, such as an appropriate web site.

Related to this issue are the rights and responsibilities of Comcast Phone that may extend through this agreement to its wholesale VoIP customers (e.g., Comcast Digital Voice). In various instances within this agreement, Comcast Phone's wholesale customers are conferred certain rights and responsibilities, including access to ported numbers, directory listings,

15. I do not express any opinion as to the merits of the Bright House decision, but can find little justification in legal precedent or the record to conclude that a service provider that is a telecommunications carrier for purposes of Section 222(b) of the Act would not also be one for purposes of Section 251. Chairman Martin, in his dissent in Bright House, acknowledged that the finding affords affiliates of Comcast Corporation "the privileges of a 'telecommunications carrier,' including the right to interconnection, even though there is scant evidence that the affiliates have ever offered telecommunications to the public and no evidence that they have provided telecommunications to any entity other than . . . Comcast." Statement of Chairman Keith J. Martin, dissenting in Bright House.

directories, and information services. In order to ensure competitive neutrality and nondiscrimination, the derivative rights and responsibilities of Comcast Phone that extend to its affiliate or end-use customers of an affiliate through this agreement, must extend to any qualifying wholesale VoIP provider that uses Comcast Phone to terminate or originate traffic from VTel within the relevant local calling area. VTel and Comcast Phone must ensure that the language of the agreement applies comparably to Comcast Phone's potentially unaffiliated wholesale VoIP providers.

As a telecommunications carrier, Comcast Phone would be entitled to interconnect with VTel under Sections 251(a) and (b) to provide local interconnection services even to CDV. In this context, the status of CDV as an information services provider rather than a telecommunications service provider would be irrelevant. As the FCC ruled in a petition of Time Warner Cable, wholesale telecommunications carriers are entitled to interconnect with incumbent local exchange carriers under Sections 251(a) and (b) of the Act when providing services to voice-over-internet-protocol service providers. The statutory classification under the Act of a third-party provider's VoIP service as an information service or a telecommunications service was determined to be irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under Sections 251(a) and (b). (*Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, 22 FCC Rcd 3513 ¶¶ 1, 8, 9 and 15 (2007)).

As a wholesale provider of local interconnection services to its voice-over-internet-protocol service affiliate, Comcast Phone (and not CDV) is the appropriate party to any interconnection agreement with VTel. Comcast Phone holds a CPG to provide telecommunications services in Vermont, and the Board has approved two prior interconnection agreements between Comcast Phone and incumbent local exchange carriers in Vermont. (*Id.*; CPG 834-CR, 8/24/06; exh. Comcast-1 at 5; Department's Brief at 3 and 5).

I also note that, even if I concluded that CDV was a telecommunications service provider, my conclusion that it is not the appropriate party would be unchanged. Under Section 252 of the

Act, negotiations on an interconnection agreement are triggered by a carrier requesting such an agreement from an incumbent local exchange carrier, in this instance, VTel. Here, the only company that requested such negotiations was Comcast Phone. Thus, there is no basis under an arbitration of interconnection issues between these two carriers to include a third company (CDV) that did not request negotiations.

Furthermore, in the context of a request for interconnection and arbitration in which Comcast Phone and VTel are the appropriate parties, VTel may request that Comcast Phone meet obligations under Sections 251(a) and (b). But, VTel is not entitled to arbitrate services and arrangements that could only be provided by a third-party to the agreement, such as CDV or Comcast Cable, albeit affiliates of Comcast Phone. In addition, judicial precedent suggests that the Board may not have jurisdiction to arbitrate issues that do not arise under Section 251 unless these issues were the subject of negotiations between the parties. (*CoServe LLC v. Southwestern Tel. Co.*, 350 F.3d 482, 487 (5th Cir. 2003)).¹⁶ Comcast Phone contends that it never agreed with VTel to negotiate any issues other than those arising under Sections 251(a) and (b) of the Act. (Exh. Comcast-2 at 3- 4; tr. 11/5/08 at 64 and 136 (Choroser)). VTel initially took the position that there were voluntary negotiations about additional commercial terms. Comcast-VTel Disputed Issue List at 6. However, none of the testimony or correspondence introduced into the record clearly establishes that Comcast Phone agreed to negotiate issues outside the scope of Section 251. (*See* prefiled testimony of Jeffrey J. Binder and Valerie Wimer; exh. Comcast-2 at 9-11).¹⁷

As a rural telephone company, VTel is exempt from the duties of an incumbent local exchange carrier under Section 251(c) unless and until the Board terminates that exemption as

16. Although it was the requesting carrier that sought negotiation of unrelated issues in CoServe, there is no reason to conclude that the decision would not be equally applicable to an incumbent local exchange carrier that sought to negotiate non-Section 251 issues with the requesting carrier.

17. VTel did not address this issue directly in either its brief or reply brief, so it is not clear whether VTel continues to assert that Comcast Phone voluntarily negotiated commercial terms with it outside the scope of Section 251.

provided in Sections 251(f)(1)(A) and (B).¹⁸ However, Section 251(f)(1) does not exempt VTel from its duties under Sections 251(a) and (b). (47 U.S.C. § 251(f); Telephone Number Portability, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, ¶ 121 n.401 (1997) ("Rural LECs are not exempt from Sections 251(a) or (b) requirements under Section 251(f)(1)").

Under Section 252 of the Act, for a period of between 135 days to 160 days following the receipt by an incumbent local exchange carrier of a request to negotiate an interconnection agreement, either party may petition this Board to arbitrate any open issues.

47 U.S.C. § 252(b)(1). Regardless of whether VTel, as a rural telephone company, has an obligation to negotiate an interconnection agreement in good faith (as would be specifically required by Section 251(c)(1) of the Act if it were not a rural telephone company), Section 252(b)(1) provides jurisdiction to the Board to arbitrate an interconnection agreement upon petition by a party during the prescribed period following a request for negotiation made upon an incumbent local exchange carrier. Accordingly, the Board has jurisdiction under the Act to arbitrate an interconnection agreement between Comcast Phone and VTel.

In summary, I conclude that (i) Comcast Phone is a telecommunications carrier for purposes of the Act subject to Comcast Phone's compliance with the condition set forth above, (ii) Comcast Phone is an appropriate party to an interconnection agreement with VTel under Sections 251(a) and (b) of the Act, (iii) VTel is not entitled to arbitrate proposed services and arrangements that could only be provided by third-parties to this proceeding, even if such parties are affiliates of Comcast Phone, and (iv) the Board has jurisdiction under Section 252 of the Act to arbitrate an interconnection agreement between Comcast Phone and VTel.

18. "Subsection (c) of this section [251] shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)." 47 U.S.C. § 251(f)(1)(A).

Issue 4: Is Comcast entitled to both direct and indirect interconnection with VTel?

Findings

17. Section 251(a)(1) establishes the duty of telecommunications carriers *to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.* 47 U.S.C. § 251(a)(1).

18. VTel proposes to use the indirect method of interconnection for exchange of local traffic. Wimer pf. at 6.

19. VTel has a trunk group that carries all the local traffic to the tandem owned by FairPoint Communications-NNE ("FairPoint") in White River Junction, Vermont. A single trunk group currently carries the local traffic destined to all local carriers, including local traffic destined to FairPoint exchanges and to Verizon Wireless, with whom VTel has a wireless interconnection agreement. Wimer pf. at 6-7.

20. There is spare capacity in this interconnection with FairPoint. Tr. 11/6/08 (Wimer) at 123.

21. VTel has an access tandem that connects all of VTel's exchanges to interexchange carriers for the purpose of exchanging interLATA access traffic. Wimer pf. at 8.

22. The VTel tandem does not have any local capabilities. Wimer pf. at 8.

23. As long as both parties are connected to the same third-party transit provider, an indirect connection can be established. Wimer pf. at 8.

24. The VTel and Verizon Wireless agreement is the only interconnection agreement that VTel has entered into since the Act. Wimer pf. at 9.

25. Although the VTel/Verizon Wireless agreement allows a direct connection, neither party has requested to implement a direct connection. VTel has determined, based on its network, that an indirect connection will best serve its needs. Wimer pf. at 9.

Discussion

This issue concerns the ability of Comcast to gain a direct connection to VTel's network rather than rely on an indirect connection through a third party. Comcast seeks a direct connection with VTel. VTel has offered indirect interconnection. Indirect interconnection uses

FairPoint's tandem in White River Junction to route traffic, but imposes additional costs on Comcast to pay FairPoint for the transit service.

Comcast Phone is only entitled to indirect interconnection under Section 251(a)(1). I agree with VTel that the plain language of Section 251(a)(1) provides that "Each telecommunications carrier has the duty – (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." This language indicates that so long as the carriers can connect indirectly, VTel's obligation is met. Comcast could obtain direct connections pursuant to Section 251(c)(2), however, as noted above, under Section 251(f) of the Act, VTel is exempt from the obligations of Section 251(c). Comcast Phone has the ability to petition the Board for removal of the VTel rural exemption.

I recognize that the agreement with Verizon Wireless permits direct interconnection. To date neither party has requested it and it is not clear that either party could interconnect directly without agreement of the other. Moreover it is not clear that VTel's agreement with Verizon Wireless provides any basis for overcoming the rural exemption, although it may suggest that the exemption, as it relates to direct interconnection, is no longer necessary in this instance. In any event, I recommend that the Board require the parties to file language consistent with the VTel interpretation of the Act, that only requires an indirect connection. This recommendation affects many provisions of the proposed interconnection agreement ("ICA")¹⁹ as proposed by Comcast, including Sections 2.2, 26, 51, Appendix ITR, Appendix NIM, and Section 5.1 of the Appendix Reciprocal Compensation. This recommendation also relates to Sections 1.1, 22.5, and Section 5.2.2 of Appendix Reciprocal Compensation of the VTel proposal.

Issue 5: Should VTel be required to withdraw its petition for declaratory ruling at the FCC?

This issue relates to the request by VTel of the Federal Communications Commission ("FCC") regarding its "Petition for Declaratory Ruling Whether Voice over Internet Protocol Are Entitled to Interconnection Rights of Telecommunications Carriers" in FCC WC Docket No. 08-

19. In general, where I refer to the "proposed interconnection agreement" or "ICA" I refer to the Comcast proposal, unless specific reference is made to the VTel proposal.

56. This issue is no longer in dispute. (Comcast Phone Initial Brief at 25). No decision or action on this issue is needed from the Board.

Issue 6: Does Local Traffic include VoIP-originated or terminated traffic?

Findings

26. The FCC has not determined whether [non-nomadic] VoIP is a telecommunications service. Wimer pf. at 14.

27. Most categories of IP-enabled voice services to date remain without a regulatory classification made by the FCC. Wimer pf. at 14.

28. VTel would like to capture in its definition of services covered under the agreement, IP-enabled services that fall outside of the FCC's definition of "Interconnected VoIP", and that also fall outside regulatory classifications as telecommunications or information services. Wimer pf. at 16.

29. There are a couple instances where the FCC has designated a regulatory classification to certain categories of IP-enabled voice services. In the *AT&T Phone-to-Phone Order*, the FCC determined that AT&T's voice service, which originated and terminated on the Public Switched Telephone Network ("PSTN") and utilized IP technology for transport in the middle, is a "telecommunications service" as defined in the Communications Act of 1934, as amended. Wimer pf. at 15; *AT&T Phone-to-Phone Order*, ¶¶ 11 & 12; 47 U.S.C. § 153(46).

30. In its *Free World Dialup IP-to-IP Order*, the FCC determined that the Free World Dialup offering, which originates and terminates over a broadband Internet connection and which never touches the PSTN, is an unregulated information service and not a telecommunications service. Wimer pf. at 15; *Free World Dialup IP-to-IP* ¶ 8.

31. The Comcast Phone proposed definition would only cover interconnecting VoIP traffic. Specifically, it would cover VoIP traffic that is two-way, requires a broadband connection, requires compatible customer premises equipment and permits access to the public-switched telecommunications network. Wimer pf. at 15 and 18; *FCC IP-Enabled Order*, ¶ 24.

32. The VTel proposed language includes a definition of "VoIP" that sweeps broader than the FCC's definition and would include traffic that has already been definitively classified by the

FCC as information services traffic. Exh. Comcast-1 at 15.

Discussion

This issue concerns the definition for "Local Traffic", for purposes of intercarrier compensation. This issue concerns Sections 2.2.43, 2.2.75, and 22.3 of the ICA.

VTel's position is that all traffic, "regardless of whether it is telecommunications, IP-enabled voice, VoIP or information services, should be classified as local or toll, depending on the end points of the call." Further ". . . calls that originate or terminate on the parties' networks should be classified and billed in accordance with the [certain] principles, without exception for VoIP or information services traffic." (VTel Brief at 42).

Comcast Phone, for their part, proposes a definition that is more limited than the definition offered by VTel. Comcast is particularly concerned that the definition recognize local traffic that originates or terminates from its VoIP affiliate. Comcast Phone urges the Board to adopt the definition of VoIP from federal regulations as codified in Title 47 Part 9 for an Interconnected VoIP. (Comcast – VTel Disputed Issues List). Comcast Phone, however, highlights the areas of agreement between VTel and Comcast Phone in their Brief. Comcast Phone and VTel agree that the traffic they exchange should be rated and routed based on the location of the calling and called parties, regardless of the technology used to originate, transport, and terminate those calls. Comcast advocates that all local traffic, including VoIP-originated and ISP-bound traffic, be determined based on whether both parties to the call are located in the same local calling area. Comcast maintains that the contract language Comcast proposes is consistent with this advocacy and is the same language with which TDS Telecommunications Corporation ("TDS")²⁰ agreed and the Board has already approved in prior agreements. (Comcast, Reply Brief, at 20).

Having heard the parties' presentation of their concerns, I too share a concern with either extreme. On the one hand, the Comcast Phone proposal may risk excluding traffic that might

20. TDS entered into the agreement as agent for the three subsidiary Vermont operating companies: Ludlow Telephone Company; Northfield Telephone Company; and Perkinsville Telephone Company. *See* Docket 7431, Order of 8/20/08.

today be appropriately captured and rated at local or toll traffic for interconnection and the billing. On the other hand, I am concerned that the VTel proposal sweeps so broad as to include the information services, such as computer-to-computer VoIP, that never touch the PSTN, and which the FCC has clearly identified as information services that are inappropriate to rate and bill pursuant to the standards of telecommunications services.

On balance I conclude that Comcast Phone definition is clear and, I believe, more appropriate. I found little evidence in the record that the gap that VTel was trying to address solved a material concern. This definition has been incorporated in other agreements. If, in the future, there is evidence of a material concern demonstrated, then the definition should be revisited in future agreements or revisions to this agreement and the scope broadened to ensure that there is no material gap in revenue due to the breadth of the VoIP definition in determining the rating and billing of traffic. I believe that the Comcast Phone definition is adequate to the task and less likely to foster later confusion. It also has the secondary benefit of being tied to the *current* FCC rules and definitions, which I find clear.

In its reply brief, VTel raises concern that Comcast Phone's delivery of Comcast Digital Voice's services may not actually meet the definition. I am not persuaded that the matter requires further inquiry at this time.

Issue 7: Should certain obligations and rights under the interconnection agreement be reciprocal?

Findings

33. It is each Parties' responsibility to compensate the other for the traffic that is exchanged under the interconnection agreement. It is Comcast Phone's responsibility to ensure that its own actions on behalf of itself or of its third-party wholesale customer are in compliance with the interconnection agreement. Wimer pf. at 21.

34. Comcast Phone is responsible for compensating VTel for the traffic that Comcast Phone delivers to VTel for termination under the terms of the Section 251 interconnection agreement, just as VTel is responsible for compensating Comcast Phone for the traffic that VTel delivers to Comcast for termination. Exh. Comcast-2 at 17.

35. Section 22 of the General Terms and Conditions includes provisions governing the responsibility of each party to provide call signaling information, as well as prohibitions on rate circumvention and arbitrage. Section 2 of the agreement governs call signaling for the purpose of VoIP traffic. Wimer pf. at 21.

36. Comcast Phone is willing to agree that the access rates that Comcast Phone charges VTel, if any, under that agreement will be no higher than the access rates in VTel's or FairPoint's tariff, and Comcast Phone agrees to reflect that commitment in the language of the Section 251 interconnection agreement. Exh. Comcast-2 at 17.

37. VTel would be willing to accept a rate that meets the condition that the Comcast rate would not exceed the FairPoint rate. Wimer pf. at 22.

38. Board Rule 7.506 provides a check to ensure that LECs that impose terminating access charges get approval before those rates if they exceed the default terminating access charges established by the Board. The Board has not established the default terminating access rates. Campbell reb. pf. at 9.

Discussion

This issue relates to a number of sections and subsections of the agreement concerning the reciprocal nature of terms of the agreement.²¹ Because this issue grouping involves so many different sub-issues and sub-sections, it presents challenges to summarize. This issue includes the provision of signaling information, rights-of-way, the payment of access charges, and use of the term "tariff."

VTel objects to the definition of "tariff" under language proposed by Comcast. Comcast proposed language in the definition that includes a reference to Comcast's "intrastate service guide." (Campbell pf. at 8). VTel is concerned with reliance on such as a guide without the standards of regulatory review that typically accompany a tariff. The Department supports reliance on the Comcast proposal provided that the protections promised by Board Rule 7.506(d)(1) are fulfilled by establishing, in the context of this agreement, an appropriate default

21. Specifically, this issue relates to Sections 2.2.68, 22.4-22.6, Sections 2.6-2.7 of the Appendix Reciprocal Compensation and the VTel proposals for Sections 50.1.1 and 50.3.1.

terminating access charge. (Campbell reb. pf. at 9).

In general, VTel argues that it is Comcast's responsibility to ensure that its own actions on behalf of itself or a third-party wholesale customer are in compliance with the interconnection agreement. The testimony of Comcast suggest there is agreement. (Exh. Comcast-2 at 17). As such, Comcast Phone through this Agreement, takes responsibility, for example, for fees and charges due from either Comcast Phone or CDV, due to the nature of the traffic flows. VTel has signaled its agreement with this in principle, but wording has not been agreed upon. (Wimer pf. at 6). The breadth of the agreement here still remains somewhat obscure.

Comcast Phone is willing to agree that the access rates that Comcast Phone charges VTel, if any, under that agreement will be no higher than the access rates in VTel's or FairPoint's tariff. (Exh. Comcast-2 at 17.) For its part, VTel would accept a rate that would not exceed the FairPoint rate. (Wimer pf. at 22). The proposal of Comcast Phone as related in the prefiled rebuttal testimony of Ms. Choroser for access charges appears reasonable. Further, each party is responsible for populating certain signaling fields or face access charges.

The Department supports setting the default terminating access charges equal to the terminating access charges of the largest LEC in the state, currently Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications ("FairPoint"). (Campbell reb. pf. at 9-10). I agree.

I recommend that the Board require the Agreement adopt the Comcast proposed language for "Tariff" and reflect the nature of access charges and other proposals as outlined by Comcast Phone. That is, that the terminating access rates that Comcast Phone charges VTel (and VTel charges Comcast Phone, when terminating Comcast Phone traffic), if any, will be set no higher than the access rates of the largest LEC in the state, currently FairPoint.

In its rebuttal, VTel also asks that the agreement reflect terms and conditions for rights-of-way. The Department expresses concern that the Comcast Phone position that its obligations are not the same as VTel "seems inadequate." (Campbell reb. pf. at 10). I conclude that the rights-of-way issue need not be resolved at this time in this proceeding, except through a general expression of the parties intent to address the issue. While proposed language is covered in Section 50.1.1 of the Disputed Issues List, I could find no further foundation for this discussion

in the direct testimony of VTel's witnesses. (In various places in testimony, the parties appear to have signaled agreement through silence on an issue.) As VTel notes in their rebuttal, the rights-of-way issue is governed by a separate section of the Act. The parties may rightfully address terms and conditions governing rights-of-way in a separate commercial agreement. I recommend that the Board encourage parties to establish such an agreement through general language in this Agreement but act no further as a matter of compliance in this proceeding to resolve this issue.

Issue 8: Should Comcast be required to provide VTel with call detail records for the purpose of preparing VTel's invoices to Comcast?

Discussion

This issue relates to the call detail information to be provided by Comcast for billing purposes. This issue covers Section 15 of the ICA and Section 5.2.1 of Appendix Reciprocal Compensation. Both parties appear to acknowledge that the records of the tandem provider (FairPoint) should be adequate in conjunction with the call detail records from VTel's switch.

Both parties agree that this issue is no longer in dispute. (Wimer pf. at 6; exh. Comcast-2 at 17). It appears that the resolution largely accepts the Comcast Phone proposed language.²² I recommend that the Board adopt the language proposed by Comcast Phone in the Disputed Issues Matrix as proposed by their witness or allow the parties to propose an acceptable alternative.

22. While the negotiating parties appear to have reached agreement, Comcast requests that the Board find that the Comcast proposed language is accepted, to eliminate further confusion around what has been agreed to. Exh. Comcast-2 at 17.

Issue 9: Should the interconnection agreement include a 12-month limitation on backbilling?

Findings

39. Comcast proposes language for Section 15 of the agreement that establishes that neither party may bill for charges incurred more than 12 months prior to the bill date. VTel exh. VTel-3 at 18.

40. VTel agrees with the Comcast proposal. Exh. VTel-3 at 18.

Discussion

This issue relates to the timeliness of rendering bills between providers. The Comcast proposal includes a provision that neither party may bill for charges incurred more than 12 months prior to the bill date.

Both parties agree that this issue is no longer in dispute. (Wimer pf. at 6; exh. Comcast-2 at 17). No further language was proposed by VTel in the list of Disputed Issues. I recommend that the Board allow the parties to propose language that is mutually acceptable. In the absence of a proposal, and to ensure resolution of this matter, I recommend that the Parties adopt the language of the Comcast proposal for Section 15 of the Agreement. The proposed language appears reasonable and no alternative language was proposed by VTel as an alternative. (Exh. VTel-3 (Comcast-VTel Disputed Issues List) at 18).

Issue 10: Should the dispute resolution provisions authorize the parties' recourse to the courts only for the purpose of seeking a temporary restraining order or an order compelling compliance with the dispute resolution procedures?

Findings

41. Comcast proposes language in Section 16 adopted by the Board in the TDS/Comcast interconnection agreement that establishes agreement by the parties to use the Dispute Resolution procedure "with respect to any controversy or claim arising out of or relating to this Agreement

or its breach." However, "either party may need to seek immediate judicial relief in situations in which end-user customer-service is affected. Exh. VTel-3 at 18-19.

Discussion

This issue is addressed in Sections 16.1.2 and 16.5.1 of the proposed Agreement and concerns the path relied upon for resolving disputes between the parties. Comcast Phone's proposal would require the parties to negotiate with each other before filing any action with the Board or a court of competent jurisdiction. (Comcast Brief at 30).

There appears to be little or no dispute to resolve related to Issue #10. (Wimer pf. at 6; exh. Comcast-2 at 18). However, Comcast maintains that the issue may still be in dispute. (Exh. Comcast-2 at 18; Comcast Brief at 30-31). In the interest of ensuring that the issue is resolved, I recommend that the Board adopt the proposed language of Comcast Phone as presented in the Disputed Issues List. I find it reasonable and consistent with prior agreements approved by the Board. I recommend, however, that the Board allow room for Comcast Phone to work with VTel to identify any further language changes that are also agreeable to all parties in the Compliance filing.

Issue 11: Does the interconnection agreement involve unique provisioning that must be tested before implementation?

Findings

42. Comcast Phone proposes Board-approved contract language that would require both parties to work cooperatively to implement the agreement. Exh. Comcast-2 at 18.

43. Comcast has over 100 Interconnection Agreements with incumbent local exchange carriers, including a dozen with smaller rural carriers. Exh. Comcast-1 at 5; exh. Comcast-4.

44. VTel does not have any interconnection agreements with competitive LECs and has only one interconnection agreement with a wireless carrier. Wimer pf. at 23.

45. Local interconnection with FairPoint (and its predecessor, Verizon Vermont) has been in place since before VTel began operations in 1994 and is historically based. Wimer pf. at 23.

46. Comcast Phone has agreed to the testing of local number portability ("LNP") and trunk operations. However, the Comcast Phone proposal covers only two processes. Wimer pf. at 24.

47. The VTel proposal would provide a general requirement for testing that applies to all the processes and not just selected processes. Wimer pf. at 24.

Discussion

This issue concerns the scope and time frames for testing procedures by VTel prior to actual implementation of the interconnection agreement. VTel seeks additional time and scope for the procedures that need to be tested.

VTel claims there are differences between the access services that VTel currently provides and those that would be associated with the exchange of traffic with Comcast Phone that, if not tested, can result in the misrouting of traffic, incorrect information being provided, or the unintentional release of Customer Proprietary Network Information ("CPNI"). (Wimer pf. at 24). VTel wants to avoid testing new processes with actual customers after traffic and services are being exchanged. (Wimer pf. at 23).

Comcast Phone is concerned that the VTel proposal adds unwarranted delay for Comcast Phone's ability to interconnect with VTel. Comcast Phone notes that

"VTel does not claim that it does not undertake pre-ordering, maintenance, and billing for other carriers – including Verizon Wireless, with which VTel executed a traffic exchange agreement more than two years ago. Yet there is no provision in that agreement that requires testing of any processes, despite the fact that VTel's agreement with Verizon Wireless is the first and only such agreement between VTel and a competing provider."

Comcast Phone's concerns here are well taken. Nevertheless, it seems reasonable to me that this agreement and arrangements would present special challenges for VTel and cause for concern that were not simply motivated to delay. I recommend that the Board adopt the VTel proposed language or a close approximation to recognize that the agreement involves the provision of services in ways such services were not previously available. I further recommend that VTel file with this Board and with Comcast Phone specific tests and timeframes for conducting such tests regarding operational issues that are unique or are sufficiently unique to VTel to warrant such tests, but so as not to unduly delay the exchange of service under this

agreement. I recommend that this filing take place within two weeks of this agreement being approved by this Board.

Issue 12: Should Comcast be required to provide call detail on transit traffic and authorize VTel to block any such traffic, impose access charges, or terminate the agreement?

Findings

48. The interconnection agreement as proposed expressly prohibits Comcast Phone from sending traffic to VTel for transit either to or from third parties. Wimer pf. at 25; exh. VTel-3 at 20.

49. As an additional assurance, the VTel proposed agreement includes a provision requiring Comcast Phone to provide call detail records for any traffic that is terminated over VTel's network, including the Calling Party Number ("CPN") and Jurisdictional Identification Number ("JIP") for the call. Wimer pf. at 25.

50. VTel also proposes that if Comcast Phone terminates transit traffic in violation of the agreement, Comcast Phone is responsible for the payment to VTel of billed access charges. Wimer pf. at 25.

Discussion

This issue concerns language VTel proposes for Section 22.3 and Section 22.4 under its commercial services agreement (exh. VTel-8) regarding the monitoring, penalties, charges, and actions that VTel could take under the agreement to address violations of terms of the agreement concerning traffic passed from third parties.

VTel is concerned that under the proposed dispute resolution arrangements contained in the Comcast Phone proposed agreement, it is subject to a long waiting period, even as prohibited transit traffic is being transmitted over its network, before VTel can obtain complete relief. VTel proposes enforcement provisions that would allow it either to block the transit as prohibited traffic or to charge Comcast Phone terminating access service charges as set forth in VTel's tariffs. (Wimer pf. at 25).

VTel cites a case in Georgia involving a longstanding billing dispute between BellSouth Communications, Inc., d/b/a AT&T Georgia ("AT&T"), and Global NAPs Georgia, Inc. ("GNAPs"). In that case, AT&T issued a disconnect notice to GNAPs after several years of billing disputes. AT&T was only able to actually disconnect almost 4 years later.²³

The Department argues that FCC "precedent provides that no carrier, including interexchange carriers, may block, choke, reduce or restrict traffic in any way." (Campbell reb. pf. at 12 citing FCC, *In the Matter of Establishing Just and Reasonable Rates by Local Exchange Carriers and Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, DA 02-2863 (rel. June 28, 2007), ¶6). VTel's proposed language would prevent Comcast Phone from exchanging traffic with VTel that ultimately originated or terminated with Comcast's VoIP end users. Under VTel's language, VTel would then be able to block traffic. Campbell reb. pf. at 12.

For its part, the Department argues that the Georgia case does not provide sufficient rationale for VTel to engage in the types of self-help it proposes. As the Department notes, "the parties to the agreement in Georgia are not the parties to the agreement being considered here in Vermont." (Campbell reb. pf. at 11). The Department recommends that the interconnection agreement not be structured to allow one party or another to unilaterally decide to block or discontinue exchange of traffic. (Campbell pf. at 6). The Department recommends that disconnection or blocking of traffic should only be relied on as a last resort, and should be done after adequate opportunity to remedy the situation or request independent review of a dispute, such as by the Board. (Campbell pf. at 6). However, the Department acknowledges that "[t]rue emergencies" that threaten harm to the network may require a more immediate response. (Campbell pf. at 6).

I agree with the concerns raised by the Department and by Comcast Phone that VTel's proposal could allow it to take unilateral actions to either block traffic or terminate this agreement in response to perceived violations of the agreement without prior negotiations or review by the Board. I recommend that VTel be required to exhaust all other remedies available

23. The disconnect notice to GNAPs was issued on December 15, 2003, and the final disconnection of interconnected facilities occurred on or about September 2007. Wimer pf. at 28.

in the agreement and seek explicit authority instead from the Board before taking action to block traffic or terminate the agreement, unless there is a true emergency that threatens the network. If a party finds that the dispute resolution process is not addressing the problem quickly enough, it can ask the Board for relief. The parties are invited to identify in the agreement circumstances that may constitute true emergencies requiring more immediate action.

Comcast Phone and the Department also express concern that the VTel language would prevent the exchange of traffic between Comcast Phone and its interconnecting VoIP affiliate. I recommend that the language of the agreement should reflect that the termination or origination of traffic by Comcast Phone on CDV or other retail VoIP customers using Comcast Phone wholesale services shall be treated as permissible traffic consistent with the terms of the agreement. In general, I find that language proposed by Comcast to be reasonable and recommend its inclusion in the agreement, supplemented to permit VTel to monitor compliance.

Issue 13: How should the interconnection agreement address ISP-bound traffic?

Findings

51. Subsection 51.100(b) of the FCC's rules establishes that:

A telecommunication carrier that has interconnected or gained access under Sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangements, so long as it is offering telecommunications services through the same arrangement as well. 47 C.F.R. § 51.100(b); Wimer pf. at 31.

Discussion

As framed in the original statement of issues, this issue appears to address the question of how to handle Internet Service Provider traffic. However, the issue evolved to address an overlapping foundation concern covered in earlier issues. The issue at hand is not really about how to handle ISP traffic. (Campbell reb. pf. at 13). Rather, VTel maintains that Comcast Phone may not, under FCC rules, obtain interconnection for Comcast's VoIP service as a "non telecommunications" service unless it has some other telecommunications traffic to exchange.

Comcast Phone maintains that there is no basis in Section 51.100 of the FCC rules that limits the amount of information services traffic that can be routed through an interconnection

arrangement to "incidental" levels of traffic. (Exh. Comcast-2 at 22 and 23). Comcast Phone opposes what it claims are the "change-in-law" provision in its Section 22.3 proposal. (Exh. Comcast-2 at 24).

The Department argues that the more relevant question is whether the services offered by Comcast Phone of Vermont, the certified CLEC requesting interconnection, are telecommunications services. (Campbell reb. pf. at 13). Pursuant to state law a "'Telecommunications service' means the transmission of any interactive two-way electromagnetic communications, including voice, image, data and information." (30 VSA § 203(5)). As noted earlier, I have concluded that Comcast Phone provides telecommunications services under federal law.

The Department cites language from the FCC decision indicating that the statutory classification of third-party providers VoIP service as in information or telecommunications service is irrelevant to the issue of whether a wholesale provider may seek interconnection under Sections 251(a) and 251(b). The Department recommends that the Board adopt the Comcast Phone proposed language that indicates "The Parties may offer Information Services consistent with 47 C.F.R. 51.100(b)." (Campbell pf. at 14).

I conclude that Comcast Phone provides telecommunications services independent to the interconnecting VoIP services that would be provided under the agreement.

Based on the foregoing, I conclude that the FCC rules permit Comcast Phone, as a provider of telecommunications services, to be entitled to provide VoIP through its wholesale interconnection arrangements. The status of the Comcast Phone affiliate Comcast Digital Voice, VoIP traffic may ultimately be viewed by the FCC as either an information service or a telecommunications service. I recommend that the Board accept the recommendations of the Department and Comcast Phone and adopt the language proposals of Comcast Phone for Section 22.3 that "The Parties may offer Information Services consistent with 47 C.F.R. 51.100(b)."

Issue 14: Is VTel entitled to a special right to audit Comcast's records for rate arbitrage?

Findings

52. VTel proposes a Section 22.9 that would provide VTel the right at any time and within VTel's sole discretion to audit Comcast Phone's or CDV's records to ensure that no Rate Arbitrage and/or delivery of traffic not covered under this agreement is taking place. Exh. VTel 3 at 23-24; exh. Comcast-1 pf. at 16.

53. Section 38 of the proposed interconnection agreement (about which there is no dispute) provides both parties with the rights to audit the records of the other to ensure compliance with the interconnection agreement. Exh. Comcast-1 at 16.

54. If Comcast Phone or CDV passes toll traffic as local traffic, VTel will lose revenue. Wimer pf. at 35.

55. VTel does not object to allowing Comcast Phone to have reciprocal rights to audit VTel's call records. Wimer reb. pf. at 26-27.

Discussion

This issue concerns the audit rights that VTel seeks over Comcast Phone and Comcast Phone's affiliate, CDV, to ensure that no rate arbitrage is occurring with respect to the traffic being passed between Comcast Phone and VTel under the agreement. VTel is concerned that unless it has access to the records of CDV, it may be challenging to determine whether such abuse is occurring. Under Section 22.9 of the VTel revision, VTel proposes that it "shall have the right at any time and within VTel's sole discretion to audit Comcast's records to ensure that no Rate Arbitrage and/or delivery of traffic not covered under this agreement is taking place." (Exh. VTel-3 at 23-24.) The issue then can be separated into two parts. First, should the reach of VTel's audit include CDV. Second, should VTel have the ability to initiate an audit at any time.

VTel asserts that Comcast Phone should not be able to perform rate arbitrage because it is not receiving call records or the proper signaling information from a third party, its affiliate, Comcast Digital Voice. (Wimer pf. at 34). VTel seeks the rights both to review the based call records to determine if all traffic is properly identified and to determine whether the associated billing is accurate. This would include examination of records from Comcast Digital Voice. (Wimer pf. at 34). VTel asserts that unless Comcast Digital Voice is made a party to the

agreement, VTel asserts it would not have access to the final originating and terminating records. Without these records, it could be difficult to demonstrate that rate arbitrage was occurring. (Wimer pf. at 34).

First, I note that Comcast Phone, and not CDV, is the Party to the Interconnection Agreement. Thus there is no basis for auditing CDV itself or any other customer using Comcast Phone's services. Nevertheless, the concerns raised by VTel here seem reasonable in light of the perceived threat. VTel has a valid interest in obtaining accurate call data to verify that the correct charges apply. I am troubled by the asymmetries in the information that may be available to one or another party to the agreement by virtue of Comcast's corporate structure. While I do not believe that rate arbitrage or audit/information asymmetries are the reason for Comcast's choice of corporate structure, I am nonetheless concerned that information asymmetries are a natural consequence. This structure shouldn't serve as a basis for denying VTel access to information that it reasonably needs. However, rather than placing obligations on a non-party, the appropriate resolution is to mandate that Comcast Phone leverage its role as the interconnecting telecommunications carrier. Comcast Phone, as the party to the interconnection agreement, must ensure that it has access to all the information that VTel could reasonably request to verify call data. It can do this either by obtaining assurances of audit access-on-request to its affiliate's (or other client's) records necessary to determine that the associated billing is accurate, or by routinely obtaining, as a condition of its providing wholesale service to its affiliate, the signaling information and call records necessary to achieve that same result for review by VTel as part of a routine audit. This information should be the same or comparable to the information that Comcast Phone would itself have access to from VTel necessary to ensure that there is no rate arbitrage.

I recommend that the Board first request that VTel identify the specific information that it seeks access to from Comcast Digital Voice, or other potential upstream providers of end-user services, and that VTel will itself make available to Comcast Phone under routine audit arrangements. I recommend that the parties include language in the agreement (either as part of Section 38 or in a new Section 22.9) that reflects these rights and responsibilities pursuant to a schedule proposed by Comcast Phone and VTel as a condition in this arbitration.

I am, however, not persuaded that the concerns highlighted by VTel warrant any special spot-audit authority separate from the routine annual audits specified in the agreement. Thus, I do not recommend that the Board adopt such language in the agreement.

Issue 15: Should Comcast be required to make special representations and warranties on behalf of its affiliate with respect to CALEA?²⁴

Findings

56. Section 23 of the ICA as proposed includes all applicable provisions to ensure that both parties comply with their obligations with respect to handling law enforcement requests. Exh. Comcast-1 at 17; exh. VTel-3 at 24.

57. The status of Comcast Phone's VoIP affiliate as a telecommunications carrier under state law, is itself the subject of a separate regulatory proceeding before the Board in Docket 7316. Campbell reb. pf. at 15.

Discussion

Section 23 of the agreement as proposed by Comcast pertains to the cooperation between VTel and Comcast Phone concerning law enforcement requests. In light of the structural differences between Comcast Phone and VTel, VTel is concerned that these differences may not serve the public interest. VTel acknowledges, however, that resolution of this issue follows the resolution of Issue #2. VTel maintains that if the Board determines that Comcast Phone should be the party to the agreement, then Comcast Phone should be required to make special representations and warranties on behalf of its affiliate, Comcast Digital Voice, to ensure that the public is protected through CDV's compliance with laws and regulations applicable to telecommunications carriers. (Binder pf. at 37-38). Neither Party to the negotiated agreement proposed additional language to address Issue #15. (Exh. VTel-3 at 24).

VTel argues that if the Board determines that Comcast Phone should be the party to the agreement, then Comcast Phone should be required to make special representations and warranties on behalf of its affiliate, Comcast Digital Voice, to ensure that the Vermont public is

24. Commission on Accreditation for Law Enforcement Agencies, Inc.

protected through Comcast Digital Voice's compliance with laws and regulations applicable to telecommunications carriers, including CALEA. (Binder pf. at 37-38). The Department argues that to the extent that any of the CALEA regulations apply to Comcast Phone or its affiliates, they do not require the interconnection agreement to give them force. Campbell reb. pf. at 15. As noted above, VTel believes this issue should be resolved as part of the resolution of Issue #2 (Is Comcast Phone of Vermont, LLC, the appropriate party to an interconnection agreement?). (Exh. VTel 3 [Comcast - VTel Disputed Issues List] at 23). While Comcast Phone argues that its VoIP affiliate is not a telecommunications carrier, the Department disagrees. (Campbell reb. pf. at 15).

I am sympathetic to the concern expressed by VTel that the regulatory environment and requirements imposed on competitive carriers should ensure public safety despite the emergence of potential seams. I am, however, also concerned about reliance on interconnection agreements as the appropriate vehicle for achieving this result as it relates to CALEA. This seems like an issue that is not well suited to piecemeal remedies through individual interconnection agreements. The scope of responsibilities under CALEA are already defined by that statute. And, as noted by the Department, these responsibilities do not require the ICA to give them force. Comcast Phone and Comcast Phone's interconnected VoIP affiliate must comply with CALEA and E911 requirements. Thus, I recommend that the Board not require that any further special representations and warranties be made by Comcast Phone with respect to the obligations of its affiliates to CALEA. I believe that the language of the Comcast Phone proposal is reasonable. I would note that further clarity on the scope of CDV's obligations as a carrier under Vermont law, including E911 or CALEA duties may come from the Board's investigation in Docket 7316 and FCC rulemakings. To the extent that gaps remain, the Board should consider this to be the subject of a separate review of Board rules.

Issue 16: Should Comcast be required to ensure its affiliate's compliance with certain specified regulations?

Findings

58. Comcast proposes language for Sections 24.2 that requires each party to comply with all applicable federal, state, and local laws, rules and regulations applicable to its performance under this Agreement. Exh. VTel-3 at 24.

Discussion

This issue concerns portions of Sections 24 (Changes in Subscriber Carrier Selection) and 27.4 of the proposed Interconnection Agreement and overlaps with Issue #15. VTel proposes the same language that Comcast proposes, and more. VTel asserts that it is attempting to close a gap in the interpretation of Comcast Phone's obligations under the agreement. In addition to the general language proposed by both parties requiring each to comply with all applicable laws, rules, and regulations, VTel proposes that Comcast's affiliate, CDV, "comply with, participate in, and take independent responsibility for, ensuring compliance by Comcast Phones" with national network plans and Continuous Emergency Access ("CEA"). They also extend this to ensuring Comcast Phone's obligations, as a provider of telecommunications services, address Vermont Public Service Board Rules (Rules 3.500, 4.700, 7.100, 7.600), E-911, CALEA (per Issue #15), Title 1 and 2 of the Act, and Part 64 of the FCC Rules, CPNI, and related privacy requirements. They also assert that CDV should bill its customers the rates contained in tariffs filed with regulators, and comply with the FCC's subscriber line charge. In section 27.4 VTel proposes provisions that, in effect, nullify the terms of the agreement if the other party is no not authorized or no longer authorized to provide service in Vermont or fails to perform its obligations under the agreement. (Exh. VTel-3 (Comcast – VTel Disputed Issues List) at 25-26).

VTel argues that Comcast Phone should be required to ensure its affiliates' compliance with certain specified regulations to avoid confusion, ensure certainty regarding the Comcast entity that is responsible for compliance with specific regulations. (Binder pf. at 38). Comcast Phone argues that the agreement should only extend to the parties to the interconnection agreement, and not to affiliates. As it is currently structured and approved in other agreements, each party is responsible for complying with applicable law. (Exh. Comcast-1 at 17). However, the Department does not agree with claims that Comcast Phone's position that Comcast Digital

Voice, the Comcast IP affiliate, is not a telecommunications carrier. The issue is before the Board is Docket 7316. (Campbell reb. pf. at 15).

Similar to my conclusions under Issue #15, I recommend that the interconnection agreement not be used as the vehicle for ensuring affiliate compliance with specified plans and requirements detailed by VTel in Sections 26 and 27.4. I acknowledge and appreciate the merit to the concerns. In most instances, however, I believe that the interconnection agreement itself is not the appropriate instrument for providing a remedy. It would place VTel in what I believe is an inappropriate role oversight over the Comcast Phone or its affiliate. Similar to my concerns expressed in Issue #15, it would offer only piecemeal remedies through individual interconnection agreements. The scope of responsibilities of telecommunications providers are already defined through statute, rules, and regulations. And, as noted by the Department, these responsibilities do not require the ICA to give them force. Rather, I believe that the concerns expressed by VTel are appropriately placed with the Board, the FCC, and other enforcement agencies of government. I recommend that the Board require the language consistent with the Comcast proposal that requires each party to comply with all applicable federal, state, and local laws, rules and regulations applicable to its performance under this Agreement.

Issue 17: Should VTel be authorized to discontinue service, block traffic, or assess access charges if Comcast delivers a high volume of traffic to VTel for termination?

Findings

59. Section 40.3 under both the Comcast Phone and the VTel proposals is designed to address an instance where a party has caused the interference with the use of the other party's service which impairs the quality of that service to others. Exh. VTel-3 at 25; Wimer at 36.

60. VTel proposes language that would also address VTel's rights to protect its network from "excessive, high volume traffic or other unusual traffic patterns that are directed toward its network, and threaten harm to the VTel network." Wimer pf. at 36; exh. VTel-3 at 26.

Discussion

This issue concerns reliance on unilateral enforcement mechanisms by VTel for blocking traffic that is not truly local VoIP traffic. VTel proposes language for Section 40.3 that would allow it to protect its network in circumstances where services provided causes network interference. Comcast proposes language consistent with Vtel's proposal that would prevent either party from use of services, but is silent on the unilateral penalties that may be taken to protect the network. Comcast suggests that any disputes here should be addressed through the Dispute Resolution process. (Exh. VTel-3 at 25).

The Department opposes the VTel proposal and raises the same concerns here that it expressed with Issue #12 with allowing one party or another to unilaterally decide to block or discontinue exchange of traffic. (Campbell pf. at 6; Campbell reb. pf. at 15). The Department recommends that disconnection or blocking of traffic should only be relied on as a last resort, and should be done after adequate opportunity to remedy the situation or request independent review of a dispute, such as by the Board. (Campbell pf. at 6). The Department, however, acknowledges that "true emergencies" that threaten harm to the network may require a more immediate response. (Campbell pf. at 6).

I am sympathetic to the concerns expressed by the Department. Neither party should be permitted to block traffic without reliance on the Dispute Resolution process or Board approval, save emergencies that threaten harm to the network and require immediate response.²⁵ I recommend that the Board accept the language proposed by Comcast Phone for Section 40.3, supplemented only by provisions that allow the other to charge access charges for such traffic that is not local. Any language that implies that either party has power to block traffic should first reflect reliance on the Dispute Resolution process, and narrow the circumstances under which such authority would be allowed to true emergencies. This resolution is consistent with my recommendation on Issue #12.

25. While I believe that cooperative communications among the parties will avert any potential emergencies, should actions be necessary, they should be implemented in a competitively neutral manner to the extent practicable. In the unlikely event that such emergencies arise, the parties should be expected to document the circumstances and provide an explanation to this Board.

Issue 18: Do the rates, terms, and conditions of VTel's tariffs apply to the interconnection and services provided under the interconnection agreement?

Findings

61. This Agreement does not provide the detailed technical descriptions of the services provided. VTel asserts that this agreement is supplemented by the descriptions in the tariffs. VTel notes, for example, this agreement does not include a technical description of a T1 line. Exh. VTel-3 at 27-28.

62. The tariffs may also provide more information on the ordering and the limitations of use. VTel proposes to include an express reference to the tariff in lieu of repeating the descriptions of services from the tariffs. Wimer pf. at 37-38.

63. For all local services governed by the agreement, where the tariff and the agreement conflict, the agreement would prevail. Wimer pf. at 38.

64. Services like bold or special directory listings in the directory are examples of services that are not anticipated in the agreement. Wimer pf. at 38.

Discussion

This issue concerns the role that VTel's tariffs can serve to supplement or potentially supplant the terms of the interconnection agreement. The Comcast Phone proposal includes provision stating that "Every interconnection and service provided hereunder shall be subject to all rates, terms and conditions contained in this Agreement which are legitimately related to such interconnection or service." (Exh. Comcast-1 at 19; exh. VTel-3 at 26). VTel proposes to reframe the provision by inserting "and VTel's tariffs" into the Comcast Phone proposal so that it reads "Every interconnection and service provided hereunder shall be subject to all rates, terms and conditions contained in this Agreement *and VTel's Tariffs* which are legitimately related to such interconnection or service." (Exh. VTel-3 at 26). Comcast Phone is concerned that VTel proposes to modify the language of the agreement to include rates, terms, and conditions in VTel's tariffs. Comcast Phone asserts that VTel is not entitled to include language in the agreement that would permit VTel to "trump" or supplant the negotiated provisions of the agreement with VTel's tariffs. (Exh. Comcast-1 at 18-19).

It does not appear to be VTel's intent here to "trump" provisions of the agreement with VTel's tariffs. Rather, VTel correctly recognizes that there may be provisions in the tariff (or in the terms and conditions of service that were formerly tariffed), that may provide useful supplemental detail for clarity where detail is absent in the agreement and its appendices. Regardless of the intent, I believe that such supplemental rate or tariff information could be helpful to reference, if it can be referenced to accomplish the goal of providing supplemental information. That said, the insertion of the language proposed by VTel does not appear to serve well the purpose. Rather, I conclude that it contributes an additional source of confusion. I recommend that the Board require that the language as proposed by Comcast Phone be included in the proposal in the appropriate sections within the Appendices to the Agreement, but allow VTel to offer clarifying supplemental language that allows the tariffed (or non-tariffed) rates to supplement that agreement as appropriate. I do not recommend that VTel be permitted to propose language that would have the effect of supplanting provisions of the agreement with tariffs or rates that fall outside the agreement.

As an issue of overlapping concern, the Department is concerned that various categories of services referenced by VTel in testimony and in its proposals for the agreement, may no longer truly be "tariffed" pursuant to changes in State law from Act 95 of the 2007-2008 legislative session, which amended 227d of Title 30 and detariffed many of VTel's services. (Campbell reb. pf. at 16). The Department recommends that where there is an objection to a reference to a rate contained in a tariff that may no longer exist, that the Board direct it to be deleted or the reference replaced with a valid rate reference. (Campbell reb. pf. at 16).

As the Department notes, recent changes in Vermont law have some bearing on references to a company's rates or tariffs. I recommend that the Board require the parties, in offering compliance proposals, to guard against reliance on the term "tariff" where it is inappropriate, given these changes.

Issue 19: Does the interconnection under the interconnection agreement exclude exchange access service?

Discussion

This issue concerns the question of whether the interconnection agreement should provide for the combining of local and long distance exchange access services. This relates to language contained in Section 1.3 of Appendix NIM of the proposed agreement. This issue is closely linked with Issue #4 in which I conclude the agreement doesn't need to require direct interconnection.

Comcast Phone proposes language for Section 1.3 of Appendix NIM of the ICA to the effect that requires VTel to provide interconnection for Comcast's facilities and equipment for the transmission and routing of telephone exchange services and exchange access at a level of quality equal to that which VTel provides itself. (Exh. VTel-3 at 28). VTel proposes alternative language for that same section to the effect that only requires VTel to provide indirect interconnection for Comcast's facilities and equipment for the transmission and routing of telephone exchange service, at a level of quality equal to that which VTel provides itself. . . ." (Exh. VTel-3 at 28).

VTel asserts that it has no obligation to include exchange access in this agreement either under commercial terms or under such federal interconnection rules as may apply. VTel has non-discriminatory tariffs filed with the Board and is governed by the National Exchange Carrier Association ("NECA") tariffs in the federal jurisdiction. Access services are available to Comcast Phone under the VTel tariff terms. (Wimer pf. at 39). Comcast Phone maintains that to the extent that Comcast Phone and VTel interconnect directly, network efficiency, standard industry practice, and the language of other Board-approved interconnection agreements require that the parties use the same facilities to exchange both local and intraLATA toll traffic. (Exh. Comcast-1 at 19).

While Comcast Phone is correct that network efficiency supports their contention that local and long distance access should be combined where there are efficiencies to realize (where there is a direct connection), I am not recommending that the Board require direct

interconnection between Comcast Phone and VTel (*see* Issue # 4) because I do not believe such a mandate is authorized under the Act. Nevertheless, if the parties do choose to interconnect directly at some point through mutual agreement, I believe that the language of this provision should require VTel to provide interconnection for the transmission and routing of telephone exchange service and exchange access service, at a level of quality equal to that which VTel provides itself or any other party. I recommend that the language of Appendix NIM Section 1.3 be changed to reflect that VTel is only required to provide indirect access. However, to the extent that the parties choose, through mutual consent, to provide direct access, network efficiency argues in favor requiring the parties to use the same facilities to exchange both local and intraLATA toll traffic. I therefore recommend that the language of the agreement require the parties use the same facilities for exchanging both local and intraLATA toll traffic in the event that direct interconnection occurs.

Issue 20: Is Comcast required to have its own number resources in the VTel rate center as a prerequisite to local number portability?

Findings

65. VTel proposes additional language requiring that "[w]ireline-to-wireline LNP is only available where Comcast Phone has facilities or its own numbering resources in the VTel Rate Center from which the numbers will be ported." Exh. Comcast-2 at 30; exh. VTel-3 at 29.

66. The assignment of a numbering resource would constitute either a full NPA-NXX²⁶ or a thousand block from the North American Numbering Plan Administration ("NANPA"). Wimer pf. at 41.

Discussion

This issue pertains to whether Comcast Phone needs either "facilities" or "number resources" as a prerequisite to its asserting its rights to obtain numbering resources in each rate center. The source of controversy here is that differing interpretations of what the FCC requires

26. NPA-NXX refers to the area code and the first three digits of the end user's seven-digit dialing number.

of Comcast Phone. VTel proposes to insert language in Section 2.1 of Appendix NP that would resolve the controversy in their favor.

Comcast Phone does not object to including language in the Section 251 interconnection agreement that requires both parties to "adhere to all FCC orders and guidelines that establish all technology and standards for Local Number Portability." (Exh. Comcast-2 at 30). Comcast objects to the VTel interpretation of FCC rules and the insertion of select language into the agreement that carries forward what Comcast Phone believes is a VTel misinterpretation of the FCC rules. (Exh. Comcast-2 at 30).

VTel asserts that the FCC adopted the North American Numbering Council's ("NANC") recommendations for the implementation of the wireline-to-wireline local number portability in 1997. The NANC guidelines limited the wireline number porting to carriers with facilities or numbering resources in the same rate center. (Wimer pf. at 41). VTel argues that in the VoIP Porting Order, the FCC confirmed that for wireline-to-wireline porting, the VoIP carrier's numbering partner must have numbering resources in the same rate center. (Wimer pf. at 41). VTel asserts that to meet the obligation to have facilities, a carrier must have either a switch or a point of interconnection. (Wimer pf. at 41-42).

In contrast, Comcast Phone asserts that the porting-in carrier (i.e., Comcast in this case) is required only to have a local routing number ("LRN") for each rate center. (Exh. Comcast-1 at 30). Comcast Phone asserts that VTel has incorrectly framed the term "facilities" here to only include a switch or a point of interconnection. (Exh. Comcast-1 at 30).

The Department argues that the language of the FCC order cited by VTel does not support its position that Comcast Phone is required to have its own number resources in the VTel rate center as a prerequisite to number portability. Specifically, the Department asserts that language that VTel cites from the VoIP Porting Order speaks about the porting obligation of an interconnected VoIP provider and the wireline partner of an interconnected VoIP provider to port out a NANP telephone number to a wireline carrier with facilities or numbering resources in the same rate center. (Campbell reb. pf. at 17).

The issue centers (1) on whether VTel has correctly interpreted the FCC rules and the NANC document that it relies upon, and (2) whether it is necessary for the agreement to settle the

issue of the correct interpretation. In general, I conclude that VTel has an obligation to port numbers pursuant to 47 U.S.C. § 251(b)(2) and that the references cited by VTel do not provide justification for the proposed language in the agreement. I further conclude that it is unnecessary for this agreement to address the issue beyond including a mandate of adhering to all FCC orders and guidelines establishing the technology and standards for Local Number Portability and provisions necessary to implement those standards. I am concerned that the provisions advanced by VTel seem likely to thwart the intent of the Act by preserving barriers to competition from the inability of end users to retain their telephone numbers when switching carriers. I recommend that the Board require that the agreement in Appendix NP Section 2.1 not include language that would require that LNP only be available where Comcast Phone has facilities or its own number resources in the VTel Rate Center from which the numbers will be ported. I find the language of the Comcast Phone proposal reasonable and recommend that the Board require that the language of the interconnection agreement incorporate the Comcast Phone proposal as filed in the Comcast-VTel Disputed Issues List on October 14, 2008, from Exh. VTel-3 at 28-29.

Issue 21: Must Comcast have a letter of authorization prior to obtaining LNP from VTel?

Findings

67. VTel proposes that each carrier submit a blanket letter of authorization to cover day-to-day orders. No individual documents would have to be provided with the order, but the requesting carrier would need to certify that proper authority had been obtained. If there is a customer complaint, the requesting carrier would need to provide proof of authorization. If proof cannot be provided, the customer at its request would be switched back to VTel at the expense of the requesting carrier. Wimer pf. at 42.

68. Comcast Phone offers to "agree to execute reciprocal blanket letters of authorization certifying that each carrier has authority to request number porting on behalf of its customers." Exh. Comcast-2 at 31.

69. The FCC requires the carrier whose wholesale number is being ported (the "porting out carrier") to assume that the porting in carrier has authorization from the customer unless a customer makes a complaint. Exh. Comcast-2 at 31; 47 C.F.R. § 64.1120(2).

70. Board and FCC rules "provide for requirements for carriers submitting a change to a consumer's preferred carrier to obtain verification of consumer's authorization for change." Campbell pf. at 10.

Discussion

This issue concerns customer authorization prior to porting numbers. VTel proposes language for Section 2.1 of Appendix NP that would require each carrier to execute a blanket letter of authorization. This letter is intended to ensure that customers have, in fact, authorized the change in carriers and are not being slammed.

For its part, the Department highlights the importance for consumers to expedite implementation of porting requests. (Campbell pf. at 9.) The Department recommends against re-statement or elaboration of state or federal anti-slamming regulations and notes that no such restatement is necessary for implementation. (Campbell pf. at 10).

I conclude that no re-statement or elaboration of state or federal anti-slamming regulations is necessary or helpful under the circumstances. I recommend that the Board not accept the VTel proposal to address its concerns for slamming, except as noted below. At best VTel's proposal re-states and elaborates on FCC and Board rules. At worst, they may contribute to unwarranted confusion. Comcast Phone is willing to agree to execute a reciprocal blanket letter of authorization certifying that each carrier has authority to request number porting on behalf of its customers. I recommend that the Board require that language be added to reflect this agreement.

Issue 22: What terms should govern return of ported numbers when those numbers are no longer in service?

Findings

71. When a ported telephone number is no longer in use – for example, because the customer has discontinued service and moved out of state – that number is returned automatically to the original ported out carrier after an "aging period" during which a recorded message notifies any calling parties that the number is no longer in service. The aging period also provides a window of time during which the customer could resume service with that number. Exh. Comcast-2 at 32.

72. VTel proposes that Comcast return the numbers after they are "aged" to VTel. Further, VTel wants notification when the number is returned. Lastly, VTel wants Comcast to be prohibited from reassigning the number to a different Comcast customer. Wimer pf. at 43.

73. VTel has obtained numbers from NANC for use with its customers. The NPA NXX has an identity with the service area and its commonly identified with it. This identification has marketing benefit to VTel. When the customer leaves the area or otherwise disconnects the number, VTel wants that number returned so that it can be used with another VTel customer. Wimer pf. at 43.

74. The return of ported numbers is a standard occurrence in the industry, and carriers are typically responsible for tracking this information independently in the Number Portability Administration Center ("NPAC") database. Exh. Comcast-1 at 21.

75. Industry guidelines do not specify that the number is returned after the ported customer disconnects service. Wimer reb. pf. at 52.

76. Comcast Phone proposed language of Appendix NP that requires adherence to FCC rules and industry guidelines. Exh. Comcast-1 at 21.

77. The public benefits when disconnected numbers are allowed to have an appropriate intercept message for a reasonable period of time. This role is best filled by the carrier providing service on the number immediately prior to disconnection. Additionally, disconnected consumers benefit when they are able to re-establish service with their old telephone number after removing the cause of the disconnection. Campbell pf. at 11.

78. Five days is an unreasonably short period of time for the return of ported numbers following disconnections. Campbell pf. at 12.

Discussion

This issue concerns Section 2.3.2 of Appendix NP, the terms under which the return of ported numbers occurs once the numbers are no longer in service. VTel seeks notice when a number has been released back to VTel and assurance that ported numbers not be reassigned. VTel also asks that numbers be returned to it within 5 days.

VTel asserts that Comcast is required to obtain its own numbering resources in each rate center. These are the numbers that Comcast has to assign to its own customers that are not ported numbers. (Wimer pf. at 44). VTel argues that Comcast should be restricted from retaining VTel numbers for this purpose. (Wimer pf. at 44). As a small carrier, VTel maintains that it cannot afford the fully functional interface into the NPAC to monitor numbers. When Comcast releases the number in the NPAC database, the database is updated but there is no notification to VTel from NPAC. VTel asserts that it needs notice from Comcast to identify returned numbers. (Wimer at 44). Comcast would need to maintain the directory listing database and notify that provider when a listing is removed. VTel argues that Comcast can use that same process to notify VTel. (Wimer pf. at 35).

Comcast Phone argues that "[a]ll carriers are required to monitor their own number resources, and VTel is not entitled to have Comcast undertake such monitoring on behalf of VTel." (Exh. Comcast-2 at 32). Comcast Phone argues that VTel's proposal would require Comcast to expend resources to establish and maintain processes to separately track numbers ported from VTel and generate notices – activities that Comcast does not undertake for any other carrier. Comcast Phone maintains that VTel is not entitled to shift its responsibilities and the costs of its regulatory compliance to Comcast. (Exh Comcast-2 at 33).

The Department focused its comments on a feature of the VTel proposal (Exh. VTel-8 (Appendix NP 2.2)) that would require the return of ported numbers after only five days when those numbers are no longer in service.

I am not persuaded that the simple notice requirement in the agreement presents an unreasonable burden on Comcast Phone. Given the resources available to Comcast Phone and multiple avenues for communications, some form of simple notice would not impose an undue burden. This seems like the kind of reasonable accommodation that should exist between the

two companies. Notice here can also be coupled with other communications between providers. I recommend that the Board require simple notice from Comcast to VTel notifying it when a number has been released back to VTel (and framed to be reciprocal, to the extent desired by or useful to Comcast). I further recommend that the agreement specifically state that the number shall be returned after the ported customer disconnects service.

With respect to the Department's concern about the unreasonably short period of time associated with the release, I concur. Comcast (and eventually VTel) should allow for an appropriate period of time before returning numbers. Absent a clear basis for an alternative, I recommend a period of not less than 30 days. Notice of the return should occur within a week of the release of the number.

Issue 23: Which LNP rules and guidelines should the Parties be required to follow?

Findings

79. Unless standards and guidelines are adopted by the FCC, they are only recommendations. The FCC has enforcement authority if its rules are violated, but the NANC and its working group do not have any authority to enforce their recommendations, standards, and guidelines. Wimer pf. at 45.

80. Comcast and VTel must follow FCC rules regarding LNP. Campbell pf. at 11.

Discussion

This issue concerns the question of which rules, guidelines, standards, and practices should be followed by the parties under the agreement for Local Number Portability. This issue relates to Sections 2.3.3 and 2.3.4 of the proposed interconnection agreement and Section 2.1 added by VTel in its proposed revisions to Appendix NP.

VTel is concerned that Comcast Phone proposes to reference industry standards and guidelines in lieu of VTel's processes. VTel cites differences in size and ability to adapt to changing standards and guidelines. VTel asserts that Comcast, as a large company, has membership on committees that set the industry standards and guidelines. (Wimer pf. at 46).

For its part, Comcast Phone maintains that the agreement should follow "industry guidelines" for LNP. Specifically, Comcast Phone proposes that "FCC rules and orders and Industry Guidelines shall be followed regarding all aspects of porting numbers from one network to another." (Exh. VTel-3 at 32). This, they argue, contrasts with VTel proposals that add language that would require the parties to comply with procedures established by VTel, which VTel does not identify or include. (Exh. Comcast-1 at 21). Comcast Phone notes that the VTel proposal amounts to requiring Comcast to comply with unspecified procedures and guidelines that VTel "unilaterally establishes." (Exh. Comcast-2 at 33). Comcast Phone argues that rural ILECs and their interests have been, and continue to be, represented in the industry working groups that monitor LNP standards. The barriers to participation in these groups are relatively small since there is no fee and group members can participate by phone. (Exh. Comcast-2 at 34).

The Department is concerned that the positions advocated by both parties are unclear. On the one hand, VTel advocates practices that are not clearly identified and Comcast Phone advocates industry standards that are unclear. (Campbell pf. at 11). The Department asserts that the FCC has rules and guidelines of the North American Numbering Council that should govern procedures for LNP. (DPS Initial Brief at 9).

I am not persuaded that VTel, or companies similarly situated to VTel, do not have a reasonable opportunity to participate on standards and guidelines setting working groups. Rather, industry standards offer advantages for both incumbents and CLECs (and ultimately retail consumers that bear the cost) by helping to overcome incongruous practices of many industry participants. I recommend that the Board adopt the language proposed by Comcast Phone for Section 2.3.3 of the Appendix NP. The Department, however, raises a valid concern. The absence of references to the industry guidelines presents its own concerns. I recommend that the parties propose references to specific guidelines in the language of the agreement that is adopted for Section 2.3.3. This can be addressed in the compliance submission by the parties.

Issue 24: Should Comcast be required to provide written confirmation that it will assume responsibility for 911 access and indemnify VTel when porting each telephone number?

Findings

81. VTel has the obligation to provide CEA to every primary line where telephone service has been installed. VTel's obligation continues unless the structure is scheduled to be demolished, there are multiple lines that remain in service at the premise, there is documentation in writing that other conditions exist such that service will not likely be reinstated to the structure, there is fraudulent use of the line, the primary residential dial tone is being provided by another local exchange carrier, or six months following when a customer requests or gives permission for disconnection of local telephone service. Wimer pf. at 48 and VPSB Rule 7.100.

82. VTel proposes that when a customer leaves VTel for another wireline carrier like Comcast, the CEA responsibility should also transfer to the new carrier. This transfer of responsibility may fall under the permanent discontinuance provisions of either Board Rule 7.106(B)(1)(c) ("The CEA Provider reasonably determines and documents in writing that other conditions exist such that service will not likely be reinstated to the structure.") or Board Rule 7.106(B)(1)(e) ("Primary residential dial tone is being provided by another local exchange carrier.") Wimer pf. at 48.

Discussion

This issue concerns the scope of Comcast Phone's responsibilities and the limits of VTel's responsibilities for CEA and 911 service upon transfer of service.

Under Board rules, VTel has the obligation to provide CEA to every primary line where telephone service has been installed. VTel's obligation continues unless certain specified conditions are met. VTel, however, is concerned that under a limited set of circumstances, the end user would have no dial tone from the old carrier and no service from the new carrier. VTel's concern arises from the fact that Comcast Phone is a wholesale provider without end-user customers and CDV claims not to be a telecommunications carrier, and so may deny an obligation to assume CEA responsibilities. VTel argues that it needs assurances by positive declaration on individual topics that Comcast Phone takes responsibility and assumes liability associated with the customers when the customer is no longer served by VTel. Comcast Phone asserts that the VTel proposal would require Comcast Phone to provide written confirmation to

VTel for each number ported and to indemnify VTel against claims that Comcast has not complied with its obligations. Comcast Phone asserts that neither the FCC nor industry guidelines impose such a requirement and that they are unnecessary and unduly burdensome. (Exh. Comcast-1 at 22).

The concerns of VTel highlight gaps in the emerging regulatory environment that impose unwarranted confusion and disputes among interconnecting VoIP providers and incumbent local exchange providers. The positions of both parties in this instance are understandable. Some provisions of the pre-existing regulatory regime that predate local exchange competition may require adaptation in an environment where there are a myriad of technologies and multiple service providers providing overlapping service capabilities. As a wholesale provider of telecommunications service, Comcast Phone itself would not have CEA responsibilities. Adding to the confusion here is that fact that the FCC and Vermont have not affirmatively concluded that the interconnecting VoIP services being offered by CDV here are telecommunications services under either state or federal law, so that CDV's obligations to provide CEA is unclear. Indeed the question of its status under state law is a matter before this Board in a separate proceeding.

I conclude that VTel should no longer retain responsibility under Board rules to provide CEA once the transfer of service to a CLEC or interconnecting VoIP provider has taken place. The current Board rules governing E-911 and CEA can be interpreted to provide the necessary assurance, provided that the Board clarifies here the point of transfer of that responsibility in the interconnection agreement (subject to potentially later review and revision under revisions to existing Board orders). The agreement must also make clear that point at which VTel would regain or acquire that responsibility from a customer that changes service from CDV to VTel as may occur in the future. Both parties and the agreement can supplement this point by ensuring that the instance of service transfer is clear under the agreement (so that the limits of VTel's responsibility here are also clarified).

Once the CEA obligation has left VTel, the question of Comcast Phone's further obligations can then be addressed as a compliance matter in the open Board investigation, or through potential revisions to Board Rule 7.100. I recommend that the Board require the parties to incorporate provision in the agreement that establishes the point in the process after which

VTel would no longer be responsible for CEA under existing Board rules (pursuant to either 7.106(B)(1)(c) or (e)). In separate proceedings, the Board should (1) clarify the application of Rule 7.100 as it applies to the transfer of local exchange service from an existing local exchange provider to an interconnecting VoIP provider and (2) initiate an inquiry into provisions of PSB Rule 7.100 (and/or potentially other) requirements that deserve review in light of the changing nature of local exchange service and competition in recent years that are being highlighted in this proceeding. To the extent the issue is not resolved in Docket 7316, the scope of that inquiry should address, at a minimum, the scope of CEA obligations that may apply to interconnecting VoIP providers.

Issue 25: Is either Party entitled to charge the other for LNP other than the standard service order charge specified in the interconnection agreement?

Findings

83. In the proposed agreement with Comcast Phone from VTel, VTel proposes to assess a service order charge for every local service request ("LSR") submitted by Comcast to VTel. The service order charge is a general charge designed to pay for the processing of a local service request. Wimer pf. at 50.

84. VTel incurs costs when Comcast submits an LSR that entails number porting. VTel has costs for receiving the manual order, inputting into the OSS, validating and updating records, and communicating with Comcast. Wimer pf. at 51.

85. The normal cost recovery mechanism is to charge end users or other carriers. In the case of a service order, the entity that places the order is charged. Wimer pf. at 52.

86. Service order costs do not meet the test of an Local Number Portability ("LNP") cost. Service order costs associated with the LSR would be incurred even if there was no number portability. Wimer pf. at 54.

87. VTel's proposed rates are higher than VTel's service orders for end-user customers, but lower than carrier service orders rates. Wimer pf. at 61.

Discussion

This issue concerns whether either party is entitled to charge the other for number porting or a service order request related to number porting. This issue covers Section 2.5.2 of Appendix NP.

VTel asserts that there is no rule or order prohibiting the assessment of the LSR charge in this situation. (Wimer pf. at 51). VTel asserts that the FCC ordered companies to implement LNP and recover costs in a competitively-neutral manner. (Wimer pf. at 51). VTel recommends that the Board allow service order fees to continue to be charged for all LSR's submitted by Comcast, including but not limited to those involving porting. (Wimer pf. at 55). Comcast Phone asserts that the FCC has not authorized any charges for LNP. (Exh. Comcast-1 at 22). Nonetheless, Comcast Phone has agreed that it will pay a standard service order charge when placing orders for LNP. (Exh. Comcast-2 at 36). The only dispute with respect to service order fees for LNP is the rate, which is addressed in Issue #30. (Exh. Comcast-2 at 36).

Both parties agree that charges apply for local service requests submitted by Comcast Phone to VTel, including service order charges related to LNP. As VTel points out, these orders or requests involve costs incurred by VTel that are distinct from the categories of costs that are associated with LNP that the FCC has not authorized. I recommend that the Board require language in the agreement consistent with the application of a local service order charge for LNP. The only remaining dispute with respect to service order fees for LNP, as noted by Comcast, is the rate, which is addressed in Issue #30.

Issue 26: What terms and conditions for VTel's provisioning of white pages directory listings should be included in the interconnection agreement?

Findings

88. VTel is obligated to provide directory listings pursuant to Section 251(b)(3) of the Act. Exh. Comcast-1 at 23; Martin pf. at 2; 47 U.S.C. § 251(b)(3).

89. Comcast proposed the same terms and conditions for VTel's provisioning of white pages directory listings to which TDS agreed. Exh. Comcast-1 at 23; exh. Comcast-2 at 36.

90. Section 251(b)(3) of the Act requires LECs to permit competing providers of telephone exchange service and toll service to have "nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings." Martin pf. at 2.

91. "Nondiscriminatory access" as it pertains to Section 251(b)(3) encompasses both (1) nondiscrimination between and among carriers in rates, terms, and conditions of access and (2) the ability of competing providers to obtain access that is at least equal in quality to that of the providing LEC. The Act requires LECs to permit competing providers to have access to provisions that are identical to the access that an LEC provides itself. Martin pf. at 2.

92. VTel has a public interest obligation to publish a directory and make distributions to retail customers. Martin reb. pf. at 1.

93. A "foreign listing" refers to an end user in a "foreign exchange." A definition of "Foreign Exchange Service" is a "telephone exchange service furnished to a customer other than the regularly serving area in which the customer is located." Martin reb. pf. at 1.

Discussion

The issue here concerns the terms and conditions of service for the listing and delivery of directories to Comcast Phone. This issue relates to Appendix WP covering Sections 3.1 and 3.2 addressing Directory Listings and Directory Distribution. This issue also relates to Directory Assistance and Toll and Toll Assistance. (Exh. VTel-3 at 38).

VTel has offered to provide Comcast end-use customers directories and to include their customers' listings in the directory. VTel asserts that it has met its obligation to include Comcast end-use customers in its VTel directory by allowing them to purchase foreign listings. In addition, VTel has offered to arrange for directories to be delivered to Comcast end-use customers for a charge. (Wimer pf. at 56). VTel has offered to make arrangements with the publisher to have directories sent to Comcast end-use customers. Comcast would pay VTel a market-based charge for the actual directory and a distribution charge. Comcast may also purchase directories in bulk so Comcast may distribute them directly to its own end-user customers. (Wimer pf. at 57; Wimer reb. pf. at 41). VTel asserts that "special processes must be

used because the end-users are not VTel end-users." At a minimum, a special (customer) account needs to be arranged. (Wimer reb. pf. at 42).

Comcast Phone argues that it has proposed that the parties follow an industry-standard approach in the agreement. Under this approach, VTel would include Comcast's end-user listings in its directories. (Exh. Comcast-2 at 36). Under the Comcast Phone approach, VTel would be compensated for performing this service in two ways: (1) as part of the local service request ("LSR") charge that Comcast has agreed to pay; and (2) through the revenues that VTel receives from selling its own and Comcast's listing information to directory publishers and directory assistance service providers. (Exh. Comcast-2 at 36).

The Department recommends that the Board recognize the direct provisioning of directory listings by VTel and require VTel to provide this service under the terms and conditions consistent with the 1996 Act. (Martin pf. at 2). Comcast Phone's proposal that would allow Comcast Phone to submit directory additions and changes directly to VTel. By contrast, the VTel proposal would require that Comcast submit additions and changes to a third-party directory vendor. (Martin pf. at 2).

The Department maintains that its proposal is consistent with industry practice as has been applied in Vermont between Verizon and CLECs. None of these agreements required the CLEC to file directory additions or changes with a directory vendor or third-party vendor. All of the agreements required filing with Verizon the basic "listing information" on a regularly scheduled basis, at no charge. (Martin pf. at 3). The Department recommends that VTel should be required to accept a mutually agreed-upon industry-standard form from Comcast Phone. (Martin pf. at 3). The Department further recommends that VTel should be compensated for the costs incurred by publishing a directory according to the prices that appear in the August 22, 2008, Appendix Pricing, Attachment A. These prices should include a \$5.00 charge for each book delivered to a Comcast end user, a 5% discount on orders over 500, and an Informational Page charge of \$100. (Martin reb. pf. at 2).

I recommend that the terms and conditions for VTel's provisioning of white pages directory listings be consistent with the Department's recommendations. As the Department and Comcast Phone note, the Comcast Phone proposed-approach has emerged as an industry

standard. In the Department's Brief on the issue of white pages directory listings, they cite a recent decision in Indiana that permitted the incumbent carrier to charge a reasonable fee. (*Petition of Comcast Phone of Central Indiana, LLC for Arbitration of an Interconnection Agreement with United Telephone Company of Indiana, Inc. d/b/a Embarq*, Cause No. 42462 INT 01, Final Order (Indiana Utility Regulatory Commission, Nov. 6, 2008); DPS Initial Brief at 10). Comcast responded by noting that VTel does not charge its own customers for primary directory listings or directory distribution. Further, Comcast agreed "to pay VTel a service order charge to process each directory listing that Comcast submits, and VTel is entitled to charge directory publishers fees. . . ." (Comcast Reply Brief at 26). I conclude that the service order charges should be sufficient to cover the costs of directory listings and recommend that no further charges for directory listings are appropriate. The fees associated with the Comcast proposal were accepted in the TDS agreement, providing a commercial basis for their reasonableness. I am not persuaded that there are any material new cost burdens on VTel that are not addressed as either part of a (1) local service request charge, or (2) that would not be compensated through the revenues that VTel receives from selling its own and Comcast's listing information to directory publishers and directory assistance providers. As part of the arrangements, Comcast directory listings should be submitted to VTel through an industry-standard form. As Comcast Phone notes, there are other advantages to this approach that lowers transaction costs for all carriers and directory publishers, and improves the accuracy of the directory listing information available to the public. I do not recommend that the language of the agreement treat Comcast customers' directory listings as foreign exchange listings. Treating customers in this fashion serves no benefit to consumers or the public.

Issue 27: How should the Parties compensate each other for the exchange of Local Traffic?

Findings

94. VTel and Comcast propose that the language of Section 4.2 to read, in relevant part, that ". . . the Parties shall initially terminate each other's Local Traffic on a Bill and Keep basis." Exh. VTel-3 at 38.

95. The language of the Act also requires rates for interconnection requests pursuant to Section 251(b)(5) provide a "reasonably approximation of the additional costs of terminating such calls." Section 252(d)(2)(A)(ii).

96. The language of the Act expressly permits "mutual recover of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." Section 252(d)(2)(B)(I).

97. The transport and termination rates from the agreement between Verizon Wireless and VTel equal \$0.015 per-minute of use, for indirect interconnection, and \$0.012 per-minute of use for a direct connection. Exh. Comcast-Cross-8.

Discussion

This issue concerns how the parties propose to compensate each other for the exchange of local traffic pursuant to Appendix Reciprocal Compensation 4.2-4.4. Both parties agree that "bill and keep" should prevail when traffic is in balance and recognize that reciprocal compensation will apply if traffic is unbalanced. (Exh. Comcast-1 at 23; exh. VTel-3 at 38). The parties disagree on whether, at the onset, bill and keep should prevail.

Comcast favors an initial presumption in favor of bill and keep, while VTel favors bill and keep arrangements only after traffic has been proven to be in balance.

VTel contends that the parties should agree to initially pay reciprocal compensation, and when the traffic becomes balanced, the parties would move to a bill and keep arrangement. (Wimer reb. pf. at 43). VTel is concerned that CLECs and VoIP providers have an opportunity to choose the customers they serve. Some CLECs choose customers to shift the balance of traffic to their benefit. VTel has no such choices, since it is the carrier of last resort and must serve all customers in its territory. (Wimer reb. pf. at 44).

I acknowledge VTel's concern that traffic may initially be imbalanced because Comcast can target and market its service in ways that lead to imbalance. However, I do not find the case to be sufficiently compelling to recommend such a presumption initially. Indeed, a presumption of an initial balance of traffic is reasonable. This appears to be consistent with the Comcast Phone position and the initial presentation of VTel in this investigation. I recommend that the

Board adopt the Comcast Phone proposed language for Appendix Reciprocal Compensation, Section 4.2-4.4.

To the extent that a reciprocal rate becomes necessary due to an imbalance of traffic, the rate should reflect a reasonable approximation of the additional costs of terminating such calls to be consistent with the Act. I am concerned that the rates highlighted in this proceeding rely on too thin a foundation of information making them inadequate for me to offer a recommendation for the reciprocal compensation rate based on incremental cost. In lieu of an incremental cost-basis, however, I recommend that the transport and termination rates from the Interconnection and Reciprocal Compensation Agreement between VTel and Vermont Wireless provides a sound basis for transport and termination. Because these rates are embedded within an existing agreement, they provide evidence that, at a minimum, the incremental costs are covered. The indirect rate from that agreement is 1.5 cents/minute of use. I conclude that any proposal above this rate is likely to be further from incremental costs and less appropriate given the standards of the Act.

Issue 28: Should the provision and recording of billing records be governed by VTel practices and procedures?

Findings

98. The Board-approved TDS/Comcast Phone Agreement requires the parties to comply with applicable state and federal rules, practices, and procedures governing provision and recording of billing records. Exh. Comcast-1 at 24.

99. Comcast proposes that the "Parties shall be governed by applicable state and federal rules, practices and procedures regarding the provision and recording of billing records." Exh. VTel-3 at 39.

100. VTel proposes that the "Parties shall be governed by applicable state and federal rules as well as practices and procedures established by VTel regarding the provision and recording of billing records. Exh. VTel-3 at 39.

Discussion

This issue concerns the provision of billing records pursuant to the requirements of Appendix Reciprocal Compensation, Section 5.4. VTel proposes that the parties' provision and recording of billing records be governed by its own established practices and procedures, and governed by applicable state and federal rules. Comcast Phone agrees that state and federal rules apply, but argues that industry standards and practices should prevail where they conflict with VTel's practices.

VTel is concerned that there are so many industry billing standards and procedures that it would be impractical for VTel to implement them all. VTel implements a subset of all the industry standards and has limitations based on the systems it uses for billing. (Wimer pf. at 58). For example, VTel uses a billing standard called the Small Exchange Carrier Access Billing ("SECAB") standard, while most Regional Bell Operating Companies ("RBOCs") and CLECS use the Multiple Exchange Carrier Access Billing ("MECAB") standard. (Wimer pf. at 58). VTel asserts that these practices do not conflict with applicable law or industry standards. (VTel exh. VTel-3 at 39-40). However, VTel contends that implementing all industry practices and procedures would be a burden on VTel. (Wimer pf. at 58). VTel is not willing to make what it believes are costly changes to its billing system to accommodate a Comcast Phone process that may be standard for larger RBOCs and CLECs but is not currently used by VTel. (Wimer pf. at 58-59). VTel asserts that it does not have an obligation to modify its systems based on Comcast Phone's requests. (Wimer pf. at 59).

Comcast Phone is concerned that the VTel proposal modifies the Comcast Phone proposal by obligating the parties to also comply with VTel's practices and procedures, which VTel does not include. (Exh. Comcast-1 at 24). Comcast Phone asserts that nothing in federal or state law requires Comcast Phone to comply with VTel's "unilateral" practices and procedures. (Exh. Comcast-1 at 24).

I recognize that VTel uses the SECAB standard, which is different than the MECAB standard used by most RBOCs and CLECs. However, the Comcast Phone clause here is designed to, in part, help provide some common arrangements between carriers to, over time, lower costs for all carriers (and ultimately to end users). Comcast may be the first wireline competitor for VTel, but it is unlikely to be the last. As such, VTel would likely later be

confronted with the same concern. More significantly, the Comcast Phone proposal for the Appendix Reciprocal Compensation on Section 5.4 has no language that actually favors one set of standards over another (e.g., MECAB over SECAB). Thus, VTel would be able to continue to provide bills based upon existing standards VTel applies. Based on the proposal, VTel has not presented compelling information suggesting that if Comcast Phone provided bills based on a different industry standard, VTel would be required to change its own practices. Moreover, while it is understandable that VTel is unwilling to make changes that it believes are costly changes to its billing system, it does not appear that any changes would be necessary nor exactly what would be required of VTel. Indeed, VTel appears to maintain that their practices do not conflict with industry standards or applicable law. I recommend that the Board require the parties to adopt the Comcast Phone proposal for Appendix Reciprocal Compensation Section 5.4.

Issue 29: Should pricing for products and services provided pursuant to the Act but not specified in the pricing appendix be determined by VTel's tariffs?

Findings

101. Tariff prices are reviewed by the appropriate regulatory commission and are provided on a nondiscriminatory pricing basis. Wimer pf. at 59.

102. ILECs may charge CLECs for the facilities and services the ILECs are required to provide. Exh. Comcast-1 at 40.

103. VTel proposes to charge its tariff rates for any product or service it provides Comcast for which rates are not specified in the agreement. Exh. Comcast-1 at 40.

Discussion

This issue relates to Appendix Pricing, Section 1.2 of the proposed interconnection agreement. This issue covers the pricing of products and services not specifically addressed through the agreement, but which are covered under the Act, and are also included in VTel tariffs. Comcast Phone proposes to include in the pricing appendix a provision that, in the event the price for a product or service required under the agreement is not specified in the agreement,

that the price will be established consistent with the requirement so Section 252(d) of the Act or through negotiation if the product or service is not subject to the Act's pricing principles. (Comcast Brief at 58). VTel proposes language specifying that for services that are covered by retail tariffs, those charges would apply. This would only leave room for negotiations of rates to the extent that the rates are not covered under tariff. (Exh. VTel-3, Comcast Redlined Draft at 39).

Comcast Phone argues that VTel has offered no evidence to support continuation of its rural exemption and, as such, the Board could require VTel to establish rates consistent with federal pricing principles. (Exh. Comcast-1 at 40). Comcast asserts that even if the Board did not remove VTel's rural exemption, federal pricing principles still apply to facilities and services that VTel must provide under the Act, and those principles generally require at least some basis in cost to be considered "just and reasonable" under Sections 201 and 202. (Exh. Comcast-1 at 40). VTel asserts that even if the Board determines that this agreement is a Section 251 agreement, Section 252(d) does not apply. They argue that the Section 252(d) standard arises out of Section 251(c)(2)(D) of the Act. VTel asserts that, as a rural telephone company, it is exempt under Section 251(f)(1) from the requirements of Section 251(c). (Wimer pf. at 60).

As I discussed above, VTel is a rural carrier, which means that, under Section 251(f) of the Act, it is exempt from the interconnection obligations set out in Section 251(c). This would extend to any of the pricing provisions specified in that section and in most of Section 252(d) of the Act (although the pricing provisions of subsection 252(d)(2) for termination of traffic do apply to VTel). Further, Comcast Phone has not requested that the Board remove VTel's rural exemption. Indeed, Comcast and VTel petitioned for arbitration of this agreement pursuant to Sections 251(a) and (b), but not (c). Absent an alternative, the VTel proposal referencing the rate regulations set forth in VTel's tariffs appears reasonable. I recommend that the Board require the parties to adopt the VTel proposed language for Appendix Pricing Section 1.2. The parties should enjoy the flexibility to negotiate an alternative rate, even where a tariffed rate may exist, provided circumstances justify such differentiation. If Comcast wishes to establish an agreement that applies the standards of Section 251(c), Comcast should petition the Board to remove the rural exemption and provide the necessary support.

Issue 30: What should the rates be for local service orders?

Findings

104. VTel proposes an initial service order rate of \$75, a supplemental order rate of \$50, and an expedited order charge of \$75. VTel believes these are fair rates based on an estimate of the work involved in the service order process. Wimer pf. at 61.

105. Comcast proposes an initial service order charge of \$20 and the supplemental order Charge of \$5. These Comcast proposals are not acceptable to VTel. Wimer pf. at 61.

106. VTel's end-user rates have not changed for over ten years and VTel does not believe they provide a fair representation of current activities required for transferring customers to Comcast. Wimer pf. at 61.

107. The expedited order charge proposal of Comcast is the same charge as proposed by VTel and so is acceptable to VTel. Wimer pf. at 61.

108. Another rural ILEC, TDS Telecommunications, agreed to service order rates of \$20 per initial order and \$5 per supplemental order.

Discussion

This issue relates to the charges that are associated with the initial and supplemental service order charges contained in Appendix A of Appendix Pricing. VTel proposes a charge of \$75 for each. Comcast Phone objects because these charges are not cost-based. Instead, Comcast Phone proposes substantially lower charges consistent with those that were embedded in its agreement with TDS. Both parties agree to the \$75 charge for expedited orders.

As I have explained above, the cost-based standards of Sections 252(d)(1) and (3) do not appear to apply. At the same time, a price advocated by one party, in this case VTel, without presentation support in the form of a market-based price (to include a willing buyer) or an alternative cost basis (other than the standard prohibited by Section 252(d)) does not constitute an appropriate basis for establishing a rate. VTel offers a tariffed rate for service orders, but raises concerns over the dated nature of the information. In light of the other problems I identify with the other pricing proposals, I am not persuaded that the potentially dated nature of the end-user service order rates should be an overriding concern. I am therefore left with either

recommending the rates from the agreement with TDS, based on some indication of a prevailing rate agreed to by negotiating parties, or to recommend the customer service order rates of VTel, which was supported by neither party. I recommend that the customer service order rates of VTel apply. This seems to strike an appropriate balance between the two extremes presented by the parties. In the face of a limited record in this proceeding for a rate that is not based on costs, this approach seems reasonable. I recommend that the service order rates be based on a simple average of the business and residential retail service order charges from VTel's most recently filed tariffs, and that the same apply for service order requests. This suggests a rate of \$30 for each initial service order and \$9.75 for a secondary service order charge, respectively.

Issue 31: Should there be a rate to establish an account for Comcast?

Findings

109. An account establishment charge is for the initial set up of the Comcast account with VTel. VTel will establish a billing account that provides contact information to all appropriate VTel employees, and set up a new account to handle Comcast's requests for individual customers. Wimer pf. at 62.

110. Both parties will need to establish accounts for each other, and each should be responsible for the costs they incur to update their respective order and operations support systems. Exh. Comcast-1 at 25.

Discussion

This issue relates to whether VTel should be permitted to include in the agreement, an account establishment or initial set up charge on Comcast Phone. On the Attachment A to the Appendix Pricing, VTel proposes a \$400 fee for "CLEC Account Establishment Per CLEC". VTel does not object to making this charge reciprocal if Comcast also works through the same process as VTel in establishing the rate. (VTel Reply Brief at 60).

The obligation to establish an account is, in theory, reciprocal. I see no basis for imposing a charge on one without making it reciprocal and voiding the need for such a charge in

the first instance. I recommend that the Board require the language proposed by Comcast and not include a separate charge on one carrier without applying it reciprocally to the other.

Issue 32: What should the labor rates be?

Findings

111. The labor rates in the Comcast Phone proposal and in the Board-approved TDS/Comcast Phone Agreement are based on NECA's 5 tariff rates. Exh. Comcast-1 at 25.

112. VTel has paid commercial rates to other telecommunications companies for services for its deregulated fiber business. VTel pays between \$100 and \$325 in their commercial business for technical escort services in collocation space. Wimer pf. at 63.

Discussion

This issue relates to the labor rates that apply in the Pricing Attachment to the agreement. Section 3.4 addresses the "Time and Material" non-recurring charges and indicates that these are the "additional labor charges defined in the Pricing Attachment A, under "Miscellaneous Testing and other Additional Labor - each hour or fraction thereof." Comcast Phone proposes rates based on the NECA tariff rates, which more closely approximate a cost-based rate. VTel objects to these labor rates and proposes rates that it has been charged on a commercial basis.

Comcast Phone asserts that "commercial rates" are not appropriate for inclusion in Section 251 interconnection agreements. (Exh. Comcast-1 at 43). VTel asserts that VTel's state tariff labor rates are inappropriate because they have not been updated in over ten years. These rates are not reflective of current labor rates or of commercial labor rates. NECA rates have not been updated for over a year. (Wimer pf. at 63). The cost-based rates Comcast Phone proposes are Section 251(c) obligations, from which VTel is exempt. (Wimer reb. pf. at 47).

I agree with VTel that the commercial rates that have been paid out by VTel provide a reasonable benchmark for establishing the labor rates that apply here. The labor rates proposed by Comcast Phone approximate some form of cost-bases. Without a better understanding of the basis that underlies the establishment of those cost-based rates, I am concerned that such rates are

inappropriate in light of the Comcast rural exemption. The relationship between the NECA tariff rates and the cost standards of Section 252(d)(1) from which VTel is exempt, is not clear. I therefore recommend that the Board require that the labor rates reflect the rates proposed by VTel as listed above.

Issue 33: Is the jurisdiction of the call based on the physical location of the customer?

Findings

113. The actual physical location of the customer should be used for both telecommunications traffic and VoIP traffic. Wimer reb. pf. at 48-49.

114. The FCC defines traffic based on the physical locations of the end users, not the NPA-NXX. Wimer pf. at 64; 47 U.S.C. 51.701.

115. Comcast Phone's affiliate VoIP service is a stationary service. Customers do not have the ability to move their service to other locations off the Comcast cable network. Since Comcast VoIP service is not nomadic, Comcast can tell exactly where each call originates and terminates. Wimer pf. at 64.

116. The 911 location will provide the physical location of the customer. Comcast could use this information if there were any doubt as to the physical location of the customer. In addition, Comcast sets the terms for the wholesale service. Comcast would only have to make identification of the physical location of the customer a requirement of the VoIP provider agreement. Wimer pf. at 64.

Discussion

This issue concerns a VTel proposal for modifying language originally proposed by Comcast under the general terms in Section 2.2 to include under the definition of "local traffic" the concept of traffic that is "located within the same exchange or other non-optional extended local calling area." The VTel proposal also includes language related to "reciprocal compensation" in Appendix Reciprocal Compensation Section 2.2 indicating that "[t]he Parties agree that the jurisdiction of a call is determined by its originating and terminating (end-to-end) points, including the physical locations of the originating and terminating points for calls that

originate to or terminate from VNXX numbers." The VTel language also ensures that traffic that originates or terminates as VoIP traffic be expressly incorporated in the definition. (Exh. VTel-3 at 40).

There appears to be little dispute on this issue. Comcast Phone agrees that the actual physical location of the customer should be used for both telecommunications traffic and interconnected VoIP traffic and will route traffic accordingly. (Exh. Comcast-2 at 44). Both parties agree that physical location should dictate the jurisdiction of the customer and the rating of calls. Comcast Phone maintains that it has no intention of bypassing access charges by allowing local numbers not to be used locally. (Exh. Comcast-2 at 44-45). The language proposed by VTel for Section 2.2 of both the General Terms and the Appendix Reciprocal Compensation in this instance appears reasonable and I recommend that this language be incorporated in the agreement.

Issue 34: Does VTel have to provide Comcast access services outside the VTel access tariffs?

Findings

117. VTel proposes to provide access according to its access tariff. In addition to the actual rates charged in the access tariff, the proposal also means that VTel will only accept traffic according to routing listed in the Local Exchange Routing Guide ("LERG"). Based on the LERG, VTel will accept traffic at its end-office switch that is destined for an NPA-NXX assigned to that switch. Wimer pf. at 66.

118. Comcast Phone proposes language that would prevent VTel from blocking traffic from IXCs that is delivered to VTel's end office but is destined for Comcast's network. Wimer pf. at 66; exh. Comcast-2 at 44.

119. Comcast Phone has proposed language that would preclude VTel from blocking any switched access traffic, even if misrouted. Exh. Comcast-2 at 44.

Discussion

This issue concerns the application of VTel's access tariffs and the concerns of Comcast for VTel to block traffic that was misrouted to VTel over a local trunk. Comcast proposes language that would preclude VTel from blocking what it perceived to be access traffic. In Appendix ITR, Section 5.4 indicates that VTel "will not block switched access customer traffic

delivered to any VTel Office for completion on Comcast's network." (Exh. Comcast 5 (Petition, Exhibit C, Appendix ITR at 5)). The language is inserted to address situations in which the routing of the calls was incorrect or in error. (Exh Comcast-2 at 44). Comcast Phone claims its sole concern here is to ensure that customer calls are completed. (Exh. Comcast-2 at 44). VTel claims that the Comcast language requires VTel to transit through the VTel end office requiring VTel to have its end office function as a tandem switch. Indeed, VTel claims that the language proposed by Comcast is inappropriate because it falls outside of the scope of this agreement (over local traffic rather than access traffic), and that VTel simply does not have the ability to perform the function that is being sought. (Wimer reb. at 50-51).

I share the concerns of Comcast Phone that customer calls should be completed when access traffic is routed incorrectly. I also believe that the approved access tariffs should generally control the terms and conditions under which access services are provided. On balance, the Comcast proposed language provides a reasonable safeguard to the extent that it is technically feasible in the, hopefully, infrequent or unlikely event that access traffic is incorrectly routed. This best serves the long-term interests of end users and in the spirit of cooperation that should exist among the two interconnecting providers under the agreement. I recommend that the Board adopt the Comcast proposal, but include language that makes clear that it only applies to traffic that is incorrectly routed, to the extent that it is within the technical capabilities of the existing switch and trunks, and is consistent with VTel's proposal that will provide Exchange Access in accordance with the regulations set forth in its toll access tariffs filed with the Commission and the Federal Communications Commission. Disputes should be addressed and resolved through the dispute resolution process contained in the agreement.

D. Concluding Comments and Recommendations

Throughout the presentation of this decision and recommendations, I have attempted to provide recommendations that are as clear and prescriptive as possible, within the limitations of the record. I have attempted to err on the side of such prescription in order help resolve the issue and minimize the room for further disputes in finalizing the agreement in the compliance phase of this arbitration. In some instances, I have gone so far as to recommend specific language proposed by one party or another. That said, I recommend that the Board provide the parties with room to negotiate alternative language within the boundaries of the Board's decision to

ensure that the agreement is clear and tailored to the needs of the parties. I recommend that the parties be provided with 30 days to propose mutually agreed-upon language to finalize the agreement.

III. CONCLUSION

For the foregoing reasons, I recommend that the Board adopt the arbitration awards set out in this Proposal for Decision.

In accordance with 3 V.S.A. § 811, this Proposal for Decision has been served on all parties to this proceeding.

Dated at Montpelier, Vermont, this 21st day of January, 2009.

s/J. Riley Allen
J. Riley Allen
Hearing Officer

IV. BOARD DISCUSSION

On January 20, 2009, Comcast Phone of Vermont, LLC ("Comcast Phone") and Vermont Telephone Company, Inc., filed comments on the Proposal for Decision ("PFD") of the Hearing Officer. In general, the comments submitted by Comcast Phone were supportive of the PFD. In particular, Comcast Phone supports Comcast Phone's right to an interconnection agreement by virtue of its status as a telecommunications carrier. In contrast, VTel argues that the PFD reflects the "paramount problem" that Comcast Phone is acting in a discriminatory manner. Further, VTel argues that the PFD fails to adequately address un rebutted record evidence of the discriminatory behavior, and that the cure that Comcast Phone make a filing to publicly disclose the prices, terms and conditions of its arrangements with its affiliate, Comcast Digital Voice ("CDV"), is not adequate to the task.

Legal Issues

There are two critical threshold legal issues in this proceeding. The first is whether Comcast Phone is a "telecommunications carrier" for purposes of the Act; most significantly, in this case, is Comcast Phone a common carrier that holds itself out to offer its services indiscriminately to all potential users? Second, does VTel's rural exemption under the Act preclude the Board from arbitrating an interconnection agreement between Comcast Phone and VTel as asserted by VTel?

The Hearing Officer concluded that Comcast Phone is a telecommunications carrier entitled to interconnection with VTel under Section 251(a) and (b) of the Act, and that VTel's rural exemption does not preclude arbitration of this dispute by the Board under Section 252(b) of the Act. Following a review of the PFD and the record and taking into consideration the comments and oral arguments of the parties in response to the PFD, we adopt the conclusions of the Hearing Officer on these issues.

In its comments on the PFD, VTel frames its objections to the PFD with a variety of separate arguments, most of which, however, fundamentally relate to questions of whether Comcast Phone really can be found to offer its Local Interconnection Service ("LIS") indiscriminately as a common carrier, whether Comcast Phone is a provider of information services rather than telecommunications services, and whether VTel can decline to enter into an interconnection agreement because, as VTel characterizes it, Comcast Phone is merely a shell

entity established to take advantage of Section 251 of the Act. VTel also contends that its rural exemption precludes the Board from arbitrating an interconnection agreement.

VTel asserts that the PFD did not correctly apply the common carrier standards of the NARUC decisions²⁷ to the facts in this proceeding. We conclude that, to the contrary, the discussion of this issue in the PFD indicates that the Hearing Officer did appropriately apply the common carrier standards enunciated in the NARUC decisions and subsequent precedents to the factual findings, and thus appropriately concluded that Comcast Phone is a telecommunications carrier for purposes of the Act. As the D.C. Circuit stated in the second NARUC decision: "a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users."²⁸

In this case, there are several indicators that Comcast Phone is a telecommunications carrier. It has a CPG in Vermont issued by the Board authorizing it to provide telecommunications services. Moreover, Comcast Phone already provides telecommunications services under two prior interconnection agreements which we approved. FCC decisions, most notably Bright House and Time Warner,²⁹ provide further support for our determination that Comcast Phone is a telecommunications carrier entitled to an interconnection agreement for the benefit of an affiliate VoIP provider. We recognize, as VTel argues, that the Bright House decision interpreted Section 222 of the Act rather than Section 251. However, the logic used by the FCC would apply equally to Comcast Phone's provision of service to CDV.

Significantly, Comcast Phone has also declared its willingness to serve as a common carrier. It provides information about the availability of its LIS in a guide that is available on Comcast's website. It may be, as VTel argues, that Comcast's offerings would not be useable by most service providers. We also have considered VTel's assertion that limitations on the service and the possibility of unjust discrimination actually mean that only CDV could possibly purchase

27. Nat'l Ass'n of Regulatory Util. Comm'r v. FCC, 525 F.2d 630 (D.C. Cir. 1976); National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976).

28. National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976).

29. *Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, 22 FCC Rcd 3513 ¶¶ 1, 8, 9 and 15 (2007).

the services offered by Comcast Phone.³⁰ We are not persuaded by these arguments. First, Comcast Phone may still constitute a common carrier even if there are only a limited number of non-affiliated providers who can use the service. Here, Comcast Phone has not restricted its service only to its own affiliate. Second, we find that the Hearing Officer's requirement that Comcast Phone offer the same rates and terms that it now provides to its affiliate will largely alleviate VTel's concerns about the validity of the LIS service as an offering to a subset of the public. Moreover, as a telecommunications provider, Vermont law bars Comcast Phone from unjust discrimination in rates.

There is some precedent supporting the conclusion that CDV is a provider of information services and not a telecommunications carrier, and that calls originating on an IP network and terminating on a circuit-switched network (and vice versa) are information services. However, little support is provided by these precedents for the conclusion that Comcast Phone, itself, is an information services provider rather than a telecommunications carrier. The classification of CDV as an information service provider or a telecommunications carrier and the characterization of calls originating or terminating on an IP network as information services are largely irrelevant to the determination of Comcast Phone's own status as a telecommunications carrier.³¹

VTel argues that the Board has no authority to arbitrate the interconnection agreement under Section 252 of the Act because of the rural exemption in Section 251(f). According to VTel, it is a rural carrier, which means it is exempt from the obligations imposed on incumbent local exchange carriers pursuant to Section 251(c) of the Act. VTel maintains that subsection (c)(1) sets out the obligation to negotiate interconnection arrangements both with respect to the specific mandates of subsection (c), but also concerning the more generalized interconnection responsibilities in subsection (b). VTel maintains that since it has no duty to negotiate

30. VTel also asserts that Comcast provides LIS for free to CDV, but this assertion appears to be based solely on a statement of a Comcast witness in another proceeding, which the witness subsequently corrected. Docket 7316, tr. 11/13/08 at 45-47, 176-177 (Kowolenko). VTel also contends that LIS is not offered to the public because the significant limitations on eligible users mean that CDV is the only potential user of its LIS services. However, the Hearing Officer correctly concluded that "the record is insufficient to support a conclusion that only CDV could meet the offering requirements of Comcast Phone for its wholesale local interconnection services," while acknowledging "as a practical matter, that potential wholesale customers of Comcast Phone are, at minimum, severely limited." Footnote 12 above, *infra* at 16.

31. See, for example, the FCC decision in *Time Warner* referenced in footnote 4 above. The fact that Time Warner was providing wholesale local interconnection services to non-affiliate VoIP service providers does not make this conclusion inapposite. See, for example, *Bright House*.

interconnection arrangements and, therefore, there is no formal request for interconnection, the arbitration procedures in Section 252 are not available. In support of its position, VTel cites to a federal district court decision in *Sprint Communications v. Public Utilities Commission of Texas*,³² which upheld a dismissal of an arbitration request by Sprint. Specifically, VTel cites to the Court's statement that:

The policy evinced in § 251(f) is that rural telephone companies should be shielded from burdensome interconnection requests until the PUC has screened such requests. This policy could be too easily thwarted if a CLEC, such as Sprint, could evade PUC screening by denominating its request for interconnection as one solely under § 251(a) and (b).³³

Comcast disagrees with VTel's arguments. Comcast argues that the right to request arbitration under Section 252 is not affected by the rural exemption.

There is no dispute that VTel is a rural carrier as defined by the Act. To date, no carrier has filed a bona fide request seeking that the Board remove the exemption. Accordingly, the exemption under Section 251(f) continues to apply and precludes the Board's arbitration of an interconnection agreement under Section 251(c) of the Act. However, VTel still has responsibility to provide interconnection under Section 251(a) and (b) of the Act, which is what Comcast Phone is seeking. This duty, which is not affected by the rural exemption, includes the responsibility for providing interconnection, number portability, and reciprocal compensation.

Even granting VTel's assertion that VTel has no duty to negotiate the terms of interconnection due to the rural exemption, this would not strip the Board of its jurisdiction to arbitrate an interconnection agreement under Section 252(b). Under Section 252(b)(1) of the Act, the triggering event for the Board's arbitration jurisdiction is "a request to negotiate" an interconnection agreement, not actual negotiations. This language suggests that, contrary to the Sprint decision, the ability to conduct an arbitration is not barred by Section 251(f). This result is reasonable and appropriate since, in the absence of an ability to seek such relief, a carrier such as Comcast Phone may be unable to obtain interconnection under Section 251(a) and (b) notwithstanding its right to such services. Thus, under the Act, the Board's jurisdiction was

32. 2006 WL 4872346 (W.D.Tex. 2006)). It should also be noted that the original basis for the dismissal of Sprint's arbitration request by the Texas Commission was a finding by the Commission that Sprint's request was under Section 251(c).

33. *Id.* at 5.

properly triggered, even assuming the validity of VTel's position that, as a rural carrier, it can refuse to negotiate.

Comcast Phone also maintains that VTel waived any assertion of its rural exemption in this proceeding because of its conduct and its failure to raise the purported exemption earlier. We need not address this issue because of our conclusion that the rural exemption would not preclude arbitration of interconnection agreements under Section 251(a) and (b) of the Act.

Detailed Comments on Other Issues

Comcast Phone commented on two and VTel commented on seven of the roughly thirty more detailed technical, billing, provisioning, and pricing decisions contained in the PFD. Their comments and our determinations follow.

Issue #10 addresses the dispute resolution provisions of the Agreement. As reflected in the testimony of both sides, the negotiating parties were near resolution of this issue during the evidentiary phase of the negotiations. Based on these representations, the Hearing Officer concluded that the language of the agreement as proposed by Comcast Phone appeared reasonable. However, in its January 20, 2009, comments on the PFD, VTel reiterated a position contained in its Reply Brief, and identified on the issues list, that VTel does not agree with what it views as an "open-ended" dispute resolution process. VTel argues that these arrangements provide inadequate incentives to prevent a defaulting party passing illegal traffic. VTel recommends that the Board impose a time limit for negotiations, such as thirty (30) days, to discourage either party from employing delay tactics to the detriment of the other party.

While we are sympathetic to VTel's concern here, we find the Comcast Phone proposal for resolving disputes as reasonable and generally sound. It provides multiple avenues for dispute resolution including formal dispute resolution, and allows for potential arbitration. Some additional time boundaries may strengthen this framework. We are concerned that 30 days is too short a time frame for resolving more complex disputes. Absent agreement to an alternative, we conclude that 90 days is a more appropriate deadline for resolving any disputes. We seek to ensure that there is sufficient time to allow more cooperative approaches to reach a conclusion. That said, time limits should either be suspended or not apply in instances where arbitration or other formal mechanism has been involved for resolving the dispute. Moreover, either party still may seek faster recourse to the Board in the event of an emergency. We conclude therefore that

the parties should have an opportunity to seek relief from the Board, the Commission, or an appropriate court of law after 90 days, unless the parties have agreed to binding arbitration or other formal dispute resolution mechanisms that require additional time.

Issue 11 addresses the question of whether the interconnection agreement involves provisioning of service sufficiently unique to warrant testing prior to implementation. In the PFD, the Hearing Officer recommended that VTel be permitted to conduct such testing, but also be asked to provide "specific tests and time frames for conducting such tests regarding operation issues that are unique or are sufficiently unique to . . . warrant such tests, but not to unduly delay the exchange of service under this agreement." (Proposal at 32). Comcast Phone urges the Board to limit the testing period to 60 days. VTel's witness suggested four months. Given the two timeframes, we believe that 90 days strikes an appropriate balance, with the 90-day period beginning once a request for the testing has been made after the agreement has been established. In its filing, VTel should provide its tests consistent with the 90-day limitation.

Issue 19 addresses the question of whether the agreement includes, within its scope, exchange access services. Specifically, the Hearing Officer recommended that to the extent that the parties directly interconnect, the agreement should require that the parties use the same facilities for exchanging both local and intraLATA toll traffic in the event that direct interconnection occurs. As VTel notes, the recommendations under Issue 4 of the Hearing Officer do not require direct interconnection. Since direct interconnection is not required under the agreement, we conclude that separate provision for direct interconnection under the agreement is unnecessary at this time. As such, we will not require that the agreement include within its scope provisions for efficient handling of both local and intraLATA toll traffic, as recommended by the Hearing Officer. Nevertheless, we expect the parties to generally rely on the most efficient means of interconnection available in the exchange of traffic, consistent with the extent of VTel's obligations. We encourage but will not require any specific language in the agreement to that effect.

Issue 22 concerns the return of ported numbers when those numbers are no longer in service. The Hearing Officer recommended that the Board "require simple notice from Comcast Phone to VTel notifying it when a number has been released back to VTel (and framed to be reciprocal, to the extent desired by or useful to Comcast)." (Proposal at 51). Comcast Phone requested that the Board modify this recommendation included in the PFD because the Hearing

Officer's recommendation would require Comcast Phone system engineers to duplicate functionality for a VTel-only solution. Comcast Phone asserts that the notice in question would be unnecessary if VTel's number administrator simply upgraded its system. Comcast Phone asserts that industry guidelines "place the requirement on monitoring returned numbers squarely on the carrier to whom they were originally assigned." Comcast Phone asserts that VTel did not meet its evidentiary burden demonstrating that compliance would be costly.

The failure of the negotiating parties to reach some resolution on this issue is unfortunate and symptomatic of the persistent failures throughout the negotiations. We see any number of potential solutions that seem likely to strike a reasonable balance between the positions of the parties. We continue to believe that some accommodation by Comcast Phone is in order here. However, some consideration on VTel's part also seems warranted, especially in light of the limited cost information presented in the record on the topic. We will require that Comcast Phone provide notice to VTel of numbers that are returned for a period of at least 12 months after the agreement takes effect. The notice will be in a form of Comcast Phone's choosing and can be coupled with other notices concerning changes to directory listings. This period will allow VTel's number administrator to upgrade its systems to ensure that VTel receives timely notice.

Issue 26 concerns the terms and conditions for VTel's provisioning of white pages directory listings. The Hearing Officer recommended that VTel be required to provide directory listings, directories and directory distribution to Comcast Digital Voices' end-user customers at rates contained in the Comcast Phone agreement with TDS. VTel objects to VTel being required to perform obligations involving a non-party to the agreement at rates that it argues are not commercially based. It argues that the Hearing Officer has been inconsistent in addressing the rights and responsibilities of Comcast Phone and VTel to Comcast Phone's VoIP affiliate end users under the agreement.

VTel has offered to include Comcast Digital Voice customer listings in its directory and distribute the directories for a commercial-based fee. We agree that commercial rates should apply to directory distribution. In doing so, VTel will meet its obligations under Section 251(b)(3). Both parties presented figures for directory distribution.³⁴ We have found

34. Comcast Phone proposed a rate of \$5 per copy delivered to Comcast end users. (Exh. VTel-7 at Appendix Pricing, Attachment A.) VTel proposed a rate of \$24 per copy delivered to Comcast end users. (Exh. VTel-8 at Appendix Pricing, Attachment A). Each proposed a 5% discount for orders over 500.

inadequate support in the record to be confident in either figure presented by the parties with respect to directory distribution charges. Neither party provided evidence adequate to support a conclusion that its proposed figure is commercially based. Without sufficient evidence to show otherwise, we are concerned that the Comcast Phone proposal is too low. On the other hand, the VTel proposal appears high. We therefore conclude that taking a simple average of the two is appropriate. We calculate an appropriate rate to be \$14.50, with a 5% discount for volume purchases, as proposed by each of the negotiating parties.

With respect to directory listings, we find the recommendations of the Hearing Officer sound and consistent with offering nondiscriminatory service. This ruling is only for the primary directory listings. Additional directory listings will be charged at VTel's regular tariffed rates.

With respect to concerns expressed by VTel that the Hearing Officer has been inconsistent in extending the reach of the agreement to end-users, we disagree. The Hearing Officer's recommendations focus on the relationship between the two principals to the agreement — Comcast Phone and VTel. As a result, the PFD and this Order put responsibilities on Comcast Phone that will require it to obtain usage and other end-user data (from its affiliate CDV and any other interconnected providers) that are necessary to meet its obligations under the agreement. However, we are also mindful that the ultimate end-users of the services that Comcast Phone provides are Vermont customers using what they consider to be a telecommunications service. Accordingly, in limited instances, we have imposed obligations that recognize their needs, such as the directory-related services at issue here.

Issue 27 relates to the terms of compensation that applies to either party when their counterpart terminates a local call on its behalf. The Hearing Officer recommends a presumption in favor of bill and keep, and that reciprocal compensation rates apply in the event that traffic is demonstrated to be out of balance. With respect to Issue 27, VTel now prefers that if traffic is found to be imbalanced, that the arrangements be left at bill and keep, rather than reciprocal compensation. This is a new position for VTel, which has not provided a basis to support its position. The reciprocal compensation regime is intended fundamentally to ensure that, in the event of an imbalance, that parties are compensated for their costs of termination. The Hearing Officer has recommended rates based on an existing agreement. We concur with the recommendations made by the Hearing Officer.

Issue 34 relates to the handling of misrouted inter-exchange carrier (IXC) traffic delivered to VTel by Comcast Phone, provided that the ability to complete those calls was within the current technical capabilities of VTel's existing switch. The Hearing Officer recommends that either party be required to terminate the calls, provided that the ability to complete those calls was within the current technical capabilities of VTel's existing switching equipment, that the call was indeed incorrectly routed, and that the routing of such calls is consistent with existing tariffs. VTel objects to the PFD based on its conclusion that it does not have the technical ability to terminate the call. We find the objections of VTel here to be unpersuasive. The Proposal does not require VTel to terminate traffic that it does not have the technical ability to terminate. As such, we see no basis for modifying the recommendations of the Hearing Officer.

V. ORDER

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

1. The Findings and recommendations of the Hearing Officer are adopted, except as modified in the Board's Discussion.
2. Within 14 days, Comcast Phone of Vermont, LLC ("Comcast Phone"), shall file with the Public Service Board ("Board") the terms and conditions of its service arrangements with its affiliate, CDV, and make them publicly available on its web site.
3. Vermont Telephone Company, Inc., and Comcast Phone shall submit an interconnection agreement for Board approval, incorporating and consistent with the Hearing Officer's recommendations, as modified herein, by March 4, 2009.

Dated at Montpelier, Vermont, this 2nd day of February, 2009.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: February 2, 2009

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

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