STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5713

Investigation into New England Telephone	)
and Telegraph Company's (NET's) tariff filing	)
re: Open Network Architecture, including	)
the unbundling of NET's network, expanded	)
interconnection, and intelligent networks	)
in re: Phase II, Module Two (Preemption)	)

Order entered: 10/08/98

PRESENT: Frederick W. Weston, III
Hearing Officer

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for the Vermont Department of Public Service

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PHASE II ORDER RE: FEDERAL PREEMPTION OF STATES' AUTHORITY TO REQUIRE THE RECOMBINATION OF UNBUNDLED NETWORK ELEMENTS

I. INTRODUCTION

This proposed order concludes that the federal Telecommunications Act of 1996 ("Act"[1]) does not preempt state power to order local exchange companies ("LECs") to provide unbundled network elements ("UNEs"), on a recombined basis, to competitive LECs ("CLECs") and other telecommunications providers who request them. This order also concludes that the Public Service Board has sufficient authority under current state law to direct incumbent LECs to recombine UNEs for CLECs, if the Board concludes that such recombination is appropriate – which is to say, will promote efficient competition in the Vermont local exchange market, thus assuring consumers adequate service at just and reasonable rates.

A. Procedural Background and Scope of this Order

During a status conference (by telephone) on December 23, 1997, the New England Telephone & Telegraph Company (d/b/a Bell Atlantic-Vermont, "BAVT" or "Company"),[2] AT&T Communications of New England, Inc. ("AT&T"), and the Department of Public Service ("Department" or "DPS") asked the Board to determine whether it has authority under Vermont law to regulate the manner in which incumbent LECs provide UNEs to CLECs and other telecommunications providers. They agreed that the Board could take up this jurisdictional question without holding evidentiary hearings, relying instead upon pleadings that they would file. A schedule for the submission of those pleadings and additional relevant documentation was set.[3]

The parties further agreed that, if the Board finds that it does have such authority, then it may later, in this or another proceeding, take up any remaining technical issues that UNE provision – in

1. The Act amends, and adds to, many sections of Title 47 of the United States Code (47 U.S.C.).

2. BAVT is a division of the Bell Atlantic Corporation, which operates in thirteen eastern states and the District of Columbia. In this Order, "Bell Atlantic" refers to the corporation in its entirety; when it is followed by a hyphen and a state's name, it refers to the company's division operating in that state.

3. BAVT Letter 12/23/97 at 1-2; AT&T Letter 1/9/98 at 3. The parties agreed to adopt part of the record from a Massachusetts Department of Telecommunications and Energy proceeding, specifically, Dockets DPU 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Hearing Volume No. 25, December 16, 1997, which includes the testimony and relevant exhibits of Bell Atlantic witness Amy Stern and AT&T witness Robert Falcone.

particular, recombination – raises.[4] However, later in its written submission, the DPS argues that a second phase in which the Board would develop a policy on UNE recombination is unnecessary and that the Board could, on the basis of the filings, reach a final determination on whether UNE recombination should be required if requested by a CLEC.[5] I disagree. The parties consented to brief and discuss only the narrow questions of federal preemption and state authority. A subsequent inquiry into whether and, if so, how incumbents should be required to combine, or refrain from disassembling, UNEs will likely necessitate an evidentiary record, and I therefore leave it for another time.

B. Positions of the Parties

AT&T alleges that, upon the issuance of the Eighth Circuit's Rehearing Order in a proceeding concerning the validity of rules issued by the Federal Communications Commission ("FCC") to implement provisions of the Act,[6] Bell Atlantic-Massachusetts made the decision to "rescind prior commitments and representations as to its willingness to provide unbundled network element combinations."[7] AT&T asserts that Bell Atlantic's proposed changes to UNE provisioning in that state have implications for its UNE provisioning in Vermont. According to AT&T, such a UNE provisioning policy would be unnecessary, costly, and detrimental to service quality.[8] AT&T asks that the Board order BAVT to refrain from disassembling "existing combinations of unbundled network elements, and more generally require Bell Atlantic to provide unbundled network

4. AT&T Letter 1/9/98 at 1-3.

5. DPS Memorandum of Opposition to Bell Atlantic's Network Dismantlement Proposal 1/23/98 ("DPS 1/23/98") at 3.

6. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *Iowa Utilities Bd. v. FCC*, No. 96-3321 et al., 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997)("Rehearing Order" or "Eighth Circuit Decision"). The relevance of this decision to today's proposed order is described in the following sections.

7. Memorandum of AT&T Communications of New England, Inc. 1/23/98 ("AT&T 1/23/98") at 4.

8. "The real issue," according to AT&T, "is not whether Bell Atlantic can be required to 'assist' CLECs by combining UNEs, but rather whether Bell Atlantic can be prohibited from affirmatively harming competitors and competition by doing needless, costly, and destructive disassembly of network elements that have already been physically combined." AT&T 1/23/98 at 11.

combinations to competing local exchange carriers."[9] The DPS joins in AT&T's request.[10] In response, BAVT argues that, even if state law would permit the Board to consider a requirement for BAVT to provide combined UNEs, such authority has been preempted by the Act.[11]

II. Federal Preemption of State Law

In the Rehearing Order, the Eighth Circuit concluded that § 251(c)(3) of the Act does not require incumbent LECs such as BAVT to combine UNEs for CLECs, and the Court therefore vacated an FCC rule mandating such "recombination." Among other things, this section of the Act imposes upon incumbents the duty:

> [T]o provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.[12]

The Eighth Circuit concluded that the second (and final) sentence of this section "unambiguously indicates that requesting carriers will combine the unbundled elements themselves," and that "this language cannot be read to levy a duty on the incumbent LECs to do the actual combining of elements."[13]

BAVT argues that the Board has no authority to "lawfully compel BAVT to provide 'combined' network elements to other telecommunications carriers."[14] It contends that § 251(c)(3) of the Act requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. In other words, argues BAVT, § 251(c)(3) does not permit a new entrant to purchase assembled platforms of combined network elements (or a lesser

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9. *Id*. at 10. AT&T asserts that, if the Board agrees with AT&T as to the extent of the Board's ability under Vermont law to mandate UNE provisioning according to AT&T's view, then in the subsequent phase to this proceeding, AT&T will argue that the Board should order BAVT to provide unbundled network combinations in order to further the Board's pro-competition goals. *Id*.

10. DPS 1/23/98 at 3 n.2.

11. Memorandum of Law of Bell Atlantic-Vermont 1/23/98 ("BAVT 1/23/98") at 1.

12. Act, § 251(c)(3).

13. Rehearing Order at 813.

14. BAVT 1/23/98 at 11.

combination of elements) in order to offer competitive telecommunications services.[15] According to BAVT, to permit this and to require access to already-combined network elements at cost-based rates for unbundled access would destroy the careful distinctions which Congress established in §§ 252(c)(3) and (4) between unbundled elements on the one hand and the purchase, for resale purposes, of an incumbent's entire retail services on the other hand.[16]

BAVT also argues that the Eighth Circuit vacated the FCC requirement that incumbent LECs offer combined network elements to other providers "not because the authority to impose that requirement was reserved to the States, but rather because [the rules] could not be 'squared with,' and were 'contrary to,' the Telecommunications Act of 1996."[17] Under the Supremacy Clause of the U.S. Constitution and the doctrine of preemption, argues BAVT, the Eighth Circuit's interpretation of the Act is equally applicable to the States. Consequently, asserts BAVT, the Board cannot impose a like condition upon the Company in Vermont.[18]

I do not agree. The Board is not preempted by the Act from taking action in this respect. The Eighth Circuit's decision went to the validity of FCC rules and the nature of FCC authority under the Act. To the extent that the Court considered State authority at all, it observed that States retain independent power to develop interconnection and access requirements.[19] The Act recognizes that role of the States; § 251(d)(3) expressly provides:

> (3) PRESERVATION OF STATE ACCESS REGULATIONS – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order or policy of a State commission that –
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) ***is consistent*** with the requirements of this section; and
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> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[20]

In addition, §§ 261(b)-(c) of the Act state:

> (b) EXISTING STATE REGULATIONS – Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to

15. Hence the term, UNE-P, or "unbundled network element platform."
16. BAVT 1/23/98 at 2, 7-9.
17. *Id*. at 1-2.
18. *Id.*
19. Rehearing Order at 806.
20. Emphasis added.

> February 8, 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are ***not inconsistent with*** the provisions of this part.
>
> (c) ADDITIONAL STATE REQUIREMENTS – Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are ***not inconsistent with*** this part or the Commission regulations to implement this part.[21]

These sections establish Congressional intent not to preempt access and interconnection requirements adopted and enforced by States, unless the state requirements are inconsistent with the Act.

The Supremacy Clause (Art. VI, cl. 2) of the United States Constitution provides the federal government with the power to preempt state law.[22] To determine whether a state statute or regulation is preempted by federal law, the fundamental inquiry is whether Congress intended to preempt the state.[23] This inquiry ". . . starts with the basic assumption that Congress did not intend to displace state law."[24] This presumption against preemption is especially strong when Congress has legislated in an area historically subject to regulation by the states: "we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[25]

Courts customarily treat preemption as falling into one of three general categories – express preemption, implied preemption, and conflict preemption – although, as Professor Tribe notes, the categories "are anything but analytically air-tight."[26] The first category, express preemption, exists when Congress expressly states its intention to preclude state action.[27] Implied preemption is found when the structure or objectives of federal law demonstrate that Congress intended to preclude state

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21. Emphasis added.

22. Assuming, of course, that Congress is acting within the scope of its legitimate authority. No party in the current proceeding has suggested that regulation of telephone rates is outside the scope of Congressional authority.

23. *E.g., Medtronic, Inc. v. Lohr*, 64 U.S.L.W. 4625, 4629 (1996); *Schneidewind v. ANR Pipeline Co. and ANR Storage Co.*, 108 S.Ct. 1145, 1150 (1988).

24. *Maryland v Louisiana*, 451 U.S. 725, 746 (1981); *see also Medtronic*, 64 U.S.L.W. at 4629; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 at 479-480 (2d ed. 1988).

25. *Medtronic*, 64 U.S.L.W. at 4629 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2618 (1992).

26. L. TRIBE, *supra*, § 6-25 at 481 n.14; *Schneidewind*, 108 S.Ct at 1150.

27. *Id.*; L. TRIBE, *supra*, § 6-25 at 481 n.14.

law.[28] Conflict preemption results when state law actually conflicts with federal law, either due to the physical impossibility of complying with both laws or to a state regulation obstructing the accomplishment of the full objectives of Congress.[29]

In recent decisions, the United States Supreme Court has somewhat truncated this traditional three-part preemption analysis. Specifically, the Court has noted that:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.[30]

When Congress so includes an express preemption provision in its legislation, a court must of course construe that statutory language to determine the scope of that preemption.[31] This exercise in statutory construction must be informed both by the ultimate goal of ascertaining Congressional intent and by the presumption against preemption, a presumption that (as noted above) is particularly powerful when Congress has legislated in an area historically subject to regulation by the state.[32]

In considering the overall scope of preemption implied by the subsections of §§ 251 and 261 quoted above, we must bear in mind that State access and interconnection policies need only be "consistent with" the Act.[33] Those express provisions convey in unambiguous terms the Congressional intent not to broadly preempt state action. Instead, those provisions demonstrate that states have primary jurisdiction over interconnection and access, and are preempted only from imposing requirements that are inconsistent with relevant provisions of the Act and FCC regulations. This conclusion is in keeping with the Supreme Court's command in *Cipollone* that ". . . we must construe these provisions in light of the presumption against the pre-emption of state police power

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28. *Schneidewind*, 108 S.Ct. at 1150; L. TRIBE, *supra*, § 6-25 at 481 n.14.

29. *Schneidewind*, 108 S.Ct. at 1150-1151; L. TRIBE, *supra*, § 6-25 at 481 n.14.

30. *Cipollone,* 112 S.Ct. at 2618 (citations omitted); *see also Medtronic*, 64 U.S.L.W. at 4629.

31. *Medtronic*, 64 U.S.L.W. at 4629.

32. *Id.* at 4629-4630.

33. Since Congress included in the federal statute provisions that explicitly address the preemption of state authority, the scope of preemption is determined by the terms of those express provisions, with this determination measured against the touchstone of Congressional intent and informed by the strong presumption against preemption in this field historically subject to regulation by the states. *Medtronic*, 64 U.S.L.W. at 4629; *Cipollone*, 112 S.Ct. at 2618.

regulations. This presumption reinforces the appropriateness of a narrow reading of [the statutory preemption provision]."[34] This is also in keeping with the conclusion that "consistent with" does not require that States implement regulatory policies that are identical to those that will prevail at the Federal level.[35]

Finally, I note that BAVT's reading of the Eighth Circuit's interpretation of § 251(c)(3), taken to its logical extreme, would lead one to conclude that the Act contains an outright prohibition against UNE combination. There is no support for this conclusion, either in the Eighth Circuit Decision or in the Act itself. Nowhere in either is there a suggestion that LECs or CLECs may not voluntarily agree to combine UNEs or that such a practice is unlawful. The Eighth Circuit Decision merely states that the FCC cannot require such a practice.[36] At this time I do not reach the issue of whether it would be appropriate under Vermont law to require BAVT to combine UNEs, but I do conclude that such a decision may be consistent with the purpose of the Act to promote competition in the market for local exchange service. For all these reasons, I conclude that neither the Act nor the Eighth Circuit's decision precludes the Board from considering whether it is appropriate for BAVT to make available combined network elements for requesting CLECs.

III. Issue Preclusion

BAVT also argues that AT&T and the DPS are precluded under the doctrine of collateral estoppel (issue preclusion) from raising UNE-platform issues in this docket.[37] Specifically, BAVT argues that "[h]aving litigated and lost the issue of combined network elements before the Eighth Circuit, the doctrine of issue preclusion mandates that the [CLECs] not be permitted to relitigate the same issue before the Board."[38] For the reasons that follow, I conclude that the parties are not barred from raising the question of the Board's authority to consider UNE combination.

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34. *Cipollone*, 112 S.Ct. at 2618.

35. See *Environmental Defense Fund, Inc. v. E.P.A.*, 82 F.3d 451 (D.C. Cir. 1996)("consistent with" does not require exact correspondence, but only congruity or compatibility). Note also that, in the Rehearing Order (at 806-807), the Eighth Circuit reaches the same conclusion.

36. Rehearing Order at 813.

37. BAVT 1/23/98 at 15, citing *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) and Rehearing Order.

38. *Id.*

Before precluding relitigation of an issue, a court must "examine the first action and the treatment the issue received in it."[39] Also, as proponent, BAVT has the burden of establishing that the prior litigation bars the parties from raising, and therefore the Board from considering, whether the Board has authority over the provisioning of UNE combinations.[40] The Vermont Supreme Court held, in *Trepanier v. Getting Organized, Inc.*, that the application of "issue preclusion" involves a determination of five factors.[41] For the purposes of this analysis, I will focus first upon the third factor set out in *Trepanier* – that is, is the issue the same as the one previously litigated? – before looking at the other elements. Absent a demonstration that there is an identity of issues between the question of Board authority being raised in this docket and the issues raised in the Eighth Circuit case, collateral estoppel cannot bar consideration of the Board's authority.

In their arguments on preemption (already discussed), the parties confront the question of whether the issue raised in this docket is the same as that which was taken up in the earlier action. AT&T and the Department contend that the Eighth Circuit ruled on whether the FCC was justified in developing its unbundling regulations. They also argue that the Court never considered the state role in the unbundling process. Finally, they contend that, had that question been considered, the Court's discourse on the point would have been *dicta* only and, as such, inessential to its holding. BAVT, on the other hand, argues that the Eighth Circuit Decision was not jurisdictional but, rather, dispositive on the substance of the issue, when it concluded that mandating UNE combinations is inconsistent with § 251(c)(3) of the Act.

In its Rehearing Order, the Eighth Circuit ruled on two issues that are relevant to the question before the Board now: one, the FCC's authority with respect to unbundling generally and, two, its specific proposal for network element unbundling practices.[42] The Eighth Circuit expressly characterizes its inquiry as the review of a final order issued by the FCC pursuant to federal

39. *State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme Court, Dec. 5, 1997).

40. *Ianelli v. Standish*, 156 Vt. 386, 388 (1991).

41. *Trepanier v. Getting Organized, Inc.*,155 Vt. at 265 (1990); *State v. Stearns*, 159 Vt. 266, 268, 617 A.2d 140, 141 (1992).

42. Other state commissions agree with this characterization of the Eighth Circuit's Rehearing Order. See, *e.g., In the matter of the petition of BRE Communications, L.L.C. for arbitration of interconnection terms, conditions, and prices from GTE North Incorporated and Contel of the South, Inc., d/b/a GTE Systems of Michigan*, Michigan Public Service Commission Case No. U-11551, Order of 1/28/98, at 4-6.

statute.[43] In the current docket, it is the Board's authority, and not the FCC's, that is at issue.[44] Here the Board must consider whether the Act according to the Eighth Circuit Decision preempts it, acting under state authority, from considering UNE combination. Accordingly, the issue is not the same as that addressed by the Eighth Circuit and collateral estoppel does not apply.[45]

IV. Board Authority Under State Law

There is no dispute among the parties that, if the Board is not preempted by the Act or precluded by federal case law from ordering UNE combinations, existing state statutes and precedents accord the Board sufficient authority to do so. AT&T cites 30 V.S.A. § 209(a)(3) and the Board's February 21, 1986, Order in Docket 4946 in support of its argument.[46] The DPS relies primarily on the Board's May 29, 1996, Order in Phase I of this docket when it asserts that the Board currently has authority to require UNE combinations, and it also suggests that Vermont's general policies in favor of the competitive delivery of telecommunications services, as set out in 30 V.S.A. §§ 202c(b)(2), 226b(b)(9), and 227a, further support its position.[47] In contrast, Bell Atlantic does

43. Rehearing Order at 792.

44. It is common for a federal agency and similar state agencies to concurrently consider related issues, *e.g.,* the current FCC Notice of Proposed Rulemaking on measurement and performance of Operational Support Systems (OSS) and numerous states' proceedings on OSS costs and cost allocations.

45. Absent a showing that the issues are the same, there is little sense in providing an extended discussion of the other *Trepanier* elements. However, to be thorough, I quickly consider each of the remaining elements: (1) *Preclusion must be asserted against one who was a party or in privity with a party in the earlier action*. This case involves many of the same parties as those that participated in the Eighth Circuit case, including AT&T, MCI, Sprint, and Bell Atlantic; however, the Department was not a party. Thus, element one is not met. (2) *The issue was resolved by a final judgment on the merits*. Related to this factor is the precept that preclusion applies only to an issue which was necessary and essential to the resolution of the prior case. See, *e.g., State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme court, Dec. 5, 1997); *Berisha v. Hardy*, 144 Vt. 136, 138, 474 A2d. 90, 91 (1984); *Longariello v. Windham Southwest Supervisory Union*, No. 95-275 Slip Op. (Vt. Supreme Court, May 31, 1996); *In Re Application of Carrier*, 155 Vt. 152, 157 (1990). No party has argued that the Rehearing Order was not a final judgment; however, because the issue of the Board's authority was not addressed, this element is not met. (4) *There was a full and fair opportunity to litigate the issue in the earlier action*. I am not persuaded that there was a full and fair opportunity to litigate this matter in the prior proceeding. For the reasons articulated under the third *Trepanier* element above, the same issue was not addressed and, therefore, there was no opportunity to litigate the Board's authority in this context. (5) *Applying collateral estoppel in the subsequent action must be fair*. I am not persuaded that application of collateral estoppel in this proceeding would be fair, inasmuch as the Board's authority to consider this issue has never been raised until now.

46. AT&T 1/23/98 at 25-28.

47. DPS 1/23/98 at 16-18. Here the DPS's logic presumes that the availability of UNE combinations will promote competition and thus the general good. At this time, that is an assumption merely, as yet untested in the hearing room.

not even reach the question, instead arguing only that the Board is preempted by the Act and the Eighth Circuit's decision.[48]

I conclude that existing Vermont statutes and case law provide the Board sufficient authority to consider the questions surrounding UNE combinations. The analysis of the Board's legal authority "to implement rules and procedures for the competitive delivery of local exchange services" that was performed in Phase I of this docket lays this question to rest. I refer the parties to that discussion; there is no need to repeat it here.[49]

V. CONCLUSION

For the foregoing reasons, I conclude that the Board is not preempted by federal law or precluded by the Eighth Circuit's Rehearing Order from examining whether incumbent LECs should be required to offer combined UNEs to competitive providers. In addition, I conclude that, under current state law, the Board has the authority to do so.[50]

It is therefore necessary to address the factual and policy issues related to UNE combinations. Should evidence and testimony on the issue be presented? If so, should the question be taken up in this phase of the docket or in a later one, or in another docket altogether? I direct the parties to file, with their comments on this proposal for decision, recommendations for how to proceed in this matter.

48. BAVT 1/23/98 at 11, fn. 26. The Company states merely that "Presumably, the state authority to mandate [UNE combinations] would be 30 V.S.A. §§ 203 and 209. . . ."

49. Phase I Order at 8-14. Let me state clearly that this conclusion is not the same as finding that, as the DPS argues, mandating UNE combinations would promote competition. DPS, 1/23/98, at 16. Simply, in the context of determining what policies (competitive or otherwise) will promote the public good, the Board is entirely within its authority when it considers whether the availability of UNE combinations will serve that end.

50. These conclusions are consistent with those reached in the recent proposal for decision issued on March 27, 1998, in this docket (Phase II, Module One). In considering whether the Eighth Circuit's ruling with respect to the FCC's "pick and choose" rule preempts the Board from adopting its own pick and choose requirement, I concluded that "it is difficult to see how the FCC's pick and choose rule, and the Eighth Circuit's overturning of it, can be construed as preemptive of state action. I agree with the Department that the Board is well within its authority to consider the question." Phase II, Module One, proposal for decision, 3/27/98, at 35, referring to *Iowa Utilities Board v. FCC*, No. 96-3321, 1997 WL 403401 (July 18, 1997).

This proposal for decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

DATED at Montpelier, Vermont, this 2nd day of June, 1998.

s/ Frederick W. Weston, III
Frederick W. Weston, III
Hearing Officer

VI. Board Discussion

It is the policy of the state of Vermont, and of federal law, to promote conditions that will allow competition to develop in the local exchange (and in telecommunications markets generally), wherever competition promises to stimulate innovation and more efficiently meet demand for service.[51] As a general matter, making available unbundled network elements to competitors will serve that policy. However, we recognize that there may be a tension between, on the one hand, the manner in which the unbundled network is made available to competitors and, on the other hand, the availability of retail services for resale.[52]

We concur with the Hearing Officer's analysis. The Board is not precluded by federal law from examining whether incumbent LECs should be required to offer combined UNEs to competitive providers; furthermore, under Vermont law the Board is authorized to do so. However, we also conclude that the factual basis for determining whether such a conclusion is consistent with the public interest is lacking. In order to develop a UNE-combination policy that appropriately balances the objectives of economic efficiency, fairness, improved service, and creative product development, a full factual record must be developed. We hereby direct the Hearing Officer to take evidence and submit a proposed decision on this question.

VII. Order

It Is Hereby Ordered, Adjudged, and Decreed by the Public Service Board of the State of Vermont that:

1. The conclusions and recommendations of the Hearing Officer are adopted.
2. The Hearing Officer shall set a procedural schedule, hear evidence, and issue a recommended decision for resolving the factual and policy issues relating to the provision by incumbent local exchange companies of combinations of unbundled network elements.

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51. Phase I Order at 7; Telecommunications Act of 1996.

52. While we conclude that we have the authority to require incumbents to offer recombined UNEs, it is not clear that, under the Act, we can require incumbents to recombine UNEs in such a way as to allow a competitor to replicate an incumbent's retail service and thus avoid the purchase of that service at wholesale rates under § 251(c)(4). Whether a CLEC would even prefer to do so depends, presumably, upon any arbitrage opportunities that differences between wholesale and UNE prices offer.

Dated at Montpelier, Vermont, this 8th day of October, 1998.

s/ Richard H. Cowart	)	
	)	PUBLIC SERVICE
	)	
s/ Suzanne D. Rude	)	BOARD
	)	
	)	OF VERMONT
s/ David C. Coen	)	

OFFICE OF THE CLERK

Filed: October 8, 1998

Attest: s/ Susan M. Hudson
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 of any technical errors, in order that any necessary corrections may be made.

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.