

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7798

Petition of Waitsfield-Fayston Telephone)
Company, Inc., d/b/a Waitsfield Telecom, d/b/a)
Champlain Valley Telecom, pursuant to)
47 U.S.C. § 251(f)(2), for suspension or)
modification of the interconnection)
requirements of 47 U.S.C. § 251(b))

Hearings at
Montpelier, Vermont
January 30 & 31, 2012

Order entered: 4/27/2012

PRESENT: Jay E. Dudley, Hearing Officer

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I. INTRODUCTION

In this Proposal for Decision ("PFD"), I recommend that the Vermont Public Service Board ("Board") modify the Federal Communications Commission's ("FCC") local number portability ("LNP") requirements for Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom ("Waitsfield" or "Company"), and establish December 1, 2013, as the date by which Waitsfield is obligated to implement local number portability. As outlined below, approval of this modification within the provisions of § 251(f)(2) of the Telecommunications Act of 1996 (the "Act") is appropriate because immediate implementation of LNP would be economically burdensome for the Company and because such modification is otherwise in the public interest.

II. PROCEDURAL HISTORY

A. Petition and Intervention

On September 23, 2011, Waitsfield petitioned the Board seeking suspension or modification of local number porting ("LNP") requirements pursuant to the Board's authority under 47 U.S.C. § 251(f)(2), regarding an interconnection request made by Comcast Phone of Vermont LLC ("Comcast") under § 251(b)(2).

On November 3, 2011, I convened a joint prehearing conference in this docket and Docket No. 7799 (Petition of Comcast Phone of Vermont, LLC, for Arbitration of an Interconnection Agreement with Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom, pursuant to Section 252 of the Federal Communications Act of 1934, as amended, and Applicable State Law). At the prehearing conference, a procedural schedule was established and Comcast made an oral motion to intervene which I granted. The schedule established a deadline of November 17, 2011, for motions to intervene, but no other parties filed to intervene. Comcast also entered a Motion for Admission *Pro Hac Vice* for Michael C. Sloan, Esq., which I granted.

B. Testimony

Waitsfield filed direct testimony on December 5, 2011, along with a Protective Agreement executed by the parties to this docket. On December 22, 2011, Waitsfield filed

corrections concerning two confidential exhibits. A Motion for a Protective Order concerning portions of the prefiled testimony and exhibits of Waitsfield witnesses Douglas Duncan Meredith and Roger Nishi was subsequently filed on January 13, 2012.

Comcast filed direct testimony on January 13, 2012. Subsequently on January 24, 2012, Comcast filed a Motion for a Protective Order concerning portions of the prefiled testimony and exhibits of Comcast witnesses Robert Munoz and Dr. Michael D. Pelcovits.

On January 24, 2012, Waitsfield filed an Emergency Motion to Compel Comcast to Respond to Information Requests. I convened a status conference by telephone concerning Waitsfield's Motion on January 26, 2012. During the status conference, I deemed Waitsfield's Motion to be procedurally defective. Waitsfield filed a revised Motion on January 27, 2012, to replace its original Motion. On the same day, Comcast filed an Opposition to Waitsfield's Motion to Compel.

The Vermont Department of Public Service ("Department") did not serve formal discovery requests on the parties.

C. Technical Hearings and Briefing

On January 30 and 31, 2012, I conducted technical hearings. At the hearings, I heard oral argument on Waitsfield's Motion to Compel and subsequently denied the Motion. Following the technical hearings, the parties conferred regarding a briefing schedule, and on February 7, 2012, Waitsfield filed a Limited Waiver and Stipulation to Enlarge Time, signed by all of the docket parties, requesting to adjust the schedule previously adopted by the Hearing Officer. On February 10, 2012, I approved the parties' request. The revised schedule set a deadline for Initial and Reply Briefs, as well as a deadline of April 27, 2012, for a Final Order from the Board.

On February 24, 2012, Waitsfield, Comcast, and the Department filed their initial briefs in this proceeding.

On March 9, 2012, Waitsfield and Comcast filed their reply briefs. By letter also dated March 9, the Department notified the Board that it would not file a reply brief. In Waitsfield's reply brief, Waitsfield requested that Comcast's proposed Findings of Facts be rejected by the Board for violating Board Rule 2.222 because the findings did not provide cites to the evidentiary record as required under the Rule.

On March 14, 2012, Comcast filed a response to Waitsfield's objections along with its amended proposed findings of fact and accompanying "Attachment A," requesting that the Board accept the amended findings and attachment pursuant to Board Rule 2.204(G).

Waitsfield filed a letter on March 16, 2012, reiterating and expanding upon its prior request that the Board reject Comcast's proposed amendment, along with Comcast's Attachment A, and all of Comcast's arguments based thereon.

Comcast filed a reply on March 21, 2012, maintaining that its amended findings and citations are accurate and that its filing is permissible and compliant under Rule 2.204(G).

On March 28, 2012, I issued an Order denying Waitsfield's request to reject Comcast's amended findings of fact and Attachment A.

D. Protective Orders

On February 7, 2012, I issued an Order approving a protective agreement that was executed by all of the parties. Concurrently on February 7, I also issued two separate Orders approving separate motions filed by Waitsfield and Comcast to provide confidential treatment to the prefiled testimony and selected exhibits previously filed by the parties with the Board.

III. POSITIONS OF THE PARTIES

A. Waitsfield

Waitsfield asks the Board to suspend or modify Waitsfield's duty to provide local number portability ("LNP") under 47 U.S.C. § 251(b)(2). Waitsfield seeks such relief until such time as a final order in pending FCC proceedings shows the impacts of the FCC's expected FUSF and ICC reforms on Waitsfield, and for such duration thereafter as may be necessary to allow Waitsfield to stabilize its revenues as a result of such impacts.

Waitsfield argues that it has provided evidence in this matter which shows that it confronts a dire economic environment as a result of recent reforms adopted by the FCC, which threaten to trim millions of dollars in revenues that Waitsfield receives each year in federal universal service support and intercarrier compensation. Waitsfield asserts that these reforms already place it at risk of being unable to continue to meet the heavy obligations that it has as the carrier-of-last-resort and federal eligible telecommunications carrier in its rural telephone

exchanges. At the same time, Comcast has requested that Waitsfield accept an interconnection agreement that includes local number portability. Comcast is the CLEC affiliate of Comcast Corporation, which, with its affiliates, is the largest cable television provider in the United States. Waitsfield estimates that the competitive threat posed by Comcast's interconnection request with LNP will accelerate the loss of access lines and revenues that Waitsfield is already experiencing. As a result, Waitsfield contends that allowing Comcast to use LNP as part of its competitive entry into Waitsfield's voice market will be "the straw that broke the camel's back" for Waitsfield's beleaguered finances.

Waitsfield argues that Comcast's business model relies on the selective marketing of high-revenue "triple-play" bundles of voice, data and cable television services to customers in the densest and lowest-cost portions of Waitsfield's service area. Waitsfield has long relied on these customers to counterbalance the higher costs of serving customers in the outlying, more sparsely populated and more economically challenged portions of its service area. Because of uneven regulatory treatment, Waitsfield argues that it is obligated to maintain a standalone basic telephone service and to provide service to any customer who requests it anywhere in Waitsfield's service area, even in areas that are uneconomical to serve. By contrast, Waitsfield points out, Comcast has no requirement to offer a standalone voice service and can refuse to serve customers who are not "cost effective" to serve.

Waitsfield argues that even as Comcast "cherry-picks" the most valuable customers from Waitsfield's customer base, Waitsfield's costs to maintain and operate its telecommunications network throughout its service territory remain the same. The arrival of voice competition from Comcast, with local number portability, Waitsfield asserts, will create a situation in which Waitsfield is forced to raise its basic exchange rates to meet its operational expenses. Waitsfield maintains that increased rates will only hasten the flight of Waitsfield's customers to Comcast and exacerbate the economic impact of Comcast's competitive presence in Waitsfield's territory.

In sum, Waitsfield argues that it has shown that allowing Comcast to port local telephone numbers to customers in Waitsfield's territory (1) imposes a requirement that is unduly economically burdensome and (2) will have a significant adverse economic impact on users of telecommunications services generally in Waitsfield's territory. Finally, Waitsfield asserts that it

has proven that suspension or modification of the number-porting duty is consistent with the public interest, convenience and necessity. Accordingly, Waitsfield believes that it has met its burden of proof on each element of the statute, and is entitled to the relief it seeks and asks that the Board issue an Order granting such relief.

B. Comcast

Comcast argues that Waitsfield's Petition must be denied because it is (1) deficient as a matter of law; (2) based on unreasonable assumptions about Comcast's competitive success; (3) based upon a misleading presentation of Waitsfield's economic health; and (4) would be poor public policy.

Comcast asserts that the Petition is legally defective on its face for three separate reasons. First, Waitsfield seeks an indefinite suspension of its LNP obligations, while Section 251(f)(2) only authorizes the Board to grant temporary relief for a specific period of time. Second, Waitsfield has failed to account for the fact that Comcast will still win customers even if customers are denied LNP and has, therefore, failed to present evidence that would justify the relief it seeks. Third, Waitsfield urges the Board to consider factors unrelated to the impact of providing LNP (such as regulatory uncertainty and "line loss," which affect all telephone companies), even though Section 251(f)(2) does not authorize the consideration of such extraneous factors.

Second, Comcast argues that the Petition is based on unreasonable assumptions about Comcast's competitive success. Waitsfield's Petition is premised on the assumption that, if customers are granted LNP, Comcast will win more than 17 percent of eligible customers in the first year and will have a 23 percent share by year four. Comcast contends that the record shows that Waitsfield's customer losses are likely to be significantly less, even if customers are permitted to port their phone number(s).

Third, Comcast asserts that the Petition is based on a misleading presentation of Waitsfield's economic health. Comcast argues that the evidence shows that Waitsfield is a profitable subsidiary of a profitable company (Selectronics Corp.). According to Comcast, Waitsfield's presentation of its economic position ignores the profits from its affiliates, even though those affiliates employ facilities paid for largely by Waitsfield. Moreover, Comcast

asserts that the evidence shows that Waitsfield – the "regulated" telephone company – will remain profitable even in the wake of recent FCC reforms and even if Comcast enters the market with LNP.

Lastly, Comcast argues that granting the Petition would be poor public policy. Permitting Waitsfield to evade its LNP obligations would, at most, dissuade several hundred customers from switching to Comcast. Comcast asserts that the public policy question for the Board, therefore, is whether the relatively small benefit to Waitsfield is worth the harm to Vermonters that would result from thwarting competition by denying customers the right to port their numbers. Comcast believes that the answer to this question is clearly "no." The benefit to Waitsfield is remote and uncertain, but the harm to Vermont consumers is not. Some customers who want to switch and keep their telephone numbers will switch anyway, and needlessly be deprived of their old telephone numbers. Others, Comcast maintains, will be frustrated and stay with Waitsfield, denying them the Comcast services they would prefer to have.

In sum, Comcast concludes that Waitsfield's Petition should be denied because it has failed to prove, as required by Section 251(f)(2), that denying customers the benefits of LNP is "necessary to avoid a "significant adverse economic impact on users of telecommunications services generally," or would be "unduly economically burdensome," *and* is "consistent with the public interest, convenience, and necessity."

C. Department

The Department presented no testimony during the proceeding and submitted its arguments solely in a brief. The Department believes Waitsfield has not met the legal burden required by Section 251 (0)(2). The Company has not demonstrated that the relief sought in this proceeding, i.e., suspension of the number porting requirement, is necessary to avoid economic harm, either in the form of a significant adverse economic impact on users of telecommunications services or as to an undue economic burden on the Company. The Department asserts that it understands the overall tension between the obligations of carriers of last resort to provide essential telecommunication services and the economic hardships facing providers such as Waitsfield, but feels the broad policy issues inherent in this problem are not ones that can or should be addressed by imposing barriers to competitive choice in the fashion

presented by the Petition.

The Department stated it is not convinced that the financial outlook presented by the Company establishes a causative relationship between the introduction of Comcast voice service with LNP and the economic losses expected in the four-year study period such that the Board can conclude a suspension will provide the relief contemplated by Section 251(f)(2). Moreover, the Department argues, Waitsfield had not shown that the requested relief would promote the public interest, convenience and necessity, as a complete and indefinite suspension of LNP will harm competition and disadvantage customers in the Waitsfield service area who wish to switch to Comcast without conveying a tangible benefit to customers in Waitsfield's high-cost areas that are not serviced by Comcast. Accordingly, the Department recommends that the Board deny Waitsfield's Petition. However, if the Board determines that Waitsfield has satisfied the requirements of Section 251(f)(2), the Department believes it would be appropriate to modify the conditions of interconnection, rather than grant an outright suspension of the number porting requirement.

IV. LEGAL STANDARD

A. Standard of Review

Section 251(f)(2) of the Telecommunications Act of 1996 (the "Act") provides in its entirety as follows:

SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS — A local exchange carrier with fewer than two percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a state commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The state commission shall grant such petition to the extent that, and for such duration as, the state commission determines that such suspension or modification:

- (a) is necessary
 - (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
 - (ii) to avoid imposing a requirement that is unduly economically burdensome; or
 - (iii) to avoid imposing a requirement that is technically infeasible; and
- (b) is consistent with the public interest, convenience, and necessity.

The state commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the state commission

may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.¹

Section 251(f)(2) allows a rural local exchange carrier ("RLEC") to petition a state commission, such as the Board, to obtain the relief authorized by the statute, namely, suspension or modification of the application of a requirement or requirements of Section 251(b) or 251(c) to the petitioning RLEC's exchange service facilities. A companion provision, Section 251(f)(1), establishes an automatic statutory exemption for RLECs from the interconnection obligations of Sections 251(c) unless the state commission terminates the exemption.² The automatic exemption of Section 251(f)(1) is not at issue in the present proceeding.

In enacting the provisions of Sections 251(f)(1) and (f)(2), Congress granted rural carriers certain exemptions and the ability to seek protection from any undue economic impacts associated with competition.³ As the U.S. District Court in Indiana explained in the case of *Indiana Bell Tel. Co., Inc. v. Smithville Tel. Co., Inc.*, 31 F. Supp. 2d 628 (S.D. Ind. 1998):

When Congress established the comprehensive statutory provisions in the 1996 Act, it intended for the scheme to mesh with existing statutory and regulatory provisions. An important part of those provisions had been the state commission's authority over rates, classifications, practices, services, facilities or regulations related to intrastate telecommunications services. By allowing the state commission to exempt rural LECs from the § 251 requirements, or modify those requirements for small or rural LECs, Congress recognized the need to balance the goal of increased competition with the state's interest in maintaining universal service. This is why the Act allows different treatment, at the state commission's discretion, of interconnection requirements for rural LECs.⁴

In granting state commissions statutory authority under Section 251(f) of the Act, Congress entrusted the state commissions with responsibility for making public policy determinations and decisions involving the reasonable preservation of the universal telephone service that has been

1. 47 U.S.C. § 251(f)(2)

2. See 47 U.S.C. § 251(f)(1).

3. See *Iowa Utils. Bd. v. Fed. Communs. Comm'n*, 219 F.3d 744, 760-762 (8th Cir. 2000), *affirmed in part and reversed in part on other grounds sub nom. Verizon Communs., Inc. v. Fed. Communs. Comm'n*, 535 U.S. 467 (2002).

4. *Id.* at 642-43 (citation omitted).

in place prior to the arrival of competition.⁵

Under the statutory standard referenced above, the petitioning carrier must show, and the state commission must find, that suspension of the carrier's duty for number portability under Section 251(b)(1) does not result in an adverse economic impact on end-users, does not pose an undue economic burden on the carrier, nor impose a requirement that is technically infeasible and that such suspension is in the public interest. In addition, an affirmative order of the state commission in response to a petition by a LEC under Section 251(f)(2) must contain certain specified findings, including, but not limited to, the size of the petitioning carrier, the impact of the statutory requirements on the petitioning carrier, and the projected impact of the requested order on the public interest.⁶

1. Applicable Standards

Based on the preceding discussion, I will apply the following standard in determining in this proceeding whether to grant Waitsfield's request for modification and suspension of the LNP requirements under Section 251(b)(1) within the provisions of Section 251(f)(2). Waitsfield carries the burden of proof on all of the following questions:

- (1) Whether the requested modification and suspension of the LNP requirement is necessary to avoid a significant economic impact on the users of Waitsfield's telecommunications services.
- (2) Whether the requested modification and suspension of the LNP requirement is necessary to avoid placing an undue economic burden on Waitsfield.
- (3) Whether the requested modification and suspension of the LNP requirement avoids a requirement that is technically infeasible for Waitsfield.
- (4) Whether the requested modification and suspension of the LNP requirement is consistent with the public interest, convenience and necessity.

V. FINDINGS

Based on the evidence of record and the testimony presented at the technical hearing, I

5. *Id.* at 643.

6. *Rural Iowa Indep. Tel. Ass'n v. Iowa Utils. Bd.*, 385 F. Supp. 2d 797, 825 & 64 (S.D. Iowa 2005).

hereby report the following findings to the Board in accordance with 30 V.S.A. § 8. All proposed findings not specifically adopted herein are specifically rejected.

A. The Parties

1. Waitsfield

1. Waitsfield is an independent, family-owned telecommunications company serving the Mad River Valley since 1904 and the central Champlain Valley region since 1994. Waitsfield offers telecommunications services to the public on a common carrier basis under 30 V.S.A. 203(5) and holds a certificate of public good ("CPG") issued by the Board under 30 V.S.A. § 231(a) on December 14, 1998, in Docket No. 6171. Nishi pf. at 13-17; exh. RN-1.

2. Waitsfield has an affiliate company, Green Mountain Long Distance ("GMLT"), which offers long-distance telecommunications services in Vermont. Nishi pf. at 8-9; Comcast exh. 4.

3. Waitsfield and GMLT are wholly-owned subsidiaries of Selectronics Corporation ("Selectronics"), which is a privately-held company. Tr. 1/30/12 at 2-6 (Nishi); Comcast exh. 4.

4. Waitsfield is an incumbent local exchange carrier ("ILEC"), as defined in Section 251(h) of the Act, as amended, providing local exchange telephone service in the following Vermont exchanges: Waitsfield (496), Warren (583), Addison (759), Bridport (758), Bristol (453), Charlotte (425), Hinesburg (482), Panton (475), Richmond (434) and Weybridge (545). Petition at 1; Nishi pf. at 4-5.

5. As the incumbent local exchange carrier, Waitsfield serves as the carrier of last resort ("COLR") for retail end-users in its rural exchanges, and is obligated to serve any member of the public who requests service in its service territory, even if the cost of serving that customer is not economically viable at prevailing rates. Nishi pf. at 9.

6. As of November 2011, Waitsfield supports approximately 18,270 access lines, a figure representing fewer than 2% of the nation's subscriber lines installed in the aggregate nationwide. Petition at 2; Nishi pf. at 5.

7. Waitsfield is a rural telephone company ("RLEC") as defined under the Act, as amended, and has been designated by the Board as an eligible telecommunications carrier ("ETC") under 47 U.S.C § 214(e) and is obligated to provide the elements of universal telephone

service, as set forth at 47 U.S.C. § 254(e) and 47 C.F.R. § 54.101(a), to the subscribers in its rural service area. Nishi pf. at 3, 8.

8. Waitsfield's telecommunications network provides local and long distance telephone service, unified messaging solutions, digital subscriber line ("DSL") broadband, fiber-to-the-home, and a variety of calling features. Under the tradename "Waitsfield Cable," Waitsfield also offers more than 225 channels of digital video services to subscribers in its Mad River Valley exchange. Waitsfield introduced broadband service in 1998 and attained 100% broadband availability to its customers in 2006. Nishi pf. at 4, 9.

9. Waitsfield serves exchanges on the eastern and western slopes of the Green Mountains and the river valleys in Chittenden, Addison and Washington Counties in Vermont. Much of the landscape and terrain in the areas Waitsfield serves can be characterized as very rural with many Waitsfield subscribers located in areas that are not easily accessible. As a result, Waitsfield serves both high-cost and low-cost service areas. Nishi pf. at 5.

2. Comcast

10. Comcast Corporation, the parent of Comcast Phone of Vermont LLC, is the largest provider of cable television service in the United States. Munoz pf. at 3.

11. Comcast is authorized to provide telecommunications services in Vermont pursuant to a CPG (CPG No. 834-CR) issued by the Board on August 24, 2006. Munoz pf. at 4-5.

12. Comcast IP Phone II LLC, d/b/a Comcast Digital Voice ("CDV"), provides retail Voice over Internet Protocol ("VoIP") service to retail customers in Vermont. Tr. 1/31/12 at 106-107 (Munoz).

13. CDV does not interconnect directly with ILEC's but only interconnects indirectly through Comcast. Munoz pf. at 5.

14. CDV does not hold a CPG in Vermont. The Board recently determined that CDV's fixed VoIP service is a telecommunications service under Vermont law. Tr. 1/31/12 at 107, 127 (Munoz).

15. In Vermont, Comcast is neither a COLR nor a designated ETC, with the attendant universal service obligations. Pet. at 6.

16. Comcast presently has interconnection agreements with three Vermont ILEC's:

Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications ("FairPoint"), Vermont Telephone Company, Inc. ("VTel"), and TDS Telecom ("TDS"). All of Comcast's existing interconnection agreements contain provisions for number portability. Munoz at 4-5, 9.

17. Comcast has offered its CDV voice service in the FairPoint market areas in Vermont since 2007; in two of the three TDS areas in Vermont since 2008; and in the VTel areas since 2009. Munoz pf. at 7.

18. Over the past 15 years, Comcast has invested a substantial sum of money in Vermont to upgrade its local cable television facilities to create a state-of-the-art, national, broadband communications network. This network allows Comcast to offer an array of services in addition to cable television, including high-speed Internet access, VoIP, commercial Ethernet, as well as other advanced video and IP services. Munoz pf. at 4.

19. In Vermont, Comcast has more than 5,000 miles of network plant that extends to more than 230,000 households in 127 communities. Taking into account cable television, voice, and Internet access, Comcast provides communications services to more than 120,000 Vermonters. Comcast's plant passes approximately 8,597 homes in the Waitsfield service territory. *Id.*; exh. Waitsfield 4.

20. Comcast Corporation, through its cable television affiliate, provides cable television and high-speed Internet service in portions of Waitsfield's territory and competes with Waitsfield for Internet customers. Tr. 1/31/12 at 79 (Meredith).

21. Comcast does not currently provide service throughout the Waitsfield footprint, but does overlap several of its exchanges. Comcast's four largest operating areas within Waitsfield's service area include Bristol, Charlotte, Hinesburg and Richmond. Overall, Comcast covers 37% of the same roads and 62% of the same homes as Waitsfield. Nishi pf. at 16.

B. The Interconnection Request

22. Comcast formally requested that Waitsfield enter into discussions to establish interconnection pursuant to 47 U.S.C. § 25 1(a) and (b) on October 28, 2010. Comcast must obtain an interconnection agreement ("ICA") with Waitsfield before it can begin offering LNP in conjunctions with its interconnected VoIP service, or "CDV," to the public. Munoz pf. at 6, 8.

23. Comcast's proposed Interconnection Agreement includes terms for local number

portability ("LNP"), as governed by 47 U.S.C. § 251(b)(2). Comcast proposes to offer local exchange service, through CDV, in selected service areas and to allow Waitsfield customers who transition to Comcast's service to port their existing Waitsfield telephone numbers to Comcast. Petition at 3.

24. The Act defines LNP as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers, without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." From an economic perspective, LNP is important for competition because customers often prefer to retain their telephone numbers when they switch carriers. LNP lowers transaction costs associated with switching service providers. 47 U.S.C. § 153(30); Pelcovits pf. at 7.

25. Comcast's request for interconnection with Waitsfield does not seek rights under § 251(c) from which Waitsfield is exempt as a rural carrier, such as network unbundling, total service resale, and collocation. Tr. 1/30/12 at 67-68 (Nishi).

26. Comcast and Waitsfield negotiated and reached agreement on a comprehensive interconnection agreement, upon which the parties differed only in the provision and pricing of LNP, to which Waitsfield objected. Comcast chose not to sign the ICA without the LNP provision. Nishi pf. at 12; tr. 1/30/12 at 19 (Nishi); tr. 1/31/12 at 133-134 (Munoz).

27. Waitsfield anticipates that allowing Comcast to port current Waitsfield numbers to Comcast will result in an outflow of Waitsfield's lower-cost/higher-revenue customers to Comcast while Waitsfield remains obligated to continue serving its high-cost/lower-revenue customers. Meredith pf. at 30-32.

28. Waitsfield believes that, unless the Board suspends or modifies Waitsfield's number portability obligation, it will face rapid line losses that will have a substantial adverse impact on the remaining users of Waitsfield's COLR network generally and that will impose revenue losses that are unduly economically burdensome on Waitsfield. *Id.*; Nishi pf. at 34-35.

29. The Board has previously acknowledged demand for Comcast voice service within Waitsfield's service territory. On October 7, 2010, prompted by a Waitsfield customer's complaint regarding the unavailability of Comcast Digital Voice service, the Board issued a Memorandum in which it asked Comcast to "describe its plan, if any, to extend service to St.

George (the Waitsfield customer's town)," and asked both companies to indicate the status of negotiations towards an interconnection agreement that could facilitate Comcast's entry."

Munoz pf. at 7-8; exh. MZ-2.

30. In December 2010, Waitsfield entered into an interconnection and traffic exchange agreement with Charter Fiberlink VT-CCO, LLC ("Charter"). Charter operates to the east of Waitsfield's service territory (in the same calling area), but does not overlap; therefore, Waitsfield's interconnection agreement with Charter does not provide for number portability. Nishi pf. at 11; Munoz pf. At 14; tr. 1/30/12 at 25 (Nishi).

31. Since 2009, Waitsfield has been providing number porting to wireless carriers, including Verizon Wireless and AT&T Mobility. Waitsfield has ported 49 customers to wireless carriers between 2008 and 2011. Nishi pf. at 11; tr. 1/30/12 at 165 (Nishi).

32. Waitsfield feels some competitive pressure from wireless carriers but perceives wireless service as complementary to the landline services, especially for customers in Waitsfield's remote service areas, because many customers use their wireless service when they are away from home but rely on Waitsfield's dialtone service when they are at home. Nishi pf. at 13.

33. A crucial difference between the loss of customers to wireless providers and the loss of customers to Comcast is that the migration of customers to Comcast for voice, video and broadband service results in the loss of two revenue streams to Waitsfield - broadband and voice. Tr. 1/30/12 at 159-160 (Nishi).

C. Federal Regulatory Reforms

34. On November 18, 2011, the FCC released a Report and Order ("FCC Order") that comprehensively reforms the Federal Universal Service Fund ("FUSF" or "USF") and the intercarrier compensation regime ("ICC").⁷ Most of the FCC's rules became effective on December 29, 2011. Meredith pf. at 18; exh. DDM-2.

35. Waitsfield modeled the short-term impacts of the FCC's announced reforms to the FUSF and ICC programs (the "Baseline Model"). That model, provided as Exhibit RN-3rev

⁷ *In re Connect America Fund, Connect America Fund et al.*, WC Docket No. 10-90 et al, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011).

(Confidential), reflects the known and anticipated capital investments, expenses, and revenues for Waitsfield for a four-year period beginning in 2012, and projects the reductions in access charges and USF due to the implementation of the FCC's Order. Nishi pf. at 21; exh. RN-3rev (Confidential).

36. Waitsfield anticipates that it will experience adverse financial consequences as the FCC begins to implement the reforms to FUSF support and ICC. The FCC is implementing comprehensive reforms in its access rate structure, with "Bill and Keep" as the final end-state for all telecommunications traffic exchanged with a local exchange carrier. The process begins by addressing terminating switched access rates. The FCC has created the "Connect America Fund (CAF) Recovery Mechanism (RM)" comprised of a carrier's frozen interstate switched access revenue requirement, plus terminating intrastate switched access revenues as a proxy for cost or as a proxy for the revenue requirement, plus net reciprocal compensation. The revenues have been frozen at 2011 levels and will be decreased by 5% per year under the FCC's Order. The FCC also intends to re-prescribe the interstate rate-of-return and lower the existing 11.25% rate-of-return to a rate no more than 9%. Nishi pf. at 22; tr. 1/31/12 at 16 (Meredith); Meredith pf. at 19-20.

37. The FCC Order also updates the capital expenditures and operational expenditures cap formula for High Cost Loop ("HCL") support and extends the application of the corporate operations cap to the Interstate Common Line Support fund. Under the revised corporate cap formula, the FCC limits the maximum allowable corporate operations expense per loop based on a formula. Under the formula, Waitsfield will forego recovery of expenses above the cap through the FUSF programs. Waitsfield projects that this will result in a significant reduction in its revenue in the amount of *** **BEGIN CONFIDENTIAL INFORMATION** [[████████]] **END CONFIDENTIAL INFORMATION** *** over four years. Nishi pf. at 23 (Confidential).

38. Based on its projected expenses, Waitsfield anticipates that it will exceed the FCC's mandated cap in the range of \$2.3 million to 2.5 million before any expense reductions that the Company is currently exploring. Even with possible regulated expense reductions in Year 1 and increasing in Year 4, Waitsfield expects this unrecovered amount will cause an immediate reduction in Waitsfield's interstate annual revenues over the 4-year model period. Nishi pf. at 23-

24; exh. RN-3rev(Confidential).

39. Waitsfield expects that the impacts of the FCC's limitations on capital expenditures and operational expenditures will be on the High-Cost Loop Support Program, but the FCC has adopted a policy to extend these capital and operational expenditure limitations to recipients of Interstate Common Line Support. Meredith pf. at 18-19.

40. Waitsfield believes that the FCC reforms may result in rate shock and upward pressure on end-user rates throughout its service territory. For example, the access recovery charge adopted by the FCC in its recent order, intended to recover existing access charges currently paid by interexchange carriers, will add an additional \$3.00 on end-user service fees over the next six years. Meredith pf. at 24.

41. Based on its projections, Waitsfield anticipates that the FCC's reforms to the FUSF and ICC will result in revenue losses that will require offsetting increases in Waitsfield's local rates beyond the level of affordability. These changes would most likely cause Waitsfield to seek legislation before the Vermont General Assembly authorizing the Board to implement a state high-cost fund or similar state universal service mechanism, so that local rates in rural areas remain reasonably comparable with local rates in non-rural areas. Petition at 5-6; Nishi pf. at 31.

43. Waitsfield expects that, absent increases in local rates or the creation of a Vermont State High Cost Fund, Waitsfield's broadband investment will be curtailed significantly, causing rural consumers living in its service area to have broadband service inferior to that available in urban areas. Petition at 2.

44. Comcast believes that there is currently a high degree of uncertainty surrounding the ultimate impacts of the FCC's reforms, making it difficult to accurately project those impacts. For example, significant changes have been proposed for CAF, and this major reform of the FUSF is still at the stage of a Notice of Proposed Rulemaking (released simultaneously with the FCC's Order); thus, it is impossible to accurately predict the impact it will have on Waitsfield. Pelcovits pf. at 13, 17-18; tr. 1/31/12 at 168-172 (Pelcovits).

45. Due to the proposed FCC reforms the level of uncertainty surrounding rural carriers has increased dramatically and will likely continue through 2012. The non-modeled actual and proposed reforms are likely to create financial stress on Waitsfield's ability to recover its costs

and continue to provide universal service throughout its study area. Meredith pf. at 20.

46. Waitsfield requests that the Board suspend the requirements of Section 251(b)(2) as to number portability to Waitsfield's telephone exchange facilities until such time as a final order in pending FCC proceedings shows the impacts of the FCC's expected FUSF and ICC reforms on Waitsfield, and for such duration thereafter as may be necessary to allow Waitsfield to stabilize its revenues as a result of such impacts. Petition. at 8.

D. Legal Standard Under 47 U.S.C. § 251(f)(2)

1. General

47. Under § 251(b), a local exchange carrier must, to the extent technically feasible, provide number portability to an interconnecting carrier. 47 U.S.C. § 251(b); Nishi pf. at 8.

48. The transfer (or porting) of numbers allows end-user customers to keep their existing Waitsfield-assigned telephone number after they change local service providers. Meredith pf. at 6.

49. Under Section 251(f)(2) of the 1996 Act, rural carriers "with fewer than two percent of the Nation's subscriber lines installed in the aggregate nationwide" may request a suspension or modification of interconnection requirements upon petition to the appropriate state utility commission, provided that the requested suspension or modification:

- (a) is necessary:
 - (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
 - (ii) to avoid imposing a requirement that is unduly economically burdensome; or
 - (iii) to avoid imposing a requirement that is technically infeasible; and
- (b) is consistent with the public interest, convenience, and necessity.

47 U.S.C. 251(f)(2); Nishi pf. at 7; Meredith pf. at 7.

2. Necessity

a. Adverse Economic Impact on Users

50. Waitsfield believes Comcast's LNP proposal will allow "unfair competition that will threaten [Waitsfield's] continued ability to meet [its] carrier of last resort obligations."

Waitsfield believes that not allowing Comcast to port Waitsfield telephone numbers would "temper" the competitive pressures Waitsfield will face and allow it to continue meeting its

service obligations throughout its study area. Nishi pf. at 13-15.

51. As a COLR, Waitsfield is obligated to provide service to all consumers in its service area, whereas Comcast is not required to do so. Waitsfield must maintain its loop throughout its entire study area to provide service to all consumers within the area. Nishi pf. at 19.

52. Waitsfield's COLR obligation to maintain its entire network remains the same even if Comcast wins every customer in a town except one last remaining customer at the end of the line. Tr. 1/31/12 at 161 (Pelcovits).

53. Customers in higher density areas are proportionately less expensive to serve than those in lower density areas. One method to determine what constitutes a high-cost area is to look at the subscriber density per square mile. Fewer subscribers per square mile increase the cost of providing service. Nishi pf. at 17; Meredith pf. at 27-28.

54. Waitsfield modeled the impact on local service rates both with and without Comcast porting numbers in Exhibits RN-5 (Confidential) and RN-6 (Confidential). As projected in Exhibit RN-5, considering the FCC's proposed reforms, Waitsfield projects it would need to nearly double rates for basic residential service in year 1, with subsequent rate increases to occur thereafter. After factoring in anticipated line losses from competition with Comcast, incorporating LNP, Exhibit RN-6 projects the immediate shortfall per working loop will increase significantly. As a result, Waitsfield projects that it will be forced to raise rates on remaining end-users in subsequent years. In addition, the access recovery charge adopted by the FCC's Order will add an additional \$3.00 on end-user service fees. These rising costs are likely to fall on the majority of Waitsfield's customers who reside in the more remote, higher-cost areas where Comcast's service does not reach, which could force many customers off the public switched telephone/broadband network in Waitsfield's operating area. Nishi pf. at 34; exhs. RN-5 and RN-6 (Confidential); Meredith pf. at 24, 32.

55. Waitsfield is likely to also attempt to mitigate the projected negative financial impacts by reductions in labor and by delaying or canceling infrastructure upgrades, potentially resulting in reduced customer service and a compromise in network maintenance and improvements. Nishi pf. at 35-36.

56. Comcast analyzed Waitsfield's projections and concludes that the projections

overstate the effects of the FCC's Order and LNP on Waitsfield and Waitsfield's customers. Comcast agrees that the potential loss in revenues is not insignificant, however, Comcast's analysis indicates that the loss is not sufficient enough to prevent Waitsfield from continuing to invest in its network. Waitsfield recently received a \$5.56 million stimulus grant from the United States Department of Agriculture which is nearly double Waitsfield's construction budget for 2010. In addition, Waitsfield did not consider potential revenues from providing higher speed broadband data service. Pelcovits pf. at 33-34.

57. LNP facilitates competition among telephone service providers by removing a potentially costly barrier to new entrants and by reducing the cost to customers who want to switch carriers. The FCC cites that the absence of LNP is a barrier to market competition because consumers are more reluctant to change carriers if they cannot keep their existing telephone number. Fewer market barriers lead to greater competition among carriers which leads to better performance and greater responsiveness to the needs of consumers. Pelcovits pf. at 7; tr. 1/31/12 at 155-156.

b. Undue Economic Burden

58. The U.S. Court of Appeals for the Eighth Circuit has reviewed the "undue economic burden" standard as interpreted by the FCC in the context of a rural exemption under Section 251(f)(1). The term "undue economic burden" is used in both the rural exemption subsection and the suspension or modification subsection of Section 251(f). In *Iowa Utils. Bd. v. F.C.C.*, the Court rejected the FCC's interpretation of the phrase which excluded "economic burdens ordinarily associated with competitive entry." In this decision, the Eighth Circuit Court stated:

If Congress had wanted the state commissions to consider only that economic burden which is in excess of the burden ordinarily imposed on a small or rural ILEC by a competitor's requested efficient entry, it could easily have said so. Instead, its chosen language looks to the whole of the economic burden the request imposes, not just a discrete part.

However, no federal court has reviewed the "undue economic burden standard" in the context of a request for suspension or modification under Section 251(f)(2). As such, the present proceeding represents a case of first impression concerning the exercise of the Board's federal authority under Section 251(f)(2). Meredith pf. at 9-11, 24; *Iowa Utils. Bd. v. F.C.C.* ("*Iowa Utils.*"), 219 F.3d 744, 760-62 (8th Cir 2000), *rev'd in part on other grounds sub nom. Verizon*

Communs., Inc. v. F.C.C., 535 U.S. 467 (2002); tr. 1/31/12 at 28-32 (Meredith)(Confidential).

59. Since 2007, Waitsfield has seen an average annual access line loss of 1.73%. Nishi pf. at 11.

60. Access lines are discontinued when telephone service arrangements previously used for dial-up Internet service are replaced by broadband lines, or when end users drop traditional landline service in favor of wireless-only, or when customers transition to VoIP service arrangements. *Id.*

61. Waitsfield's access minutes-of-use have also declined, with total access minutes decreasing by 21% between 2005 and 2010. Nishi pf. at 12.

62. Between 2005 and 2010, Waitsfield's local measured service revenues have dropped from an annual amount of \$1,610,000 in 2005 to a year-end 2011 estimate of \$696,000. *Id.*

63. A recipient of FUSF support, Waitsfield's receipt of HCL support has decreased over the past several years, from a high of approximately \$1.2 million in 2005 to approximately \$500,000 in 2010; Waitsfield forecasts that it will receive \$0 in HCL support for 2012. Nishi pf. at 10.

64. Comcast covers approximately 37% of the same roads and 62% of the same homes as Waitsfield does in Waitsfield's territory. Nishi pf. at 16.

65. As a large cable provider with expansive statewide coverage, Comcast is able to make advertising purchases that exceed Waitsfield's capabilities. Waitsfield is unable to match the potential impact of Comcast's radio, television, and newspaper advertising. Meredith pf. at 29.

66. Economic and regulatory disparities exist between Waitsfield's and Comcast's service offerings. Waitsfield has agreed to open its network and territory to Comcast's competitive offerings; however, by suspending LNP, Waitsfield believes that a more level playing field for competition between the two companies will result. Nishi pf. at 15-16.

67. Waitsfield charges \$23.23 for basic residential service (inclusive of the monthly basic rate of \$13.40 plus the current FCC subscriber line charge and average local measured service charges) and provides optional calling features and access to the underlying carrier of choice. Waitsfield does not require the purchase of additional features or services to obtain the published

basic-service price. Waitsfield does not require a contract commitment for its phone services, unlike Comcast, which requires term commitments from its business customers as a condition of service. Nishi pf. at 21.

68. Comcast does not offer standalone "basic service" as that term is generally defined in the telecommunications industry. Comcast's "basic" phone service includes a package of calling features and local and long distance calling that are rolled into the base rate for Comcast services which are typically marketed as part of a bundle. Comcast's rates range from an introductory rate of \$19.95 per month to the standard rate of \$44.95, varying on whether the end user purchases other qualifying video or data services. According to Comcast's 2010 Form 10K filing with the U.S. Securities and Exchange Commission, Comcast's average revenue per customer was approximately \$129 per month. Nishi pf. at 20; exh. RN-7.

69. Waitsfield re-ran its financial model depicted in Exhibit RN-3rev to incorporate Comcast's entry into Waitsfield's market with LNP. That version of the model is provided as Waitsfield's CDV entry model, Exhibit RN-4rev (Confidential), and attempts to depict the net impact of anticipated line losses (along with the financial impact of the FCC's reforms), relative to the Baseline Model, of Comcast's entry into the voice market in Waitsfield's territory by means of interconnection with LNP authority. Nishi pf. at 21-22; exh. RN-4rev (Confidential); Tr. 1/30/12 at 83 (Nishi).

70. Exhibit RN-4rev projects a rapid loss of Waitsfield's access lines producing a material impact on broadband and telephone revenues billed directly to end users and on switched access recovered from interexchange carriers. The model assumes that Waitsfield would face present and future revenues without a material reduction in operating costs since the costs of operating Waitsfield's network remain relatively the same even if revenues or number of customers declines. Nishi pf. at 28-29.

71. Waitsfield estimates that Comcast will capture 17.4% of its target market within the first year, and by year 4, capture 23% of total homes passed in Waitsfield's service territory. Nishi pf. at 29.

72. Exhibit RN-4rev projects that the impact from competition with Comcast will reduce Waitsfield's net income significantly resulting in revenue losses over the 4-year forecast period.

Waitsfield Exhibits RN-4rev (Confidential).

73. Comcast defines its CDV penetration rate as "the percent of all 'homes passed' that Comcast serves" with CDV. Comcast provided four data points for its CDV penetration rate: a national penetration rate of 18%; and three CDV penetration rates in the Vermont ILEC areas where Comcast presently has interconnection agreements: the TDS areas, the VTel service area, and the FairPoint service areas. Munoz pf. at 10.

74. Comcast's penetration rates may be understated because "homes passed" includes those houses that are not CDV capable. Waitsfield instead used a "take rate" based on active customers. Using Comcast's active accounts in areas in Vermont where CDV is currently offered as a base, Comcast has a high CDV "take rate" among Comcast's active accounts. Waitsfield Exhibits 2 and 5 (Confidential); tr. 1/30/12 at 196-200 (Meredith).

75. If the CDV take rate that Comcast has experienced in Vermont were applied to the active accounts that Comcast reports in Waitsfield's service territory, Waitsfield would lose customers to CDV service over a time period of as little as three years (in the case of TDS and VTel) and as long as five years (the case of FairPoint). Waitsfield Exhibits 2 and 3 (Confidential).

76. Comcast provided CDV porting rates for the four data points in its sample, as follows:

- i) National: 30%
- ii) TDS: [Confidential]
- iii) VTel: [Confidential]
- iv) FairPoint: [Confidential]

Munoz pf. at 18.

77. Waitsfield applied the projected porting rates over the forecast period to those customers Waitsfield anticipates losing to CDV. The model produced substantial line-loss counts that Waitsfield would experience from porting to Comcast over a 3-5 year period. Waitsfield Exhibit 5 (Confidential).

78. Comcast typically finds that annual port rates are higher in the early years after CDV is first rolled out and then declines over time as the customer base turns over and more and more

new customers take Comcast "native" numbers. Munoz pf. at 11.

79. Comcast believes its analysis shows that Waitsfield's estimate of customer losses due to LNP is inflated. Comcast's national "penetration rate" (the number of homes subscribing to CDV divided by the number of CDV serviceable homes) is 18% and that includes territories where Comcast has been offering service for nearly seven years. Given the similarity between the VTel, TDS, and Waitsfield service territories, Comcast's analysis indicates a lesser impact than Waitsfield's projection that Comcast will achieve a 17.4 percent penetration rate in the first year. Given that it took Comcast two years to achieve its current penetration rates in VTel and TDS service territories, Comcast projects that its penetration rate in Waitsfield's territory after one year is more likely to be half the rate projected by Waitsfield, and could be expected to rise slightly at the end of the fourth year, below Waitsfield's projections. Nishi pf. at 29; Munoz pf. at 10-13.

80. Customers value number portability and without it Comcast will probably win fewer customers than if LNP were available. However, Comcast is likely to still win customers if it enters the market without LNP — just not as many. Munoz pf. at 9-11; Pelcovits pf. at 29; tr. 1/30/12 at 73-82 (Nishi).

81. Suspending LNP will not prevent Comcast from competing with Waitsfield. However, Waitsfield believes that doing so will "create a more level playing field for competition" and "temper the competitive pressures Waitsfield will face and allow it to continue meeting its service obligations throughout its study area." Nishi pf. at 15.

82. Comcast projects that it will win half as many customers without LNP than it will with LNP. Munoz pf. at 12-15; Pelcovits pf. at 29-30.

83. Waitsfield's corporate parent, Selectronics Corp., is comprised of Waitsfield, Green Mountain Access (its broadband Internet service provider affiliate), Green Mountain Long Distance, and Waitsfield Cable. These affiliates, and Selectronics itself, are profitable. Waitsfield did not consider these other potential sources of revenue in its forecast. Comcast believes that the financial analysis should reflect these income sources because Waitsfield can and will rely on these other lines of business for revenue support in the event that Waitsfield experiences the adverse economic impacts that Waitsfield projects over the next four years.

Pelcovits pf. at 21-34; tr. 1/30/12 at 27-42 (Nishi); tr. 1/31/12 at 185-192 (Pelcovits).

84. Although Waitsfield's non-regulated affiliates have made investments in Waitsfield's regulated plant, the Company does not believe it is appropriate to use funds from its non-regulated services to ensure that the regulated entity can continue serving as a carrier of last resort or to reflect such sources in the financial model. Pelcovits pf. at 21-23; tr. 1/30/12 at 29, 94-95 (Nishi).

85. Waitsfield follows the FCC's Part 64 Rules governing the allocation of regulated and non-regulated costs for accounting purposes. Tr. 1/30/12 at 40 (Nishi).

c. Technically Infeasible

86. The technical feasibility of number porting is not an issue in this proceeding. Meredith pf. at 13.

d. Public Interest, Convenience, and Necessity

87. The State of Vermont's policies toward telecommunications service which requires the Board both to "[s]upport the universal availability of appropriate infrastructure and affordable services for transmitting voice and high-speed data" and to "[p]rovide for high-quality, reliable telecommunications services for Vermont businesses and residents," while at the same time "[s]upporting competitive choice for consumers among telecommunications service providers and promot[ing] open access among competitive service providers on nondiscriminatory terms to networks over which broadband and telecommunications services are delivered." Title 30, Vermont Statutes Annotated, Section 202c(2), (4) & (6); Meredith pf. at 31.

88. Customers in some portions of Waitsfield's rural service area may experience some benefit associated with allowing Comcast to port Waitsfield numbers, however, those benefits are likely to be limited to customers who reside in lower-cost areas and who have the ability to purchase bundled voice-data-video packages from Comcast. Meredith pf. at 32.

89. Waitsfield's analysis indicates that Waitsfield will need to increase its basic dial-tone rate significantly in order to remain financially able to continue to provide service in its exchanges. As Waitsfield's basic rates become unaffordable, especially for Waitsfield's customers who reside in more remote, higher-cost areas that Comcast's services do not reach, the rate increases are likely to cause increasing numbers of customers to seek cheaper alternatives,

resulting in greater line losses and revenue reductions. Meredith pf. at 32.

90. Granting Waitsfield's Petition does not prevent Comcast from obtaining number blocks and from offering voice service to customers in Waitsfield's service territory. Tr. 1/30/12 at 23 (Nishi).

91. Comcast is the largest cable provider in the United States, while Waitsfield is a small, local carrier serving high-cost rural exchanges. As such, Waitsfield maintains that a suspension of Comcast's ability to port numbers will have little impact on Comcast's operations, whereas failure to grant Waitsfield's suspension request poses genuine financial harm for Waitsfield that is disproportionate. Meredith pf. at 33.

92. Waitsfield requests a temporary suspension in order to allow for a "pause" or a "breather" to provide time for the impact of the reforms at the FCC level to become clearer and to allow the State of Vermont to determine whether and how it will respond to those changes. Tr. 1/31/12 at 55 (Meredith).

93. It is difficult to determine how a customer will prioritize his or her options between Waitsfield and Comcast. While some customers will be deterred from switching to Comcast without number porting, it is fair to assume some customers will value the service options offered by Comcast enough to switch to Comcast service, but they will be disadvantaged by having to change their telephone numbers. Tr. 1/30/12 at 166-167 (Nishi).

94. Suspending LNP in Waitsfield's service territory will be harmful to some customers by denying them the ability to keep their phone number if they seek to switch to a provider they find preferable to Waitsfield. Pelcovits pf. at 4.

95. Granting Waitsfield's Petition may distort competition by making it more difficult for providers to enter and compete in the market, potentially resulting in fewer options for customers and higher prices for telecommunications. Pelcovits pf. at 4.

VI. DISCUSSION AND CONCLUSION

The issue before the Board in this proceeding is whether or not the Board should grant Waitsfield's request for suspension or modification of Waitsfield's LNP obligation under 47 U.S.C. § 251(b). Waitsfield maintains that it is entitled to relief from this obligation under the

attendant subsection of the statute, 47 U.S.C. § 251(f)(2), in order to avoid a significant adverse economic impact on users of telecommunications services generally and to avoid imposing a requirement that is unduly economically burdensome to the Company, and that granting its petition would be consistent with the public interest, convenience and necessity. Comcast contends that Waitsfield's request must be denied because Waitsfield has failed to meet its burden of proof under the applicable legal standards set forth under § 251(f)(2). The parties in this docket have presented numerous arguments both for and against suspension or modification of the LNP requirement, and have introduced copious amounts of evidence into the evidentiary record, much of it confidential. Based on the preceding findings, my review of the evidence, and for the reasons outlined below, I recommend that the Board grant a temporary suspension of Waitsfield's LNP obligation for a period of time not to exceed eighteen months from the date of the Board's final order in this proceeding. In this Proposal for Decision ("PFD"), I do not address § 251(f)(2)(A)(iii) (which allows waiver of interconnection requirements that are not technically feasible) since the parties are in agreement that deployment of LNP by Waitsfield is technically feasible.⁸

A. Adverse Economic Impact on Users

Waitsfield contends that Comcast's LNP request will have a significant adverse economic impact on users of telecommunications services generally under § 251(f)(2)(A)(i). Waitsfield asserts that a substantial majority of customers in its territory are not passed by Comcast's facilities and are not likely to be passed by Comcast's facilities for the foreseeable future.⁹ These customers will not have any greater competitive choice in their service options upon Comcast's entry into Waitsfield's voice market.¹⁰ Moreover, Waitsfield contends that these customers will face significant adverse economic harm in the form of sharply higher rates for Waitsfield's basic exchange service, and may see a decline in network investment, as a result of Waitsfield's line losses and revenue losses experienced following Comcast Phone's competitive entry.¹¹ According to Waitsfield, these impacts are exacerbated by recent FCC modifications to FUSF

8. Waitsfield Brief at 10; Comcast Brief at 10; fn no. 27.

9. Waitsfield Brief at 22

10. *Id.*

11. *Id.*; exhs. RN-5 and RN-6 (Confidential).

support and ICC. Waitsfield also asserts that all users of telecommunications services in Waitsfield's territory would eventually suffer significant adverse economic harm if Waitsfield's resultant financial condition were such that it could no longer carry out its carrier-of-last resort obligations.¹² Comcast is not a COLR is not obligated to provide service to all consumers in Waitsfield's service area.¹³

Comcast counters, and the Department concurs, that denying Vermonters LNP – a choice available to customers everywhere else landline competitors have entered the local market – will harm end users and distort competition and is therefore contrary to the public interest.¹⁴ Comcast argues that its market analysis shows that the impact LNP will have on Waitsfield is minimal. By factoring in its own estimated penetration rates after the first year and the fourth year of market entry with LNP, Comcast calculates that Waitsfield would be expected to lose customers in Year 1 and Year 4.¹⁵ Without LNP, Comcast estimates that these customer losses would be approximately 50% less, meaning that Comcast would pick up the remaining 50% anyway.¹⁶ Comcast contends that these losses are small in magnitude and do not pose a "significant adverse economic impact on users of telecommunications services generally" or an impact that is "unduly economically burdensome."

Both parties have submitted analysis into evidence in this proceeding that consist of different projected penetration rates, and differing projected financial impacts, that may result from Comcast's competitive entry into Waitsfield's service territory. It is difficult to estimate with certainty how many customers would switch to Comcast, or what Waitsfield's losses would be, even if customers were unable to retain their existing telephone numbers. Financial projections are essentially estimations of what may occur in the future based on certain assumptions about the future. As such, the practice of financial forecasting constitutes an inexact science. When confronted with two differing views of the future, as in the present case, the substantive question is which version of the analysis offers the most content and the closest

12. *Id.*

13. Nishi pf. at 19.

14. Comcast Brief at 1.

15. *Id.* at 14-15.

16. *Id.*

approximation to reality. On balance, I am inclined to believe that the answer lies somewhere in the middle, in which case, the losses to Waitsfield are not insignificant. Waitsfield's analysis (as in Confidential Exhibits RN-5 and RN-6) is detailed and indicates the Company's grasp of where the Company is, and where it may be, financially. Comcast did not provide the same level of detail and did not directly challenge Waitsfield's numbers much beyond factoring in Comcast's own estimates of penetration. Accordingly, I conclude that it is appropriate to give additional weight to Waitsfield's analysis in determining, at least over the near term, the degree of impact on end-users, and on the Company, resulting from increased competition due to LNP.

Waitsfield's projections, as provided in Exhibits RN-5 and RN-6, model the impact on local service rates both with and without Comcast porting numbers.¹⁷ The projections incorporate changes, actual and likely, due to the FCC's recent USF/ICC order. These changes suggest that Waitsfield will need to increase rates. LNP will add to these impacts by reducing the number of customers from whom cost recovery is sought. Waitsfield's analysis indicates that in order for Waitsfield to recover average costs per working loop, it would have to nearly double rates for basic residential service in year 1, with subsequent rate increases thereafter. After factoring in the anticipated line losses from competition with Comcast, incorporating LNP, Exhibit RN-6 projects the immediate shortfall per working loop will increase significantly. As a result, Waitsfield projects that it will be forced to raise rates on remaining end-users in subsequent years. The access recovery charge adopted by the FCC's Order will add an additional \$3.00 on end-user service fees, adding to the initial "rate shock." These rising costs are likely to fall disproportionately on the majority of Waitsfield's customers who reside in the more remote, higher-cost areas where Comcast's service does not reach, eventually forcing some customers to seek out cheaper alternatives. In addition to upward pressure on rates, the resultant loss in revenues might make it increasingly difficult to maintain and improve its telecommunications infrastructure, which will also have an adverse affect on end-users.¹⁸

In addition, consideration of Waitsfield's obligations as a COLR cannot be overlooked.

17. Waitsfield Exhibit RN-5 depicts revenue surplus/(deficiency) without Comcast's competitive market entry. Exhibit RN-6 depicts revenue surplus/(deficiency) with Comcast's competitive market entry.

18. Meredith pf. at 24,32.

As mentioned above, many of Waitsfield's customers are located in low density areas that are more costly to serve than Waitsfield's average customer, and are located beyond Comcast's current service area. As a COLR, Waitsfield must maintain its loop throughout its entire market area to provide service to all consumers within the area, regardless of the number of customers it may lose to competition. Indeed, Waitsfield is obligated to serve any member of the public who requests service in its service territory, even if the cost of serving that customer is not economically viable at prevailing rates.¹⁹ Comcast did not directly address or refute these impacts in its filings. Comcast is not a COLR nor an ETC and thus is not subject to the same obligations or the costs associated with fulfilling those obligations. Furthermore, Comcast's service area is limited, mostly within the high-density areas of Waitsfield's market, and Comcast apparently has no plans to extend service beyond that existing footprint.²⁰

Accordingly, I find that the record adequately shows that if Waitsfield is not provided with sufficient time to plan and mitigate for the competitive affects of LNP, an adverse economic impact on end-users is reasonably likely to result from the immediate introduction of LNP in Waitsfield's service area. It is apparent from the record that those costs, at least in the near term, will be borne by Waitsfield and ultimately its customers.

B. Unduly Economically Burdensome

Waitsfield contends that Comcast's request to include LNP in its proposed interconnection agreement imposes a requirement that is unduly economically burdensome to Waitsfield under 47 U.S.C. § 251(f)(2)(A)(ii). In Waitsfield's view, the ability of Comcast to offer LNP as it enters the voice market in Waitsfield's territory will cause a rapid loss of high-revenue Waitsfield customers to Comcast. The resulting loss of revenue creates an undue economic burden on Waitsfield at a time when federal regulatory changes, ushered in by the FCC's Order, are already siphoning millions of dollars in federal revenue from Waitsfield.²¹ Waitsfield argues that its CDV entry model, Exhibit RN-4rev, depicts the material impact of Comcast's market entry on Waitsfield's revenues, and provides support for Waitsfield's argument

19. Nishi pf. at 9.

20. Tr. 1/31/12 at 147 (Munoz).

21. Waitsfield Brief at 10-11.

that suspension or modification of Waitsfield's LNP duty is necessary to avoid imposing this undue economic burden on Waitsfield.²²

Waitsfield also relies on a decision by the Eighth U.S. Circuit Court of Appeals, whereby the Court struck down the FCC's interpretation of "unduly economically burdensome," as conflicting with the intent of Congress when it enacted Section 251(f)(2) of the Act.²³ Following enactment of the Telecommunications Act of 1996, the FCC adopted a rule that attempted to define an "unduly economically burdensome" requirement as an: "undue economic burden beyond the economic burden that is typically associated with efficient competitive entry."²⁴ Waitsfield quotes the Eighth Circuit Court's ruling, in part: "Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily-granted exemption from doing so should continue unless the state commission . . . determined that all prerequisites for suspension or modification were met in order to grant an ILEC affirmative relief. *It is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission.* (emphasis added).²⁵

In light of the Court's ruling, Waitsfield contends that "the full economic burden of the ILEC of meeting the [LNP] request" and the "total actual economic burden that competitive entry would impose on a small or rural LEC" involve consideration of the full economic circumstances in which Waitsfield presently finds itself, and then a determination of whether the actual economic burden of meeting Comcast's LNP request constitutes an undue economic burden in light of present circumstances.²⁶

Comcast argues that Waitsfield has failed to prove that denying customers the benefits of LNP relieves Waitsfield of a requirement that will be "unduly economically burdensome" for Waitsfield. Comcast contends that the evidence shows that Waitsfield is a profitable subsidiary

22. *Id.* at 19-20.

23. *Iowa Utils. Bd. v. Fed. Communs. Comm'n*, 219 F.3d 744, 760-61 (8th Cir. 2000), *affirmed in part and vacated in part on other grounds sub nom. Verizon Communs., Inc. v. Fed. Communs. Comm'n*, 535 U.S. 467 (2002).

24. 47 C.F.R. § 51.405(d).

25. *Id.*, 219 F.3d at 760-62; Waitsfield Brief at 11-12.

26. Waitsfield Brief at 13.

of a profitable company (Selectronics Corp.). Comcast asserts that Waitsfield's presentation of its economic position overstates its losses and ignores the profits from its affiliates, even though those affiliates employ facilities paid for largely by Waitsfield.²⁷ Moreover, Comcast asserts that the evidence shows that Waitsfield (the "regulated" telephone company) will remain profitable even in the wake of recent FCC reforms and even if Comcast enters the market with LNP.²⁸

Comcast rejects Waitsfield's projections as grossly inflated and unrealistic. Comcast points out that its national "penetration rate" (the number of homes subscribing to CDV divided by the number of CDV serviceable homes) is just 18%, and that includes territories where Comcast has been offering service for nearly seven years.²⁹ In Vermont, Comcast claims that it has achieved lower penetration rates in the VTel and TDS service territories respectively after two years of providing service. Comcast argues that given the similarity between the VTel, TDS, and Waitsfield service territories, Comcast's analysis indicates a lesser impact than Waitsfield's projection that Comcast will achieve a 17.4 percent penetration rate in the first year.³⁰ Given that it took Comcast two years to achieve its current penetration rates in VTel and TDS service territories, Comcast projects that its penetration rate in Waitsfield's territory after one year is more likely to be half the rate projected by Waitsfield.³¹

Comcast argues that from an economic perspective, LNP is important for consumers and competition because it lowers transaction costs associated with switching service providers. "Number portability is essential to meaningful facilities-based competition in the provision of local exchange service," the FCC has said, "because survey data show that customers are reluctant to switch carriers if they must change telephone numbers."³² Moreover, Comcast points to the testimony of its economic expert witness, Dr. Michael Pelcovits, who testified that "the absence of LNP is an entry barrier because, without it, consumers are more reluctant to

27. Comcast Brief at 2.

28. *Id.*

29. Comcast Brief at 11.

30. *Id.*

31. *Id.*

32. Comcast Brief at 7.

change carriers."³³ In addition, Comcast asserts that competition will actually make Waitsfield a better company, and therefore benefit consumers.³⁴ Indeed, Comcast argues that if it is to remain competitive, it will have to continue improving its service offerings, and Waitsfield will have to respond in kind, thus supporting the positive dynamics of market competition.³⁵

Comcast also takes issue with Waitsfield's interpretation of the Eighth Circuit's ruling in *Iowa Utilities*. Comcast asserts that the Court says only that the FCC violated the law by, in effect, instructing state commissions to ignore the "whole economic burden occasioned by the request" for access to facilities and services necessary for full competitive entry.³⁶ However, Comcast argues, nothing in *Iowa Utilities* stands for the proposition that the Board may consider factors unrelated to Comcast's request for LNP in evaluating Waitsfield's Petition.³⁷ The Department agrees with Comcast's interpretation and points out that no federal court has reviewed the "undue economic burden standard" in the context of a request for suspension or modification under Section 251(f)(2).³⁸

In that vein, Comcast discounts the impact of the upcoming FCC reforms on Waitsfield and argues that the Board should not consider general business and environmental factors, such as line losses and the "uncertainty" surrounding the FCC's ICC/USF reforms, that affect all telephone companies equally.³⁹ Comcast argues that doing so would be inappropriate and inconsistent with the statute. Section 251(f)(2) instructs the Board to evaluate the impact that providing LNP will have on the specific "service facilities specified in the petition."⁴⁰ Comcast asserts that this narrow focus, when coupled with the narrow reading of Section 251(f)(2) that the FCC has endorsed, means that state commissions should not look at factors outside the impact of the competitor's request – in this case, Comcast's request for LNP – in evaluating a Section

33. *Id.*

34. Comcast Brief at 3.

35. *Id.*

36. Comcast Brief at 24-25.

37. *Id.*

38. Department Brief at 10.

39. Comcast Brief at 24.

40. *Id.*

251(f)(2) petition.⁴¹

Based on the evidence in the record, I am persuaded that Waitsfield will experience an undue economic burden if Comcast is allowed to enter Waitsfield's service territory with immediate LNP. In reaching this conclusion, I find the reasoning of the Eighth Circuit Court in *Iowa Utilities* to be both relevant and instructive in getting to the meaning and intent of the legal standard. In that decision, the Court determined that Congress intended not only to promote competition, but also to protect small rural telephone companies from the undue economic impacts of competition. If this were not the case, then there would have been no basis for Congress to enact the protections granted in § 251(f). The Court stated, in part:

Congress intended to protect the small or rural ILEC's from only those 251(b) and 251(c) requirements that might be unfair or inappropriate. . . .Congress sought both to promote competition and to protect rural telephone companies as evidenced by the congressional debates. . . .Because the small and rural ILEC's, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILEC's to meet such a request, the Congress declared that their statutorily-granted exemption from doing so should continue unless the state commission found all three prerequisites for terminating the exemption, or determined that all prerequisites for suspension or modification were met in order to grant an ILEC affirmative relief. It is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission.⁴²

With this understanding, it is appropriate to consider not only the accelerated line losses and revenue losses Waitsfield projects, but to also take into account the potential revenue impacts of the upcoming FCC reforms. Those impacts are substantial and thus it is not appropriate to view Waitsfield's situation in a vacuum. On this issue, I reject Comcast's and the Department's arguments that the Board should not consider the affects of these types of externalities on the ability of Waitsfield to compete and still remain profitable, at least over the near term.

Moreover, even under the more narrow formulation cited by Comcast, it would be unreasonable to ignore the likely effects of the FCC changes to USF and ICC. These changes are likely to alter Waitsfield's cost and revenue structure going forward. And, they may require

41. *Id.*

42. *Iowa Utils. Bd. v. Fed. Communs. Comm'n*, 219 F.3d 744, 760-62 (8th Cir. 2000), *affirmed in part and vacated in part on other grounds sub nom. Verizon Communs., Inc. v. Fed. Communs. Comm'n*, 535 U.S. 467 (2002).

Waitsfield to increase rates or decrease investment. Such changes alone do not mean that competitive entry itself is unduly burdensome. Nonetheless, any evaluation of the impact of LNP must reflect Waitsfield's financial state during the time period of Comcast's competitive entry, which means recalibrating the baseline to reflect the impact of federal changes.

As reflected in the findings above, the reforms related to the FCC's Order not only freeze the revenue requirement associated with ICC for rate of return carriers (at 2011 levels), the FCC is also indicating that it may reduce the frozen amount by 10% per year (currently 5%) after five years. In addition, the CAF and RM framework, which replaces FUSF, limits capital expenditures and operational expenditures to the 90th percentile of similarly situated carriers, essentially eliminating HCLS funding, and potentially ICLS, for Waitsfield. The amounts involved are not insignificant (+\$2 million) and in fact, Waitsfield anticipates no HCLS support for 2012.⁴³

A related question worth examining in this proceeding, concerning undue economic impact, is which party is better situated financially to absorb the impacts imposed by § 251. Clearly both parties incur some economic burden depending how the Board decides this issue. Waitsfield has shown that allowing immediate LNP, in conjunction with the specter of the FCC reforms, will have an undue economic impact on the Company. Comcast, on the hand, posits that suspension of the LNP requirement may hurt the consumer, and constitutes poor public policy relative to competition; but in the end, Comcast acknowledges that it will gain some Waitsfield customers and market share anyway if it chooses to enter the market.⁴⁴ Comcast's considerable size is, and should be, an obvious factor in deciding this issue. Although Comcast can clearly absorb the costs associated with being temporarily unable to port numbers, it will still gain customers in the interim. Overall, the financial impact on Comcast will be minimal. In contrast, Waitsfield will be forced to confront and mitigate daunting financial and operational issues if LNP is allowed.

That said, I am not unsympathetic to Comcast's concerns regarding the impacts on the public policy goal concerning promotion and protection of competition within the

43. Nishi pf. at 22; tr. 1/31/12 at 16 (Meredith); Meredith pf. at 19-20.

44. Comcast Brief at 8.

telecommunications industry, and that suspending LNP may hamper competition. The FCC views LNP as a means to promote competition. The Board concurs with this opinion. As the record shows, although it is true that Comcast (and wireless carriers) already operate in Waitsfield's service area, LNP removes an obstacle to competition by giving customers, who would otherwise not switch providers because they do not want to change their telephone number, the opportunity to keep their telephone number and switch providers.⁴⁵ Moreover, the mere existence of this opportunity arguably benefits customers who do not take advantage of LNP because the existence of additional competition may induce Waitsfield to offer better service and/or prices to retain those customers.⁴⁶ It is in recognition of these facts, and the important public policy issues involved, that I am recommending a limited suspension of the LNP requirement.

Nevertheless, it must be acknowledged that under the concept of true competition, all market participants are exposed to the same externalities and risks and are forced to utilize their individual resources to deal with those risks. As mentioned above, and as indicated in the findings, Comcast is not a COLR and is not exposed to the additional costs associated with that obligation. Moreover, Comcast is not an ETC and therefore will not experience any adverse financial or economic impacts from the FCC's Order or the FCC's proposed reforms. The opposite is true for Waitsfield, which has no such option. Comcast has made clear that it wants no obligation to extend its lines to serve customers that may be uneconomic.⁴⁷

Based on the foregoing, it is appropriate to give Waitsfield's arguments greater weight under this legal standard.

C. Public Interest, Convenience, and Necessity

Waitsfield contends that its Petition is consistent with the public interest, convenience, and necessity, under 47 U.S.C. § 251(f)(2)(B). While there is disagreement about whether Waitsfield's requested relief is adequate to address the significant economic pressures that it now faces, Waitsfield argues that it has narrowly tailored its Petition so as to impose the least burden

45. Comcast Brief at 2-3; tr. 1/31/12 at 154-156 (Pelcovits)

46. *Id.*

47. Tr. 1/31/12 at 146-147 (Munoz).

on the competitive environment in its service territory.⁴⁸ In addition, Waitsfield asserts that suspension or modification of Waitsfield's LNP duty would not prevent Comcast from entering into a comprehensive interconnection agreement with Waitsfield, from obtaining locally homed telephone numbers in Waitsfield's exchanges from the North American Numbering Plan Administrator, from actively selling CDV's VoIP service to customers passed by Comcast's network in Waitsfield – in short, from competing effectively for Waitsfield's voice customers in all respects but one, which is the ability to have those customers port their existing Waitsfield telephone numbers to Comcast.⁴⁹

Consequently, Waitsfield believes that a temporary suspension of its LNP duty will cause the least disruption to competition while providing Waitsfield with an opportunity to address the severe economic challenges it now faces. Waitsfield asserts that in light of the economic impacts that Comcast's competitive entry poses, the narrow relief that Waitsfield seeks is consistent with the public interest, convenience, and necessity.⁵⁰

Comcast counters that Waitsfield claims erroneously that its Petition satisfies the "public interest" requirement of § 251(f)(2)(B) because competition from Comcast would endanger Waitsfield's ability to fulfill its COLR obligations. In particular, Waitsfield claims that Comcast will effectively cream-skim the "high value" customers who will purchase Comcast's higher-priced bundled service offerings, leaving Waitsfield with lower-value phone-only customers in higher-cost-to-serve territories where Comcast does not offer service. It is unfairly disadvantaged, Waitsfield claims, because Comcast chooses to serve lower cost-to-serve customers in higher-density communities to whom it can offer higher margin services.⁵¹

Comcast argues that there are several problems with this theory, namely Waitsfield's claim that Comcast will win an unusually large percentage of its customers, consisting of mostly higher density customers. Based on the evidence, Comcast asserts there is no reason to believe that will happen. Comcast argues that to satisfy its burden of proof, Waitsfield would have to show that the profits lost from the higher density customers will be so great as to endanger

48. Waitsfield Brief at 24.

49. *Id.*

50. *Id.*

51. Comcast Brief at 26.

Waitsfield's ability to serve other, higher-cost-to-serve customers. But even then, Waitsfield would need to somehow tie these claims to the actual issue in this case, which is whether revenue losses due to providing LNP, as opposed to not providing LNP, are so great that Waitsfield's business future is significantly threatened. Comcast argues that no such showing has been made by Waitsfield.⁵²

Comcast asserts that in addressing the real issue before it, the Board will need to consider the degree to which Vermonters would be harmed by not being able to retain their phone numbers when switching from Waitsfield to Comcast.⁵³ As Comcast has noted, some will be discouraged from switching, while others will switch anyway. There is, however, simply no way of knowing for certain the precise number of customers that will take Comcast's service absent LNP. As a result, Comcast argues that granting Waitsfield's Petition would mean that the Board would be conducting a public policy experiment to determine just how badly competition will be hurt — and just how many Vermont consumers will be prevented from getting telephone service from the carrier they prefer — if LNP is not available.⁵⁴ Comcast maintains that the public interest is not served by conducting this experiment, which would use Vermont consumers as the test case. Instead, the public interest is served by giving all Vermonters — including those in Waitsfield's territory — the full benefits of competition for local telephone service, and creating an environment in which both Waitsfield and Comcast have to work hard — have to compete — to win consumers' business.⁵⁵

The Department asserts that Waitsfield's Petition essentially asks the Board to weigh the competing interests of customers in Waitsfield's service area who would be given the competitive choice to switch to Comcast voice service and port their existing telephone numbers, and the customers in Waitsfield's high-cost areas who rely upon Waitsfield as a COLR. While the outcome of this proceeding will inevitably generate some disadvantage to one set of customers, it is the Department's belief that the public interest necessitates a denial of

52. Comcast Brief at 27.

53. *Id.* at 28.

54. *Id.*

55. *Id.*

Waitsfield's Petition.⁵⁶

Although the Department recognizes that competition is fierce and there is a significant risk to COLR customers, the Department argues that in this case § 251 does not provide the appropriate means for addressing the problem. The Department believes that it is misguided to deny Vermonters number portability, which is essentially a back door barrier to competition, in order to "fix" a problem that at the bottom will require broad policy changes. As the consumer advocate, the Department believes the balance that must be struck between competition and COLR responsibilities cannot be achieved by suspension of LNP in this instance, even if it is for a "limited" period of time.⁵⁷

As a first step in addressing the dilemma faced by Waitsfield and other COLRs, the Department points out that it is currently supporting legislation that would commission a study to determine what, if any, state high-cost support is needed for these providers. The Department supports competition but it understands the fundamental inequity when competitors serve only the more profitable urban customers and leave other providers with the obligation of providing COLR service. In sum, the Department believes that this issue needs to be addressed in a larger context than the one presented in this case. Restricting competition in the manner requested by Waitsfield does not provide a solution that serves the overall public interest.⁵⁸

I disagree with Comcast's and the Department's arguments that even a limited suspension of Waitsfield's LNP duty will pose an unacceptable burden on consumers, or that it constitutes an attempt by the Board to conduct a public policy experiment or an attempt to fix the compensation and competitive dilemmas currently facing Waitsfield and other COLRs. As discussed above, the Eighth Circuit Court's interpretation of Congressional intent indicates that Congress saw value in preserving RLEC's as a matter of public policy and in providing them with certain protections because of their COLR obligations which other competitors, in particular cable

56. Department Brief at 29.

57. *Id.*

58. Department Brief at 30.

providers, are not required to perform.⁵⁹ Indeed, even the Department recognizes the "inequity" caused by the market entry of non-COLR competitors and the risk this poses to COLR customers.⁶⁰ In looking at the totality of the economic burden presented in this case, Waitsfield has shown that the probability of raising rates over the near-term, and cutting back on network improvements that customers would find desirable, is high, thus negatively impacting those rural customers who do not have access to Comcast's services as an alternative. In addition, Comcast's substantial financial, marketing, and operational strength, as compared with Waitsfield's, makes Comcast's entry into Waitsfield's service area a formidable prospect even without LNP. In fact, even Comcast appears to downplay the real advantages behind LNP since Comcast claims that we should discount the likely harm of LNP to Waitsfield because Comcast will win market share in Waitsfield's territory regardless of the outcome of this proceeding.⁶¹

Accordingly, I find that it is not in the public interest, nor is it consistent with the public's convenience or necessity, in the near term, to provide Comcast with the additional competitive advantage of LNP, given the potential negative impacts on rural ratepayers and Waitsfield's ability to continue to carry out needed improvements to its network and infrastructure.

Moreover, although Waitsfield, and other RLEC's, have enjoyed the benefits of FUSF and ICC in prior years, they are clearly at a pivotal moment in time for their industry in light of the recent FCC Order. This Proposal for Decision does not attempt to "fix" that problem for Waitsfield, nor to "experiment" at the margins with public policy; but rather is intended to provide Waitsfield with a brief window of opportunity within which to mitigate, as best it can, the negative impacts provided by a "perfect storm" of both competitive entry and regulatory reform.

D. Suspension Period

Waitsfield contends that a temporary suspension or modification of its LNP duty under Section 251(b)(2) of the Act is necessary to provide Waitsfield with an opportunity to hold off

59. *Iowa Utils. Bd. v. Fed. Communs. Comm'n*, 219 F.3d 744, 760-62 (8th Cir. 2000), *affirmed in part and vacated in part on other grounds sub nom. Verizon Communs., Inc. v. Fed. Communs. Comm'n*, 535 U.S. 467 (2002).

60. *Id.*

61. Comcast Brief at 13-15.

the full economic impact of Comcast's competitive entry into Waitsfield's voice market, while allowing sufficient time for the economic impacts of the FCC's Order and the State's responses to the Order to become clearer. Waitsfield argues that it has demonstrated the need for such a "pause" to avoid imposing a requirement that is unduly economically burdensome, as required by Section 251(f)(A)(ii) of the Act.⁶²

Both Comcast and the Department construe Waitsfield's request as a request for indefinite suspension of the LNP requirement which they oppose.⁶³

Although Waitsfield has not specified a clearly defined suspension period, it does indicate a preference in its filings for a "phased-in" approach similar to what was implemented by the Alaska Regulatory Commission in *In re Petition for Suspension and Modification of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications Act of 1996 filed by Matanuska Telephone Association Inc.*, Docket No. U-05-46, 2005 Alas. In that case, the Alaska Commission ordered an initial three-year suspension period, with the possibility of two additional one-year periods based on a continued showing of undue economic burden.⁶⁴ Given the FCC's stated policy goals regarding increased competition in telecom, and greater access to high speed internet, policy goals which have been discussed at great length in the present proceeding, I conclude that Waitsfield has not shown that a suspension period of three to five years is reasonable at the present time. Indeed, Comcast's representation of known precedents concerning cases involving suspension or modification of § 251(f)(2) requirements nationwide, Attachment A, reveals that although some LNP suspensions extend up to two years, the vast majority of cases provided for limited suspension of LNP between one year and fifteen months.⁶⁵

Waitsfield argues that it is only seeking, in part, a period of time within which to assess and then mitigate the effects of the FCC's final determination regarding FUSF and ICC. However, predicting how and when the FCC will ultimately decide this important issue is not an appropriate exercise for the purposes of this Order nor is it the appropriate role of the Board.

62. Waitsfield Brief at 21

63. Comcast Brief at 9; Department Brief at 11.

64. Waitsfield Brief at 24; Waitsfield Reply Brief at 6.

65. See Comcast Attachment A.

That said, based on the recent FCC Order, it is fairly certain that the FCC will replace the current funding regime with an alternative that may be less generous to the RLECs than in the past. The replacement of the current methodology appears inevitable and Waitsfield clearly indicates as much in its filings.

Therefore, without attempting to speculate when the FCC will finalize and implement a new regime of compensation, and bearing in mind the FCC's continued emphasis on promoting competition, and given that Waitsfield has provided a showing that it will suffer adverse economic harm, at least over the near term, from the combination of competition provided by a much larger competitor and reduced funding under USF, I conclude that Waitsfield has met the requirements for suspension under § 251(f)(2) and that an 18-month suspension period is reasonable. This should allow sufficient time for Waitsfield to conduct strategic planning concerning its competitive position and organize a lobbying effort at the state level, in conjunction with other RLEC, for a more conducive USF reimbursement policy, with or without any additional enhancements that may or may not be forthcoming from the FCC.

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 12th day of April, 2012.

s/Jay E. Dudley

Jay E. Dudley
Hearing Officer

VII. BOARD DISCUSSION AND CONCLUSION

On April 17, 2012, the parties to this docket filed comments on the Hearing Officer's Proposal for Decision. Comcast's filing included a request for oral argument and a separate Motion to Reopen the Record. Waitsfield subsequently filed its Opposition to Comcast's Motion to Reopen the Record on April 20, 2012. In general, the comments submitted by Comcast and the Department were not supportive of the PFD and request that the Board reject the Hearing Officer's recommendations and conclusions. Conversely, Waitsfield supports the PFD and, with the exception of some proposed corrections and modifications, asks that the Board adopt the Hearing Officer's findings and decision. On April 20, 2012, we convened an oral argument pursuant to Comcast's request.

After consideration of the parties' written and oral arguments, and upon review of the evidentiary record in this proceeding we accept and adopt the Hearing Officer's findings, recommendations, and conclusion, that Waitsfield has met the requirements for LNP suspension under § 251(f)(2) of the Act and that an 18-month suspension period is appropriate. As outlined below, we also adopt some of the modifications and corrections to the PFD proposed by Waitsfield and deny Comcast's motion to reopen the record in this proceeding.

Comcast

In Comcast's comments on the PFD, and during oral argument, Comcast presented several arguments as to why the Board should not adopt the PFD. First, Comcast argues that it submitted evidence in this case that refutes Waitsfield's projections of financial harm and loss of revenue due to Comcast's market entry with LNP, and that the Hearing Officer failed to consider or undertake an appropriate analysis of Comcast's arguments and evidence. Comcast asserts that its evidence shows that Waitsfield's financial projections grossly overstate the adverse economic impact of LNP, and that Waitsfield's projections are based on an accounting error, discovered and highlighted by Comcast, which Waitsfield and the Hearing Officer fail to acknowledge or address. In reality, Comcast argues, Waitsfield is a profitable company and will remain profitable for the foreseeable future, regardless of Comcast's market entry or the FCC's proposed changes to FUSF and ICC. Comcast requests that the Board give Comcast's evidence due consideration and an appropriate review.

Second, Comcast argues that the PFD leads to an anti-competitive result, and constitutes bad public policy, by denying customers who wish to switch providers the right to port their telephone numbers to Comcast for a period of eighteen months. Comcast asserts that denying customers the benefits of full competition based simply on the potential for financial harm, or regulatory uncertainty, is not consistent with the concept of competition envisioned by the Board or the FCC, and that such a result discourages investment of private capital in advanced voice and broadband service. Comcast rejects Waitsfield's claims, and the related conclusion of the Hearing Officer, that the line losses resulting from Comcast's competitive entry will cause Waitsfield to increase rates and curtail upgrades to Waitsfield's network. Comcast argues that its market entry into Waitsfield's territory will merely result in Waitsfield becoming a better competitor. Comcast also asserts that because Waitsfield is the dominant provider in Waitsfield's territory, Comcast's larger size should not be a relevant factor in the Board's decision.

Third, Comcast contends that Waitsfield has not met the statutory burden for an RLEC requesting relief under § 251(f)(2), since Waitsfield has failed to show that Comcast's market entry with LNP will be so disruptive that it will be impossible for Waitsfield to continue to provide service. Comcast argues that Waitsfield has not proven, under the applicable legal standard, that suspension of LNP is "necessary to avoid a significant adverse economic impact on users of telecommunications services generally" or is "necessary to avoid imposing a requirement that is unduly economically burdensome," and that the suspension is "consistent with the public interest, convenience, and necessity."⁶⁶

Lastly, Comcast asserts that the PFD places too much emphasis on the projected effects of the FCC's Order concerning FUSF and ICC reforms, and that it is based on the false premise that Waitsfield requires an additional eighteen months to plan its response to Comcast's competitive entry and to the FCC's revised funding methodologies. Comcast argues that these reforms will effect all RLECS, not just Waitsfield, and that many of the proposed changes have been in the offing, and known to the industry, for more than a decade. Comcast also contends that its analysis shows that the actual losses to Waitsfield resulting from implementation of the reforms are not significant and constitute only a small percentage of Waitsfield's revenues.

66. Comcast's Comments dated 4/17/12 at 4.

Comcast maintains that these impacts remain minimal even when considered in conjunction with the added impact of Comcast's competitive entry. Consequently, Comcast argues that the effects of the FCC's Order are irrelevant to this proceeding and do not provide a basis for suspending LNP for the eighteen-month period recommended by the Hearing Officer.

In relation to Comcast's critical assessment of the PFD's emphasis on the effects of the FCC reforms, Comcast also submitted with its comments a motion to reopen the record in this docket. The motion further requests the Board to take judicial notice of Vermont Senate Bill 180 ("S. 180") which would create a high-cost support program under the Vermont Universal Service Fund to provide ILEC's with a funding source to defray costs associated with maintaining networks and serving customers in high-cost areas. Comcast argues that this new potential source of funding is relevant to this proceeding because it obviates the concerns raised in the PFD involving the FCC's reduction of high-cost universal support funding and thus may lead the Board to reach a different conclusion and decision in this matter. S. 180 was passed by the Senate on April 11, 2012, and is now before the Vermont House for consideration.

The Department

The Department is largely in agreement with Comcast's comments and responses to the PFD. The Department disagrees with the Hearing Officer that Waitsfield has met its burden of satisfying the statutory criteria under § 251(f)(2) because Waitsfield did not provide sufficient evidence that the requested relief was necessary to avoid economic harm, either in the form of a significant adverse impact on users of telecommunications services or as an undue economic burden on the Company, nor did Waitsfield establish that the relief would be consistent with the public interest, convenience, and necessity. In addition, the Department argues that it is unconvinced that the suspension of LNP for the brief eighteen month period recommended in the PFD will actually result in any significant avoidance of the overall losses anticipated as a result of the FCC's reforms, or that it sufficiently addresses the overall policy issues highlighted in this proceeding. The Department asserts these policy issues, and possible remedies, can and should be addressed by a much broader policy-making initiative.

In relation to the proposed relief represented by S. 180, the Department does not support Comcast's motion to reopen the record in this proceeding since S. 180 is pending legislation and

the Board should not give weight to legislation that is not in its final form. Further, the Department disagrees with Comcast's characterization that the bill will provide lasting relief to Waitsfield and other carriers since, in its present form, S. 180 only provides a small, one-time payment to carriers for high-cost support.

Waitsfield

Waitsfield supports the findings of fact and recommendations made by the Hearing Officer in the PFD concerning each of the litigated issues, and the Hearing Officer's conclusion that the financial impact of Comcast's competitive entry into Waitsfield's territory risks significant financial losses to Waitsfield. Waitsfield also supports the Hearing Officer's recognition of Waitsfield's role as a COLR and the obligations that such a designation entails, and the fact that Comcast is not a COLR and does not bear the additional costs of those obligations. Waitsfield rejects the view taken by Comcast and the Department that only the interconnection request itself, and its potential impact, can be considered in this proceeding, and that the overall economic circumstances in which Waitsfield finds itself are immaterial and irrelevant. Waitsfield argues that the impacts of interconnection can not be viewed in isolation and that that was not the intent of Congress in enacting § 251(f)(2). Waitsfield contends that the statute envisions a case-by-case analysis whereby a state commission takes into consideration the entire economic situation in which a company finds itself to properly analyze whether the economic impact of interconnection creates an undue economic burden. In addition, Waitsfield reiterates that Comcast and Waitsfield are not similarly situated companies in that Waitsfield has COLR and ETC obligations whereas Comcast does not. Waitsfield argues that the evidence shows that Comcast provides service only where it is economic for Comcast to do so and that Comcast has no plans to expand its service throughout Waitsfield's territory. Waitsfield maintains that it is only seeking very narrow relief in this proceeding and is not seeking to stop or eliminate competition.

With respect to S. 180, Waitsfield asserts that its own calculations of its allocated portion of the proposed one-year fund show that Waitsfield will receive only \$75,000 which constitutes an inadequate amount to meet the high-cost needs of Waitsfield as a COLR.

Discussion and Conclusion

Both Comcast and the Department have emphasized, as a primary issue in this proceeding, the overall benefits of competition in telecommunications and that those benefits sufficiently outweigh the financial concerns raised by smaller competitors such as Waitsfield. Indeed, the Board has consistently established policies designed to open the Vermont telecommunications market to competition, with the expectation that competitive pressures will lead to a broader range of service choices and lower prices for consumers. A significant component of this effort has been the requirement that ILECs provide interconnection to competitors, including access to unbundled network elements.⁶⁷ As highlighted by the parties, and the Hearing Officer, in the present proceeding this requirement is also embodied in federal law. As a result of this policy focus, all Vermont carriers in recent years have been confronted with competition from a variety of sources including cable and wireless carriers. To compete, these carriers, mostly RLECs, have had to invest significant resources to expand broadband availability and bandwidth, roll out new products and bundles, and offer high-quality service. There is no question that this build-out has benefitted the state and Vermont consumers, and in this area we agree with Comcast and the Department that competition has been beneficial. That said, we also recognize that a great deal of investment has not been driven primarily by competition, which is limited in rural service territories. Instead, the FCC has adopted USF mechanisms that created an incentive to invest in facilities, including broadband. Federal USF support covered a large portion of the investment, allowing service expansion that might not have been cost-effective otherwise.

Nevertheless, the Board is confronted with the invocation of a federal statute, § 251(f)(2), which appears to recognize that for small regulated carriers, typically RLECs, not all competition in telecommunications is not necessarily beneficial to all customers, and that under certain circumstances, temporary exemptions from the statutory interconnection requirements may be appropriate. In the PFD above, the Hearing Officer correctly discerns this intent by Congress, and its applicability to the present case, when he relies on the reasoning of the Eighth Circuit Court in *Iowa Utils. Bd. v. F.C.C.* and concludes "that Congress saw value in preserving RLEC's

67. See Docket No. 7599, Order of 6/28/10 at 47.

as a matter of public policy and in providing them with certain protections because of their COLR obligations which other competitors, in particular cable providers, are not required to perform." Accordingly, the Hearing Officer decided in favor of giving Waitsfield due consideration in applying the legal standards under § 251(f)(2) based on the policy prerogative set out by Congress on this issue, and we concur with the Hearing Officer's judgment in this area. Thus we find unpersuasive the arguments of both Comcast and the Department that the PFD constitutes poor public policy, since clearly both the advantages and disadvantages associated with competition were contemplated by Congress in enacting § 251. As the Hearing Officer rightly concludes, Congress never would have granted the RLECS these protections if it did not see value in preserving the small rural telcos as a matter of public policy. Moreover, we stress that the relief we grant today is for a limited duration.

One of Comcast's primary objections to the PFD, and raised again during oral argument, is that the Hearing Officer did not consider and did not analyze the evidence provided by Comcast concerning Waitsfield's financial projections. First, we would like to make clear to Comcast that simply because Comcast did not get the decision it was looking for, or the type of analysis it desired, does not mean that the evidence was not analyzed or weighed by the Hearing Officer. The Hearing Officer, as the trier of fact in this proceeding, decided the level of weight and credibility to give to each party's testimony and evidence based on his review, and we concur with the Hearing Officer's reasoning. Second, as the Hearing Officer correctly points out, much of the evidence provided in this case was submitted under seal and was related to, or based on, financial projections of the future which involve varying degrees of interpretation and imprecision. Speculation of what will or will not occur based upon the substitution of certain numeric variables contributes to the uncertainty and difficulty associated with weighing the differing outcomes presented by the parties. Indeed, during oral argument, even Comcast alluded to this difficulty when it attempted to pinpoint the exact losses to Waitsfield resulting from the FCC's USF reforms.⁶⁸

With the above considerations in mind, we have reviewed the financial projections submitted by Waitsfield and the challenges to those forecasts raised by Comcast, and concur with

68. Tr. 4/20/12 at 22.

the Hearing Officer's conclusion that on balance greater weight should be given to Waitsfield's projections in determining whether allowing LNP poses a significant economic burden to Waitsfield. However, in response to Comcast's concerns regarding a proper analysis of the evidence, we include the confidential information in our review of the financial projections below.

First, in its financial modeling (specifically Exhibits RN-3rev and RN-5), Waitsfield is projecting net losses of nearly ***** BEGIN CONFIDENTIAL INFORMATION [REDACTED] END CONFIDENTIAL INFORMATION ***** during the 4-year model period from the combination of recent trends in usage and line losses, in High Cost Loop support, in projected interstate private line recovery, and in the impact of the known and anticipated reforms in the FCC's Order.⁶⁹ According to Waitsfield, this establishes the baseline against which Comcast's LNP entry into Waitsfield's territory should be measured. Even without Comcast's entry into the voice market, Waitsfield has calculated that existing financial realities will require Waitsfield to increase its basic residential service rate from the current rate of \$23.23 to ***** BEGIN CONFIDENTIAL INFORMATION [REDACTED] END CONFIDENTIAL INFORMATION ***** in Year 1, up to ***** BEGIN CONFIDENTIAL INFORMATION [REDACTED] END CONFIDENTIAL INFORMATION ***** in Year 4.⁷⁰ Under present circumstances, again without considering the potential impact of Comcast's entry into Waitsfield's voice market, Waitsfield projects that its regulated revenues fail to cover the costs of providing regulated services to its customers. In each of the baseline model years, Waitsfield projects an annual intrastate regulated revenue shortfall of ***** BEGIN CONFIDENTIAL INFORMATION [REDACTED] END CONFIDENTIAL INFORMATION ***** to ***** BEGIN CONFIDENTIAL INFORMATION [REDACTED] END CONFIDENTIAL INFORMATION *****.⁷¹

When including Comcast's market entry in the modeling, Waitsfield estimates that Comcast will capture 17.4% of its target market within the first year, and that, by Year 4, Comcast will have captured 23% of its total homes passed in Waitsfield's service territory.

69. Waitsfield Brief at 17-18.

70. *Id.*

71. *Id.*

Competition from Comcast is estimated to reduce Waitsfield's net income by *** **BEGIN CONFIDENTIAL INFORMATION** [[█████]] **END CONFIDENTIAL INFORMATION** *** , for a loss of just over *** **BEGIN CONFIDENTIAL INFORMATION** [[█████]] **END CONFIDENTIAL INFORMATION** *** over the 4-year study period. To offset these revenue losses, Waitsfield would need to increase its monthly basic residential service rate to *** **BEGIN CONFIDENTIAL INFORMATION** [[█████]] **END CONFIDENTIAL INFORMATION** *** in Year 1, up to *** **BEGIN CONFIDENTIAL INFORMATION** [[█████]] **END CONFIDENTIAL INFORMATION** *** in Year 4.⁷²

Comcast maintains that Waitsfield's loss projections are grossly inflated and that its accounting is suspect. Comcast rejects Waitsfield's estimate of line losses of 17.4% in Year 1 and 23% in Year 4 if customers are afforded LNP. Comcast argues that these estimates are unrealistically high given Comcast's national penetration rate of *** **BEGIN CONFIDENTIAL INFORMATION** [[█████]] **END CONFIDENTIAL INFORMATION** *** which includes territories where Comcast has been offering service for nearly seven years.⁷³ Comcast claims that it has achieved *** **BEGIN CONFIDENTIAL INFORMATION** [[█████]] **END CONFIDENTIAL INFORMATION** *** penetration rates in the VTel and TDS service territories respectively, and those penetration rates were achieved only after more than two years of providing service.⁷⁴ Given Comcast's experience in these market areas, Comcast estimates that its penetration rate in Waitsfield's territory after one year should be *** **BEGIN CONFIDENTIAL INFORMATION** [[█████]] **END CONFIDENTIAL INFORMATION** *** and is expected to rise to *** **BEGIN CONFIDENTIAL INFORMATION** [[█████]] **END CONFIDENTIAL INFORMATION** *** at the end of the fourth year, below Waitsfield's projections.⁷⁵

With respect to Waitsfield's projected economic health, Comcast argues that Waitsfield is a profitable company and will remain profitable despite its pending financial challenges, especially when reviewed in conjunction with its holding company, Selectronics. Comcast

72. *Id.* 20-21.

73. Comcast Brief at 11.

74. *Id.*

75. *Id.* at 12.

points out that according the Waitsfield's 2010 Annual Report to the Board, Waitsfield reported net operating income of \$2.6 million at the end of 2010. Selectronics reported a profit of ***

BEGIN CONFIDENTIAL INFORMATION [[██████]] **END CONFIDENTIAL INFORMATION** *** in 2010.⁷⁶

Comcast also maintains that Waitsfield's projections are unreliable and incorrect due to a significant accounting error on the part of Waitsfield. Comcast argues that the error occurs in the way Waitsfield accounts for *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** *** in "Non-regulated/other expense/income" on line 50 of Exhibit RN-3rev.⁷⁷ Specifically, Comcast asserts that the "Part 64 Non-reg Allocation" component of line 50, in the amount of *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** ***, and the "Expense Reallocation" component in the amount of *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** *** were not properly accounted for under the FCC's cost allocation rules.⁷⁸ Those rules "govern[] an incumbent local exchange carrier's allocation of joint and common costs between activities regulated under Title II and nonregulated activities," and require that the costs in the regulated and unregulated "pool" of expenses and revenues be "allocated between regulated and nonregulated activities using a usage-based allocation factor ... based upon direct analysis of the origin of the costs [and revenues] themselves."⁷⁹ Comcast argues that Waitsfield's treatment of the allocations is in error because instead of reducing expenses on Waitsfield's regulated books (i.e. non-regulated services provided in support of the regulated company), Waitsfield treats the allocations as additions to total operating expenses, thereby reducing Waitsfield's net income.⁸⁰ Thus, instead of increasing net income by *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** *** the Part 64 adjustment decreases it by that amount.⁸¹

76. *Id.* at 16.

77. *Id.* at 17-18.

78. *Id.* at 19-21.

79. *Id.*

80. *Id.* at 20.

81. *Id.* at 21.

Likewise, Comcast asserts that the Expense Reallocation component in the amount of ***
BEGIN CONFIDENTIAL INFORMATION [[██████]] **END CONFIDENTIAL**
INFORMATION *** has the same impact in that it is not an expense reallocated from
 Waitsfield, the regulated telephone company, but rather an expense imposed on Waitsfield.⁸²
 Comcast argues that Waitsfield, the "regulated telephone company," is supporting the
 "deregulated operations" to the tune of *** **BEGIN CONFIDENTIAL INFORMATION** [[
 ██████]] **END CONFIDENTIAL INFORMATION** *** in 2012, an amount that rises to ***
BEGIN CONFIDENTIAL INFORMATION [[██████]] **END CONFIDENTIAL**
INFORMATION *** in 2015.⁸³ Comcast claims that the net effect of this "reallocation" on
 Waitsfield's bottom line is *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END**
CONFIDENTIAL INFORMATION *** of reduced net revenue in 2012 and *** **BEGIN**
CONFIDENTIAL INFORMATION [[██████]] **END CONFIDENTIAL INFORMATION**
 *** in 2015.⁸⁴ Taken together, Comcast argues that the two adjustments (Part 64 and Expense
 Reallocation) improperly reduce Waitsfield's reported net income by *** **BEGIN**
CONFIDENTIAL INFORMATION [[██████]] **END CONFIDENTIAL INFORMATION**
 *** in 2012 and *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END**
CONFIDENTIAL INFORMATION *** in 2015.⁸⁵

Upon review of the evidence, the PFD, and the comments of the parties, we find that our
 decision in this proceeding essentially hinges on two basic questions: i) Will Waitsfield
 experience significant financial harm from providing Comcast with LNP given Waitsfield's
 current and pending economic circumstances, and ii) will Waitsfield's ratepayers be adversely
 impacted by granting Comcast LNP?

In answering the first question, we once again turn to Waitsfield's projections, specifically
 Exhibits RN-3rev, RN-5, and RN-6. The issue in constructing any financial model is
 establishing an appropriate baseline assumption related to a company's historical performance,
 and then plugging in the potential impacts of future events. Pursuant to this methodology,

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

Waitsfield considered its performance in fiscal year 2010 as a starting point. In looking at RN-3rev in Year 1 we find that total revenues of *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** *** less total operating expenses of *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** *** equal net operating income of *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** ***. These amounts are not inconsistent with Waitsfield's historical performance as reflected in Waitsfield's Annual Report for 2010 filed with the Department and the Board, nor are they inconsistent with Waitsfield's most recent Annual Report for 2011.⁸⁶ Indeed the trend lines for these amounts as represented in Years 1 through 4 of RN-3rev remain fairly consistent and appear to be conservative estimates. Although we recognize that baselines can be moved and tweaked to fit the desired results, we see no indication of that here. In addition, as the Hearing Officer points out, Comcast did not provide an alternate set of projections for the Board to consider. Consequently, we find no clear basis exists to reject Waitsfield's baseline assumptions, and agree with the Hearing Officer that additional weight should be given to Waitsfields projections.

Turning to Exhibits RN-5 and RN-6 we see the forecasted results of the baseline with and without Comcast's competitive entry. Without getting into the minutia of the projections, RN-5 reflects a deficiency (Line 17) in net revenue in Year 1 of *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** ***, culminating in a deficiency of *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** *** in Year 4, reflecting incremental increases to expenses, and decreases to revenue, that may result from the FCC's FUSF and ICC reforms. In examining RN-6, which essentially overlays the projected impact of Comcast's entry with LNP, we calculate that the revenue deficiency is exacerbated in Year 1 by *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** ***, escalating to *** **BEGIN CONFIDENTIAL INFORMATION** [[██████]] **END CONFIDENTIAL INFORMATION** *** in Year 4. Given our finding that Waitsfield's baseline assumptions appear to be credible, we agree with the Hearing Officer that these losses

86. Waitsfield's Annual Report for 2011 was filed with the Board on April 16, 2012, pursuant to 30 V.S.A. § 22.

are not insignificant and threaten a substantial economic impact for Waitsfield.

Comcast has argued that these results are over-inflated and unreliable due largely to the effects of an alleged accounting error in Waitsfield's treatment of the "non-regulated expense" or "Part 64 allocation" component of other operating expenses, as well as the "Expense Reallocation" component. As noted above, the approximate amounts of the purported deviations appear to be *** BEGIN CONFIDENTIAL INFORMATION [[██████]] END

CONFIDENTIAL INFORMATION *** and *** BEGIN CONFIDENTIAL INFORMATION [[██████]] END CONFIDENTIAL INFORMATION *** respectively.⁸⁷

Waitsfield asserts that the non-regulated expenses were properly allocated away from the regulated company pursuant to the Part 64 allocation rules in that the *** BEGIN CONFIDENTIAL INFORMATION [[██████]] END CONFIDENTIAL INFORMATION *** figure is included "below the line" (Line 50) and is not included as a part of common operating expenses (Line 49).⁸⁸ As such, Waitsfield points out that the amount was not included in the revenue-impact models represented by RN-5 and RN-6.⁸⁹ With respect to the Expense

Reallocation of *** BEGIN CONFIDENTIAL INFORMATION [[██████]] END CONFIDENTIAL INFORMATION ***, Waitsfield maintains that its treatment is legitimate since it represents a portion of the amount of the FCC's mandated reduction in regulated expenses as a result of the FCC's cap on operating expenses.⁹⁰ Accordingly, the amount is reflected as a negative number on Line 48 of RN-3rev so as to remove it from regulated expenses. However, in recognition of the fact that it was unlikely for Waitsfield to achieve that level of expense reduction, Waitsfield asserts that it correctly included a large portion of this expense with non-regulated expenses on Line 50.⁹¹

In reviewing the evidence on this issue, we are persuaded that Waitsfield performed the above-referenced accounting entries properly. Irrespective of the Hearing Officer's conclusion

87. In its Brief, Comcast misquotes the amount of the Expense Reallocation as *** BEGIN CONFIDENTIAL INFORMATION [[██████]] END CONFIDENTIAL INFORMATION ***. The actual amount reflected in Waitsfield's Exhibit RN-3rev is *** BEGIN CONFIDENTIAL INFORMATION [[██████]] END CONFIDENTIAL INFORMATION ***.

88. Waitsfield Reply Brief at 12-13.

89. *Id.* at 14.

90. *Id.*

91. *Id.* at 14-15.

that Waitsfield is more familiar with its financial operations than Comcast, Comcast's objection to these entries appears to be based on its inability to understand the accounting treatment as part of the modeling process.⁹² As such, Comcast appears to make the assumption that the accounting is wrong but provides no firm basis for the alleged error. Nevertheless, even if we were to assume that Comcast is correct and that the net expenses and net revenues in RN-5 and RN-6 need to be adjusted to reflect a lesser impact, that overall adjustment would not be substantial and Waitsfield would still appear to be in need of relief. Indeed, Comcast's expert witness, Dr. Michael Pelcovits, acknowledged this more minimal impact in his live testimony before the Board.⁹³ Thus, after working through the analysis, we understand why the Hearing Officer did not give greater weight to Comcast's objections to Waitsfield's modeling, and agree with his overall conclusion that Waitsfield will experience significant economic harm over the near term.

In weighing the evidence in this proceeding, in particular the projected financial impacts outlined above, we are also concerned that many of Waitsfield's ratepayers may be adversely affected by Comcast's immediate entry into Waitsfield's territory. Comcast argues that consumers have nothing to lose and everything to gain from Comcast's competitive product offerings. However, as the evidence shows, a substantial percentage of Waitsfield's customers will not be eligible to reap those benefits since many of them reside beyond Comcast's subscription area. Given that Waitsfield is a regulated utility and is allowed to recoup its cost of service, the rate impacts associated with the additional revenue losses, as reflected in Exhibit RN-6, could be substantial. As a result, although customers in Comcast's limited service area will presumably change providers, customers in Waitsfield's outlying areas will be left without a viable alternative and will likely bear the costs of Waitsfield's struggle to meet operating expenses and still remain in business. Noteworthy to us is the fact that nowhere in Comcast's testimony does Comcast address this potential burden on outlying ratepayers. Indeed, if Comcast were to provide ubiquitous service throughout Waitsfield's territory, this issue would not be a concern for us and we would likely deny Waitsfield's request for relief and grant LNP to Comcast. Unfortunately that is not the case here since Comcast is not a COLR and has neither

92. Tr. 1/30/12 at 121-123 (Nishi).

93. Tr. 1/31/12 at 180-182 (Pelcovits).

the obligation nor the intention to provide service outside of its existing footprint. Waitsfield, on the other hand, is a COLR and has no choice but to provide service to all customers who request it, even if that customer is the last remaining customer at the end of the line. On this issue we reiterate our conclusion outlined above that this proceeding does not involve competition between two equals. As the record clearly shows, Waitsfield and Comcast are neither equal according to their size nor are they equal relative to their regulatory treatment.

Both Comcast and the Department argued that the Hearing Officer failed to comply with federal law because the determination of the economic impact was based upon changes in federal law, not on the effect of Comcast entry (which they assert is the relevant consideration under Section 251(f)(2)). We agree that, under that section, the Board's decision relative to suspending LNP must be related to the adverse economic impact that LNP would cause. However, we do not find Comcast's and the Department's arguments persuasive as they appear to be based upon a misunderstanding of the PFD. The Hearing Officer's recommendations rest upon his conclusion that competitive entry by Comcast using LNP is likely to create an adverse economic effect upon Waitsfield. As we discuss above, in reaching this conclusion, he considered likely penetration rates for Comcast and their impact on Waitsfield's finances. Essential to this analysis is an assessment of Waitsfield's finances in the absence of competitive entry by Comcast using LNP; this is the significance of the Hearing Officer's examination of the effects of federal USF/ICC changes. It would be unrealistic to base our evaluation of the effect of competition on Waitsfield's current financial status when we know that it is going to change and can make reasonable assumptions as to the nature of those changes, whether positive or negative. The PFD, and our Order, are thus not based upon the impact of federal USF/ICC changes. Rather, they incorporate the effects of those changes into the baseline against which the effect of Comcast's entry is measured.

We understand, as pointed out by the parties, that this proceeding involves a case of first impression since no court or state commission has granted LNP suspension under the economically burdensome standard of § 251(f)(2). Nevertheless, Vermont is a small rural state with a long history of small local telcos providing telecommunications services to many Vermonters. Not all states are similarly situated. With that point in mind, we agree with

Waitsfield and the Hearing Officer that part of the intent of § 251(f)(2) was to provide for a case-by-case review of the economic impacts of competitive entry on the petitioning RLEC and its ratepayers. Moreover, we reiterate our agreement with the conclusion of the Hearing Officer in citing *Iowa* that one of the policy initiatives considered by Congress in enacting § 251(f)(2) was to ensure that RLEC's would have a reasonable chance for survival when faced with rigid competition, especially if the competitor is not a COLR with none of the attendant obligations. That said, we also realize that the type of suspension sought by Waitsfield was not intended to be permanent or absolute, but rather to provide Waitsfield with sufficient time to evaluate the financial impacts of the FCC Order, Comcast's entry with LNP, and to undertake any necessary actions at the state level to address the related policy issues concerning an alternate support mechanism.

Comcast asks that we reopen the record in this proceeding to consider the effects of S. 180, which is now under consideration in the Vermont Legislature (in the alternative, Comcast suggests that we take notice of the legislation). We decline to do so. At this time, the legislation has passed the state Senate, but has not been considered by the House. The legislation could change or not be enacted at all. Thus, we would be speculating on the final outcome of the legislation. It would be inappropriate to base our decision on such speculation. Moreover, even if we were to consider the legislation, it does not do what Comcast asserts. S. 180 does not establish a high-cost fund; instead, it requires a study of the establishment of such a fund. It also directs some funds now in the Vermont Universal Service Fund to Waitsfield and other incumbent local exchange carriers on a one-time basis. However, these amounts (estimated by Waitsfield to be \$75,000, a figure Comcast did not rebut) are quite small relative to Waitsfield's total revenue requirement and the other adjustments discussed in this Order. A one-time \$75,000 increase in state funding would not materially affect our analysis.

As a final matter, Waitsfield raises concerns about the recommendations in the PFD that the suspension last until December 1, 2013, after which Waitsfield must offer LNP. Waitsfield is concerned that this would preclude a further request by Waitfield to extend the deadline.

At this time, we see no reason to alter the PFD recommendations. We find that, based upon the evidence before us and our balancing of the effects of competitive entry against the

potential benefits, an eighteen-month suspension period is reasonable. We expect that during this period, Waitsfield will be able to adjust to changes in federal USF/ICC mechanisms, seek high-cost legislation to address the fact that Waitsfield has COLR obligations that its competitors do not, and prepare for competitive entry. We also expect that, at the end of the suspension period, Comcast and Waitsfield will have in place an interconnection agreement that allows Comcast to begin using LNP on December 1, 2013. We are prepared to arbitrate any dispute in this area. As suggested by Waitsfield, this decision does not preclude Waitsfield from making a further request for suspension, nor does it signal the success of any such request.

Therefore, based on the evidentiary record in this proceeding, we accept and adopt the Hearing Officer's findings, recommendations, and conclusions, with modifications. We also accept and adopt Waitsfield's proposed exceptions and technical corrections to the PFD (represented as numbers 1, 2, and 3) in Waitsfield's Comments to the Proposal for Decision dated April 17, 2012.⁹⁴ In addition, we conclude that the eighteen-month suspension period proposed by the Hearing Officer is appropriate and we adopt it. Said suspension shall run from the date of this Order.

94. WCVT's Comments to Proposal for Decision dated 4/17/12 at 2-4.

VIII. ORDER

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

- 1. The findings, conclusion and recommendation of the Hearing Officer are adopted, as modified herein.
- 2. Limited suspension of Waitsfield's duty to provide number portability under § 251(b)(2) of the Telecommunications Act of 1996, as amended (the "Act"), has been granted pursuant to the requirements for suspension and modification § 251(f)(2) of the Act. Said suspension of the number portability requirement shall be for a period not to exceed eighteen months from the date of the Board's final order, after which Waitsfield shall be required to implement local number portability with Comcast.
- 3. This Docket shall be closed within 60 days.

Dated at Montpelier, Vermont, this 27th day of April 2012.

s/James Volz)
) PUBLIC SERVICE
) Board
s/David C. Coen)
) Of Vermont
s/John D. Burke)

OFFICE OF THE CLERK

FILED: April 27, 2012

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.