Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Application by Verizon New Jersey	)	
Inc., Bell Atlantic Communications,	)	
Inc. (d/b/a Verizon Long Distance),	)	CC Docket No. 01-347
NYNEX Long Distance company	)	
(d/b/a Verizon Enterprise Solutions),	)	
Verizon Global Networks Inc., and	)	
Verizon Select Services Inc., for	)	
Authorization To Provide In-Region,	)	
InterLATA Services in New Jersey	)	

COMMENTS ON BEHALF OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE IN OPPOSITION TO THE APPLICATION OF VERIZON NEW JERSEY FOR AUTHORIZATION TO PROVIDE IN-REGION, INTERLATA SERVICES IN NEW JERSEY

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SUMMARY

Telecommunications competition in New Jersey is weak and diminishing, with many competitive carriers going bankrupt and still others exiting the market. As this dispiriting downward spiral plays out, Verizon's co-CEO characterizes as a "joke" the fundamental mechanisms of the Telecommunications Act of 1996, and other Verizon executives call for higher barriers to competitive entry. Despite all this, in this proceeding Verizon-NJ has requested authority under section 271 of the 1996 Act to offer in-region, inter-LATA service in New Jersey, where competition is significantly weaker than in any of the other states where such requests on Verizon's part have succeeded. The Commission should deny that request.

Verizon-NJ has failed in at least three areas to carry the burden of proof established for its request. Verizon-NJ has not established its compliance with Track A, which requires, among other things, that Verizon-NJ demonstrate that competitors are actually serving New Jersey's residential local exchange market over their own facilities. Verizon-NJ has also failed to establish that it provides non-discriminatory access to UNEs in compliance with item ii of section 271's competitive checklist. Finally, and significantly, Verizon-NJ has utterly failed to prove that granting its request would be in the public interest, and in particular has not proven either that there is local competition today or that competition will improve after a grant of 271 authority.

Verizon-NJ fails the Track A requirement on several grounds. Verizon-NJ does not prove that facilities-based residential competition exists in New Jersey, and the "evidence" that Verizon-NJ does provide does not demonstrate that more than a *de minimis* number of residential subscribers receive service from facilities-based competitors. In addition, Verizon-NJ provides no evidence that the service it claims is being provided is being offered for a fee. For these

reasons, Verizon-NJ fails to meet the requirements of Track A, and its Application should be denied.

Verizon-NJ has fallen short of its burden under item ii of the competitive checklist in two areas. First, it has not established either that its OSS provides non-discriminatory access to UNEs. Despite the importance of OSS to non-discriminatory access to UNEs, Verizon-NJ's Application provides no evidence of actual commercial testing of its OSS systems. Verizon-NJ relies instead on KPMG's OSS test results. The KPMG tests are inherently incapable of demonstrating that Verizon-NJ's OSS will function properly under real-world demands and conditions. In addition, Verizon-NJ's omission of data relevant to the KPMG performance metrics establishes that the KPMG results are flawed and unacceptable on their own terms.

Second, Verizon-NJ has failed to show that its UNE rates satisfy the checklist. In particular, Verizon-NJ has not yet implemented all the TELRIC-compliant rates that it claims satisfy its burden under checklist item ii. Moreover, the Commission can properly judge "successful implementation" only through experience of the TELRIC-compliant UNE rates by competitors and consumers; this has not yet occurred. Finally, it appears that Verizon-NJ has failed to meet the conditions set by the New Jersey Board of Public Utilities for implementing its UNE rates.

The Ratepayer Advocate urges the Commission to give particular attention to the public interest inquiry required by Section 271, and to carefully analyze whether New Jersey's markets are now competitive or could be expected to become competitive after a grant of 271 authority. The recent decision of the D.C. Circuit in the Commission's Kansas/Oklahoma 271 proceeding establishes the vital role competitive analysis and a public interest inquiry should play here. In the case of this Application, that analysis can only show that there is no competition in New

Jersey's residential local exchange market, and no evidence of the geographic distribution of the residential competition that Verizon-NJ claims to see in New Jersey.

Finally, to promote the public interest in competitive telecommunications markets in New Jersey, the Commission should refuse section 271 authority unless Verizon-NJ agrees to structural separation or functional/structural separation under a strong code of conduct. Structural separation is the only proven remedy for the anticompetitive incentives and abilities built into Verizon-NJ's operations, and it is a remedy that the New Jersey Board of Public Utilities is fully capable of administering.

TABLE OF CONTENTS

LIST OF ATTACHMENTS

Appendix:

DOCUMENT	SUBJECT MATTER	LOCATION
Attachment 1: Declaration of Blossom A. Peretz on Behalf of the New Jersey Division of the Ratepayer Advocate ("Peretz Declaration")	Qualifications of Blossom A. Peretz	¶¶ 1-5
Attachment 1: Peretz Declaration	Purpose	¶ 6
Attachment 1: Peretz Declaration	Lack of Residential Local Exchange Competition	¶¶ 7-13
Attachment 1: Peretz Declaration	Lack of Commercial Testing of Verizon-NJ's Operational Support Systems	¶¶ 14-15
Attachment 1: Peretz Declaration	Lack of Experience with New Unbundled Network Element Rates	¶ 16
Attachment 1: Peretz Declaration	Competition in the Local Exchange Market is Critical to Protecting the Public Interest	¶¶ 17-18
Attachment 1: Peretz Declaration	Structural Separation	¶¶ 19-22
Attachment 2:	Blossom A. Peretz, Op-Ed, *A Premature Filing*, THE RECORD, Jan. 8, 2002, at L13.	Page 3
Attachment 3:	Jayson Blair, *Verizon Seeks Advantage Over Smaller Competitors: Wants to Charge More to Lease Phone Lines*, THE NEW YORK TIMES, Dec. 15, 2001, at D3.	Pages 3, 4
Attachment 4:	James K. Glasman, Op-Ed, *Verizon Exploited a National Tragedy*, THE WASHINGTON TIMES (Oct. 23, 2001) at A19.	Page 4
Attachment 5:	Vijag Vaitheeswaran, Op-Ed, *Electricity Deregulation is Still Sound Policy*, THE NEW YORK TIMES, Dec. 15, 2001, at A31.	Page 4

DOCUMENT	SUBJECT MATTER	LOCATION
Attachment 6:	*DOJ Seeks to 'Untangle' Factors Impacting Local Competition*, TR DAILY, Jan. 10, 2002 at 2.	Page 5
Attachment 7:	Susan Ness, Op-Ed, *No: Entry Will Deter Local Competition*, THE RECORD, Jan. 8, 2002 at L13.	Pages 5, 14
Attachment 8: Declaration of Lee Selwyn on Behalf of the New Jersey Division of the Ratepayer Advocate ("Selwyn Declaration")	Introduction and Summary	¶¶ 1-6
Attachment 8: Selwyn Declaration	Track A	¶¶ 7-14
Attachment 8: Selwyn Declaration	Causes of lack of residential competition	¶¶ 15-21
Attachment 8: Selwyn Declaration	Harm to the long distance market from premature 271 approval	¶¶ 16-24
Attachment 8: Selwyn Declaration	Verizon-NJ miscalculation of consumer benefits from 271 approval	¶¶ 25-27
Attachment 8: Selwyn Declaration	Conclusion	¶ 28
Attachment 8: Selwyn Declaration	Statement of Qualifications	Attachment 1
Attachment 8: Selwyn Declaration	Verizon and SBC Press Releases regarding Residential and Long Distance Market Shares in New York, Massachusetts and Texas	Attachment 2
Attachment 8: Selwyn Declaration	Declaration of Lee L. Selwyn, filed October 22, 2001, in New Jersey Board of Public Utilities Docket No. TO01090541	Attachment 3
Attachment 9:	Martha McKay, *BPU Opens Hearings on Verizon Expansion*, THE RECORD, Nov. 6, 2001, at L-6.	Page 5

DOCUMENT	SUBJECT MATTER	LOCATION
Attachment 10:	Andrew Backover, *As Dot-coms and Telecoms Crash, the Fallout Lands on Main Street*, USA TODAY, June 25, 2001, at B.01.	Page 7
Attachment 11:	Dinah Wisenberg Brin, *Covad Bankruptcy Latest in Series for DSL Wholesalers*, DOW JONES NEWS SERVICE, Aug. 7, 2001.	Page 7
Attachment 12:	*I/M/O Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-Region, InterLATA Service in New Jersey*, BPU Docket No. TO0190541, Discovery Responses VNJ-ATT 3, VNJ-CLEC 3, VNJ-RCN 1, VNJ-COVAD-1, VNJ-CVL 3.	Pages 18, 30
Attachment 13:	*I/M/O Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-Region, InterLATA Service in New Jersey*, BPU Docket No. TO0190541, Discovery Responses RPA-VNJ 112, 113.	Page 19
Attachment 14:	Letter from Gregory K Smith, AT&T, to Henry Ogden, Esq., Acting Secretary, New Jersey Board of Public Utilities (Dec. 21, 2001).	Page 22
Attachment 15:	Letter from James H. Laskey, Counsel to WorldCom, Inc., to Henry Ogden, Esq., Acting Secretary, New Jersey Board of Public Utilities (Jan. 4, 2002).	Page 24
Attachment 16:	Letter from Frederick C. Pappalardo and Gregory K. Smith to Henry Ogden, Esq., Acting Secretary, New Jersey Board of Public Utilities (Jan. 7, 2002).	Page 24
Attachment 17:	Letter from Henry Odgen, Acting Secretary, New Jersey Board of Public Utilities to Bruce Cohen, Esq., Verizon New Jersey, Inc. (Jan. 9, 2002).	Page 25

DOCUMENT	SUBJECT MATTER	LOCATION
Attachment 18:	*I/M/O the Consultative Report on the Application of Verizon-New Jersey, Inc. for FCC Authorization to Provide In-Region, InterLATA Service in New Jersey*, Docket No. TO01090541, Board Meeting, T.57-66, (Jan. 9, 2002).	Pages 25, 26
Attachment 19:	Letter from Bruce D. Cohen, Verizon-NJ, Inc., to Henry Ogden, Esq., Acting Secretary, New Jersey Board of Public Utilities (Jan. 10, 2002).	Page 25
Attachment 20:	Blossom Peretz, *Ratepayer Advocate Applauds BPU for Lowering Rates Verizon Charges Competitors*, Press Release (Nov. 20, 2001).	Page 25
Attachment 21:	*I/M/O Application Verizon New Jersey Inc. For Approval (i) of a New Plan for an Alternative Form of Regulation and (ii) to Reclassify Multi-line Rate Regulated Business Service as Competitive Services, and Compliance Filing*, Hearing Transcript , T.31-49 (Aug. 13, 2001).	Page 29
Attachment 22:	Letter from James F. Dieterle, AARP New Jersey State Director, to President Connie O. Hughes, Commissioner Frederick F. Butler and Commissioner Carol J. Murphy, New Jersey Board of Public Utilities (January 7, 2002).	Page 31
Attachment 23:	Edythe S. Miller, *The Impact of Technological Change on Market Power and Market Failure in Telecommunications*, JOURNAL OF ECONOMIC ISSUES (June 1, 2001).	Page 36

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IN OPPOSITION TO THE APPLICATION OF
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The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") hereby submits these comments in opposition to the Application by Verizon New Jersey Inc. ("Verizon-NJ"), Bell Atlantic Communications, Inc., Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in New Jersey filed with the Federal Communications Commission ("FCC") on December 20, 2001 ("Application").

* * *

The Ratepayer Advocate, established in 1994 through enactment of Governor Christine Todd Whitman's reorganization plan, represents and protects the interests of all New Jersey utility consumers – residential, small business, commercial and industrial – in all policy matters, including rate issues, that will affect the provision of telecommunications, energy, water and

wastewater services.[1] The Ratepayer Advocate's prime mission is to ensure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory.[2] In addition, the Ratepayer Advocate works to insure that all consumers are knowledgeable about the choices they have in the emerging age of utility competition.[3]

[1] Declaration of Ratepayer Advocate Blossom A. Peretz ("Peretz Declaration") ¶¶ 1-2 (Attachment 1).

[2] *Id*. ¶ 1.

[3] *Id*. ¶ 2.

The position of the Ratepayer Advocate is clear. We welcome Verizon New Jersey's entry into the long-distance market – when the time is right for consumers. Unfortunately, the time is not ripe now because competition does not yet exist in the local telephone market. Consumers do not have affordable choice – in fact, they do not have any choice – for their basic local telephone service.[4]

INTRODUCTION

A NEW YORK TIMES headline on Saturday, December 15, 2001, read *Verizon Seeks Advantage Over Small Competitors: Wants to Charge More to Lease Phone Lines*.[5] The article reported that Verizon is lobbying state regulators in Albany, New York, to increase rates for competitors "to lease space on its networks," because of "new security needs." More importantly, Verizon has asked federal regulators "to make it more difficult for competitors to lease space on its network, arguing that its success in restoring phone service in Lower Manhattan proves that only a big company could handle maintenance, recovery and security in the wake of such a disaster."[6] The article went on to say that since September 11, Verizon executives have been arguing that "all competitors should eventually be forced to build their own networks."[7] Indeed, according to another account, Mr. Ivan Seidenberg, the co-chief executive of Verizon, in mid-September called "this whole scheme of CLEC interconnection a joke."[8] Based on THE NEW YORK TIMES article, Mr. Seidenberg specified "that he would welcome competition from companies with the same scale as Verizon, but that smaller ones that lease lines on a local carrier's network" could not cope with security or recovery requirements. In

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[4] Application, App. B, Tab 5, *Consultative Report on the Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-Region, InterLATA Services in New Jersey*, Docket No. TO01090541 ("BPU 271 Proceeding"), 11/05/01 Hearing Transcript, T.17:21-18:6 (opening statement of Ratepayer Advocate Blossom A. Peretz); *see* Blossom A. Peretz, Op-Ed, *A Premature Filing*, THE RECORD, Jan. 8, 2002, at L13 (Attachment 2).

[5] Jayson Blair, *Verizon Seeks Advantage Over Smaller Competitors: Wants to Charge More to Lease Phone Lines*, THE NEW YORK TIMES, Dec. 15, 2001, at D3 (Attachment 3).

[6] *Id.*

[7] *Id*.

response to Mr. Seidenberg's allegations, according to the article, small telecommunications companies argued that Verizon was attempting to gain competitive advantage from the September 11th events with an ultimate goal of returning to the unchallenged state of local monopoly that preceded the passage of the Telecommunications Act of 1996[9] ("1996 Act").

On that same day in an Op-Ed article in THE NEW YORK TIMES, economist Vijag Vaitheeswaran analyzed the impact of the collapse of Enron on the regulatory framework in the energy marketplace.[10] He cautioned regulators that the Enron collapse should not portend the return to a regulated energy market, but instead that "deregulation, carefully monitored, remains sound policy."[11] He explained that:

> [e]xperience in other nations shows that competition in energy works if there is a strong, but carefully circumscribed, role for regulators – especially during the heady, uncertain transition phase.[12]

The Ratepayer Advocate was astounded to learn of the views of Verizon's CEO.[13] He attacks the very core of Congress' intent in its passage of the 1996 Act – to provide incentives for a robust competitive marketplace with opportunities and incentives for all companies, not just those that might be large and powerful enough to match the advantages Verizon enjoys due to its monopoly status, and to bring choice for all classes of consumers.

The 1996 Act requires the Commission to examine whether the local telecommunications market is irreversibly open to competition in order to evaluate Verizon-NJ's section 271

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[8] James K. Glassman, Op-Ed, *Verizon Exploited a National Tragedy*, THE WASHINGTON TIMES, Oct. 23, 2001 at A19 (Attachment 4).

[9] 47 U.S.C. §§ 151 *et. seq.*, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[10] Vijag Vaitheeswaran, Op-Ed, *Electricity Deregulation is Still Sound Policy*, THE NEW YORK TIMES, Dec. 15, 2001, at A31 (Attachment 5).

[11] *Id*.

[12] *Id.*

[13] *See* Blair, *supra* note 5.

application. As the Deputy Assistant Attorney General for economic analysis in the Antitrust Division of the U.S. Department of Justice stated last week, this examination is necessary to "untangle" the complex factors regarding whether the local market is open to competition.[14] Because of the complexity of this analysis and the limited usefulness of data generally provided by both incumbents and competitors, the Antitrust Division is asking carriers to provide better data and is considering conducting open-ended workshops beginning in late March or April.[15]

With the analysis both critical and complex, it is essential that the Commission get the analysis right. As former Commissioner Susan Ness explained just last week in commenting on Verizon-NJ's Application, "if it goes wrong, a state's consumers may lose the lower prices, increased investment, innovation, and other benefits of competition – forever."[16] Thus, until Verizon-NJ has demonstrated that it has opened its local market, it should not receive long distance authority.[17]

Unfortunately, the New Jersey local market is not irreversibly open to competition. Rather, today Verizon-NJ still retains monopoly control, particularly in the residential market. Competitive carriers provide local service to less than two percent (2%) (*i.e.*, less than 58,000) of the approximately 4.4 million residential access lines in New Jersey.[18] At most, 850 of these residential lines are provided by competitors using their own facilities.[19] Indeed, when a Ratepayer Advocate staff member attempted to obtain local residential service from competitive

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[14] *DOJ Seeks to "Untangle" Factors Impacting Competition*, TR DAILY at 2, Jan. 10, 2002 (Attachment 6).

[15] *Id*.

[16] Susan Ness, Op-Ed, *No: Entry Will Deter Local Competition*, THE RECORD, Jan. 8, 2002 at L13 (Attachment 7).

[17] 47 U.S.C. § 271; *infra* Section I.

[18] Application at 8, 10; Declaration of Lee L. Selwyn for the Ratepayer Advocate ¶¶ 5-6, 11-13 ("Selwyn Declaration") (Attachment 8) (*citing* Declaration of Lee L. Selwyn for the Ratepayer Advocate Before the New Jersey Board of Public Utilities ¶ 27 (Oct. 22, 2001) ("Selwyn BPU Declaration") (Attachment 8, Att. 3)); *see also* Martha McKay, *BPU Opens Hearings on Verizon Expansion*, THE RECORD, Nov. 6, 2001, at L-6 (Attachment 9).

carriers, not a single such carrier was offering residential service.[20] Moreover, the recent rash of bankruptcies by competitive carriers, including voice providers WinStar and Teligent and advanced services providers NorthPoint, Rhythms and Covad, further diminishes the prospects for competition in New Jersey.[21]

For Verizon-NJ to publicly deride the purposes of the 1996 Act in an evident attempt to seek greater monopoly advantage sends a warning to all policymakers in this important field. Let us not respond by supporting Verizon's attempt to stifle competition by retreating to the old, failed monopoly system of telecommunications. Instead, we should encourage a vibrant marketplace with new opportunities and technologies. Let the policy guiding the breakup of AT&T and the development of competition in the long distance marketplace – bringing lower rates and new technologies to consumers – remain the regulator's goal for the local exchange marketplace. And let us follow the wise advice of economist Vijay Vaitheeswaran, that to reach the goals of utility competition, *regulators must remain vigilant during the transition process.* Until the time is ripe for Verizon-NJ to enter the long distance marketplace – *i.e.*, until effective competition really exists in the local marketplace with true consumer choice – consumers still require the Commission to maintain and enforce the incentives necessary to open that market.

The statements of Verizon CEO Seidenberg provide a wake-up call for the Commission. They stand as a public acknowledgment of Verizon's attempts to thwart the development of competition in the local telecommunications markets. However, monopoly providers seeking to shut out competitors should not be permitted to dominate the market.

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[19] Application at 8.

[20] Application, App. B, Tab 5, BPU 271 Proceeding, 11/05/01 Hearing Transcript (Redacted), T:19:12-20:5.

The crux of the instant proceeding is whether the Commission will follow the construct of the 1996 Act and require Verizon-NJ to irrevocably open its local telecommunications markets to competition before it approves Verizon-NJ's entry into the lucrative long distance market. As the Ratepayer Advocate will show in these comments, the record supports only one conclusion: Verizon-NJ has yet to demonstrate that its local markets are open to competition, and has made no showing that any of the competition it claims to see will persist. Therefore, it is premature for the Commission to approve Verizon-NJ's section 271 application.

* * *

These Comments are organized as follows. This Introduction established the proper context for the Commission's analysis – the status of competition in the local market. Section I of the Discussion sets forth the proper legal standard for the Commission's analysis, focusing on the independent public interest requirements of this standard. Section II demonstrates that Verizon-NJ failed to comply with Track A of section 271. Section III shows that Verizon-NJ failed to satisfy item ii of the competitive checklist. Section IV demonstrates that Verizon-NJ failed to satisfy its public interest burden. Finally, in Section V, the Ratepayer Advocate explains why the Commission should not approve the Application unless Verizon-NJ is subject to full structural separation of its retail and wholesale activities or functional/structural separation accomplished via a strong code of conduct.

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[21] *See, e.g.*, Andrew Backover, *As Dot-coms and Telecoms Crash, the Fallout Lands on Main Street*, USA TODAY, June 25, 2001, at B.01 (Attachment 10); Dinah Wisenberg Brin, *Covad Bankruptcy Latest in Series for DSL Wholesalers*, DOW JONES NEWS SERVICE, Aug. 7, 2001 (Attachment 11).

DISCUSSION

I. SECTION 271 IMPOSES A STRICT LEGAL STANDARD ON VERIZON-NJ

A. Verizon-NJ Must Satisfy *All* Section 271 Requirements

Section 271 of the 1996 Act sets forth specific criteria that regional bell operating companies ("BOCs"), in this case Verizon-NJ, must satisfy if they are to receive permission to provide in-region, interLATA telecommunications services.[22] The purpose of section 271 is for BOCs to first open their local markets to competition in order to subsequently receive permission to enter the competitive long distance market.[23] Indeed, the Commission explicitly recognized the key Congressional goal that BOCs must irreversibly open their local markets when it stated in evaluating an earlier section 271 application that, "[i]n order to effectuate Congress' intent, we must make certain that the BOCs have taken real, significant, and irreversible steps to open their markets."[24] Congress required this sequence of events because any other would be fundamentally unfair. Thus,:Senator Dorgan noted,

> The Bell operating companies are not now free to go out and compete with the long distance companies because they have a monopoly in most places in local service. It is not fair for the Bell operating companies to have a monopoly in local service, retain that monopoly and get involved in competitive circumstances in long distance service.[25]

As the Commission has long recognized, this logical progression– first the BOC opens its local market, then it is permitted to enter the long distance market – is a crucial predicate to the success of the 1996 Act.

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[22] 47 U.S.C. § 271.

[23] *E.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, CC Docket No. 97-137, FCC 97-298, Memorandum Opinion and Order ¶ 3 (1997) ("FCC MI 271 Order").

[24] *Id*. ¶ 18.

[25] 141 Cong. Rec. S8057 (1995) (statement of Sen. Dorgan) (quoted in *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region,*

> Through this statutory provision [Section 271], Congress required BOCs to demonstrate that they have opened their local telecommunications markets to competition *before* they are authorized to provide in-region long distance services. Section 271 thus creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets.
>
> By requiring BOCs to demonstrate that they have opened their local markets to competition before they are authorized to enter into the in-region long distance market, the 1996 Act enhances competition in both the local and long distance markets.
>
> . . .
>
> If the local market is not open to competition, the incumbent will not face serious competitive pressure from new entrants, such as major interexchange carriers. In other words, the situation would be largely unchanged from what prevailed before the passage of the 1996 Act. . . . Although Congress replaced the MFJ's structural approach, Congress nonetheless acknowledged the principles underlying that approach – that BOC entry into the long distance market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition. This is clear from the structure of the statute, which requires BOCs to prove that their markets are open to competition before they are authorized to provide in-region long distance services.[26]

Verizon-NJ, therefore, should not be granted long distance authority in New Jersey until it has opened its local markets to competition.

Section 271 approval is contingent upon Verizon-NJ's demonstration that: (1) it either has interconnection agreements under which one or more competitors provide local exchange service in *both* the residential and business markets ("Track A") or, if no such competitors exist, it offers generally available terms and conditions under which facilities-based residential and

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InterLATA Services in Louisiana, 13 FCC Rcd 20599, CC Docket No. 98-121, FCC 98-271, Memorandum Opinion and Order ¶ 3 n. 6 (1998) ("FCC LA II 271 Order").

[26] FCC MI 271 Order ¶¶ 14-15, 18 (footnotes omitted) (emphasis in original); *see* FCC LA II 271 Order ¶ 3; *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, CC Docket No. 99-295, FCC 99-404 ¶ 3 (1999) ("FCC NY 271 Order").

business competitors could provide competitive services ("Track B");[27] (2) it complies with each of the fourteen (14) point checklist items;[28] (3) it would implement the requested long distance authority in accordance with the separate affiliate and other safeguards of section 272;[29] *and* (4) its provision of long distance services would be fully "consistent with the public interest, convenience, and necessity."[30] Thus, according to the express language of the statute, *each* of these criterion is an essential element to section 271 approval, and each of these criterion must necessarily be reviewed by the Commission.[31]

Accordingly, the Commission in analyzing previous section 271 applications has found that a BOC must prove by a preponderance of the evidence that it has fully met each criterion.[32] Further, the Commission repeatedly emphasized that the burden of persuasion falls firmly on the applicant. "Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied."[33]

This burden is absolute. For example, in denying BellSouth's second Louisiana section 271 application, the Commission determined that section 271 requires that "[a] BOC must plead,

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[27] 47 U.S.C. §§ 271(c)(1)(A-B). In its Application, Verizon-NJ asserts only that it satisfies Track A. Application at 6-13.

[28] 47 U.S.C. § 271(c)(2)(B).

[29] 47 U.S.C. § 272.

[30] 47 U.S.C. § 271(d)(3)(C).

[31] *See, e.g., Sprint Communications Co. L.P. v. FCC*, 2001 U.S. App. LEXIS 27292, at *3-*4 (Dec. 28, 2001) ("Sprint v. FCC"); FCC LA II 271 Order ¶ 13; FCC MI 271 Order ¶ 9; FCC NY 271 Order ¶ 18; *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, IntraLATA Services in Arkansas and Missouri*, CC Docket No. 01- 194, FCC 01-338, Memorandum Opinion and Order at App. D ¶ 3 (rel. Nov. 16, 2001) ("FCC AK/MO 271 Order"); *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01- 138, FCC 01-269, Memorandum Opinion and Order at App. C ¶ 3 (rel. Sept. 19, 2001) ("FCC PA 271 Order").

[32] *See* FCC MI 271 Order ¶ 45; FCC LA II 271 Order ¶ 59; FCC NY 271 Order ¶ 47; *see also* 47 U.S.C. § 271(d)(3).

[33] FCC MI 271 Order ¶ 43; *see id.* ¶ 43 n. 84 (burden of persuasion); *e.g.*, FCC NY 271 Order ¶¶ 47-48.

with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met."[34] In fact, a BOC can fail to satisfy this burden even if its section 271 application is unopposed.

> Because Congress required the Commission affirmatively to find that a BOC application has satisfied the statutory criteria, the ultimate burden of proof with respect to factual issues remains at all times with the BOC, even if no party opposes the BOC's application.[35]

Thus, failure by Verizon-NJ to prove any one of these criteria requires that Verizon-NJ's section 271 application be denied.[36]

Finally, Verizon-NJ must prove that each criterion is satisfied at the time of its application.[37] Evidence submitted after the initial application is generally to be accorded no weight, and *promises of future compliance may not be relied upon*.[38]

> [W]e find that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof. In order to gain in-region, interLATA entry, a BOC must support its applications with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.[39]

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[34] FCC LA II 271 Order ¶ 52.

[35] FCC MI 271 Order ¶ 43; FCC LA II 271 Order ¶ 51 (re-emphasizing same); FCC NY 271 Order ¶ 47; FCC PA 271 Order, App. C ¶ 5; *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, IntraLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, CC Docket No. 00-217, FCC 01-29, Memorandum Opinion and Order ¶ 46 (rel. Jan. 22, 2001) ("FCC KS/OK 271 Order"), remanded on other grounds, Sprint v. FCC, *supra* note 31.

[36] 47 U.S.C. § 271(d)(3) ("The Commission shall not approve the authorization requested . . . unless it finds that" these criteria are met); FCC LA II 271 Order ¶¶ 11, 13 ("The statute directs that the Commission 'shall not approve' the requested authorization unless it finds that the criteria specified in section 271(d)(3) are satisfied."); see FCC MI 271 Order ¶ 6.

[37] *E.g.*, *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, 16 FCC Rcd 6923, 6925, 6927, DA 01-734, Public Notice (March 23, 2001)("Updated 271 Public Notice"); *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, 11 FCC Rcd 19706, 19709, FCC 96-469, Public Notice (1996) ("Dec. 6 Public Notice").

[38] Dec. 6 Public Notice, 11 FCC Rcd. at 19709; FCC MI 271 Order ¶¶ 51, 55.

[39] FCC MI 271 Order ¶ 55 (emphasis in original).

Moreover, Verizon-NJ must demonstrate not only that it is in full compliance at the time it files its application, but it must show that it will remain in compliance with section 271 if its application is granted.

> It is not enough that the BOC prove it is in compliance at the time of filing a section 271 application; it is essential that the BOC must also demonstrate that it can be relied upon to remain in compliance.[40]

Verizon-NJ has failed to prove that its section 271 application satisfies the statute. Verizon-NJ has not demonstrated that it faces facilities-based residential competition, as required under Track A.[41] Verizon-NJ also did not prove that it satisfies checklist item ii.[42] Finally, and most significantly, Verizon- NJ failed to show that the grant of its application would be in the public interest.[43] As the FCC has recognized, the failure to satisfy any one of these criteria by itself requires rejection of a section 271 application.[44] That Verizon-NJ fails to satisfy each of them simply reinforces the result called for by the statute – the Commission should reject Verizon-NJ's Application.[45]

B. The Public Interest Test Is Crucial to the Commission's Section 271 Evaluation

One of the four criteria that Verizon-NJ must satisfy in order to receive section 271 authority is the public interest test.[46] As the Commission has consistently and repeatedly stated in its section 271 orders, the public interest test is a requirement separate from the fourteen (14)

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[40] *Id*. ¶ 22.

[41] *Infra* Section II.

[42] *Infra* Section III.

[43] *Infra* Section IV.

[44] *See* FCC MI 271 Order ¶ 6; FCC LA II 271 Order ¶¶ 11, 13, 48.

[45] *See* FCC MI 271 Order ¶ 6; FCC LA II 271 Order ¶¶ 11, 13, 48.

[46] 47 U.S.C. § 271(d)(3); *see* Sprint v. FCC, *supra* note 31, at *3, *7, *10-*14, *36.

point checklist and the other section 271 criteria, but equally necessary to section 271 analysis in compliance with the 1996 Act.

> [W]e reaffirm the Commission's earlier decision that section 271 relief may be granted only when: (1) the competitive checklist has been satisfied; *and* (2) the Commission has independently determined that such relief is in the public interest.[47]

Congress intended the public interest test to form the basis of the Communications Act, including the 1996 Act amendments, such as section 271.

> The public interest, convenience and necessity standard is the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in this bill.[48]

In its deliberations preceding the enactment of the 1996 Act, Congress expressly rejected an amendment that would have enabled compliance with the checklist in and of itself to satisfy the public interest test.[49] Rather, as the Commission has previously found, checklist compliance (which does not exist in this proceeding) does not guarantee that barriers to entering the local telecommunications market have been eliminated.

> In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition.[50]

The D.C. Circuit recently reinforced the high premium that the statute places on the Commission performing an independent public interest examination that places particular

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[47] FCC LA II 271 Order ¶ 361 (emphasis added); *see, e.g.*, FCC PA 271 Order, App. C ¶ 71 ("the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."); FCC NY 271 Order ¶¶ 422-423; FCC MI 271 Order ¶¶ 389-390.

[48] S. Rep. No. 23, 104th Cong., 1st Sess. 44 (1995) (quoted in FCC MI 271 Order ¶ 385 n. 992).

[49] FCC MI 271 Order ¶ 389 n. 1004 and accompanying text (citing 141 Cong. Rec. S7971, S8043 (1995)).

[50] *Id.* ¶¶ 389-390.

emphasis on competitive analysis.[51] The public interest inquiry required by section 271 is an expansive one.[52] In carrying out this inquiry, the Commission has broad discretion to consider any factor relevant to assessing whether BOC entry into the long distance market is in the public interest.[53] Moreover, the Commission has specifically requested that commenters identify any factor they deem relevant to the public interest determination.

> We encourage interested parties . . . to identify other factors that we might consider in the context of a specific application, and the weight that we should attach to the various factors, in making this assessment.[54]

Further, the Commission has provided substantial guidance as to some of the possible areas in which it desires detailed input from commenters as part of its public interest evaluation.[55] As part of the public interest evaluation, the Commission should examine commenters' views on whether the local telecommunications market is irrevocably open to competition.[56] Additionally, the public interest review must include analysis of whether competition currently exists and will continue to exist in the local market.[57]

Moreover, this evaluation should analyze the actual amount of competitive services being provided "to different classes of customers (residential and business)," and the scope of

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[51] Sprint v. FCC, *supra* note 31, at *3, *7-*15, *36; this important decision is discussed further in Section IV., *infra*.

[52] FCC MI 271 Order ¶ 385; *see also* FCC LA II 271 Order ¶ 365.

[53] FCC MI 271 Order ¶¶ 383-422; FCC LA II 271 Order ¶ 362.

[54] FCC MI 271 Order ¶ 398.

[55] *E.g.*, FCC MI 271 Order ¶¶ 383-422; FCC PA 271 Order, App. C ¶ 71.

[56] *E.g.*, FCC PA 271 Order, App. C ¶ 71.

[57] FCC LA II 271 Order ¶ 361. According to former Commissioner Susan Ness, this is the best test of whether the public interest has been met.

> *Indeed, the best test whether a Bell company has met the [1996 Act's] requirements to open the local market is this: do consumers have a real choice of local service providers?* Especially now, six years after the [1996 Act] was passed, one would expect that if the local market were truly open we would see high levels of actual competition in the residential market by service providers using a variety of forms of market entry.

Ness, *supra* note 16 (emphasis added) (Attachment 7).

competition "in different geographic regions (urban, suburban, and rural)."[58] Verizon-NJ's obligation, therefore, is to show not isolated pockets of competitive effort, but competition that benefits all classes of consumers in all areas of the state.

Despite this clearly established, consumer-oriented principle, Verizon-NJ asserts that "allegations about the state of local competition in New Jersey are inapposite as a legal matter,"[59] and that it "disagrees as a legal matter that the Commission may conduct any analysis of local competition in its public-interest inquiry."[60] These positions misstate the law, and if adopted would eviscerate the public interest inquiry. Likewise, Verizon-NJ's claim that the long distance market, rather than the local market, should be the focus of the public interest inquiry not only misreads the statute, but ignores Commission precedent rejecting this position.[61] As the Commission stated in its first section 271 evaluation:

> We reject the view that our responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market. We believe that our inquiry must be a broader one. The overriding goals of the 1996 Act are to open all telecommunications markets to competition . . . In adopting section 271 Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ [Modified Final Judgement] on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.[62]

Accordingly, the Commission's analysis of the state of local competition in New Jersey is not only appropriate, it is essential.[63] Failure to include such an examination would fatally undermine the Commission's public interest analysis. This, in turn, would render the

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[58] FCC LA II 271 Order ¶ 391.

[59] Application at 81.

[60] Application at 77 n. 70.

[61] *Id*, at 77 n. 70.

[62] FCC MI 271 Order ¶ 386.

Commission unable to conclude that Verizon-NJ satisfied section 271(d)(3) of the 1996 Act, one of the four distinct, mandatory section 271 criteria.

II. THE COMMISSION SHOULD REJECT VERIZON-NJ'S PETITION FOR SECTION 271 AUTHORITY BECAUSE VERIZON-NJ FAILS TO MEET THE REQUIREMENTS OF SECTION 271(C)(1(A) (TRACK A)

Under section 271 of the 1996 Act, Verizon-NJ must show that it satisfies the requirements of either Section 271 (c)(1)(A), known as Track A, or Section 271 (c)(1)(B), known as Track B.[64] In the instant Application, Verizon-NJ has filed under Track A. Thus, in addition to the required demonstration of compliance with each and every point of the section 271 competitive checklist, Verizon-NJ must show that it "provide[s] access and interconnection to its network facilities [to] one or more unaffiliated competing providers of telephone exchange service … to residential and business subscribers."[65]

Track A specifies that the competing carrier's service may be offered either exclusively over its own facilities or predominantly over its own facilities in combination with the resale of the telecommunications services of another carrier.[66] The Commission has further defined facilities-based competition to include services provided by competitors over their own networks, over UNEs obtained from the incumbent, and over UNE-Platforms ("UNE-Ps") also obtained from the incumbent.[67] Services offered by means of resale are not considered facilities-based and, contrary to Verizon-NJ's assertions,[68] are not to be included in meeting Track A

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[63] *Id*. ¶ 402.

[64] Section 271 (d)(3)(A).

[65] Section 271 (c)(1)(A)

[66] FCC MI 271 Order ¶ 8.

[67] FCC MI 271 Order ¶¶ 92-103.

[68] "Here, competing carriers serve approximately 56,000 residential lines through resale, further buttressing the conclusion that Track A is satisfied." Application at 10.

requirements.[69] Importantly, "a sufficient number of residential customers [must be] served by competing LECs through the use of their own facilities to demonstrate that there is an 'actual commercial alternative'" available.[70] Although the Commission has not set a threshold limit of facilities-based residential lines required to meet this burden, it has stated that a BOC must show that "more than a *de minimis* number of residential customers are served[.]"[71] Finally, in order to be considered for Track A purposes, residential subscribers must be provided with service for a fee; CLEC employees and test lines do not count toward the fulfillment of Verizon-NJ's Track A requirements.[72]

Verizon-NJ fails to fulfill the Track A requirements for several reasons. First, Verizon-NJ fails to provide sufficient evidence for the Commission to determine that facilities-based residential competition exists in New Jersey. Second, the "evidence" that Verizon-NJ does provide does not demonstrate that more than a *de minimis* number of residential subscribers receive service from facilities-based competitors. Finally, Verizon-NJ provides no evidence that such service is being provided for a fee. For these reasons, Verizon-NJ fails to meet the requirements of Track A, and its Application should be denied.

First, Verizon-NJ has not provided sufficient evidence that any competitor offers facilities-based local residential service within the State of New Jersey. Verizon-NJ declares that competitors serve "approximately 850 residential lines over their own facilities (including platforms)."[73] This number is substantially greater than the 680 (disputed) facilities-based

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[69] FCC MI 271 Order ¶¶ 92-103.

[70] *See* FCC KS/OK 271 Order ¶ 42.

[71] *Id*.

[72] *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, 12 FCC Rcd. 8685, CC Docket No. 97-121, FCC 97-228, Memorandum Opinion and Order ¶ 17 (1997) ("FCC Oklahoma 271 Order").

[73] Application at 8.

residential customers that Verizon-NJ claimed in the recent section 271 proceeding before the New Jersey Board.[74] In addition, three of the four facilities-based competitors held out as exemplars in Verizon-NJ's instant filing received no more than a passing mention in the proceeding before the New Jersey Board.[75] Yet, Verizon-NJ provides no support for the discrepancy in numbers, and it does not explain why it prevented parties from developing a complete record before the New Jersey Board by withholding information that it now presents to the Commission. Moreover, given the current competitive and economic climate, with carriers entering bankruptcy rather than the local exchange market,[76] the increase in facilities-based residential lines alleged by Verizon-NJ is both counterintuitive and unsupported. The Commission should not accept Verizon-NJ's accounting of facilities-based competitors without concrete evidence that its numbers are correct.

Second, even accepting Verizon-NJ's accounting of facilities-based residential customers (which the Ratepayer Advocate does not recommend), Verizon-NJ fails to provide evidence that its 850 residential lines constitute a more than a *de minimis* amount as required.[77] 850 lines constitute at most 0.0196% of the residential access lines in New Jersey.[78] This percentage is less – indeed, orders of magnitude less – than the percentage of residential customers being served by competitors at the time Verizon filed for section 271 approval at the FCC in other states, as the following graph demonstrates:

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[74] Indeed, in the proceeding before the New Jersey Board, discovery responses showed that none of the CLECs participating in the proceeding was serving residential customers over its own facilities, as alleged by Verizon-NJ. BPU 271 Proceeding, Discovery Responses VNJ-ATT 3, VNJ-CLEC 3, VNJ-RCN 1, VNJ-COVAD-1, VNJ-CVL 3 (Attachment 12).

[75] Peretz Declaration ¶¶ 9-10 (Attachment 1).

[76] Note 21, *supra,* and accompanying text.

[77] FCC KS/OK 271 Order ¶ 42.

[78] Selwyn Declaration ¶ 12(Attachment 8).

Residential Market Penetration
Facilities-Based Competitive Carriers

State	Percentage Penetration
New Jersey[79]	0.0196%
New York[80]	1.54%
Massachusetts[81]	1.91%
Pennsylvania[82]	4.71%
Rhode Island[83]	6.26%

Moreover, according to Verizon-NJ information (dated September 2001), competitors in New Jersey hold far fewer standalone and UNE-P loops and UNE-P switching ports than any other state in the former-Bell Atlantic territory for which Verizon has been granted section 271 approval by the Commission.[84] Thus, the Commission should find that the 0.0196% figure represents less than a *de minimis* amount of competitive facilities-based residential customers, and should deny Verizon's Application on that basis.

Finally, Verizon-NJ fails to provide any evidence that the alleged facilities-based residential lines are provided by competitors on a commercial basis. Verizon-NJ has admitted that it does not know whether any of the UNE and UNE-P residential lines that it alleges are being provided to customers for a fee.[85] Verizon-NJ Witness Dr. Taylor affirmed Verizon-NJ's

[79] *Id.*

[80] FCC NY 271 Order ¶ 14

[81] *Application of Verizon New England et al for Authorization to Provide In-Region, InterLATA Service in Massachusetts,* CC Docket No. 00-176, Verizon Application at 5 (filed Sept. 2000).

[82] *Application of Verizon Pennsylvania et al for Authorization to Provide In-Region, InterLATA Service in Pennsylvania*, CC Docket No. 01-138, Verizon Application, Declaration of William Taylor, ¶¶ 3, 51, 52 (filed June 2001).

[83] *Application by Verizon New England et al for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, Verizon Application at 8 (filed Nov. 26, 2001).

[84] BPU 271 Proceeding, Discovery Responses RPA-VNJ 112, 131 (Attachment 13).

[85] Application, App. B, Tab 11, BPU 271 Proceeding, 11/20/01 Hearing Transcript (Redacted), T.1431:2-7, 15-23, 1432:3-6.

ignorance on the matter: "it's really none of Verizon's business how the CLEC is selling or giving away its service to its customers or friends."[86] Verizon-NJ has included no additional information on the matter in its Application. However, because Verizon-NJ "retains at all times the ultimate burden of proof that its application satisfies section 271,"[87] it is entirely Verizon-NJ's "business" to demonstrate that competitors are providing facilities-based local residential services on a commercial basis. Failure to provide this evidence necessarily warrants Commission rejection of Verizon-NJ's petition for section 271 authority.

III. VERIZON-NJ DOES NOT MEET CHECKLIST ITEM 2 - NONDISCRIMINATORY ACCESS TO UNES

A. Commercial Testing of Verizon-NJ's OSS is Required Prior to Granting Verizon-NJ's 271 Petition

The ability of competitors to provide effective service to their customers and competition to Verizon-NJ depends heavily upon nondiscriminatory access to OSS functions. Such nondiscriminatory access is required by item ii of the section 271 checklist.[88] Its crucial importance has been recognized many times over by both federal and state regulators. Specifically, the Commission has noted that without such nondiscriminatory access, "a competing carrier will be severely disadvantaged, if not precluded altogether, from fairly competing in the local exchange market."[89]

In evaluating whether a section 271 application complies with checklist item ii, the Commission has determined that data drawn from *actual commercial usage* are the most

[86] Application, App. B, Tab 11, BPU 271 Proceeding, 11/20/01 Hearing Transcript, T39:7-10.

[87] *See* FCC MI 271 Order ¶ 44.

[88] 47 U.S.C. § 271(c)(2)(B)(ii).

[89] FCC NY 271 Order ¶ 81 (internal quotation marks omitted).

probative form of evidence.[90] Such information can only be obtained from real world data involving the actual provision of OSS by Verizon-NJ to competitors in a market environment.[91]

Despite its import, Verizon-NJ's Application fails to provide any evidence of actual commercial usage in New Jersey by which the Commission can evaluate the ability of Verizon-NJ's OSS systems to sustain a realistic level of demand in a competitive market.[92] Instead, Verizon-NJ relies exclusively on KPMG's OSS testing results, derived from tests conducted in an artificial environment and of questionable relevance to real world provisioning of OSS.[93] This is inconsistent with 271 analyses conducted in other jurisdictions. For example, in New York, Verizon provided actual commercial usage data pertaining to the provision of nondiscriminatory access to its application interfaces for all of the pre-ordering functions that it provides to itself.[94] In Pennsylvania as well, the Pennsylvania PUC allowed three months of actual commercial usage to assist it in its review of Verizon's section 271 application in that state.[95] Both New York and Pennsylvania commissions lauded the use of commercial testing, emphasizing the fact that "the most probative evidence that OSS functions are operationally ready is actual commercial usage."[96]

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[90] *Application by SBC Communications, Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order at ¶ 102 (June 30, 2000) ("FCC TX 271 Order").

[91] Selwyn BPU Declaration ¶ 19 (Attachment 8, Att. 3).

[92] *Id*.

[93] Peretz Declaration ¶ 14 (Attachment 1).

[94] FCC NY 271 Order ¶¶ 130, 133.

[95] *Consultative Report on Application of Verizon Pennsylvania, Inc. for FCC Authorization to Provide In-Region, InterLATA Service in Pennsylvania*, Docket No. M- 00001435, Procedural Order at 12 (Pa.P.U.C. Nov. 29, 2000) ("PA Procedural Order").

[96] FCC NY 271 Order ¶ 89; *see* PA Procedural Order at 12.

The importance of actual commercial usage of OSS is underscored by the recent approval of the New Jersey Performance Assurance Plan ("PAP").[97] The PAP is designed to prevent Verizon-NJ from discriminating against competitors through the imposition of monetary penalties for failures under the New Jersey Carrier-to-Carrier Guidelines.[98] While the PAP was approved by vote on November 1, 2001, the New Jersey Board has yet to issue a written decision. Consequently, Verizon-NJ's Application contains no actual usage data regarding its performance in the provision of OSS to competitors.[99] The absence of actual experience with penalties prevents the development of the full record that is necessary for a section 271 determination. More importantly, neither consumers nor competitors have yet been able to discern whether the PAP will prove sufficient to ensure nondiscriminatory treatment by Verizon-NJ.[100] Indeed, while Verizon-NJ repeatedly touts its "perfect score" on KPMG's OSS testing,[101] AT&T recently notified the New Jersey Board that Verizon-NJ has failed to include five of six New Jersey area codes in performance metrics related to provisioning for the preceding 17 months.[102] This failure places KPMG's reported results, and the Board's decision which was based upon those results, in considerable doubt. Moreover, such unreliable performance reporting directly contradicts Verizon-NJ's claims of nondiscriminatory access to OSS and regulators' abilities to prevent backsliding by Verizon-NJ.[103]

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[97] *In the Matter of the Board's Investigation Regarding the Status of Local Exchange Competition in New Jersey—Performance Standards and Remedies*, BPU Docket N. TX98010010—Item 4B, BPU Agenda Meeting (October 12, 2001).

[98] *Id.*

[99] Selwyn BPU Declaration ¶ 19 (Attachment 8, Att. 3).

[100] *Id.* ¶ 21.

[101] *See, e.g.* Application at 2.

[102] Letter from Gregory K Smith, AT&T, to Henry Ogden, Esq., Acting Secretary, New Jersey Board of Public Utilities (Dec. 21, 2001) (Attachment 14).

[103] *Id.*

Because Verizon-NJ cannot demonstrate that it provides OSS on a nondiscriminatory basis as required by checklist item ii, its Application should be denied. The Ratepayer Advocate respectfully suggests that Verizon-NJ be required to demonstrate compliance with the PAP in a commercial environment for at least three months before the Commission contemplates approval of Verizon-NJ's Application.

B. The Commission Should Deny Verizon-NJ's Application Because Nondiscriminatory Access Under New UNE Rates Cannot Yet Be Determined

The successful implementation of TELRIC-compliant UNE rates is a necessary prerequisite to nondiscriminatory provision of UNEs under checklist item ii of section 271.[104] Moreover, as previously stated, such implementation must be current as of the filing of the 271 Application.[105] The Ratepayer Advocate observes that Verizon-NJ has not yet implemented several of the TELRIC-compliant rates that it claims satisfy its burden under checklist item ii. Moreover, the Ratepayer Advocate respectfully submits that the Commission can properly judge "successful implementation" only through experience of the TELRIC-compliant UNE rates by competitors and consumers; this has not yet occurred. For these reasons, Verizon-NJ's Application should be denied.

As this Commission is well aware, Verizon-NJ must comply with the requirements of the section 271 checklist as of the date of its Application.[106] The New Jersey Board of Public Utilities approved new UNE rates on December 17, 2001.[107] Days later, on December 20, Verizon-NJ filed its Application with the Commission. As of January 4, 2002, several weeks

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[104] Selwyn BPU Declaration ¶ 12 (Attachment 8, Att. 3).

[105] *E.g.* Updated 271 Public Notice, 16 FCC Rcd 6923, 6925, 6927 (March 23, 2001); Dec. 6 Public Notice, 11 FCC Rcd at 19709.

[106] *Id.*

[107] Application, App. F, Tab 9, *Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey*, Summary Order of Approval, Docket. No. TO00060356 (NJ BPU Dec. 17, 2001).

after Verizon-NJ submitted the instant Application, there was evidence that Verizon-NJ had failed to comply with the mandate of the New Jersey Board in at least three respects: (1) Verizon-NJ improperly imposed different reciprocal compensation and end office switching rates on competitors; (2) Verizon-NJ improperly charged two minutes of the "per Minute of Use" switching rate for each minute of an intra-switch call; and (3) Verizon-NJ improperly charged terminating local switching, instead of reciprocal compensation, on the terminating end of an inter-switch call.[108] Moreover, AT&T recently pointed out to the New Jersey Board that "hot cut" rates, as newly-implemented by Verizon-NJ, are very likely not TELRIC compliant.[109] These failures prevent Verizon-NJ's compliance with checklist item ii as of the date of its Application.

The fact that the competitors and ratepayers of New Jersey have not had experience with brand new UNE rates likewise prevents Verizon-NJ's compliance with section 271 checklist item ii.[110] Verizon-NJ filed its section 271 Application with the Commission on December 20, 2001, a mere three days after the *approval* of new UNE rates by the New Jersey Board, and well before the rates were implemented by Verizon-NJ. Obviously, neither competitors nor consumers were afforded any time in which to observe Verizon-NJ's implementation of the rates as prescribed by the Board, let alone their effect on the market. And, while the development of TELRIC-based rates is certainly a prerequisite to a grant of section 271 authority, it is the implementation of those rates by the incumbent that determines whether competitors are

[108] Letter from James H. Laskey, Counsel to WorldCom, Inc., to Henry Ogden, Esq., Acting Secretary, New Jersey Board of Public Utilities (Jan. 4, 2002) (Attachment 15).

[109] Letter from Frederick C. Pappalardo and Gregory K. Smith to Henry Ogden, Esq., Acting Secretary, New Jersey Board of Public Utilities (Jan. 7, 2002) (Attachment 16).

[110] 47 U.S.C. §271(c)(2)(B)(ii).

receiving nondiscriminatory access to UNEs.[111] This fact was recognized by the New Jersey Board itself when it conditioned its 271 comments in this proceeding on evidence of compliance with the newly-established rates: "the Board determined that a finding of compliance with Checklist Item 2, is conditioned on Verizon charging no more than the new UNE rates to all CLECs in New Jersey effective December 17, 2001."[112]

Such evidence has been neither presented nor developed, rendering Verizon-NJ's Application premature and deficient. Indeed, in response to the New Jersey Board's statements, Verizon-NJ apologetically responds that it can promise no more than future compliance with the obligations imposed by the Board's December 17 letter.[113] Promises of future compliance cannot and must not suffice.

As Ratepayer Advocate Blossom Peretz stated upon the release of new UNE rates for New Jersey:

> The next step is to see whether this new UNE rate actually works and serves as an incentive to telephone companies to come to New Jersey to offer local service in competition to Verizon's near monopoly. We should know by next spring whether we will have irreversible competition in the local telephone market.[114]

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[111] For example, Verizon-NJ might disadvantage its competitors by unintentionally, but improperly, "double billing" a given type of service order. This type of action would very effectively disadvantage competitors and undermine the development of competition. Indeed, subsequent to the FCC NY 271 Order granting Verizon interLATA authority competitors noted an "unconstrained aggressiveness" in Verizon's attempts to dismantle competition and put them into a price squeeze. *See, e.g.*, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-C-1357, New York Public Service Commission, Recommended Decision on Module 3 Issues, 2001 N.Y. PUC LEXIS 293 at 23 (May 16, 2001) ("New York Module 3 Recommended Decision").

[112] Letter from Henry M. Ogden, Acting Secretary, New Jersey Board of Public Utilities, to Bruce D. Cohen, Esq., Verizon New Jersey, Inc. (January 9, 2002) (Attachment 17); *see* BPU 271 Proceeding, Board Meeting, Item 4A, T.57-66 (Jan. 9, 2002) (Attachment 18).

[113] Letter from Bruce D. Cohen, Verizon-NJ, Inc., to Henry Ogden, Esq., Acting Secretary, New Jersey Board of Public Utilities (January 10, 2002) (Attachment 19).

[114] Blossom Peretz, *Ratepayer Advocate Applauds BPU for Lowering Rates Verizon Charges Competitors*, Press Release (November 20, 2001) (Attachment 20).

For the moment, however, without an affirmative showing that the new UNE rates are both implemented as directed by the New Jersey Board and nondiscriminatory as demonstrated by experience, Verizon-NJ cannot meet the nondiscriminatory access requirements of 47 U.S.C. §271(c)(2)(B)(ii). Its Application should therefore be denied.

IV. VERIZON-NJ'S PETITION FAILS THE PUBLIC INTEREST TEST BECAUSE RESIDENTIAL COMPETITION DOES NOT EXIST

As described in section I.B, *supra*, the 1996 Act requires that, in addition to an examination of the 14-point checklist under section 271, the Commission must make an additional inquiry into the public interest in a section 271 determination.[115] This inquiry is an expansive one and, despite Verizon-NJ's claims to the contrary,[116] it must focus on whether the "local telecommunications market is, and will remain, open to competition."[117] Without careful consideration of whether competition will truly flourish as a result of a BOC's compliance with the checklist, allowing that BOC to enter the interLATA market creates a grave danger of recreating the monopolistic regime that the MFJ ended decades ago.[118] The Commission's determination on this point, therefore, is crucial to the ratepayers of New Jersey, particularly given the New Jersey Board's conclusory treatment of the public interest component of Verizon-NJ's section 271 showing.[119]

The D.C. Circuit recently affirmed the critical role of a competition-based public interest test in its remand of the FCC's Order granting SBC section 271 authority in Kansas and

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[115] 47 U.S.C. § 271(d)(3); FCC MI 271 Order ¶ 389, n. 1004 (*citing* 141 Cong. Rec. S7971, S8043 (1995)).

[116] Application at 77 n. 70, 81.

[117] FCC MI 271 Order ¶ 386.

[118] Selwyn BPU Declaration ¶ 25 (Attachment 8, Att. 3).

[119] BPU 271 Proceeding, Transcript of Board Meeting, Item 4A T. 64:22-65:9 (Jan. 9, 2002) (Attachment 18).

Oklahoma.[120] The appellate court found no fault with the Commission's conclusion that SBC's applications satisfied the competitive checklist.[121] It remanded the Commission's order, however, because, rather than conducting a well reasoned analysis of competition-based public interest claims against the application, the Commission gave these claims a "brush-off."[122] This, the court concluded, was insufficient; the Commission must affirmatively analyze and weigh the public interest claims before it.[123] Under the D.C. Circuit's decision, moreover, because "the [1996] Act aims directly at stimulating competition," public interest claims regarding the lack of competition and their underlying rationales must be directly addressed by the Commission.[124] And a mere assumption about competitive conditions, as opposed to fact-based analysis, "is no basis for rejecting a proffer of evidence" regarding the public interest.[125] Accordingly, it is critical that the Commission provide a detailed, factual evaluation of competition in New Jersey's telecommunications markets to determine whether granting Verizon-NJ's application would promote the public interest.

Clearly, the public interest is best served by sustained and effective local competition, not by continued or even expanded domination of the market by the incumbent.[126] It is almost axiomatic that, until consumers have access to effective competition in local services, Verizon-NJ will have the opportunity and incentive to use its market power to the detriment of New Jersey ratepayers through increased prices and lower service quality.[127] In addition, Verizon-NJ

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[120] Sprint v. FCC, *supra* note 31.

[121] *Id.* at *8-*9, *16-*33.

[122] *Id*. at *10-*11.

[123] *Id*. at *10-*11, *14.

[124] *Id*. at *15.

[125] *Id*, at *13.

[126] Peretz Declaration ¶¶ 17-18 (Attachment 1).

[127] Selwyn BPU Declaration ¶ 25 (Attachment 8).

will have the added incentive *and ability* to leverage its monopoly in local exchange services to remonopolize the market for interLATA services.[128] Concern that Verizon-NJ will act on these incentives can only be heightened by the attitude of Verizon's executives, who deem the competitors and competition required by the 1996 Act a "joke", and attempt to capitalize on post-September 11 concerns by calling for a return to the monopolistic regime that preceded the MFJ.[129] Before the Commission permits Verizon-NJ to provide interLATA services, therefore, it must be absolutely sure that Verizon-NJ truly faces effective competition in local exchange services and that such competition will remain after a grant is made.[130] In the absence of regulation, only effective competition will give Verizon-NJ the proper incentives to lower prices and increase service quality and innovation to the benefit of New Jersey ratepayers.

A. There is no Competition in the Residential Local Exchange Market

Competition has yet to become a reality for New Jersey ratepayers.[131] Verizon-NJ continues to dominate the local telecommunications market to the exclusion of competitive providers and to the detriment of consumers.[132] New Jersey Ratepayer Advocate Blossom A. Peretz summed up the problem by observing that five years after the enactment of the 1996 Act,

> New Jersey consumers are still waiting [for] competition and innovation. All efforts to date to facilitate the development of that competition in New Jersey's local telephone exchange market have prove[n] futile. Verizon's competitors have

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[128] Selwyn Declaration ¶ 5-6, 11-4 (Attachment 8).

[129] *Supra* at 3-4.

[130] Without either effective local competition or the kinds of incentives provided by section 271, Verizon-NJ will be able to use its market power to stifle competition. Selwyn Declaration ¶ 15-24 (Attachment 8). Indeed, the situation in New York, where Verizon New York, Inc. was granted section 271 authority in 1998, is instructive on this point. Following Verizon New York's section 271 approval in New York, competitors reported renewed attempts to derail competition on the part of the incumbent. *See, e.g.*, New York Module 3 Recommended Decision at 23. Possessing even less competition than was evident in New York at the time, New Jersey will face even more severe competitive problems subsequent to a grant of section 271 authority. Peretz Declaration ¶¶ 17-18 (Attachment 1).

[131] Peretz Declaration ¶¶ 17-18 (Attachment 1).

[132] *Id*.

> captured only a small and insignificant fraction of the local exchange market. Right now, here in New Jersey, ratepayers have no choice.[133]

This decided lack of local exchange competition is evident even in Verizon-NJ's Application. Verizon-NJ claims that competitors service a total of 850 facilities-based residential lines in all of New Jersey.[134] This figure includes some 800 lines provided by competitors over UNE-P, and a scant 50 or so that are provided via UNEs or competitors' facilities.[135] Thus, in total Verizon-NJ's Application demonstrates that all facilities-based competitors serve a mere 0.0196 percent of the total number of residential access lines in New Jersey.[136] The Commission must recognize that this paltry level of facilities-based residential competition will not suffice to restrain Verizon-NJ from using its market power to disadvantage both competitors and consumers.

Moreover, while Verizon-NJ's figures on residential facilities-based lines demonstrate no appreciable level of competition, the Commission should consider even those figures unreliable. In the proceeding before the New Jersey Board, Verizon-NJ presented far different numbers regarding residential facilities-based lines and attributed those lines to different companies than it identifies in its Application. Specifically, Verizon-NJ originally stated that competitors had 680 facilities-based residential lines, 400 being provided by UNE-P.[137] Discovery responses revealed, however, that not one of the participants to that proceeding was serving residential

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[133] *Application of Verizon New Jersey Inc. For Approval (i) of a New Plan for an Alternative Form of Regulation and (ii) to Reclassify Multi- line Rate Regulated Business Service as Competitive Services, and Compliance Filing*, BPU Docket No. TO01020095, Hearing, T.33:9-19 (Aug. 13, 2001) (Attachment 21).

[134] Application at 8.

[135] Application at 79.

[136] Selwyn Declaration ¶ 12 (Attachment 8).

[137] Application, App. B, Tab 1, Declaration of Dennis Bone at 8.

customers via its own facilities, as alleged by Verizon-NJ.[138] Having been thwarted before the New Jersey Board, Verizon-NJ now presents the Commission with completely different figures of 850 residential facilities-based lines, 800 of which are provided via UNE-P.[139] Thus, the previous figure of 280 pure facilities-based residential customers (excluding UNE-P) has been reduced to 50.[140] The Commission should also note that Verizon-NJ obtains its current figures from four CLECs, three of which were given no more than passing mention in the New Jersey Board proceeding.[141] Verizon-NJ presents no justification for these glaring discrepancies. These facts should cause the Commission to look askance at Verizon-NJ's recently concocted figures, and accord them no evidentiary weight in this proceeding.

The bleak competitive picture in New Jersey emerges most clearly when a comparison is made with other states where Verizon-NJ has been granted section 271 authority. While New Jersey is the most densely populated state in the nation, and therefore a potential haven for local services competition, according to this Commission's Report on Local Telephone Competition, as of December 31, 2000, competitors in New Jersey served 323,680 end user lines, amounting to a paltry five percent of the total.[142] In contrast, at the point of section 271 authorization in other Verizon states, competition (measured as a percentage of local lines served by CLECs) was significantly more developed. In Pennsylvania, competitors served ten percent of the residential lines.[143] In Massachusetts, the corresponding number was 11 percent.[144] And in New York,

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[138] BPU 271 Proceeding, Discovery Responses VNJ-ATT 3, VNJ-CLEC 3, VNJ-RCN 1, VNJ-COVAD 1, VNJ-CVL (Attachment 12).

[139] Application at 79.

[140] Selwyn Declaration ¶ 13.

[141] Peretz Declaration ¶ 8-10 (Attachment 1).

[142] *FCC Report on Status of Local Telephone Competition*, Table 6, December 31, 2000 (rel. May 21, 2001).

[143] *Id*.

competitors enjoyed a market share of 9.8 percent, or nearly double that of competitors in New Jersey.[145] Thus, Verizon-NJ's argument that the doors of competition are open fails, given the clearly more significant levels of residential competition in states that have already granted section 271 authority.

As a result of the lack of local competition in New Jersey, and the attendant probability that Verizon-NJ will use its market power to disadvantage consumers, Verizon-NJ's Application cannot meet the public interest requirement of section 271, and the Commission should deny it. Verizon-NJ fails to demonstrate a sufficient level of local exchange competition, much less that such competition is "irrevocable," as required.[146] Indeed, the lack of actual experience with both OSS and new UNE rates (two vital components of local competition) definitively precludes any inference at this time that competition will flourish under a grant of section 271 authority. For these reasons, the Commission should deny Verizon-NJ's application as contrary to the public interest.[147]

B. There is No Evidence of the Geographic Distribution of Competition in New Jersey

Evidence that every geographic region in the state is sufficiently open to competition is a vital component of the public interest inquiry. Without such evidence, approval of a 271 application risks a state-sanctioned local service monopoly in many markets within New Jersey.

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[144] *FCC Report on Status of Local Telephone Competition*, Table 6, May 21, 2000 (rel. Dec. 31, 2000).

[145] *NYPSC Analysis of Local Exchange Service Competition in New York State* (rel. Dec. 31, 2000).

[146] *See, e.g.*, FCC MI 271 Order ¶ 386.

[147] Verizon-NJ also exemplifies policies that are inconsistent with its state public interest obligations in its opposition to any meaningful state universal service requirements. Peretz Declaration ¶ 6 (Attachment 1). Specifically, Verizon-NJ opposes (1) the creation of a state universal service fund, including a state low-income fund and a state high cost fund, (2) sufficient funding for a schools and libraries program, (3) automatic enrollment for low-income residents into universal service programs, including Lifeline, and (4) any state contribution to the Lifeline program. These state universal service failings on Verizon-NJ's part led AARP New Jersey to oppose Verizon-NJ's section 271 efforts unless a state universal service fund was first established. Peretz Declaration ¶ 6 (Attachment 1); Letter from James F. Dieterle, State Director, AARP New Jersey, to New Jersey Board President Hughes, and Commissioners Butler and Murphy (Jan. 7, 2002) (Attachment 22).

For example, the New York Public Service Commission, during its own proceeding on section 271, had available to it information and investigated the extent of competition in seven separate geographic regions of the state.[148] The detail on the geographic spread of competition put the New York PSC in a position to make an informed decision on this important issue. Verizon's showing here on this issue is decidedly inferior to the information provided in New York, and insufficient to carry its burden of proof.

That showing is also questionable in light of Verizon-NJ's submission to the New Jersey Board. There, Verizon-NJ claimed that, as regards the 680 facilities-based residential lines it alleged, "[p]latform and loop data are not available by area code."[149] Without bothering to explain the sudden change in availability of data, Verizon-NJ now offers this Commission figures on the geographic distribution of 850 alleged residential facilities-based lines in its Application.[150] As previously noted, Verizon-NJ attributes these lines to four "competitors," three of which were barely mentioned in the proceeding before the New Jersey Board.[151] The sudden change in alleged numbers of residential facilities-based lines and the sudden availability of information on the geographic distribution of these new lines should give the Commission pause. Moreover, the discrepancy in data presented to the New Jersey Board and this Commission undermines the recommendation on approval given by the New Jersey Board. The Ratepayer Advocate respectfully recommends that, faced with these anomalies, the Commission should accord Verizon-NJ's figures no evidentiary weight.

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[148] Selwyn BPU Declaration ¶ 23 (Attachment 8, Att. 3).

[149] Application, App. B., Tab 1, BPU 271 Proceeding, Verizon-NJ Petition, Declaration of Dennis Bone, Att. 101 at 2.

[150] Application, App. A, Declaration of William Taylor, Att. 1 at 2 (Table 2).

[151] Peretz Declaration ¶¶ 8-10 (Attachment 1).

The Ratepayer Advocate submits that significant numbers of New Jersey ratepayers are likely to be harmed by a grant of section 271 authority at this time.[152] Verizon-NJ has demonstrated no appreciable level of competition in facilities-based residential services and the evidence that it has proffered is severely tainted. The Commission should therefore deny Verizon-NJ's Application as contrary to the public interest.

V. WITHOUT STRUCTURAL SEPARATION, INTER-LATA AUTHORITY FOR VERIZON-NJ WOULD NOT BE IN THE PUBLIC INTEREST

As long as Verizon-NJ's wholesale and retail operations are combined as they are today, the Commission should decline to authorize Verizon-NJ to provide inter-LATA service. If this combination of retail and wholesale functions persists, Verizon-NJ cannot meet the public interest test of section 271, which requires, among other things, that the local telecommunications market be irrevocably open to competition.[153]

The current structure of Verizon-NJ gives it the incentive and ability to favor its own retail operations at the expense of competitors and competition. The best means – and a proven one – for ensuring the ongoing competitive conditions required by section 271 is full structural separation of Verizon-NJ's wholesale and retail operations. In the alternative, proper competitive conditions may be achieved through functional/structural separation – a strong code of conduct supported by strict penalties and accounting safeguards. The New Jersey Board of Public Utilities is currently considering these options in its proceeding concerning the plan of alternative regulation for Verizon-NJ.[154] The Ratepayer Advocate urges the Commission to

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[152] *Id*. ¶¶ 6-20 (Attachment 1).

[153] *E.g.*, FCC PA 271 Order ¶ 71; *see also*, Selwyn Declaration ¶¶ 22-24;Selwyn BPU Declaration ¶ 5 (Attachment 8, Att. 3).

[154] *Application of Verizon New Jersey, Inc. for Approval (i) of a New Plan for an Alternative Form of Regulation and (ii) to Reclassify Multi-line Rate Regulated Business Services as Competitive Services, and Compliance Filing*, Docket No. TO01020095 ("PAR"), Order of Approval (June 20, 2001).

require Verizon-NJ, as a condition for receiving section 271 authority, to agree to one of these approaches to structural separation in the New Jersey PAR proceeding.

Under section 271, Verizon-NJ must show not only that competition and competitive conditions exist at the time interLATA authority is granted (a showing it has not made), but that those conditions will continue to exist. The Commission has held that:

> We need to ensure that the market opening initiatives of the BOCs continue after their entry into the long distance market. . . . The section 271 approval process necessarily involves viewing a snapshot of an evolving process. We must be confident that the picture we see as of the date of filing contains all the necessary elements to sustain growing competitive entry into the future.[155]

Without such an assurance, a grant of interLATA service authority will remove any incentive for Verizon-NJ to promote competition, and leave only its natural incentive to retard competition by discriminating against rivals.[156] As a prerequisite for authorization under section 271, therefore, the Commission must take positive steps to minimize Verizon-NJ's incentive and ability to thwart competition through discriminatory behavior.

The combination of Verizon-NJ's wholesale and retail operations in a single business unit gives Verizon-NJ the incentive and ability to restrain competition in a way that offends the public interest requirement of section 271. A firm with a dominant position in a wholesale market has powerful incentives and a unique ability to use that position to disable competitors by favoring its retail business units.[157] This results in artificial, unearned preferences and advantages for the incumbent's retail business to the detriment of competition. In addition, this

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[155] FCC MI 271 Order ¶ 22.

[156] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order, 11 FCC Rcd. 21905 ¶ 11 (December 23, 19960); Selwyn BPU Declaration ¶ 45.

[157] *See* Selwyn BPU Declaration ¶ 97 (Attachment 8, Att. 3).

type of discrimination is difficult to prevent because it is difficult to detect. Therefore anticompetitive conduct must be prevented and not allowed to take root.[158]

Real-world results establish the need for a structural approach to ensuring competitive conditions. As Dr. Selwyn explained:

> Intense competition has developed in virtually every segment of the US telecommunications industry in which the RBOCs do not maintain some form of bottleneck control over essential facilities, either because such control has been expressly prohibited by legislative, judicial or regulatory fiat, or in which the RBOCs have themselves had minimal involvement (*e.g*., and at least up to now, dial up access to the Internet). *On the other hand, where RBOCs have been permitted to engage in retail operations in markets in which they also control essential facilities (e.g., local exchange service), competition has failed to develop*.[159]

The prime example of this is the Bell System divestiture, in which the separation of AT&T's long-distance business from the BOCs' monopoly businesses allowed long-distance competition to thrive as it never had under previous regulatory regimes.[160]

While the Ratepayer Advocate is not recommending the complete divestiture that brought competition to long distance markets, the lesson of the Bell System divestiture remains. When steps are taken to separate the competitive side of a business from the monopoly side, the incentive and ability to quash competition diminish, and results can be expected that far surpass the results of behavioral regulation. Industry observers with direct experience in telecommunications regulation have recognized this lesson:

> An additional step is required, at least when it comes to traditional utilities: the separation of competitive from network services, preferably in independent

[158] *Id.*

[159] *Id.* ¶ 98 (emphasis added).

[160] *Id*. ¶ 10.

> companies, but at a minimum structurally separated units. In the absence of such a requirement, the potential for abuse remains.[161]

Full structural separation of Verizon-NJ would create a separate corporation responsible only for wholesale operations. This would greatly decrease incentives to discriminate in favor of Verizon-NJ's retail arm, since wholesale employees and managers would be focused on and measured by their provision of wholesale service, not the success of Verizon-NJ's retail segment.[162] In addition, the separate identities of the affiliates providing wholesale and retail services would enhance regulators' ability to detect instances of improper favoritism toward Verizon-NJ's retail arm. Structural separation would create a situation in which "Verizon-NJ-retail would be required to deal with Verizon-NJ-wholesale in exactly the same manner and under the same terms, conditions, and operational interfaces as its nonaffiliated retail competitors."[163]

Functional/structural separation under a code of conduct would be designed to make the wholesale-retail relation resemble full structural separation through a strict code of conduct designed to eliminate all favoritism toward Verizon-NJ-retail.[164] The code would be designed to ensure that Verizon-NJ's retail competitors have completely equal, non-discriminatory access to the same resources Verizon-NJ provides its retail business unit.[165] The relation between Verizon-NJ's wholesale and retail operations would be made as transparent as possible through strict accounting rules. Cost accounting provisions would recognize and measure all transfers of

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[161] Edythe S. Miller, *The Impact of Technological Change on Market Power and Market Failure in Telecommunications*, JOURNAL OF ECONOMIC ISSUES (June 1, 2001) (Attachment 23). Ms. Miller is a former chair of the Colorado Public Utilities Commission.. *Id. See also* Peretz Declaration ¶¶ 19-22 (Attachment 1).

[162] Selwyn BPU Declaration ¶ 97 (Attachment 8, Att. 3).

[163] *Id*. ¶ 99.

[164] *Id*. ¶ 102.

[165] *Id*. ¶ 106.

value between those operations, including transfers that are not now accounted for and the joint use of assets.[166] Finally, the code of conduct would be reinforced by strict penalties, swiftly applied, and would order that if Verizon-NJ does not abide by the code of conduct, formal structural separation will follow.[167]

Separation of Verizon-NJ's wholesale and retail operations is necessary because past regulatory efforts have not brought widespread, meaningful competition to New Jersey.[168] CLECs' current market penetration is minuscule, and the financial condition of these would-be competitors is weak and declining.[169] This bleak competitive picture, moreover, is not the result of a lack of effort on the part of CLECs, which have invested heavily in efforts to compete with Verizon-NJ.[170] Rather, CLECs' competitive difficulties flow largely from their need to rely on access to Verizon-NJ's network and the resulting disadvantages they face in trying to compete with Verizon-NJ's retail operations.[171] Efforts to level the playing field by enforcing the requirements of sections 251 and 252 of the 1996 Act and the procompetitive commands of New Jersey's 1992 Act have not brought anything like the vibrant competition envisioned by the framers of the statute. Clearly, future competition for Verizon-NJ – and therefore the public interest – require structural separation – an approach that addresses the fundamental causes of the distress in which we find the competitive segment of New Jersey's telecommunications industry.

Numerous aspects of Verizon-NJ's operations exemplify the artificial competitive advantages its retail arm enjoys. Verizon-NJ's advocacy in this very proceeding illustrates the

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[166] *Id*. ¶ 104.

[167] *Id*. ¶ 107.

[168] *Id*. ¶¶ 26-44.

[169] *Id*. ¶¶ 27, 30,41-44, Tables 1, 2.

[170] *Id*. ¶ 30.

[171] *Id*. ¶ 41.

edge that Verizon-NJ gains through its integrated structure. Using the E911 database to which it has exclusive access, Verizon-NJ has provided information purporting to show the competitive position of its rivals in New Jersey.[172] Although that information does not demonstrate that competition exists in New Jersey, the E-911 data show that Verizon-NJ has exclusive access to granular information of great value about its retail competitors' activities.[173]

Another example of the anticompetitive advantages that structural separation will cure is Verizon-NJ retail's ability to use the Verizon brand name. That name is well known to consumers – and thus valuable – because it is associated with the telephone service that has been consumers' only option for many decades, and because it has been the object of extensive promotion funded by ratepayers. Alone among retail competitors, Verizon-NJ's retail arm derives great value from that brand name, but pays no compensation to Verizon-NJ to reflect that value.[174] Properly designed structural separation would help give true competition room to breathe by eliminating this and other unfair advantages.

There is ample authority demonstrating that structural separation or a code of conduct is in the public interest. The New Jersey Board engaged only in a cursory discussion of the public interest during its meeting concerning its recommendation to approve the instant application.[175] It is clear, however, that from the perspective of the state affected by the Commission's decision here, structural separation or a code of conduct is in the public interest.

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[172] *E.g.*, Application, App. A, Taylor Declaration ¶¶ 8, 9, 11, Table 1, Att. 1.

[173] Selwyn BPU Declaration note 44 (Attachment 8, Att. 3).

[174] *Id*. ¶ 67.

[175] BPU 271 Proceeding, Transcript of Board Meeting, Item 4A T. 64:22-65:9 (Jan. 9, 2002) (Attachment 18).

The New Jersey Legislature has affirmed the value of structural separation as a means of replacing regulation with competition. In the Electric Discount and Energy Competition Act,[176] the Legislature confirmed the propriety of functional or structural separation in the electric and gas industries. In that Act, the Legislature recognized the Board's power to require that a utility provide competitive services through a business unit that is functionally separate from the unit providing monopoly services or from a structurally separate affiliate.[177] Under the statute's functional separation provisions, the competitive business unit must use a separate corps of employees and separate assets to provide its services.[178]

The New Jersey Board has likewise recognized the benefits of functional/structural separation in its treatment of electric and gas utilities, and has shown the feasibility of that approach as a regulatory tool.[179] The Board's Affiliate Relations Standards provide detailed guidance on the relationship between the wholesale and retail operations of electric and gas utilities.[180] These Standards address the same structural concerns that are relevant to Verizon-NJ's situation. They strictly prohibit discrimination against retail competitors in various areas, including access to wholesale products and services, pricing, processing of service requests, sharing of proprietary information and physical assets, and other matters.[181] The Affiliate Relations Standards also require that the utilities keep separate accounts for each competitive product or service.[182] Finally, there are stiff penalties for violating the Standards.[183]

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[176] 1999 N.J. Laws 23 ("EDECA").

[177] N.J.S.A. §§ 48:3-56.f(4) (electric utilities), 48:3-58.k(4) (gas utilities).

[178] *Id.*

[179] *See generally* Selwyn BPU Declaration ¶ 93 (Attachment 8, Att. 3).

[180] N.J.A.C. §§ 14:4-5.1-5.6 (2000).

[181] *Id.* §§ 14:4-5.3(b)2, 14:4-5.3(f), 14:4-5.3(j), 14:4-5.4(a), 14:4-5.5(e), 14:4-6(m)2.

[182] *Id.* §§ 14:4-5.6(n), -(p)-(r).

[183] *Id.* § 14:4-5.9.

The New Jersey Board's treatment of FirstEnergy Corporation's acquisition of Jersey Central Power and Light Company reiterated and reinforced the public interest in a strong code of conduct.[184] There, the Board established such a code to regulate dealings between the competitive and non-competitive business units of the merged firm.[185] That code requires that the firm's non-competitive units transact business with the firm's competitive units in the same manner as with unaffiliated competitors and that the firm conduct its wholesale and retail operations as separate corporate entities, with separate staffs below the senior officer level, and in physically separate locations.[186] The New Jersey Board has thus clearly recognized the value of structural separation and has gained significant experience in implementing this important competitive safeguard.

Imposition of functional/structural separation would not be a first for Verizon. Verizon-Pennsylvania agreed to such treatment in proceedings before the Pennsylvania Public Utilities Commission. The Pennsylvania Commission had ordered full structural separation in an earlier proceeding.[187] After a proceeding meant to implement that decision, the Pennsylvania Commission gave Verizon the choice of either Commission consideration of full structural separation or functional/structural separation accomplished via a strict code of conduct.[188]

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[184] *Joint Petition of FirstEnergy Corp. and Jersey Central Power and Light Company, d/b/a GPU Energy, for Approval of a Change in Ownership and Acquisition of Control of a New Jersey Public Utility and Other Relief*, BPU Docket No. EM00110870, Order of Approval (Oct. 9, 2001) ("FirstEnergy Order").

[185] *Id*. at 14, 17-18, Att. A ¶¶ 1-10.

[186] *Id*. at 14, 17-18, Att. A ¶¶ 1(a), 2.

[187] *Joint Petition of Nextlink Pennsylvania, Inc.; Senator Vincent J. Fumo; Senator Roger Madigan; Senator Mary Jo White; the city of Philadelphia; The Pennsylvania Cable & Telecommunications Association; RCN Telecommunications Services of Pennsylvania, Inc.; Hyperion telecommunications, Inc.; ATX Telecommunications; CTSI, Inc.; MCI WorldCom; and AT&T Communications of Pennsylvania, Inc. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues; Joint Petition of Bell Atlantic Pennsylvania, Inc., Conectiv Communications, Inc.; Network Access Solutions; and the Rural Telephone Company Coalition for Resolution of Global Telecommunications Proceedings*, Docket Nos. P-00991648, P-00991649, Opinion and Order at 235 (Pa.P.U.C. August 26, 1999).

[188] *Bell Atlantic-Pennsylvania Inc*., Docket No. M-00001353 Order at 29 (Pa. P.U.C. April 11, 2001).

Verizon opted for functional/structural separation under a code of conduct. This approach would include accounting requirements to prevent cross-subsidization and rules requiring non-discriminatory treatment of retail competitors.[189]

The Commission can rely, therefore, on the declarations of the New Jersey Legislature and the New Jersey Board's actions to identify the strong public interest in ensuring future competition through full structural separation or functional/structural separation. Either of these approaches would be measured, viable means to ensure that Verizon-NJ and its retail competitors compete on a full, fair and equal basis. One of these approaches is required to satisfy the public interest test for a grant of section 271 authority. In addition, Verizon has already agreed to functional/structural separation in a neighboring state. Accordingly, the Ratepayer Advocate respectfully urges the Commission not to grant interLATA service authority unless and until it provides for structural separation of Verizon-NJ's retail and wholesale operations.

[189] *Id.* at 30.

CONCLUSION

For the foregoing reasons, the New Jersey Division of the Ratepayer Advocate respectfully urges the Commission to deny Verizon-NJ authorization to provide in-region, interLATA services in New Jersey. Verizon-NJ should not receive such authorization until it has established its compliance with Track A and Checklist Item ii, shown that authorization would be in the public interest, and agreed to structural separation of its wholesale and retail activities.

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Respectfully submitted,

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